REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

AT THE

JANUARY TERM, 1872.

BY THOMAS G. JONES, State Reporter.

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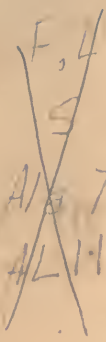

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REPORTS

OF

CASES ARGUED AND DETERMINED

AT THE JANUARY TERM, 1872.

JOHNSON *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Capital cases; what must affirmatively appear.*—In capital cases, and other felonies, there are some matters which must affirmatively appear in the record, otherwise the judgment will be reversed; among these is the oath administered to the jury.
2. *Oath of jury; what omission will invalidate verdict.*—If it appear from the record that an essential part of the oath, required by section 4092 of the Revised Code to be administered to the jury, was omitted, the judgment will be reversed.
3. *Dying declarations, when admissible; what evidence of, sufficient to authorize admission of.*—As a general rule, dying declarations are only admissible in evidence, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. When this is the case, dying declarations are admissible if the deceased knows or thinks he is in a dying state. Positive evidence of this knowledge is not required, but it may be inferred from the conduct and condition of the deceased. The dying declarations admitted by the court, under the evidence in this case, were properly admitted.
4. *Motion to exclude evidence, refusal to decide at time when made; when will be cause for ... of judgment.*—Where the State offers evidence of the dying de... sort ... the deceased, and the defendant objects to their admissib... ot. T... es to exclude them, if the court refuses to decide on the ... alton d... all the evidence in the case is closed, and compels the ... proceed with his defense, and then, after the evidence in ... ing. T... closed, decides the defendant's motion and excludes a p... dkins, ... the dying declarations objected to and the defendant i... immed..., the judgment will be reversed.

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5. *Wife, not competent witness for husband in a criminal case.*—In a criminal case the wife is sometimes a competent witness against the husband, but never for him.
6. *Venire, motion to quash; what no ground for.*—A mistake in the christian name of one of the jurors on the list delivered to a defendant, in a capital case, is no cause to quash the venire. The remedy in such a case is provided in section 4175 of the Revised Code.
7. *Absent juror; when court not bound to send for.*—The court is not bound to send for a juror, summoned in a capital case, who fails to answer to his name when called, although it be shown that the juror resides in the city where the court is held, and was in the city at the time his name was drawn.
8. *Same; when court should send for.*—If, however, a juror, in such a ca e, is in jail under the order or sentence of the court, a refusal to send for him, on the request of the defendant, is a reversible error.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

Joe Johnson, the appellant, having been indicted for the murder of Henry Walton, was tried, found guilty of murder in the first degree, and sentenced to be hung. Having reserved exceptions to various rulings of the court below, he brings the case to this court by appeal.

On the trial, after several persons had been selected as jurors, and after both the State and the defendant had each exhausted several peremptory challenges, the sheriff drew from the hat the name of *R.* A. Brady, who was not on the list of jurors, summoned for the trial, which had been served upon defendant. "The defendant made this fact known to the court, and objected to going any further with the trial upon said list of jurors summoned for his trial, and moved the court to quash said list and also to order another summoning of persons as jurors for the trial of defendant. Thereupon the sheriff stated that he summoned *R.* A. Brady as a juror for this trial, and instead of putting his name on the list which had been s[illegible] on defendant, he (the sheriff) by mistake put *I.* A[illegible]y on the list served on defendant. The court overr[illegible]ndant's objection and motions, and directed the [illegible]orthwith to summon another person as a juror and [illegible]'s name in the hat in place of said Brady, and direc[illegible] drawing

to be suspended until this could be done; the court at the same time announcing to the defendant that he had the right to challenge peremptorily the juror thus summoned, in addition to the peremptory challenges allowed him by law. To each of these rulings and decisions defendant duly excepted."

After this, and before the jury was complete, the sheriff drew from the hat the name of Samuel Lacy, a well known resident citizen of Montgomery, and who was then known to be in the city of Montgomery, and whose name was on the list of jurors summoned for the trial of defendant and served upon him. Lacy being absent, the defendant insisted that the further drawing be suspended until Lacy was sent for, and moved the court to have said Lacy sent for and brought into court. The court thereupon ordered a fine assessed against Lacy, overruled defendant's motion, and ordered that the drawing of jurors from the hat continue until a jury was obtained. To each of the aforesaid rulings the defendant duly excepted."

The jury being complete, the defendant went to trial on plea of not guilty.

The evidence shows that Walton, who had the defendant employed on his plantation, received a message from defendant one Wednesday morning in the latter part of November, 1870, requesting him (Walton) "to come down here, [to Joe's cabin] and bring that stick he beat my wife with; I want to take it to town with me." On receiving this message Walton went into his house, and in a few minutes afterwards went down to Joe's cabin. Shortly after this a gun was heard to fire, and Walton was found some twenty steps or more from the door of Joe's cabin, lying upon his back, his knees drawn up, holding in one hand a loaded "Derringer pistol." He had been "shot in the right arm and side, sort of to the rear," with a load of ordinary sized bird-shot. This occurred about an hour "after sun-up," and Walton died between ten and eleven o'clock the same morning. There was no eye-witness to the shooting.

Lum Judkins, a witness for the State, who heard the gun fire, ran immediately to Walton, who was lying on the

ground "hollering." Walton said to witness, "Joe has killed me. I was talking to him and he shot me, and he has killed me." To this witness replied, "I reckon not." Walton said, "Yes, I am bound to die." After this Walton was "toated" some distance to his house. He was shot about an "hour after sun-up," and died between ten and eleven o'clock the same morning.

Dr. Hill, a witness for the State, testified that he was a practicing physician of many years' experience, and had been sent for to see Walton, reaching his house about eight o'clock in the morning. At that time Walton was suffering greatly and gradually sinking. "Deceased, when offered medicine, would shake his head and say it is no use to do any thing, but would take the medicines given him. Witness did not tell Walton what he thought of his condition. Walton was in a dying condition when witness first saw him—collapsed, and with very little or no pulse. Towards the last deceased's breathing was a little labored; he talked so he could be understood—showed a little effort. Ceasing to talk was the first symptom of immediate dissolution. All at once, two hours after witness saw him, Walton became speechless."

Thomas Merriwether, a witness for the State, testified that he lived about a mile from Walton's house, and reached there three quarters of an hour before Walton died. "Witness thought deceased in a dying condition as soon as he saw him. Deceased told witness, '*If they don't do something for me, I will die.*' Witness heard deceased say nothing else about dying. Dr. Hill told deceased that it was necessary to know something about the difficulty, and deceased replied, 'Joe sent for me and I went down; when I got close to him he told me not to come closer, if I did he would shoot me. I wheeled to walk off, and he shot me.' This declaration was made about fifteen minutes before Walton died."

Dr. Hill was then recalled, and testified as to the declaration made by deceased, his testimony being the same as that of witness Merriwether. This declaration was made not long before Walton's death; and at the time it was made

witness could perceive no pulse, and Walton's hands and feet were cold. Witness had given Walton opiates and whisky two or three times. In reply to a question by the prosecution, "if a man in Walton's condition was bound to know that he was bound to die," the witness was permitted, against defendant's objection, to answer, and stated that "he (witness) was satisfied in his own mind that deceased believed he would die."

All the foregoing testimony was given to the court as a basis for determining upon the admissibility of the dying declarations of deceased, but was delivered in the presence and hearing of the jury, who were cautioned by the court that none of the testimony relating to the declarations of deceased should be considered by the jury, except that which the court would thereafter expressly inform the jury should be considered by them.

The State introduced evidence tending to show, that a day or so before the killing, the defendant, who had been absent from the place for several days, and was then on his way to Walton's place, was seen to take a drink, and on being asked by a witness if he would not give some of it to one Jerry Lucas, remarked, "Uncle Jerry can not drink this liquor. I can. There is hell in me." There was some evidence tending to show that about this time defendant had some trouble with his bowels, and his physician, the witness Dr. Hill, had given him a prescription of some sort of bitters. There was evidence tending to show that on Sunday before the killing, which occurred on the next Wednesday, Walton was seen coming out of his house, shaking his stick, which was a good sized walking cane, at some one, and saying, "When Joe comes tell him I'll give him the same." The witness who testified to this did not know to whom Walton was talking, and had never informed Joe of it. The State also introduced the clothing worn by Walton at the time he was shot.

After this testimony was delivered to the jury the State announced that it had closed its evidence, except evidence in rebuttal; and "thereupon the defendant moved the court separately and successively to exclude each of the dying

declarations of deceased, as testified to by the foregoing witnesses. The counsel for the State asked the court not to exclude the evidence of the dying declarations until authorities could be submitted to the court, they believing that Alabama authorities could be found which would be decisive of the motions. Thereupon the court remarked, that after the defendant's testimony was all introduced, but before the argument was commenced to the jury, it would decide said motions." The defendant insisted that the court should decide his motions then, and before proceeding further with the case, but the court refused to decide said motions then or at any earlier period than it had before indicated; and defendant "duly excepted to each of said refusals, declinings, and rulings of the court."

The defendant was then directed to proceed with the case, and he again insisted to the court that he should not be compelled to proceed with the examination of his witnesses until his several motions to exclude the declarations of deceased, &c., were decided, as he could not know what to meet as to the declarations above referred to, or whether they would be in evidence or not; the court, however, required him to proceed with the examination of his witnesses, and defendant duly excepted.

The defendant then introduced witnesses who proved the nature of the message sent by defendant to Walton, as already stated, and the fact that Walton was found, immediately after the shooting, a few steps from Joe's cabin, with a loaded "Derringer" pistol in his hand. The defendant did not question the witnesses as to the declarations made by Walton, and objected to their testifying as to them; but the court overruled defendant's objection and permitted the witness to testify as to these declarations, cautioning the jury that no evidence of declarations by deceased could be considered by the jury, except such as the court should direct them to receive in evidence. To which ruling defendant duly excepted. The testimony thus given by defendant's witnesses was substantially as follows: "When one of the witnesses, Randall Gilmer, and his mother got to the place where Walton was lying, immediately after the

shooting, Walton said, '*I am a dying man; Joe shot me for nothing.*' Witness' mother replied, 'You are hurt right bad, but I reckon you aint as badly hurt as that.' Deceased answered, '*No, I am dying.*'"

The defendant then introduced some evidence tending to show, that shortly before the shooting occurred he had made preparations to remove to an adjoining plantation, and that at the time of the killing defendant's wife was pregnant. There was evidence showing that defendant had a gun with which he was in the habit of hunting.

The defendant then offered —— Johnson as a witness in his behalf, stating to the court that the witness was his wife, and that he did not offer her as a general witness in his behalf, but offered her specially and separately to prove—

1st. The violence on her person by the deceased on Sunday before the killing on the succeeding Wednesday.

2d. To prove by her that she was the *only* living witness who saw, or knew, or could testify to the commission of violence (beating) on her person by deceased on said Sunday before the killing, and to threats made by deceased against defendant before the shooting.

3d. To prove by her that she communicated, shortly before the shooting, the violence committed on her person by deceased, and the threats made by deceased against defendant.

The court refused to permit the witness to testify for the purposes for which she was offered, and decided that she was incompetent to prove anything whatever in the case; and defendant duly excepted. The defendant then closed, and the bill of exceptions states, "upon the consideration of the authorities adduced and the argument of counsel on the separate and successive motions of defendant to exclude each and all of the dying declarations of deceased, the court decided to exclude all evidence of dying declarations, except those made by the deceased when he was lying upon the ground immediately after he was shot; and all the evidence of the witnesses Hill and Merriwether in relation to the declarations of deceased were excluded." De-

fendant duly excepted to the ruling of the court in admitting any of the dying declarations as evidence.

The minute entry, after reciting the arraignment of defendant, &c., the service upon him of a copy of the indictment and list of jurors, &c., as required by law, the defendant's plea of not guilty, &c., and the order for empanneling a jury to try the issue joined, &c., then says: "The following persons were drawn and accepted by the State and defendant for the trial of this cause, to-wit: W. M. Langham, and eleven others, (naming them) good and lawful men, duly qualified; the jury being now complete, and agreed upon by the solicitor for the State and the defendant, were duly sworn to well and truly try the issue joined between the State of Alabama and the defendant, Joe Johnson, after hearing all the evidence in the cause and being duly charged by the court, on their oaths do say, 'We, the jury, find the defendant, Joe Johnson, guilty of murder in the first degree, and assess his punishment at death. W. H. Ogbourne, foreman.' Defendant was then remanded to jail to await his sentence."

The errors assigned, among others, are—

1st. The ruling of the court in relation to the juror Brady.

2d. The refusal of the court to send for the juror Lacy, and to stop the drawing a reasonable time for that purpose.

3d. The refusal of the court to decide one way or the other upon defendant's motions to exclude evidence of the dying declarations, at the time said motions were made.

4th. The ruling of the court compelling defendant to proceed with his defense before the court had decided one way or the other upon defendant's several motions to exclude the evidence of the dying declarations.

5th. The admission of the evidence of the dying declarations, which the court permitted to go to the jury.

6th. The refusal of the court to permit defendant's wife to testify for the purposes for which she was offered.

7th. The jury which tried the case was not sworn as required by law,

THOS. G. JONES, for appellant, in support of the assignments of error, contended as follows:

As to the refusal of the court to send for the juror Lacy—

1. That in order to sustain and preserve the great fundamental right of trial by jury, the means furnished by law for its support and enforcement must be held to be a part of the right itself. And as the original right is the inalienable heritage of every freeman, not dependent for its exercise on the discretion of any power, so, too, must be the administration of the statutes passed to secure the exercise of that right.—*Ex parte Chase*, 43 Ala.

2. That the statute regulating the selection of juries gives to the accused the *absolute* right to have an opportunity of choosing, as one of his triers, every one of the jurors drawn, until the jury is complete. This right is subject to defeat only by challenge by the State, or disqualification defined by law, or by the absence of such juror under such circumstances that the court can not compel his attendance in a reasonable time. The right can not be destroyed by the voluntary absence of the juror who prefers paying a fine to serving on the jury, nor by the discretion of the court. If this were so, the court might, in its discretion, send for absent jurors who were thought to be prejudiced against the prisoner, and refuse to send for those thought to be favorable to him. It was not the intention of the law to arm the court with such discretion.

3. That mere non-attendance of a juror can not of itself destroy this right of the accused. If the juror be within the power of the court, the accused has as much right to have the court exercise its powers to compel the attendance of such juror as he has to have any other right enforced.

4. That if the accused shows to the court that an absent juror is within its jurisdiction and reach, it becomes the duty of the court to order reasonable effort to be made to compel his attendance.

5. That the presence of each juror being an essential element of the right of trial by jury, its enforcement is not

dependent on the discretion of the court. And if the court refuse to suspend the drawing of the jury for a reasonable length of time, and refuse to send for such juror, it is an error for which the judgment should be reversed.

6. That it is never inconvenient to obey the law, and the inconvenience of the allowance of a constitutional right is no reason for denying its exercise. What is reasonable time in such a case, must depend greatly on the discretion of the lower court. If injury result from the exercise of this discretion, it is reviewable on appeal.

He further urged, in support of the third assignment of error, the following argument:

1. After a trial has commenced on an indictment, and the State has closed its evidence, the evidence thus offered by the State is, strictly speaking, the charge which the accused is called upon to answer.

2. In order to meet this charge, two legal methods of defense are open to a prisoner. If he deem the evidence insufficient, he may submit his case; or if he think it best, introduce witnesses in his defense, so as to break down the evidence against him. This latter right he can not freely exercise until he knows what that evidence is.

3. What is evidence, is the peculiar province of the court to decide, and it is necessary to the exercise of a prisoner's rights that he should be informed what portions of the testimony against him are legal evidence. After the State closes, he has the right to test this by motion to exclude such evidence as he may deem illegal.—21 Ala. 277; 27 Ala. 173.

4. To decline to decide such a motion one way or the other until after the defendant has offered all his evidence and closed his defense, is in effect to deny his right to submit his cause, and to deprive him of a free opportunity to break down particular parts of the testimony against him. Such a ruling greatly hampers a prisoner's defense, and tends to uncertainty and looseness, and destroys all certainty in criminal trials.—27 Ala. 173.

5. The effect of such a declining to rule one way or the other at the time such a motion is made to exclude such

evidence, being to hamper the prisoner's defense and deny him a plain right, it is error not to decide such a motion at the time it is made, whether the evidence sought to be excluded be legal or illegal; although the rule may be different in civil cases.

6. It is the great purpose of jury trials to keep the minds of jurors impartial, and unaffected by facts or evidence not legally affecting the issue tried before them. It happens of necessity that illegal evidence is sometimes offered, but it is the absolute right of a defendant in a criminal case to have its effect destroyed, as far as may be, by its exclusion as soon as the State has rested.

7. So far as legal consequences are concerned, an act may be a nullity. In physics and morals an act is never a nullity. The mind of man is so constituted that all evidence must necessarily have some effect on his reasonings and conclusions, which effect can not be entirely effaced even at the will of that mind. It being the legal right of an accused to have illegal evidence excluded as soon as the question is first properly presented, the error in refusing to decide such motion at the time it is made can not be cured by subsequently excluding the evidence. The legal rights of the accused have been violated by its remaining to influence the minds of the jury after his motion to exclude it. This court can not know that the accused has not been prejudiced by this denial of his legal rights. Practically speaking, it might as well be said that a declaration by a court that the judgment of a vigilance committee was a nullity, would restore to life a man hung under it, as to say that the direction of a judge to a jury not to regard illegal evidence (which had been on their minds for hours after it should have been excluded,) was sufficient in law to remove the poisonous effect of such evidence on the fairness of a juror's mind. The human mind is not a sponge out of which the judicial hand can squeeze, at will, that which it has once absorbed.

As to the exclusion of the wife—

The reason for the exclusion of the wife as a witness for or against the husband is said to be: "principally because

of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of the law, *nemo in propria causa testis esse debet:* and if against each other, another maxim, *nemo tenetur seipsum accusare.*"—Blacks. Com. 443; see, also, 1 Phil. Ev. 78.

The main foundations of the rule against the admission of the wife as a witness in favor of the husband have been swept away by the policy of our law.—§ 2704 Rev. Code; *Robison v. Robison*, 44 Ala. 223.

The fact that their interests are identically the same, is now no reason at all. Exclusion on account of interest, or being party to the suit, is now the exception, not the rule. Interest, except in exceptional cases, does not disqualify.

The mere fact of testifying for the husband can not, in a true sense, be said to be "inconsistent with the relation of marriage." The marriage state is one of mutual helpfulness and care; each is dependent on the other. It is not only the duty, but the law gives to each the right to slay in defense of the other. It is the most solemn duty of each to cherish and defend the other. Any mode whatever which does not violate law or morals is open to either to protect and defend the other. It is certainly not inconsistent with the marriage relation that the wife should warn the husband of danger, or that she should testify truthfully what she told the husband—and especially where the truth of the very facts she testifies to, have been brought out and established by the State, with the exception of the communication of those facts to the husband—and when it was the wife's most solemn duty to communicate these facts to the husband. The very facts of the case overthrow any presumption of inconsistency in the wife's proving the facts for which she was offered in this case.

How could the testimony of the wife in this case "lead to disunion, unhappiness, and possibly to perjury?" The husband is on trial for his life; the wife has told him the truth; her telling that truth to the jury is of great weight in determining his life or death. Is it possible that human

nature could be so vile and mean a thing as to make cause for "disunion and unhappiness" on the part of either husband or wife out of the fact that the wife so testified in such a case? It can not be said that any confidence is betrayed by the wife's testifying.

Now, as to the "temptation to perjury." There can not be a case in which there could be less. The fact that the wife did communicate the facts (to prove which we offered her,) to the husband is one that can be almost established by *presumption*, so certain was it, in accordance with the dictates of love, duty, instinct, law, womanhood. To doubt that she did, would be to doubt all experience—all that is lofty and noble in human nature. The *existence* of the facts which she communicated has already been proved by the State. She is not a witness on her own terms, but bound down in her narrative to facts already proved, and asked to prove facts which, if she can not be allowed to prove, it seems to me should, by a wise system of jurisprudence, be *presumed* to have been communicated by her to the husband whenever the wife has had the opportunity to communicate.—1 Phil. Ev. 604, note 10; 12 Whea. 69, 70.

The privilege or consent for the wife to be introduced has been exercised by the husband in offering the wife as a witness.

Every reason for the exclusion of the wife in this case, even going to the stern standard of the common law, has been broken down. The reason for the law ceasing, the law ceases. The reason ceasing, "it has been the practice of the courts to make it yield to the demands of justice." *Robison v. Robison*, 44 Ala. 234.

The common law never excluded any testimony, even from criminals, interested parties, parties to the suit, where it was the presumption of law that as to such testimony the person would speak the truth, and the facts about which he testified were most likely, according to the experience of mankind, to have occurred as testified to, and the evidence itself, not the vehicle by which it is brought to notice, is not excluded by considerations of public policy. It is a presumption of law, that no man will deliberately make

admissions which are injurious to his interest, or his life or liberty, unless his admissions are true; for this reason, declarations of a prisoner are received as evidence against him. It is natural, and according to human experience, that a guilty person would make untrue statements in order to screen himself from punishment; the law presumes this, and hence will not allow a party to make evidence out of his own declarations in his own favor.

In this case, it was the duty of the wife to inform the husband—a duty enjoined by the law of God, dictated by love, and urged by instinct and womanhood. That she did communicate these facts, is borne out by the universal experience of mankind in every age.

But again. In this case the wife comes within another exception of the common law. Often the common law, from a notion of policy, would not allow a party to prove the existence of the main facts in a case by his own testimony, but when the truth of these facts was established by other witnesses, the presumptions of law against the truthfulness of the witness vanished, and he was permitted from necessity to prove facts essential to obtain justice.

The case of a person suing for the loss of a trunk by a common carrier is a familiar one. The shipment and loss of the trunk being proved by other parties, the law, to prevent a failure of justice, allows the owner to prove the contents.—*Herman v. Drinkwater*, 1 Greenl. 27; *Sneider v. Geiss*, 1 Yates, 34; see, also, 2 Mass. 444; 37 Ala. 639. Is there not great temptation to perjury here? Does not the temptation increase where the facts testified to are only known to the witness? Is not the danger of detection less? Yet, here justice, which is smothered down by precedent, cries out, and is granted relief on the plea of "necessity."

Could the necessity be greater than in this case?

Necessity is a law of our being; it results to the creature from the nature of earthly things. The creature can not, except in a very limited sense, control or foreordain events. He is imperfect, and all human regulations must for the same reason be imperfect. Wrongs arise for which there

is no remedy; rules are laid down which do wrong and injury; and hence the *exceptions* to the rules.—See 1 Phil. Ev. 78.

The books abound with exceptions from necessity.—44 Ala. 234; 2 Mass. 444; 1 Greenl. 27; 18 Maine, 372; 21 Ver. 23; 6 Ala. 685.

In *Douglass v. Montgomery & West Point Railroad Co.*, 37 Ala. 639, this court say: "For where the law can have no force but by the evidence of persons in interest, there the rules of the common law respecting evidence in general are presumed to be *laid aside;* or rather, the subordinate are *silenced* by the most transcendent and universal rule, that in all cases that evidence is good than which the nature of the subject presumes none better to be attainable."

In that case, the exception to the general rule was sustained in order to enable a traveler to recover for a lost trunk. Here it is invoked to save life.

Again. The communication of the threats and beating to the husband, before the shooting, is evidence which, if offered by any other witness, would be received without hesitation. To refuse to receive it in that event would be monstrous.

The mental and physical surroundings of the prisoner at the time of the shooting are as much elements of his guilt or innocence as the fact of the shooting itself. To condemn without knowing these, would indeed be to immolate justice.

There is no fixed rule or law which necessity does not overrule. It excuses taking life in self-defense; it excuses the commission of crime under compulsion; it overrules general principles of evidence in admitting dying declarations; it allows the wife to testify against the husband, and governs all the innumerable transactions of life from the cradle to the grave.

The necessity of protecting the wife is so great that it overrules all other considerations, and permits her to testify in her own behalf against the husband. In fact, it places the husband in her power. This necessity is so im-

perious that it annihilates public policy—"tendency to promote unhappiness and disunion, and to perjury!"

If, from necessity, the law permits the wife to testify against the husband for her protection, by what sound and consistent rule, in a case like this, can she be excluded from testifying that another man has beaten her, and bade her convey threats to her husband, when this is necessary for the husband's protection? If in the one case she is allowed to testify for her own protection, why may she not be permitted to testify to the communication to the husband of facts brought out by the State, and for the purposes for which we offered her in her husband's defense?

One of the most effective ways in which the wife can protect the husband is to warn him of impending danger. But how will this duty be performed hereafter, if it be held that she can not tell a jury what she told the husband, when that husband is on trial for his life for a killing growing out of, and connected with, those very facts which she communicated to him? The rules of law on the subject of communications between husband and wife are intended for the promotion of confidence between man and wife, *not to destroy it.* What wife will tell the husband whom she loves of violence done her, if the law shall say that nothing which the wife shall say to the husband shall have any effect on the mind of the husband, and shall not be considered when he shall be tried for a killing done growing out of the very facts communicated to him? If the testimony of the wife is not admissible in this case, where can it ever be admissible? According to the doctrine contended for by the State, all humanity must stand silenced, and all of God's laws be hurled aside, whenever the wife is the only witness to complain to her husband of her wrongs. The wife overpowered, when alone, may be robbed of all that woman holds dear, and if she tells the husband of her wrongs, and the husband, in his transport of rage, slays the violator of his and her honor, a blind and monstrous precedent comes in, by excluding the truth because the wife alone knows it, to immolate him on the altar of what is called justice. The rule contended for by

the State destroys all confidence on this subject between man and wife. The timid wife will submit to wrong rather than inform the husband of facts which must have effect upon his mind and actions, and control his doings, and yet which, in law, shall not even be shown. Will the law allow the deed to be shown for the husband's destruction, but none of the causes or facts for his salvation?—*Flannagan v. State*, 46 Ala. 703.

The decisions that a wife can not be a general witness in favor of the husband are not attacked. They have nothing to do with this case.

No case like this was ever found in any book. It stands on its own necessities and merits. It is not governed by any rule of law which excludes the evidence, and is within many of the exceptions which would admit it even at common law.

As to the dying declarations—

None of the dying declarations should have been admitted. There is nothing to show that they were made under a sense of *impending* dissolution. The declarations admitted were made immediately after the deceased was shot; his passions were still blazing, and hope had not fled. He was not then in a condition to reflect and realize the dread reality before him. His utterances were but passion and anguish.

He never enquired about his condition; was never told he was bound to die, or that his wound was fatal. After he was taken from the ground he never said a word or did an act showing that he thought he was bound to die. His remark, "if they don't do something for me, I will die," which was a few minutes before death, shows not only that he had "not despaired of life, but had the belief that something could be done for him." He seemed only to desire immunity from pain, and was in a stupor. The evidence shows that death took him by surprise. "All at once deceased became speechless."—See *State v. Centre*, 35 Ver. 385; 8 Ohio State R. 131; 9 Humph. 23; 17 Ill. 17–22.

As to the oath of the jury—

Various decisions in the different courts throughout the Union, and some of our own supreme courts prior to the Code of 1852, show that where the record states that the jury were "duly sworn," or duly "sworn and charged," the appellate court will presume that the proper oath was administered, in the absence of proof to the contrary.

Presumptions have nothing to do with this case. The record itself sets out the oath taken by the jury; and that is not the oath required by law. It omits the words, "and true verdict render according to the evidence," &c.—See Rev. Code, § 4092.

This is the only oath prescribed by law. No power is given the courts to alter, change, modify, or dispense with the oath, or any part of it. When this is the case, the very form is of the essence of the law.—*Dover v. State*, 45 Ala. If part of the oath may be dispensed with, why not all?

Oaths have ever been regarded by the law as of great weight; nothing but the belief that the creature is about to appear before the creator can dispense with it. It is the greatest hold which the law can obtain over the conscience. It is just as essential that the jury should take the oath required by law, as that it should consist of twelve men. The very word "juror" imports one who is sworn. "Trial by jury," as the words are used in the constitution, had a fixed and well defined meaning at common law. One of the essentials to the constitution of a jury at common law was that it should consist of twelve sworn peers. The legislature itself can not dispense with the requirement of an oath; to do this, would be to set up a different tribunal from what the constitution intended, and the right of trial by jury would not "remain inviolable." If the law-making power can not dispense with an oath, how can the courts do it by upholding verdicts rendered by men not sworn according to law?

It is well settled that jurors must take the oath required by law.—*Williams v. State*, 45 Ala. 57, (opinion); 2 Iowa,

285; 4 *ib.* 381; *Bivens v. State*, 6 English, (Arkansas) 455; *Perry v. State*, 43 Ala. 24.

The form of oath required by law must have meant something when it uses the words, "true verdict render according to the evidence." Why was it incorporated in the oath? The courts are bound to construe it (if it can be reasonably done,) so as to give force to every word. It was incorporated to do away with an old doctrine of common law, that jurors were not bound by the evidence; the reason given for this doctrine being, that jurors were summoned from the vicinage, near the place where the crime was committed, and were therefore cognizant of the facts, whether proved by witnesses or not.—Forsyth's Trial by Jury. It was intended to prevent verdicts founded on the opinions of jurors, or on evidence known to jurors, but not delivered on the trial.

It may be contended that this objection has been waived by not objecting below, and can not be raised for the first time in this court.

In the earlier days of Alabama, the supreme court had no power or jurisdiction to pass upon any questions whatever, in a criminal case, except such as were expressly referred to it by the court below, and reserved as "novel and difficult," and perhaps by *certiorari*, &c. Afterwards, when bills of exception and appeals were allowed, the supreme court had no jurisdiction to pass upon anything not expressly objected to, and the objection stated and reserved in the bill itself, and of course, therefore, necessarily raised not for the first time in the supreme court.

Now the supreme court can look not only at the questions raised in the lower court, in the record, or in the bill of exceptions, but it "must render such judgment" on the proceedings, record, bill of exceptions, and all, "as the law demands," and must look at *all errors*, whether raised or not.

The reason for the rule in the earlier adjudications having ceased, the rule itself ceases; and this doctrine has latterly been held by this court.—*Frank v. State*, 40 Ala.

14; *Parmer v. State*, 41 Ala. 416; 41 Ala. 399; 43 Ala. 24; *ib.* 329.

Waiver stands on no higher ground than consent. To make a good waiver, it must appear that the party plainly knew what he was waiving, or was culpably negligent in not knowing.

This court knows the practice of the lower courts in administering oaths.—1 Phil. Ev. 623. It is often done by the clerk in such an inaudible and indistinct tone that the form can not be heard by a person a few feet off. It is often run over so rapidly that an error in the form can not be detected. Again: a prisoner on trial for his life may well be so engrossed with his witnesses, or in scanning and trying to learn something of the witnesses of the State, that both he and his attorneys should have their attention diverted from the form of oath being administered.

In *Frank v. The State*, *supra*, the court say: "In a criminal case, the prisoner will never be presumed to have waived any of his rights, except by proof amounting to direct proof of waiver. * * * Where some fact necessary to give the court jurisdiction of a particular case may not be shown by the record, * * * it can always be attacked by a direct proceeding on appeal, unless the party has waived such matter of fact. But in criminal cases such waiver is not to be presumed from the failure of the accused to raise the question in the court below."

In *Robertson v. State*, 43 Ala. 329, (top of page,) this court held that in a capital case, the record must show affirmatively that a copy of the indictment and list of jurors was served on the prisoner as required by law. That is a matter which is more certain to be brought to a prisoner's attention than a defect in the form of oath administered to a jury. Why hold that the record must show that the law had been complied with in the one case, if not in the other? The oath is just as essential for the protection of the rights of the accused, as service on him of copy of indictment, &c.—See, also, 41 Ala. 116; *ib.* 399.

The "fact necessary to give the court jurisdiction in the particular case" is, that the jury was sworn according to

law. This is a jurisdictional fact. The prisoner could no more waive, or consent to the omission of the proper oath, than he could to be tried by eleven jurymen. In either event it would be a tribunal unknown to law. Consent can not confer jurisdiction in such cases, and if it appear from the record that the court had no jurisdiction, the prisoner's waiver could not confer it. The record affirmatively shows that the proper oath was not taken, and hence a reversal must follow.—41 Ala. 116. The oath being set out, the court can not presume that any other was taken than the oath set out in the record. The common sense import of the words used forbids presumptions.—*Bivens v. State*, 6 English, 455.

No case can be found in the books, where a conviction was upheld, when the record affirmatively shows that the jury was not sworn according to law.—*Bivens v. State*, 6 English, 455.

JOHN W. A. SANFORD, Attorney-General, and WATTS & TROY, *contra*.—1. The mistake made by the officer in entering the initials of a juror on a list served upon the prisoner, is no ground for quashing the *venire*.—Rev. Code, § 4175; *Birdsong v. The State*, at the present term.

2. The court did not err in its refusal to send for Lacy and Wharton, whose names were on the list of the jurors served on the accused.—*Waller v. State*, 40 Ala. 325. Their places could be supplied by talesmen.—Rev. Code, §§ 4091, 4177. Nor in permitting Wharton to be brought in as a talesman after the list of jurors was exhausted.

3. The record does not set out the oath of the jury, but merely recites the fact that they were sworn, not to answer questions, but to try the issue. Unless the record shows to the contrary, the maxim, *omnia presumunter esse rite acta*, will control the action of this court. If the oath was not properly administered, the defendant should have objected; and failing to do so, will be presumed to have waived his right to object to the irregularity.—*Hall v. State*, present term. Inasmuch as he did not except to the action of the court below, if it erred in the administration of

the oath to the jury, he can not avail himself of it here. The court will consider no errors that were not indicated in the court below.—3 St. & Port. 222; *Lowry v. Commissioners Court*, 18 Ala. 482–88; *Murrah v. Rice*, 20 Ala. 398.

4. The court acted properly in excluding the wife of the accused.—*Hampton v. State*, 45 Ala.

The action of the court in regard to the admission of the evidence proving the dying declarations of the deceased, could not have injured the accused.—*Thomas v. Henderson*, 27 Ala. 523; see *Mose v. State*, 35 Ala.

PECK, C. J.—The appellant was indicted at the February term of the city court of Montgomery county, 1871, for the murder of Henry Walton, by shooting him with a gun. At the October term of the same year he was tried and convicted of murder in the first degree, and sentenced to be hung on Friday, the 8th day of March, 1872. From said sentence he has appealed to this court. The case has been elaborately argued, presenting many questions for consideration. An examination of the record, in connection with the arguments, has convinced us that the conviction and sentence must be reversed.

In disposing of the case, we shall confine our opinion to the questions in which, we think, errors are to be found, and to such other questions as will probably arise on another trial.

In capital cases, and other felonies, there are some matters that must affirmatively appear in the record, or the conviction will be erroneous, and the judgment of the court must be reversed.

In such cases, where the defendant is in actual imprisonment, it must affirmatively appear that a copy of the indictment and a list of the jurors summoned for his trial, including the regular jury, were delivered to him at least one entire day before the day appointed for his trial.—Revised Code, § 4171; *Robertson v. The State*, 43 Ala. 325. And in all felonies the record must show that the defendant was asked, before sentence, if he has anything to say, why judgment should not be pronounced upon him.—*Crim*

v. The State, 43 Ala. 53; 1 Bish. Crim. Pro. § 865. And we hold it equally necessary to a legal conviction, that the record should show that the jury was sworn, and that the oath administered conforms substantially to the oath required to be administered by the Revised Code, § 4092. That oath requires the jurors to be sworn, not only well and truly to try the issue joined between the State of Alabama and the defendant, but also *a true verdict to render according to the evidence.* The record in this case states, the jury "were duly sworn to well and truly try the issue joined between the State of Alabama and the defendant, Joe Johnson." If it were stated that the jury were duly sworn according to law, it might, perhaps, be presumed they were sworn in the form required by the statute, but as the oath administered is stated, we can not presume that they were otherwise sworn. The oath stated leaves out an essential and substantive part of the oath required to be administered, to-wit: "and a true verdict render according to the evidence: so help you God." Thus, we see, not only an essential, but the most impressive part of the oath, was omitted; that part that directs the jurors to look to God for help, in the discharge of their important and solemn duty, a duty in which the life of a human being was involved. This omission must necessarily render the verdict illegal, and insufficient to justify the fearful and terrible punishment to which the defendant is consigned by the sentence and judgment of the court.—*Harreman v. The State*, 2 Greene's Iowa Rep. 270–283; *Bivens v. The State*, 6 Eng. Rep. 455–465; *Jones v. The State*, 5 Ala. 666, 673.

2. Were the declarations offered by the State, as the dying declarations of the deceased, admissible?

Dying declarations are only admissible where the deceased knows or thinks he is in a dying state. Positive evidence of this knowledge is not required; it may be inferred from the conduct and condition of the deceased. Roscoe's Crim. Ev. 29.

It is a general rule, that dying declarations, though made with a full consciousness of approaching death, are only admissible where the death of the deceased is the subject

of the charge, and the circumstances of the death are the subject of the dying declarations.—Roscoe's Crim. Ev. 28. The dying declarations offered in evidence in this case fall strictly within this rule. The death of the deceased was the subject of the charge, and they were offered to prove the circumstances of the death of the deceased, and the party by whom it was occasioned.

A careful examination of the evidence satisfies us that the deceased not only believed that he was in a dying state, but that he was so in fact. He lived only about three or four hours after he was shot, said he was bound to die; and the physician who visited him directly after the shooting said he was then in a dying condition, was collapsed, had but little pulse, was sinking, and soon after became speechless; that after a little while he became able to speak so as to be understood. Another witness named Merriwether stated that about fifteen or twenty minutes before deceased died he said, to a question asked him by the physician, "Joe sent for me, and I went down. When I got close to him, he told me not to come closer; if I did, he would shoot me. I wheeled to walk away, and he shot me."

Other witnesses were examined on this subject, and proved similar declarations. These examinations were to the court, for the purpose of determining the admissibility of the dying declarations of the deceased, but in the presence and hearing of the jury, the court telling the jury the evidence was for the court, and not for the jury. The defendant's counsel objected to said evidence, and to the admissibility of the dying declarations of the deceased, and moved the court to exclude the same. This the court refused to do then, but said, when the evidence is closed, and before the arguments of the counsel to the jury commence, the motion of defendant to exclude the dying declarations of deceased would be decided. To these several rulings of the court the defendant excepted. The evidence of the State being closed, the court directed the defendant to proceed with the case. The defendant objected to proceeding further, or to enter upon the examination of his witnesses, until his motion to exclude the evidence of the dying

declarations of deceased was decided by the court, as he could not know what to meet, or whether said dying declarations would be evidence or not. The court overruled defendant's objection, and directed him to proceed with the case, and defendant excepted. Thereupon, the defendant proceeded and examined his witnesses. After the defendant had closed his evidence, and after argument of counsel on the several motions of defendant as aforesaid, to exclude the dying declarations of deceased, the court excluded all evidence of the dying declarations of the deceased, except those made by deceased when he was lying on the ground, immediately after he was shot, and the evidence of the physician, and of a witness by the name of Merriwether; and to this ruling of the court the defendant excepted.

The court committed no error in deciding that the dying declarations of deceased, referred to, were admissible, but we think the court erred in requiring the defendant to proceed with his defense before deciding that question. This is certainly a novel question. No authority is referred to sustaining the decision of the court, and, so far as we know, none exists. Novelties in the law are to be regarded with distrust. No accused person should be required to make his defense until he is informed what the evidence against him is. Common justice requires this, and common justice is common law. Such a practice reverses all the well settled rules of criminal procedure on this subject, and must therefore be erroneous.

3. In a criminal case the wife is sometimes a competent witness against the husband, but never for him.—1 Greenl. Ev. § 343, and the two following sections; *Williams v. The State*, 44 Ala. 24; Revised Code, § 2704.

4. The court committed no error in refusing to quash the venire, because of the mistake in the christian name of one of the jurors in the list of jurors required to be delivered to the defendant by section 4171 of the Revised Code. The remedy for such a mistake is provided for in section 4175, and the record shows the defendant had the benefit of that remedy.

5. Where jurors, whose names are in the list of jurors delivered to the defendant for his trial, if drawn, fail to answer when called, it is no error in the court to refuse to send for them, although it be shown that they live, and are in the city at the time they are called; but when a juror is in the jail, under an order or sentence of the court, in such a case, on the motion of the defendant, if the court refuses to send for him and have him brought into court, it is an error for which the judgment will be reversed.—*Boggs v. The State*, 45 Ala. 30.

For the errors named, the judgment is reversed, and the cause is remanded for another trial, and the defendant will remain in custody until discharged by due course of law.

MORGAN *vs.* THE STATE.

[IMPRISONMENT FOR COSTS ON CONVICTION IN CRIMINAL CASE.]

1. *Revised Code, section* 3760 *of; not unconstitutional.*—Section 3760 of the Revised Code is not unconstitutional, either as to fine and costs, and unless both are paid, a defendant may be lawfully imprisoned in the county jail, or, in the discretion of the court, sentenced to hard labor for the county if he refuses to confess judgment, with good and sufficient securities for both fine and costs, or for the costs only, if the fine be paid.
2. *Constitution of Alabama, section* 22 *of article* 1 *of; what not a debt within meaning of.*—The costs in a criminal case do not constitute a debt within the meaning of section 22 of article 1 of the constitution of Alabama.

APPEAL from Circuit Court of Perry.
Tried before Hon. M. J. SAFFOLD.

The facts are stated in the opinion.

P. LOCKETT, and RICE, JONES & WILEY, for appellant. Section 3760 of the Revised Code gives the court below no

right whatever to imprison the defendant for the non-payment of *costs merely*, but expressly provides: "If the fine *and* costs are not paid, or a judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail," &c. In this case the "*fine*" assessed against the defendant by the jury *was paid* by her, although she refused or failed to settle "*the costs*" of the court below, or to confess judgment with sureties for the same. The circuit court could not, under that section of the Code, either imprison the defendant or sentence her to hard labor for the county, except upon a failure to pay both "the *fine and costs*," or confess judgment according to the provisions of section 3759 of the Code. The contingency in which the court had power to act had not arisen. The statute must be construed most favorably for the defendant, involving as the case does the liberty of the citizen.

It is evident that "the costs" of the court, in this instance, can form no part or parcel of the "fine" or punishment imposed by the jury upon the defendant for the violation of a law, because the verdict of the jury trying the issue is: "We, the jury, find the defendant guilty, and assess a *fine of one dollar*."

A debt is an obligatory contract, but under the constitution of the State can not be compulsory, except by civil process, inasmuch as the constitution declares in express terms, "that no person shall be imprisoned for debt."—Dec. of Rights, Con. of Ala. art. 1, § 22. *Thompson v. The State*, 16 (Harrison) Indiana Reports, p. 516, is a case expressly in point. The head-note is as follows: "Section 128 R. S. p. 378, which provides that when the defendant in a criminal case is adjudged to pay any fine and costs, he may be committed until the same are paid or replevied, is unconstitutional, so far as the same authorizes a commitment for the non-payment of costs, being in conflict with article 1, section 2, of the constitution."

The costs in a criminal case are matters of private right, and constitute a mere indebtedness, for which (in the ab-

sence of a fraud) a defendant can not be ordered to be imprisoned."—*The State v. Farley*, 8 Blackf. 229.

Article 1, section 22, of the Constitution of Alabama, leaves out "except for fraud."

If the "costs" were not debts due to the officers of the court, but were merely part of the penalty itself, the pardoning power of the governor could remit the costs, for it reaches all penalties for crime except where the fundamental law fetters the power. But the pardoning power can not remit costs already taxed, because they are mere debts due the officers of court.

PECK, C. J.—There is no error in this record. Appellant was convicted of an assault and battery with a stick, and fined one dollar, and judgment was rendered for the fine and the cost of the prosecution. Thereupon, appellant paid the fine to the clerk, but refused to pay the cost, or to confess judgment, with good and sufficient sureties, for its payment, and moved to be discharged. Her motion was denied, and the court sentenced her to hard labor for the county for ten days; and she excepted to the ruling and judgment of the court, and appeals to this court to have the sentence and judgment of the circuit court reversed.

Her counsel insists that section 3760 of the Revised Code, which provides, that "if the fine and costs are not paid, or a judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county," &c., is unconstitutional, in so far as it authorizes the defendant to be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county, for failing either to pay or to confess judgment for the cost; that the cost, in such a case, is a debt, and the constitution, article 1, section 22, declares, "that no person shall be imprisoned for debt." In this the counsel is mistaken. In criminal cases, the cost is no more a debt than the fine, and accurately speaking, not as much so, for the fine is a sum certain *in*

numero, and the cost is not. If the defendant refuses to pay the cost, or to confess a judgment with good and sufficient sureties for their payment, as provided in section 3759 of the Revised Code, it is no violation of the constitution to compel their payment by hard work for the county.

Let the judgment be affirmed at appellant's costs.

THOMPSON *vs.* THE STATE.

[INDICTMENT FOR MALICIOUS MISCHIEF.]

1. *Jury, province of; what charge invades.*—A charge which assumes a fact to be proved, without referring to the jury the credibility of the evidence offered to prove it, and whether if credible it proves the fact, invades the province of the jury, and is therefore erroneous.

APPEAL from Criminal Court of Dallas.
Tried before Hon. GEORGE H. CRAIG.

The point upon which the case turns is fully stated in the opinion.

—— —— for appellant.
J. W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—The indictment in this case was found in the criminal court of Dallas county. The charge is, that the appellant, John Thompson, unlawfully and maliciously disabled a cow, the property of Stephen Tarrant, against the peace and dignity of the State of Alabama.

The trial was had on the plea of not guilty; the appellant was convicted and fined fifty dollars. On the trial a bill of exceptions was signed and sealed at his instance, which set out all the evidence.

The court charged the jury in writing, to which the appellant excepted. In this charge, among other things, the

court stated to the jury, "It has been testified to before you, that the cow proven to have been shot, was outside of the field in which the corn of John Thompson was growing at the time of the shooting." Was this proper to be said to the jury? or, in saying it, did the court invade the province of the jury? We think it was most clearly the latter. The court assumed to tell the jury what was testified to, and what was proved, without leaving it to the jury to find from the evidence what was, or was not proved. It assumed as a fact that the cow was shot, and where she was at the time she was shot—that she was outside of the field in which the corn of John Thompson was growing, at the time of the shooting. This was a clear invasion of the province of the jury. A charge which assumes a fact to be proved, without referring to the jury the credibility of the evidence offered to prove it, and whether, if credible, it proves the fact, is an invasion of the province of the jury. It is the province of the jury, not of the court, to find from the evidence what is proved. The jury alone can determine the credibility of the evidence, and what it proves, and a charge that assumes to do this is erroneous. Shep. Dig. p. 460.

The judgment is reversed, and the cause is remanded for a new trial.

RICE *vs.* THE STATE.

[INDICTMENT FOR BURGLARY.]

1. *Confessions of guilt; when should not be excluded.*—When no promises are made or threats used to obtain confessions, they should not be excluded because the circumstances surrounding the defendant were threatening. Such circumstances are proper to be considered by the jury in determining the credibility of the confessions, and what force and effect should be given to them.
2. *Same; charge as to, what erroneous.*—A charge asked in the following

words may be refused, to-wit: "If the confessions of the defendant are not corroborated, a strong presumption arises that they are not true." There is no general presumption that confessions are to be regarded as untrue unless they are corroborated.

APPEAL from Circuit Court of Wilcox.
Tried before Hon. P. O. HARPER.

The indictment in this case charged that Henry Rice, *alias* Wright, "broke into and entered the dwelling house of William T. Spencer, with intent to steal," &c. The defendant having gone to trial on plea of not guilty, was convicted, and sentenced to ten years imprisonment in the penitentiary. The State, after having proved that Spencer's house was broken into in the year 1868, and a large sum of money in ten and twenty dollar gold pieces, and some few two-and-a-half dollar gold pieces, stolen at the time of the breaking, introduced Sam. Spencer, who testified that he and his brother visited defendant in jail, the prisoner, and witness and his brother alone being present at the interview. The witness then said to defendant, "I want to know what you and Bill did with father's money." Defendant replied that "he did not go into the house, but broke Bill's leg for him to go in, and that Bill broke the shutters, went in and got the money, and handed it to defendant at the window." The defendant, at the same interview, told the witness that if he would go to a certain place described by the prisoner, he would find the money in a hole in the ground. Witness found the hole, and some cloth in it which had been seen in Spencer's house, but could find no money. "Witness did not promise defendant anything to confess, nor use any threats against him if he did not confess." The defendant then moved the court to exclude the confessions on the ground that "the circumstances surrounding the prisoner were threatening, and that said confessions were not corroborated." The court overruled this motion, and defendant excepted. The State then proved that a short time after the house was entered, defendant bought goods and jewelry in Mobile, Alabama, to the amount of about $100, all of

which, except eight dollars, was paid for in gold coin; a twenty-dollar gold piece and two-and-a-half dollar gold pieces being used for that purpose, and that at the time of defendant's arrest he had a number of ten or twenty-dollar gold pieces on his person. There was some evidence tending to show that in 1866 defendant had been paid $87.50 in two-and-a-half dollar gold pieces. After the general charge to the jury, (which is not set out in the bill of exceptions,) the defendant asked the following charge: "That if the confessions of the defendant are not corroborated, a strong presumption arises that they are untrue." This charge the court refused, and defendant excepted, and the court then remarked to the jury "that they would recollect what the court had told them as to the law of confessions, and to this qualification the defendant excepted."

The errors assigned are—

1. Refusal to exclude the confessions.
2. The refusal of the charge asked.
3. The qualification of the charge.

JOHN MCCASKILL, for appellant.
J. W. A. SANFORD, Attorney-General, *contra.*

(No briefs came into Reporter's hands.)

PECK, C. J.—But two questions are made on this record. One arises on a motion to exclude the confessions of the defendant, upon the ground that the circumstances surrounding him at the time they were made were threatening; and that the confessions were not corroborated.

1. No objection was made to the admissibility of the confessions at the time they were deposed to by the witness. The witness stated that no promises were made to obtain the confessions, and no threats used if the defendant did not confess.

The circumstances stated were proper to be considered by the jury in determining the credibility of the confessions, and what force and effect should be given to them,

but not sufficient to exclude them altogether. There was no error, therefore, in overruling the motion.

2. The other question grows out of the refusal of the court to give a charge asked by the defendant. After the court had charged the jury, the defendant asked the court to give the following charge to the jury: "If the confessions of defendant are not corroborated, a strong presumption arises that they are not true." There was no error in refusing this charge. Confessions are sometimes the most satisfactory evidence of the defendant's guilt; sometimes they are of very little value; but we know of no general presumption that confessions, unless corroborated, should be regarded as untrue, or should be presumed to be so. All confessions ought to be cautiously received by the court, and carefully considered by the jury. If voluntarily and intelligently made—not obtained by promises of favor, or by putting in fear by either threatening acts or words—a jury may very properly convict on confessions merely, without other evidence; but, if made by an ignorant party, under suspicious circumstances, as, if made when no one is present but the witness, or made by one in the custody of an officer, or in jail, and to a person interested to obtain them, or to one who might be supposed to inspire the prisoner with fear, or with a hope that by confessing, he would obtain a mitigation of his punishment, or from any other cause that might be fairly presumed to exercise an undue influence on the prisoner's mind, then conviction should rarely, if ever, be based upon such confessions only, without corroborating evidence. After the defendant's charge was refused, the court said to the jury, "You will recollect what I told you as to the law of confessions." To this the defendant objected, as a qualification of his charge. It is not readily seen how that remark can be construed as a qualification of the charge that had been refused. If the charge had been given in whole, or in part, it might, perhaps, amount to a qualification. But the charge was not asked in writing; therefore, if it had been given, there would have been no error in adding to it a proper qualifi-

cation. Courts are only prohibited from qualifying charges asked in writing.—Rev. Code, § 2756.

Let the judgment be affirmed.

LOCKETT *vs.* THE STATE.

[INDICTMENT FOR CARRYING CONCEALED WEAPONS.]

1. *Oath of jury, recital in record as to; what sufficient.*—Where the record recites that the jury "were duly sworn, according to law," this sufficiently shows that the oath required by law was administered.
2. *Revised Code, section* 3555 *of; word "traveling" used in, defined.*—The word "traveling" used in section 3555 of the Revised Code means to pass from place to place, whether for pleasure, instruction, business, or health, and the length of the journey does not destroy the character of the occupation. (SAFFOLD, J., *dissenting.*)
3. *Same.*—A person who is a passenger and passing on a railway train from Selma to Marion in this State, a distance of twenty-eight miles, to seek employment, is "traveling" in the sense of the statute, and may carry a pistol concealed about his person. (SAFFOLD, J., *dissenting.*)

APPEAL from Circuit Court of Perry.
Tried before Hon. M. J. SAFFOLD.

Reid Lockett, freedman, being indicted and on trial for carrying a pistol concealed about his person, the State introduced a witness who testified, that some time in August, 1871, while coming from Selma on the passenger train, he noticed defendant, and some time after this he saw the conductor eject defendant from the train for drunken and boisterous conduct. At the time a brakeman, who was aiding the conductor, took from Lockett a pistol which Lockett had drawn, and immediately afterwards defendant exhibited another pistol, both pistols having been previously concealed about his person. "Witness thought from defendant's action that he was a train hand, but was not

positive about it. Defendant was traveling on the train, and may have been a passenger."

Defendant introduced a witness who testified, that defendant's regular occupation was that of a brick mason and plasterer, although he had known him to do other kinds of work; that he was at Selma a good part of his time; that he (witness) did not know whether defendant was a train hand or not at the time referred to.

Powhattan Lockett testified, that he saw defendant on the cars after passing "the Marion Junction," and invited him to go to Marion to do some plastering for him. Defendant had been working at the Junction, but agreed to do the work which witness wished to have done. It was admitted that it is twenty-eight miles from Selma to Marion; that the train from which defendant was put off was a passenger train running from Selma to Marion; that it is fourteen miles from Marion Junction to Marion; and that the defendant was put off a short distance after leaving the Junction. This was all the evidence.

The court, at the request of the solicitor, charged the jury, "if they believed the evidence, they must find the defendant guilty." The defendant excepted to this charge, and requested the court, in writing, to charge the jury that "if they believed from the evidence that defendant was engaged in traveling, and was on the cars as a passenger from Selma to Marion, a distance of twenty-eight miles, that he had a right to carry concealed weapons, and that they must find the defendant not guilty." The court refused to give this charge, and defendant duly excepted.

The defendant then asked the court to charge the jury, that "if they believed from the evidence that defendant was traveling and on the cars from the Junction to Marion, a distance of fourteen miles, that then they must find the defendant not guilty." The court refused to give the charge, and defendant duly excepted.

The jury brought in a verdict of guilty, and assessed a fine of fifty dollars against the defendant. The judgment-entry, after reciting defendant's plea and joinder, &c., is as follows: "Thereupon, came a jury of good and lawful men,

to-wit: M. W. Oliver, and eleven others, who being duly empanneled and sworn according to law, well and truly to try the issue joined, upon their oaths do say," &c.

The errors assigned are—

1st. The charge given and the charges refused by the court.

2d. That the judgment-entry shows that the jury were not properly sworn.

P. LOCKETT, and A. A. WILEY, for appellant.

J. W. A. SANFORD, Attorney-General, *contra.*

PETERS, J.—This is an indictment under the statute for carrying a pistol concealed about the person of the accused. There was a conviction in the court below, and the defendant was fined fifty dollars. From this conviction he appeals to this court.

The record shows that the jury was "duly empanneled and sworn according to law, well and truly to try the issue joined." This could not be, unless the oath administered was that laid down in the Revised Code. It was therefore sufficient.

The defendant, in the court below, for his defense relies on the fact that he was "traveling" at the time when the offense charged is alleged to have been committed. The statute creating this offense is in the following words: "Any person who, not being threatened with or having good reason to apprehend an attack, or *traveling*, or setting out on a journey, carries concealed about his person a bowie-knife, or any other knife or instrument of a like kind or description, or a pistol, or fire-arms of any other kind or description, or an air-gun, must be fined, on conviction, not less than fifty, nor more than three hundred dollars; and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months."—Revised Code, § 3555; 1 Ala. 612; 31 Ala. 387; 33 Ala. 347. The testimony tends to show, that when the defendant was "traveling on the train and may have been a passenger," on the rail-way between the city of Selma and the town of

Marion in this State, he carried concealed about his person a brace of pistols. It was shown, that the accused was a brick-mason, and that he resided near Selma, and had been invited to Marion to do some brick work and plastering there. It was admitted that the distance between these two places was about twenty-eight miles, and that it was about fourteen miles from Marion, where the defendant was put off the train by the conductor, on account of his improper and boisterous conduct. It was there that he exhibited his pistols.

On this evidence the defendant moved the court to give a written charge to the jury in the following language: "That if they believe from the evidence that the defendant was engaged in traveling, and was on the cars as a passenger from Selma to Marion, a distance of twenty-eight miles, that then he had a right to carry concealed weapons, and that they must find the defendant not guilty." This charge was refused, and defendant excepted. I think this was a proper charge under the evidence, and should have been given. The word "traveling" has no very precise or technical meaning when it is used without any limitation. Its primary and general import is to pass from place to place, whether for pleasure, instruction, business, or health. A person may travel to seek employment as well as to seek amusement, information, or health.—Webster's Dict. Unabridged, Roget's Thesaurus of English Words, p. 109, *word* TRAVEL. The length of the journey or its continuance does not destroy the character of the occupation. The proofs in this case do not make it certain that the defendant may not have been engaged in an honest journey to a neighboring town to procure employment in his trade. He might have done the same thing, by a trip to California or to Mexico. In the latter case, to be caught with pistols concealed about his person would be no crime. And there is no very clear reason why a different interpretation should be placed on his conduct in the two cases, because the journey was shorter in the one case than it was in the other, when his purpose in both cases was to seek employment in his occupation. Nor is it required that he should have any

necessity for the use of his pistols. It is enough if he was *traveling* on a journey, long or short. This is the language of the statute above cited.

There was also a charge given by the court below, which was the reverse of that set out above. This was objected to by the defendant. Such a charge cannot be maintained upon the reasoning above shown. It excluded all consideration of the evidence that the defendant was *traveling* when he exhibited his pistols. There was some evidence tending to show this, and however slight it might have been, it was entitled to its proper weight. But the charge of the court, which was given and excepted to, was calculated to exclude this. This was also error. The court reluctantly concur in the reversal of this cause, but think that the question of "traveling" should have been left to the jury.

The judgment of the court below is reversed, and the cause is remanded, and a new trial is ordered. In the mean time the defendant, said Reid Lockett, will be held to answer the indictment in this case until discharged by due course of law.

B. F. SAFFOLD, J., *(dissenting.)*—The appellant was indicted for carrying concealed weapons under section 5555 of the Revised Code. He lived near Selma, and was going to Marion, a distance of about twenty-eight miles. Fourteen miles from Marion, or half way his journey, he was put off the cars by the conductor for improper and boisterous conduct, and at that time he exhibited pistols.

The court holds that his passage from Selma to Marion was such a traveling or going on a journey as relieved him from the penalty of the statute.

No more indefinite words could have been used in a penal statute than those of "traveling" or "setting out on a journey." But it is manifest that they were not employed in their most extensive signification. This would nullify the law, because any passing from one place to another, no matter how near, would be a traveling, and to prohibit the possession, or even the carrying of arms at home, would be contrary to the constitution.

The evil sought to be remedied was the insecurity of life caused by the practice of carrying concealed weapons, and the consequent demoralization of society. It was deemed criminal for a person to put in his pocket a weapon to kill his friends and acquaintances in a chance quarrel, or premeditated attack by himself. The distance of the travel was therefore intended to be such as would take him beyond the circle of his general acquaintance, and amongst strangers for whose conduct he was in no wise responsible, either by his precept or example, and against whom he was not protected by the consideration we exhibit for those whom we know. Since travel has been so much expedited by railroads, distance has almost given way to time as its measure. I would therefore much prefer to construe the traveling or setting out on a journey, intended by the statute, to mean a going beyond the jurisdiction of the particular law, that is, beyond the State.

BROWN *vs.* THE STATE.

[INDICTMENT FOR PERJURY.]

1. *Indictment; when sufficient.*—An indictment for perjury, in the form prescribed in the Revised Code, is sufficient.—Revised Code, p. 812, No. 44.
2. *Variance.*—A charge of larceny of the property of M. G. is not the same as a like charge of the property of W. G. M. G. or his son M. G., and a record of the latter case is not competent proof of the former.
3. *Sentence; when illegal.*—A sentence for a longer or shorter time than the law prescribes is error. The court can not sentence one convicted of perjury to confinement in the penitentiary for *two* years.—Revised Code, § 3557; 5 Wis. 529; 20 Gratt. (Va.) 848.

APPEAL from Circuit Court of Dallas.
Tried before Hon. JAMES Q. SMITH.

G. A. NORTHINGTON, for appellant.—1. There was a clear

variance in the proof. The proof offered shows a different offense, in law, from the one about which the perjury is alleged, and for which appellant was on trial.

2. There is no law whatever which authorizes *two* years imprisonment on conviction in a case of this kind. The sentence is therefore unlawful.—Rev. Code, § 3557. The law is in effect the same as if it expressly enacted that on a conviction for perjury the sentence of imprisonment shall *not be for two years*, or any less number than three years. Where a defendant is convicted, and the law under which the trial was had is repealed (without a saving clause,) before sentence passed, the court has no power in the premises. And it has as much right to pass sentence in such a case, as it had to pass the sentence it did in this case. The judgment and sentence must be reversed, because there is no law to sustain them.

J. W. A. SANFORD, Attorney-General, *contra.*

PETERS, J.—This is an indictment for perjury. The appellant, Jonas Brown, was found guilty and sentenced to the penitentiary for *two* years. From this judgment he appeals to this court.

There are but two questions of serious moment raised on the record. The one is a point raised upon an exception reserved in the bill of exceptions, and the other is an objection to the judgment of the court condemning the accused to *two* years imprisonment in the penitentiary. There is also an objection to the sufficiency of the indictment, raised on motion in arrest of the judgment, but this objection is not sustained by the record. The indictment is in one of the forms given in the Revised Code.—Rev. Code, p. 812, No. 44; *ib.* §§ 3557, 4139. The charge is, that the accused committed the perjury alleged on a trial in the circuit court "under an indictment for feloniously taking and carrying away one horse or poney, the property of *W. G. M. Golson, or his son Mallard.*" The record offered in proof of this averment showed that the indictment was for feloniously taking and carrying away "a bay mare

poney or horse, the property of *W. G. M. Golson's son Mallard.*" This was objected to by the defendant below, the objection was overruled by the court, and the defendant excepted, and incorporated his exception into the record by bill of exceptions. It is now insisted by the appellant's counsel that there is a fatal variance between the allegation and the proof, and that the court below erred in refusing to exclude this record on account of such variance. In such a case, the variance is material if the offense alleged can not be supported by the same evidence which would support the offense attempted to be proven. Here, the evidence which would sustain an averment that the horse stolen was the property of Mallard Golson, would not sustain an allegation that it was the property of his father. Then there might be a conviction under one charge which could not be sustained under the other. Such indictments are not identical. Necessarily, then, the one is variant from the other. The record, then, should have been rejected. The court erred in refusing defendant's motion to exclude it.—1 Bish. Cr. Law, § 886.

The second objection above mentioned, which assails the sentence of the court below, is also well taken. The court can impose only such penalty as the law sanctions. It can not impose a sentence of greater or less severity than that commanded by the law. In such a case, the question is not one of injury or favor to the accused, but one of legal authority. The court can only do what the law commands. Its judgment is a declaration of the law.—*Haney v. The State*, 5 Wis. 529; *Jones v. Commonwealth*, 20 Grattan, 848. On a conviction for perjury, there is no authority of law to confine the accused in the penitentiary for a less term than three years, nor for a longer term than twenty years.—Rev. Code, § 3557. The sentence of the court, then, was wholly without authority of law. Such a judgment is error.

The judgment of the court below is therefore reversed, and the cause is remanded for a new trial. And the defendant, said Jonas Brown, will not be discharged except by due course of law.

BUGG *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Oath administered to jury; what recital of, not sufficient to uphold verdict.*—The judgment entry in this case recites: "Thereupon came a jury of good and lawful men, to-wit, A. L. Mathews and eleven others, good and lawful men, who being duly elected, tried, and sworn to well and truly try the issue joined and true deliverance make between the State of Alabama and the defendant, upon their oaths do say" &c.—*Held*, upon the authority of *Joe Johnston v. The State*, to be insufficient to uphold the verdict.
2. *List of jurors and copy of indictment; when failure to serve on defendant is a reversible error.*—Where the defendant is in actual custody, charged with a capital offense, the record must show that defendant was served with a copy of the indictment and list of jurors at least one entire day before the day set for his trial.

APPEAL from Circuit Court of Montgomery.
Tried before Hon. JAMES Q. SMITH.

The appellant, who was indicted for the murder of Harper James, was convicted of murder in the second degree and sentenced to the penitentiary for twenty-five years. The record shows that he was confined in jail at the time of the trial, and it does not show service upon him of a copy of the indictment and list of jurors summoned for his trial at least one entire day before the day set for his trial.

The following is the judgment entry so far as relates to the verdict of the jury: "Came the State by its attorney, and the defendant in his own proper person and by attorney, and the bill of indictment pending against him for murder being read to him, he pleaded thereto not guilty, and thereupon came a jury of twelve good and lawful men, to-wit, A. L. Matthews and eleven others, good and lawful men, who being duly elected, tried, and sworn to well and truly try the issue joined and a true deliverance make between the State of Alabama and the defendant, W. R. Bugg, upon their oaths do say, 'We, the jury, find the

prisoner guilty of murder in the second degree, and sentence him to the penitentiary for twenty-five years."'

The appeal is taken on the record, and the errors assigned are—

1. That the jury was not properly sworn.

2. That it does not appear that a copy of the indictment and list of jurors were served upon appellant as required by law.

WATTS & TROY, for appellant, cited *Johnson v. State*, at present term, and *Lacy v. State*, 45 Ala. 80.

JOHN W. A. SANFORD, Attorney-General, *contra*.—The record is a history of the facts of a case from its commencement to its conclusion. It does not, in all its parts, set out in *ipsissimis verbis*, what is said. A substantial narration of all the events of a case in a clear, orderly and perspicuous manner, is all that is required. No form is recognized as absolutely necessary.—*Crist v. The State*, 21 Ala. 137-48; 1 Bish. Cr. Pr.

The record in this case recites that an oath was administered to the jurors to the effect that they would well and truly try the issue joined, and true deliverance make. It does not set forth the words or the form of the oath. No objection was made to the mode in which the jurors were sworn. In the absence of any evidence to the contrary, or any exception on the part of the prisoner, the court is bound to presume that the legal oath was duly administered; or, if there was any irregularity in swearing the jury, it was waived by the accused.—*Hall v. The State*, at present term.

For many years the records of criminal cases in Alabama only stated the fact that the jurors were "elected, tried, and sworn well and truly to try the issue joined." Such an entry was considered sufficient by the officers charged with the duty of making up of records, and their custody, and has indeed been decided in the following cases to contain all that is necessary to show that the prisoner was tried by his peers duly sworn: *Pile v. The State*,

5 Ala. 72–74; *Crist v. The State*, 21 Ala. 137-148; *McGuire v. The State*, 37 Ala. 161–163. Reason, as well as authority, sustains the sufficiency of the above entry. How could the prisoner be "well and truly tried" in a court of Alabama, unless he was tried on proper evidence according to law?

Indeed, the only cases that deny the correctness and sufficiency of the above entry have been decided at the present term.

If this recitation of the swearing of the petit jury be deemed insufficient because the record does not contain what it never purposed to contain, why is the entry that the grand jurors were duly "drawn, impanneled and sworn," considered sufficient, without setting out the oath that they would "diligently inquire, and due presentment make," &c.? This caption is the part of every indictment. If the record should contain the words of the oath, instead of a recital of the fact that the jurors were sworn, then no person has been properly indicted for years in Alabama. Notwithstanding this fact, many have been convicted and punished, and that, too, when it was the duty (as clearly expressed in Andrew Johnson's case,) of the court to examine the whole record, and if any error exists, to reverse the judgment.

It seems to be just as important that the grand jury should be properly organized and legally sworn when they enter upon their duties, as it is that the jurors trying the cases should be properly impanneled and sworn. If a recitation of the fact of the administration of an oath, without stating what it is, be sufficient in the first instance, why should not the recital of the same fact be sufficient in the second? That, in the first instance, it is sufficient, is shown by the fact that in its search for errors, this court has never discovered that such a statement in the record of the drawing and swearing of the grand jury is erroneous.

The record does not set out the oath, but only states for what purpose the jurors were sworn. It is submitted, that to reverse the case for not employing words in a particular collocation, is almost too technical. We wonder that a

notorious murderer was acquitted formerly because the word "brachio" was spelt "bracio," and another went unwhipped of justice because "alias" was spelt "alius." Are we not relapsing into the reign of technicalities when we reverse the sentence of a murderer because the clerk, in describing or telling what was done, omits to say that the jurors were sworn "a true verdict to render according to the evidence?"

B. F. SAFFOLD, J.—The judgment is reversed and the cause remanded, on the authority of *Joe Johnson v. The State*, at the present term, in respect to the oath administered to the jury. And, of *Lacy v. The State*, 45 Ala. 80, as to the service on the prisoner of a copy of the indictment and a list of the jurors summoned for the trial.

CROKER *vs.* THE STATE.

[INDICTMENT FOR ROBBERY.]

1. *Robbery; description of property, what insufficient.*—In an indictment for robbery, a description of the property taken as "ten dollars in money of the United States currency," is too indefinite.
2. *Same; what equivalent to a taking from the person.*—Property taken in the presence of the owner, under circumstances constituting robbery, is taken from his person.
3. *Copy of indictment and list of jurors; failure to serve on defendant, when reversible error.*—The failure to serve a copy of the indictment and list of jurors on the defendant in actual custody, one entire day before the trial, is a reversible error.
4. *Sentence; failure to do what, invalidates.*—So, too, is the failure to ask him, when convicted, if he has anything to say why sentence should not be passed on him.
5. *Arrest of judgment; what not ground for.*—The misconduct of the jury in dispersing and mingling with other persons after the cause has been submitted to them, is ground of new trial, but not of arrest of judgment.
6. *Quere.*—Whether the verdict, "We, the jury, find the defendant guilty

of robbery; imprisonment ten years in penitentiary," sufficiently ascertains the subject of the punishment.

APPEAL from Circuit Court of Calhoun.
Tried before Hon. W. L. WHITLOCK.

The indictment in this case was as follows, omitting the caption, &c.: "The grand jury of said county charge, that before the finding of this indictment, James Croker feloniously took ten dollars in money of United States currency, and five gallons of whiskey, less one pint, the property of Lemuel Reaves, from his person and presence, and against his will, by putting him in such fear as unwillingly to part with the same, against the peace," &c.

The defendant went to trial on plea of not guilty, and the jury returned the following verdict: "We, the jury, find the defendant guilty of robbery; imprisonment ten years in penitentiary." The court passed sentence on this verdict on October 14, 1871, but the judgment entry does not show that defendant was asked before sentence was passed if he had anything to say why judgment should not be awarded against him. There was no bill of exceptions taken on the trial. The record shows that on the 7th of October, an order was made by the court directing the sheriff to bring the defendant, who was then confined in the jail of Cleburne county, to Calhoun county, (to which the trial of the cause had been changed,) for trial. There is nothing in the record to show that defendant was in actual confinement at the time of the trial, save what appears in the motion in arrest of judgment and the order overruling the same.

After sentence was passed, and on the 18th day of October, 1871, a minute entry shows that "defendant, in his own proper person and by counsel, moves the court in arrest of judgment, and to set aside the verdict of the jury on the following grounds:

"1st. The defendant was confined in jail, charged with a capital offense, and was not served with a copy of the indictment and list of jurors one entire day before the day set for his trial.

"2d. The jury was permitted by the court, after they had been impanneled and sworn, to separate and disperse from time to time during the progress of the trial, to get their meals, and did mix with the crowd in attendance upon court without the consent of defendant.

"3d. The indictment does not describe with sufficient certainty the kind of currency alleged to have been stolen.

"4th. The indictment charges two separate and distinct offenses in the same count—1st, a taking from the person; 2d, a taking from the presence. It does not aver which taking was from the person and which from his presence. It does not aver that the taking from his person was done by violence to the person.

"5th. The verdict is wanting in form and substance; it is not signed by the foreman or by any member of the jury."

The minute entry recites that "it was proved to the satisfaction of the court, that the facts set forth in the 1st and 2d grounds of the motion were true;" and that upon consideration of the motion the court overruled the same, and defendant excepted.

The ruling of the court on the motion in arrest of judgment is now assigned as error.

ELLIS & CALDWELL, for appellants.—Not serving a prisoner with copy of indictment and list of jurors is a reversible error.—*Robison v. State*, 46 Ala. 9; *Flanagan v. State*, 46 Ala. 703.

The jury, after being impanneled and sworn, should not have been permitted by the court to disperse from time to time to get their meals, and mix with those persons who were in attendance upon the court.

In many of the States, "the mere fact of separation having been shown, the possibility that a juror has been tampered with exists, and *prima facie* the verdict is vicious." By a separation of the jury "a presumption is raised that the irregularity has been prejudicial to the defendant;" and, that this presumption can only be overcome or removed by affirmative, or rather satisfactory,

proof on the part of the State, showing no improper conduct upon the part of the jury.—See *McLain v. State*, 10 Yerg. 241; *Hines v. State*, 8 Humph. 597; *Riley v. State*, 9 Humph. 644; *Luster v. State*, 11 Humph. 169; *State v. Prescott*, 7 N. H. 287; *Organ v. State*, 26 Miss. 78; *People v. Reynolds*, 2 Mich. 422. Even in the case of *Stone v. The State*, 4 Humph. 27, where a new trial was refused, it was because the State made satisfactory proof that the jury had not been tampered with. Not so, as disclosed by the record in this case.

The indictment in this case must be bad for uncertainty. "Ten dollars in money" is too uncertain a charge in criminal proceedings. The pleader might just as well have said "ten dollars in personal property," without setting out the particular kind of personal property meant. Nor is this uncertainty cured by the addition of the descriptive words, "of United States currency." These words do not describe the kind of money in such a manner as to leave nothing for intendment. If the "ten dollars in money" taken were in gold, silver, copper, or nickel coin, (all of which are United States currency,) then the number and denomination of the coin should have been stated with sufficient particularity.—*State v. Murphy*, 6 Ala., and authorities there cited.

The indictment is bad for duplicity. It charges two separate and distinct offenses in the same count—1st, a taking from the person; 2d, a taking from the presence of the prosecutor. It does not aver which taking was from the person, nor which was from the presence of the prosecutor. If the "money" was taken from his person, then the "whiskey" was taken from his presence; making two separate, independent takings or offenses committed by the defendant. If there were not two takings, the pleader would not have charged that the "money" and "whiskey" were taken from "his person *and* presence." Clearly, there are two offenses charged. "Two offenses can not be charged in the same count; the count in such a case would be bad for duplicity."—Arch. Cr. Pl. 95, 96, as cited in *Burgess v. State*, 44 Ala. 193.

The verdict of the jury should have been set aside, because it was wanting in form and matter. "We, the jury, find the defendant guilty of robbery; imprisonment ten years in penitentiary." It is the province of the jury to make and return into court a verdict in all cases; and, in cases of robbery, (Code, § 3668,) they alone can fix the punishment. There is an ellipsis in this verdict which the jury did not supply; they did not fix his punishment. The court has no power to do it.

J. W. A. SANFORD, Attorney-General, *contra.*

B. F. SAFFOLD, J.—The indictment charged the appellant with feloniously taking "ten dollars in money of United States currency, and five gallons of whiskey, less one pint, the property of Lemuel Reaves, from his person and presence, and against his will, by putting him in such fear as unwillingly to part with the same."

The description of the money is too indefinite. The term "currency," when applied to the medium of trade, means equally coin, bank notes, or notes issued by the government.—Webster's Dict.

The averment that the taking of the money and whiskey was from the person and presence of the party robbed, is not the inclusion of two separate offenses conjunctively in the same count. Property taken in the presence of the owner, under circumstances constituting robbery, is taken from his person.—1 Russ. on Crimes, 873.

The failure to serve a copy of the indictment and a list of the jurors on the defendant, who was in custody, one entire day before the trial, is a reversible error.—*Flanagan v. State*, 46 Ala. 703.

The misconduct of the jury in dispersing and mingling with other persons after the cause was submitted to them, has been held by this court to be a good cause for a new trial, but not a ground for arrest of judgment.—*Franklin v. State*, 29 Ala. 14; *Brister v. State*, 26 Ala. 107.

Another error apparent from the record is, the defend-

ant was not asked if he had anything to say why sentence should not be pronounced on him.---*Perry v. State*, 43 Ala. 21.

The verdict, "We, the jury, find the defendant guilty of robbery; imprisonment ten years in penitentiary," is imperfect in the expression of the subject of the punishment to be inflicted. *Quere*, whether the judgment should be reversed if this were the only error.

The judgment is reversed and the cause remanded.

HORTON *vs.* THE STATE.

[INDICTMENT FOR SELLING SPIRITUOUS LIQUORS WITHOUT LICENSE.]

1. *Judgment and conviction; what recital as to oath of jury will cause reversal.*—When the record shows that the jury who tried the case was not duly sworn as required by law, and that the verdict of the jury was not delivered on "their oath," this is error for which the cause will be reversed.
2. *Grand jury, objection to; when too late.*—An objection to the grand jury, which found the indictment, comes too late after the defendant has pleaded to the merits.

APPEAL from City Court of Mobile.
Tried before Hon. C. F. MOULTON.

Appellant was indicted for selling spirituous liquors without license and contrary to law. He demurred to the indictment, and assigned, among other grounds, "that the record and minutes of the term at which the indictment was found do not show that the alleged grand jury, by which said indictment purports to have been found, was regularly drawn, impanneled, and sworn in the manner and form as prescribed by law, or that said indictment was found and returned into open court by any legally constituted grand jury." The demurrer was overruled, and defendant went

to trial on plea of not guilty, was convicted, and fined fifty dollars.

The minute-entry showing the formation of the grand jury, after giving the names of the jurors, &c., concludes: "And the court being of opinion that they possessed the legal qualification required for jurymen, the said grand jury was organized, with T. M. LeBaron, by nomination of the court, as foreman, sworn and charged as to their duties as the grand inquest of the county."

The judgment-entry recites: "Thereupon, came a jury of good and lawful men, to-wit: B. A. Reynolds, and eleven others, who being empanneled and sworn well and truly to try the issue joined, and having heard all the evidence and the charge of the court, rendered the following verdict: We the jury find the defendant guilty, and assess the fine at fifty dollars."

The errors assigned are—

1st. That the record shows that the grand jury was not legally sworn or organized.

2d. That the foreman of the grand jury took no oath whatever.

3d. That the petit jury was improperly sworn, and did not take the oath required by law.

Smith & Bestor, for appellant.—1. The record shows that the grand jury who found the indictment were not sworn in the manner prescribed by section 4083 of the Revised Code, but shows that they were sworn "as to their duties as the grand inquest of the county." This is nothing more than a certificate of the clerk of the court that they were sworn in the manner stated.

2. The record does not show that the foreman was sworn as required by section 4082 of the Revised Code, nor that he was sworn at all.

3d. The petit jury were sworn simply "well and truly to try the issue joined." The recital of the record is as follows: "And thereupon, came a jury of lawful, qualified men, to-wit: B. A. Reynolds, and eleven others, who being impanneled and sworn well and truly joined, and having

heard the evidence and the charge of the court, rendered the following verdict: We, the jury, find the defendant, Reed Horton, guilty, and assess the fine at fifty dollars. It is therefore ordered," &c.

The record imports verity, and the conviction and judgment in this case was not a conviction by due process of law. The finding of the jury was not under the oath required, which should have been "to well and truly try all issues," &c., "submitted to them," &c., and "a true verdict render according to the evidence."—Revised Code, § 4092; 4 Black. Com. 355. Such a trial is erroneous.—*Joe Johnson v. State*, at present term; *Andrew Johnson v. State*, *ib.*

J. W. A. SANFORD, Attorney-General, *contra*.—1. Any illegality in drawing, impanneling and swearing the grand jury should be shown to the court by a plea in abatement. *Collier v. The State*, 2 Stew. 388; *State v. Pile*, 5 Ala. 72.

The record is a history of the facts that occur in the trial of a case. It does not, in this case, purport to set out the oath in the very words of the statute. It merely recites that an oath was administered to the jurors to try the issue joined. This is sufficient.—*State v. Pile*, 5 Ala. 72–74; *Crist v. The State*, 21 Ala. 137–148; *McGuire v. The State*, 37 Ala. 161–163.

PETERS, J.—The conviction in this case must be reversed upon the authority of *Joe Johnson v. The State*, at the present term. The record recites the oath administered to the petit jury who tried this case in the court below, in these words: "Thereupon, came a jury of lawfully qualified men, to-wit; B. A. Reynolds, and eleven others, who being impanneled and sworn well and truly to try the issue joined, and having heard the evidence and the charge of the court, rendered the following verdict." This is not the oath required by the statute, nor is it equivalent to the recital that the jury were well and truly sworn to try the issue joined according to law. Nor does it appear that the finding of the jury was upon "their oath." The rule in criminal prosecutions is, that the record must show affirmatively

that the court has proceeded according to law. This court can not know that a party accused has been tried "by due process of law" unless this is shown by the record. It is to the record alone that the court must look. If this is defective, there is no authority to amend it by presumptions.—Const. Ala. art. 1, § 8; Rev. Code, § 4314. Here the oath set out in the record is not that required by the statute.—Rev. Code, § 4092. Nor is it averred or stated in the record that the jury were sworn according to law. Then there is no grounds upon which the court can base a presumption to help out the record. Without this, the presumption would be a mere guess. And beside this, it does not appear that the jury delivered their verdict upon "their oath." This is usual in all the forms.—Black. Com. App. p. 111.

I can not consent to authorize such irregularities. There will be no end to them, if this court sanctions the amendment of the record on presumptions, which in such a case are rather mere guesses.

The objection to the grand jury that found the indictment comes too late, after the accused has pleaded a plea to the merits in the court below.—Rev. Code, § 4187; 30 Ala. 511; 33 Ala. 366. This is the case here.

The other objections to the proceedings in the court below are not such as will likely occur upon a new trial. They are therefore not noticed in this opinion.

The judgment of the court below is reversed, and the cause is remanded for a new trial; and the defendant (said B. Reed Horton) will be kept in custody until discharged by due course of law.

JOHNSON *vs.* THE STATE.

[INDICTMENT FOR LARCENY OF A HORSE.]

1. *Oath of jury; what recital shows that jury was not properly sworn.*—The recital in the record, as to the oath of the jury, that "thereupon came a jury, to-wit: E. B. R., and eleven others, good and lawful men, who being elected, tried and sworn well and truly to try the issue joined between the State of Alabama and the defendant, on their oaths do say," &c., shows that the proper oath was not administered to the jury.
2. *Larceny; what competent evidence on trial of.*—On the trial of an indictment for the larceny of a horse, which grazed in the day and regularly returned to his stall at night, proof that the horse failed to return to his stall as usual, though slight evidence, is admissible, in connection with proof tracing the horse into defendant's possession, to show a taking by him. But the testimony of a witness to such facts, whose knowledge of them is derived solely from what his wife and family reported to him, is mere hearsay.
3. *Confession; when proper evidence.*—The evidence in this case shows that the defendant's confessions were voluntarily made; they were therefore properly admitted against him.

APPEAL from City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

Appellant was indicted, tried and convicted for the larceny of a horse, the property of John Murray.

On the trial, Murray, in his direct examination, testified that the horse was in the habit of grazing near his stable and coming up regularly every night; that in the month of August, 1870, the horse was missing, and "continued missing, and did not come up at night for some eight days;" that a few days after this he went to Benton, and there met a constable who pointed out defendant, who was then in jail, to witness, saying "there is the man I saw have your horse." After this, witness talked with defendant, who admitted that he had the horse and brought him to Benton, but said that he got him from some gipsies, who had robbed him. Afterwards, coming on the cars to Montgomery, defendant told witness that he did take the horse in the city

of Montgomery and carry him to Benton. The witness further testified, that "these admissions were not extorted by any hope or fear, excited by witness or any one he knew of." Witness did not see the horse at Benton, and never saw it in defendant's possession, but while at Benton he learned that the horse was a few miles off, and dispatched a man for it, who delivered the horse to witness in Montgomery.

On cross-examination, Murray testified that at the time the horse was stolen or missing, witness was confined to his bed by sickness, and knew nothing about the horse being missing except what his wife and members of his family told him.

"The evidence of the witness as to what his wife and family told him while sick, as to the horse being missing, was objected to by defendant's counsel when offered, but the court decided to leave it subject to a motion to exclude it before the jury retired, and defendant excepted." The above is substantially all the evidence offered; and "thereupon the State rested the case, and defendant's counsel moved separately to exclude from the jury all the testimony of witness as to what his wife had told him, and also what the constable told him. The court permitted the testimony to go to the jury for what it was worth in connection with the other evidence of the witness, and defendant duly excepted."

The defendant offered a witness who testified that about the time the horse was stolen there were a company of gipsies in the place, and that defendant was seen one night following them, and accused them of having robbed him, but he did not overtake them, and returned in the direction of their camp near Murray's house.

The judgment-entry, so far as it relates to the oath administered to the jury, is as follows: "Thereupon came a jury, to-wit: E. B. Randolph, and eleven others, good and lawful men, who being elected, tried and sworn well and truly to try the issue joined between the State of Alabama and the defendant, upon their oaths do say," &c.

Numerous errors were assigned in regard to the overrul-

ing of a motion in arrest of judgment, and the refusal to give charges, but the view which the court took of the case renders it unnecessary to notice any but the first and second assignments, which were as follows:

1st. The court erred in not excluding the testimony objected to.

2d. The jury was not properly sworn.

J. FALKNER, for appellant.—The testimony of Murray as to the horse being missing was entirely hearsay, as the witness only knew what his wife and family had told him. This was hearsay, and was not the best evidence. His wife was a competent witness, but was not introduced, as she should have been.—Greenl. Ev. § 82, p. 97; *Commonwealth v. Kinney*, 12 Met. 235.

When evidence is offered which is *prima facie* incompetent, it is the duty of the court to exclude it, unless the party offering it proposes to show by other evidence its relevancy and legality. This was not done in this case. *Bilbury's Adm'r v. Mobley*, 21 Ala. 271; *Ashley's Adm'r v. Robinson*, 29 Ala. 112; *Bush & Co. v. Jackson*, 24 Ala. 273.

It is always improper to allow illegal evidence to go to the jury, when there is no prospect of its being made legal, even if it should be afterwards excluded, as it is likely to make an impression on the minds of the jury which can not be entirely effaced, as in this case; for even if the judge afterwards excludes it, every practitioner knows that it has its effect to some extent on the minds of jurors.

The defendant was in jail when the witness went to Benton and when approached by witness and constable, and did not know what his rights were. There was no evidence that the horse had been stolen.—See *Swinney & Lawson v. State*, 20 Ala. 65.

J. W. A. SANFORD, Attorney-General, *contra*.—A horse running loose in the country, or going astray, may be the subject of larceny.—*Murray v. The State*, 18 Ala. 730, and authorities cited.

The confessions of the prisoner were voluntarily made, and therefore properly admitted.

The conversation of the wife with the husband in regard to the disappearance of the horse, merely gave him information that put him on inquiry for the horse. It did not charge the prisoner with larceny. At most, its admission was irregular, but not injurious to the accused. Again, the conversation merely furnished an inducement for the search. The conversation of the constable only pointed out the accused.

It has been decided at the present term of this court that when the case was fully sustained without irrelevant testimony, that its admission would not work a reversal.

PETERS, J.—This is an appeal from a judgment of conviction in the city court of Montgomery, in a criminal case, upon a charge of horse stealing. The accused, Andrew Johnson, was found guilty of grand larceny, and sentenced to perform hard labor for the county of Montgomery for the term of three years, beginning on the 17th day of July, 1871. From this conviction and judgment he appeals to this court.

There is a bill of exceptions in the record, and an assignment of numerous errors; but in such an appeal, it is the duty of this court to examine the whole record, "and render such judgment on the record as the law demands."—Rev. Code, § 4314; *Brazier v. State*, 44 Ala. 387. In doing this, the court will be careful to ascertain that the accused has not been "deprived of his life, liberty or property *but* by due process of law."—Const. Ala. Art. I, sec. 8; Const. U. S. Art. V. In a criminal prosecution, "due process of law" means a procedure according to established forms. The record in the cause must show that those forms have been complied with, because the record is the only proof of what has been done in the court below.—Pasch. Anno. Const. U. S. p. 258, *et seq.*, and cases there cited; Rev. Code, § 767, cl. 9; 2 Burr. Law Dict. p. 386, *Record;* 3 Bla. Com. 24, Cooley's ed. 1871. This record can not be contradicted. It is to be taken as the whole

truth of the matter upon which it speaks.—*Deslonde & James v. Darrington's Heirs*, 29 Ala. 92; *Beverly v. Stephens*, 17 Ala. 701. The record in this case shows by its recitals that the jury were improperly and illegally sworn. The recital is in these words: "Thereupon came the jury, to-wit, E. B. Randolph and eleven others, good and lawful men, who being elected, tried, and sworn *to well and truly try the issue joined* between the State of Alabama and the defendant, on their oaths do say," &c. The "oaths" upon which the verdict was based was evidently that set out in the record. The court can not presume any other, because this would contradict the record. The "oath" thus recited is not the oath required by the statute. The statutory oath imposes upon the jury a most solemn responsibility "well and truly" to "try all issues submitted" to them, but they must also "true verdict render *according to the evidence*."—Rev. Code, § 4092; 4 Bla. Com. 355. Under the former oath the jury are not bound by the evidence; under the latter they are. A trial so conducted is erroneous.—*Joe Johnson v. State*, at present term. Such distinctions may sound to uncultivated ears and minds, impatient of a nice sense of legal certainty, as a little hypercritical; but a sterner logic, and a reason that is determined to be controlled by the legislative will, have always acknowledged their importance. *Via trita, est tutissima.*—10 Coke, 142; 5 Pet. 223; 4 Maule & S. 168. And this is the rule, especially when life and liberty are concerned. Where the statute is peremptory, as in this case, if the courts can be permitted to depart from its requirements at all, there is no limit to their peregrinations. A little carelessness, now and then, in the clerk who enters the minute of the judgment and the judgment itself, will soon make a new code, or such a judicial jumble as shall defy the law itself.—1 Tidd Pr. 47, *et seq.*; 3 Chitt. Gen. Pr. 53–56. This certainty, or nicety, if it should be so called, is no novelty to our law. In criminal cases it has always been insisted on by the ablest judges. On a case before Chief Justice TINDAL, the accused was indicted for stealing "three eggs of the value of two pence;" he quashed the indictment, be-

cause it was not stated what kind of eggs they were. For all that appeared in the record the eggs might be adder's eggs, or other eggs which could not be the subject of a larceny.—*R. v. Cox*, 1 Car. & K. 494; 1 Arch. Cr. Pl. 88, *et seq.*

For the error above pointed out the judgment must be reversed and remanded.

The other assignments of error hardly need to be discussed, as those which are founded on the action of the court in refusing to arrest the judgment are not likely to occur a second time.

The fact that the horse alleged to have been stolen failed to return at night to his stable, is evidence, however slight, that something had occurred to him which had occasioned this change in his habits. If the horse was afterwards found in the possession of the defendant, it was proof in that connection that he had been taken by the defendant, and taken in the county of Montgomery. For this purpose it was competent. But it could only be proved in the proper way; by a witness who knew the fact. It could not be proven by the declarations of such witness. The declarations of the wife of the prosecutor and of his family were improperly admitted. They were mere hearsay.—1 Greenl. Ev. §§ 99, 100.

The confessions of the accused were wholly voluntary. There was no inducement held out to him to make them. They were properly admitted.—*Regina v. Baldry*, 2 Lead. Cr. Ca. 164; 1 Greenl. §§ 219, 220.

The judgment of the court below is reversed, and the cause remanded for a new trial. And the defendant, said Andrew Johnson, will be held to answer the indictment against him until discharged by due course of law.

BIRDSONG *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Venue, application for change of; not discretionary.*—An application for change of *venue*, in this State, no longer rests in the discretion of the court. If denied in a proper case, it is an error for which, after conviction, the judgment will be reversed on appeal; or, before trial, the defendant may obtain the benefit of his application by *mandamus*.
2. *Same; counter affidavits, what insufficient to defeat.*—A counter affidavit that does not deny the truth of the defendant's affidavit, but only that affiant does not believe there is any such prejudice or excitement in the public mind of the county against defendant as would deny him a fair and impartial trial, is not sufficient to defeat the application.
3. *Venire; what no ground to quash.*—The *venire*, or list of jurors summoned in a capital case, will not be set aside or quashed because one of the persons so summoned was a member of the grand jury which found the indictment, and was present when the witnesses were examined by the grand jury, and when the indictment was returned into court a true bill.
4. *Challenge for cause; what good ground for.*—It is a good ground for challenge for cause to a juror put upon the defendant, that he was one of the grand jury by whom the indictment was found, and if the challenge is disallowed and the defendant excepts, and then challenges him peremptorily, the defendant is entitled to the benefit of his exception, although his peremptory challenges be not exhausted before the jury is completed.
5. *Murder, trial of; what irrelevant evidence on.*—On a trial for murder, it is improper for the State to prove that defendant, on the day the killing took place, proposed to deceased that they should go and rob a negro man who was supposed to have money. Such evidence is not a part of the *res gestæ*, and might create an improper prejudice against the defendant.
6. *Witness; what proper question to ask of.*—On the cross examination of a witness for the State, defendant may ask a question that may enable him to show that an apparent inconsistency between confessions proved and the evidence of said witness could be reconciled, and both be true.
7. *Declarations of defendant; when can not be proved in his own behalf.* A defendant should not be permitted to prove his acts or declarations, in his own behalf, unless they constitute a part of acts or declarations proved by the State, or properly form a part of the *res gestæ* of the main fact under consideration, and were contemporaneous with it.

APPEAL from Circuit Court of Limestone.
Tried before Hon. JAMES S. CLARK.

The appellant, Birdsong, was indicted and tried for the murder of Eli McKee, found guilty of murder in the second degree, and sentenced to the penitentiary for ten years. On the trial, which took place on November 1st, 1871, the defendant filed a sworn application for a change of *venue*, setting forth specifically the reasons why he could not have a fair and impartial trial, to-wit: "That he had been published and posted in the newspapers of the county as a horse thief and murderer, and that in consequence thereof there is great excitement and prejudice in the minds of the people against affiant." Attached to the application were copies of the publications referred to, which were dated respectively August 23d and 25th, 1871. The publication in the *Athens Post* was headed, "Horse Thief Killed," and after reciting the finding of McKee's body, and that he belonged to a gang of horse thieves who had been committing extensive depredations through that part of the State, concludes as follows: "He was shot by a man named Birdsong, who belonged to the same gang, and whose purpose was ostensibly robbery, as the pockets of McKee were turned wrong side out. * * * There is no doubt a regular band of horse thieves exists among us. The people are becoming aroused, and will bring them to justice wherever found."

The *Limestone News*, after stating that McKee was killed by a man named Birdsong, states: "McKee, Birdsong, and a young Tennesseean named Knight, had been plying the trade of horse-stealing. Knight separated from the other two for a short time, when for some unknown purpose Birdsong shot McKee twice in the breast. Knight, who was captured by some citizens, confessed that himself, McKee and Birdsong were banded together for stealing horses."

In opposition to the application, the State introduced the counter affidavit of several citizens, as follows: "We, whose names are hereto subscribed, swear that we have

heard of the offense charged to have been committed by James R. Birdsong, which is now pending in the circuit court; that we do not believe there is any such prejudice or excitement in the public mind of this county against said Birdsong as would deny him a fair and impartial trial. We have never heard or read in any published newspaper of this county that James R. Birdsong was published as a horse thief or murderer." This was all the evidence adduced, and thereupon the court overruled the application, and defendant excepted.

The defendant then moved to quash and set aside the *venire* from which the jurors were to be drawn for his trial, on the ground that George W. Tanner, one of the grand jurors, who had been sworn and was then acting with the grand jury then in session, was on said *venire*, and had heard the evidence and passed upon the same as a grand juror in finding and returning into court the indictment against the defendant at the present term. The court overruled this motion, and defendant excepted. After this, the name of said Tanner was drawn, and he was put upon the defendant for acceptance or challenge, and defendant challenged said juror for cause, stating the same grounds as those in support of the motion to quash the *venire*. The challenge for cause was overruled and the juror put on defendant, who excepted and peremptorily challenged Tanner. When the jury was completed, Birdsong had several peremptory challenges.

The bill of exceptions states that "after the State proved by the confessions of defendant that defendant had said deceased had tried to get defendant to join him in stealing, and that defendant refused to do so, the State offered a witness to prove that defendant, on the day of said killing, proposed to deceased to go and rob a negro man who was supposed to have money. The defendant objected to this evidence and to the witness being questioned thereon, but the court overruled the objection, and allowed the evidence of the witness to go to the jury, and defendant excepted."

The bill of exceptions further recites "that the State having proved, as part of the confessions of defendant, that he had taken the saddle-bags and some other articles

belonging to deceased at the time of the killing, the solicitor introduced one Hays, the coroner of the county, who testified that he took a watch and several other articles belonging to deceased from the person of the deceased, and that the saddle-bags and other articles were delivered to witness, as coroner, on the morning after the killing, while he and the jury were holding an inquest over the body of the deceased, &c. Defendant, on cross examination of the coroner, asked him from whom he received the saddle-bags, &c., which he stated were delivered to him at the time of holding the inquest. The court refused to permit the witness to answer, and defendant duly excepted."

After this, "the State having proved by the confessions of defendant that deceased had made one or two efforts to kill defendant, within a few days previous to the killing, in one of which he made a "cavalry charge" on defendant with a cocked pistol leveled at him, defendant offered Lou Hern as a witness, and proposed to prove in substance by him that on the evening of the killing, witness and defendant walked together for a mile on the road towards defendant's home; that during the time they saw a man on horseback nearly a half a mile behind, and coming towards them in a fast trot; that defendant remarked to witness that deceased had made threats against defendant, and tried to kill him that evening, and was then pursuing him to take his life; that defendant said he was trying to keep out of his way, and that his manner indicated fear and alarm. Witness knew deceased, but the deceased was too far off for witness to recognize the horseman; that about this time witness and defendant separated, and soon after this he saw the horseman go at a fast trot up the road in the direction in which the defendant had gone." The court refused to allow this proof to be made, or to allow the same to go to the jury, and defendant duly excepted.

The defendant then offered to prove by John and Mary Kimbrough that they lived with defendant, and two miles from where McKee was killed; that immediately after the killing defendant rode home, told them what he had done, directed them what to do with the property of McKee, and

to report to the sheriff that he would go away until the excitement was over, (as he feared a mob of McKee's friends,) and then surrender himself. The court refused to allow this proof to be made, and defendant duly excepted.

The rulings of the court to which exceptions were reserved are now assigned as error.

HOUSTON & PRYOR, for appellant.—1. The application for a change of *venue* tendered to the State an issue of fact. It is attempted to be met by an issue of belief. The counter affidavits deny nothing, but merely state the *belief* of affiants that prejudice does not exist. The fact that affiants had never heard of the publications, is no answer whatever to the allegation that they were made as stated in defendant's affidavit.

2. The evidence that defendant tried to get deceased to join him in robbing a negro just before the killing, being in no way connected with the killing, was illegal evidence. It was introduced solely to prejudice the prisoner. There is no pretence that it was part of the *res gestæ*.

3. The evidence offered by the witness, Lou Hern, and the Kimbroughs, tended to throw some light on the prisoner's situation and surroundings at the time of the killing. The jury, in forming a verdict, were bound to pass upon these things. There being no direct evidence, the evidence offered was the best attainable. It showed that defendant had reasonable cause to fear great bodily harm from the deceased, and tended to show that the accused had not sought the meeting in which deceased was killed. It tended to rebut any presumption of malice on account of the past ill feeling existing between the parties. It should not have been excluded.

4. Where one of the petit jurors summoned to try an indictment was on the grand jury that found the bill,—held, that the defendant might challenge him.—*Barlow v. State*, 2 Blackf. (Ind.) 114; U. S. Dig. Cr. Law, 489, § 395; *O'Driscoll v. State*, 2 Bays, (S. C.) 153, two cases.

5. Persons belonging to the grand jury list, as selected

by the officers of the county, are not disqualified or excused from serving on juries to try persons charged with offenses against the laws, provided they are not sworn on the grand jury for the term of the court at which the trial takes place, and have other statutory qualifications.—*Rafe v. State*, 20 Ga. 60.

J. W. A. SANFORD, Attorney-General, *contra*.—The affidavits contradicting the statements of the prisoner were made according to the opinion in *Ex parte Chase*, 43 Ala., and upon the affidavits the application for a change of *venue* was properly refused.

The motion to quash the *venire* because there may have been an objectionable person on it, was rightly overruled. The right to challenge is given for the purpose of excluding incompetent, or corrupt, or prejudiced, or partial persons from the jury.—See Rev. Code, §§ 4178–80; *Barlow v. State*, 2 Blackf. 114.

If the court erred in ruling that a person who acted as a grand juror in finding the indictment could not be challenged for cause when summoned as a petit juror to try the accused on it, the error caused no injury to the defendant, because the person was excluded the jury by a peremptory challenge.—*State v. Brantly*, 27 Ala. 44.

As the jury was authorized to believe a part of the prisoner's confession, and to disbelieve a part, there was no error in permitting it to be contradicted.—Roscoe Cr. Ev. p. 51.

The exclusion of the testimony of Hern and Kimbrough was proper. The prisoner's declarations, either before or after the commission of the crime, when introduced to exculpate him, and forming no part of the *res gestæ*, are inadmissible.—*Taylor v. State*, 42 Ala. 529; *Maynard v. State*, 46 Ala. 85; *Oliver v. State*, 17 Ala. 587; *Carroll v. State*, 23 Ala. 37.

PECK, C. J.—An application for a change of venue, in a criminal case in this State, no longer rests in the discretion of the court. If denied on a proper application, it is

treated as an error, for which, after conviction, the judgment will be reversed on appeal, or, before trial, the defendant may obtain the benefit of such an application by *mandamus—Ex parte Chase*, 43 Ala. 303; *Murphy & Ashford v. The State*, at January term, 1871.

The application of the defendant in this case was made in proper time, and his affidavit, upon which it was made, contains all that the statute requires on such an application. It states that he could not have a fair and impartial trial for the offense with which he was charged in the county in which the indictment was found, for the reason that he had been published and posted in the newspapers of said county as a murderer and horse-thief, and that there was great excitement and prejudice in the minds of the people of said county against him in consequence thereof.

Copies of the publications referred to are made parts of said application, and it seems to us they might well have produced the excitement and prejudice complained of.

The opposing affidavit of the several persons, offered by the State, does not deny the existence of the alleged excitement and prejudice against the defendant, or that the said publications were not made, but only that affiants had never heard of, or read in any public newspapers of said county, that said defendant had been published as a murderer or horse-thief; and that they did not believe there was any such prejudice or excitement against him as would deny him a fair and impartial trial. Admitting the truth of said affidavit, it does not prove that said publications were not made, but only that said affiants had not heard of or read them; neither does it disprove that great excitement and prejudice existed against the defendant, but only that they did not believe there was any such prejudice or excitement as would deny him a fair and impartial trial.

To decide that an application for a change of venue may be defeated by an affidavit of this sort, will be to make a precedent by which this great right and privilege of accused persons may be rendered almost worthless; for it will seldom happen that persons may not be found who will, and honestly, too, believe, whatever may be the excitement in

any given case, that, notwithstanding, the party against whom it may exist can have a fair and impartial trial. We think the venue should have been changed in this case, and that the overruling of the application for that purpose is an error for which the judgment must be reversed.

2. The motion of the defendant to quash and set aside the venire, or list of jurors summoned for the trial, &c., because one of said jurors had been a member of the grand jury by which the indictment was found, and was present when the witnesses were examined in the case, and found and returned the indictment into court, a true bill, &c., was properly overruled.

We are unwilling to hold, that the incompetency of one of the persons named in the list of jurors served on the defendant in a capital case, or the fact that he is shown to be an unfit juror, in the particular case, is a sufficient reason to quash and set aside the panel or list of jurors served on the defendant.

The remedy of the defendant, in such a case, is to challenge the objectionable juror for cause, if he is put on him as one of his triers, or, it may be, to move the court to direct the name of such person to be discarded, and another person to be forthwith summoned to supply his place.—Rev. Code, § 4175.

In the absence of fraud or improper conduct on the part of the officer by whom the jurors are elected and summoned, the panel or list of jurors should not be quashed or set aside, because an improper, incompetent, or unfit person has been summoned as one of the list of jurors served on the defendant.

3. The challenge of the defendant of the juror Geo. W. Tanner, for cause, because he was a member of the grand jury by whom the indictment was found, &c., should have been allowed. This question, so far as we know, has never been decided by this court, but it has been before the courts of several of the States, and uniformly, we believe, decided to be a good challenge for cause, and that the overruling of such a challenge was an error for which the conviction and judgment should be reversed. In note 4 to section 806,

Bishop's Criminal Procedure, it is said: "Where a juror, on a trial for murder, is objected to for cause, and the objection is overruled, to which the prisoner excepts, and afterwards challenges the juror peremptorily, he is entitled to the exception," and cites *Baxter v. The People*, 3 Gilman, 368. And this error will not be cured, although the defendant does not exhaust his peremptory challenges, before the jury is completed.—See, also, *Barton v. The State*, 2 Blackford, 489; *Lithgrow v. The Commonwealth*, 2 Virginia Cases, 279; *O'Driscoll v. The State*, 2 Bay, 153; *The People v. Bodine*, 1 Denio, 281; *Dowdy v. The Commonwealth*, 9 Grattan, 729, referred to in the brief of defendant's counsel. In most, if not all, of these cases, the objection was, that the juror challenged had been a member of the grand jury who found the indictment.

4. The evidence offered by the State, that the defendant, on the day the killing took place, proposed to deceased that they should go and rob a negro man who was supposed to have money, should have been rejected on defendant's objection. It formed no part of the *res gestæ*, and could have had the effect only to create an improper prejudice against the defendant.

5. The question asked by the defendant on the cross-examination of the witness Charles M. Hays, the coroner, who held the inquest over the body of deceased, and had been examined on the part of the State, and had stated that he (witness) had taken a watch and several other articles, the property of the deceased, from the person of the deceased, and that the saddlebags and other articles were delivered to him, as coroner, on the morning after the killing, when he and the jury were holding an inquest on the body of the deceased, and examining into the circumstances of the killing—(the State, before the examination of this witness, having proved, as a part of the confessions of the defendant, that he (defendant) had taken the saddlebags and some other articles, the property of the deceased, from his person at the time of the killing,) was a proper question to be asked. The question so asked of the coroner on cross-examination was, "of whom he re-

ceived the saddlebags and said other articles, which he had stated were delivered to him at the time of holding said inquest?" This should have been permitted to be answered. It was pertinent, both to the confessions proved and to the evidence of said witness on his direct examination. If it was supposed there was an apparent consistency between the confessions of the defendant and the evidence of this witness, then the answer to this question might have enabled the defendant to show that the supposed or apparent inconsistency, if any, could be reconciled, and the confessions of the defendant and the evidence of this witness both be true. For these reasons the said question was proper, and the court mistook the law in sustaining the State's objection to it.

6. What the defendant proposed to prove, both by the witness Lou Hern, and the witnesses John and Mary Kimbrough, was a clear effort on his part to make evidence for himself, and was properly excluded. What was proposed to be proved by the witness Lou Hern, had no connection with, and formed no part of the confessions of defendant, proved on the part of the State. It consisted of acts and declarations of the defendant, done and made at altogether a different time, and consequently formed no part of the *res gestæ*. Mr. Greenleaf, in his work on Evidence, speaking on this subject, says: "The principal points of attention are, whether the circumstances and declarations offered in proof were cotemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character.—Vol. 1, § 108, and note 3; Shepherd's Dig. p. 49, §§ 73–79.

The same authorities show that what was proposed to be proved by John and Mary Kimbrough, was also rightly excluded. The proposed evidence consisted of declarations of the defendant, made to his wife on his coming home after the killing, as to what he desired her to do and say, &c., and therefore could not be proved by him as evidence in his own behalf.

The conviction and judgment of the court below is reversed, and the cause remanded, with instructions, if the

defendant renews his application for a change of venue, that the same be granted; and the defendant will remain in custody, until acquitted or otherwise discharged by due course of law.

McALPINE *vs.* THE STATE.

[INDICTMENT FOR ARSON.]

1. *Discontinuance; what prevents.*—A general order, made before the final adjournment of the court, continuing all causes not otherwise disposed of, is sufficient to prevent a discontinuance, although section 162, page 342, in Clay's Digest, is omitted in the Revised Code.
2. *Charge to jury; what erroneous.*—A charge in writing requesting the court to instruct the jury, that unless they believe from the evidence, *to a moral certainty*, that the defendant is guilty, they can not convict him, is an improper charge, and should be refused.
3. *Same.*—The charge of the court should be confined to the evidence, and if the court, in a criminal case, states to the jury a purely hypothetical case, and asks the jury what is the presumption in such a case, the charge will be erroneous, as tending to mislead the jury.

APPEAL from Circuit Court of Greene.
Tried before Hon. JAMES Q. SMITH.

The facts are sufficiently stated in the opinion.

W. J. WEBB, for appellant.—1. It appears that the indictment was pending for two years in said court, (between the finding and the trial) during which time four regular terms of said court intervened, to which the suit or case was not regularly continued by any general or special order.

2. The court will take judicial notice of the terms of said court.—See Code, p. 233; 17 Ala. 229; 26 Ala. 461.

3. There is no section of the Code which provides for the continuance of cases by operation of law, or otherwise

than by order of court. The statute found in Clay's Digest, p. 342, § 162, "for the continuance of cases to the next term," has not been re-enacted by the Code. Section 4150 of the Revised Code provides only for the dismissal or discontinuance of indictments, by permission of court, and does not apply to discontinuance by the failure of the State to prosecute the case.

4. The question now presented must be decided by the rules of the common law. At common law, "when there was a failure to continue the case to the next adjourned term of the court, and one or more terms elapsed or intervened, the suit was held to be discontinued."—See Hawk. Pl. p. 416, § 84; *ib.* p. 417, § 86; 1 Chitty's Crim. Law, p. 363, m. 364–365; *Drinkard v. The State*, 20 Ala. p. 9; *Ex parte Rivers*, 40 Ala. 712–714, in which it was held, "that at the common law a chasm or gap in the proceedings, by neglect to continue the cause, is a discontinuance of the action, and entitles the defendant to a discharge. Such undoubtedly is the rule in civil actions, (5 Ala. 677), and the rule would be even more strictly held and enforced in criminal cases.—See authorities cited, *supra; Ex parte Hall*, at present term.

5. If it be insisted that defendant waived his right to make this objection on appeal, or by failure to move in arrest of judgment, we reply that any error, to arrest the judgment, must appear on the record, and if it appears of record, it is an error on appeal which will work a reversal.

6. This court will not indulge any presumption against the defendant to cure or sustain the defect of the record, but favoring the liberty of the citizen, will require the record to show that the judgment and proceedings were legal and regular.

7. The court erred in refusing the written charge asked by the defendant. The evidence set out in the bill of exceptions, and referred to in the said charge, show that the State relied solely on circumstantial evidence for a conviction, and that the "tracks" or "slewfoot" was the link by which the defendant could or must be connected with the perpetration of the crime. And therefore the jury must

be satisfied by the evidence, to a *moral certainty*, that they were tracks of the defendant before they could convict, whether they believed the evidence of the defendant's *alibi* or not.

J. W. A. SANFORD, Attorney-General, *contra.*

PECK, C. J.—The indictment, in this case, consists of two counts. The first charges that George McMills McAlpine willfully burned a mill-house and granery, with the mill and machinery therein contained, which was of the value of more than five hundred dollars, the property of John W. McAlpine.

The second count charges that George McMills, *alias* George McMills McAlpine, willfully burned a building, used for the time as a cotton-house, with the property therein contained, of the value of more than five hundred dollars, the property of John W. McAlpine, against the peace and dignity of the State of Alabama.

This indictment was found at the fall term, 1869. It does not appear whether the defendant was in custody when the indictment was found, nor does the record show when he was arrested, or how he was brought into court; but at the spring term, 1870, the cause was continued by the defendant. After this, to the trial term, 1871, being the fall term of the court, the record does not show any special continuance of said cause by name, but at each succeeding term there was a general order made continuing all causes pending in the court. It is also shown that the defendant appeared at the trial term, in his own proper person, and was then arraigned on the said indictment, and pleaded not guilty, was tried and convicted, no objection being made that the cause was discontinued. It is now objected by the defendant's counsel, that the cause was then discontinued, and that therefore the defendant was erroneously tried, and that the judgment should now be reversed for that error. We think this objection not only comes too late, but that if it had been made at the time the defendant was arraigned, it should have been overruled; that his appearing and pleading, without objection, was a

waiver of the supposed discontinuance.—*Ex parte Hall*, at the present term. Although the old provision in Clay's Digest, p. 342, § 162, which authorized the continuance of all causes pending and not disposed of, by a general order for that purpose, is omitted in the Revised Code, yet, as the practice has been continued, notwithstanding such omission, a general order ought now to be held sufficient to continue all causes not disposed of before the general adjournment of the court. This practice not only prevails in the circuit courts, but it is also the practice in this court; and to put an end to any doubts on the subject, we hereby recognize it as the settled practice in this State.

After the evidence was closed, the court, without any request by either party, gave two charges to the jury, neither of which seems to have been excepted to. The defendant then asked the court to give the following written charges to the jury, to-wit: "That unless the jury are satisfied by the evidence, *to a moral certainty*, that there were *slew-footed tracks* going from the mill-house, and that those tracks were made by the defendant George, they can not find the defendant guilty; and this is so, whether the jury believe the evidence tending to prove an *alibi* or not."

The court refused to give this charge as asked, and the defendant excepted.

This charge seems to have been based upon the following statement in the bill of exceptions, to-wit: "In the progress of the trial, the State offered evidence tending to show that there were tracks of a person found leading from the lot gate, or bars, near the quarter, *towards* the mill, and also tracks *from* the mill, towards the road; that said tracks were peculiar, or different from the tracks of other persons, in this, to-wit: that the right foot was *slewed*, or twisted out, and was a flat track, about No. 9 in size. The defendant's counsel cross-examined the State's witnesses about the tracks, and asked them how they knew or identified the defendant's tracks, and to describe any other peculiarity about said tracks. The witnesses were unable to give any other peculiarity of the tracks, but all of them stated they knew the tracks to be the tracks made by the prisoner;

some of the witnesses having known the prisoner from a child." Evidence was also offered by the defendant tending to prove an *alibi*.

There was no error in overruling said charge. In criminal cases, the jury may very properly be charged, that if after considering all the evidence, they have a *reasonable doubt* of the defendant's guilt, it is their duty to acquit him; and it is an error to refuse such a charge, when asked. In favor of life and liberty, such a charge has always been recognized as a legal charge, although no rule can be laid down by which to determine, with any degree of certainty, what a reasonable doubt is, or whether it does or does not exist in any particular case. Every case must, necessarily, be left to the good sense and conscience of the jury. Some times judges undertake to instruct juries what a reasonable doubt is, and some times what it is not. We think all such efforts, to say the best for them, are unsafe, indiscreet, and oftener than otherwise distract and confuse juries, and may lead them to convict when they ought to acquit, or to acquit when they ought to convict. We know of no case by which a charge like the one asked has ever been recognized as a legal charge; no one in which such a charge was ever before asked. Its very novelty was a sufficient reason for its refusal. It is a maxim of the law, that "the old way is the safe way." The courts will not sanction speculative novelties, without the warrant of some principle, precedent, or authority.—Broom's Legal Maxims, m. p. 136.

The bill of exceptions also states, that "in the progress of the trial there was evidence, by the witnesses of the State, to show that the defendant, before the burning, had made certain threats, that he would burn the cotton in said mill; that the judge, in charging the jury on the matter of previous threats to burn the mill and cotton by the defendant, said, 'If it be true, that threats were made by the prisoner, immediately before the burning, that he would burn the mill and cotton, and it appears the object of the threat is destroyed by fire, what is the presumption, when taken in connection with all the other circumstances tending to show he was at or about the place of burning at

the time of the fire?' The judge also said, in speaking of said threats, 'if a man says he is going over to the hotel to cut a man's throat, and he goes to the hotel and the man's throat is found immediately cut, what is the presumption from the threats?' To these declaration and questions of the court the defendant excepted."

We have no hesitation in saying, these declarations and questions addressed to the jury in the manner here stated were improper. The court may correctly charge the jury, that certain evidence, if believed by them, raises a presumption of guilt. Such a charge, in this case, might have aided the jury to come to a correct conclusion; but these declarations and questions must, almost necessarily, have confused and misled the jury, to the prejudice of the defendant. A charge should be confined to the evidence in the case. It is error for the court to state a mere hypothetical case in its charge, and then ask the jury what would be the presumption in such a case. The minds of the jury might, and would, probably, thereby be withdrawn from the consideration of the case made by the evidence, to the supposed case put by the court. As the course pursued by the court may have had an improper influence upon the jury, to the injury of the defendant, the judgment must be reversed, and the cause remanded for a new trial. The defendant will remain in custody until discharged by due course of law.

MAYOR, ALDERMEN, &c., OF MOBILE *vs.* BARTON.

[APPEAL FROM FINE IMPOSED BY MAYOR'S COURT.]

1. *Mobile, ordinance* 292 *of; to what has no reference.*—Ordinance No. 292 of the city of Mobile, against disorderly conduct, has no reference to a simple trespass upon a vacant lot, though committed in an attempt to assert an adverse right to the property.
2. *Same; appeal from conviction for violating, fine subject to revision.* Where a city ordinance prescribes a fine for its violation of not exceeding a specified amount, and the trial of an appeal in the circuit court from a conviction before the mayor for its violation is *de novo*, the amount of the fine imposed is subject to revision as any other issue in the case.
3. *Quere*—Whether in such a case, the acquittal of the accused in the circuit court subjects the city to a judgment for costs.

APPEAL from Circuit Court of Mobile.
Tried before Hon. JOHN ELLIOTT.

The facts are fully stated in the opinion.

RAPHAEL SEMMES, with whom was O. J. SEMMES, for appellants.—1. The charge of the court to the jury, that the statute of the State (§ 3556 of the Code,) which makes it a misdemeanor for one, without legal cause, or good excuse, to enter on the premises of another, after having been warned within six months preceding not to do so, had no bearing on the case, or anything to do with it, may be quite correct, and yet the charge was calculated to mislead the jury, and probably did mislead it. The appellee was not being tried for the misdemeanor provided for in that statute, and the statute was only referred to by the pleader to describe and characterize the conduct of the appellee as being disorderly and riotous, and calculated to lead to a breach of the peace. But it did not follow, that because the statute referred to had nothing to do with the case, the appellee was not guilty of the breach of the city ordinance charged against him; and yet the jury probably so con-

cluded, from the charge of the judge. But whether the charge was erroneous in this respect, or otherwise, it was clearly erroneous in assuming that the *intent* of the appellee had anything to do with the offense. The judge charged, that however much the conduct of the appellee may have provoked the other party, or been calculated to produce a breach of the peace; and however much such conduct, "taken in connection with similar acts done by the defendant, about the same time, in reference to other vacant lots to which there were different claimants, may have been calculated to produce disturbances and fighting in the community," the offense was not made out unless the defendant *intended* "to produce such results."

In misdemeanors, it is not necessary to show any *intent*, unless the intent be a necessary ingredient in the offense charged; as in a larceny, for instance, where the taking and carrying away must be shown to be felonious. The *intent* with which the act of the appellee was done, did not make the act more or less disorderly, or more or less riotous.

An offense against a statute of the State may, at the same time, be a violation of a city ordinance; and hence, if the appellee was guilty of the disorderly conduct charged, he was not the less guilty, because guilty of a misdemeanor under the statute of the State, for which he was not being tried.

C. W. Rapier, on same side.—The court below improperly refused the charge asked. When the mayor imposes a fine within the limits prescribed by the charter and ordinances, if the facts authorize the imposition of any fine, then the fine becomes a debt, and the amount can not be enlarged or diminished by a jury, the law having left the question of amount to the discretion of the mayor alone. See the Charter and Ordinances of Mobile; also, 27 Ala. 55.

If an appeal be taken from the mayor's court, the trial in the appellate court is *de novo* as to the facts only. If it be not shown as a fact that the ordinance has been violated, then the accused is to be discharged. But if the

accused has offended in fact, then the penalty is already fixed by the judgment of the mayor, as much as it would be if the corporation charter had not left the amount to the discretion of the mayor, but had itself fixed a specified amount, as ten or twenty dollars.

CHILTON & THORINGTON, and MORGAN, BRAGG & THORINGTON, *contra.*—Under the proof in this case, it is clear that appellee was not guilty of violating the ordinance of the city of Mobile entitled, "an ordinance to prohibit vagrancy, quarreling, riotous, immoral and disorderly conduct." That ordinance is leveled against "fighting, quarreling, or any riotous, indecent, or blasphemous language, or disorderly conduct, in the streets, houses, or anywhere else in the city, or of abusing, provoking or disturbing, either by word or action, any person in, or walking in any street, road, or public way;" and the ordinance further provides, that if any person shall violate any of its provisions, he shall "suffer such penalty as the mayor may impose, not exceeding fifty dollars."

The mayor and aldermen of Mobile had no jurisdiction to convict of this misdemeanor, created by section 3556 of the Revised Code, but the Code vests it in the county, circuit or city courts.—See §§ 3931–33. The court, therefore, properly charged that section 3556 of the Code had nothing to do with the case.

The rest of the charge was more favorable for the plaintiffs than the law warrants, and certainly the appellants should not be heard to complain of it. It simply asserts that if a man enter upon a vacant uninclosed lot *honestly*, without any improper motive, and erects a fence upon it *peaceably and without violence*, after being warned within six months preceding not to enter, he is not guilty of a breach of the ordinance of the city; but if he did so from spite, or for the purpose of provoking another, or with a view of creating a disturbance, or to produce a breach of the peace, then he might be found guilty, &c. We repeat, this charge is more favorable to appellants than the law warrants.

The third part of the charge is substantially the same as the second. It simply affirms that if a man honestly enter upon a vacant and unimproved lot, though warned within six months preceding not to do so, and erect a fence upon it, but with no intention of provoking a disturbance or breach of the peace, he is not guilty.

We think it too clear to admit of any doubt, that neither the ordinance nor the statute was intended to prevent a person taking peaceable possession, in good faith, of vacant property claimed by him, or those he represents. This would be a very strange law.

The charge refused limited the jury to a fine of fifty dollars, as found by the mayor. The case was on an appeal from the mayor, and the jury would have the same discretion as to the fine that the mayor had, that is, "not exceeding fifty dollars." If limited to the mayor's fine, they were bound by his decision in all other respects, which would be equivalent to no appeal at all. The case was to be tried *de novo*, and this charge was properly refused.

B. F. SAFFOLD, J.—The appellee was tried before the mayor of Mobile, and fined fifty dollars for an alleged violation of a city ordinance. He appealed to the circuit court, and there, upon a re-hearing of the cause, he was acquitted of the charge, and a judgment was rendered against the appellants for the costs of the proceeding. From this judgment they appeal.

The ordinance referred to forbids fighting and quarreling, or any riotous, indecent or blasphemous language, or disorderly conduct, in the streets, houses, or anywhere else in the city, or abusing, provoking or disturbing, by word or action, any person in, or walking in, any street, road, or public way, under a penalty not exceeding fifty dollars, to be imposed by the mayor.

The evidence shows that the appellee, Barton, employed several persons to put a fence around a vacant lot in the city of Mobile which belonged to Eaton. They were ordered off by Eaton, but presently returned, after a confer-

ence with Barton, whereupon Eaton had them arrested for disorderly conduct. They were released through the instrumentality of Barton, and by his direction returned to their work. After two or three repetitions of this, Eaton procured the arrest of Barton on the same charge, upon which he was tried before the mayor. No personal altercation occurred between Eaton and Barton, and there was no breach of the peace by any of the parties. But the persistence of Barton in sending the men back to the premises to continue the work upon the fence greatly irritated Eaton, and was calculated to do so. Barton claimed to be acting as the agent of persons living in Mississippi, who, he said, asserted some right to the lot, but none was attempted to be shown.

The court charged the jury, in substance, that section 3556 of the Revised Code, which forbids the intrusion of any person on the premises of another within six months after having been warned not to do so, had no connection with this case; that the peaceable entrance of a person on a vacant lot with the simple intention of putting a fence upon it, though he had been warned not to do so by one claiming the lot, was not a violation of the city ordinance, no matter how much it irritated the claimant, or was calculated to produce a breach of the peace, unless his action was dictated by spite, or the intention of provoking another, or creating a disturbance, or producing a breach of the peace; that such entrance upon a vacant lot for the purpose mentioned could not be regarded as riotous conduct, however much such acts, taken in connection with similar acts done by the defendant about the same time in reference to other vacant lots to which there were different claimants, may have been calculated to produce disturbance and fighting in the community, unless the defendant by such acts intended to produce such results. The plaintiffs excepted to this charge, and asked the court to charge that if the jury should find for the plaintiffs, the measure of their verdict should be the amount of the fine imposed by the mayor. But this was refused, to which exception was taken.

We find no error in the charge of the court. Disorderly conduct, in the sense of the ordinance, is virtually explained by the other portions with which it is connected. It has reference to some unwarrantable aggression upon or towards other persons, of an insulting character, accompanied with more or less of noisy demonstration. Obstructing the side-walk with goods would produce great annoyance to those passing, and, perhaps, cause actual injury to some of them, and it might lead to a breach of the peace. But this would be disorderly conduct only when accompanied with an evil design.

Barton's trespass upon the vacant lot (it was no more than that,) was not an affront to Eaton's person, nor an injury to his property. The ground of his objection was the repudiation of his right to the property. For this the law gave him an adequate remedy. His anger was therefore unreasonable, and Barton should not be held to account for it.

The charter of the city of Mobile, approved February 2d, 1866, directs, in section 91, that the mayor, or other officer acting in his stead, shall issue his process, as a justice of the peace for the city of Mobile, for a breach of any of the by-laws or ordinances of the corporation to any police officer of the corporation, who shall bring the offenders before the mayor or other officer for trial. The accused, if convicted, may appeal to the circuit or city court of Mobile, where the proceedings shall be as prescribed by law in other cases of appeal. The trial in the appellate court is therefore to be *de novo* on all of the issues, including the amount of the fine. The ordinance allows a margin of discretion to proportion the fine to the character of the offense, and the exercise of this discretion may be the ground of the appeal. There was therefore no error in refusing the charge asked by appellant, that "if tthe jury should find for the plaintiffs, then the measure of their verdict would be the amount of the fine which was imposed by the mayor."

No issue has been made about the propriety of the judg-

ment for costs against the city, and we make no decision respecting it. But I am inclined to the opinion that it is not liable for costs in a case of this sort. The mayor sits as the judge of an inferior court of a judicial division of the State, and performs his duties in the interest of the peace and good order of society. Wisdom and necessity concur in the delegation of a limited legislative power to a populous city, for the more prompt, energetic, and just exercise of the functions of government. Why should the people of such a community be held responsible for the errors in judgment of its judges, more than those of other communities in the State?—*Withers v. Posey*, 36 Ala. 252; *Com'rs Court of Russell v. Tarver*, 25 Ala. 480.

The judgment is affirmed.

NAPIER ET AL. *vs.* JONES, ADM'R.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN.]

1. *Vendor's lien; when part of contract for sale of land.*—To every contract for the sale of lands legally executed in this State, the right of the vendor to retain a lien on the lands sold, for the payment of the purchase-money, is an incident of such contract, unless it is waived or abandoned.
2. *Same; what not waiver of.*—The mere execution of a bond for the purchase-money with two sufficient sureties, and the execution and delivery of a deed by the vendor to the vendee for the lands sold, is not a waiver or abandonment of such lien, when it is otherwise understood and agreed by the parties at the sale and the delivery of the deed.
3. *Same; how may be enforced.*—In such a case, the vendor's lien may be enforced by bill in chancery, against the vendee, or a sub-purchaser with notice of the lien.
3. *Assignment of error; practice of court as to.*—Generally, a general assignment of error will not be extended, by this court, beyond the specific objections insisted on in the arguments and briefs of counsel at this bar.

APPEAL from Chancery Court of Lawrence.
Heard before Hon. WM. SKINNER.

THIS is a bill in chancery filed by Hodge L. Stephenson as the executor of the last will of James Wallace, deceased, and revived in the name of Theophilus Jones as his successor, to enforce a vendor's lien on lands sold by said executor, under the provisions of the will, to appellant, Napier, trustee of his wife, Mary C. Napier, in November, 1858, at public sale. The clause of the will under authority of which said sale was made, is in these words: "I request that my executor shall give my three boys, George, Ell, and Tom, the choosing of their own masters, and that he shall sell them to the one whom they may choose at a fair price, making the debt secure. And all the balance of my estate, both real and personal, not named in this will, to be sold at public outcry on twelve months time. And after all my debts are settled, the balance of my money that may be in the hands of my executor to be paid and appropriated to free schools in township (7) seven, range (9) nine, west, in Lawrence county, except $200 dollars to the benefit of H. L. Stephenson, for his kindness to me in our transactions."—8th Item of the Will.

This was the only clause giving any power to sell. At the sale, thus authorized to be made, the real estate was purchased by appellant as the trustee of Mary C. Napier, for the sum of seven thousand, four hundred and forty-four dollars and eighty cents. This sale was upon a credit of twelve months, and the purchaser was required to secure the payment of the purchase-money by bond with two sufficient sureties, and it was declared by the vendor at the time of the sale, as one of the terms of the sale, that a lien was retained upon the land to secure the purchase-money. For the price of the land thus sold, together with a considerable amount of personal property, also purchased at the same sale, by Napier, he executed his note, with Fletcher C. Vincent and John C. Stephenson as his sureties. Said note bears date November 13, 1858, and is payable to H. L. Stephenson, the executor named in said will, and falls due in twelve months from its date. On the same day the note bears date, Stephenson, as executor, executed and delivered to Napier a deed conveying said lands. No men-

tion is made in the note or on the face of the deed of the lien or its retention for the security of the purchase-money. Yet the lien was in fact retained in pursuance of the terms of the sale, as proclaimed at the time of the sale, and asserted by the executor and assented to by Napier at the date and the delivery of the deed of conveyance to him.

The note for the purchase-money of the lands was not paid at maturity. Afterwards the executor filed this bill to enforce his said lien. The obligors to said bond and said Mary C. Napier were made parties defendant to the suit; all were served with subpœnas, and all answered the bill, but not upon oath. The allegations of the bill are admitted, except those that assert said lien, and the appellants rely upon the bond with sureties and the deed (in which no mention is made of the lien) as an abandonment and waiver of the lien. The defendants took no evidence in the court below; and the evidence of the complainant clearly shows that the statements of the bill in reference to the retention of the lien, notwithstanding the bond and deed, are true. The chancellor ascertained the balance of the purchase-money due and unpaid upon the note, and rendered judgment for the same on the final hearing against the defendants, and decreed that the complainant was entitled to a lien on said lands for the payment of the same, and ordered the lands mentioned in the bill to be sold for the purpose of satisfying the decree.

From this decree the defendants appeal to this court, and here assign said final decree for error.

Rice, Chilton & Jones, and Lewis & Fullerton, for appellants.—1. As long ago as January, 1842, this court, upon a deliberate review of the English and American authorities, settled it that "where the vendor executes a conveyance and takes a distinct and independant security of property, or the responsibility of third persons, the lien on the land is waived;" and approved the decision in *Wilson v. Graham*, (5 Munf. R. 297,) to the effect that "where a vendor of land executed a conveyance, and took from the purchaser a bond with surety, the equitable lien was gone, even

while the land continued the property of the purchaser;" and cited other cases to the same effect.—*Foster v. The Trustees of the Athenæum*, 3 Ala. 302.

2. This decision has become a rule of property, and has been uniformly acted upon as such in this State for nearly thirty years. It is too late to disturb it. The maxim, "*stare decisis*," must apply here or be repealed.

Manifestly the decree of the court below should be reversed, and a decree be here rendered dismissing the bill, upon the authority of the case above cited from 3d Alabama Reports.

McIntosh v. Reid, (at last term,) is wholly different from the present case. This was a case of a sale under order of the probate court, to which the maxim "*caveat emptor*" applies in its utmost rigor, and to which other peculiar rules apply. The present is the case of a sale without the interposition of any court. The sale is by the executor in the complete execution of plenary power to make it conferred by the will. It is, in effect, a sale under a power which excluded the retaining of a lien. The testator carefully sets down and specifies in his will what the executor must get. He does not mention lien, but he does mention a bond with security. "*Expressio unius exclusio alterius.*" The power was completely executed and exactly fulfilled; a conveyance was made, and no mortgage or other lien taken or claimed. Under such circumstances, no court in this State can give a lien to the executor of the will and of the power. There is no reason for it, and our settled law is against it. The difference between a sale under order of probate court, and under power conferred by will, is well illustrated in *Ala. Conference M. E. Church South v. Price*, 42 Ala. 39.

It is unnecessary to deny that a vendor may make a conveyance and take a note or bond with security, and by express agreement at the time of sale preserve and retain a vendor's lien as against the vendee. But conceding that position to be true, it is true only as to a vendor who sells his own land; it is not true as to an executor who sells the

land of a testator in the execution of a mere power conferred by the will of the testator.

The testator himself, by his last will and testament, waived the vendor's lien; that is the legal interpretation of the will. And as the testator thus waived the lien, the executor could not, whilst executing the power conferred by the will, undo what the testator had done. The executor had no authority in the execution of that power, except that which the will conferred upon him. Whatsoever the executor, in the execution of that power, did beyond the power itself, was "*ultra vires*" and a nullity. He could only execute the power.—*Ala. Conf. M. E. Church South v. Price, Executor*, 42 Ala. 39, and authorities there cited.

In the case last cited the will gave power to sell, but the sale was made, not under the power, but under an order of probate court. It was therefore held to be a nullity.

R. O. PICKETT, *contra*.—"It is said every vendor has a lien upon the estate he has sold, to the amount of the purchase-money, unless he has by his own act waived his right."

"The universal rule laid down on this point seems to be, that every case must depend and be determined by its own circumstances." And the principle has been carried to this extent, that the lien exists, unless the intention, and a manifest intention that it shall not exist, appears.—6 Ves. Jur. 97, note 2; *ib.* 483; *ib.* 757; 2 Story's Eq. §§ 1218, 1224; 40 Ala. 540; 43 Ala. 663; 15 Vesey, 340–350.

Taking separate and independent security is not of itself a positive waiver of the lien, such as a note or bond with security for the money. It exists in every case of a sale where the money is not paid, unless it be otherwise agreed between the parties, either expressly or by such arrangement as clearly to show their intention. And it is incumbent on the party contesting the lien to show that it has been relinquished.—See the following cases: 2 Story's Eq. § 1226; 1 John Ch. Ca. 308; 3 Bibb, 183; 4 Kent, 153; 1 Paige, 20; 2 Yerger, 84; 6 Yerger, 50; 3 Hayw. 197; 6 Vesey, 752; 9 Cowan, 316; 5 Munf. 297; 3 Sug. on Vendors, top p. 123, and note 2.

The vendor's lien will be defeated if he do any act manifesting his intention not to rely on the land as security for the purchase-money. But what act would be deemed a waiver of his lien is not so easily defined. The lien can only be waived by taking collateral security showing his intention to waive his lien, or by an express agreement to that effect. But the presumption of a waiver may be rebutted by evidence that it was intended that the vendor should retain the lien.—Washburn on Real Estate, top page 90; 3 Geo. 333; 21 Cal. 175; 43 Barbour, 29; 1 Mason, 217–19; 1 S. & Mar. 463; 3 J. J. Mar. 553; 3 Par. on Contracts, 277.

Vendor's lien is retained as well when the conveyance is made, as when bond for title is given; and it is not necessary to exhaust the legal remedy before resorting to its enforcement. The lien follows the consideration unless an intention to interrupt it is shown.—*Campbell v. Roach et al.*, 45 Ala.

The vendor has the right to give in evidence the real nature of the transaction, to show his lien was not waived or discharged, although the contract is stated in the conveyance.—17 Eng. Law & Eq. 457. And the principle is well established that parol proof is admissible in equity to establish a trust in certain cases where the deed is absolute on its face.—1 Greenl. Ev. § 266; 3 Greenl. Ev. § 365; Tiff. & Ballard on Trusts, 191, *et seq.;* Shepherd's Digest, §§ 26-7-8-9; 44 Ala. 227.

"The appellant insists that the sale of the lands was made under a power conferred by the will, which excluded the retaining of a lien, and that the testator carefully sets down and specifies in his will what the executor must get, and that he does not mention a lien, but does mention bond and security; and that the power was completely executed and exactly fulfilled. "*Expressio unius exclusio alterius.*"

The appellants' counsel mistakes the language of the will conferring the power. It authorizes the executor to sell merely. By implication the will gives every power necessary to accomplish the purpose for which the sale is to be

made. The legal effect of the will would have authorized the taking of a mortgage; it is far from excluding such idea.

PETERS, J.—As early as 1842, now thirty years ago, it was, in a well considered opinion of this court, declared that "it is well settled, both in England and the United States, that the vendor, in the absence of any agreement to the contrary, retains a lien on the land he has sold and conveyed, for the unpaid purchase-money, and that this lien will be enforced against a subsequent purchaser with notice."—*Foster v. The Trustees of the Athenæum*, 3 Ala. 302, 305. This just exposition of this important principle has not been modified or abandoned. It was the law at the date of the sale involved in this case, and it governed the stipulations of this contract. The law of the contract enters into the contract itself, and in its construction forms a part of it. It may be said to be a dormant stipulation of the contract, and it must be enforced as a part of it, and as it is construed at the time of entering into it.—*Gelpcke v. City of Dubuque*, 1 Wall. 175.

The lien thus created attaches as well in favor of an administrator or executor with power to sell as in favor of any other person.—*Wood et al. v. Sullens*, 44 Ala. R. 686. Whether this lien has been waived or abandoned depends, in each case, upon the proofs.—*Macreth v. Symmons*, 15 Ves. Jur. 329; *Newsome et al. v. Collins*, 43 Ala. 656. Here, the evidence very clearly shows that the lien was expressly reserved, and that the taking of the bond and security and the execution of the deed was not intended to release it. When this is so, the testimony of decided cases is overwhelming in favor of its continued existence.–4 Kent, 152, 153, marg.; Tiff & Bull. on Trusts and Trustees, pp. 84, 85, 86, (ed. 1862); 2 Story's Eq. 1226; *Frail v. Ellis*, 17 Eng. L. & Eq. 457; 1 Parsons on Contr. p. 526, *et seq.*; 3 Sug. on Ven. p. 123, *et seq.*, top page; Washb. on Real Estate, top page 90, *et seq.*; *Ross v. Whitson et al.*, 6 Yerg. 50; *Gaston v. Green et al.*, 1 John. Ch. 308; *Campbell v.*

Roach, 45 Ala. 666; *Brooks v. Woods*, 40 Ala. 538; and the numerous authorities collected in appellee's brief.

There was no other question argued at the bar or discussed in the brief of the learned counsel for the appellants in this appeal. When such is the case, general assignments of error will not be extended beyond the specific error pointed out and argued at the bar and in the brief of counsel.—Rule of Practice No. 1; *Waller v. Shultzbacher & Paige*, 38 Ala. 318.

The decree of the court below is affirmed; and the appellants will pay the costs of this appeal in this court and in the court below.

HUGHEY *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Threats, evidence of; for what purpose inadmissible.*—The proof showing the commission of a felonious homicide, perpetrated by the accused by lying in wait, he offered evidence that deceased had often threatened his life, and the day before the killing had lain in wait in the road to shoot him, and that this was known to accused before the killing; but also stated, in reply to a question by the court, that he did not expect to show any act done by deceased at the time of the killing indicating an intention to kill accused or do him great bodily harm, but that he did expect to show such act on the part of deceased as late as the evening before, and thereupon the court rejected the evidence,—*Held*, that the evidence was incompetent either to justify or excuse the homicide, and as that was the only purpose for which it was offered, the evidence was rightfully excluded.
2. *Same; what necessary to excuse or justify homicide.*—No mere threats to take life, or even past attempts to execute such threats, will justify or excuse a felonious homicide. There must be actual impending danger to the slayer at the time of the fatal blow, or such a state of facts as are justly calculated to impress upon his mind a reasonable belief of the necessity to take life.

APPEAL from the Circuit Court of Marion.
Tried before Hon. W. S. MUDD.

THE appellant, George Hughey, was indicted for the murder of James W. Crumbia, tried, found guilty of murder in the first degree, and sentenced to the penitentiary for life.

The evidence shows that Hughey and Crumbia were brothers-in-law, living about half a mile apart, and between whom bad and unfriendly feelings had existed for some months previous to, and up to the time of the killing. In reply to a message sent by deceased the day before the killing, informing Hughey that if he would admit that deceased had not stolen some hogs, &c., deceased would be at peace with him, Hughey replied: "What I would say once I would say twice, and what I would say twice I would die by; and if Crumbia believes there is no hell in Georgia, let him go on." Hughey, on the same day, remarked to another witness, who had expressed a desire to see Crumbia and settle matters, that if witness did not go soon, he would not get to see Crumbia.

Two witnesses testified that a few days after the killing the defendant gave them the following account of the killing: On the morning of the killing he took his gun and went through the fields to Crumbia's house, and on getting within a hundred or so yards of the house, sat some time on the fence. He then started in the direction of the house, and after going a short distance he saw deceased in the field, and immediately presented his gun and popped a cap at deceased, who threw up his hands, asked "what do you mean," and then ran into the house. Defendant went a little closer to the house, stopping at the root of a tree, and while there took out a memorandum book and wrote something in it, "as he did not know who might be killed, what he wrote would show something." At this tree Hughey remained for two hours, and then went up near the house and stopped. Defendant intended to get in front of the house, but before he got in front of the door deceased opened it, stepped in, looked around, and immediately went in and shut the door. Defendant thought deceased saw him, and he (defendant) immediately cocked his gun, presented it towards the door, held his thumb on the hammer of the lock so that he might not shoot his sister by mistake,

as he wanted to be sure that it was deceased before he shot. "As soon as deceased appeared at the door, and Hughey was certain that it was Crumbia, he pulled down on him."

Another witness testified that Hughey told him that while sitting at the root of the tree, he deliberated what he should do. Other witnesses testified that shortly after the shooting defendant told them that "he had killed Crumbia, and wanted them to see him decently buried at defendant's expense; that he regretted that he had killed Crumbia, but Crumbia had repeatedly threatened his life, and waylaid the road the day before to kill him."

Defendant then offered to prove by several witnesses that "on various occasions and for some time before the killing, deceased had been threatening defendant's life; that on Saturday before the killing deceased presented a gun at defendant, and would have shot him had he not been prevented by the by-standers; that on the day before the killing deceased waylaid the road, with his gun, for the purpose of shooting defendant, who, being warned of it, went another road, and deceased, after waiting some time on the road, went to defendant's home and tracked him a mile or two. The State objected to the admission of the evidence. The court asked if defendant expected to show any act done by deceased at the time of the killing indicating an intention on the part of deceased to kill defendant or do him great bodily harm: and upon the reply of his counsel, that they did not expect to show any such act on the part of deceased later than the evening preceding the killing, the court sustained the objection and excluded the proposed testimony, and defendant excepted."

The widow of deceased testified that on the morning of the killing Crumbia requested her to go to her father's to see if defendant was there; that upon her refusal to go just then, deceased said he would go, and taking his gun started off. Soon she heard a cap pop, and saw deceased running with his gun first on one shoulder and then on the other. He ran into the house and she shut the door. Deceased then hunted for a crack to shoot through, and asked her

to go out and look for defendant, which she did, but saw nothing of him. After this, at deceased's request, she went to her father's, which was half a mile distant, to hunt for defendant, but saw nothing of him and returned. Deceased went to the door and turned away, and soon looked out again, when the gun fired and he fell, shot through the body, and expired in a few minutes.

After the testimony of this witness, defendant again offered to prove the threats and attempts of deceased as proposed before; but the court excluded the evidence, and defendant excepted.

The court charged the jury as follows:

1. "If the jury believe from the evidence that there was bad and unfriendly feeling existing between defendant and deceased at the time of the killing, and that deceased had made threats against defendant, and on the day before the killing waylaid the defendant; and should further believe that at the time of the killing no attempt was being made to execute said threats, and nothing done to show an intention to execute said threats by deceased, that then the threats so made would afford no excuse or justification for the killing of the deceased."

2. "That if the jury shall believe from the evidence that bad and unfriendly feeling had grown up between deceased and defendant, and existed at the time of the killing, and that on the morning of the killing the defendant left his home with the intention to take the life of deceased, and that on the way to deceased's house defendant met deceased about 150 yards from his home and popped a cap at deceased, and that deceased ran into his house and his wife closed the door, and that defendant, after deliberating some time, went up to the house of the deceased, and as soon as deceased showed himself the defendant shot and killed the deceased, this would be murder on the part of defendant, notwithstanding deceased may have made previous threats to take the life of defendant, and may have waylaid him for that purpose on the day before."

3d. That if the jury believe from the evidence that defendant may have believed he would have either to take

the life of deceased or lose his own at some future time, this would not justify or excuse the killing of deceased, unless at the time of the killing deceased did some act showing an intention of taking the life of defendant, and which act was not provoked by some act of defendant at the time of the killing, showing an intention on the part of defendant to take the life of deceased.

These charges were written, and the jury, with the consent of the court, took the charges with them when they retired. The defendant excepted to each of the charges, and to the action of the court in allowing the jury to take the charges with them.

The defendant then requested the court to give the following written charges:

1. That if the jury believe from all the evidence that defendant believed it was necessary to take the life of deceased, and defendant acted upon that belief alone, then it would rebut the presumption of malice, and defendant in that case would not be guilty of murder.

2. That the delusion on the part of the defendant, that deceased would take his life, and that it was necessary for him to kill deceased to prevent the loss of his own life, brought about from his threats and lying in wait; if from these circumstances defendant really and honestly believed it was necessary to take the life of deceased to save his own, then defendant is not guilty of any offense. The necessity which will justify the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with a reasonable belief that such necessity is impending, and the jury are to determine that fact from all the circumstances.

3. That if the jury believe from the evidence that there was such a derangement of defendant's mind at the time of the killing, that if he did not kill deceased, the deceased would take his life, [and that] the killing was [done] under such a state of mind, they should find defendant not guilty.

4. If the jury, after weighing all the testimony, have a reasonable doubt whether the defendant killed deceased

with malice, or to protect his own life, then they must acquit.

The court refused to give any of these charges, and defendant duly excepted.

W. S. EARNEST, for appellant.—The charges given are based upon, and in fact are in the language of the court in the case of *State v. Prichett*, 22 Ala. 39.

While we recognize the doctrine laid down in that case as good law, we hold that it is not applicable to the case before the court. That was based upon threats only; this, upon acts and attempts,—trying to shoot defendant, waylaying the road for him, tracking him on his mule, the day before the killing, and in the morning by sun-up, with his gun going to hunt the defendant. They met, as the evidence shows, on the road from the house of the slain to that of the defendant, about half way.

In the case above referred to the court says: "But however bad or desperate that character may be, and however many threats such person may have made, he forfeits no right to his life until by an actual attempt to execute his threats." In this part of the sentence, and the concluding part, the court intends to draw a distinction between "threats" and "attempts." "Where threats are made *only*, there must be some act or demonstration at the time of killing." But where there have been attempts to kill at different times and in different ways, by waylaying, &c., it does not require an attempt at the time.

2. The charge is given upon the assumption of law that malice express, as defined in the law books and in the Code (§ 3653) can not be explained; that if there is a lying in wait, or deliberation, that fixes conclusively the offense. This is an invasion of the rights of the jury. Malice is the essential ingredient of murder. The jury must look to the facts, to all the facts, to find whether malice entered into and made the act murder, or a less offense. The case of *Oliver v. The State*, 17 Ala. 598, gives to the jury all the facts, and leaves with them to find whether the defendant acted from malice, or was governed by the law of self-

protection; and if deceived by appearances, if he acts on such facts as a reasonable man would act, it rebuts malice, though there was deliberation in the killing.

3. The charges asked only sought to leave all the facts to the jury, and for them, as they had a right to do, to determine the malice or the want of malice.

4. The refusal to let all the acts and attempts to kill, waylaying, and tracking, come in, was error. They are of a higher order of evidence than mere idle threats. They can not be placed upon the same level with threats. But if true, as the defendant proposed to prove, they justified, or at least excused the defendant in doing as he did.

J. W. A. SANFORD, Attorney-General, *contra*.

PETERS, J.—The appellant, Hughey, was convicted of murder in the first degree and sentenced to the penitentiary for life, at the fall term, 1871, of the circuit court of Marion county. And he appeals to this court from this judgment of conviction on the matters set out in his bill of exceptions.

No threats unaccompanied with acts which threaten the life or limb of the slayer, will justify or excuse a felonious homicide. The threats insisted on in this case were not of this character. The court properly excluded them, as they could have been offered for no other purpose.—*United States v. Wiltberger*, 3 Wash. C. C. R. p. 515; 2 Archl. Cr. Pl. p. 223 (marg.) *et seq.* and notes, Waterman's ed. 1853.

The objections to the charges given by the court, and to the refusal of those moved for by the defendant on the trial below, proceed upon the same mistake, that mere antecedent threats are an excuse or justification for a felonious homicide. This is not so. There must be actual danger to the slayer at the time of the fatal blow, or such a state of facts as are justly calculated to impress his mind with the existence of such danger, before he is justified to strike in self-defense. Self-defense is simply the resistance of force, or seriously threatened force actually impending, by force sufficient to repel the danger, and no more. If it goes beyond this, there is guilt which is not excusable or

justifiable. This is the result of the cases and authorities above cited.—2 Bouv. Law Dict. p. 509, *Self-Defense*, and cases there cited. On the trial below there was no proof of actual impending danger, or any seeming danger, which would have justified the prisoner in his heartless destruction of his victim's life. He sought the occasion to kill, with the purpose to kill, when there was no sufficient necessity for it, and when it might have been avoided, and when it was clearly within his power to have resorted to peaceful means to restrain the deceased, had it been his wish to have assaulted him.—Rev. Code, p. 741, § 3956, *et seq.* We think the conviction was eminently proper, and regular; and it must stand.

The judgment of the court below is affirmed; and that court will proceed to execute its sentence as required by law.

OFFUTT ET AL. *vs.* SCOTT.

[BILL IN EQUITY TO SUBJECT LAND PURCHASED WITH PARTNERSHIP FUNDS, AND IN POSSESSION OF ADMINISTRATOR AND DEVISEES OF DECEASED, TO PAYMENT OF JUDGMENT RECOVERED AGAINST SURVIVING PARTNER ON FIRM INDEBTEDNESS.]

1. *Real estate; when treated as personal property in equity.*—Real estate purchased by a partnership, for partnership purposes, and paid for with partnership funds, as to the creditors of the firm is, in equity, treated as personal property, and will, if necessary, be subjected to the payment of their debts, whether the title be conveyed to the partners by name, or to one of them, or to a third person.
2. *Surviving partner; powers and duties of.*—In case of the death of one partner, the survivor is a trustee for all persons interested in the partnership, for the creditors of the firm, for the representatives of the deceased partner or his heirs, and for himself; and for the purpose of closing up the business of the firm, he is invested with the exclusive right of possession and management of the whole partnership property and business. His trust being to wind up the concern, his powers are commensurate with the trust; hence he may collect, compromise,

or otherwise arrange all the debts of the firm, and his receipts, payments, and doings generally, in that behalf, are valid, if honestly done, and within the fair scope and purposes of the trust; and until the debts of the firm are paid, neither the personal representatives nor the heirs of the deceased partner have any beneficial interest in the partnership property.

3. *Firm, dissolved by death of partner, judgment creditor of; how and against what may proceed in equity for satisfaction of his debt.*—When a partnership is dissolved by the death of one partner, the only remedy at law against the firm, by the creditors of the firm, is by suit against the survivor; and when a creditor has exhausted his remedy at law against the firm, by a suit against the survivor prosecuted to a return of an execution "no property found," he may then file his bill in equity to subject the real estate of the partnership to the payment of his debt, and this, whether the possession be in the surviving partner, the personal representative or the heirs of the deceased partner, or any other person who is not a *bona fide* purchaser for valuable consideration and without notice.

4. *Goods received on consignment before death of partner; duty of survivor as to.*—If goods shipped and consigned to a firm doing a commission business, to be sold on account of the shipper, are received, but before they are sold one of the partners dies, the survivor may sell such goods, and, in such case, the claim of the shipper on account of such sale is properly against the firm, and not against the survivor individually.

5. *Variance between bill and proof; when should be held immaterial.*—A variance between the statements of the bill and the proof, if not of such a character as to operate as a surprise to the defendants, and the defendants do not appear to be thereby injured, should generally be held to be immaterial.

6. *Purchaser of land bought with partnership assets; when equity of, superior to that of creditor of partnership to subject for payment of firm debt.* If a surviving partner sell and convey his interest in the real estate belonging to the partnership to a *bona fide* purchaser for valuable consideration, without notice, before a creditor of the firm has acquired a lien on the same by bill filed to subject it to the payment of his debt, the purchaser will hold it against the general equity of the creditors to have it appropriated to the payment of the partnership debts.

APPEAL from Chancery Court of Montgomery.
Heard before Hon. A. W. DILLARD.

The case made by the bill, answers and proof may be stated as follows:

In May, 1860, and prior thereto, a partnership composed of R. H. and his brother W. E. Offutt, did business in the city of Montgomery, Alabama, under the firm name and

style of R. H. & W. E. Offutt. In the month of September, 1860, the firm was dissolved by the death of W. E., who left R. H., the surviving partner, one of his executors. During the existence of the partnership the brothers, who were equal partners, made a purchase as tenants in common of certain valuable real estate in the city of Montgomery from one Knox, to whom $9,000 of the purchase money was due at the death of W. E. After the purchase the firm used a store-house on this real estate "as a business stand," in which they carried on business as grocers and commission merchants. The unpaid balance due for the purchase was paid by R. H. with partnership assets after the death of W. E., the debt for this balance being evidenced by "an ordinary negotiable note, signed R. H. & W. E. Offutt." Before the filing of the bill R. H. had been removed, and in his stead A. J. Noble appointed administrator with the will annexed, R. H. having also sold his interest in the real estate to one Waggoner, from whom Ray purchased under circumstances which it is admitted made him a *bona fide* purchaser for value and without notice. A partition of the real estate had also been made between Ray on the one hand, and the administrator Noble and the devisees of Wm. E.; R. H. having surrendered all claim, whether as heir or partner, to the real estate partitioned to W. E. At the date of the filing of the bill, the real estate was in the possession of Noble as administrator, unincumbered with debt, Noble having received rents, and was claimed by two of the devisees, the others having assigned their interest to them.

Scott, in April and the early part of May, 1860, had shipped in his own name from Lexington, Kentucky, certain consignments of bagging, rope and twine, for sale on commission. On May 4th, 1860, a small payment had been made on these consignments, and on January 1st, 1861, R. H. gave Scott a note signed in the firm name for $1,045.92 in settlement of part of the consignments, no account being stated as to the balance. The evidence as to the time and by whom these shipments were received is fully stated in the opinion, and need not be here repeated.

The bill alleges that separate shipments were made by Scott and by Hamilton. The proof, however, shows that the shipments were all made in Scott's name, but that Hamilton had an undisclosed interest in one of them which was transferred to Scott. It was urged in this court that this was such a variance between the allegations and proof as to entitle appellants to a reversal. The point does not appear to have been made in the chancery court.

Shortly after the note was given the late war commenced, and as Offutt continued to reside at the South, and Scott and Hamilton resided in Kentucky, they had no further communication about the matter until they met in New Orleans in February, 1866, when R. H. Offutt took up the original note for $1,045.94, giving instead two notes, one to Hamilton and one to Scott, the respective notes being for their respective interests in the original note. These notes were given simply in renewal of the original, were signed "R. H. & W. E. Offutt," and were not intended by any of the parties as a release to the firm. Shortly after this R. H. rendered an account of sales of the consignments not before accounted for, showing a balance due Scott of $2,347.20. R. H., as surviving partner, had possession of the assets of the firm, and wound up its business.

In July, 1868, Scott having purchased the note given to Hamilton, brought suit on the account and notes heretofore mentioned, against R. H., in the circuit court of Montgomery, recovering judgment, on the 1st of February, 1870, for $4,952.24. Execution was duly issued on this judgment, and returned "no property found." The bill also alleges that R. H. is insolvent.

On the 18th of March, 1870, Scott filed his bill praying that an account be stated, &c., and that the real estate mentioned in the bill be subjected to and sold for the payment of the amount found to be due upon the judgment.

R. H. Offutt, Noble the administrator, &c., and the four devisees and heirs at law of Wm. E., and Ray, the purchaser of R. H.'s interest, were made parties defendant, and answered the bill.

The respondents objected to the relief prayed for, and

set up in their answer—1st, That the indebtedness mentioned in the bill, as shown by the bill itself, occurred after, and not before the death of Wm. E. 2d, That the judgment is against R. H. individually, and not against him as surviving partner of the firm of R. H. & W. E. Offutt. 3d, That before the filing of the bill R. H. had sold his interest in the real estate, and that the real estate had been partitioned between Ray on the one hand and the heirs and devisees and administrator of W. E. Offutt on the other, and that the portion now held by the administrator was assets of the estate of Wm. E., and subject only to payment of the debts of Wm. E., and belonging to the heirs and devisees of Wm. E. 4th, That the estate of Wm. E. is not in any way indebted to complainant, or liable to pay his demand; that the claim set up was never presented, as required by law, or to any personal representative of W. E. within eighteen months after grant of letters of administration. 5th, That the claims against the firm were open accounts at the death of Wm. E., and the same were barred by the statute of limitations of three years before the bill was filed, or any proceeding commenced to enforce the same against the estate of Wm. E.

The cause was submitted for decree on bill, answers and proof. The chancellor overruled the plea of the statute of limitations and non-claims, and decreed that complainant was entitled to the relief prayed against the real estate in the hands of the administrator to the extent of one half of the amount of partnership funds used by R. H., the survivor, in paying for the same, with interest on that amount from the time the administrator commenced receiving the rents and profits thereof, &c., and dismissed the bill as to respondent Ray.

The defendants appeal, and assign the decree of the chancellor as error.

WATTS & TROY, for appellants.—There is a variance between the allegations and the proof, which must necessarily work a reversal of the case. The bill alleges separate shipments of bagging, &c. by Scott and by Hamilton; the

proof showed joint shipments, in which they were both interested.—Shep. Dig. p. 252.

2. It does not appear that complainant has exhausted his remedy at law.

3. A court of equity will not take jurisdiction to subject equitable assets of a debtor to the payment of a debt, until all remedy at law has been exhausted, unless some statute authorizes such proceeding by a simple contract creditor, or unless such simple contract creditor can establish a *trust* in his favor.—See Reavis' Dig. p. 351, §§ 207, 208; 11 Ala. 437; 14 Ala. 198.)

4. In the case under consideration, it is alleged that complainants' claims were debts of R. H. & W. E. Offutt *as partners;* that one of the partners, W. E. Offutt, died about the first of September, 1860. The bill must be construed most strongly against complainant. It must therefore be held that W. E. Offutt died not later than the first of September, 1860. The partnership was dissolved by his death. R. H. Offutt became the executor of W. E. Offutt shortly after his death. The bill shows that a suit was brought by complainant against R. H. Offutt as an *individual*, on notes he had executed long after the death of W. E. Offutt, and a judgment was obtained in *this suit*, and that execution on it was regularly returned "No property found." And there is no allegation that the partnership effects liable *at law* have ever been exhausted. It is averred that R. H. Offutt was insolvent at the time of filing the bill; but there is no allegation that the *partnership* was insolvent. It thus appears that so far as the *partnership* is concerned the claims of the complainaut are merely *simple contract* debts.

It is alleged that a part of the money of the firm was used by the surviving partner to pay for land, which the bill shows was the individual property of Wm. E. Offutt. And it is this money so invested by R. H. Offutt, the surviving partner, which is sought to be subjected to the payment of an alleged partnership debt. The bill shows that the real estate sought to be subjected in part to the payment of this alleged partnership debt, descended, on the

death of W. E. Offutt, to his heirs, and it is now in the possession of his heirs.

Now, conceding that complainant's debt was one against the partnership, and that W. E. Offutt was liable to pay it, this land now in the possession of the heirs and devisees, cannot be subjected to the payment of this debt, unless the complainant has exhausted all remedy at law against the personal representatives *as such*, of W. E. Offutt, or unless it is shown that the personal representative and his sureties are insolvent.—*Grant v. Reed*, 24 Texas, 46; see *Pike v. Searcy et al.*, 4 Porter, 52; *Darrington v. Borland*, 3 Porter, 10; *Ledyard v. Johnston*, 16 Ala. 548.

There is no allegation in this bill that any remedy at law against the estate of W. E. Offutt has ever been attempted. Under section 2538 of the Revised Code of Alabama there was ample remedy at law against the estate.—See this statute construed in *Waldron, Isley & Co. v. Simmons et al.*, 28 Ala. 629.

Indeed, it appears on the face of the bill that all remedy against it is barred by the statutes of limitations and non-claim both.

It is not necessary to plead statute of limitations, or that of non-claim. The bill on its face must show that the remedy is not barred.—2 Ala. 555; 41 Ala. 344.

5. The suit against R. H. Offutt was not against him for a partnership debt. It was founded on notes made by him the 1st of January, 1866, and on account stated January 1st, 1866, more than five years after the dissolution of the partnership by the death of W. E. Offutt.

The declarations of R. H. Offutt, made *after* the dissolution of the partnership, do not bind the estate of the deceased partner, nor can his declarations or acts subsequent to the dissolution be evidence against the estate of W. E. Offutt.—12 Ala. 714; 17 Ala. 145; 37 Ala. 436; 41 Ala. 222; 9 S. & M. 290.

6. This bill shows that letters testamentary on the estate of W. E. Offutt were granted to R. H. Offutt shortly after the death of W. E. Offutt. He died as early as 1st September, 1860. The bill seeks to subject property belong-

ing to the estate of W. E. Offutt in the hands of his heirs and administrator *de bonis non*. The bill, answers and proofs show that R. H. Offutt transferred to the defendants, C. L. Offutt and Mrs. Sweitzer, all the interest he had in said real estate, and that said real estate, which had, at one time, been owned jointly as tenants in common by said R. H. Offutt and W. E. Offutt, had been divided between the estate of W. E. Offutt and Ray, the purchaser and owner of R. H. Offutt's interest.

Now a material question arises, whether the complainant, if he really be a partnership creditor, has a superior equity to the personal representatives and heirs of W. E. Offutt.

The partnership creditors as such have no lien on the partnership property proper until they have obtained execution at law against such effects, and thus established an execution lien.—See Story on Partnership, § 358, and particularly on p. 509; *Reese & Hayden v. Bradford*, 13 Ala. 836.

The lien, which is sometimes spoken of as the equity or lien of the creditor, is in fact that of the surviving partners, to enable them to pay the partnership debts and to reimburse themselves for advances made in and about the partnership business.—See authorities, *supra*.

The only right of the partnership creditors is to be subrogated to this lien of the surviving partners, and this equity of the partnership creditors is to be worked out (as it is quaintly said) through the equity of the surviving partners.

Whenever the surviving partners have, by any act performed in good faith, lost their lien, the supposed equity of the creditors is gone.—See authorities, *supra*, and *Kimball v. Thompson*, 13 Mitc. 283; *Coffin v. McCullough*, 30 Ala. 107.

The last payment of $9,000 became due, and was paid after the death of W. E. Offutt. One-half of this balance was the individual debt of R. H. and the other was the individual debt of W. E. R. H. was the surviving partner, and was the executor of the estate of W. E. Offutt.

He paid this balance, thus paying $4,500 for and on account of the estate of W. E. Offutt. Now, concede that it is clearly proven that R. H. Offutt paid this sum out of the assets of the partnership, what follows? It is simply using $9,000 of partnership money, in which he and his brother were equally interested, to pay his individual debt and that of his brother's estate. Did he in good faith make this payment? Did he thus voluntarily and in good faith convert the partnership assets, which were joint funds, into the separate property of each? If he did this, he, R. H. Offutt, could never afterwards assert any lien on the assets of the partnership thus voluntarily and in good faith invested in real estate belonging to his brother's estate.—*Coffin v. McCullough*, 30 Ala. 107; see the authorities before cited.

The creditors' *quasi* lien, to be worked out through the surviving partner on partnership assets, never exists until the *dissolution* and *insolvency* of the partnership. And any assignment of partnership assets, made *bona fide* before said dissolution and insolvency, would convert the joint, *i. e.* partnership property, into separate property, and such conversion removes it from the operation of the lien.—See note *g* to p. 346, Parsons on Partnership, and the long list of authorities cited therein.

If R. H. Offutt could not file his bill against his brother's estate, to assert a lien on the joint assets so converted into separate property—if he could not file his bill against the real estate in the hands of his brother's heirs and personal representatives, and have a lien and trust declared on it, the creditors of the partnership, who must work out their equity through him, cannot assert any right to relief against said real estate.

He could not do so, because at the time he did so there is no pretense that the partnership was insolvent; and because he voluntarily paid an individual debt of his brother, and because the payment on account of his brother's estate was not any advance made by him on account of partnership transactions.

At the time R. H. Offutt paid the money to Knox there

is no pretense that the partnership was insolvent. At the time R. H. Offutt paid Knox the balance due for the real estate, the partnership was amply solvent. This assignment to his brother's estate was *bona fide*, and converted what had been joint assets of the partnership into the separate property of W. E. Offutt's estate. And this assignment or conversion, having been made whilst the partnership was solvent, removed the property thus converted or assigned from the operation of every lien of the surviving partner or of the creditor. The lien never attached, because the assets had become the separate property of W. E. Offutt's estate before the insolvency of the partnership. See *Coffin v. McCullough*, 30 Ala., *supra*, and other authorities, *supra*.

It may be said that such result would work injustice to the partnership creditors. But this is only seemingly so; really there is no injustice. The estate of the deceased partner is liable to the partnership creditor, either in equity or at law. In Alabama it is liable both in law and equity. See § 2538 of Revised Code; *Waldron, Isley & Co. v. Simmons*, 28 Ala. 629.

It is not alleged or pretended that the estate of W. E. Offutt was or is insolvent.

If the complainant has lost his right to proceed directly against the estate of W. E. Offutt, he has lost it by his own neglect in failing to present his claim within the time required by law, and by failing to sue the estate either in law or equity until the statute of limitations completed a bar.

This bill is not framed with a view to assert or claim any personal liability against the estate of W. E. Offutt. It is a proceeding *in rem*, and no decree *in personam* could be rendered against the administrator of W. E. Offutt under it, even if it did not show on its face that such relief is barred by the statutes of both limitations and non-claim.

II. The equity of complainant's bill, and his right to have any decree, are dependent and predicated upon the establishment of three propositions:

1st. That his claim is a partnership debt.

2d. That the real estate sought to be condemned is either in part or whole the property of the partnership, or that the estate holds in trust for the partnership creditor the $4,500 of partnership assets used by the surviving partner in paying for the real estate; and

3d. That his partnership claim cannot be collected, and could not have been collected, by remedy at law, without subjecting this land to its payment.

Do the pleadings and proofs show that the complainant's claim is a partnership liability?

R. H. Offutt, one R. B. Hamilton and Scott are the only witnesses examined by complainant.

Scott and Hamilton swear that they shipped in May, 1860, certain pieces of bagging, to be sold on commission. Neither Scott nor Hamilton swear when this bagging was received, nor whether it was received by the firm during the existence of the partnership, viz., before the death of W. E. Offutt, on or before the first of September, 1860. The time of shipment makes but little matter, except so far as it may tend to show that the bagging was received by the firm before its dissolution by the death of W. E. Offutt. If the bagging was not received before the death of Wm. E., no liability arising out of the sale of the bagging could be a partnership liability.

The only evidence as to the time when the bagging was received in Montgomery is that of R. H. Offutt. He swears that it was received in the fall of 1860. If this be correct (and he is the only witness who testifies as to the time of the receipt of the bagging), then the bagging, though shipped in May, was never received in the lifetime of W. E. Offutt, and consequently was not received in Montgomery while the partnership was subsisting.

It matters not what has been done by R. H. Offutt. Or he may have supposed that, as the bagging was shipped to the firm, it was a partnership matter. But his opinion, or his act in selling, or in making the note of $1,045 04 on the 1st of January, 1861, four months after the dissolution of the partnership, and signing the firm name to it, could not legally make it a partnership transaction. He had no

right, after the dissolution, to create any new liability on the firm, and could not renew in the firm name the obligations of the partnership.—See 12 Ala. 714; 17 Ala. 145; 37 Ala. 436; 41 Ala. 222.

On the foregoing facts, the claim of the complainant, so far at least as the $2,347 20 account is concerned, ought not to be sustained even against R. H. Offutt.

But suppose this bagging was received before the death of W. E. Offutt and was not sold, but remained on hand at his death, unimpaired by any act of either partner, could the firm be held liable for its value, or for the proceeds of a sale which took place after the dissolution, by death, of the partnership? The death of bailor or bailee puts an end to the relation of bailor and bailee, principal and factor, as well as that of partnership.—See Story on Bailment, § 202; Story on Agency, § 490; Merrick's Estate, 8; Watts & Serg. 402. If the bagging remained on the first of September, 1860, unsold and uninjured, could not Scott have directed the bagging to be reshipped to him, or could he not have directed the surviving partner to deliver to some other person? He certainly could. So far as the proof shows, no advances had been made by R. H. & W. E. Offutt before the death of W. E. Offutt. They therefore had no lien or special property therein on the death of W. E. Offutt. The bagging was therefore subject to the order of the bailor.—See Merrick's Estate, 8; Watts & Serg. 402, and authorities, *supra*.

If a bailor ship goods to two or more partners to be sold on commission, and one die before anything is done, this ends the relation. The bailees have a personal trust to perform, and this trust cannot legally be performed by less than the whole, without the consent, express or implied, of the bailor.—See Story on Bailments, § 202; Story on Agency, §§ 488, 490.

Elmore & Gunter, *contra*.—1. Parsons on Partnership, p. 342, *et seq.*, says: "There are two entirely distinct, and indeed opposite ways of viewing a commercial partnership. One of them regards it as a modified tenancy in common;

the other, as a modified corporation. * * * Exactly so far as a partnership is a tenancy in common, it has no existence as a body by itself, and has no property, and no debts or creditors. Just so far as it is a corporation, it has an independent existence, and its own property, and its own debts."

The principle, now firmly established, that partnership assets are to be separately administered, and that partnership liabilities are preferred claims, (*Emanuel v. Bird*, 19 Ala. 596; Parsons on Part. 345, note *f*,) is founded directly on the idea of "an independent existence in the partnership."—Parsons on Part. 344.

A creditor of a corporation, or of an individual, or of a partnership, has a natural equity to have all the assets of the debtor subjected to the payment of his debt.

Neither is this right dependent upon a dissolution and insolvency, for, as stated by Mr. Parsons, it is difficult to imagine how either could create a lien or right; but is a right arising with the creation of the debt itself.—Parsons on Part. 342–50; Coll. on Part. § 578.

2. The *gravamen* of this bill is the claim founded on the judgment, and the matters antecedent to it are averred by way of inducement only, to show the character of the debt on which the judgment is rendered. It is only in the statement of material allegations that a variance can be taken advantage of.—*Paulding v. Lee & Ivey*, 20 Ala. 768–9. And objections curable by amendment should not be allowed in the appellate court unless taken below.—*Andrews v. Hobson*, 23 Ala, 232.

3. This is not a proceeding against any persons *as distributees* to make them refund assets received from their intestate's representative, as such, for the purpose of paying a debt of the deceased. The bill is to subject assets belonging to R. H., as survivor of the firm of R. H. & W. E. Offutt, which have passed, contrary to law, into the hands of third persons, who are volunteers. The grounds of equitable jurisdiction are a judgment and return of no property against said R. H., and his insolvency, and that the assets we seek to subject can not be reached at law.

The mere fact that the *volunteers* happen to be distributees of the estate of the deceased partner does not give them any right to stand in the way of the full assertion of our remedy for the collection of our debt out of the survivor and the partnership assets.

The estate is in the hands of the administrator; so the principle on page 52 of 4th Porter, and 16 Ala. 548, can not be invoked.

4. The judgment against any survivor is always against him *individually*. There is no other way of rendering judgment. And it is a well established rule of pleading, that "there is not any occasion to make any distinction in the declaration on account of the sources of the debts."—See the law fully on this point in 4 Robinson's Practice, 500, 501; 1 Chit. Pl. 50. The partnership, at law, on the death of William E. was merged in R. H., the survivor; the assets and debts became his, at law. And a judgment against him individually, after the death of the other member of the firm, is the only judgment which could be rendered at law which would enable the creditor to reach partnership assets. But, of course, in the administration of the partnership assets it would be competent, especially in a court of equity, to look behind the judgment to see upon what it is based.

5. Admitting that R. H. Offutt had turned over to the heirs of his brother, free from any claim by him, the real estate mentioned, would such an assignment, without a valuable consideration, and even with a valuable consideration, if made with the known intent to prefer individual to partnership creditors, or to defeat partnership creditors, be sufficient to prevent our following it? It is admitted that any *bona fide* transfer of partnership property before the accrual of a lien will prevent the partnership creditor from following it. Such is the case of *Coffin v. McCullough*, 30 Ala. 107. If this were not so, a partnership could never deal with its property until every debt had been paid.

But there never can be a *bona fide* transfer, or assignment, without a sufficient legal consideration to make the transferee a *purchaser* in the eye of the law. And a per-

son can never be a *bona fide* purchaser who has notice, actual or constructive, of the use of trust funds for an improper purpose. If this were not so, partnership creditors, who gave credit on the faith of the firm assets, would generally find before rendition of judgment that there had been a *bona fide* division or diversion of the firm property. The rule is, as stated in *Coster v. Bank of Georgia*, 24 Ala. 59, that the property of the firm is pledged in equity for the payment of the debts of the firm, and, as mentioned in Parsons on Partnership, 353, that "the partner himself is wholly without the right of appropriating to himself in severalty anything whatever which belongs to the common stock. All the partners together can not do it, if it be needed for the payment of the debts."

It would be most unreasonable to hold, that a partnership creditor is necessarily to be concluded by the act of the partners, one, or all; and that they can always raise an estoppel against him by raising one against themselves. As a partnership creditor, we do not claim that we have any lien until our lien is reduced to judgment. But we say that our rights against a partnership are the same as those against an individual, or against a corporation; in either of which cases we are permitted to follow the assets of the debtor until the equity of some *bona fide* holder for value shuts us off. And in the absence of such *bona fide* disposition for value in the due course of trade, no estoppel against the debtor can hinder the creditor. It is an every day occurrence for separate creditors of partners, who have received payment out of firm assets, to be made to refund. And how can the estate of a deceased partner stand in any better position? Can any one pretend, that notwithstanding the law in the administration of partnership assets gives a preference to partnership creditors, a devotion of the firm assets by the survivor to the payment of individual debts will be a lawful administration? The incorrectness of the theory that creditors' rights have to be worked out through the lien of partners, is fully shown in Parsons on Partnership, page 342, *et seq.*

The appellants contend that the judgment is rendered

on a note given, and an account stated, after the death of William E., and that, *therefore*, it is no charge against the firm assets in the hands of the survivor.

We take it to be clear and undisputed, that if on our judgment firm assets, in the hands of the survivor, could lawfully be taken in satisfaction, the character of the judgment is such that the same assets may be followed where there has been a mal-administration of them, as in this case.

During the existence of the partnership, or after dissolution, otherwise than by death, a creditor, to get at the partnership assets, must sue all the members of the firm, (we speak of rules at the common law). The judgment rendered is conclusive upon all, and is a personal charge upon each member, and upon his estate. The creditor can have either joint or several executions, which can be levied on joint or several property.—*Ex parte Ruffin*, 6 Vesey, 126.

The authority to bind the firm *as persons*, and the *firm assets*, after dissolution, except in case of survivorship, is the same; for, the firm assets can not be reached unless all the partners are sued, and a judgment obtained is personally binding upon all. In a suit against a partnership after dissolution, a judgment could undoubtedly be obtained if the plaintiff proved an admission by each defendant that the debt was correct; for every admission by a person, against his interest, is evidence against him, and, each one having concluded himself, all the members are bound in the same manner as if they had each joined in a new note for the partnership liability, which still remains a firm debt.—16 Ala. 453; 31 Ala. 230.

So, that though after a dissolution the power of each partner to bind the other members and their estates by admissions is at an end, each member may, nevertheless, conclude himself and the interest he represents in the partnership assets. And if all liable to be sued, severally admit the same account, or sign a note, after dissolution, suit may be brought thereon, and the judgment can be satisfied out of firm assets.—31 Ala. 230.

In case of a dissolution by death, the survivor is, in law,

not only the representative of his own interest in the firm, but also of the entire partnership assets.—*Marlow v. Calvert*, 18 Ala. 67; Par. on Part. 440–41.

The creditor seeking to charge the firm assets has only to deal with him, and with him only as an individual. The whole legal liability and all of the assets of the firm at law belong to him; and the judgment against him for firm debts is precisely in the form of one on any debt in which the partnership never was interested. Now, whatever is evidence against him, he being the only possible party to the suit, of course, is sufficient for the pleader. Any admission, whether written or verbal, does not change or vary the liability, for it is *sole* before and afterwards; and any judgment that may be rendered in no way concludes the estate of the deceased as to the character of the debt, or imposes on it any personal liability. For, if the survivor pays a debt which was in fact not a partnership liability, he will not be allowed a credit for it on the settlement of the accounts; and if he suffers a judgment, and firm assets are sought to be charged in the hands of the representative of the deceased, the creditor is bound to show *aliunde* that it is founded on a partnership liability.

It is clear, therefore, that the reason of the rule, above stated, that the several partners, after dissolution, have no authority to bind the estates and persons of the other members, has no application in the case of a survivor. *Cessante ratione, cessat ipsa lex.*

The absurdity of the position, that a survivor can not state an account, is obvious; for every account must be stated before it is paid, and if the former power is taken away, the latter is gone. And why should the survivor be required to make the creditor, at great expense, to be paid in the end by the partnership assets, litigate and establish a claim known and admitted to be correct, when, no matter how fiercely contested, the judgment would only be binding upon the parties, to-wit: the creditor and the survivor—there being no law providing for the representative of the deceased taking part in such suit.

The confusion in this matter arises from not keeping

clearly in the mind the distinction between the debt and the evidence of the debt; and from not remembering that the proceedings between the creditor and the survivor are, as to the representatives of the deceased partners, *res inter alios acta*. It is to debts, and not to the evidences of them, that rights appertain, and these rights are not lost on account of the difficulties in showing the identity of the debts.

And it is absurd to say that the creditor's rights, or the pleadings against the survivor, are to be determined, in any manner, by a thought of the representative of the deceased partner, who is not a party, and is not concluded in any manner by the judgment, or by its payment. The only way in which a creditor can reach the partnership assets, after a dissolution by death, is to litigate with the survivor, who, in the absence of proceedings restraining or removing him from authority, is held out to the world as the proper party to deal with. His position is different from that of an ordinary trustee; it is not necessary to declare against him except as an individual, and the judgment and execution are against him merely as an individual. The creditor's right of action, by the death of one partner, has become sole against the survivor. To say, now, that the survivor, who has been invested with this sole authority to settle the business, may pay debts, but can not admit them to be due; and that assets, in equity pledged for the payment of the debt, are not liable for the payment of the judgment merging the partnership liability, because, in one of the stages of the debt, between an open account against the survivor, and a judgment against the survivor, it had the shape of an account stated by the survivor, or of a due bill given by the survivor, or because the pleader forgot to declare as well on the open account as on the due bill, seems very ridiculous, to say the least.

It can make no difference to any one, but the survivor, upon what evidence the judgment is rendered against him. If it merges a partnership liability and is against the only person who could have been sued, and is in the only form

authorized by law, there can be no reason for impeding the creditor in his efforts to get at assets in equity pledged for his payment.

7. The question, whether or not this judgment is entitled to have in equity a dividend as a partnership liability, is to be determined by the nature and origin of the claim. If the law had provided any special form of pleadings in suits against survivors of partnerships, and the form of a judgment, as in case of administrators, directing a levy of particular assets, then the judgment would, in the absence of fraud, be as conclusive of its character on the survivor and the partnership assets, as is a judgment against an administrator that it is a charge on the assets of the estate. But the judgment against the survivor is always personal, and only authorizes an execution *de bonis propriis*, in which character, at law, the goods of the partnership are held. It is only in equity that any distinction is taken between the assets of the firm in the hands of the survivor and his individual property. And the only purpose of ever mentioning in a declaration against a survivor, that another person, "since deceased," was concerned in the transaction, is to enable the defendant to know with greater certainty what claim he is to defend.—1 Bar. & Ald. 29.

The liability of the survivor is sole, and the judgment is, and can only be, against him individually.

In the absence of fraud, however, a judgment against a survivor can no more be impeached by the representatives of the deceased partner on account of the nature of the proof offered on the trial, than can a judgment against an administrator be required to be re-established to the satisfaction of the distributees.

But, when a judgment creditor claims that he has an equity against particular assets, he must, in the case of a survivor, be prepared to show *aliunde* that his debt belonged to the class to which that right appertains.

The question relates merely to the nature, origin and consideration of the debt, in order that the court may class it; the correctness of the judgment itself, in a direct proceeding for its enforcement, can not be questioned by any

person, in the absence of fraud. Admitting the judgment to have been properly rendered, and upon ample proof, the inquiry is confined to the single point, whether the plaintiff's claim originated in partnership transactions, or not.

The respondents admit that the judgment is upon the claims mentioned in the bill of complaint. The claims mentioned are those arising out of the shipment of goods by the plaintiff, in the early part of 1860, from Lexington, Kentucky, to the firm of R. H. & W. E. Offutt, at Montgomery, Alabama. There had been previous dealings of a similar character, and the character of them is indicated, in some degree, by the fact that there was a cash payment on the consignment. Offutt states that something had been paid on the goods. And Scott states the date and the amount of the payment, and the execution of a note by the firm; thus showing privity by the firm and its approval of the transaction, long before the death of William E. Offutt.

The idea that goods shipped in April from Lexington, Kentucky, to Montgomery, Alabama, did not reach their destination until the fall of the year is sufficient to show the loose manner in which the word "fall" is used by the witness R. H. Offutt. It is evident, however, from the time of the shipment, and the general statements of R. H. Offutt's deposition, that the goods were received before the death of William E. But it is not necessary that such should have been the case; for the inception of the contract, and the transfer of the possession, does not date from the reception of the goods by the consignee, but from the shipment, if made in pursuance of an agreement, or, from approval and ratification of it, if made without previous agreement.—3 Par. on Contr. 261, note *w*, and authorities there cited.

The depositions of Scott, Hamilton, and Offutt, all show that the transaction was with the firm, and that all parties interested so regarded it. The renewal of the note for $1,045.94 in 1866, by the survivor, is even signed in the firm name. It is plain that the goods were sent to the firm; that the latter assented to the same, and acknowledged its

liability therefor by making advances thereon, and undertaking the sale of the goods; and, in the absence of all evidence, the court is authorized to presume consent to a general consignment.—*Tompkins v. Wheeler*, 16 Pet. 106; *Brooks v. Marbury*, 11 Wheat. 96.

The estates of individuals are not relieved by death from liability for continuing contracts.—*Moore v. Wallis et als.*, 18 Ala. 458. And the survivors of a partnership have authority, and are in law bound, to complete in the name of the firm all unfinished business and unexecuted contracts. *Calvert v. Marlow*, 18 Ala. 67; Par. on Part. pp. 388–89, 392–3–4, 440–1; Coll. on Part. § 546.

On page 394 of Parsons on Partnership, above cited, it is said: "No dissolution of any kind affects the rights of third parties who have had dealings with the partnership, without their consent. This is a universal rule, without any exception whatever." And on page 392 it is said, the settling partner may, after dissolution, sell goods consigned to the firm before dissolution—citing *Heberton v. Jepherson*, (10 Barr, 124,) which more than covers this case.

PECK, C. J.—The first question that seems to arise on this record is, how is the real estate purchased of Knox and wife by Richard H. and William E. Offutt to be regarded? Did it belong to these parties as individuals, as tenants in common, or did it belong to them as partners, and, therefore, in equity subject to the payment of the partnership debts?

The rule undoubtedly is, that real estate purchased for partnership purposes, and paid for with partnership funds, becomes partnership property, and as far as the creditors of the firm are concerned, and for the payment of their debts, it is, in equity, to be regarded and treated as belonging to the partnership, as assets of the firm. It is immaterial to whom the legal title may be conveyed—whether to the partners by name, as individuals, or to one of them, or to a third person.—Parsons on Partnership, 364.

In the case of *Lang's Heirs v. Waring*, 25 Ala. 639, the court say: "After much vascillation by the English courts,

the doctrine may now, perhaps, be considered as settled, that, unless there is something in the articles of copartnership, or some agreement by the parties, real estate purchased with partnership funds, for partnership purposes, is, in a court of equity, converted and treated as personalty, and, therefore, goes to the personal representatives, and not to the heir of the deceased partner." They further say, "While the decisions of American courts generally concur in affirming that such estate is, in equity, chargeable with the debts of the partnership, and with any balance there may be due from one partner to another, there is much conflict among them as to whether the surplus, in case of the death of a partner, shall descend to the heir, as real estate, or go to the personal representative for distribution."—See, also, Story on Partnership, § 93.

It is unnecessary for us to resolve the doubt that seems to exist as to what shall be done in such a case with the surplus that may remain after the payment of the partnership debts, whether it shall be regarded as real or personal property. It seems to us, however, that the better opinion is, that it is to be treated as real property, and to be disposed of as such.

By looking at the deed of Knox and wife, a copy of which is made an exhibit to the complainant's bill, we see that this real estate consists of two lots in the city of Montgomery, and was purchased on the 24th of March, in the year 1859, at the price of $30,000, and was conveyed to said Richard H. Offutt and William E. Offutt; but at the time of the purchase said parties were, and for some time before had been partners, doing a grocery and commission business in said city of Montgomery, under the firm name of R. H. & W. E. Offutt; that said partnership continued to the 1st of September, 1860, when it was dissolved by the death of said William E. Offutt; that before this event all the purchase money had been paid except $9,000, and for that sum the said Knox held the note of said firm, which was afterwards paid by the surviving partner, R. H. Offutt.

There is no positive evidence for what purpose this real

estate was purchased, or with what funds it was paid for. The bill states there was a store-house on said premises, which, after the purchase, was occupied by said firm as a *business stand;* and this is admitted by the answer of the respondents, Charles L. Offutt, L. A. R. Switzer, and the administrator *de bonis non*, &c., of said William E. Offutt, deceased, Andrew J. Noble. It seems to us, therefore, the fair inference or presumption is, that this property was purchased for partnership purposes, and, also, that it was paid for out of the partnership funds. If not, why had the note of the firm been given for the $9,000 that remained unpaid at the death of said W. E. Offutt? The said R. H. Offutt, who was examined as a witness, says "the purchase was made partly for cash and partly on a credit. The last of $9,000 remained unpaid at the time of the death of William E. Offutt, and was subsequently paid to William Knox, or his order. I do not recollect at what time it was paid. The claim was an ordinary negotiable note, signed by R. H. & W. E. Offutt." It does not appear that these parties had any property outside of the business of the firm, or that did not belong to the firm.

If this is a correct view of the transaction, as we think it is, then, on the death of the said W. E. Offutt, in equity it vested, with all the other partnership property, in the surviving partner, R. H. Offutt, who thereby became entitled to the exclusive right of possession and management of the same, but only for the purpose of closing up the partnership business, and paying the partnership debts, &c. In equity, he held the property in trust, first, for the payment of the partnership debts, and then for those who might be entitled to what remained, whether as heirs or personal representatives of the deceased partner, or otherwise.—Parsons on Part. 364, 440.

Was the debt of the complainant upon which he recovered his judgment against the said R. H. Offutt, the debt of said firm of R. H. & W. E. Offutt, or the individual debt of said R. H. Offutt? and if the debt of said firm, had the complainant exhausted his remedy at law against said firm before the filing of this bill?

1st. The bill states that said debt grew out of shipments of bagging, rope and twine, made in Lexington, Kentucky, in the latter part of April and the early part of May, 1860, which were consigned to said firm, in Montgomery, Alabama, to be sold on account of the shippers; that one R. B. Hamilton made one of said shipments, and that the other shipments were made by complainant.

The evidence, however, shows they were all made in the name of the complainant, but that said Hamilton had some interest therein, which was afterwards assigned to complainant.

These shipments, if they were received by said firm before the death of said W. E. Offutt, whether sold in whole or in part, or remaining on hand at the time of his death, constituted a legitimate part of the business of said firm, and, therefore, for the purpose of winding up the business of the firm, might be sold by the said R. H. Offutt, as surviving partner, and when sold the claim of the complainant on account thereof was properly against the said firm, and not against the survivor as an individual; and being a claim against the firm, it was the duty of the survivor to render an account of the same to the complainant, and after deducting the usual commissions, or such as might have been agreed upon between the parties, to have paid the remainder to the complainant. A surviving partner, in winding up the business of the firm, is a trustee for all persons interested in the partnership, for the creditors of the firm, for the representatives of the deceased partner, and for himself; and his trust being to wind up the concern, his powers are commensurate with the trust, and, generally, whatever he may do in that behalf is valid, if honestly done, and within the fair scope and purpose of the trust. If there be negligence, delay, misconduct, or gross mistake, equity will interpose to give the proper relief.—Parsons on Part. 440–443.

In the absence of satisfactory evidence to the contrary, it is to be presumed these shipments were received within the time then required to transport such goods from Lexington, Ky., to Montgomery, Ala., in the usual course of

trade and of commercial intercourse between these places; that is, within a reasonable time. The said R. H. Offutt, in his deposition, says they were received in the fall; but we think it manifest he uses the word "fall" in a very loose manner, and without the intention to convey the meaning that they were, in fact, received after the death of his brother, the said W. E. Offutt, which happened early in September, 1860, after said shipments were made. In speaking of the dissolution of said firm by the death of said W. E. Offutt, and when it ceased to do business, he ssys it was dissolved by the death of William E. Offutt, that it ceased to do business in the fall of 1860; and speaking of the shipment of said goods, he says, "I recollect the shipment to said firm by said plaintiff; the shipment was received in the fall of 1860." This evidence certainly does not prove the said goods were received after the dissolution of said firm by the death of W. E. Offutt. The time between the date of the last shipment, the 8th day of May, and the death of said W. E. Offutt, if it happened on the 1st day of September, thereafter, is 114 days. It seems to us unreasonable to believe, on such evidence, knowing, as we do, the facilities of transportation between the two places at that time, that 114 days elapsed between the shipment of said goods and their arrival at Montgomery. We think it far more reasonable to believe they reached their place of destination before the expiration of half that time; therefore, we feel constrained to believe, and hold, that said goods were received by said firm before the death of W. E. Offutt, and that the complainant's debt, arising out of their sale, whether made before or after the dissolution of the firm, must be regarded as the debt of said firm, and, therefore, should be paid out of the assets of the firm.

The character of this indebtedness was not changed, nor the liability of the firm to pay the same was not released, by the settlement that was had between the said R. H. Offutt, as surviving partner, the said Hamilton and the complainant, in New Orleans, in February, 1866. The said Hamilton, in his deposition, expressly states that such was

not the intention of himself or of the complainant, and the inference is that such was not the intention of said R. H. Offutt, as he then renewed the note that had been given to the complainant on the first day of January, 1861, for $1,045 94, in the name of the firm, on account, in part, of said goods, and then, or shortly afterwards, rendered to complainant an account of sales, showing the firm was indebted in the further sum of $2,347 20.

2d. Had the complainant exhausted his remedy at law against the firm before the filing of this bill? His only remedy at law against the firm was by suit against the surviving partner.—Parsons on Part. 447; *Murray v. Mumford*, 6 Cowen, 441; 1 Ch. Pl. 50. Such suit had been brought, judgment recovered, and an execution on said judgment returned by the sheriff, "no property found." This was the end of his remedy at law against the firm, and it had proved unavailing. The only remedy left was in equity, to subject this real estate to the payment of his judgment. Equity, notwithstanding the form of the conveyance, regards it as the property of the firm, and equity only can appropriate it to the payment of the debts of the firm.

On the part of the respondents, Charles L. Offutt, L. A. R. Switzer, and the administrator *de bonis non*, &c., it is objected, that said suit was brought and the judgment rendered against said R. H. Offutt, not in his character of surviving partner, but as R. H. Offutt individually, and that, therefore, said judgment did not in any way affect the partnership or the partnership property; and as to said respondents, it proved nothing, except its own existence as a judgment against R. H. Offutt, but did not prove the complainant had exhausted his remedy at law against said firm. This objection can not prevail. On the death of said W. E. Offutt, the complainant's only remedy at law against the firm was by suit against the surviving partner. Such a suit may properly be brought against the surviving partner, without any reference to the partnership, or that the defendant is sued as surviving partner, (*Goelet v. McKinstry*, 1 Johns. Cases, 405; 1 Ch. Pl. 50;) and an execution issued

on a judgment so recovered may be levied, not only on the individual property of the defendant, but also on the personal property of the firm; consequently, the complainant's judgment in this case, and the return of the execution issued on it "no property found," not only proved the complainant had exhausted his remedy at law against the firm, but that the surviving partner himself was insolvent. Neither can the objection of the statutes of non-claim and of limitations, interposed by said respondents, be sustained. The object of the complainant's bill in this behalf is not to obtain a personal decree, or to enforce a liability against the personal representative of the deceased partner, but to enforce the trust alleged to exist in favor of the complainant, as a creditor of the said firm, against the real estate of the partnership, his remedy at law against the firm having been exhausted.

This real estate being a trust fund for the payment of the debts of the firm, and the complainant a creditor of the firm, with his remedy at law exhausted, equity will decree the payment of his debt out of said real estate, whether it be in the possession of the surviving partner, or in the possession of the personal representative or the heirs of the deceased partner. Until the debts of the firm are satisfied, neither the personal representative nor the heirs of the deceased partner have any beneficial interest in the real estate of the partnership; but after they are paid, what is left becomes the property of the surviving partner, and the personal representatives or heirs of the deceased partner discharged of the trust.—Parsons on Part. 372, 441, and note *p*.

The respondent Ray, in his answer, claims that as to the half interest of the surviving partner, R. H. Offutt, in said real estate, he is a *bona fide* purchaser for valuable consideration, without notice, and therefore entitled to hold it against the equity of the complainant, as a creditor of the firm. This, on the hearing, was conceded by the complainant's counsel, and they admitted that, as to said half interest, the complainant was entitled to no relief.

The bill, as to said respondent, was therefore properly

dismissed. As to the remaining half interest, that is, the interest of the estate of the deceased partner, we see no reason why it should not be subjected to the payment of the complainant's debt. The fact that it had passed into the possession of the deceased partner's administrator, with the permission of the surviving partner, and that he and the respondent, R. H. Offutt, as heirs of the said W. E. Offutt, had assigned their interest in the same to the respondents, Charles L. Offutt and A. L. R. Switzer, who are also heirs of said W. E. Offutt, and that a partition had been made between said respondent Ray and said Charles L. Offutt and A. L. R. Switzer, and said administrator, it seems to us, can not defeat the complainant's equity as a creditor of the firm. As far as appears, the said assignment was a mere voluntary assignment, without consideration, and as the surviving partner, from whom the said administrator obtained the possession, held it as a trustee for the creditors of the firm, his possession can stand upon no better equity than the possession of the person from whom he received it, without paying anything for it. It still remains trust property, and equity will appropriate it to the purposes of the trust.

As to the alleged variance between the statements of the bill and the proof, it seems to us said variance is insufficient to prevent a decree in favor of the complainant. It could hardly have operated as a surprise to the respondents, and we do not see how they are prejudiced or injured by it, and if not suprised or injured by it, then it should be regarded as an immaterial variance.—*Lock's Executor v. Palmer*, 26 Ala. 312; *Chapman v. Hamilton*, 19 Ala. 121.

The chancellor decreed that the complainant was entitled to relief, out of the half interest of said real estate not conveyed to said respondent Ray, to the extent of one half of the amount of the partnership assets of $9,000 used by said R. H. Offutt, after the death of said W. E. Offutt, in payment for said real estate, and interest thereon, from the time the administrator, respondent Noble, commenced receiving the rents and profits of the same. The reasons of the chancellor for limiting his decree by the amount of

the assets of the firm paid for said real estate, after the death of said W. E. Offutt, and subjecting the interest of the estate of the deceased partner in the same to one half of that amount only, with interest thereon from the time the administrator commenced receiving the rents and profits on said real estate, are not stated in the opinion; whatever his reasons may have been, it seems to us there is no error in the decree on that account of which the appellants can complain. The complainant certainly gets no more by it than he is entitled to.

The decree is affirmed, at the costs of the appellants.

JORDAN vs. COBB ET AL.

[ACTION ON PROMISSORY NOTE.]

1. *Promissory note; what sufficient consideration for.*—M., in March, 1863, having purchased property of R., gave him in payment an order, payable in Confederate currency, on C., who was M.'s debtor. C. took up the order, giving therefor his promissory note to R.,—*Held*, that the note was neither illegal, nor without consideration.

APPEAL from Circuit Court of Lee.
Heard before Hon. LITTLEBERRY STRANGE.

REESE, on the 19th day of March, 1863, sold to McElhany an interest in a distillery, Reese receiving in payment therefor an order, drawn by McElhany in favor of Reese upon appellees, for "$1,100 00 in Confederate currency." At the date of the order, as well as at the time of the trial, appellees were indebted to McElhany in a note given by them in 1861 for a good and legal consideration; but not being able to pay the order on presentation, appellees executed to Reese their promissory note, payable one day after date, and took up the order. The order was drawn on appellees without consulting them, and there was no

express understanding that their indebtedness should be credited with the amount of the order. Appellees' indebtedness to McElhany had not been settled, nor had they ever borrowed any Confederate currency from Reese.

Reese transferred the note after maturity to Jordan, who brought this suit. On the trial, the court charged the jury, in substance, that if the note sued on was given for the order, then the plaintiff was not entitled to recover. The court also charged the jury, that a payment by defendants of the order would be no protection to them if sued on their indebtedness by McElhany. The plaintiff duly excepted to the giving of each of these charges, as well as to the refusal of the court to charge the jury that they should find for the plaintiff if they believed the evidence.

In consequence of the ruling the plaintiff took a nonsuit; &c., and now moves to set aside the same.

The errors assigned are the charges of the court and the refusal to give the charge asked.

STONE & CLOPTON, for appellants.

W. H. BARNES, *contra*.—The note in this case was given upon the consideration of an order from McElhany to pay so much Confederate money; the order was illegal, as it was to pay and deal in an illegal and insurrectionary currency, and the order, which was the consideration, being illegal, the note given in the place of the Confederate money was only for Confederate money, and has no other consideration but the Confederate, that being illegal and void as against public policy, cannot be enforced by the courts. The note is founded on the order for Confederate money. The note is an executory contract, given and founded upon an illegal consideration, and the court will not aid in its collection.

PECK, C. J.—The evidence disclosed in the bill of exceptions does not show that the note described in the complaint was given without consideration, or that the consid-

eration was illegal. The order on the defendants for $1,100, payable in Confederate currency, was of some value to the payee of the note, and its surrender to the defendants was a detriment to him. The order was given to him for an interest in a distillery sold by him to the drawer of the order, and if it had been protested he might have recovered of the drawer the value of so much Confederate currency at the date of the order, or the value of the interest in the distillery sold by him to the drawer.

This court has decided that a note given for *a loan of Confederate currency* is void, (*Hale v. Huston, Sims & Co.*, 44 Ala. 134,) but a note payable in such currency, *given for property purchased*, is not.—*Herbert & Gessler v. Easton*, 43 Ala. 547. The evidence does not show that the giving of this note was not a benefit to the defendants. It was received by the payee of the said order instead of Confederate currency, to accommodate the defendants; the reasonable presumption is, therefore, that they were benefited by it. The charges given by the court are erroneous. The charge asked by the plaintiff is a proper charge, and should have been given.

The judgment is reversed, the non-suit is set aside, and the cause is remanded for another trial. The appellees will pay the cost.

GRACE *vs.* MARTIN.

[ACTION AT LAW AGAINST SURETY OF ADMINISTRATOR ON BOND EXECUTED DURING THE WAR.]

1. *Statute of non-claim suspended during the war.*—The statute of non-claim was suspended in this State from the 11th day of January, 1861, to the 21st day of September, 1865.
2. *Judgment nil dicit against administrator and execution returned nulla bona, conclusive against surety.*—An execution *de bonis intestatis* upon a judgment rendered against an administrator, returned "no property," is conclusive evidence of assets or a *devastavit* against the sureties of the administrator, in a suit upon the administration bond.

APPEAL from the Circuit Court of Tuskaloosa.
Tried before Hon. W. S. MUDD.

The administrator of Peter Martin, deceased, on the 25th of March, 1867, suffered a judgment *nil dicit* to be rendered against him as such administrator on a note executed by his intestate and himself, and payable January 1, 1861. An execution *de bonis intestatis* was duly issued on this judgment, and on July 22d, 1868, was returned "No property found." Thereupon this action was brought against appellee as one of the sureties of the administrator on his bond. The proof showed that said bond was executed by appellee as such surety on the 31st day of December, 1862, and approved by the judge of probate of Tuskaloosa county on that day; that on the same day letters of administration on said estate were granted to the principal in said bond, and after the expiration of eighteen months (but during the war, all the debts against the estate having been paid, except the note here sued on,) the heirs of the estate distributed the property among themselves without any order or proceeding of court authorizing it. It does not appear that the heirs-at-law were of age at the time of the distribution, the record being entirely silent as

to that point. The surety proved that no assets came into the hands of the administrator after the distribution, nor had he any assets in his hands at the time of the rendition of judgment. The note here sued on was not presented for payment until after the distribution aforesaid; but was presented in the latter part of 1865 or in January, 1866, and was filed in the office of the judge of probate as a claim against said estate in January or February, 1866.

The court charged the jury that, "If the jury shall believe from the evidence that letters of administration were duly issued by the probate court of Tuskaloosa county to J. L. Martin as administrator of the estate of Peter Martin, deceased, on the 31st day of December, 1862, and that all the debts against the estate of Peter Martin, deceased, were paid, except the note on which the judgment was rendered in the circuit court of Tuskaloosa county in favor of Francis M. Grace and his wife, Mary J. Grace, for $1,684 28, as stated in plaintiff's complaint; and if they shall further believe that said note on which said judgment was rendered had not been presented to the administrator aforesaid within eighteen months after the grant of letters of administration as aforesaid, then the heirs of said estate had the right, at any time, after the expiration of eighteen months, to divide and distribute the property of said estate among themselves without any order of the probate court for that purpose; and if said division and distribution did take place between said heirs after the said eighteen months had expired, and no assets had come to the hands of said administrator since said division and distribution, and that none were in his hands at the time the suit was brought on the note against J. L. Martin, as administrator as aforesaid, or at the time judgment was rendered thereon, that then the plaintiff cannot recover in this action;" to which charge the plaintiff (appellant) excepted.

The plaintiff (appellant) then requested the court to charge the jury that the suffering of the judgment to be rendered against him by J. L. Martin, as administrator of the estate of Peter Martin, deceased, was an admission of assets in his hands sufficient to satisfy said judgment

which is binding, not only on said J. L. Martin, but on his sureties also," which charge the court refused to give, and plaintiff excepted.

The jury, under the charge of the court, found a verdict for the defendant. The errors now assigned are, 1st. The charge given; and 2d. Refusing to give the charge requested.

HARGROVE & FITTS, for appellant.—The claim against the estate of Peter Martin was not barred by the statute of non-claim, for that statute was suspended until the 21st of September, 1865.—Ord. Const. Conv., Rev. Code, p. 53, Ord. 5, § 2; and that ordinance was not repealed until after rendition of judgment on said claim on 25th March, 1867. Moreover, there was no legal court, from said intestate's death until 1865, in which the people of the State were compelled to have their causes adjudicated.—*Coleman v. Holmes*, 44 Ala. 134. And how could a claim be filed (as provided in section 2241 of the Rev. Code) in the office of the judge of probate, when there was no legal judge of probate? Nor was there any legal administrator during that period to whom creditors were *required* to present their claims.—*Bibb & Falconer v. Avery, Adm'x*, 45 Ala. 691.

But the plea of non-claim, *plene administravit, ne unques administrator*, distribution among the heirs, or any other such plea, comes too late for the surety, when the administrator has suffered judgment *nil dicit* to be rendered against him as such administrator. That judgment is a legal ascertainment of assets sufficient to satisfy plaintiff's demand, and it estops the administrator and his sureties on his bond from denying it afterwards.—*Watts v. Gayle*, 20 Ala. 825; *Lamkin v. Heyer*, 19 Ala. 228; *Holley v. Acre*, 23 Ala. 603; *Kyle v. Mays, use, &c.*, 22 Ala. 692; *Stovall v. Banks*, 10 Wall. 588. Hence, section 2278 of the Revised Code has no application here.

The record must show that the heirs at law were adults, or the distribution was not legal.—*Perryman v. Gue*, 39 Ala. 133; *Carter v. Owens*, 41 Ala. 217.

The charge asked should have been given. It was a clear, legal proposition, and not abstract.—*Watts v. Gayle*, 20 Ala. 825, and authorities cited above.

J. M. MARTIN, and SOMERVILLE & MCEACHIN, *contra*.

B. F. SAFFOLD, J.—The appellant, as a creditor of the estate of Peter Martin, deceased, recovered a judgment *nil dicit* against his administrator, upon which an execution *de bonis intestatis* was returned "no property found." He then brought this suit upon the administration bond against the appellee as surety.

The court charged the jury, that if the note on which the judgment against the administrator was obtained was not presented to him within eighteen months after the grant of letters of administration, and the heirs of the said estate had, after that time, distributed the property among themselves, without any order or proceeding to that effect from the probate court, and that the administrator had received no assets since that distribution, when the suit was brought, and the judgment obtained against him, the plaintiff could not recover against this defendant.

The substance of this charge, as shown by the bill of exceptions, is, that the plaintiff's demand was barred by the statute of non-claim, because it was not presented to the administrator within eighteen months from the 31st of December, 1862, when letters of administration were granted to him. It was presented in the latter part of 1865, or in January, 1866.

The statute of non-claim, like the statute of limitations, was suspended in this State from the 11th of January, 1861, to the 21st of September, 1865. This decision accords with the theory of the decision in *Bibb & Falkner v. Avery*, 45 Ala. 691, with the legislation of the State during the late war, (Acts of 1862,) with ordinance No. 5 of the convention of 1865, and with the decision in *Coleman v. Holmes*, 44 Ala. 124. This being the case, the above charge was erroneous.

The charge asked by the plaintiff, that the recovery of

the judgment against the administrator was a finding of assets in his hands sufficient to pay the judgment binding on his sureties as well as himself, asserted a correct proposition. *Amason v. Nash*, 24 Ala. 279, and other authorities in our reports which seem to be in opposition, are based upon a statute passed in 1826, and found in Clay's Digest, 228, § 34, as follows: "No security for an executor or administrator shall be chargeable beyond the assets of the testator or intestate, on account of any omission or mistake in pleading of the executor or administrator." The Revised Code does not contain any such provision, but by section 2282 an execution *de bonis propriis* is authorized, whenever one is returned "no property" on a judgment rendered against the administrator, as such, in the circuit court. Section 2278 limits his individual responsibility to the amount of assets which have come into his hands, or which have been lost, destroyed, wasted, injured, depreciated, or not collected, by want of diligence on his part, or an abuse of his trust. In all of these cases his sureties are liable, and the extent of their liability to a creditor of the estate is ascertained whenever he entitles himself to an execution against the administrator personally. The administrator is enabled to prevent the rendition of a judgment against him by reporting the estate insolvent to the court specially authorized to determine that issue, or by appropriate pleading. By the common law, an inquiry whether the administrator had committed a *devastavit* or not, either by an action of debt suggesting a *devastavit*, or other proceeding, resulted in an execution *de bonis propriis*, when found against him.

This liability of an administrator to an execution against him personally, seems to be the test of some dereliction of duty, as well under the common law as our statutes, which the bond required by our law was intended to provide against.

The judgment is reversed, and the cause remanded.

[NOTE BY REPORTER.—At a subsequent day of the term the appellee's counsel, Messrs. J. M. Martin, and Somer-

ville & McEachin, applied for a re-hearing, and in support thereof filed the following argument:]

The evidence shows that J. L. Martin, if ever the administrator of Peter Martin, deceased, was such administrator by the grant of letters of a court of probate not now recognized as a court of probate of the State of Alabama; and, therefore, said Martin was, if administrator at all, at most but a foreign administrator; and that he and his sureties are, and be liable, only as parties to a foreign administration. In *Bibb & Falkner, ex'rs, v. Avery, adm'r,* in concluding a similar recital of facts, PECK, C. J., uses the following language: "For these reasons it is, that the judgments and judicial acts of its courts can stand upon no higher grounds than the judgments and judicial acts of foreign courts" (see p. 693); and again, on page 694 the same learned Justice observes, "They certainly were not the judgments and judicial acts of the courts of one of the United States." Again, on page 694, *supra,* we find the following language: "The admitted doctrine, both in England and this country, is, that a foreign executor or administrator can not maintain an action in the courts in either country, in virtue of his foreign letters testamentary or of administration. New letters must be taken out, and new security given, according to the rules of law prescribed in the country or jurisdiction where the suit is brought." And again, on said page 694 the following language is employed: "Usually such new letters are held to be ancillary merely, but under the peculiar circumstances attending such cases, at present, they should be regarded as original." Now, we submit, if J. L. Martin, the administrator aforesaid, could not have maintained an action in the circuit court of Tuskaloosa on the 25th day of March, 1867, the day of the date of the judgment in favor of F. M. Grace, the appellant in this action, against said J. L. Martin, administrator, &c., how could a judgment obtained against him, as administrator as aforesaid, be conclusive of assets in the hands of said Martin, as administrator as aforesaid, in an action against L. V. B. Martin, (appellee

in this action,) in a certain suit, (the one which originated this appeal,) in which he was sued as one of the sureties upon what purported to be a bond, and which, if in truth a bond, was the bond of a foreign administrator? How, indeed, could the action be maintained against appellee, as surety upon said bond? But if that action was properly entertained, we then make respectful inquiry of this court, why it is "new letters must be taken out and new security given, according to the rules of law prescribed in the country or jurisdiction where the suit is brought"? We ask, if security be required because of the probability of assets coming to the hands, thereby, of the administrator, how is it, and why is it, that the foreign administrator's foreign surety is to be dealt with, and held liable for the acts of his principal in a foreign jurisdiction? If such surety be liable, on action, under our local statutes, why demand other, and home sureties, when the estate is to derive benefit from action on the part of such foreign administrator? Is it not true that "equality is equity," and that this benign principle should be operative in all instances where the good of the body politic will not be sacrificed in the interest of the individual?

The principle is settled that an executor or administrator appointed in a neighboring State (that is to say, a *foreign* executor or administrator,) cannot be sued *as such* out of the State conferring his authority.—*Campbell, Adm'r, v. Tousey, Ex'r*, 7 Cowen, 63.

Such foreign administrator or executor can only be sued as administrator or executor *de son tort*, and creditors, through such an administrator, cannot bind the estate.—7 Cowen, 63, and *Campbell v. Sheldon*, 13 Pickering, 8. Besides, our own statute holds (Rev. Code, § 2292) that "no person is liable to an action as executor of his own wrong," except "to the executor or administrator" for the value of all the property which may have come into his hands under a particular state of facts fully specified.

How, we ask, if the principles above enumerated be *law*, could the judgment against J. L. Martin, a *foreign admin-*

istrator, be conclusive against his purported surety, L. V. B. Martin, the appellee?

Again, the undertaking of the sureties is to answer for the acts and doings of their principal within the jurisdiction only of the court granting the letters of administration. This fact is evidenced by the requirement of Revised Code, § 2293, requiring the foreign administrator to record his foreign letters, duly authenticated, and to give a new bond, before he is permitted to execute the functions of his office.

With becoming deference to the opinion of the learned Justice delivering the opinion in this cause, we venture to maintain that the judgment against the administrator was not conclusive against his sureties. To sustain this view of the case, we invite a careful reading, by the court, of §§ 2281 (1922) and 2282 (1923), Revised Code. In the former, execution may issue against the administrator *and his sureties* upon the return of execution (on decree of the probate court against the administrator) "no property"; but in the latter section, upon a like state of facts, the execution can only be issued against the administrator, *personally*. Now, we ask, why provide for issue against the sureties upon return of the execution "no property," in the former, and not so in the latter, if it be true that the judgment of the circuit court be conclusive against the surety? Why render it necessary to sue upon the bond, suggesting a *devastavit* in this instance, when we find the bond required in both instances taken and approved by the same officer? Let us suppose that a decree had been rendered against the administrator in the probate court about the time of the rendition of this judgment in the circuit court, and what would have resulted? In the former, execution being returned "no property" upon the decree, "an execution may issue against such executor or administrator and his sureties;" whilst in the latter a long and tedious litigation is opened up for the judgment creditor in the circuit court. It is true that the statute of 1826, Clay's Dig. 228, § 34, referred to in the opinion of the court in this case, is not incorporated *in his verbis* in the Revised

Code, yet we maintain that the provisions and benefits of it are fully secured by section 2282 (1923) of said Code.

B. F. SAFFOLD, J.—Application for rehearing overruled.

CHAPMAN *vs.* LEE'S ADM'R.

[ASSUMPSIT BY VENDOR, AGAINST ADMINISTRATOR OF DECEASED PURCHASER, FOR UNPAID BALANCE OF PURCHASE-MONEY.]

1. *Agency; sufficiency of complaint, in declaring against principal, on contract of agent.*—In declaring against the principal, on a contract made by the agent in his own name, it is sufficient to allege that the defendant made the contract by his duly authorized agent, although the contract itself, as set out in the complaint, appears on its face to be the personal contract of the agent.
2. *Same; ratification.*—When a person adopts, deliberately, and with a full knowledge of all the circumstances of the case, an act which another has done for his benefit, such adoption, as a general rule, amounts to a ratification of the unauthorized act, and puts the ratifying principal in the place of the person who assumed to act as his agent; unless the contract itself is absolutely void, and not voidable merely.
3. *Merger of antecedent contract in deed; when both instruments will be construed together without merger.*—Where a written contract for the sale and purchase of lands is signed by the vendor, and by one who, without written authority, assumes to act as the agent of the purchaser; and afterwards, on the same day, the vendor executes a deed for the land to the purchaser; which deed expressly refers to the contract, declares that "it is made a part of" the deed, and that the intention of the parties in making the deed "is that it shall conform in all respects to said contract,"—the contract is not merged in the deed, but the two instruments are to be construed together, as parts of the same transaction.
4. *Stated account; relevancy of evidence to prove.*—In an action to recover the unpaid balance of the purchase-money for land, the written contract between the parties, and the vendor's subsequent deed to the purchaser for the lands, in which the terms of the contract are stated, are relevant evidence for the plaintiff, under a count on an account stated, to prove the amount of the purchase-money, and the terms on which it was to be paid.

APPEAL from the Circuit Court of Sumter.
Tried before the Hon. LUTHER R. SMITH.

THIS action was brought by Reuben Chapman, against the administrator with the will annexed of Mrs. Susan Lee, deceased; was commenced on the 9th September, 1865; and sought to recover an alleged unpaid balance of the purchase-money for a certain tract of land sold and conveyed by plaintiff to said decedent on the 23d December, 1858. The original complaint requires no notice, as another (called the first amended complaint) was substituted for it by leave of the court, which was in the following words:

"The plaintiff claims of the defendant, as administrator with the will annexed of the estate of Susan Lee, deceased, the sum of three thousand dollars, for breach of an agreement entered into by said defendant's testatrix, Mrs. Susan Lee, by her agent, John R. Lee, on the 23d day of December, A. D. 1858, the said John R. being then and there her agent duly authorized to execute said agreement for the said Susan, in her behalf, in substance as follows: 'This contract, made and entered into this 23d day of December, A. D. 1858, between Reuben Chapman, of Madison county, of the first part, and John R. Lee, of Sumter county, of the second part, witnesseth: that the party of the first part has this day bargained and sold to the party of the second part all his lands lying and being in township number eighteen (18), range number two (2), west, in the said county of Sumter, supposed to be known according to United States surveys, and to contain the quantity as follows, all lying in said township, to-wit,' specifying the several subdivisions, and the quantity in each. 'All of the said lands the said party of the second part buys, and agrees to pay to the party of the first part therefor, at the rate of twenty dollars per acre, all considered as cash on the first day of January next, 1859. But the said party of the second part proposes, and the party of the first part agrees to receive one-half of the sum in a draft of this date, drawn by the party of the second part, (as the agent of his mother, Su-

san Lee, for whose benefit this contract is made, and to whom the party of the first part is to make a warranty deed for all the lands hereby sold, with the full relinquishment of the dower of the wife of the party of the first part,) on the house of Gary, Maggard & Co., of Mobile, payable the 1st day of January next, at their business house in Mobile, accepted by them; and for the balance of the said sum, the said party of the second part agrees as before stated, draws and delivers to the party of the first part his drafts on said house, one for one-half of the balance, with one year's interest on the whole, falling due on 1st January, 1860; and the other for the balance, according to the estimated quantity of land as herein stated, with interest thereon for one year, to fall due on 1st January, 1861. It is understood by the parties to this contract, that either party may, at any time within two years, have the lands surveyed by a legal officer; and that the amount to be paid will be estimated accordingly, and the sum to be adjusted as on the 1st January, 1859. If the said party of the first part, with his wife's relinquishment of dower, as is requested by the party of the second part, executes his absolute deed for said lands here described, before the expiration of the two years, it shall contain a covenant, authorizing a survey of said lands, and correcting the numbers, description, and quantity; as it is understood that this contract is for the sale and purchase of all the lands said party of the first part holds in the said township lying on the east side of Sucarnatchie. It is understood that the legal fees for the survey shall be equally divided between the contracting parties. It is also understood that possession of the said land will be given on the 1st day of January next.' (Signed 'R. CHAPMAN, [seal],' 'JOHN R. LEE, agent for SUSAN LEE;' and attested by Geo. B. Saunders.) "And plaintiff avers, that, in pursuance of said agreement, the said plaintiff did, on the 23d day of December, 1858, execute a deed, jointly with his wife, Mrs. F. Chapman, conveying all of said lands in fee simple, and delivered the same to the said Mrs. Susan Lee, who thereupon took possession of the said lands; and that, in pursuance of said agreement, said lands were

surveyed, at the request of the plaintiff, within two years from the date of said agreement, by one William E. Chiles, the county surveyor of Sumter county, Alabama; of which survey the said Susan Lee had legal notice, and at said survey the said John R. Lee was present, and acting as agent for the said Susan Lee; and by said survey it was ascertained that there was fifty-three and 57-100 acres more than was paid for by the said Susan Lee. And plaintiff avers, that he has complied with all the provisions of said agreement on his part; and that the said Susan Lee in her life-time, and the said defendant, as administrator as aforesaid, since her death, has failed and refused, although often requested, to comply with the following provision of said agreement, viz., the payment of the sum of twenty dollars per acre for said fifty-three and 57-100 acres, with interest thereon from the first day of January, 1859.

"The plaintiff claims of the defendant also, as administrator with the will annexed of Susan Lee, deceased, the sum of three thousand dollars, due from him, as administrator as aforesaid, by account stated between the plaintiff and the defendant's testatrix, on the 23d day of December, 1858, with interest thereon from the 1st January, 1859.

"The plaintiff also claims of the defendant, as administrator as aforesaid, the sum of three thousand dollars, due him by account stated, for lands sold by the plaintiff to the defendant's testatrix, on the 23d day of December, 1858; and for money paid by plaintiff, for defendant's testatrix, at her request, which sum of money, with interest thereon, is now due."

The defendant demurred to the special count, and pleaded to the second and third counts, "in short by consent, the general issue, the statute of non-claim, and the statute of limitations of six years." At the March term, 1869, the court sustained the demurrer to the special count, but gave leave to the plaintiff to file an additional amended complaint by the next term; and at the next term, in pursuance of the leave so granted, the plaintiff filed the following amended complaint:

"The plaintiff claims of the defendant three thousand

dollars as damages for breach of a contract entered into in writing by and between the plaintiff and the defendant's testatrix, the said Susan Lee, in her life-time, to-wit, on the 23d day of December, A. D. 1858, which was duly executed by the said plaintiff and the said Susan Lee, in her life-time, by and in the name of John R. Lee, who was then and there her duly appointed agent, with full and complete authority from her to execute the same for her; by which said contract the said plaintiff bargained and sold to the said Susan Lee the following described lands, situated in the said county of Sumter, and State of Alabama, to-wit: All of his lands lying and being in township 18, range 2, west." [Here follows a description of the lands.] "In consideration of which the said Susan Lee, by her said agent, John R. Lee, and his name, in substance then agreed to pay the said plaintiff for said land at the rate of twenty dollars per acre, as follows: one-half of the said purchase-money on the 1st day of January, A. D. 1859; one-fourth of said purchase-money on the 1st day of January, A. D. 1860, with the interest due on the half of the purchase-money remaining unpaid from the 1st day of January, A. D. 1859; and the balance of said purchase-money on the 1st day of January, A. D. 1861, with interest thereon from the 1st day of January, A. D. 1860; and the said plaintiff and the said Susan Lee, by and in the name of her said agent, the said John R. Lee, further, in substance, agreed by and in said contract, that either of said parties to said contract, to-wit, the said plaintiff and the said Susan Lee, within two years from the date of the execution of said contract, might have the said lands surveyed by a legal officer authorized to survey lands, and if the said lands contained by such survey an excess of acres over and beyond the estimated number, as set forth in said contract, the said Susan Lee was to pay the plaintiff for such excess at the rate of twenty dollars per acre, with interest thereon from the 1st day of January, A. D. 1859; and if by said survey there was a deficit in said land, or a less number of acres than set forth in the estimate in said contract as aforesaid, the said plaintiff was to refund to the said Susan Lee the

amount of the value of such deficit at the rate of twenty dollars per acre therefor, with interest thereon from the 1st day of January, A. D. 1859. And it was in said contract further agreed by and between the said plaintiff and the said Susan Lee, by and in the name of her said agent, the said John R. Lee, in substance as follows: that if the said plaintiff should, within two years from the date of said contract, as requested by the said Susan Lee, execute his absolute deed conveying said land, with his wife's relinquishment of dower in said land, to the said Susan, that the said deed should contain a covenant authorizing a survey of said lands and correcting of the numbers, description and quantity of said lands, as set forth in first part of said contract. And it was further, in substance, agreed by said parties, to-wit, the said plaintiff and the said Susan Lee, by and in the name of her said agent, the said John R. Lee, that the legal fees for the survey of said lands provided for as aforesaid should be paid equally by the said plaintiff and the said Susan Lee; and that the possession of the lands described in said contract should be given and surrendered by the said plaintiff to the said Susan Lee on the first day of January next after the date of the execution of the contract aforesaid, to-wit, on the 1st day of January, A. D. 1859. And the said plaintiff avers, that in pursuance of said contract, and at the request of the said Susan Lee, he did execute, on the 23d day of December, A. D. 1858, a deed to said Susan Lee, jointly with his wife, F. Chapman, conveying said lands in fee simple to the said Susan Lee, and that said deed contained the covenant provided for in said contract as hereinbefore set forth, and that he, the said plaintiff, surrendered and delivered the possession of said lands to the said Susan Lee on the 1st day of January, A. D. 1859.

"And the said plaintiff further avers, that within two years from the date of said contract, to-wit, on the 3d day of October, 1860, he procured one William E. Chiles, of the county of Sumter, who was then and there the legally appointed county surveyor of said county, and who was such legal officer as provided for and mentioned in said

contract, to survey said lands, by and with the knowledge and consent of the said Susan Lee, and that the said Wm. E. Chiles, as county surveyor as aforesaid, then and there surveyed said lands, and ascertained that said lands contained 1,076 acres, and that there were fifty-three 57-100 acres more than the estimate set forth in said contract as aforesaid, and fifty-three 57-100 acres more than was paid for to the plaintiff by said Susan Lee; at which survey the said Susan, by her duly authorized agent, the said John R. Lee, was present and assenting to; and that the said Susan Lee then and there became indebted to the plaintiff in the sum of $1,071.40, (the value and price of the excess aforesaid,) and interest thereon from the first day of January, A. D. 1859, and then and there promised by and through her said agent, the said John R. Lee, who was then and there duly authorized by her to bind her in the premises, to pay to the plaintiff the said sum of $1,071.40, and interest thereon from the 1st day of January, A. D. 1859. And the plaintiff further avers, that he paid to the said William E. Chiles, as his legal fees for making the survey aforesaid, to-wit, on the 3d day of October, A. D. 1860, the sum of $20.00, the one-half of which, to-wit, $10.00, the said Susan Lee was liable to pay by the terms of the contract aforesaid, and that she, the said Susan, then and there was indebted to and became liable to pay the said plaintiff the said sum of $10.00 on, to-wit, the said 3d day of October, A. D. 1860.

"And the said plaintiff avers, that afterwards, to-wit, on the 26th day of December, A. D. 1862, the said Susan Lee departed this life in said county, leaving her last will and testament, which was duly admitted to probate in the probate court of said county of Sumter on, to-wit, the 26th day of January, A. D. 1863; and that afterwards, to-wit, on the 26th day of January, A. D. 1863, the said James M. Lee qualified in said court as the administrator with the will annexed of the said Susan Lee, deceased, and then and there became, and from that time hitherto has been, and now is, the administrator with the will annexed of said Susan Lee, deceased. Yet the said Susan Lee in her life-

time, and the said defendant, as the administrator with will annexed of said Susan Lee, deceased, since her death, have not paid the said plaintiff the said sums of money, or any part thereof, but wholly failed and refused to pay the same; which said sums, with the interest thereon, are now due."

The defendant demurred to the second amended complaint, and assigned the following causes of demurrer: "1st, that said complaint does not set forth or allege any breach of any contract made by the said Susan Lee, deceased; 2d, that said complaint does not show any cause of action against said defendant as the administrator of said Susan Lee, deceased; 3d, that said complaint shows that the contract, of which said plaintiff alleges a breach, has been executed and annulled, so that no action can be maintained upon it; 4th, that said complaint shows that the contract sued upon in this case, and of which the complaint alleges a breach, has been merged and discharged, in and by a subsequent contract specified in said complaint."

The court sustained the demurrer to the second amended complaint, to which the plaintiff excepted, but declined to make any further amendments; and issue was thereupon joined on the pleas filed to the second and third counts of the first amended complaint.

"On the trial," as the bill of exceptions states, "the plaintiff offered in evidence to the jury, in support of said common counts, and of his right to recover thereon, a contract in words and figures following, to-wit," (the contract set out at length in the first amended complaint,) "in connection with evidence tending to show that the said John R. Lee had authority from the said Susan Lee to make said contract, though not in writing by her. The defendant objected to the introduction of said contract and evidence, on the ground that the said Susan Lee had never given the said John R. any power or authority in writing to sign said contract; and on the ground that said evidence was irrelevant and inadmissible under the issues. The court sustained said objection, and excluded said contract

and evidence from the jury; to which ruling of the court the plaintiff excepted.

"The plaintiff then offered the said contract as evidence to the jury, in connection with evidence tending to show that the said Susan Lee, after its execution, with full knowledge of everything done by the said John R. in and about said contract, ratified the same in every particular; to which evidence the defendant objected, on the ground that there was no evidence that the said Susan Lee ever ratified the said acts of the said John R. by any writing signed by her; and on the ground that said evidence was irrelevant, and inadmissible under the issues. The court sustained the objection, and excluded the said contract and evidence from the jury; to which ruling of the court the plaintiff excepted.

"As further evidence to show that said John R. was authorized to execute said contract for and on behalf of said Susan Lee, the plaintiff offered the following evidence to the jury: 1st, a deed executed by himself and wife to the said Susan Lee, which was duly acknowledged, proved, and in the words and figures following." This deed is dated the 23d day of December, 1858; recites as its consideration the payment by Mrs. Susan Lee of the sum of $24,448; conveys, with full covenants of warranty, the lands described in the contract above referred to; and contains a stipulation in these words: "It being understood between the parties, viz., the said Reuben Chapman, and the said Susan Lee, by her agent, the said John R. Lee, that the contract this day entered into by them for the purchase and sale of said lands, and witnessed by George B. Saunders, is made a part of this deed, and the intention in making this deed is that it shall conform in all respects to said contract." The defendant objected to the admission of said deed as evidence, "on the ground that there was no evidence that the said Susan Lee had ever ratified the said acts of the said John R. by any writing signed by her; and on the ground that said evidence was irrelevant, and inadmissible under the issues. The court sustained

the objection, and excluded the evidence; to which the plaintiff excepted.

"2. Evidence tending to show that the said Susan Lee, after the execution of said contract, paid to said plaintiff the drafts mentioned in said contract, and received from him, to-wit, on the 1st day of January, 1859, possession of said lands, and continued to claim and possess said lands from that date until her death, as her own property, and devised the same by her last will and testament. To this evidence the defendant objected, on the ground that there was no evidence that the said Susan ever ratified the acts of the said John R. Lee by any writing signed by her; and on the ground that said evidence was irrelevant, and inadmissible under the issues. The court sustained the objection, and excluded said evidence from the jury; to which ruling the plaintiff excepted.

The plaintiff offered evidence tending to show that the lands, for the recovery of the value of which this action was instituted, were a portion of the lands mentioned and described in the said contract and deed; to which evidence the defendant objected, on the ground that the said John R. Lee had no authority in writing from the said Susan Lee to purchase said lands for her, and that she was not bound by such contract or purchase; and on the ground that said evidence was irrelevant, and inadmissible under the issues. The court sustained the objection, and excluded said evidence from the jury; to which ruling the plaintiff excepted.

"This was all the evidence the plaintiff offered, or proposed to offer; and in consequence of the said rulings of the court, both in sustaining the demurrer, and in excluding said evidence from the jury, the plaintiff was compelled to suffer a non-suit"; which he now moves to set aside, assigning as error the several rulings of the court below, to which, as above stated, he reserved exceptions.

WATTS & TROY, for appellant.—1. The statute of frauds had nothing to do with the case, under the facts alleged in the special count.—*Butler v. Lee*, 11 Ala. 888; *Bowen v.*

Bell, 20 Johns. 340; *Gordon v. Phillips*, 13 Ala. 566; *Boykin v. McLaughlin*, 35 Ala. 566; *Rhodes v. Starr*, 7 Ala. 348; *Worthington v. Porter*, 7 Ala. 814; *Battle v. Gillespie*, 15 Ala. 276.

2. No written authority to the agent, and no written ratification of his act, was necessary to the maintenance of the action. The contract was fully executed by the delivery and acceptance of the deed, possession taken and held under it, and payment of the purchase-money. Under such circumstances, it would be shocking to justice to allow the purchaser, while holding the land under the contract, to refuse compliance with one of its express stipulations. Authorities above cited; also, *Pomeroy v. Winship*, 12 Mass. 514.

3. The contract is expressly referred to in the deed, and made part of it. Consequently, the stipulation in the former, as to the survey, and the adjustment of the balance of the purchase-money, can not be considered merged in the acceptance of the deed.

4. The rulings of the court on the evidence in detail precluded the plaintiff from all possibility of recovery, and compelled him to take a non-suit.

REAVIS & COOKE, *contra*. (No brief on file.)

PETERS, J.—This is an action of assumpsit for a balance of the purchase-money for lands alleged to have been sold by the appellant, Chapman, to Mrs. Susan Lee, in her life-time, but who has since died, and is represented in this suit by the appellee, James M. Lee, as her administrator with the will annexed. There was a judgment of non-suit in the court below against the plaintiff in that court, said Chapman, who brings the case by appeal to this court, and here moves to set the judgment of non-suit aside, and for a new trial. The cause went off on the trial in the court below upon the demurrers to the plaintiff's complaints, and upon the ruling of that court in rejecting certain evidence offered in support of the general counts upon which issues were joined, as shown in the bill of exceptions. The ac-

tion of the circuit court in sustaining said demurrers, and in rejecting the evidence abovesaid, are now assigned in this court for error.—Revised Code, § 2759.

There were three complaints filed by the plaintiff in the court below. The first, which is called, in the record, the original complaint, need not be noticed, as it seems to have been abandoned in the progress of the cause. Besides this original complaint, there was also filed a first amended complaint, which contained three counts—one count upon a special contract, which is copied into the count, and two other counts on stated accounts, in the usual statutory form, as prescribed by the Code. This amended complaint was demurred to, and the demurrer sustained Then, upon leave of the court, a second amended complaint was filed, which contained one count upon a special contract, alleged to have been made by said Mrs. Susan Lee, in her life-time, with the plaintiff, Chapman, for the sale and purchase of certain lands named and described in the contract, at the price and upon the terms therein stated; and it was averred that Mrs. Lee had failed and refused to pay to the plaintiff a certain balance of said purchase-money, as required in said contract, with such other averments as showed that the defendant, as the representative of Mrs. Lee, was liable to pay such balance. This second amended complaint was also demurred to by the defendant, and the demurrer was allowed. The parties then went to trial by a jury upon issues joined upon the counts upon stated accounts.

There can be no question that, had the contracts alleged in the special counts of the first and second amended complaints been made by Mrs. Lee herself, they would have imposed upon her a liability to pay for the whole quantity of lands named in the contracts at the price and upon the terms therein set forth. These contracts are alleged to have been made in writing, are intelligent, and in sufficient form of words to give them validity.—Rev. Code, § 1862; 4 Kent, 460. This is all the law requires. And in the counts objected to they are alleged to have been made by Mrs. Lee in her lifetime, by her duly authorized agent,

John R. Lee. There is nothing in the contracts set out in the complaints which contradicts these allegations. Whether these allegations were true or not, was a matter of proof, and could not be raised on the demurrers. These counts are sufficient, and the court erred in sustaining the demurrers, as shown in the record.—Rev. Code, § 2629.

It seems that the learned judge in the circuit court, in considering the demurrers to the complaints, suffered himself to be carried beyond the allegations of the counts under discussion, to the fact of ratification, which arose upon the contract made and entered into between Chapman and John R. Lee, as the alleged agent of Mrs. Lee, in her life-time, on December 23, 1858, for the sale of the lands mentioned therein. This fact of ratification could only be tried and determined by the jury, unless it was submitted to the court on a demurrer to the evidence. Rev. Code, §§ 2750, 2751. But there was no demurrer to this effect.

As a general rule, when a party adopts what another has done for his benefit, this is evidence of ratification, if the adopting party may have legally acted in the matter without an agent.—*Kenan v. Holloway*, 16 Ala. 53, 60; Story Ag. § 239, *et seq.*, and cases cited. This ratification, when made deliberately and upon a full knowledge of all the circumstances of the case, refers to the original act of the agent, or the party assuming to act as agent, and puts the ratifying principal in his place. It makes the act of the agent, or assumed agent, the act of the principal himself. Story Ag. §§ 243, 244. It is, nevertheless, true that a *void* contract can not be made good by ratification, but a contract merely *voidable* may be; and when so ratified it becomes in every sense the contract of the party so making the ratification.—Story Ag. §§ 240, 241.

The objection to the evidence rejected is, that it is irrelevant. Is this so? An account stated is a confession that there is a fixed and definite sum due from the defendant to the plaintiff at the date of the alleged accounting. If the facts show that this is the necessary result of the settlement between the parties, any of such facts are competent

on the trial of such an issue.—2 Stark. Ev. 97, (marg.), *et seq.;* 1 Chit. Pl. 558, (marg.); *Freeland v. Heron, Lenox & Co.*, 7 Cranch, 147, 151; *Ware & Cowles v. Dudley*, 16 Ala. 742. The deed of Chapman to Mrs. Lee was evidence tending to show that she had purchased the lands therein intended to be conveyed, and the amount of the price agreed to be paid for the same. This deed bears the same date of the contract entered into between Chapman and John R. Lee as the agent of Mrs. Lee, and it is by direct reference and agreement made a part of said deed as a contract entered into between Chapman and Mrs. Lee The recital in the deed is in these words, to-wit: "It being understood between the parties, the said Reuben Chapman and the said Susan Lee, by her agent, the said John R Lee, that the contract this day entered into by them for the purchase and sale of said lands, and witnessed by George B. Saunders, is made a part of this deed; and the intention in making this deed is, that it shall conform in all respects to this contract." This is not a merger of the first contract in the deed, but the deed and the contract were thus made by Mrs. Lee herself parts of the same transaction.—7 Cr. 540; Shep. Dig. 500, § 3. And as such, they were both evidence of the sale and the terms of the sale. And in a suit for the purchase-money of the land, or the balance of the purchase-money for the land, by the vendor against the vendee, they were not irrelevant evidence to prove the amount of the purchase-money and the terms upon which it was to be paid. This was the purpose of the suit, whether upon the special or the general counts. Such evidence was competent so far as it went, and the plaintiff could not proceed after its rejection. The rejection of this testimony rendered it necessary for the plaintiff to suffer a non-suit. This was done, and the decision of the court below was reserved by bill of exceptions for review in this court.—Rev. Code, § 2759; *Vincent v. Rogers*, 30 Ala. 471. The ruling of the court below was erroneous.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

OATES, ADM'R, *vs.* PARISH ET AL.

[ACTION ON BILL OF EXCHANGE.]

1. *Bankrupt, discharge of, contest on ground of fraud in obtaining; in what court only can be contested.*—The bankrupt act of March 2, 1867 vests exclusively in the federal courts the power to contest the validity of a bankrupt's discharge, on the ground that it was fraudulently obtained. This can not be done, in the first instance, in the State courts.
2. *Bankruptcy, plea of; when State courts bound to allow.*—Upon plea of bankruptcy pleaded as required by the provisions of the bankrupt act, in a State court, that court is bound to allow the plea, if the bankrupt offers in evidence of its truth his certificate of discharge, authenticated as required by law. On such an issue, the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge, if it has not been set aside and annulled by a direct proceeding in a proper federal court.

APPEAL from Circuit Court of Henry.
Tried before Hon. J. MCCALEB WILEY.

This was an action on a bill of exchange, brought by appellant against the appellees. The case was tried in the court below on agreed state of facts and pleading, the substance of which is as follows: Appellees pleaded in due form their plea of bankruptcy, and duly set out their discharges in bankruptcy in bar of the plaintiff's right of action. It was admitted that the certificates of discharge were legally plead and set out as required by the bankrupt act of 1867 and the rules of pleading in Alabama, and that the discharges, if valid, are a bar to plaintiff's right of action. It was also agreed and admitted that plaintiff had filed his replication in due and legal form to said plea of bankruptcy and the discharges therein, said replication showing a state of facts which invalidate a discharge under section 29 of the bankrupt law of 1867. To this replication appellees demurred. The court sustained the demurrer, and taxed appellant with the costs, &c.; hence this appeal.

SEALS & WOOD, for appellant.—Section 29 of the bankrupt law of 1867 makes the discharge of a bankrupt invalid, if the bankrupt has been guilty of any of the acts in said section denounced. Section 34 of the bankrupt law provides a mode by which a discharge may be set aside as to all the world. It is claimed by the appellees that the way provided for attacking a discharge, as found in section 34, is the only remedy of a creditor to avoid a discharge. This can not be the law, and has been so decided.—See *Perkins v. Gay*, Bankrupt Register, June 15, 1870; *Noble & Bro. v. Whetstone*, present term, under the bankrupt law of 1867, and *Pearsall v. McCartney*, 28 Ala. 110, under the old bankrupt laws.

It is a rule without exception, that fraud vitiates everything. The construction of the bankrupt law contended for by the appellees' counsel would violate this plain rule of law.

J. L. PUGH, *contra*.—Under the constitution of the United States, the power of affording relief to the debtor class by bankrupt laws is vested alone in congress, and if the debtor's discharge under such laws is open to attack for fraud, *in all courts*, the benefits intended to be given by such legislation amount to nothing; in fact, it holds out the promise of relief, while it subjects him to the perpetual danger of the most ruinous, and costly, and disgraceful litigation. It is no answer to say that fraud does and should vitiate everything, and that the most solemn decrees and judgments of the highest courts are not exempt from its contaminating influence; and that those who commit it ought never to get out of the reach of punishment. The plainest and most adequate remedies are provided by the bankrupt act itself to prevent the discharge before it is granted, and after it is granted to set aside and annul it, for fraud. Every act of fraud denounced by the bankrupt act as sufficient to prevent or vacate a discharge, is easily discovered by ordinary diligence. One year is given by the law to prevent, and two years more to vacate the discharge, for fraud. All criminal punishment of fraud has a

statutory limitation, and why should a debtor be compelled to live and die under the dread of being assailed for some of the acts that would render his discharge void? When his witnesses who prove his innocence are dead or gone to parts unknown, or the evidence of the *bona fides* of his discharge is lost or destroyed, or the debtor himself dies, and his living representatives are ignorant of the means of defense, the creditor runs out his execution or commences his action, and the protection of the bankrupt certificate is destroyed by proof of facts that can not be rebutted or explained. A man may be never so free from fraud, and yet he is always in danger of ruinous and disgraceful litigation by one, or a combination of creditors. Three years are allowed to reach the guilty, but for the safety of the innocent the certificate imports absolute verity and fairness after that time.

An examination of the bankrupt acts of 1800, 1841, and 1867, and a comparison of the sections of the several acts defining the effect of the certificate, and the grounds upon which it may be attacked, and the mode of attack, and the forum where attacked, can not fail to satisfy the court that the judgment must be affirmed.

The case of *Corey v. Ripley*, 57 Maine, 69, settles the question.

PETERS, J.—There is but one question presented by the record in this case, and but one that has been argued by the learned counsel in their briefs submitted to the court. That question is this: Can the validity of the discharge of a bankrupt be assailed for fraud in a State court, without first contesting its validity in the federal court in which the certificate of discharge had been granted? This important question depends, for its solution, upon the construction of the act of congress authorizing the discharge. The law is entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and went into operation on the first day of June of the same year.—U. S. Stat. at Large, 1866–7, p. 517, ch. 176, §§ 1, 50; *Martin v. Berry*, 37 Cal. Under this act,

the federal courts alone have the exclusive jurisdiction of all matters and proceedings in bankruptcy.—*Van Nostrand v. Carr*, 30 Md. This prescribes the parties, the mode of proceeding, and the form and effect of the discharge. It also fixes the grounds upon which the certificate shall be denied, and the grounds upon which the discharge shall be set aside and annulled, after it has been granted; prescribes the court in which the validity of the discharge shall be contested, the practice to be observed in the contest, and limits the time within which the contest shall be made.—Act of Cong. *supra*, §§ 1, 29, 32, 34. This carries to the federal courts the final jurisdiction of all questions arising upon the validity of the discharge, with the same exclusive power that it does the authority to grant the discharge in the first instance. This would be useless, unless the jurisdiction is exclusive and final. There can be no doubt that the congress has this power to confine this contest to the federal courts. The power over bankruptcies is plenary and unlimited in the general government. It is given in these words: "The congress shall have power" "to establish uniform laws on the subject of bankruptcies throughout the United States."—Const. U. S. Art. I, § 8, cl. 4. The law to contest the discharge for fraud is found in the 34th section of the above quoted act. It is this: "Sec. 34. *And be it further enacted*, That a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded by a simple averment that, on the day of its date, such discharge was granted to him, setting the same forth in *hæc verba*, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge; *Always provided*, That any creditor or creditors of such bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently ob-

tained, may at any time within two years after the date thereof, apply to the court which granted it, to set aside and annul the same. Said application shall be in writing, shall specify which in particular of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of said acts; but said application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of said application to be given to said bankrupt, and to order him to appear and answer the same within such time as to the court shall seem fit and proper. If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of such creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But, if said court shall find that said fraudulent acts, and all of them set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings."—Act of Cong. *supra*, § 34. This section is the law as to the effect of the discharge, the evidence of it, and the mode of pleading it, and of the grounds, the forum, and the manner of its contest, and the effect of the decision on the contest. There can be no doubt that the discharge is final and conclusive, unless it is contested in the time and the manner prescribed. This is the express language of the law. Where the proceeding is statutory, and the thing to be done, and the mode in which it shall be done, are prescribed, the mode is imperative and exclusive.—Smith Constr., 1st ed. p. 654, § 508. The power to set aside and annul the discharge being vested by law in the federal courts, it can not be exercised by the State courts, because the jurisdiction is exclusive.—*Slocum v. Mayberry*, 2 Whea. 1; *Gelston v. Hoyt*, 3 Whea. 246; Const. U. S. Art. III, § 2;

Pasch. Annot. Const. p. 194. The only defense that can be raised in the State courts is, whether *any* discharge has been regularly granted to the party relying upon the plea of bankruptcy. And the certificate is made the exclusive evidence in favor of the bankprupt of the fact of the discharge, and the regularity of the discharge. The State court can not, then, go behind this, unless it appears that the discharge has been set aside and annulled by a proper proceeding in the federal court. It seems to me that the language and the purpose of the statute above quoted can have no other rational interpretation. This gives uniformity and certainty to the system, and to the laws which govern it. And this is one of the purposes of the act. It is not likely, in the event that a State court should adjudicate the question of the validity of a bankrupt's discharge, that any attention to such an adjudication would be given in the federal courts upon a recurrence of the same question there. The federal courts being clothed with the power to make the adjudication, would make it in their own way, without regard to any action of the State courts. The one might settle the same question in one way, and the other might settle it in a different way. This would be such a collision of jurisdiction as would destroy the uniformity and harmony of the law. This would be in direct contradiction to the object of the statute. I therefore think that the act of congress vests in the federal courts the sole and exclusive power to contest the validity of the discharge for fraud, or for any other reason, and this necessarily excludes the jurisdiction of the courts of the States. The general government had the power to do this, and the language of the act shows that it has been done, and was, properly, intended to be done.—*Corey v. Ripley*, 57 Me. 69.

The judgment of the court below is therefore affirmed.

MILLER *vs.* MAYOR AND ALDERMEN, &c. OF MOBILE.

[BILL IN EQUITY FOR INJUNCTION.]

1. *Injunction; when will lie to restrain opening street by municipal corporation.*—An injunction will lie, at the suit of the proprietor, to restrain a municipal corporation from opening a new street on his land, and collecting a sum of money out of him, assessed as his benefit of the proposed improvement, and his contribution to the cost of opening the street, when the proceedings of the corporation appear to be regular, and their invalidity is to be shown by extrinsic evidence.
2. *Mobile, § 94 of charter of; unconstitutional.*—Section 94 of the charter of Mobile city violates Art. XIII, § 15, of the State Constitution, which prohibits the appropriation of a right of way to the use of a corporation, without full compensation in money, irrespective of any benefit to be derived, &c.

APPEAL from Chancery Court of Mobile.
Heard before Hon. A. W. DILLARD.

The facts are sufficiently stated in the opinion.

E. S. DARGAN, for appellant.

RAPHAEL SEMMES and O. J. SEMMES, *contra*.—1. The assessment against Miller was an exercise of the taxing power. It was, in no sense, the taking of private property for public use, by right of eminent domain. No more money was taken from Miller than his proper share of contribution to a public burthen. When property is taken by right of eminent domain, something more than the owner's share of contribution is taken.

2. This mode of taxing the citizen is constitutional, and when his money is taken from him, by the usual machinery of tax laws, it is taken from him by "due process of law." *The People v. Mayor, &c. of Brooklyn*, 4 Comstock, 419; 37 New York Rep. 267.

3. It was not necessary that the owners of the property, to the extent of one-fourth in value, *on each side* of the proposed street should petition. It was sufficient if the owners of one-fourth in value of the property petitioned, without reference to the question whether their property lay on one or both sides of the street. In this respect section 94 of the charter differs from section 58, commented upon by this court in another case.

4. The jury was a jury of assessment merely, and not assembled to condemn private property to public uses; and when tax assessors assess property it is not necessary that the owner of the property should have notice, or be present. The act (charter, section 94,) under which this proceeding was had, requires the mayor to give notice, through the newspapers, of the petition, and of the proposed improvement, but it does not require him to give notice of the impanneling of the jury of assessment, and such notice only as the act requires is sufficient.—15 Wendell, 374.

5. The impanneling of the first jury did not exhaust the power of assessment. If, for any reason, this jury did not do all that was necessary—if, for instance, it was found that the improvement had or would cost more than the estimate, a second jury might be impanneled to assess the deficiency. The labors of the second jury were, in fact, but the continuation of the labors of the first, in and about the same subject matter.—29 New York Rep. 198.

6. It is a perversion of terms to say that the levy of a tax casts a cloud upon the title of the real estate, upon which it becomes a lien. It is no more a cloud than any other legal incumbrance; and if this alone were a ground of equitable jurisdiction, it would break down all the barriers between courts of law and courts of equity.

7. The question whether Miller was damaged, or benefited, and if benefited, whether the assessment was excessive, cannot be considered in this court. These are matters of fact, which have been passed upon by a jury.

8. The injunction was improvidently issued in this case, and was properly dissolved and the bill dismissed upon the

hearing by the court below. There was, in short, no ground on which appellant could claim to go into a court of chancery for relief; his remedy, if he was damaged, being adequate and complete at law. Even if it be admitted that the tax was illegally assessed, this, of itself, does not entitle the party aggrieved to seek redress in a court of chancery, and the courts will discourage such attempts to stop the wheels of government by tax-payers. 25 New York Rep. 312, and cases therein cited.

B. F. SAFFOLD, J.—The bill of the appellant was dismissed on the ground of adequate remedy at law. He complained that the appellees, under the authority of the 94th section of the charter of Mobile city, and in pretended compliance with it, ordered a new street to be opened through a lot belonging to him, and appointed a jury to ascertain and assess the damages and benefits to result from it to the adjacent proprietors, without notice to them, and that they determined he would be benefited one hundred and seventy-five dollars. They returned this verdict to the said defendants, who were about to open the street, and collect the above sum of money from him in the manner prescribed by the charter. He alleged that only one of those who made the application owned any land adjacent to the proposed street, and he owned less than one-fourth. He prayed for an injunction against the opening of the street and the collection of the money.

The defendants admitted the truth of the statements in the bill, but denied that they entitled the complainant to the relief sought.

Section 94 of the charter authorizes the defendants to make a new street upon the written application of the owners at least one-fourth in quantity of the property through or over which the new street is desired to be made. But it is to be done at the expense of those whose property is benefited by and adjacent to the street. A jury is to ascertain and assess this benefit to each proprietor, and the amount assessed is to be a lien on his said property, and collectible as the taxes on real estate are to be collected

under the charter. The charter makes the assessed taxes a judgment, and authorizes a sale of either real or personal property for their payment.—§§ 38, 39. The benefited parties are required to contribute to the expense of the street, although the forms prescribed by the said section 91 may not have been strictly complied with. The request, and the ordinance complying with it, are alone to be deemed essential to create the claim for contribution.

I do not know that any definite line of separation can be drawn between the jurisdictions of law and equity in matters of this sort. The general rule is, that the correction of errors in the proceedings of such inferior jurisdictions is matter of legal cognizance, and probably under our loose system of practice, a *certiorari* to the circuit court would procure a reversal of what has been done in this case. But there are three recognized exceptions to this rule: 1st, where the proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions; 2d, where they lead in their execution to the commission of irreparable injury to the freehold; 3d, where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved in order to establish the invalidity or illegality.

This case may properly come within the third exception. A number of citizens signed the application for the opening of the street. It is denied that they were proprietors of one-fourth in quantity of the adjacent lands. This is an extrinsic fact necessary to be proved. It was essential that they should be.

The complainant also denies that he was benefited one hundred and seventy-five dollars, and claims that he was injured several hundred dollars. These facts require external proof, while the contrary appears upon the proceedings. *Baldwin v. City of Buffalo*, 29 Barb. 396, was very similar to this case, and the court reviewed the case of *Brooklyn v. Meserole*, 26 Wend. 132, in which it was held that an injunction was not the proper remedy, and also the case of *Heywood v. City of Buffalo*, 14 New York Reports,

534, the principles of which it adopted. While it is entirely proper to preserve the two systems of jurisprudence distinct, it is impossible to keep them from trenching upon each other, and justice and the reasonable satisfaction of the people are more to be desired.

Section 94 of the charter violates Article XIII, § 5, of the State Constitution, which prohibits any appropriation of a right of way to the use of a corporation until full compensation be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, the compensation to be ascertained by a jury of twelve men in a court of record.

The decree is reversed, and a decree will be rendered in this court granting the relief prayed for.

BUSH vs. GLOVER.

[STATUTORY ACTION FOR RECOVERY OF LAND.]

1. *Complaint; necessary averments of.*—A complaint in an action for the recovery of land, whether under the statute or at common law, must allege that the plaintiff was in possession of the premises sued for, (describing them,) and that, after his right accrued, the defendant entered thereupon, and unlawfully withholds and detains the same. If it fails to do this it is bad on demurrer.—Rev. Code, § 2611; Rev. Code, Forms, p. 677.
2. *Judgment by default, rendered since the war on summons issued and served during the war, not a nullity.*—A judgment of a circuit court of this State, rendered on 3d September, 1866, during the existence of the provisional government, founded upon a summons issued from a rebel court in this State on the 8th day of February, 1861, and served upon the defendant by the rebel authorities, though such judgment be taken by default, is not a nullity.
3. *Sheriff's sale; validity of under such judgment.*—A sale of lands made by the sheriff under authority of an execution issued on such a judgment, and regularly conducted, is valid, and the sheriff's deed conveys to the purchaser such title as could pass by the sale.

4. *Charge; if asked for in writing, should be given or refused.*—The right to have a written charge given or refused is peremptory, and it leaves no discretion in the court, and the judge should do his *duty* as prescribed.—Rev. Code, § 2756.

APPEAL from Circuit Court of Choctaw.
Tried before Hon. LUTHER R. SMITH.

The facts are sufficiently stated in the opinion.

SMITH & SMITH, and WALKER & MURPHEY, for appellant. The demurrer to the complaint should have been sustained, on account of its non-conformity to the form laid down in the Revised Code, p. 677.

The judgment rendered September 3, 1866, in favor of *Hale, adm'r, v. McLean et al.*, is void. It is a judgment by default rendered after the war, upon a summons issued February 8, 1861, and executed February 12, 1861, by the sheriff of Choctaw county. The clerk issuing, and the sheriff serving the summons, must be regarded in the light of officers of a foreign government; and as there was no appearance, it is void.—*Bibb & Falkner v. Avery*, 45 Ala. 791.

It was also void because rendered in favor of an administrator appointed by the judge of probate of Choctaw county in 1863.—*Bibb & Falkner v. Avery, supra.* The judgment being void, all proceedings subsequent thereto are void.

For a portion of the lands appellant had only a bond for titles, not having paid the purchase-money. This land was not subject to execution, and it was competent for appellant to show that fact.—*Cook & Hardy v. Webb*, 18 Ala. Rep. 810; *Wilson v. Beard*, 19 Ala. R. 629; *You v. Flinn*, 34 Ala. 409.

GLOVER & COLEMAN, with whom were BROOKS, HARALSON & ROY, *contra.*—A plaintiff in ejectment must prove—1st, that he had the legal estate in the premises at the time of the demise laid in the declaration, and the right of equity; and, 2d, that the defendant was in possession at the time of the service of the writ in ejectment.—2 Greenl. Ev. § 319.

The legal estate of the plaintiff in the lands sued for is shown in the judgment rendered, execution thereon, levy, the sheriff's deed to the lands, and the possession of the defendant. These are sufficient.—*Ware v. Bradford*, 2 Ala. 676; *Levi v. Powell*, 5 Ala. 58; *Smith v. Houston*, 16 Ala. 111; *Cook & Hardy v. Webb*, 18 Ala. 812; 4 Wheat. 506; 4 Curtis, 455; 16 Ala. 642.

Appellant's objection to the validity of the judgment can not be sustained, for it was rendered by a competent court; nor can his objection to the execution thereon, or the sheriff's deed, be allowed.—Ord. 26 Const. Conv. 1865, § 1, Rev. Code, p. 58; *Powell v. Boone & Booth*, 43 Ala. 460.

Besides, proof of the judgment was unnecessary; it was sufficient to show the execution and the sale under it. If the execution was not supported by a proper judgment, defendant should have moved to set it aside; otherwise, the presumption is in favor of its regularity.—3 Greenl. Ev. § 316; 6 Ala. 224; 2 Ala. 282; 13 Ala. 289; 22 Ala. 365; 39 Ala. 131.

And the sheriff's deed, in like manner, can only be avoided by timely application to have the sale set aside for fraud or irregularity; it can not be collaterally attacked. *Hubbard v. McCullom*, 6 Ala. R. 221; *Ware v. Bradford*, 2 Ala. 682; *McKaskill v. Lee*, 39 Ala. 131; 19 Ala. 194; 16 Ala. 522; 5 Ala. 55.

Plaintiff, by showing his title to the property, also shows his right of entry. The possession by appellant of the property at the time of the judgment and levy, raises the presumption of ownership in him; the law will not presume him a trespasser.

The plea of not guilty is an admission of possession at the time the suit was commenced.—Rev. Code, § 2614; *King v. Kent's Heirs*, 29 Ala. 555.

Defendant may show that he holds a bond for titles only, and that he has paid only a part of the purchase-money; but if he holds such a bond, and has paid *all* the purchase-money, he has a perfect equity, and it is subjected to execution.—Revised Code, § 2871; *Cook & Hardy v. Webb*, 18 Ala. 813.

If defendant is aggrieved, he has his remedy against the sheriff.—6 Ala. 224; 2 Ala. 682.

After the sale, defendant's entire interest in the property is gone, except the right to redeem.—27 Ala. 193; 34 Ala. 415; 5 Ala. 727; 2 Port. 482.

That defendant had such an interest in the property as is subject to levy and sale, may be shown by possession and acts of ownership.—18 Ala. 812.

The evidence fully sustains it in this case; the charge of the court on this point was specific, and the finding of the jury in strict accordance with the law and the charge given.

PETERS, J.—This is a statutory action for the recovery of land, in the nature of action of ejectment. The suit is brought on a title derived from a sheriff's deed. The complaint was demurred to. The statement of the cause of action is in the following words: "The plaintiff *sues* to recover the following tracts of land: The north half of north-east quarter of section twenty-three, the north half of the north-west quarter of section twenty-three, the east half of the north-east quarter of section twenty-two, the south-west quarter of the south-east quarter of section fourteen, the east half of the south-west quarter of section fourteen, the north-west quarter of the south-east quarter of section fourteen, all in township twelve, range two, west, which lands were sold under an execution against the said defendant, as his property, by the sheriff of Choctaw county aforesaid, and purchased by the plaintiff; which said lands the said defendant unlawfully withholds from the plaintiff, and detains the same, together with five hundred dollars for the detention thereof." The grounds of demurrer were, the complaint did not allege "that the plaintiff was in possession of the land, according to the form laid down in the Code," and that the complaint was "otherwise informal and insufficient." This demurrer was overruled. And the defendant pleaded not guilty, and went to trial by a jury on this plea. It further appears from a bill of exceptions taken on the trial below, that the plaintiffs derived their title to the land in controversy from

a sheriff's deed, made under authority of an execution issued on a judgment of the circuit court of Choctaw county, in this State, rendered at the fall term thereof, on the third day of Sptember, 1866. This judgment was by default. And it appeared from the record, that the only notice which the defendant had of the proceedings, was the service of a summons purporting to have been issued out of the circuit court of said county of Choctaw, on the 8th day of February, 1861, upon a complaint founded on a promissory note made on the 1st day of January, 1859, and payable on the 1st day of January, 1860, for the payment of $385. It also appeared that the plaintiff in said suit had died after the commencement of the same, and that it had been revived on the day judgment was rendered in the name of his personal representative, who had been appointed as such representative by the rebel probate court sitting in said county of Choctaw in 1863. And for these reasons, the judgment of the 3d of September, 1866, was objected to by the defendant in this suit, on the trial below; but the objection was overruled by the court, and the said defendant excepted. There were many other objections made during the trial, and reserved in the bill of exceptions, which need not be more particularly enumerated. On the trial below there was a verdict and judgment for the plaintiffs, and the defendant in that court brings the case here on appeal.

The demurrer to the complaint will be first considered. This is an action for the recovery of the possession of lands, instituted under the statute. In such case, the Code directs how the suit shall be brought, and prescribes that in such cases, the law now in force in relation to actions of ejectment, except so far as relates to the fictitious proceedings therein, or except so far as the same is changed by the Code, is applicable thereto.—Revised Code, § 2610. In this statutory action, it is sufficient for the plaintiff to allege in his complaint, *that he was possessed of the premises sued for*, describing the same by its description at the land office; or when that can not be done, by metes and bounds, or other appropriate designation, *and that after his right*

accrued, the defendant entered thereupon, and unlawfully withholds and detains the same.—Revised Code, § 2611. The language in *italics* is carried into the form of complaint prescribed in the schedule of forms appended to the Code. The form there given is as follows: "The plaintiff sues to recover the following tract of land: ——, *of which he was possessed before the commencement of this suit, and after such possession accrued, the defendant entered thereupon*, and unlawfully withholds and detains the same, together," &c.—Revised Code, p. 677, App. of Forms. A comparison will show that the portion of the statute and the above cited form printed in *italics* is left out of the complaint in this case. Such a defective complaint does not bring the statement of facts necessary in such a pleading within the requirements of the statute, either in words or in substance. It is therefore insufficient.—Revised Code, § 2629. The complaint also fails to show that the lands sued for are situated in this State, with any technical degree of certainty. The demurrer ought, therefore, to have been allowed, and the court erred in overruling it. Nor is the complaint in this case sufficient as a declaration at common law in an action of ejectment.—1 Chit. Pl. p. 187, marg.; 2 ib. pp. 877, 878; 3 Bla. Com. p. 199, marg.; 3 ib., app. No. II, p. 356; Rev. Code, § 2621.

The question next of importance is the character of the judgment of the circuit court of September 3d, 1866. I have constantly felt very grave difficulty in coming to the conclusion that the courts, without legislative authority, could give validity to the acts of any department of the illegal government maintained in this State during the supremacy of the late rebellion. The courts of this country can only know the governments of the States which have been legally constituted, or which have been accepted and ratified as such, by the rightful power of the people, appointed by them for that purpose. They must wait until the legislative and executive authority have declared what is lawful and what is unlawful, before they can enforce the former and suppress the latter. Their power is solely to enforce the law, and not to make it. And the authority by

which a government is constituted and its duties carried into execution, is a law—the supreme law of the State.

But in the case of *Martin v. Hewitt*, 43 Ala. 418, the principles settled by this court recognize some validity in the judgments of the rebel courts. And the ordinance No. 39 of the convention of this State of 1867 leaves these judgments in force, if no new trial is applied for within twelve months from the adoption of this ordinance. Pamph. Acts, 1867, pp. 186, 187. This time is extended by the act of the general assembly of this State of October 10, 1868, until the 26th day of June, 1869. These decrees of the rebel courts are thus treated by the legislative authority of the rightful State government *as judgments*. They are not denounced as wholly void adjudications, but they are adopted as "judgments," subject to be opened, and as furnishing the basis of "a new trial."—Pamph. Acts, 1868, p. 269, No. 48. Then, if these decrees are of any force, as it is thus settled that they are, the process on which they depend can not justly be declared to be of no avail and utterly worthless for any purpose. This process is sufficient to show the facts, if uncontradicted, that the defendant had notice of the proceedings, upon which the judgment rests. The issuance and service of the process from the rebel courts is at least *prima-facie* evidence of notice to the defendant, and if it is permitted to remain without objection until after the judgment in the court of the legal and rightful government, it can not justly be regarded other than an irregular and defective process of notice, and if the defendant does not object to it before judgment in the rightful court, he must be held to waive exception to the jurisdiction, exercised in this way by the rightful and legal court. Therefore, a judgment based upon notice given on such a process can not, for that reason alone, be treated as void.

Then, the validity of the judgment of the circuit court of September 3, 1866, depends upon the rightful exercise of its jurisdiction. Jurisdiction is declared to be the power to hear and determine a cause pending before the judicial officer appointed to hear and to determine it. "It

is *coram judice* whenever a case is presented which brings this power into action." "Any movement of the court," which it is authorized to take, "is necessarily an exercise of jurisdiction."—*Grignon's Lessee v. Astor*, 2 How. 319, 338; *United States v. Aredondo*, 6 Pet. 691, 709; *Ex parte Tobias Watkins*, 3 Pet. 193; *Kendall v. United States*, 12 Pet. 524, 718; *Fourniquet v. Perkins*, 7 How. 160; *Doe v. Eslava*, 9 How. 421; *Sargeant v. State Bank of Indiana*, 12 How. 371; *Williams v. Gibbs*, 17 How. 239. Where the court has authority to hear the parties, and to give judgment on the subject matter in controversy between them, the right of jurisdiction is complete and perfect, and its judgment, in such a case, can not be collaterally impeached or inquired into. If assailed at all, it must be done, generally, by a direct proceeding on writ of error or appeal, or for fraud, or what amounts to fraud.—*Miller v. United States*, 11 Wall. 268; *Ludlow v. Ramsay*, 11 Wall. 581; *Cooper v. Reynolds*, 10 Wall. 308, 315; *Satcher v. Satcher*, 41 Ala. 26, and cases above cited. It has already been shown that the notice to the defendant was not void, and if unobjected to, it brought him within the jurisdiction of the court. And there is no question of the power of the court over the subject matter of the controversy. The judgment is final. It concludes the controversy between the parties.—Bingh. on Judgments, p. 12. The court below did not, then, err in giving it this effect.—*Griffith et al. v. Bogert et al.*, 18 How. 158; 10 Pet. 449.

A single other point needs to be noticed before this opinion is concluded. It does not appear that the charges asked by the defendant on the trial below, were "moved for in writing." When this is not shown, this court will not presume, against the correctness of the action of the court below, that they were so moved for in writing; and if they were not, the court might justly refuse them.—Rev. Code, § 2756. In such case, the correctness or incorrectness of the charges asked will not be considered. But if the charges are moved for in writing, the court is bound to give or refuse them; and it is the duty of the judge to write "given" or "refused" on the document containing

the charge, and sign his name thereto, and the written charge thus becomes a part of the *record* in the case, and may be taken by the jury with them on their retirement. Rev. Code, § 2756. If the court fails to do this, it is error. It is the right of the party moving for charges in writing, and the court has no discretion to defeat it.—*Miller v. Hampton*, 37 Ala. 342; *Polly v. McCall*, 37 Ala. 20; *Edgar v. The State*, 43 Ala. 45, 53. The statute is peremptory, and must be obeyed. The charges, whether given or refused, raise no question on the statute of exemptions, and that statute is not discussed in this opinion.

For the error first above pointed out the judgment of the court below is reversed and remanded, with instructions to sustain the demurrer to the complaint, and to permit the plaintiff in the court below to amend his complaint as may be allowed by law.

JONES' HEIRS *vs.* WALKER.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *When certified copy of recorded deed is admissible evidence.*—Under section 1544, Revised Code, a subsequent purchaser of land may give in evidence a certified copy of the deed to his vendor, on the ground that he has not the custody of the original.
2. *Judgments of former county courts; how certified since transfer to circuit court.*—A transcript of the proceedings and judgment of the county court of Mobile in 1840, is properly certified by the clerk of the circuit court of Mobile county.
3. *Transcript from general land-office; when admissible evidence.*—A transcript from the general land-office of the United States of the deed, to the patentee, made by a purchaser from an Indian reserve under the Indian treaty of 1832, is secondary evidence, and admissible only when the absence of the original is properly accounted for.
4. *Ejectment; when plaintiff may recover.*—In ejectment the plaintiff must recover on the strength of his own title. He is defeated if the defendant, not being estopped, shows a superior outstanding title.
5. *Indian reservation; title of purchaser under approved contract.*—A pur-

chaser of land from an Indian reserve, with the approval of the President of the United States, acquired such an interest as was subject to sale under execution in 1852; and its purchase under such sale conferred a title to the land superior to a patent issued to a purchaser from him subsequent to the sale.

6. *Ejectment; recovery of less than entire interest.*—The plaintiff in ejectment may declare for the entire interest, and recover an undivided moiety.

7. *Adverse possession; does not run against United States.*—While the title to land remains in the Federal government, there can be no adverse possession of it which will render void a conveyance made by the rightful owner.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. F. S. FERGUSON, an attorney of the court, (Revised Code, § 758,) in consequence of the incompetency of the presiding judge, who was disqualified by interest.

THIS action was brought by Seaborn Jones in his lifetime, against Mrs. Mary E. Walker, to recover the possession of a half-section of land in said county; was commenced on the 20th November, 1862, was revived in the name of the plaintiff's heirs-at-law, at the March term, 1870, and was tried at that term, on issue joined on the plea of not guilty. In consequence of the rulings of the court on the trial, both in the admission and rejection of evidence, and in the charges given and refused, the plaintiffs were compelled to take a non-suit, which they here moved to set aside, assigning as error the several rulings of the court to which they reserved exceptions.

The land in controversy was the reservation of a Creek Indian, under the treaty made between the United States and the Creeks in 1832. The plaintiffs claimed under a patent from the United States to said Seaborn Jones, dated the 7th day of November, 1856. This patent recited, that one of the Creek Indians "became entitled, under the provisions of said treaty, out of the lands ceded to the United States by said treaty," to the lands in controversy; that he had sold and conveyed the same to J. W. Freeman and C. P. Zimmerman; that said transfers or contracts had been approved by the president of the

United States, but the original approved contracts had been lost or mislaid, "as represented by proof now on file in the general land-office," and had been transferred by said Freeman and Zimmerman to said Seaborn Jones; and contained a proviso in these words: "*Provided*, however, that if the said contract, appearing, as above stated, to be lost or mislaid, is yet in existence, and the *bona-fide* property of an adverse owner, then this patent is void, and of no effect." The defendant deduced title under a sheriff's deed to one Joshua W. Willis, as the purchaser at an execution sale, on the first Monday in October, 1852, on a judgment in favor of the Branch Bank at Mobile against Fountain & Freeman, of which firm said J. W. Freeman was a partner; and a quit-claim deed from said Willis to herself, which was not produced on the trial, but was admitted to have been accidentally destroyed by fire.

On the trial, as the bill of exceptions shows, the plaintiffs offered in evidence the patent to their ancestor, Seaborn Jones; proved the defendant's possession of the land, under claim of title from said Willis, from 1852 to the day of the trial; and there rested their case. The defendant then offered in evidence a certified copy of the sheriff's deed to Willis, and a certified copy of the judgment and executions thereon in the case of the Branch Bank at Mobile against said Freeman. The judgment in that case, as set out in said transcript, was rendered by the county court of Mobile, on the 3d Monday in February, 1840, in a summary proceeding by notice and motion, and recited that the said Branch Bank had produced and proved the certificate of its president that the debt was really and *bona fide* the property of the bank; and the certificate to the transcript, which was dated the 21st day of October, 1869, was made and signed by the clerk of the circuit court of said county. "The plaintiffs objected to the admission of said transcript as evidence, on the following grounds: 1st, because the court had no jurisdiction to render such judgment, there being no such certificate by the president of said Branch Bank as was necessary to give the court jurisdiction in such summary proceeding; 2d, because the

record is irrelevant, not being the proceeding in such a case as authorized a summary judgment; 3d, because the record was not certified by any officer authorized by law to certify the same; and, 4th, because the clerk of the circuit court certified said paper under the seal of the circuit court, instead of the county court, in which the judgment purported to have been rendered." The court overruled each of said objections, and allowed the evidence to be read; to which rulings the plaintiffs excepted.

"The *defendant* then offered in evidence what purported to be a copy of a deed of conveyance, signed by John W. Freeman and wife, dated the 10th day of April, 1856, with the certificates thereto attached, which are in the words and figures following." (The papers here copied in the record are the following: 1st, a quit-claim deed from C. P. Zimmerman to Seaborn Jones, for the lands in controversy, with others, dated the 14th May, 1855, which stated, by way of recital, that said Zimmerman had conveyed all his interest in said lands to said Seaborn Jones, in 1836, or 1837, and declared that, if he had conveyed any of the said lands to any other person before the date of said deed, then said deed was to be null and void as to those lands; and, 2d, a quit-claim deed for the lands in controversy, with others, from John W. Freeman and wife to Seaborn Jones, dated the 10th April, 1856. Appended to these documents is the certificate of Joseph S. Wilson, "acting commissioner of the general land-office at Washington," "that the annexed, on pages one, two, three, four, and five, are true and literal exemplifications of the originals on file in this office.") "The plaintiffs objected to the introduction of this evidence, on the following grounds: 1st, that it was not relevant, without other proof connecting it with the case; 2d, that this purports to be a copy of the originals on file, when it is not shown that the 'originals on file' were not copies, or a copy of a copy; 3d, that the original should be produced, or its absence accounted for; 4th, that the copy thus produced was not proved, and there was no sufficient proof of the execution of the original. The court overruled these several objections, and allowed said tran-

scripts to be read in evidence to the jury; to which the plaintiffs excepted."

"This was all the evidence in the case, and the court thereupon charged the jury as follows:

"1. This is an action of ejectment brought for the recovery of land, and the plaintiff must recover upon the strength of his own title; and if that is insufficient to maintain the action, it is immaterial what title the defendant has. The law presumes the defendant's possession to be legal.

"2. The recitals in the patent are evidence of the authority of the government to issue the patent, just as the acknowledgment of the receipt of money in a deed shows the consideration thereof; and, when uncontradicted by proof, must be taken as true.

"3. If the jury believe, from the evidence, that Freeman purchased this land from the Indian reservee, and that the contract was approved by the President of the United States, then Freeman had such title in and to the land as was subject to levy and sale under execution.

"4. If the jury believe, from the evidence, that Freeman purchased the land from the Indian reservee, and that the contract was approved by the President of the United States, and the same was sold under the judgment and execution shown in evidence, and purchased by Joshua Willis, who conveyed to the defendant before this suit was commenced, and before the patent issued, and that the defendant holds said land under a deed from Willis, then the patent to Jones is void, and the plaintiffs are not entitled to recover in this suit."

"The plaintiffs excepted to each one of said charges, and asked the court to instruct the jury—

"1. That to enable the defendant to defend in virtue of the purchase of the interest of John W. Freeman, she must have shown that Freeman had such title in the land at the time of said sale, as was subject to be sold under execution; and that the recitals in the patent, under the proof offered in evidence, were not sufficient to establish such title or interest.

"2. That, if the recitals in the patent are evidence, then,

as it is recited that the Indian reservee sold to Freeman and Zimmerman, and there is no evidence that Zimmerman sold to any one but to Jones, the ancestor of the plaintiffs, then the plaintiffs were entitled to recover one moiety of the land.

"3. That if they believed all the proof, they would find for the plaintiffs the land in controversy, with nominal damages.

"4. That if they believed all the evidence, the plaintiffs were entitled to recover one undivided moiety or half of said land in controversy."

The court refused each of said charges as asked, and the plaintiffs excepted to the refusal of each.

The rulings of the court on the evidence, the charges given, and the refusal of the several charges asked, are now assigned as error.

W. C. McIver, and Morgan, Bragg & Thorington, for appellants.—1. The court below erred in its rulings on the admissibility of evidence, for the reasons stated in the record in each instance, all of which are insisted on.

2. The first charge given is erroneous.—Tyler on Ejectment, 73–4, and cases cited; *Garrett v. Lyle*, 27 Ala. 286.

3. The error in the second charge is fully shown by *Jones & Parsons v. Inge & Mardis*, 5 Porter, 327.

4. As to the third charge given, if the title in said Freeman was merely inchoate, it could not be sold under execution against him. By the treaty of March 24, 1832, it is provided that a title (that is, a patent) shall be issued to the purchaser upon the completion of the payment, which must be of fair price for the land, and which the agent of the government is to certify, and the president of the United States is to approve; and without his approval no conveyance from the reservee is good. This involves the performance of duties executive in their nature, and which, under the act of congress of July 4, 1836, are to be judged of, adjusted by, and subject to the control of the commissioner of the general land-office, and the direction of the president.—*Bates v. Herron*, 35 Ala. 124.

5. The Indian reservee had only the power to appoint the person to whom the government should convey the title, and, in default of appointment, the government engaged to give him a title.—*Chinnubbee v. Nicks*, 4 Porter, 362.

6. As to adverse possession against the government, the case of *Iverson & Robinson v. Dubose*, (27 Ala. 418,) is conclusive.

7. The patent on its face imports a complete appropriation and disposition of the land which it assumes to convey; and when the government had a title to the land, no defect in the preliminary steps can be raised in action at law to recover the land.—*Bates v. Herron*, 35 Ala. 117; *Masters v. Eustis*, 5 Porter, 368; *Suget v. Little*, 24 Miss. 115; *Perry v. Chanlon*, 11 Miss. 585; *Beardman v. Reeves*, 6 Peters, 328; *Bagnall v. Broderick*, 13 Peters, 436; *Patterson v. Winn*, 11 Wheaton, 380; *Morgan v. C——*, 4 McLean, 366.

8. The defendant showed no title in Freeman subject to execution and sale, and did not assert any claim whatever as to one undivided moiety of the land. The plaintiffs may recover that moiety, though they declared for the whole. Tyler on Ejectment, 823, and cases citied; Adams on Ejectment, 211, and cases cited; 2 Porter, 9; *Baker v. Chastang's Heirs*, 13 Ala. 42; *McArthur v. Porter*, 6 Peters, 205; 12 Wendell, 170; 8 Dana, 196; 13 Wendell, 578.

9. One who sets up no title in himself is presumed to be an intruder, and can not defend against a patent rightfully issued by the government.—*Crommelin v. Minter*, 9 Ala. 594; *Petty v. Graham*, 13 Ala. 568.

WATTS & TROY, and GRAHAM & ABERCROMBIE, *contra*.—1. Seaborn Jones, the original plaintiff, never had such a title to the land, or any part thereof, as authorized him to maintain this suit. At the time of the transfer by Freeman to Jones, the defendant was in possession of the lands, claiming them as her own under the deed from Joshua Willis. Freeman's transfer was, consequently, void, as was also the subsequent transfer by Zimmerman to Jones.—*Dexter & Allen v. Nelson*, 6 Ala. 68. This is altogether a

different question from the statute of limitations, which, it is admitted, does not run against the government.

2. That Freeman had such an interest in the land as was subject to sale under execution at law, see *Rosser v. Bradford*, 9 Port. 354; *Long v. McDougald*, 23 Ala. 416.

3. If Jones had any right to a patent, that right must be based on the transfers of Freeman and Zimmerman, both of which, under the cases above cited, are void; and hence the patent itself must also be void. By the terms of the treaty of 1832 with the Creek Indians, the title to reservations never vested in the United States, but was recognized as remaining in the Indian reservee; and the right of the reservee to sell was restricted only for his own benefit, and so far as to require the approval of the president of the United States. Whenever a sale was made by the reservee, and the contract was approved by the president, there was a full and complete legal title conveyed to the purchaser.—*Rosser v. Bradford, supra.* After this sale and approval, the government had not the semblance of a title to the land; and the possession of any third person, from that time, must necessarily have been adverse to all the world. The patent itself recognizes the title as being in the Indian: its language is, that he "became entitled" to the land.—*Stephens v. Westwood*, 20 Ala. 275; *S. C.*, 25 Ala. 719.

4. There is nothing in the objections raised to the rulings of the court on the evidence.

B. F. SAFFOLD, J.—The suit, in the nature of ejectment, was instituted by the appellants against the appellees. The source of title of both parties was a sale of the land made by an Indian reservee to Zimmerman and Freeman. The defendant was a purchaser from Willis, who bought Freeman's half interest at a sale under execution in 1852. The plaintiffs claimed under a title from the United States, made in November, 1856, in consideration of a purchase by their ancestor, Jones, from Zimmerman and Freeman, who conveyed to him by separate quit-claim deeds, the first in 1855, and the other in 1856. The de-

fendant was in possession at the time of these conveyances to Jones.

1. A certified copy of the sheriff's deed to Willis was received in evidence, against the objection of the appellants that the absence of the original had not been accounted for. Section 1544 of the Revised Code requires the reception of such a transcript, when it appears that the party offering it has not the custody or control of the original. It does appear from the evidence that this deed conveyed to Willis much more land than he conveyed to the defendant. Besides, she had no right to its custody.

2. The transcript of the proceedings in the county court of Mobile, showing the judgment against Freeman, for the satisfaction of which the land was sold, was objected to by the appellant, as evidence for the defense. This judgment was in favor of the Mobile Branch of the State Bank, and was obtained on motion. It was rendered on a promissory note, in 1840, at which time this bank was authorized by law to recover judgment on such debts, by motion, in either the circuit or county court of Mobile, on giving thirty days notice to the debtor, and producing to the court the certificate of its president that the debt was really and *bona fide* the property of the bank.—Clay's Digest, p. 99, § 7. This was done.

When the county courts were abolished, in 1850, their records were transferred to the circuit court, the clerk of which became by law their custodian. The transcript is certified by the clerk of the circuit court of Mobile county to be a correct copy. The jurisdiction of the court was sufficiently shown, and the transcript was properly certified.

3. The certificate of the acting commissioner of the general land-office at Washington, appended to the deed from Freeman and wife to Jones, was a sufficient authentication of any paper or document appertaining or belonging to that office.—Rev. Code, § 2694. But the transcript was only admissible as secondary evidence of that deed after notice to the plaintiffs to produce the original.—2 Phil. Ev. 519, 520; *Jones' and Parsons' Heirs v. Inge's and Mardis' Heirs*, 5 Port. 327. Such notice was not given.

4. The first proposition in the charge of the court is correct. The general rule is, that the plaintiff must recover on the strength of his own title. If his title is insufficient to maintain the action, or the defendant, not being estopped, shows a superior outstanding title, he is defeated.—*King v. Stevens*, 18 Ala. 475. The meaning of the second is, that a patent from the United States government, when uncontradicted by proof, is sufficient to sustain the action of ejectment. This is undoubtedly true. As to the third, the purchase of Freeman from the Indian reservee, with the approval of the President of the United States, gave him such an interest in the land as was subject to sale under execution. It gave him such a legal title as, if obtained, would defeat a patent issued to a subsequent purchaser from him. The patent offered in evidence by the plaintiffs so declares.—*Iverson & Robinson v. Dubose*, 27 Ala. 418; *Rosser v. Bradford*, 9 Port. 354.

6. The fourth proposition of the charge is incorrect. In *Baker v. Chastang*, (18 Ala. 417,) it is said to be well settled, that the plaintiff in ejectment may declare for the whole, or the entire interest, and recover a less interest. There is no evidence whatever that the defendant ever obtained more than Freeman's interest in the land, which was an undivided half. The facts stated in this portion of the charge, in view of the evidence, would not prevent the plaintiffs from recovering Zimmerman's interest.

7. The possession of the defendant at the time of Zimmerman's conveyance to Jones was not of such a character as to defeat that deed by adverse possession.—*Iverson & Robinson v. Dubose*, supra.

The charges asked by the plaintiffs, which were refused, have been sufficiently considered in the examination of the general charge.

The judgment is reversed, and the cause remanded.

MAY *vs.* COURTNAY, TENNANT & CO.

[ATTACHMENT—PARTIES—BANKRUPTCY.]

1. *Attachment; strangers to, can not move to dissolve, for irregularities, after several continuances.*—Persons, who are mortgagees merely, claiming under a mortgage executed after the levy of an attachment on the mortgaged property, and who are strangers to the attachment suit, have not such an interest as gives them a right on motion as *amici curiæ* or otherwise, to ask the court in which the attachment suit is pending, to dismiss and dissolve the attachment, on the grounds of irregularities in the affidavit and bond for the attachment, when the motion is made after the suit has been pending for several terms.
2. *Persons not parties to the suit below can not appeal.*—Persons not made parties to the suit below can not be permitted to bring a cause to this court by appeal. Nor will they be permitted, after the cause is brought here, to assign errors as parties to the record. If such errors are assigned, they will be stricken out on motion of appellees
3. *Bankruptcy, discharge; attachment levied in* 1866 *may proceed to judgment, notwithstanding.*—A suit against one who subsequently becomes a discharged bankrupt, instituted by attachment in 1866, which has been levied in that year on the lands of the defendant, may proceed to judgment in favor of the plaintiff, unless the same is stayed by order of the court of bankruptcy. And the court in which this suit is pending may ascertain, by its judgment, the amount of the plaintiff's debt, notwithstanding the defendant's discharge in bankruptcy.
4. *Same; judgment only against property levied on, not erroneous.*—The judgment, in such case, which ascertains the amount of the plaintiff's debt only against the defendant, and directs its satisfaction to be enforced against the property levied on by the attachment, is not erroneous.—Bankrupt Act, § 21.
5. *Same; discharge does not affect lien of attachment levied in* 1866.—An attachment levied on the defendant's property in 1866 is not dissolved by the discharge of the defendant on his petition in bankruptcy, under the bankrupt act of March 2, 1867. In such a case the attachment lien of the plaintiff remains unimpaired.—Bankrupt Act, § 20; Rev. Code, § 2955.

APPEAL from Circuit Court of Butler.
Tried before Hon. P. O. HARPER.

The facts are sufficiently set forth in the opinion.

CHARLES H. MORSE and JOHN GAMBLE, with whom were RICE & CHILTON, for appellants.—The bill of exceptions is the controlling part of the record as to what occurred in the court below. From it it is plain that the defendant, May, pleaded his final discharge in bankruptcy; that plaintiffs first filed a replication *tending to raise* a question as to the validity of the discharge; that defendant demurred to this replication; that this demurrer was sustained by the court; that the plaintiffs then filed (or "pleaded") another replication which confesses the discharge in bankruptcy, and seeks to avoid its legitimate effect as a bar to a recovery, by averring that "their lien had attached by the levy of their attachment more than four months prior to the filing, by defendant, of his petition in bankruptcy"; that this replication, called a plea, "was sustained by the evidence," and "judgment was rendered for the plaintiff for the sum of $1,788 95"; that the cause went to the jury, and that the verdict did not respond to or touch the plea of final discharge or the last replication thereto. It is an uncontested fact, that the defendant was finally discharged in bankruptcy; and yet the court below, with this discharge duly established before it, rendered a judgment against defendant for $1,788 95 and costs! It is true the judgment entry states that "said judgment is only to be enforced against the property levied on in this case."

The action was not to recover property, but simply a personal action, assumpsit. In such action the court had no authority or jurisdiction to render judgment against the defendant or the property attached, after it was duly established that the defendant had been finally discharged in bankruptcy, on an application made after the action was commenced. Nor can the judgment be sustained on the verdict which did not respond to or decide the issues presented by the pleadings. The errors of the court below in these respects are clear; and a reversal must be had for these errors.

The assignee in bankruptcy never was brought into the circuit court, nor made a party; nor was a day in court or

opportunity ever afforded him to assail the asserted lien of plaintiffs to the attached property. The plaintiffs could not enforce their alleged lien in any court, without giving the assignee in bankruptcy an opportunity to contest that asserted lien; the court of bankruptcy was the court to enforce and secure that lien for plaintiffs, if it existed.

HERBERT & BUELL, for appellees.—Both Malone & Foote and May appeal to this court from the judgment and rulings of the court below, and they join in the bill of exceptions, but sever in their assignments of error.

Appellees now move to dismiss the appeal of Malone & Foote, and to strike their assignments of error from the file, with costs; this should be done, for Malone & Foote were not parties below, and we can not see how persons *not parties* can appeal. If their assignment of errors be stricken out, the court committed no error in overruling May's motions, as he had already appeared and pleaded in bar.

Malone & Foote's motion came too late; they might have made it at the fall term, 1870; they had actual notice prior to that time, as well as constructive notice by the levy of the attachment. Such motions should be made at the first term at which they can be made.—*Gill v. Downs*, 26 Ala. 670; 13th Rule Circuit Court Practice. But it is in the discretion of the court always whether to hear such motions.—*Ex parte Putnam*, 20 Ala. 592; Drake on Attachments.

The attachment was sued out more than four months before the bankruptcy; the lien was therefore preserved. Bankrupt Act, § 14. The judgment entry would have been proper under the bankrupt act of 1841.—*Peck v. Jenness*, 7 How. U. S. Rep. 612. It is valid under the present law. Bump on Bankruptcy (edition of 1871), p. 299; *Bates v. Tappan*, 99 Mass. 376; *Bowman v. Harding*, 56 Maine, 559; *Leighton v. Kelsey*, 57 Maine.

PETERS, J.—The material facts of this case may be stated as follows: On December 12, 1866, Courtnay, Tennant & Co., as plaintiffs, brought suit against May, as de-

fendant, in the circuit court of Butler county. The suit was commenced by attachment, which was levied on the lands of the defendant, May, on the next day after it was issued, and the writ of attachment was regularly returned into court, with the levy indorsed thereon, as required by law. And after the return of the writ the complaint was regularly filed at the spring term of the court, out of which the attachment was issued in 1867. At the fall term following, in 1867, Page, as *amicus curiæ*, appeared and made certain motions: 1st, to strike out the entire levy made by the sheriff; 2d, to quash the attachment; and, 3d, to quash the bond for the attachment. These motions were continued until the spring term, 1868, when they were all refused and overruled. After this, the defendant, May, appeared by his attorney and pleaded, "in short, by consent, *non-assumpsit.*" The cause was then again continued until the spring term, 1871, when Gamble and Morse, as the attorneys of Malone & Foote, who claimed an interest in the lands levied on" as *amici curiæ*, asked to be heard in certain motions to *dismiss* and *dissolve* the attachment for alleged irregularities in the affidavit and bond." It appeared in the proceedings on this application that Malone & Foote had acquired an interest in said lands so levied on by a mortgage, executed to them by May, on the first day of February, 1869, and on the interest growing out of said mortgage the motion was sought to be made. The court refused the application thus made on behalf of Malone & Foote, and the cause proceeded to trial on the issues joined between the original parties to the suit; when the discharge of May in bankruptcy was established, and the amount of the debt sued for was admitted, and a judgment was entered against May for its amount, to be enforced only against the lands levied on. A bill of exceptions was taken, showing these proceedings. Both May and Malone & Foote give appeal bonds to bring the cause to this court. The final judgment against May is the one from which the appeal is taken, and both May and Malone & Foote appear here, and separately assign errors. And the appellees move in this court to dismiss the cause

out of this court and to strike out the errors assigned on behalf of Malone & Foote. And there is no joinder in errors by the appellees.

The motions will be first disposed of. The allowance of appeals to this court is wholly by legislative enactment. The sections of the statute giving this right is in these words: "From any final judgment or decree of the chancery, circuit, or probate courts, except in such cases as are otherwise directed by law, an appeal lies to the supreme court, for the examination thereof, as matter of right, on the application of either party, or their personal representatives, and the clerk, register, or judge of probate, must certify the fact, that such appeal was taken and the time when, as part of the record, *which gives the supreme court jurisdiction of the case.*"—Revised Code, § 3485. "An appeal to the supreme court may be taken before the final determination of the cause, from any judgment or decree, overruling a motion to dismiss a bill for want of equity, or overruling a motion to dismiss or quash an attachment, or sustaining a demurrer to a plea in abatement to an attachment, or sustaining an attachment against matters set up in abatement of it, either in the way of an agreed case, or by plea or otherwise; but such appeal shall be taken *only after the consent* of the opposite party or his attorney is obtained to its being taken; and on the trial of such appeal, there shall not be a reversal, if the supreme court discovers that the defect or error alleged or insisted on can be removed or remedied by amendment, under existing laws."—Revised Code, § 3486. The language thus used can not be enlarged by this court. Its meaning is perfectly apparent.—43 Ala. 617. It is evident that Malone & Foote are not persons who come within the description of parties to this suit, nor have they appealed from the judgment overruling their motion to dismiss the attachment. They were not made parties to the suit in the court below. There is no judgment against them, either interlocutory or final, in this case. They can not, therefore, be heard here upon appeal. The circuit court merely refused to entertain their motion to "dismiss and dissolve the at-

tachment." It did not act upon the motion at all. The levy of the attachment was antecedent to the execution of the mortgage; and the claim under the mortgage was not of such a nature as to displace the levy of the attachment. The levy of an attachment creates a lien in favor of the plaintiff in the attachment, upon the estate of the defendant so levied on, from the levy.—Revised Code, § 2955. And this lien continues until the suit is determined. The execution of the mortgage did not dissolve it or entitle the mortgagees to have the levy dismissed. They did not occupy the position of *bona-fide* purchasers, and were not entitled to notice of the attachment. The mortgage was not a sale, but a mere security for the mortgage debt. They took the land burdened with the lien, and that was all they were entitled to have. Even a vendee under a quit-claim deed merely is not to be regarded as a purchaser *bona fide*, without notice.—4 Kent, 134, 135, marg.; *May v. LeClaire*, 11 Wall. 217. The motion here attempted is an abuse of the office of *amicus curiæ*. The purpose of such motions is to give the court information, when the court is in doubt, but not to force into the litigation parties who are strangers to the suit, and who had no interest in the cause of action when the suit was commenced.—1 Jacob. Law Dict., words *Amicus Curiæ*. Malone & Foote had no right to make such a motion as that here insisted on, and their application for that purpose was properly refused.—*Free v. Howard*, 44 Ala. 195. They are then not parties to this suit, and they are not entitled to insist on their assignment of errors here, and the motion to strike the same from the record must be allowed, with costs.

The assignment of errors by Malone & Foote being stricken out, those that remain on behalf of May are too indefinite and uncertain. They do not conform to the rule of this court, which requires a concise statement in writing of what constitutes the error relied on.—Rule of Practice No. 1; Revised Code, p. 816. Such an assignment of errors is insufficient, and will be disregarded. In this May can not be injured. His bankruptcy protects him against the judgment. And if Malone & Foote have any right supe-

rior to that of the appellees, this litigation can not affect it.—Bankrupt Act, March 2, 1867, § 34; U. S. Statutes at Large, chap. clxxvi, pp. 517, 533.

This suit was pending at the date of May's application to be declared a bankrupt. He might then have applied to the court in which his petition was filed and have had an order to stay the proceedings in the court below until his application in bankruptcy was determined, and if the bankrupt court failed to stay the proceedings thus begun, the State court might proceed to judgment for the purpose of ascertaining the amount due. Here the amount of the judgment was confessed, and judgment was entered only for the amount so confessed or agreed on, and although execution against the defendant is not ordered to be stayed, yet the judgment is ordered to be enforced only against the property levied on under the attachment. Bankrupt Act, § 21, *supra*. Though this may not be a very technical compliance with the law, it does the defendant, May, no injury, and he has no right to complain.—Shep. Dig. p. 568, § 82.

All the bankrupt's property in the mortgaged premises passed by his bankruptcy to the assignee, and he has no interest therein which the attachment can affect.—Bankrupt Act, *supra*, § 14; *Dunn v. Massey*, 6 Ad. & E. 479; *Mays v. Manuf. Nat. Bank*, 64 Penn. And the attachment having been levied long before the passage of the bankrupt act, it is not affected by its provisions. The lien of the attachment is not, in such a case, displaced by the bankruptcy of the defendant.—Act, *supra*, §§ 14, 20.

The judgment of the court below is affirmed, with costs.

BRUCE'S EXECUTRIX *vs.* STRICKLAND'S ADM'R.

[PETITION TO SET ASIDE ADMINISTRATOR'S FINAL SETTLEMENT.]

1. *When appeal lies from probate decree.*—An appeal lies from a decree of the probate court, setting aside and declaring void a former decree rendered on the final settlement of an administrator's accounts.
2. *When probate decree may be set aside at subsequent term.*—A final decree of the probate court which is absolutely void, whether for want of jurisdiction of the subject matter or of the persons interested, may be set aside and declared void at a subsequent term; *secus*, as to a decree which is voidable merely.
3. *Notice of final settlement of administrator's accounts.*—To sustain a decree of the probate court, rendered on final settlement of an administrator's accounts, the record must affirmatively show that the parties in interest had notice, either by personal service, or by proper publication, of the intended settlement; and if the record shows that the notice was given by posting at the court-house door and three other public places in the county, (Revised Code, § 2140,) it must also affirmatively show that no newspaper was published in the county.
4. *Receipt of Confederate money by administrator, or investment in Confederate bonds.*—An administrator who, during the late war, converted the assets of the estate into Confederate money or bonds, is liable to account for the same, on his final settlement, in sound funds; but the improper allowance of a credit by the court, for such money and bonds, is a mere irregularity, or error of law, and does not render the final settlement absolutely void, nor authorize the court to set it aside at a subsequent term.
5. *Settlement of administrator with himself as guardian of infant distributees.*—When an administrator is also the guardian of the infant distributees of the estate, the chancery court only has jurisdiction to settle his accounts; but a settlement made in the probate court, in such case, is not absolutely void.
6. *Amendment of probate decree nunc pro tunc.*—A decree of the probate court, rendered on the final settlement of an administrator's accounts, which shows on its face that notice was only given by posting at the court-house door and three other public places in the county, can not be amended at a subsequent term, *nunc pro tunc*, by parol proof of the fact that no newspaper was published in the county; such amendment can only be made on proof of some order or memorandum of record.

APPEAL from Probate Court of Lowndes.
Tried before Hon. J. V. McDUFFIE.

In the matter of the estate of Ann P. Strickland, deceased, on the petition of L. J. Bryan, as the administrator *de bonis non*, to set aside a decree of final settlement of the accounts of Jacob Bruce, the former administrator, since deceased, whose executrix, Mrs. Susan Bruce, was made a defendant to the petition. The petition was filed on the 27th of April, 1871. The decree of final settlement was rendered on the 21th of August, 1866, and was in the following words:

"This being the day set to hear and pass upon the account heretofore filed by Jacob Bruce, administrator of the estate of Ann P. Strickland, for a final settlement of his administration of said estate: Now comes the said administrator, and moves the court that said account may be passed and allowed as the same has been by him filed as aforesaid. And it appearing to the court, from proper evidence, that due notice of the nature of, and of the time set to make such settlement, had been given, by advertisement posted at the court-house door and three other public places in the county, for three successive weeks; and W. C. Griffin, who was heretofore appointed guardian *ad litem* for the minor heirs, now appearing in open court, consenting to act, and contesting said settlement, the court proceeds to examine said account, and to hear the evidence submitted in relation thereto; whereupon it is found that said administrator has received, in cash, of the assets of said estate, in Confederate money, the sum of eleven hundred and eighty-eight 42-100 dollars, which was bonded under an act of congress, and is now worthless. It further appears that the said administrator has expended for said estate, in United States currency, the sum of one hundred and five 17-100 dollars, which shows an excess of disbursements, over receipts, of one hundred and five 17-100 dollars. And the said account appearing to be full and correct, it is ordered, adjudged and decreed by the court, that the same be, and it is hereby, in all things, passed and allowed, as above stated. It is further ordered that said account, vouchers, evidences and statements, together with

all the papers on file relating to this, or any former settlement and proceedings, be recorded."

The defendant moved to dismiss the petition, and also demurred to it, on the ground that the court had no jurisdiction to set aside or review the decree of final settlement; and reserved exceptions to the overruling of her motion and demurrer. On the hearing of the petition, as the bill of exceptions shows, the petitioner offered in evidence the decree which he sought to set aside; which the defendant then moved to amend, *nunc pro tunc*, by inserting in the proper place the words, "there being no newspaper published in said county," "and offered proof of the same." The court excluded the evidence, and the defendant excepted. This was all the evidence, and the court thereupon rendered a decree in accordance with the prayer of the petition, setting aside the former decree; which decree, with the other rulings of the court above stated, is now assigned as error.

FITZPATRICK, WILLIAMSON & GOLDTHWAITE, for appellant.
WATTS & TROY, and J. F. CLEMENTS, *contra*.

PETERS, J.—This is an application by petition filed by the appellee, Bryan, as the administrator *de bonis non* of the estate of Ann P. Strickland, deceased, in the probate court of Lowndes county, against Susan Bruce, as the executrix of the will of Jacob Bruce, deceased, former administrator of the estate of said Ann P. Strickland, to set aside and declare void the decree of final settlement of said Bruce of his administration of said estate of said Ann P. Strickland, made by him in his life-time in said court of probate, on the 24th day of August, 1866. The grounds for the setting aside said decree, as alleged in said petition, are as follows:

"1. That the receipt of Confederate money by the said Jacob Bruce, as administrator, would not discharge him from liability to the heirs of Ann P. Strickland.

"2. That the decree on final settlement of said Jacob Bruce, administrator of said Ann P. Strickland, deceased,

fails to recite the reason that publication was not made in a newspaper.

"3. Because a settlement by an administrator with himself as guardian is void."

The application in this case was made on April 27, 1871, and all the parties interested were made parties to the proceeding. The prayer of the petitioner was granted, and the final decree of August 24, 1866, was set aside and declared void. From this judgment the case was brought to this court by Mrs. Bruce, as executrix aforesaid.

1. The first question to be disposed of is, a motion by appellee to dismiss the appeal, because the judgment from which it is taken is not such a final decree as permits an appeal. This motion must be denied. The petition to have the judgment on the final settlement of Bruce declared void, was the commencement of a suit in the court below, and the decree in that suit makes a final disposition of the matters therein litigated between the parties. Such a judgment is a final decree, from which an appeal will lie. Rev. Code, §§ 3485, 3508, 2247. Besides, from the decrees on such applications appeals have frequently been entertained by this court.—*Satcher v. Satcher's Adm'r*, 41 Ala. 26; *Johnson v. Johnson's Adm'r*, 40 Ala. 247; *Laird v. Reese*, 43 Ala. 148. The motion to dismiss is, therefore, refused, with costs.

2. The next question presented by the argument of the learned counsel for the parties on both sides of this cause, is, the validity of the judgment of the 24th day of August, 1866, rendered on the final settlement of Jacob Bruce of his administration of the estate of Ann P. Strickland, deceased. If this judgment was void, then the action of the court below was without error, and must be sustained. But, if it was not void, but merely voidable, then the judgment of the court below must be reversed. To give validity to the judgments of a court, it must appear from the record that the court had jurisdiction of the subject matter of the suit, and also of the persons directly interested in the matters litigated in the suit.—*Lamar v. Comm'rs Court of Marshall County*, 21 Ala. 772. If these facts exist, the

judgment can not be collaterally assailed as a void proceeding. But, if they do not exist, then it may be set aside on petition and motion in the same court, or wholly disregarded as a nullity.—*Johnson v. Johnson's Adm'r*, 40 Ala. 247; *Elliott v. Peirsol*, 1 Peters, 328, 340.

3. The suit in which the decree sought to be set aside and declared void was rendered, was a proceeding on the final settlement of an administration in the same court in which the letters of administration had been granted. In such a case, there can be no doubt about the power of the judge of probate to act. His power over the administrator and the estate of the deceased is expressly given by statute.—Rev. Code, § 790. He, then, had jurisdiction over the subject matter and the persons interested in the result of the suit. If, then, the persons interested had notice of the proceeding, or appeared and had an opportunity to defend their rights, the jurisdiction of the court is complete, and the court is clothed with the power to decide every question that arises in the progress of the cause; and whether its decision be correct or erroneous, its judgment, until reversed, is conclusive, after the adjournment of the court at which it was rendered.—*Harris et al., Exr's, v. Billingslea et al.*, 18 Ala. 438. The suit to enforce the final settlement of the administration may be commenced by the administrator himself, or it may be commenced by citation for this purpose issued by the court.—Rev. Code, §§ 2136, 2137, 2153, 2154, 2157. In the first instance, which is this case, the suit is commenced, and the jurisdiction attaches, as soon as the administrator files his accounts as required by law for his final settlement.—Revised Code, § 2137. After this step is taken, it is the duty of the court to appoint a competent person to represent the interest of minors and persons of unsound mind interested in the settlement, and to fix a day for the cause to be heard, and to give notice of the same in one of the ways prescribed by law.—Revised Code, §§ 2138, 2140. When these preliminaries are complied with, the court is clothed with authority to proceed to a final decree, as soon as the parties are properly before the court. And if the decree thus rendered contains the

necessary recitals for a final judgment, in such a case, it is not void, however irregular the proceedings may appear to be after the jurisdiction has attached and the parties are duly notified.—*Satcher v. Satcher's Adm'r*, 41 Ala. 26. But the court can not render a valid decree, unless the parties entitled to notice have been served with process, or have notice by advertisement, as prescribed by the statute, in lieu of personal notice.

In the final settlement sought to be assailed, the distributees were all minors, and there was no personal service of notice upon any of them. Nor does the notice by advertisement seem to have been given in conformity with the statute then in force; this was the Code. It prescribed two modes of giving notice of the settlement, but these could not be used indifferently. The second could only be used in the event that the first could not be resorted to. The language of the statute is as follows: "Upon the filing of such account, vouchers, evidence and statement, the judge of probate must appoint a day for such statement, *("settlement"?)* and give notice of the same by publication in some paper published in the county, for three successive weeks; or, if none is published therein, by posting such notice at the court-house, and three other public places in the county, for the same length of time. Such notice must state the name of the executor or administrator, the name of the deceased, the day appointed for settlement, and, if the settlement is proposed to be final, it must be so stated."—Code of 1852, §§ 1805–6. This very great particularity could not have been pointed out by the legislature, unless it was intended that it should be observed. Where the court is one of merely statutory powers, and the statute directs the thing to be done, and the mode of doing it, both must be complied with. In such a case, the court can only proceed as it is directed to proceed.—*Mathewson v. Sprague*, 1 Curt. 457; *Grignon v. Astor*, 2 How. 319; *Kemp v. Kennedy*, Pet. C. C. 30; *Hart v. Gray*, 3 Sum. 339. An improper notice is no notice, unless the parties choose to act upon it. The guardian *ad litem* has no authority to waive this notice. Only the heirs and leg-

atees who are of age can do this.—Code of 1852, § 1807. The guardian represents the interest of the minors at the settlement.—Code of 1852, § 1803. The minors were primarily entitled to notice by advertisement published in the newspaper, and no other notice could be resorted to until this failed. And to render the notice sufficient, the judgment, or the record of the proceedings, should show that there was a failure of the primary method of notice before the secondary mode was resorted to. This was not done, and the minors were not properly before the court when the judgment of final settlement was rendered. It is, then, void as to them.—*Hollingsworth v. Barbour*, 4 Peters, 466, 470, 476; *Webster v. Reid*, 11 How. 436.

The legislature has shown its exceeding anxiety for the protection of minors, in declaring a sale of lands made by order of the probate court to be void, unless the proceedings have been conducted in conformity with the statute authorizing the sale, and prescribing the rules for such proceeding.—Rev. Code, § 2225; *Laird, Adm'r, v. Reese*, 43 Ala. 148; *Searcy v. Holmes et al., Admr's*, 43 Ala. 608; Ordinance No. 38, Pamph. Acts 1868, p. 185.

4. I have already considered the second ground alleged in the appellee's petition for setting aside the final decree of August 24, 1865, but in terms somewhat different from those alleged, because this is the principal point in the case. I will now consider the other two grounds as recited above. The first can not avail in this proceeding. At most, it is but an error in law, which can not be corrected in this way. An administrator is a trustee, and he can not change or convert the trust funds into an unauthorized and worthless security, without a proper order of court to justify such change. Here the entire estate of the minors was wasted by an unauthorized conversion of their whole estate into Confederate treasury notes, and the minors were brought in debt to the guardian. There was no law of congress that justified such a course, and it seems that it was on such a law that the court relied to authorize the credit for the "Confederate money." If the administrator converted the assets of the estate entrusted to his admin-

istration into "Confederate money," or Confederate bonds, this did not exonerate him from accounting for the same upon his final settlement.—*Head et al. v. Talley, Adm'r*, in U. S. Circuit Court at Richmond, Va., before CHASE, C. J., 1870; *Glenn v. Glenn*, 41 Ala. 571; *Hall et al. v. Hall et al.*, 43 Ala. 488.

5. The third ground above stated does not seem to be sustained by the record. And even were the facts as alleged, this would not have rendered the judgment upon the final settlement void. The accounts of an administrator upon his final settlement are made out by the administrator between himself and the estate he represents; this account is filed with the judge of probate having jurisdiction; and on the day appointed for the settlement, the court must proceed to examine and audit this account, hear contested items, and finally state the account and pass the same as stated. This account, so stated and passed, should be recorded.—Revised Code, §§ 2137, 2145, 2147, 2152. But in this case, it is insisted that the decree of final settlement is void, because the administrator who made it was also the guardian of the minor distributees, who were the only parties interested in the settement, and in such a case the remedy is only in chancery.—*Hays v. Cockrell*, 41 Ala. 75; *Carswell v. Spencer*, 44 Ala. 204. The settlement in this case certainly comes within the principle of the cases above cited. It is most obvious that it would be of doubtful propriety to permit such a guardian to control the interests of the minors in such a settlement, when the record shows that he had wholly wasted their estate in his hands, and left them in debt to him; when, in fact, they are probably entitled to a judgment against him for a considerable sum of money, in sound funds.

6. On the trial below there was an attempt to amend the decree complained of, by the entry of a correct decree *nunc pro tunc*. There can be no doubt about the power of the court to do this. But it can not be done on parol proofs. The evidence of even the judge himself, who presided on the trial, is not sufficient, if it is only evidence by parol. The correction can only be made by evidence of record.

This may be derived from the order of publication, or any other order or memorandum made by the judge, as such, in the proceedings, and which the law authorized to be so made. The correction attempted in this instance does not seem to have been predicated on any such memorandum of record. The court was therefore right in refusing the motion to amend, as shown by the record.—*Hudson v. Hudson*, 20 Ala. 364; *Saltmarsh v. Bird*, 18 Ala. 665; *Kidd v. Montague*, 19 Ala. 169; *Metcalf v. Metcalf*, 19 Ala. 319; *Kitchen v. Moye*, 17 Ala. 143; Shep. Digest, pp. 396, 397; *Gunn v. Howell*, 35 Ala. 144.

There was also an application for a *mandamus* by the appellant in this case, which was sought to compel the judge of probate of said county of Lowndes to reinstate the said decree so set aside as aforesaid, upon the docket, and to dismiss the application to have the same set aside. This is a discretionary writ, and the appellant does not show such a case as recommends itself to the favorable consideration of the court; and it is denied, with costs.

The judgment of the court below is affirmed.

REYNOLDS *vs.* WELCH ET AL.

[CREDITORS' BILL IN EQUITY TO SET ASIDE MORTGAGE.]

1. *Creditors' bill by simple-contract creditors.*—Section 3446 of the Revised Code confers upon simple-contract creditors the remedy, previously confined to judgment creditors, of a bill in chancery to set aside conveyances made with intent to hinder, delay, or defraud creditors.
2. *Mortgage to bona-fide creditor; when void as against other creditors.* Where a debtor, in failing circumstances, mortgaged to one of his principal creditors almost the whole of his estate, equal in value to fifty per cent. more than the debt secured; stipulating with him, both in the conveyance and privately, for two or more years' delay in its foreclosure, the mortgagee knowing that there were other creditors, who would thereby be hindered, delayed, and most likely totally defeated,—*Held*, that the mortgage was void, under section 1865 of the Revised Code, as against other creditors.

APPEAL from the Chancery Court of Talladega.
Heard before the Hon. B. B. McCRAW.

The facts are sufficiently set forth in the opinion.

WATTS & TROY, and M. L. WOODS, for appellant.
TAUL BRADFORD, *contra.*

B. F. SAFFOLD, J.—The appellees filed a creditors' bill, to set aside a mortgage made to the appellant by their common debtor, George C. Player, on the ground that it was executed to hinder, delay, or defraud creditors. A demurrer for want of equity was overruled. It was claimed for the defendants that the complainants were purely simple-contract creditors, and not such as were embraced in section 3446, Revised Code. "A creditor without a lien may file a bill in chancery, to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed, by his debtor." The above section was enacted in 1860, and was intended to confer upon the creditors therein described the rights and remedies provided in section 1865, Revised Code. A creditor with a lien had previously a right to go into chancery to enforce his lien, and so had a judgment creditor without a lien, but who had exhausted his legal remedies, a resort to the same forum.—*Pharis v. Leachman*, 20 Ala. 662. It was obviously the intention of the legislature, in the passage of the statute (Revised Code, § 3446), to enlarge the jurisdiction of the chancery court, and, in cases where the relation of debtor and creditor purely exists, to invest the creditor without a lien or a judgment with the privilege, hitherto confined to judgment creditors, of enforcing section 1865, Revised Code. This being so, the facts stated in the bill clearly show the jurisdiction of the court. There was no error in overruling the demurrer.

2. Section 1865, Revised Code, declares void all conveyances, &c., made with intent to hinder, delay, or defraud creditors, &c. A *bona-fide* creditor may, by fair contract,

purchase and receive the effects of his debtor in payment of such debt, even though the known effect may be to hinder or defeat his other creditors.—*Young v. Dumas*, 39 Ala. 60. But, if there is an actual intent to hinder, delay, or defraud other creditors, the existence of a just debt, or other valuable consideration, is not sufficient to uphold the transaction.—*Pulliam, Willis, Rankin & Co. v. Newberry's Administrator*, 41 Ala. 168. Though there can be no actual fraud without intention, it is constructive fraud to tie up property from other creditors, for the benefit of one, and the temporary advantage of the debtor.—*Wiley, Banks & Co. v. Knight*, 27 Ala. 336. In *Gazzam v. Poyntz*, 4 Ala. 374, it was considered as settled law, that "a debtor may convey his property in trust to pay one or more creditors in full, or to pay his creditors in unequal proportions, provided he relinquishes all control over it, and stipulates for no pecuniary benefit to himself, but fairly and *bona fide* appropriates it to the payment of his debts."

With the above principles in view, do the facts in this case show an intention on the part of the mortgagee and mortgagor to hinder, delay, or defraud the other creditors of the latter? The reservation of some pecuniary advantage to the debtor, though generally a badge of fraud, would not be so when the appropriation to the preferred creditor was less in value than his debt, or consisted of property not subject to the debtor's liabilities. The conveyance, by deed absolute, or mortgage, to the favored creditor, of property decidedly greater in value than the debt paid or secured, with a reservation to the debtor of a pecuniary benefit, would be a marked indication of an intention at least to hinder or delay other creditors, and therefore of constructive, if not actual, fraud.

The evidence establishes that Player, the mortgagee and debtor, was in failing circumstances, and that after his mortgage to Reynolds he was hopelessly insolvent as to his other creditors. The property conveyed was worth at least fifty per cent. more than the debt secured. His purpose in giving the mortgage was what he declares it to have been, to shield his property from the attacks of his

creditors until, by years of toil, he might be able to pay their demands. This intention, no matter how creditable to him, was illusory in fact, and in law one to hinder and delay them.

Reynolds, of course, desired to secure the payment of his demand. He knew that Player had other creditors, and, in order to obtain the security offered, he complied with Player's requirements for time, as shown in the conveyance, and further stipulated with him, privately, not to foreclose his mortgage as long as Player had any reasonable prospect of extricating himself from his embarrassments. He gave no new consideration deemed in law valuable for the mortgage, except the time. His note for $3,000, which he relinquished, was made up of usurious interest and Confederate currency loaned. He certainly knew Player's motive in giving the mortgage, and he not only stipulated with him for two or more years' use of the property, but provided against a large increase of his own debt in the accumulation of interest.

It is not sufficient that no fraudulent or improper motive influenced the creditor, and that he made the best arrangement he could to secure his debt. If he tie up more of his debtor's property than is sufficient to secure his debt, exempting it for an unreasonable time from his other creditors, and provide specially, or as a result of law, for a permanent benefit in the meantime to the insolvent, by retaining the possession, if there be creditors known to the parties who may be delayed or hindered in the collection of their debts, and the necessary consequence of the transaction must be to hinder or delay them, the court is justified in inferring that the deed was made with fraudulent intentions.—*Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Montgomery's Executors v. Kirksey*, 26 Ala. 172; *Pope & Son v. Wilson*, 7 Ala. 690. We find no error in the decree of the chancellor.

The decree is affirmed.

GLENN *vs.* GLENN.

[BILL IN EQUITY BY WIFE, AGAINST HUSBAND, TO ESTABLISH RESULTING TRUST IN HANDS.]

1. *Conflict of laws, as to property rights of husband and wife, under marriage celebrated in South Carolina, with intention to reside in Alabama, where husband was domiciled.*—A marriage, contracted and celebrated in the State of South Carolina, between a man, a citizen of this State, domiciled in this State, with a woman, a citizen of the former State and residing there, with the intention of coming immediately to this State, to reside at the husband's domicile here, will be treated in our courts as a marriage contracted in this State, for the purpose of regulating the marital rights of both parties; and the marital rights of the wife will be regulated by the laws of the husband's domicile, if there is no marriage contract.
2. *Same, as to property afterwards bequeathed and devised to wife in South Carolina.*—Property, given to a married woman domiciled with her husband in this State, who is a citizen of this State, by the will of her father, in the State of South Carolina, in 1848, since the passage of the act of the general assembly of this State, approved March 1, 1848, entitled "An act securing to married women their separate estates, and for other purposes," for her sole and separate use and benefit, during her natural life, is to be taken, held, and esteemed here, as the separate property of the wife to the extent of her estate therein, under the law of this State regulating the "separate estate of wife," as found in the Code of Alabama.—Pamph. Acts, 1847-48, p. 79; Code, §§ 1993, 1997; Rev. Code, §§ 2382, 2388.
3. *Resulting trust for wife declared, in lands purchased by husband with money belonging to her statutory separate estate.*—If the husband takes possession of the wife's property so given to her in South Carolina, and converts the same into money by a sale there, and afterwards brings the money thus obtained to this State, and vests it in the purchase of lands here, but takes the title in his own name, a trust results to the wife in such lands so purchased by the husband with her money, which will be enforced at the suit of the wife against the husband in a court of chancery, to the extent of the wife's money so invested, and interest thereon, if the husband makes no objection as to the interest. *Robison v. Robison*, 44 Ala. 227.

APPEAL from the Chancery Court of Barbour.
Heard before the Hon. N. W. COCKE.

The facts are sufficiently stated in the opinion.

RICE, SEMPLE & GOLDTHWAITE, for appellant.
JNO. GILL SHORTER, *contra.* (No briefs on file.)

PETERS, J.—This is a suit in chancery, filed by Mrs. Glenn, against her husband, Massillon M. Glenn. The bill and amended bill show, that Glenn, a citizen of this State, domiciled here, married Barbara W. Herndon, a citizen of the State of South Carolina, and then resident in that State, on December 26, 1839. The marriage took place in South Carolina, but with the intention to reside at the husband's domicile in this State; and immediately after the marriage the husband returned to his home here, and the wife came with him, and both have resided here continuously since. They have never domiciled out of this State since the marriage, but have lived here as citizens of this State. On the 9th day of August, 1848, Stephen Herndon, the father of Mrs. Glenn, made his will in South Carolina, the place of his residence and domicile at the time, and died there. The will thus made and published was properly proved, and admitted to record, in said State of South Carolina, on October 11th, 1848, and administration of his estate was there commenced "under said will." By the third article of said will, the testator gave to his daughter, Mrs. Glenn, certain personal property, consisting of a number of slaves, and also several tracts of land, lying in the State of South Carolina. Mrs. Glenn was then a citizen of this State, residing here with her said husband. The gift is to her "for her sole and separate use during her natural life, and at her death to be equally divided between the children she may leave, or their lawful heirs." The will is made an exhibit to the bill. And it is further alleged, that at the time said testator made and published his said will, he had knowledge of "the provisions of the act of the legislature of this State for the benefit of married women," approved March 1st, 1848, and then in force in this State; and that he "made said devises as contained in said third clause of said will to complainant with a knowledge of said act, and with the intention thereby to secure" to her "the full benefit of the provis-

ions of said act in said devise of said real and personal property." It also appears that Glenn, the husband, took possession of the property thus given to Mrs. Glenn, and sold the lands in January, 1849, for the sum of $6,450, and one of the slaves for $1,350, and a carriage for $200, making in all the aggregate sum of $8,000. And in January, 1850, the husband, said Glenn, purchased certain lands in this State, to-wit: Section 5, in township 13, and range 29, for the sum of $2,020, which was paid for with funds derived from his wife's said separate estate given to her by her father as above said; and afterwards, he exchanged the lands last above said for the west half of section 1, and the east half of section 2, all in township 13, and range 28, lying in Barbour county, in this State. This exchange was made in January, 1854. And in April, 1856, said Glenn, said husband, purchased the west half of section 2, in township 13, and range 28, for the sum of $3,200, and paid for the same with moneys belonging to the separate estate of his said wife, derived from her father's will, as above shown. In May, 1858, said Glenn, said husband, purchased a part of the northwest quarter of section 1, in township 13, and range 28, for $1,280, of which last named sum he paid $938 of the moneys belonging to his said wife's said separate estate. All of said lands so purchased as above said are situated in this State, and the titles to the same were taken in the name of said Glenn, said husband, and not in the name of his said wife, or for her use. It is also alleged that Mrs. Glenn did not consent to the sale of her said personal property in the State of South Carolina, but the same was sold against her wishes. It is likewise shown that, during the years 1850, 1853, 1857, and 1858, said Glenn, said husband, appropriated the sum of $8,000, realized from the sale of Mrs. Glenn's separate estate derived from the will of her said father as above said, and that he invested the same in purchase of the lands above mentioned, and in putting improvements on the same, and that said sum is justly due her, with interest thereon from the date the same was received by him. The prayer of the bill is for general relief,

and for an account against the husband for the wife's funds received by him of her separate estate; and that the title of the lands purchased by the husband with her funds of her separate estate be divested out of the husband, said Glenn, and vested in the next friend of the wife, to be held to answer the purposes of the original separate estate created by said will. The husband answered the bill and the amended bill, and admits all the allegations of each, and makes no objection to the relief asked. On the hearing, the learned chancellor decreed that the complainant, Mrs. Glenn, was entitled to "a resulting trust in the west half of section two, in township thirteen, and range twenty-eight, lying in Barbour county, in this State; and divested the title to the same out of the defendant, and vested the same in "E. Herndon Glenn, in trust for the sole and separate use of the complainant, Barbara W. Glenn;" and taxed the husband with the costs, and refused all other relief. From this decree the wife, Mrs. Glenn, appeals to this court, and assigns the decree below for error.

The domicile of Glenn, the husband, being in this State at the time of the marriage, and the purpose of himself and his wife being to reside here immediately after the marriage was celebrated in South Carolina, the marital contract will be regarded as a marriage entered into in this State, and as one subject to our laws.—*Ford's Curators v. Ford*, 14 Mart. p. 514; Story's Conflict of Laws, p. 300, §§ 198, 199. Such a contract is under the legislative control of this State. It can not invoke the protection of the clause of the constitution of the United States, or the constitution of this State, which forbids the State to pass any law impairing the obligation of contracts previously entered into. Such a contract the State may dissolve, or modify, by legislative enactment, if it chooses.—Const. U. S., Art. 1, § 10, cl. 1; Pasch. Const. U. S., pp. 31, 153; Const. of Ala. 1867, Art. 1, § 24; Art. IV, § 30; 1 Bish. M. & Div. § 669. Where the State is not fettered by some constitutional limitation, its legislative power is absolute, and only controlled by its wise discretion.—Cooley on Const. Law, pp. 28, 87, 168, 172.—*Sill v. Corning*, 15 New

York Rep. 303; *Dorman v. The State*, 34 Ala. 216, 232. There can be no doubt, then, that the legislature may confer upon a married woman the rights of a *femme sole* as to all her future acquisitions after the passage of the law, or from some specified day; because there is no constitutional restraint to forbid this.—See *Edwards v. Pope*, 3 Scam. 465, 469. And such has been the constant practice in this State, since its admission into the Union, up to the present day.—*Carleton & Co. v. Banks*, 5 Ala. 32; Revised Code, §§ 2394, 2395; Pamph. Acts, 1853–54, p. 225; Pamph. Acts, 1869–70, p. 103, No. 121; Pamph. Acts, 1870–71, pp. 105, 108, Nos. 293, 294; Pamph. Acts, 1847–48, pp. 100, 416, 417, 418, 419, 422. Mrs. Glenn was a married woman, and a citizen of this State, on the *first* of March, 1848. The statute of the date last mentioned threw its protection over all the married women of this State, and "*secured*" to them their property acquired after its passage, as their separate estate, under that act, by whatever title it might have been received or held. This statute was followed by the act of February 13, 1850, and this latter act was followed by the Code of Alabama, and that by the Revised Code. The act of February 13, 1850, repeals "all laws and parts of laws in conflict" with it. Pamph. Acts, 1849–50, p. 65, § 11. And the Code does the same.—Code, § 10, *ad finem;* Acts, 1853–54, p. 71, No. 87. Then, the sole law regulating the separate property of the wife, now in force in this State, is that which is found in the Code. There can be no such thing as two systems upon this subject here, since the Code went into operation. And the provisions of the Code take effect, and are operative on the estates of *all married* women in this State, who have been married, or who have *received* property by descent, gift, or *otherwise*, since the first of March, 1848; and the same must be governed by the rules, regulations, and limitations contained in the Code for the regulation of the separate estates of married women.—Revised Code, §§ 2388, 2382. This is a law in favor of the weak, against the strong; it overturns the policy of a semi-christian and a barbarous age, and substitutes in its

stead a policy of justice to the citizen deprived of the usual means of self-protection through the ballot-box. It should, therefore, be most liberally construed. It simply does justice to the weaker sex. And the law favoreth charity.—Wingt. Max. 135.

I am aware that our learned and very able predecessors are supposed to have construed this great statute, which is now in substance the constitution of this State, in somewhat a different light; that they have spoken of "contract estates" and "statutory estates" of married women as different things, since the Code went into effect. I am unable to see the basis of this distinction, where the property has been given directly to the wife. The Code operates upon all estates of married women, *held* by them, or to which they *have become entitled*, in any manner, since the first of March, 1848. All other laws regulating such estates, accruing since that date, are repealed. They do not exist in this State. Since the day above named, all estates of married women, where the title is not in a trustee for the use of the wife, are controlled by the statute, and are so far statutory separate estates.—Const. of Ala. 1867, Art. XIV; Rev. Code §§ 2371, 2382, 2388; Pamph. Acts. 1849-1850, p. 64, § 11; Rev. Code, § 10. Nevertheless, there may be estates conveyed to a trustee, for the use of a married woman, in which the trustee is the owner, and the married woman is merely the usee. Such estates are held under the contracts creating them, as at common law.—*Molton v. Martin*, 43 Ala. 651; *Sprague v. Tyson*, 44 Ala. 339.

Under this construction of the statute, Mrs. Glenn was entitled to the property which had accrued to her since the first of March, 1848, as her statutory separate estate. This is the case of the property involved in this suit. Besides, the bill shows that, it was the intention of the testator that she should so hold it. This the husband admits, and acquiesces in her claim. He sets up no right in himself to the estate, which she claims. He is, therefore, to be treated as her trustee.—Rev. Code, § 2372. He can not waste the *corpus* of her estate. If he has invested her funds in lands in this state, she is entitled to the lands, if she choose so

to elect, and he is unwilling or unable to refund her money so invested by him.—*Marsh v. Marsh, adm'r*, 43 Ala. 678; *Robison et al. v. Robison, pro ami.*, 44 Ala. 227; *May v. LeClaire*, 11 Wall, 217, 236. He can not be permitted, as between her and himself, to defeat her rights by a conversion of her property and a change of the title to himself. *Sampley v. Watson et al.*, 43 Ala. 377. Under the civil law, if the husband disposed of his wife's "*moveables*," during the marriage, his estate was bound to account to her for them, on his death or the dissolution of the marriage; and all her "*immoveables*" came back to her. The husband only had the use during the marriage. Judged by these principles, the decision of the learned chancellor of the court below was not free from error. It must, therefore, be reversed and remanded, with instructions to proceed in the further disposition of the cause in conformity with the principles laid down in this opinion.

The decree of the court below is reversed, and the cause is remanded. The appellee, said Massillon M. Glenn, will pay the costs of this appeal in this court, and in the court below.

BUNKLEY ET AL. *vs.* LYNCH, PRO AMI.

[BILL IN EQUITY IN NATURE OF BILL FOR FORECLOSURE OF MORTGAGE.]

1. Mrs. L. joined her husband in a promissory note for her husband's debt for $2,000, and also in a mortgage on her lands of her separate estate, derived from the will of her father since the passage of the Code, to secure the payment of said note to E. K. & Co.; afterwards Mrs. L. and her husband sold said lands to R. for $6,000, and R. was to pay the $2,000 mortgage debt; R. then sold the same lands to B., and B. also undertook the payment of said mortgage debt to E. K. & Co. But R. and B. failed to pay said mortgage debt, and thereupon the surviving partner of E. K. & Co. filed his bill against Mrs. L. and her husband to foreclose the mortgage and to collect the mortgage debt. In this suit he failed, and the mortgage and note were held to

be void as to Mrs. L.,—*Held*, that after the defeat of the mortgage, the $2,000 (the amount of the mortgage debt,) left in R.'s hands to pay this debt, was the separate property of Mrs. L. which was secured to her by a vendor's lien in her favor on said land, and she could file her bill in chancery by her next friend against her husband and B, who was in the possession of said land under R.'s deed, to enforce her lien for said $2,000 so left in the hands of R. as above said.

APPEAL from the Chancery Court of Montgomery.
Heard before Hon. ADAM C. FELDER.

The facts are sufficiently stated in the opinion.

STONE, CLOPTON & CLANTON, for appellants.
WALKER & MURPHEY, *contra*.

PETERS, J.—This is a suit in the nature of a suit for foreclosure, and it is founded on a certain instrument in writing, executed by the complainant in the court below, Mrs. Mary K. Lynch and her husband, to one Reading. It is in the words and figures following, to-wit: "The State of Alabama, Montgomery county. Indenture witnesseth, that in consideration of the sum of six thousand dollars, to us in hand paid by Edward M. Reading—the receipt whereof is hereby acknowledged,—We, Frank Lynch and Mary W. K. Lynch, his wife, all of said county, have, and do hereby grant, bargain, sell, convey and confirm unto the said Edward M. Reading the following described lands, secured to the sole and separate use of the said Mary W. K. Lynch under the will of her father, William K. Buford, deceased, and which lands are in the county aforesaid; that is to say, the south-west quarter, the west half of the south-east quarter, the west half of the north-east quarter, and the east half of the north-west quarter, all in section five (5), and containing 437 20-100 acres. Also, the north-west quarter, and the west half of the north-east quarter of section eight (8), containing two hundred and sixteen 42-100 acres, all in township fifteen (15) and range nineteen (19). To have and to hold to the said Edward M. Reading, and to his heirs and assigns forever.

"And, with the exception of a mortgage on said lands,

executed by us on the 15th day of January, 1866, to Eben Kirk & Co., to secure the payment of two thousand dollars due them by us on the 15th day of April, 1866, and which debt the said E. M. Reading binds himself to pay to said Eben Kirk & Co., without any claim or recourse on us, we do covenant with the said E. M. Reading, his heirs and assigns, that the said Mary W. K. Lynch is lawfully seized and possessed of said lands; that they are unincumbered; that we have a good right to sell and convey the same to the said E. M. Reading, his heirs and assigns; and the title and quiet enjoyment of the same to the said E. M. Reading, his heirs and assigns, we do warrant and will forever defend against the lawful claims and demands of all persons.

"Witness our hands and seals, — day of —, A. D. 1866.

FRANK LYNCH, [Seal.]

"Witnesses, MARY K. LYNCH, [Seal.]

Turner Clanton,

David Campbell."

[STAMPS.]

This instrument was properly acknowledged before the judge of probate of said county of Montgomery, on the 13th day of August, 1866, and recorded as required by law on the 9th day of November following.

In connection with the execution of the foregoing instrument, it is also alleged that Lynch and wife executed the mortgage therein mentioned, and that in a suit in chancery by Micou as the surviving partner of the firm of Eben Kirk & Co., against said Lynch and wife, and others, seeking a foreclosure of said mortgage for the purpose of enforcing the payment of the debt therein mentioned, the mortgage and promissory note for the security of said debt of two thousand dollars in favor of Eben Kirk & Co. was declared null and void, and the suit for foreclosure failed as to Mrs. Lynch. It is also alleged, that after the making of said mortgage and the execution of the above cited conveyance to Reading, Reading sold the lands mentioned in said conveyance to Bunkley, on the 31st of December, 1866, and in Reading's deed to Bunkley the same lands are conveyed

that are conveyed by Lynch and wife to Reading, and Reading warrants the title of said lands, "and the quiet enjoyment of the same against the claims of all persons whatsoever, except a mortgage on said lands executed by Frank Lynch and Mary K. Lynch, on the 15th day of January, 1866, and which debt the said Gordon S. Bunkley agrees to pay." The mortgage and note, the conveyance of Lynch and wife to Reading, and Reading's deed to Bunkley, and Mrs. Lynch's answer to the bill filed by Micou, are made exhibits to the bill in this case. It is also alleged that the consideration of the conveyance from Reading to Bunkley was a certain interest in the stock and goods of a drug store owned by Reading, and that Mrs. Lynch received no part of this consideration, and had no interest in it. It also appears that Mrs. Lynch owned and possessed a separate estate, which is referred to as a contract estate. Bunkley died, and his wife administered on his estate. These are all the allegations of the bill. The prayer is, that the lands mentioned in the conveyance from Lynch and wife above set out "be sold, and a portion of the proceeds of such sale, equal to the value of said mortgaged interest hereinbefore reserved, be paid" to Mrs. Lynch, and for general relief. The mortgage and promissory note to Eben Kirk & Co., the deed of Lynch and wife to Reading, and Reading's deed to Bunkley, and also Mrs. Lynch's answer to the bill filed by Micou, and the documents showing Mrs. Lynch's title to the lands sold to Reading, are made exhibits to her bill. The bill is filed in her name by her next friend, and her husband is made a party defendant. The bill is to foreclose a vendor's lien in favor of Mrs. Lynch.

Mrs. Bunkley, in her own name and in her representative character as the administratrix of her husband's estate, answered the bill, and demurred to the same for want of equity.

The learned chancellor overruled the demurrer, and decreed for the complainant, and ordered a reference to the register to take an account and report as instructed. The defendants below appeal from this decree, and bring the

case here, and assign the overruling of the demurrer and the chancellor's decree as error.

The exhibits to a bill in a suit in equity are a part of the bill itself, and whatever is found in them must be taken as a part of the statement of the facts on which the suit is founded.—Revised Code, § 3327; ib. p. 825, Rule in Chan. No. 17. So far as they are admitted facts or allegations undenied, they are to be taken as true. Whatever, then, is found in the mortgage and promissory note to Eben Kirk & Co., in the deeds to Reading and to Bunkley, and the answer of Mrs. Lynch to Micou's bill, are allegations of facts in the pleading, and if admitted or proven, they must be so treated, as they are exhibits in this case.

A conveyance for the sale of lands is a declaration, or series of propositions by the vendor to the vendee, touching the thing sold or intended to be sold.—*May v. LeClaire*, 11 Wall. 217, 228; 1 Pars. Contr. p. 8. If it is delivered to the vendee, and he accepts it, he must be presumed to acquiesce in and consent to all its recitals. And it must be accepted as a whole, or not at all. Therefore, to ascertain its proper construction, and the real purpose of the parties to it, its entire contents may be looked to. In this State it must be in writing, or printed, "on parchment or paper, and *signed at the foot* by the contracting parties." It must also be executed with the formalities prescribed by law.—Rev. Code, §§ 1, 1535, 1536, 2373; *O'Neal v. Robinson*, 45 Ala. 526. If, within these limits, it is intelligible, is made upon legal consideration and by parties competent to contract, it is sufficient, whatever form of words may be used.—1 Kent, 450; Revised Code, § 1569. In such an instrument, the part which preceded the *habendum* at common law was called the *premises*.—*Sumner v. Williams*, 8 Mass. 174. This contained the subject-matter of the conveyance, and could not be contradicted by the subsequent parts of the instrument, though it might be so explained and qualified.—*Manning v. Smith*, 6 Conn. 289; *Wager v. Wager*, 1 S. & R. 375. Here the exception which precedes the warranty comes after the *premises* and after the *habendum*. The conveyance passes a fee simple estate

in all the lands mentioned therein. The exception, then, can not be a limitation on the quantity or the title of the lands intended to be sold. This would be a contradiction of the premises, which is not to be allowed, if there is any other construction which the intention of the makers of the instrument will admit.—4 Bac. Abr. Bouv. ed. p. 212, C., *et seq.; Jackson v. Beach*, 1 Johns. Ch. Cas. 399; Shep. Dig. p. 497, §§ 124–25. The exception, then, must be applied to the warranty. This makes the whole instrument consistent with its purpose and the facts recited in it. The vendors intended to convey all their title to all the land named in the contract of sale, and they were able to warrant the title, except against the mortgage. This they do; and a rational construction of the language used, and its connection, shows that this was all they proposed to do.

The next question that presents itself is this: What was the consideration for the sale, as appears from the recitals of the deed from Lynch and wife to Reading, which is quoted above? Was it six thousand dollars, which was received at the delivery of the deed, or was it six thousand dollars and also the payment of the mortgage debt of two thousand dollars to Eben Kirk & Co. besides? In other words, was the payment of the mortgage debt reckoned as a part of the price of the land? The recitals of the deed show that Reading had paid the six thousand dollars of the purchase-money, and that he agreed also to pay off the mortgage debt of two thousand dollars to Eben Kirk & Co., in addition. It can hardly be presumed that he agreed to pay this mortgage debt *sans recourse* on the mortgagors, without any consideration, merely for their accommodation,—in effect, that he intended to give them two thousand dollars above the price of the lands; because, this would be the purport of his agreement as recited in the conveyance, unless Lynch and wife furnished him the means to pay the mortgage debt out of the value of the lands sold, over and above the money paid at the delivery of the deed. If Reading had intended to take the lands incumbered with the mortgage on payment of the six thousand dollars, he would not have agreed to pay

the mortgage debt besides. And he would not have agreed to satisfy the mortgage debt, unless Lynch and wife had furnished him the means out of the real value of the lands intended to be sold. The payment of the mortgage debt, then, was a part of the price of the lands. And the funds to pay it were deducted from the price at which the lands were evidently reckoned, and left in Reading's hands for that purpose. If he is permitted to retain it, he will be enabled to hold on to the lands for two thousand dollars—the amount of the mortgage debt and interest thereon—less than Mrs. Lynch intended to sell it. A construction of the conveyance of the title, which would lead to this result, would not be just to her. In construing contracts, equity looks to justice.—1 Fontb. Eq. 1. The exhibits to the bill show that Reading sold the lands purchased from Mrs. Lynch and her husband by him, to Bunkley, upon the same terms, as to the payment of the mortgage debt, on which he had purchased them. And it can not be assumed that Bunkley undertook the payment of the mortgage debt gratuitously. And he must be visited with notice of all that appears from an examination of Reading's title deeds.—*Witter v. Dudley*, 42 Ala. 616; *Johnson v. Thweatt*, 18 Ala. 741. If Bunkley was indemnified to pay the mortgage debt by Reading, and knew the contents of Reading's deed from Mrs. Lynch and her husband, he has no reason to complain that the indemnity which was left in his hands, after the defeat of the mortgage debt by Mrs. Lynch, should be applied in payment of that debt. The mortgage having failed, there was no mortgage debt to pay, and Mrs. Lynch's funds left in Reading's hands for that purpose, reverted to her. It was her money deposited in his hands, upon a trust for her use. If the use failed, as it did, then her title to recover the money revived; for, *equo et bono*, it belonged to her.—*Hitchcock et al. v. Lukens & Son*, 8 Port. 333; *S. C.* 4 Smith Ala. 303. And as it was a part of the price of the lands which had not been paid, it was secured by the vendor's lien; and Mrs. Lynch had the right to go into chancery and enforce that lien.—*Mahone v. Haddock*

et al., 44 Ala. 92; *Burch v. Carter et al.*, 44 Ala. 115; *Wood et al. v. Sullens*, 44 Ala. 686.

The objection that the suit is instituted by Mrs. Lynch against her husband without the interposition of her next friend, is not sustained by the record. Mrs. Whatley is the next friend. This is sufficient.—Chan. Rules No. 15, Rev. Code, p. 825. The demurrer to the complainant's bill was properly overruled. The bill is not destitute of equity, and it is sufficient in all its formal parts.—Revised Code, § 3327.

The decree of the court below is affirmed at appellant's costs, in this court and in the court below.

MONROE *vs.* HAMILTON ET AL.

[BILL IN EQUITY FOR SETTLEMENT OF PARTNERSHIP ACCOUNTS, AND FORECLOSURE OF MORTGAGE.]

1. *Partnership; settlement of accounts in equity; multifariousness, and adequate legal remedy.*—A bill in equity, filed by one partner against his insolvent co-partner in the business of carrying on a farm for one year; asking a settlement of the partnership accounts, and the foreclosure of a mortgage executed by the defendant partner on his share of the crop to be raised, to secure an individual liability to the complainant,—is not obnoxious to the objection that there is an adequate remedy at law; nor is it demurrable for multifariousness, although several purchasers from the defendant partner, of different portions of the crop at different times, are united with him as defendants.

APPEAL from the Chancery Court of Greene.
Heard before the Hon. A. W. DILLARD.

THE bill in this case was filed by Wm. O. Monroe, against Wm. M. Hamilton and others, and sought the settlement of partnership accounts between the said Monroe and Hamilton, arising out of their joint farming operations during

the year 1867, and the foreclosure of a mortgage executed by said Hamilton to secure an individual liability to said Monroe. Several other persons were joined as defendants with Hamilton, on the allegation that they had purchased, at different times, portions of the crop from Hamilton, with notice of the mortgage. Hamilton, who was alleged to be insolvent, made no defense, and a decree *pro confesso* was entered against him. The other defendants demurred to the bill, for multifariousness, and because the complainant had an adequate remedy at law. The chancellor sustained the demurrer, on both grounds, and his decree is now assigned as error.

J. B. CLARK, and R. CRAWFORD, for appellant.—1. A mortgagee, with power to take possession and sell, may, undoubtedly, in some cases, maintain an action at law against any one who has wrongfully possessed himself of the mortgaged property.—*Hopkins v. Thompson*, 2 Por. 433; 4 Kent, 154. But the more complete and appropriate remedy, in such a case as this, is in equity, where the rights of all the parties can be finally adjusted.—*Anderson v. Hooks*, 9 Ala. 704; *Guthrie v. Quinn*, 43 Ala. 561–7; *Halstead v. Shepard*, 23 Ala. 558; *Rogers v. Jones*, 1 McCord's Ch. 221.

2. The bill is not multifarious.—*Ambler v. Warwick*, 1 Leigh, 195; *Poston v. Eubank*, 3 J. J. Mar. 44. The object of the bill is single, and it does not attempt to enforce against the defendants demands wholly disconnected. All the defendants have a common interest in the subject of litigation, and claim through the same person, though by contracts made at different times. The case comes fully within the principles laid down by the following authorities: *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 409; *Salvidge v. Hyde*, 5 Madd. 138; *Campbell v. Mackey*, 1 My. & Cr. 603; *Whaley v. Dawson*, 2 Sch. & Lef. 367; *Gaines v. Chew*, 2 How. (U. S.) 642; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, 157; *Boyd v. Hoyt*, 6 Paige, 65; 20 Pick. 368; *Bank v. Walker*, 7 Ala. R. 926, 949; *Guthrie v. Alexander*, 15 Iowa, 470; *Porter v. McAllister*, 6 Humph. 408; 10 Sim. 470; 12 Peters, 230; *Kennedy v. Kennedy*, 2 Ala. 609.

W. COLEMAN, and MORGAN & JOLLY, *contra*.—1. Hamilton, in disposing of the cotton, converted it. The several purchasers from him do not claim through the trustee, but in opposition to him, and have no connection with the partnership.—*Colburn v. Broughton*, 9 Ala. 351; *Felder v. Davis*, 17 Ala. 418. The bill unites a claim against Hamilton, to settle the partnership, with a claim, as mortgagee, against several purchasers from him, for separate and distinct conversions.—*McIntosh v. Alexander*, 16 Ala. 89; *Halstead v. Shepard*, 23 Ala. 568.

2. The remedy at law was adequate and complete.—*Colburn v. Broughton*, 9 Ala. 351.

SAFFOLD, J.—The bill was dismissed, on demurrer, for multifariousness and adequate remedy at law. It charged that the complainant, Monroe, had entered into a partnership in farming with the defendant Hamilton, for the year 1867. Certain specified expenses were to be borne by each separately, and others were to be incurred on their joint liability. The profits were to be divided equally. Hamilton, being obliged to borrow money to perform his part of the contract, obtained some directly from Monroe, and some upon a bill of exchange, which Monroe signed as his surety. To secure the repayment of this money, he mortgaged his entire interest in the farming business to his partner, Monroe, under the following stipulations: As soon as the crop was gathered, or in a reasonable time thereafter, Monroe was to take possession of it, and sell it for their mutual benefit; "after the sale, the parties were to settle their partnership liabilities, and divide the net profits into two equal shares; Monroe was to have his own share absolutely, and was to retain Hamilton's in trust, and refund himself the money borrowed from him, and pay the bill of exchange, returning the residue, if any, to Hamilton."

It was further charged, that, although Hamilton had paid the bill of exchange, the money due to the complainant was still unpaid, and also the partnership debts for which he was liable. Hamilton, without authority, had sold the

crop at different times, in the quantities specified, to the other defendants, and had left the State insolvent. Neither he, nor the other defendants, had accounted to the complainant for the said cotton.

The mortgage was duly recorded, and the transactions complained of occurred subsequently. The prayer of the bill was for an account of the partnership matters, and against the purchasers of the cotton, for an account of its value, and for general relief.

If the complainant has a right to the remedy he has chosen, the defendants should not object because he did not resort to a legal remedy, by which he might have dispossessed them not only of the share of the property he is entitled to, but also of that which they may in this action retain as the share of their vendor. A mortgagee, with a power of sale, may apply at once to a court of equity for a foreclosure of the mortgage.—*Anderson v. Hooks*, 9 Ala. 704. Chargeable as these purchasers are with the disabilities imposed on their vendor by his mortgage, they still have a claim under the purchase to his interest in the cotton, subject to its appropriation to the payment of the partnership liabilities and the other debts secured. How can the account be taken? how can a multiplicity of suits be avoided, except by a resort to chancery?—Story on Part. §§ 263, 264; 1 Story's Equity Jur. 676–683; *McGown v. Sprague*, 23 Ala. 524. The remedy at law is not adequate.

The bill is not multifarious. The defendants have a common interest touching its matter. They are interested in the same claim of right, and the relief asked for in relation to each is of the same general character.—Story's Eq. Plead. §§ 284, 285; *Holman v. Bank of Norfolk*, 12 Ala. 369–409.

The decree is reversed, and the cause remanded.

LEEPER, EX'R, &C. *vs.* TAYLOR AND WIFE.

[CONTESTED PROBATE OF WILL.]

1. *Undue influence; what constitutes.*—The undue influence necessary to overthrow a testamentary disposition of one's estate, must be of such a character as to dominate the will of the testator, and substitute the will of another in its stead. There must be such importunity, or coercion, as could not be resisted, so that the motive impelling the testator is tantamount to force or fear.
2. *Unsoundness of mind; what constitutes.*—The unsoundness of mind which incapacitates one to make a valid will, is not mere impairment or weakness of intellect, which sometimes attends old age or disease, but the mind must be so prostrated as to lose the government of reason and common sense.
3. *Reversal of judgment, with instructions for rendition in primary court.* On appeal from a judgment and decree of the probate court, in the matter of the contested probate of a will, the evidence having been submitted to the court without the intervention of a jury, and being all set out in the bill of exceptions, the appellate court, on reversing the judgment of the primary court, (Revised Code, § 2251,) will direct that court what judgment to render in the case.

APPEAL from the Probate Court of Talladega.
Heard before the Hon. GEO. P. PLOWMAN.

IN the matter of the probate of the last will and testament of Dr. Edward Gantt, deceased, which was propounded for probate by Samuel Leeper, one of the executors therein named, and contested by Mrs. Louisa Taylor and her husband, LaFayette Taylor. The case was submitted to the court, by consent, without the intervention of a jury; and its judgment and decree, refusing to admit the will to probate, is now assigned as error. The evidence is too voluminous to be stated at length, and it can not be conveniently condensed. The material facts, so far as they are necessary to a correct understanding of the legal points decided, appear in the opinion of the court.

JOHN T. HEFLIN, for appellant.
BRADFORD & MARTIN, *contra*.

PETERS, J.—The will in this case is contested on two grounds. I mention these, but not in the order of the pleading: 1st, undue influence; 2d, unsoundness of mind.

Upon the first ground of contest, but little need be said. The undue influence necessary to overturn a testamentary disposition of one's estate must be of such a character as to overpower the will of the testator, and substitute another will in its stead. It is said by the text-writers on this branch of legal learning, "That the influence to vitiate the act must amount to force and coercion, destroying the free-agency." It must not be the influence of affection, or attachment, or the desire to gratify the wishes of another. And there must be evidence of such importunity, or coercion, as could not be resisted, so that the motive impelling the testator was tantamount to force or fear.—1 Williams Ex'rs, 42; 1 Jar. on Wills, 39; *Taylor v. Kelly*, 31 Ala. 59, 70; *Gilbert v. Gilbert*, 22 Ala. 529; *Dunlap v. Robinson*, 28 Ala. 100; *Leverett's Heirs v. Carlisle*, 19 Ala. 80; *Pool v. Pool*, 35 Ala. 12; *Hall's Heirs v. Hall's Executor*, 38 Ala. 131; 1 Redf. Law of Wills, 514 *et seq.* There is no proof whatever of the exercise of such an influence, in this case.

The second ground of objection above stated to the instrument propounded as the will of Dr. Gantt, is much more difficult of treatment. In this case it is more a question of fact than of law. To make a will implies the possession of mind sufficient for that purpose. The will itself should be the expression of the testator's own mind. It is the testator's wish and directions as to what disposition shall be made of his estate after he shall have departed from this life. The testamentary disposition takes effect at the testator's death. And it is doubtless for this reason that the preparation of a will is so often postponed until the expectation of death has arrived, as an earlier disposition might not suit the exigencies of that hour. Though a will may be made at any time in life by a person of sound mind and of sufficient age.—10 Bac. (Bouv. ed.) 479; Rev. Code, §§ 1910, 1916. After twenty-one, there is no limit as to age; but the soundness of mind of the testator must be such that he can be said to be of sound and disposing

mind at the time the will is made and published. The words "of sound mind" are those used in our statute. They are not terms new to the law, but have been long used and defined by judicial tribunals and eminent authors upon the subject of insanity. It is said, after repeated discussions of the same question by our own courts, *That the testator should make a valid will, it is not necessary that his memory should be perfect, and his mind wholly unimpaired. If he had memory and mind enough to recollect the property he was about to bequeath, and the persons to whom he wished to will it, and the manner in which he wished it disposed of, and to know and understand the business he was engaged in, he had, in contemplation of law, a sound mind; and his great age, bodily infirmity, and impaired mind, would not vitiate a will made by one possessing such capacity.* The authorities upon which this declaration of the law is made fully sustain it.—*Taylor v. Kelly*, 31 Ala. 72; *Harrison v. Rowan*, 3 Wash. C. C. 385; *Coleman v. Robertson*, 17 Ala. R. 84; 1 Jar. on Wills, 50; *Elliott's Will*, 2 J. J. Marshall, 340; *Dornick v. Reichenback*, 10 S. and R. 84; *Blanchard v. Nestle*, 3 Denio, 37.

It would be monstrous to permit a testator's age and infirmity of body to defeat his purpose in this disposition of his estate, when he evidently knew and intended what his will expressed at the time it was made and published. *Maverick v. Reynolds*, 2 Bradf. Sur. 360. This would make old age synonymous with imbecility. Though old age often has its weakness, physical and mental, it is not necessarily associated with such unsoundness of mind as renders its possessor incapable of making a valid will.—Ray's Med. Jur. § 336. In referring to this subject, in one of his opinions, Chancellor Kent has said: "It is one of the painful consequences of extreme old age, that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life, to command the attention due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have

been procured by fraudulent arts, but contains those very dispositions, which the circumstances of his situation and the course of the natural affections dictated."—*Van Alst v. Hunter*, 5 John Ch. 148.

The testimony here very clearly shows that Dr. Gantt very well knew what he was about when he made and published the instrument propounded for probate as his will; that he was the sole author of it, and that it proceeded from his own and from no other mind. Such facts are entitled to overpower the mere conjectures of the witnesses who testified, that they *believed* his mind to have been unsound.—*Couch v. Couch*, 7 Ala. 519. The trivial circumstances to which the witnesses, who testify of unsoundness of mind, allude, as a basis of their opinions, show that they mistook *impairment* of mind and *weakness* of mind for the *statutory unsoundness*, which is required to invalidate a will. One witness was prevented by the court from stating the facts on which he rested his belief of unsoundness of mind. Another illustrated his belief by referring to a table, on which there was a defective spot, as "large as a dime." Another, that the testator had told a young lady, that she was in "good condition," and others much of the same sort. Yet the attesting witnesses all say, that the will was made and published at the testator's own suggestion, and was wholly dictated by him, and carefully executed with all the technicalities required by the statute; that he was then able to sit up on his bed, to converse and act rationally, and becomingly to discharge the courtesies of his house and table to his guests and friends. He knew his neighbors; he talked and acted rationally, and always understood common ideas, when plainly expressed. And one of the attesting witnesses, who says he suspected his soundness of mind, but not on the day of the publication of the will, declares that "his conversation was at all times sane and rational, and he never knew him to do an irrational act."

Outside of the evidence of the attesting witnesses, there is a great mass of conflicting testimony, which can not be reconciled, except upon the hypothesis that it is mere opin-

ion, and refers to a weakened and enfeebled intellect, rather than to a mind so prostrated as to lose the government of reason and common sense. This appears when the witnesses declare that "he was not what he had been." This may be said of all old men oppressed with disease; but it is not evidence of that insanity which denies them the right to dispose of their estates by will. It has already been said that mere feebleness of mind is not enough to deprive the testator of the right to make a will, unless it is so great as to amount to a prostration of the reason.—3 Denio, 37, *supra*. Here, the will is just and equal, and displays reason, memory, and benevolence; and it was made without advice or dictation from any one. Such a will is itself evidence of a disposing mind.—*McDaniel's Will*, 2 J. J. Marshall, 331.

The will is set out at length in the record. It shows that, after a liberal devise to her daughter, Mrs. Taylor, the testator's adopted child, is placed on an equal footing with his necessitous sisters. And his sister, Elmira, after rewarding her as his nurse in his old age and his many infirmities, is also made an equal participant in his general bounty. His old and tried friend and former slave, *John*, is generously provided for, in conformity with his previous declarations. The gift to the wife and family of his relation, *Dr. William H. Gantt* of Texas, in their peculiar and unfortunate condition at the end of the late war and the death of the head and support of the family, was eminently kind and benevolent. So was the gift for the lyceum. In every sense, the testament shows such a disposition of the testator's estate, as conforms to the intelligence, character, and tastes of Dr. Gantt, who made it, as given by the numerous witnesses, who had best and longest known him. I can not, therefore, free my mind from the apprehension, that the learned judge in the court below mistook the force of the evidence, which tended to establish *impairment* and *feebleness* of mind, as going to show a higher order of derangement, that is, statutory unsoundness and insanity. In this he fell into error.—1 Redf. on Law of Wills, ch. III. § 15.

The instrument propounded as the last will and testament of "Dr. Edward Gantt" for probate in the court of probate in the said county of Talladega in this State was properly made and published, and the testator was of sufficiently sound mind and disposing memory at the time the same was so made and published as to enable him to make a valid will. It should be admitted to probate according to law.—Rev. Code, § 1965.

The judgment of the court below is reversed, and the cause is remanded. And it appearing to this court from the bill of exceptions, that all the evidence, in relation to the matter in controversy in this suit, offered in the court below, is set out in the bill of exceptions aforesaid, this court doth order and direct, that the court below shall render judgment that the said instrument propounded by said Samuel Leeper in the court below as the last will and testament of Dr. Edward Gantt, deceased, bearing date the thirteenth day of November, 1867, and attested by Hugh S. Darby, G. G. Morris, and J. L. Darby, as subscribing witnesses thereto, be admitted to probate, and declared to be duly proven, and ordered to be recorded, as and for the last will and testament of Dr. Edward Gantt, deceased, in manner and form required by law, and that said Louisa Taylor, and said LaFayette Taylor, said contestants, be taxed with the costs of said contest.—Rev. Code, §§ 2251, 2260, 2214, 1967.

And the appellants, said Louisa Taylor and said LaFayette Taylor, will pay the costs of this appeal in this court, and in the court below.

JAY, Ex'R, *vs.* MOSELY.

[APPLICATION BY LEGATEES TO CHARGE EXECUTOR WITH LEGACIES.]

1. *Legacies; proof held insufficient to charge executor with.*—On an application by legatees to charge an executor with legacies, the question being whether certain money directed by the will to be retained for a contingent liability, the balance of which was the subject of the legacies, was left by the testator at his death, and received by the executor,—*Held*, evidence that the testator had such money at the date of his will, in 1861, and of declarations made by the executor soon after the testator's death, in 1866, that the money was left for the purposes mentioned, or that there was such money to be so distributed, which declarations might be referred to the provisions of the will, with as much proprlety as to the executor's receipt of the fund,—is not sufficient to authorize a decree against the executor, when opposed by the direct and positive testimony of the executor and several other witnesses, that they were well acquainted with the testator and his property between the date of the will and his death; that he had no such property within their knowledge, though, possibly, he might have had money; and proof that he had loaned money during the time, and sustained heavy losses, and that he did not return such money in his tax list.

APPEAL from Probate Court of Conecuh.
Tried before Hon. A. W. JONES.

The facts are sufficiently stated in the opinion.

HERBERT & BUELL, and P. D. PAGE, for appellant.
S. J. CUMMING, *contra.*

B. F. SAFFOLD, J.—The decree was rendered against the appellant, Jay, as the executor of the will of his father, David Jay, on an application for the payment of legacies, made by the appellees.

The will directed that, after the payment of the debts, four thousand dollars of the estate should be retained by the executor, to await the termination of a suit respecting some land, the title to which the testator had warranted.

Whatever remained of this fund after this liability was released, was bequeathed one-half to his son Andrew, and the other to the petitioners.

The suit was compromised for something less than a thousand dollars. There is no controversy about the property reported in the inventory of the executor. But the petitioners say the testator had a sum of money amounting to four thousand dollars, supposed to have been in gold, which was in his possession at the time of his death, or was deposited by him somewhere; that the executor received this money, but has not accounted for it. The executor denies any knowledge of the money.

A summary of the testimony may be thus stated: Stallworth was intimate with the testator, and knew as much about his business as any one. He transacted his business in taking notes for money lent, and he did not think any of his large notes had been collected, or were collectible, since the war. The decedent regarded his notes taken before the war as worthless, and did not sue upon them. About the time of making his will (1861) he had as much as five thousand dollars of money on hand. He was partial to gold, but not enough so to prevent him from lending it. Ben Dolphin, his favorite negro servant, waited upon him continually, and was with him when he died (in August, 1866). He was in the habit of bringing him his money and putting it away, locking and unlocking the bureau drawer for the purpose. The witness did not know of his having any gold after the war, unless perhaps about eighty dollars.

Joseph H. Thomas was tax assessor of Conecuh county in 1865–6, and was intimately acquainted with the decedent, and with his property. It was his habit to lend out his money closely up to the beginning of 1862. He told the witness on several occasions that he had very little money. If he had had much, the witness would have known it. He told him that all of his notes were worthless.

Ben Dolphin testified that the decedent kept his gold in a bag, and his paper money in a book, both of which he

was accustomed to carry to him when he wanted them, and to put away. He is confident that he had not more than forty dollars in gold about the close of the war.

The tax list returned by the testator on oath, in 1866, contained no more than two hundred acres of land, valued at six hundred dollars, and a buggy, valued at seventy-five dollars.

Page testified that the executor shipped some gold, a few hundred dollars, to Mobile. He did not hear him say that he had any gold belonging to the estate on hand; heard him say there was four thousand dollars in gold set apart for the law-suit, but was inclined to think he referred to what the will said on the subject.

Mrs. Williamson, the sister of the executor, testified that he told her there was four thousand dollars in gold to be divided between himself and her children. Her husband, John A. Williamson, corroborates her statement, except that the executor prefaced his declaration with the words, "I have not told you any thing about our father's will." The conversation occurred in November, 1866. There was no further evidence tending to show that the executor had received any more gold or other property than he reported. He testified that he knew nothing of any more gold or other property than he had accouted for.

The evidence was wholly insufficient to authorize the charge against the executor.

The decree is reversed, and the cause remanded.

KIMBALL *vs.* GREIG.

[BILL IN EQUITY BY SURETY AGAINST PRINCIPAL, TO SUBJECT LANDS TO THE PAYMENT OF DEBT.]

1. *Surrender, or re-delivery of deed, by grantee to grantor.*—The mere surrender, or re-delivery of a deed, by the grantee to the grantor, does not work a divestiture of the title out of the grantee; nor can a trustee, having accepted a conveyance on a secret trust, repudiate the trust, and divest himself of the title conveyed to him, by surrendering the deed to the grantor, and declaring "that he will not have any thing more to do with the matter."
2. *Parties to bill to subject lands to payment of debt.*—To a bill which is filed by a surety against his principal, and which seeks to subject to the payment of the debt lands alleged to have been conveyed by the principal in secret trust, the holder of the legal title to the lands is a necessary party.
3. *Dismissal of bill without prejudice.*—When a bill is dismissed without prejudice, but neither the decree nor the opinion shows the reason of such dismissal, although the record shows that it was defective for the want of necessary parties defendant, the appellate court will presume that the complainant was allowed an opportunity to amend by adding the proper parties, and that he declined to do so.
4. *Equitable relief on grounds of fraud, discovery, and account.*—Where a surety files a bill against his principal, seeking to subject lands which are alleged to have been conveyed by the principal, in secret trust, to hinder and delay the collection of the complainant's demand, and to have been afterwards secretly released or re-conveyed by the trustee; and the answer, while admitting the conveyance and re-conveyance of the lands, denies all fraudulent intent, and alleges that the only purpose was to secure the lands as a homestead exempt from execution; all the parties being competent witnesses at law, and there being no complicated accounts to be settled,—the bill is properly dismissed on the merits; nor can it be maintained for the purpose of ascertaining the value of the homestead exemption, and subjecting the residue of the lands to the satisfaction of the complainant's demand.

APPEAL from the Chancery Court of Mobile.
Heard before the Hon. ADAM C. FELDER.

GEO. N. STEWART, for appellant.—The equity of the bill rests on the three grounds of fraud, discovery, and account. The fraud consists in the conveyance to King, which recites

the payment of a valuable consideration, when in fact none whatever existed, and the intention was to hinder and delay the plaintiff in the collection of his demand, and the secret re-conveyance by King to the defendant. These conveyances constitute such a cloud on the title as justified an appeal to the chancery court for its removal; and as to these matters a discovery is also sought from the defendant. An account is also necessary, to ascertain the amount of the debt which the plaintiff has paid, and the amount of the rent with which he is chargeable.

The master's report shows that the house and lot were of value sufficient, over and above the highest exemption claimed, to satisfy the plaintiff's demand; and a resort to chancery was necessary to reach and subject this surplus. When this obligation was contracted, (October 22, 1866,) the law exempted only $500 worth of real estate. The law exempting $1200 worth of real estate, (Rev. Code, § 2884,) was passed on the 19th February, 1867; and the provision in the constitution of 1867 is made expressly applicable to future contracts. But, in point of fact, the house and lot were not exempt at all, not being occupied by the family. *Kaster v. McWilliams*, 41 Ala. Rep. 302; *Allman v. Gann*, 29 Ala. 240.

THOS. H. HERNDON, and R. INGE SMITH, *contra*.—1. The deed from Mrs. Greig to King conveyed the legal title to him, and its subsequent surrender by him did not divest his title.—36 Ala. 586; 33 Ala. 264; 15 Ala. 619; 6 Ala. 801; 7 Peters, 171; 22 Howard, 1; 4 McLean, 12; 1 Black, 451; 12 Johns.

2. As the holder of the legal title, King was a necessary party to the bill.—21 Ala. 264.

3. The court had the right to dismiss the bill without prejudice, as the plaintiff did not offer to amend by bringing in King.—23 Ala. 232; 16 Ala. 625; 8 Porter, 270.

PETERS, J.—The bill in this case was filed by Kimball, the appellant, against Mrs. Greig, the appellee, for the purpose of subjecting certain real property owned by

her, in the city of Mobile, in this State, to the payment of complainant's debt to one Henry, which debt he had incurred as the surety for Mrs. Greig, on certain promissory notes, dated October 23, 1866, which are set out in full in the pleadings. The ground of equity on which the case mainly, and, so far as I have been able to comprehend it, wholly rests, is the allegation that Mrs. Greig was the owner in her own right of a certain house and lot in said city of Mobile, which she had fraudulently conveyed to one King, for the purpose of hindering and delaying the collection of complainant's demand, but, before the filing of the bill, King, "by some instrument secretly executed, released to Mrs. Greig all claim to said lot." It is also alleged that Mrs. Greig intended to convey her property to prevent its being subject to satisfaction of the complainant's demands. It also appears that there was an account between the parties, but it does not seem to be at all complicated. King is not made a party to the suit. Mrs. Greig was the sole defendant, and was required to answer the bill upon oath. Accordingly, Mrs. Greig answered the allegations of the bill, on oath, and admitted her indebtedness as charged, and her inability to pay it. She also admitted her conveyance to King, and his subsequent relinquishment of his title to her, and asserted her right to the lot as a homestead for herself and child. She also denied that the conveyance to King had been made to defeat, or hinder or delay the complainant in the collection of his demand, but only to secure the house and lot to herself and child as a homestead. And she asserted, by way of explanation of the conveyance to King, and by way of plea, that the said house and lot, as her homestead, was not liable to levy and sale under any legal process, for the satisfaction of complainant's said demand.

On the coming in of the answer, it was referred to the master to ascertain the amount of complainant's debt, the value of the lot at the date of the filing of the bill, and whether King had re-conveyed his title to Mrs. Greig. The master ascertained the amount of the debt to be $730 43, and the value of the lot to be $2,700; and that

King "had returned to Mrs. Greig the deed made by her to him for said lot, and at the same time stated that he relinquished any and all claim thereto which he might have obtained by said deed, and that he would have nothing further to do with the matter." This he reported to the court, and the report was confirmed. The cause was then submitted for a final decree, upon the bill, answer, and master's report. There was no testimony taken in the case. Upon the final hearing, the learned chancellor dismissed the bill, and taxed the complainant with the costs. From this decree he appeals to this court.

1–2. The decree does not show upon what grounds the bill was dismissed, whether for the want of proper parties defendant, or for want of proof to sustain the allegations, or the insufficiency of the allegations to make out a case in equity. It may have been done for any of these reasons, but there is no means of ascertaining, from the record, which reason prevailed in the judgment of the learned chancellor to influence his decision. Upon the facts reported by the master, King was a necessary party defendant to the bill. All the title that Mrs. Greig could convey, passed to him by her deed to him, and the mere re-delivery, or surrender of the deed to her, did not divest his title. She does not admit that her conveyance to King was intended as a fraud, but only to secure in his hands real estate, which she was advised she could so convey, to be held for her as her homestead, for her use as the head of a family. If King accepted the conveyance for this purpose, he could not repudiate the trust by a mere return of the deed to her and declaring his unwillingness "to have anything more to do with the matter," as he says he did. The title to the land was in him, and the chancellor could not deal with the land, under such a state of facts, without his presence in court. Lands in this State can only pass by descent, or by purchase; which latter is by will, or by bargain and sale, or some other mode of conveyance by instrument in writing. And for this reason King could only reinstate Mrs. Greig in her title by re-conveyance or by

will.—Revised Code, §§ 1554, 1535; Ib. §§ 1910, 1930; Ib. § 1888; 4 Kent, p. 441, marg.; *King v. Crocheron*, 14 Ala. 822, 828; *Gimon v. Davis*, 36 Ala. 589; *Bryant v. Young, Hale et al.*, 21 Ala. 264.

3. The bill was dismissed without prejudice. But it does not appear from the record that this objection was made in the court below, or that the complainant moved to amend his bill and was refused. To sustain the judgment, it will be presumed here that he refused to amend upon a discovery of the defect. Such has long been the practice of this court.—*Singleton v. Gayle*, 8 Porter, 270; S. C., 5 Smith's Cond. Rep. 275; *Goodman, Ex'r, v. Benham, Adm'r*, 16 Ala. 625, 631; *Andrews et al. v. Hobson's Adm'r*, 23 Ala. 219, 232; 43 Ala. 542, 555, 57. In this view of the case, the dismissal was not erroneous.

4. But the learned chancellor may have proceeded to dispose of the bill upon its merits. The only allegation in the pleadings, which would afford any pretense for a resort to the extraordinary powers of a court of chancery, is that setting up the fraud in the conveyance to King. But the bill shows that King re-conveyed, or released, "by instrument secretly executed, all his claim to said lot to Mrs. Greig" before the suit was commenced; and her answer admits this, in effect, and asserts that she had been restored to her original right and title to the lot. And she denies that she was making, or intended making, any attempt to convey away her property to defeat the collection of the complainant's demand, as charged in the bill. Then, her title was not embarrassed by the supposed fraudulent deed to King, and there was no need for any discovery that could not be made upon a trial at law; as she and King and the complainant were all competent witnesses, and could be fully examined in a court of law.—Revised Code, §§ 2704, 2731. Then, as the case was submitted, there was really no fraud, and no serious complication of accounts, and no necessity of any discovery which could not very well be made at law. The allegations of the bill material to the jurisdiction of the chancellor were not sus-

tained. And upon this ground, also, the cause was properly dismissed.

The bill is not so framed as to entitle the complainant to go into chancery to ascertain the value of the homestead interest in the land, so that he might subject the residue, if any, to the satisfaction of his claim, even if this could be done, where the interest is merely a legal interest, as in this case, which would be accessible to an execution at law. Revised Code, § 2880, cl. 4, § 2884; Ib. § 2871.

This disposes of all the questions that can legitimately arise in this case, as it is presented to this court. Any discussion of the very important question of the right of the family to a homestead would be but an expression of my own individual opinion, which, until the question can be authoritatively settled, might only increase the confusion already existing upon that subject. But I may be permitted to intimate that I am prepared to hold, that the right of the family to a homestead is paramount and fundamental, and that it is the duty of the State to secure it and to protect it, in preference to the payment of debts, by such limitations as a just and wise policy may dictate. It is purely a domestic affair, wholly within the control of the modified sovereignty of the State. That the State has the power to make some exemptions from sale under legal process, is beyond all doubt. This is admitted by Chief Justice TANEY, in the case of *Bronson v. Kinzie*, 1 How. 311, 315. It has never been seriously denied in this State. Const. Ala. 1867, Art. XIV, Pamph. Acts, 1870–71, p. 28; Rev. Code, p. 565; Code of Ala. p. 453; Clay's Digest, p. 210; Aikin's Digest, p. 164; Toulmin's Digest, p. 317; *Webb v. Edwards*, 46 Ala. 17; 4 Kent, 438, marg. And if the power exists, I have been unable to comprehend what clause of the national constitution was intended to limit it beyond the mere discretion of the State.—*Hardeman v. Downer*, 39 Ga. 425.

Let the judgment of the court below be affirmed, at appellant's costs, in this court and the court below.

KINSEY *vs.* HOWARD ET AL.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY OF LAND, AND DEVASTAVIT AGAINST PERSONAL REPRESENTATIVE OF PURCHASER.]

1. *Multifariousness.*—A bill in chancery, which seeks to enforce a vendor's lien for the unpaid purchase-money of land, against the personal representative of the purchaser and a sub-purchaser in possession, and also to establish a *devastavit* against the personal representative for misrepresenting the complainant's claim on the land, is multifarious.
2. *Plea of purchase for valuable consideration without notice; who may traverse, and on what grounds.*—A vendor, who has conveyed to the purchaser the legal title to the land sold, and who seeks to enforce his lien on the land against a sub-purchaser under an order of the probate court, made on the application of the personal representative of the deceased purchaser, cannot set up against such sub-purchaser, in traverse of his plea of purchase for valuable consideration without notice, the fact that he paid the purchase-money in Confederate currency, unless he impugns the good faith of the transaction.

APPEAL from the Chancery Court of Russell.
HEARD before the Hon. N. W. COCKE.

THE bill in this case was filed on the 3d November, 1863, by Lazarus Kinsey, the appellant, against Ralph O. Howard, as the administrator of John W. Freeman, deceased; and sought to enforce a vendor's lien for the unpaid purchase-money of a certain tract of land, which had been sold and conveyed by complainant to said Freeman in his life-time. On the 4th January, 1867, an amended bill was filed, which alleged that, in December, 1863, Freeman's estate was declared insolvent; that the notes for the purchase-money were duly filed as claims against his estate; that the lands were sold by the administrator, under an order of the probate court, in June, 1863, for the payment of debts, and were bought at that sale by one Thomas B. Jennings, who paid for the same in Cenfederate treasury-notes, and, in December, 1863, (after the filing of the orig-

inal bill,) sold and conveyed them to one Robert Caldwell. Jennings and Caldwell were made defendants to the amended bill, which alleged that they had notice of the complainant's claim for the unpaid purchase-money, and sought to hold them liable for the rents of the lands while in their possession. The amended bill further alleged, that Howard, the administrator of Freeman, in making the sale of the lands, represented to the purchaser that the titles were good, and denied that the complainant's claim was a valid charge on them; and it asked that he might be held personally responsible for any sum due to the complainant after the sale of the land, and the appropriation of the proceeds to the payment of the debt.

The defendants demurred to the bill, for want of equity, for multifariousness, and for misjoinder of parties. At the May term, 1868, on final hearing on the merits, the chancellor dismissed the bill; and his decree is now assigned as error.

WATTS & TROY, and G. D. & G. W. HOOPER, for appellant.—The vendor's lien for the unpaid purchase-money is good against all the world, except purchasers for valuable consideration without notice; and neither Jennings nor Caldwell can successfully set up that plea. The doctrine of *caveat emptor* applies to judicial sales.—*O'Neal v. Wilson*, 21 Ala. 288; *Lang's Heirs v. Waring*, 25 Ala. 625; *McCartney v. King*, 25 Ala. 681. Jennings, the purchaser at the administrator's sale, was chargeable with notice that the notes for the purchase-money were filed as claims against the estate of Freeman; and his payment of Confederate currency, when the decree required a sale for cash, can not discharge him from liability.—*Sims v. Houston*, 44 Ala. 134; *Hill v. Erwin*, 44 Ala. 499; *Mahone v. Haddock*, 44 Ala. 92. Caldwell was a purchaser *pendente lite*, and, of course, was chargeable with notice.—*Center v. P. & M. Bank*, 22 Ala. 743; *Hoole & Paullin v. Attorney General*, 22 Ala. 190; *Witter v. Dudley*, 42 Ala. 616.

B. F. SAFFOLD, J.—The bill filed by the appellant

claims, in substance, as follows: The complainant sold a tract of land to John W. Freeman, in 1858, and executed a deed therefor. The vendee gave three promissory notes for the purchase-money, but died without having paid more than an inconsiderable part of the one first due. His administrator sold the land, under an order of the probate court, in June, 1863, for the payment of the debts of the estate; T. B. Jennings becoming the purchaser. Shortly afterwards, he reported the estate insolvent, and it was so declared in November, 1863. The above mentioned notes were duly presented and filed as claims against the estate. Robert Caldwell bought the land from Jennings, in the latter part of 1863, and is in possession of it. Jennings paid Confederate treasury notes in satisfaction of his purchase, and a conveyance to him was ordered to be made. Notice of the non-payment of the purchase-money is charged against all of the defendants. It is further charged, that Howard, the administrator of Freeman, never paid any part of the debts of the estate, but mixed the proceeds of the sale with his own individual funds.

The prayer of the bill is for the enforcement of the vendor's lien upon the land, and account of the rents and profits during the possession of the defendants, a decree against the administrator for any balance of the purchase-money after the appropriation of the proceeds of the sale of the land and the rents and profits; and if the said lien shall have been lost or impaired by any wrongful act of the said administrator, that he be required to pay damages individually, and for general relief.

The defendants demurred to the bill, for want of equity, misjoinder of parties defendant, and multifariousness. Jennings and Caldwell deny notice of the non-payment of the purchase-money, and claim to be *bona fide* purchasers for valuable consideration without notice, having paid the purchase-money. The bill was dismissed, on final hearing on the merits.

1. The bill is manifestly subject to the objection of multifariousness. The defendants, Jennings & Caldwell, have no interest in that part which, in the nature of a creditor's

bill, seeks a discovery of assets, charging the administrator with waste, and praying for a decree of damages against him.—Story's Eq. Plead. §§ 271, 274, 539. All that was required to be proved against them was, that they were the sub-purchasers of Freeman with notice of the non-payment of the purchase-money, and that they were in possession. It was not necessary to make Caldwell a party defendant, because he bought from Jennings during the pendency of this suit, though he was a proper party at the election of the complainant.—Story's Eq. Plead. §§ 156, 351. He, however, is entitled to the benefit of the want of notice by Jennings.—Story's Eq. Plead. § 808.

2. Can the complainant question the validity of the payment made by Jennings in Confederate currency? There would be no doubt of his right to do so, by involving the good faith of the transaction. The heirs of Freeman might do so, and also his creditors, if the payment had been made after his estate had been declared insolvent. If Freeman himself had sold to Jennings, and received the Confederate currency in payment, it would have extinguished the debt.—*Ponder v. Scott*, 44 Ala. 241. As the complainant seeks only the enforcement of an equitable right, we can not say that Jennings would not be prejudiced by an avoidance of the payment he has made. It is not necessary to the good faith of his contract that he should have given adequate consideration. It is sufficient if he gave what the law deems a valuable consideration in execution and discharge of his agreement. Courts, both in law and in equity, refuse to disturb contracts on questions of mere adequacy, whether the consideration be of benefit to the promisor, or of injury to the promisee.—Parsons on Contracts, p. 362.

When a vendor of land conveys the title to his vendee, a subsequent purchaser ought to be protected against his lien, when, without notice, or anything to put him on inquiry, he has in good faith legally discharged his obligation to the said vendee. By his own act he has represented his vendee as clothed with power to make any contract concerning the property which the law will allow him,

as the owner of it, to make. The right of the heirs, or of the creditors, of Freeman to repudiate an unauthorized acceptance of payment by their fiduciary representative, is entirely different from the claim of this complainant. The administrator, in making the sale, did not represent him as vendor. He sold the interest of his intestate in the land, without regard to whether there was a lien upon it or not. The proceeds were distributable as other assets of Freeman's estate.—*Vaughan & Hatcher, Adm'rs, v. Holmes et al.*, 22 Ala. 593. It happened, by the act of the complainant in conveying it, that the purchaser got the legal title, and, having done so without the knowledge of the plaintiff's equity, he ought not to be responsible to him for the land, while other parties retain the payment he has made for it.

The decree is affirmed.

LAWRENCE *vs.* RANDALL & CO.

[ACTION ON ACCOUNT—AGENCY.]

1. *Agent, person dealing with; what required of.*—One who deals with an agent is bound to know the extent of his authority.
2. *Charge to jury; what, error to refuse.*—R. went to L. and requested him to purchase a small lot of paper for him, (to make paper bags,) of R. & Co. L. consented, and sent his confidential clerk with R. to R. & Co. and purchased the quantity of paper desired; the purchase was on credit and charged to L., and when it fell due it was paid by L. R. needed more paper, and he and L.'s clerk went again to R. & Co., and a second lot of paper was gotten on like credit as at first. This was delivered to R. at L.'s saloon, and a carrier's receipt was given for it in L.'s name. In a suit by R. & Co. vs. L. for the price of this paper, L. deposed that the second lot of paper was gotten without any authority from him, and he knew nothing of it, and that it was not gotten for him or for his use, and moved the court to charge the jury, "That unless the defendant (L.) authorized by himself or his agent the purchase of the paper in question on the credit of the defendant (L.), then the defendant is not liable for it,"—*Held*, the refusal of this charge is error.

APPEAL from Circuit Court of Mobile.
Tried before Hon. JOHN ELLIOTT.

The facts are sufficiently stated in the opinion.

C. W. RAPIER, for appellant.—It is settled law on the subject of agency, that wherever an agent having proper authority makes a contract for his principal, that contract is obligatory on the principal.—Story on Agency, § 442. The principal is bound where the agent is acting within the scope of his usual employment, or is held out to the public or to the other party as having competent authority, although in fact he has, in the particular instance, acted without authority.—Ib. § 443. So if a contract is originally made without the authority of the principal, he may by ratification of it give it validity.—Ib. § 445.

Applying the above well established rules of law to the facts in this case, it is manifest the appellant can not be held liable for the goods sued for. The proof in the court below was clear that Renault obtained the goods in question, and directed them to be charged to appellant; that appellant had no connection with the particular transaction—did not know of it until some time afterwards, nor did he at any time or in any manner afterwards ratify it; that Renault was not the agent of appellant, nor was he held out by appellant to be such; that Renault had no authority from appellant to buy the goods on appellant's account, or to have them charged to him; nor had appellees any authority from appellant to charge him for them.

No ratification by the appellant of the transaction with Renault can be implied from the failure of appellant to notify appellees that he repudiated it.—27 Ala. 612.

A person transacting business with one as an agent for another, is bound to know the extent of his authority. *Schimmelpennich et al. v. Bayard et al.*, 1 Peters, 264.

The charge given by the court was abstract, there being no evidence to authorize it. It was not applicable to the case before the court. Nor did it announce a correct principle of law. It is believed that not a single authority

can be found which asserts as a correct proposition of law that a man may be held liable by reason of the consequences of negligence in the management of his business, for the act of another which was wholly unauthorized by him.

The charge improperly referred to the jury matters and estimates with which their minds should not have been perplexed; and it was calculated to confuse and mislead them.—43 Ala. 719.

The charge asked should have been given. It was clearly not abstract. The evidence showed fully the circumstances of the transaction with Renault, and that appellant had no connection with it. It in effect asked, that under such circumstances appellant would not be liable. As applied to the evidence, it asserted a correct proposition of law.

The previous transaction of appellant through his agent, Verbeke, could not affect one way or another appellant's liability in the second transaction. Verbeke did not assume in the second transaction to act for the appellant, and in fact had no part in it.

P. HAMILTON, and S. CROOM, *contra*.—The court below in effect charged the jury, that if the evidence warranted the plaintiff in believing that the goods were to be charged to the defendant, by reason of the defendant's own acts, within the knowledge of the plaintiffs, the plaintiffs were entitled to recover. In other words, the court ruled, that the question was to be determined, not by the extent of power intended by Lawrence to be conferred on the agent, but by what power Randall & Co., who dealt with him, had a right to infer he possessed, from his own acts and those of his principal. And that is the correct principle, and sustains both the charge as given and the refusal to charge as asked.—*Johnson v. Jones*, 4 Barb. 369, 373; *Perkins v. Ins. Co.*, 4 Cow. 645; 4 Greenl. 503.

It is obvious from even a cursory reading of the evidence as set out in the bill of exceptions, that Randall & Co. sold the goods entirely on the credit of Lawrence; they were charged to him, and sent to him with a bill, and

his clerk signed and returned a receipt bill for them. The same thing had been gone through with on a previous occasion, and no objection made by Lawrence. On this second occasion his clerk, Verbeke, whom Lawrence himself says he trusted "implicitly in all his business," neglects to give notice not to charge to Lawrence, though he sees Renault selecting other paper, and by receiving the paper himself and signing a receipt bill made out in his own name, Lawrence in fact ratified the charging of the goods to himself, and accepted the transaction in that light, and can not be permitted to say differently a month after (and not before), when the Frenchman has disappeared. The Frenchman was an entire stranger to Randall & Co., introduced by Lawrence, at whose house he was staying. Randall & Co. would never have let him have the goods on his own credit, and Lawrence must have known it. Yet he allows Randall & Co. to believe he himself means to be responsible to them; he makes no correction of the charge made to himself, although it is brought to his knowledge, and the goods actually received by him or his "implicitly trusted" clerk for him. He is the negligent party by whose acts the other is deceived, and when taken in connection with these circumstances the law was correctly applied by the court in the charge given.

"Where one of two innocent persons must suffer by the misconduct of a third person, that party shall suffer who, by his own acts and conduct, has enabled such third person, by giving him credit, to practice a fraud or imposition upon the other party."—Story on Agency, § 56; see the whole of that section, and also §§ 95 and 96.

The charge refused was evidently abstract as applied to this case. An agent may not be specially authorized to do a certain act, yet if he act within the scope of his authority, as evidenced by previous acts of the same kind, which are recognized, it will bind the principal. That it was within the scope of his authority, witness the declaration of the defendant, Lawrence, himself, that "he was his clerk, and he trusted him implicitly in all his business."

PETERS, J.—This is an action on an account for $45.25, commenced before a justice of the peace in Mobile county, by Randall & Co., as plaintiffs, against Lawrence, as defendant. The action before the justice failed, and Randall & Co. appealed to the circuit court. The cause was then tried *de novo* by a jury, and a verdict and judgment was obtained by Randall & Co. for the amount of the account, interest and costs. From this judgment an appeal is taken to this court by Lawrence. In this court there are three errors assigned, but as the third is only a repetition of the first and second, it will not be noticed further. The first and second assignments are as follows:

"1. The circuit court erred in charging the jury as set forth in the bill of exceptions.

"2. The circuit court erred in refusing the charge asked in behalf of the defendant in that court."

The bill of exceptions purports to contain all the testimony offered on the trial in the circuit court. From this it appears, that evidence was offered by the plaintiffs tending to show that a Frenchman, named Renault, came to lodge with Lawrence, a saloon-keeper in the city of Mobile. He was poor and without means. He informed Lawrence that, if he could procure paper to make paper bags, he could thereby obtain means to pay for his lodging and make a support. Lawrence, wishing to aid him, sent his clerk with Renault to the business house of Randall & Co., with instructions to buy for him twenty or twenty-five dollars' worth of paper for his business. Renault was thus introduced to Randall & Co. He selected the paper that he needed; it was sent or carried to Lawrence's saloon, and used by Renault there, and the price was charged to the account of Lawrence. It was not paid for at the time, but it was afterwards paid for by Lawrence. Thus far Lawrence seems to have been fully advised of the whole transaction. Afterwards Renault needed more paper for his business, and he and Lawrence's clerk went again to Randall & Co.'s to procure an additional supply, but nothing was said by the clerk on this occasion about any further credit to Renault on Lawrence's account; yet the

paper was furnished him as before to the amount of $45.25, and sent by a public carrier to be delivered at Lawrence's saloon, where it was delivered to the clerk of Lawrence, who had come with Renault after it, and a carrier's receipt bill was given for it, either by the clerk or by Renault, and it was charged to Lawrence as before. Lawrence, in his testimony, stated that he knew nothing of this transaction, and that the parties had acted wholly without his authority or acquiescence in this second purchase of paper for Renault's use; but at the end of the customary credit in such cases, the plaintiffs presented him the account and demanded payment. This was some month or more after the purchase. This was the first that Lawrence knew of it. It was shown that Lawrence could neither read nor write, and that his clerk was very much trusted in the management of his business; and that Renault was not employed by him, or in his service.

Upon this evidence, the court charged the jury as follows: "1. If they believed from the evidence, that the defendant, without intending a fraud, managed his business in such a negligent way as to lead the plaintiffs to believe that the paper in question in this suit, was, by authority of the defendant, to be charged to him, though the defendant had not so intended; and if a man of ordinary prudence in the situation of the plaintiffs would, under the circumstances of the case, have been so led to believe, then the defendant would be liable on the bill." To this charge the defendant in the court below objected, and asked the court to charge the jury as follows: "2. That unless the defendant authorized by himself or his agent the purchase of the paper in question on the credit of the defendant, then the defendant is not liable for it." This was refused, and the defendant again objected to the refusal of the court to charge as asked, and made his objections a part of the record in this case of his bill of exceptions.

This cause turns wholly upon the charge of the court which was given and excepted to, and the refusal of the charge asked. A charge of the court may be correct as a general proposition of law, but if it is not applicable to the

evidence delivered in the cause, or if it goes beyond it or ignores a part of it, it is not error to refuse it. Such a charge is abstract. It separates itself from the proofs. In such a case, it is a matter of no consequence whether the evidence ignored is, in the opinion of the court, very slight, or whether it is full and complete; it can not be omitted and disregarded in the charge without error.

Both charges in this case raise the question of authority in the agent to bind Lawrence. The former deals with the modes of proof by which it may be established, and the other with the necessity of its existence, in order to bind the duty of the person dealing with the assumed agent to know the extent of his powers. These charges are not incompatible, and both may stand as admitted prinples of law.—*Schimmelpennich v. Bayard*, 1 Pet. 264; *Leroy v. Beard*, 8 How. 451; Story on Agency, § 56, and notes.

In this case the proofs show that the first purchase of paper was authorized by Lawrence, and acquiesced in by him, and that the charges for the same were paid by him. It also appears that the second purchase was conducted by the same persons, and pretty much in the same way that the first had been managed; that delivery had been made at his saloon, to his clerk, and the delivery bill of the carrier returned to the vendors as the delivery bill of the defendant. This was some evidence of authority. And so far as it went, it was admitted as such, to go to the jury without objection. That it was wholly contradicted by the defendant, himself, in his testimony, could not exclude it. It was for the jury to consider its weight in arriving at their verdict. If they mistook its weight or improperly discredited the story of the defendant, the remedy was an application for a new trial. Such a mistake can not be reached upon error. The first charge was, therefore, correct. There was some evidence tending to show that the facts on which it was based really existed. This was enough to rescue it from the vice of being abstract. For like reason, the second charge, which was refused, was not inadmissible. As an independent proposition, it is undoubted law. One who deals with an agent is bound to know the extent of his

authority.—*Powell's Adm'r v. Henry*, 27 Ala. 612; 21 Ala. 317; 9 Porter, 210; 3 Stewart, 23. Here there was no proof of ratification, because as soon as the defendant knew of the purchase he repudiated it. Then, the case turned wholly upon the authority to bind him, in the first instance. If this did not exist, he could not be made liable. This is the purport of the charge. It can not, then, be said to be too narrow for the evidence, and it leaves the jury to be impressed with the due weight of all the testimony delivered to them. All the facts asserted by this charge, where there is no proof of ratification, are required to be established in order to justify a recovery. The charge covers the whole issue, and no more; and it is pertinent to the evidence. It is, therefore, not abstract. It should have been given. It was error to refuse it.

The judgment of the court below is reversed, and the cause remanded.

COLBY *vs.* CATO'S ADM'R.

[BILL IN EQUITY TO ENJOIN MORTGAGE SALE.]

Mortgage, lands subject to, sale of part of, and payment of purchase on mortgage debt; when does not release parcel sold from mortgage.—A deed in the nature of a mortgage to secure the payment of certain enumerated debts, creates an incumbrance on the whole property conveyed for the whole of the indebtedness secured. If the mortgagor sell a portion of the land thus incumbered to a purchaser who had constructive, though not actual, notice of the mortgagee, and transfers the notes of the vendee for the purchase-money to one of the mortgage creditors, to be applied to the reduction of the mortgage debts, the payment of such notes by the purchaser to one of the mortgage creditors does not release the land thus sold from the mortgage, unless it was so agreed between the purchaser and the parties to the mortgage.

APPEAL from the Chancery Court of Barbour.
Heard before the Hon. B. B. McCRAW.

The facts are sufficiently stated in the opinion.

JNO. GILL SHORTER, and S. H. DENT, for appellant.—As Cato paid the money, in ignorance of the mortgage, though its record was constructive notice to him, and as Mrs. Colby, the executrix, received the money in ignorance of the fact that the note was given for the lot covered by the mortgage, the transaction was the same as if Cato had paid the money on the note in the hands of another person who held no mortgage. It can not be considered as an estoppel of the estate of Colby.

The conduct which precludes a party must be inconsistent with the right which he afterwards sets up, and must have induced the action by the other party to his detriment. 21 Ala. 424; 23 Ala. 393; 24 Ala. 446; 2 Hill, 219; 3 Hill, 215; 5 New York, 394; 6 New York, 236; 5 Denio, 154; 8 Wend. 480; 10 Bart. 432.

Nor can a party be estopped unless *advised* of his rights. 10 Ohio, 288. Nor when there has been no intention to mislead, and the other party is not actually misled.—10 N. Y. 402.

If Mrs. Colby, as *executrix*, had the right to release the lots from the mortgage lien on payment of the money by Cato, with full knowledge of all the facts, (which is not admitted,) the proof shows that she did not intend to do it, and thus give up a valuable security for the large debt due the estate by Cook. The mortgage debt, with interest to 1861, amounted to about $9,000. It was her duty to receive, if offered, additional securities, but not to give up or release any security she had,—much less a valid mortgage lien on real estate. And the court will not suppose that she would, as executrix, accept Confederate money from Cato in payment of his note, and give Cook credit for it on a gold debt, dollar for dollar, and also release the mortgage security she held over the lots. The inference, rather, is that, considering the mortgage security inadequate, she accepted Confederate currency from Cato in payment of his note from importunity or necessity. No other payment was received on Cook's indebtedness to the estate than

these Confederate payments made by Cato in partial amounts from 1861 to 1864, and during the whole period from 1859 down to 1867, no steps were taken to foreclose the mortgage, the executrix, no doubt, during the war, being unwilling to sell the property for Confederate currency, and afterwards waiting for a favorable opportunity to expose it in the market.

As the mortgage from Cook to Colby was on the record, it was notice to Cato, and if he paid the purchase-money for two of the lots subsequently bought by him of Cook, the payment was voluntary, and, if now a misfortune, it was the result of his own acts, uncontrolled and unaffected in any way by the act or deed of the executrix of Colby's estate. The payments to Cato's estate stand, in the eye of the law, precisely as the payment to the $486.05, which was received by the attaching creditor of Cook; and the court can no more order the estate of Colby to refund than it can the attaching creditor of Cook.

The principle, "*ex æquo et bono*," has no application in this case, but that of "*ex mora*" has.

J. L. Pugh, *contra*.—The executrix was entitled to the security of the mortgage on the real estate, but was not entitled to that security and also to the notes of Cato given to Cook for the same real estate described in the mortgage.

Cato had a good defense against the purchase-money notes in the hands of Colby, the assignee thereof. If Colby had foreclosed his mortgage on the real estate before collecting the notes Cato made to Cook, can it be insisted that Colby could have gone on Cato for payment of his purchase-money note to Cook.

If the notes of Cato would have been extinguished by a foreclosure of the mortgage before calling on Cato for payment thereof, how does the payment of the notes by Cato to Colby before foreclosure give Colby any right to the money Cato paid the executrix?

It is wholly immaterial that the executrix did not know that the notes she held on Cato were given for the real estate mortgaged. The fact is so, and that is sufficient. The

executrix will not be permitted, by a court of chancery, to accept from Cato the *entire consideration* of Cato's notes, as a security for Cook's debt to Colby, and then withhold from Cato the money paid by him, in ignorance, on the notes, whose consideration she thus attempts to appropriate.

A court of chancery, in adjusting the equities of the parties, will make the executrix of the mortgagee refund to Cato the money which, *ex æquo et bono*, belongs to him, before allowing the executrix to deprive Cato of the only consideration he ever had for the notes he paid her.

To the extent that Cato has paid the debt of Cook to Colby, is Cato entitled to be reimbursed by Colby, before permitting him to enforce his lien on the identical property for which Cato had once paid Colby's executrix. She gets what Cato was to pay Cook for the property, and applies it to the mortgage debt, and because a balance is still due, she asks to be allowed to take the property itself and sell it, and keep all the proceeds, and also to hold on to what Cato paid. In other words, she asks the court to add to, to increase her security for Cook's debt to her estate. She has a mortgage on the real estate, and she also had Cato's note for the same property mortgaged, and having realized the amount of the note, she proceeds now to appropriate the entire consideration of that note. To permit this would be an admirable illustration of the maxim that you must do equity before asking it. It would be making a strange use of the doctrine of estoppel.

The court of chancery has possession of the case; it is made known to the chancellor that by *mistake* Cato has paid the executrix so much money, which, *ex æquo et bono*, he is entitled to have refunded, and as the executrix asks to enforce her lien on the consideration of the payment to her by Cato, the court will tell her she can do so when she does equity to Cato.

PETERS, J.—In 1859, Edward B. Young accepted or indorsed a draft for John C. Cook for the sum of $2,587.50, which fell due on the 1st of February, 1860. Cook was

also indebted to John Colby at the same time by two promissory notes; the one for $5,000 and the other for $2,207.25. These notes bore date about the 10th day of March, 1858, but it does not appear when they became due. For the purpose of securing these debts, Cook conveyed to Young certain lots of land lying in the city of Eufaula in Barbour county in this State, which are particularly described in the conveyance. This conveyance bears date May 21, 1859. It was made in the city of Washington, in the District of Columbia, and it was there properly acknowledged before the commissioner of deeds for this State on the day of its date. And on the 21st day of July, 1859, it was "received and recorded" in the proper office in the said county of Barbour in this State, as required by law. By this conveyance Young was empowered to sell the property therein named to pay the debts intended to be secured, if Cook made default in their payment.

Afterwards, on January 28th, 1860, Cook sold to Lewis L. Cato, for the sum of $3,000, a portion of the lots of land conveyed to Young as aforesaid. This sale was made in the city of Washington, in the District of Columbia, and the deed for said lots, thus sold, was there made and acknowledged before the commissioner of deeds for this State, and brought to this State and properly recorded in said county of Barbour, on February 6th, 1860. The debt on which Young was bound was fully paid, and some payments were made upon the debts to Colby. And among the payments made on the Colby debts were several which were made upon a promissory note for $3,000 made by Cato and payable to Cook, and by the latter transferred to Mrs. Colby, as the executrix of her husband's will. All this note seems to have been paid to her, except the sum of $685.00, the amount of a judgment in a garnishment suit in favor of one Burrus, which was paid to Burrus. After this, Mrs. Colby, by her attorneys-at-law, caused Young to advertise the lands named in the conveyance to him as above said, for sale under said conveyance in the city of Eufaula aforesaid, on the 4th day of May, 1867, for the payment of the Colby debts, or so much thereof as re-

mained unpaid. In this advertisement of sale the lots sold by Cook to Cato were included, along with the other lands conveyed to Young to secure the payment of the debts to Mrs. Colby and to Young. Cato filed the present bill to enjoin this sale, and for general relief. And in addition to the facts already above shown, the bill and amended bill state the facts of Cook's insolvency, and his non-residence, and that the note given by Cato to Cook for $3,000 was for the purchase-money of the lots sold to Cato, and that Mrs. Colby must have known this fact, and if she did not, then Young, her trustee, did at the time the note was transferred to her. And also that the complainant knew nothing of the mortgage until the sale was advertised in 1868; and if said lots are sold to pay the mortgage debt, "said lots will be made to pay it twice." Mrs. Colby and Young and Cook are made defendants to the bill and amended bill. The two former answer, and judgment *pro confesso* is taken as to Cook. Mrs. Colby admits the several conveyances above stated, and sets up the mortgage in her defense. She also shows that her debts are not paid, but that there remains a balance thereon of $8,918.15, after giving credit for all she received on the note for $3,000 aforesaid, and demurs. Young also answers and admits the full payment of the debt on which he was liable, and that a sale of all the property conveyed to him had been advertised, as stated by the complainant. The mortgage is made an exhibit to Mrs. Colby's answer, and is referred to as such by Young. The preponderance of the proof is in favor of Mrs. Colby's answer. No notice seems to have been taken of the demurrer, and the cause was heard upon the bill as amended, the answers, exhibits and proofs. The learned chancellor directed an account to be taken to ascertain what sum of money had been collected by Mrs. Colby on the note of Cato to Cook, which had been transferred to her. This was ascertained to be $779.30, and so reported, and the report confirmed. And the court further decreed "that upon the payment by defendants to complainant of the said sum of $779.30, with interest from this date, and the costs of this suit and the filing of receipts therefor with

the register of this court, which receipts shall be made a part of the record in this cause," that then the injunction heretofore granted "shall be deemed and held of no effect and dissolved." And in default of the payment of said sum of money and costs within six months after the date of the decree, then said injunction is "declared to be perpetual." The defendants were also taxed with the costs. From this decree the defendants appeal to this court, and here assign the decree for error.

The conveyance from Cook to Young to secure the payment of his acceptance for Cook, and Cook's promissory notes to Colby, was in effect but a mortgage.—*Mussena v Bartlett*, 8 Port. 277; 7 Bac. Abr. Bouv. p. 27, *et seq*; 4 Kent, p. 134 (marg.); *Cunard v. The Atlantic Insurance Company*, 1 Pet. 386; 1 Hilliard Real Prop. 371, chap. XXIX. This instrument holds all the lands and other property mentioned therein subject to the trusts created by its stipulations. And among these are the payment of all the debts intended to be secured, and the interest theron, and all damages that Young might sustain on account of his acceptance or indorsement of Cook's draft. The recital in the mortgage, on this point, is in these words: "This grant is intended as a security for the payment of the draft and notes herein described. If not paid, then the said Edward B. Young has power to sell for cash or on time as he may think best, upon giving ten days notice by a notice put up at the post-office in the city of Eufaula, and the proceeds to be applied to the payment of said draft and notes, and to reimburse him fully for all damages he may sustain on account of said indorsement." This language is too plain for misconception. It very clearly subjects all the lands named in the conveyance to sale for the purpose of the payment of all the debts intended to be secured—the entire debt to Colby, as well as the full amount of Young's liability on his acceptance. After this conveyance, Cook had no estate, that he could pass to Cato, except his right of redemption, and possibly his possession until the law day had arrived.—1 Ala. 23, 708; 2 Ala. 553; 19 Ala. 753; 21 Ala. 288; Rev. Code, § 2871, cl. 3. The estate thus

acquired could not be allowed to impede Mrs. Colby's right, as the representative of her husband, to insist on a foreclosure.—2 Ala. 331. It does not appear from the allegations of the bill or amended bill that she had relinquished this right, or forfeited it, or that her debt had been paid, or that the mortgagee or beneficiary had been barred by the statute of limitations. The proof shows that neither Mrs. Colby nor Young knew of the consideration of Cato's note. The bill admits that Mrs. Colby's debt had not been paid.

The conveyance to Young was dated on the 21st day of May, 1859, and it was recorded after being properly acknowledged before a commissioner of this State in Washington city, in the District of Columbia, in the proper office of the county, in which the lands therein conveyed were situated, on the 21st day of July, 1859. This was within three months from the date of the conveyance. This was sufficient notice, to all subsequent purchasers, of its contents.—Rev. Code, §§ 1546, 1557, 1592; *Gimon v. Davis*, 36 Ala. 589. Cook's deed to Cato bears date the 28th day of January, 1860. He was then a purchaser subsequent to the conveyance, and its record was notice of its contents to him.—36 Ala. 589, *supra*. He is, then, not a *bona fide* purchaser without notice, and as such, he is not entitled to protection against the conveyance to Young, nor is he in a condition to displace Mrs. Colby's right to have the power in the conveyance executed by a sale of the whole of the land therein conveyed, for her benefit, as the executrix of her husband's will.—11 Ala. 438, *supra*.

Cato's note to Cook for the purchase-money of the lands sold to him and conveyed by the deed of the 28th day of January, 1860, was Cook's own property. He could pay his debts with it or transfer it to whom he might please—to Mrs. Colby or any one else, without Cato's consent or approbation.—*Andrews & Bros. v. Jones et al.*, 10 Ala. 400; Coke Litt. 223. If Cato chose to pay his note after it went into Mrs. Colby's possession, its payment only lessened the mortgage debt, so far it was received as a payment on that debt. Mrs. Colby was not bound to know that it had

been given for the purchase-money of the lots mentioned in Cato's deed from Cook; because the deed recites that the purchase-money was paid in "dollars." But so far as she collected any sums of money on this note, as it does not otherwise appear, it must be held to have diminished the mortgage debt to the amount of the balance left, after the deduction of the judgment in favor of Burrus rendered in the garnishment suit. It does not appear that she has refused to allow this credit. But the mere transfer of this note to Mrs. Colby did not release the grasp of the conveyance to Young on any part of the property therein conveyed for the payment of all the debts intended to be secured thereby. The mere fact that the note was given for the purchase-money of the lots sold to Cato by Cook, a transaction in which Mrs. Colby took no part, is not sufficient to give it the force of a relinquishment by her of the mortgage conveyance on the lots thus sold. Her mortgage rights could not be released without her consent or agreement.—8 Coke, 92. And this is not alleged or proven. A payment of the amount of the note in money by Cook on the notes payable to Colby and secured in the conveyance to Young would not have released the lots sold to Cato, unless it was so accepted by Mrs. Colby; much less would the transfer of the note have this effect. It is not alleged in the bill, nor is there any proof to support such an allegation, had the fact been so stated, that Mrs. Colby accepted the transfer of Cato's note to Cook in consideration of the release of the mortgage conveyance on the lots purchased by Cato. The bill can not, in its present form, be sustained without such an allegation or its equivalent, or an allegation that Cato was an innocent purchaser for value, without notice of an unrecorded prior incumbrance. *Allen v. Montg. R. R. Co.*, 11 Ala. 437.

The allegations in the bill that Cook had become utterly insolvent, and if the sale of the lots purchased by Cato from him was permitted to take place, Cato would have to pay for the lands twice, do not show equity as against Mrs. Colby. It is not her fault, or the fault of her testator, th a he was induced to make the purchase, and it was not her

fault that he bought an incumbered estate. It was his own fault. Had he examined the records of the proper office, he would have been advised of the character of his title, and could have taken the proper steps in time to have saved himself from harm. The law helps the vigilant; not those who sleep upon their rights until it is too late to awake. To enjoin the sale for such reasons would make Mrs. Colby responsible for Cato's unfortunate bargain. This would not be equity. *Ubi culpa est, ibi poena subesse debet.*—Jenk. Cent. 325.

The debt on which Young was bound, which is one of those secured in the mortgage, having been paid, Mrs. Colby, as the representative of her husband's estate, is the only party interested in the foreclosure. As such, she could require the sale to be made of all the lands mentioned in the conveyance, if this should be needed for the payment of her debts, or file her bill to have the mortgage foreclosed.—Rev. Code, § 1589; Shep. Dig. 304, § 59.

The case, then, as presented by the bill, neither in the allegations nor the proofs, is sufficient to sustain the decree of the learned chancellor in the court below. The bill should have been dismissed.

The decree of the court below is, therefore, reversed. And it is the order and decree of this court that the injunction granted in this case be dissolved, and that the bill be dismissed, at the costs of the appellee in this court and the court below.—Rev. Code, § 3502.

MOBLEY AND WIFE *vs.* LEOPHART ET AL.

[BILL IN CHANCERY TO FORECLOSE MORTGAGE, AND TO SET ASIDE PRIOR PROBATE DECREE AS FRAUDULENT AND COLLUSIVE.]

1. *Publication against non-resident defendants, and decree pro confesso thereon.*—A decree *pro confesso*, based upon an order of the register, published in a newspaper in the city of Columbus, Georgia, which order was made in a suit pending in the county of Barbour, in this State, is not void, if the order of the register directs the publication so to be made. The newspaper in which such an order may be published is discretionary with the chancellor, or the register, and this court will not control such discretion, if the place of publication is not made a matter of objection in the court below.
2. *Exhibits; proof of.*—When promissory notes, which are exhibits to the bill, are to be proved in a foreclosure suit, it is no sufficient objection to interrogatories to witnesses, called to prove such notes by their depositions, that the notes are not attached to the interrogatories. If the opposite party wishes copies of such notes in order to cross-examine, he can get them from the register.
3. *Wife's statutory separate estate; husband's receipt from guardian of wife.*—The husband may receive from his wife's guardian his wife's statutory separate estate, and receipt for the same; and if the receipt is in full of all demands, it is, if unimpeached, a full discharge in law and equity of the guardian.
4. *Same; decree against guardian and father, in favor of ward and daughter, postponed to lien of mortgage by guardian, in favor of bona-fide creditor.*—In such a case, when the father is the guardian, a decree rendered in favor of the husband and his wife, who is the ward, for her use, after the giving of such receipt, against the guardian, for a considerable sum of money still remaining in the hands of the guardian, and no *fieri facias* has ever been issued on such decree to enforce collection of such decree, it has no such lien against the property of the guardian as will be preferred to the lien of a mortgage of the defendant in such decree, when it appears that the mortgagee is a *bona-fide* creditor of such defendant, and that the mortgage was made and recorded during the suspension of the *fieri facias* on said decree.

APPEAL from the Chancery Court of Russell.
Heard before the Hon. B. B. MCCRAW.

The facts are sufficiently stated in the opinion.

G. D. & G. W. HOOPER, for appellants.—1. The decree *pro confesso* against the non-resident defendants must reverse the chancellor's decree. The recitals in it are not sufficient to sustain it.—*Hartley v. Bloodgood*, 16 Ala. 233; *Bogiar v. Darden and Wife*, 41 Ala. 322.

2. The publication itself was totally insufficient, being made in a newspaper published in Georgia.

3. Some of the complainants totally failed to prove their debts as alleged, and the bill ought to have been dismissed for that reason.—*Moore v. Moore*, 17 Ala. 631; *Wilkins v. Judge*, 14 Ala. 135; *Clarkson v. DePeyster*, 3 Paige, 336; Story's Eq. Pl. 392.

J. M. RUSSELL, and STONE, CLOPTON & CLANTON, *contra.*

PETERS, J.—This is a bill in chancery, filed by Leophart and others, to foreclose a mortgage, executed to them by one Earle on certain real and personal property, to secure sundry debts named in the mortgage to Leophart and others, as mortgagees, and to set aside and suspend the lien of a decree of the probate court of Barbour county, in this State, in favor of Mobley and his wife, for her use, rendered against said Earle, as the guardian of Mrs. Mobley, who was the daughter of Earle, and had intermarried with Mobley, upon the grounds that said decree operated as a lien on the lands and other property conveyed in said mortgage, and that said decree had been procured in fraud of complainants' rights under said mortgage. Said decree was for the sum of $12,054 61, when in truth there was really nothing due and owing from Earle to his said ward at the time said decree was rendered. And this was well known to said Mobley and his said wife. This decree was rendered on the 14th day of December, 1868, and the mortgage was executed, and properly recorded, or filed for record, on the 20th day of January, 1869. It does not appear that any writ of *fieri facias* was ever issued, or attempted to be issued, on said decree for its collection, or that any such *fieri facias* had ever been received by the sheriff of said county, and properly kept up, as required

by law, when said mortgage was executed and recorded. It also appears that, on the 16th day of September, 1867, Mobley, the husband of the ward, executed and delivered to Earle, as her guardian, the following receipt in writing:

"COLUMBIA, S. C., Sept. 16th, 1867.

"Received of Thompson Earle, guardian of E. S. M. Earle, eight thousand dollars, in full of all demands as guardian. J. B. MOBLEY."

This was some time before the date of said decree, and it was known to Mobley and wife.

This suit seems to have been commenced on the 1st day of May, 1869, after the law-day of the mortgage had expired, and all the mortgagees join as complainants, except A. M. Allen & Co., of Columbus, Georgia, a firm composed of Augustus M. Allen and Asbury Johnson, who are made defendants to the bill. Earle and Allen & Co. are shown to be non-residents, and are brought in by publication and decree *pro confesso*. Mobley and wife were served with process, and they answer the bill without oath, the same being waived by complainants. In their answer they deny all the material allegations of the bill, and demur, for want of equity, and for several other reasons; but no notice is taken of the demurrer in the decree of the court below, or in the assignments of error in this court.

The learned chancellor decreed in favor of the complainants below, and Mobley and wife bring the case here by appeal. In this court, a summons and severance was allowed as to Earle, and Allen & Johnson, the co-defendants of Mobley and wife; and Mobley and wife only join in the assignment of error in this court.

The demurrer of the defendants will not be considered in this opinion, as it may be presumed to have been abandoned.

The assignments of error, assailing the regularity of the decrees *pro confesso* against the defendants, Earle, and Allen & Johnson, can not be sustained. The record shows that all the proper steps were taken to authorize these decrees. Affidavit of the age and non-residence of these defendants was properly made, and an order for their ap-

pearance was duly made by the register, and published in a newspaper, as ordered by him, which newspaper was published at the city of Columbus, in the State of Georgia. The objection to these decrees seems to be founded on the fact, that the order of the Register was published in a newspaper in the city of Columbus, in the State of Georgia. This objection can not avail to defeat the decrees. The place of publication of such orders is a matter of discretion with the chancellor, or the register, and if the publication is made "in such newspaper as may be designated in the order," this is enough. This court will presume, in such a case, that the chancellor, or register, has rightly exercised his discretion.—Rev. Code, § 3339; Rules Chancery Practice, No. 22. Besides, such decrees are merely interlocutory, and may be set aside, or amended, in the court below, if they have been irregularly taken. It is within the power of the chancellor to correct all orders and decrees taken before the register, so as to make them conform to law and justice.—Rev. Code, § 636, cl. 6; Rules Chancery Practice, No. 2. The cause is not at issue until all the defendants have been served with process of subpœna, or have answered, or have been brought in on publication and decree *pro confesso*.—Revised Code, p. 829; Rules Chancery Practice, No. 48. But parties who proceed to cross-examine witnesses, and submit the cause for final decree, can not be permitted in this court to raise such an objection for the first time in this court, when the defendants against whom the alleged irregular decrees *pro confesso* have been taken, do not appear and assign errors in this court.

There was nothing improper in the interrogatories to the witnesses Leophart, for it was not necessary that the notes sought to be proven should be annexed to both sets of interrogatories. This was impossible. These notes were exhibits to the bill. If the defendants, Mobley and wife, desired copies of these notes for inspection, or for any other purpose, such copies could have been procured from the register.—Rev. Code, § 3331. The interrogatories in both series seem to be proper, and the witness Mi-

chael Leophart, in his answer, refers to the notes "as attached to the direct interrogatories in this case." And in John S. Leophart's answer to the interrogatories, the commissioner attaches the notes to his deposition, and returns them along with it, and certifies them as "proved" by John S. Leophart. There was no irregularity in this, of which the appellants are entitled to complain.

There was no evidence taken by the defendants, which was submitted on the final hearing, so far as I can discover from the note of the testimony; not even that of Mobley and wife, who were both competent. But the evidence for the complainants was ample and conclusive, and it very well sustains all the material allegations of the bill. When such is the case, the decree of the court below will be sustained. Mobley was entitled to receive his wife's property from her guardian, and his receipt therefor is a full discharge in law and equity.—Revised Code, §§ 2375, 2685. There is no proof tending to show that Mobley's receipt was not genuine, and that it was in any respect false or wrong. It would be trifling with the truth, then, to say that anything was really due from the guardian, Earle, to his daughter, Mrs. Mobley, when his settlement was made. Such a judgment and decree, as to *bona-fide* creditors, is fraudulent and void.

The decree of the chancellor is affirmed, with costs, in this court, and the court below.

BEACH ET AL. *vs.* DENNIS.

[MOTION TO SET ASIDE SALE OF LANDS UNDER EXECUTION.]

1. *Parties to motion.*—There is no settled rule, as to who are the necessary parties defendant to a motion to set aside the sale of lands under execution. Generally, those persons only who have an interest in the sale, or who will be prejudiced by setting it aside, need be made defendants to the motion.
2. *Power of courts over officers, parties, and process.*—Courts of justice have the undoubted power to control their officers, suitors, and process; and this power should be exercised to prevent oppression, correct abuses, and in furtherance of justice.
3. *Execution issued after defendant's death, and sale of lands under it; invalidity of.*—An execution, issued after the death of the defendant in the judgment, is void; and, consequently, a sale under it is also void, and may be set aside, on motion, at the instance of the heir-at-law.
4. *Costs.*—The unsuccessful party or parties to a motion to set aside a sale of lands under execution, should be taxed with the costs.

APPEAL from the Circuit Court of Dallas.
Tried before the Hon. MILTON J. SAFFOLD.

THIS was a motion by R. W. Dennis, as one of the heirs-at-law of John Dennis, deceased, to set aside a sale of certain lands by the sheriff under an execution against said John Dennis and one W. P. Jones. W. H. Cravey, the plaintiff in the execution, and W. C. Beach, the purchaser at the sale, were made parties defendant to the motion. The court granted the motion, set aside the sale, and taxed the costs against the defendant Beach, who was the only contesting party defendant; to which judgment, as also to the overruling of a demurrer to the motion for the want of necessary parties, a bill of exceptions was reserved by him; and these matters are now assigned as error.

The other facts are stated as fully in the opinion as can be gathered from the record.

J. N. HANEY, for appellant.
JOHN WHITE, *contra*.

PECK, C. J.—On the 24th of September, 1867, the appellant, Wm. H. Cravey, guardian, recovered a judgment in the circuit court of Dallas county, against John Dennis and one Wm. T. Jones, for the sum of $370 23. The said John Dennis, after said judgment was rendered, to-wit, on the 1st day of October of said year, 1867, departed this life intestate, and one Samuel H. Jones was appointed administrator of his estate. After the death of said John Dennis, to-wit, on the 17th day of said month of October, 1867, an execution was issued on said judgment, and, on the 22d day of February, 1868, was returned "No property found." On the 13th day of January, 1869, another execution was issued, and on the 8th day of February, 1869, returned "Not executed, for want of time." Again, on the 25th day of November, 1869, a third execution was issued, and, on the 8th day of January, 1870, was levied on certain lands, as the property of said John Dennis, which, on the 2d day of February, 1870, were sold by the sheriff, and bought by appellant, H. C. Beach, to whom the sheriff made a deed.

At the spring term of said court, in the year 1870, the appellee, R. H. Dennis, one of the heirs-at-law of said John Dennis, deceased, moved the said court, on notice to appellants, to set aside said sale, because the execution, under which the said sale was made, and those that preceded it, were, all of them, issued after the death of said John Dennis. The said H. C. Beach, one of the defendants in said motion, demurred to the same, because neither the sheriff, by whom the said sale was made, nor the living defendant in said judgment, Wm. T. Jones, nor the administrator of said John Dennis, deceased, were made parties defendants to said motion; and also, because said motion did not set forth sufficient reasons, under the law, to set aside said sale. The court overruled said demurrer, and, on the hearing, set aside said sale, and quashed the execution under which it was made, and taxed the defend-

ants with the costs. Said defendants appeal to this court, and assign the following errors, to-wit: 1st, overruling the demurrer; 2d, setting aside said sale on the facts stated in the bill of exceptions; and, 3d, taxing said defendant, Beach, with the costs.

The foregoing short statement of the case is made, because of the confused and almost unintelligible condition of the record.

1. The objection to the motion, because the sheriff, by whom the sale was made, the said Wm. T. Jones, and the administrator of said John Dennis, deceased, were not made defendants, was properly overruled. We are not aware of any settled rule as to who are necessary parties defendants to such motions. In the elaborately considered case of the *Mobile Cotton Press v. Moore & Magee*, (9 Porter, 679,) which was a motion to set aside the sale of real estate, made by a sheriff, the purchaser and the sheriff who made the sale were made defendants, and, we think, correctly. The reason why the sheriff was made a party, seems to have been because he had sold the property against the wishes of both the plaintiff and defendant in the execution. It was, therefore, proper that he should be made a party defendant, that he might vindicate the course he had pursued in the premises. We are persuaded no rule on this subject can be laid down that will be applicable to every case. Generally, those only who have an interest in the sale, or who will be prejudiced by the granting of the motion, need be made defendants to it.—*Stainton's Administrators v. Simmons and Simmons*, 24 Ala. 410.

2. On the merits of this case but little need be said. The evidence fully proves the allegations of the motion. The jurisdiction of courts over their officers, suitors, and process, can hardly be doubted; and it should be exercised to prevent oppression, correct abuses, and in furtherance of justice.—*Mobile Cotton Press v. Moore and Magee, supra.*

3. The most important question in this case is, did the execution issued after the death of the said John Dennis, confer any authority on the sheriff to levy upon and sell the lands of which Dennis died seized? If it did not, then the

sale was void, and the purchaser thereby acquired no title, and the sale was properly set aside on the motion of the heir-at-law. In the case of *Lucas v. Price* (4 Ala. 679), it is decided, that where an original *fieri facias* is issued in the life-time of the defendant, and returned unexecuted, an *alias*, or *pluries*, issued after his death, will not authorize a levy on and sale of the lands of which the defendant died seized. Chief-Justice Collier, in delivering the opinion of the court, says: "By the death of the defendant, his lands descend to his heirs, or vest as he may devise by will; and the mandate of an execution, which directs the sheriff to make of them the amount of a judgment, must be wholly inoperative and void. In fact, such a writ could never be executed, in consequence of the death of the defendant, which has cast his estate upon other proprietors; and such is the law in respect to personal property, where an execution has not issued against the defendant in the judgment while living; and it is only the lien of a *fi. fa.* regularly issued that legalizes an *alias* or *pluries*, which bears test after the defendant's death."—See, also, *Holloway et al. v. Johnson*, 7 Ala. 660, and *Henderson & Hudson v. Gandy's Administrator*, 11 Ala. 431.

On the authority of these cases, we hold, that the execution in this case, under which the sale was made, having been issued after the death of the defendant, John Dennis, conferred on the sheriff no authority to sell the lands, of which he was seized at the time of his death, and that, consequently, the sale was void, and the court below committed no error in setting it aside.

4. The successful party, in all civil actions, is entitled to his costs.—Rev. Code, § 2779. The defendants in this motion, as the unsuccessful parties, were, therefore, properly taxed with the costs.

The judgment of the court below is affirmed, at the appellant's cost.

BALKUM *vs.* OWENS ET AL.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN.]

1. M. sold a tract of land to F., which was incumbered by a mortgage executed by M. to O. prior to the date; but it was agreed between F. M. and O. that M. might sell the land to F. if F. would give his notes to O. for the amount of M.'s mortgage debt, and al o give a mortgage to O. on the same land to secure this debt, and that this second mortgage should be preferred to the vendor's lien in favor of M. for his part of the purchase-money to be paid by F. above the debt to O. The sale was concluded by a deed from M. to F. and a mortgage by F. to O., as agreed upon, all of the same date. F. gave his notes to M. for the balance of the purchase-money above the amount of O.'s mortgage. One of these notes was afterwards transferred by M. to B., who filed his bill against F. M. and O. to enforce his vendor's lien arising on the note held by him,—*Held*, that the lien of O.'s mortgage was to be preferred to the vendor's lien in favor of B., and upon a sale of the land under decree of the court, O.'s mortgage debt must be first paid, and then the residue, if any, applied to the discharge of B.'s debt.

APPEAL from Chancery Court of Henry.
HEARD before Hon. ADAM C. FELDER.

The opinion states the case.

J. A. CORBITT, for appellant.
F. M. WOOD, *contra*.

PETERS, J.—This is a bill in chancery filed by the appellent, Balkum, as complainant, against Owens and others, for the purpose of enforcing a vendor's lien in favor of the said complainant against certain lands named and described in the bill.

The material facts shown by the bill are these: On the 7th day of January, 1867, Matthews, one of the defendants in the court below, sold to Freeman, his co-defendant, the lands mentioned in the bill for the sum of five thousand dollars. But at the time of this sale, said Owens had a

mortgage executed by Matthews to him on said lands, to secure a debt of $3,326.22, which Matthews owed him as a balance of the purchase-money for said land at a former sale. Before the negotiations of the sale by Matthews to Freeman were completed, it was required by Matthews that the mortgage debt to Owens should be paid or secured. Owens was advised of this agreement, and consented to take from Freeman his notes for the sum due him on his mortgage, and a new mortgage from Freeman to secure the same; but it was also agreed between the parties that this latter mortgage should be preferred to the vendor's lien that might result from the sale in favor of Matthews on the notes for the purchase-money, above the debt due to Owens, which were made payable to him. Upon this agreement, Matthews executed his deed to Freeman, and Freeman at the same time executed his mortgage to Owens to secure the amount of Owens' debt. Freeman also executed his promissory notes to Owens for the debt secured in the mortgage, and other notes to Matthews for the balance of the $5,000 purchase-money which remained after deducting the debt due to Owens. This was all done on the same day and at the same time the deed was made to Freeman and Matthews. Among the notes thus made payable to Matthews, was one for $836.89, which became due on the 1st day of January, 1868. This note was transferred by Matthews to Balkum. It does not appear that the first mortgage held on the lands in controversy by Owens was returned or discharged, though Matthews says that Owens took Freeman's notes and mortgage in lieu of the notes and mortgage given by him. The note transferred to Balkum was not paid. Nor were the notes given to Owens paid, or to Matthews. On this Balkum filed his bill to enforce his lien on the note held by him. And Owens, Freeman and Matthews were made defendants. Owens set up his superior and prior lien under his mortgage, and denied Balkum's lien. Balkum took no depositions in support of his case, but stood upon his bill and the exhibit thereto, which was his note, made payable to Matthews. In his answer, Owens set up his mortgage and

the agreement that it was to be preferred to the vendor's lien. The proofs fully sustain Owens' answer. On this the learned chancellor decreed a sale of the lands, but directed that after payment of the costs, Owens' mortgage should be first discharged, and then the residue, if any, should be applied in discharge of Balkum's note. From this decree Balkum appeals, and here insists upon his right of preference over the mortgage to Owens.

No brief of authorities has been furnished by appellant to this court, and none are suggested by the facts set out in the record in support of his pretension. And it does not appear that Balkum occupies a better condition as the holder of the note for that part of the purchase-money which he claims as the transferree of Matthews, than Matthews did himself. The latter could only transfer such right as he possessed. Balkum simply stepped into his shoes. In doing this, he took a second place to Owen, and his lien is to be postponed to the prior right resulting from the mortgage, and the agreement on which it was made. This was in conformity both with the proofs in the case and the principles of law that must govern them. Besides, Matthews swears, in his deposition, that the note held by Balkum was not intended to be secured by a vendor's lien. And he was the party to whom it was given. Then its transfer could not give it a virtue it did not and was not intended to possess. *Nemo plus juris ad alienum transferre potest, quam ipse habet.*—2 Kent, 324; Coke Litt. 309, *b*; 10 Pet. 161, 175; 1 Wood. Lect. Introd. Let. 5. This is the rule of law, when the statute of frauds does not intervene; and it does not here.

The decree of the court below is in all things affirmed, and the said James W. Balkum, the appellant, will pay the costs of this appeal in this court and in the court below.

ESTIS *vs.* PRINCE & GARLICK.

[ACTION ON INJUNCTION BOND GIVEN DURING THE WAR IN 1863.]

Injunction bond; not void because taken and approved by officers of a government in rebellion against the United States.—An injunction bond taken by a register in chancery in pursuance of an order of the chancellor granting an injunction in 1863, is not void on the ground that these officers represented a government in rebellion against the United States.

APPEAL from Circuit Court of Russell.
Tried before Hon. LITTLEBERRY STRANGE.

Facts are stated in the opinion.

G. D. & G. W. HOOPER, for appellant.
SHELDON TOOMER and L. F. MCCOY, *contra.*

B. F. SAFFOLD, J.—This suit was brought by the appellant to recover damages on an injunction bond given by the appellees to restrain her from prosecuting in the probate court her claim for dower in the lands of her husband.

The defendants pleaded that the bond was executed in 1863, and that the chancellor under whose order it was taken, and the register in chancery who approved it, and to whom it was payable, were not lawful officers, and had no authority of law for their action; that they were officers of a government in rebellion against the United States. A demurrer to this plea was overruled, and the plaintiff took a non-suit.

The ruling of this court has been, that the acts of the courts and their officers in this State during the late civil war are not void.—*Griffin v. Ryland*, 45 Ala. 688. The demurrer ought to have been sustained. No other question is presented, either in the assignment of errors or the argument of counsel.

The judgment is reversed and the cause remanded.

PAULLING *vs.* MARSHALL AND WIFE.

[APPEAL FROM JUDGMENT OF NON-SUIT, TAKEN IN CONSEQUENCE OF RULING OF COURT ON PLEADINGS.]

Non-suit, appeal from judgment of; when will not be set aside.—Where the defendant demurs to the plaintiff's complaint, and it is sustained by the court, and the plaintiff excepts to the decision of the court, and thereupon suffers a non-suit, such a non-suit must be regarded as a voluntary, and not a necessary non-suit, and such a non-suit will not be set aside, on an appeal under section 2759, Revised Code. That section only applies to cases where it is necessary to make the decision of the court a part of the record, by bill of exceptions. By such a non-suit the plaintiff is out of court, and must begin again.

APPEAL from Circuit Court of Perry.
Tried before Hon. MILTON J. SAFFOLD.

The facts are sufficiently stated in the opinion.

W. B. MODAWELL, for appellant.
BROOKS & BRAGG, *contra.*

PECK, C. J.—The appellees, in the court below, demurred to appellant's complaint, which being sustained, appellant excepted to the decision of the court, and thereupon took a non-suit, and appeals to this court, under section 2759, Revised Code, to have the decision of the court below revised and the non-suit set aside.

We had occasion to construe said section at the present term, in the case of *Darden v. James.* In that case we held, that the right to appeal to this court to have a non-suit set aside, is given by said section, and as the right depended wholly upon said section, it was to be confined and limited to cases clearly within its purview and meaning; that said section did not apply to decisions of the court made on demurrers to the pleadings, but only to such decisions as are necessarily made a part of the record by a

bill of exceptions; and, as a bill of exceptions is never necessary to enable the plaintiff to revise the decision of the court, sustaining a demurrer to his complaint, such a decision did not authorize him, under said section, to suffer a non-suit, and appeal to this court to have the same set aside.

We remain satisfied with the construction of said section then given. Without doing violence to the plain meaning of said section, no case can be embraced by it where the decision to be revised necessarily forms a part of the record, without a bill of exceptions, and in such a case it can never be said to be necessary for the plaintiff to suffer a non-suit; and if he takes a non-suit, when it is not necessary for him to do so, it must be regarded as a voluntary, and not a necessary, non-suit, and he is thereby out of court, and must begin again.

Let the appeal be dismissed.

HAFLEY & SON *vs.* PATTERSON & TEMPLETON.

[ACTION COMMENCED BY ORIGINAL ATTACHMENT.]

1. *Affidavit; sufficiency of, in statement of ground for writ.*—In an affidavit for an attachment, a statement that the defendants "are fraudulently disposing of their *goods*," is equivalent to the case prescribed in the 6th subdivision of section 2928 of the Revised Code.

APPEAL from the Circuit Court of Lawrence.
TRIED before the Hon. JAMES S. CLARK.

The facts are sufficiently stated in the opinion.

W. P. CHITWOOD, for appellant.
H. C. SPEAKE, *contra*.

No briefs on file.

B. F. SAFFOLD, J.—This suit was commenced by attachment, and the single question involved by the appeal is whether the affidavit contains a sufficient statement of any legal ground for its issue.

The affiant swears that the defendants, Patterson & Templeton, are "fraudulently disposing of their goods, so as to evade the payment of their debts by ordinary process of law." Is this equivalent, in substance, to the cases specified in section 2928 of the Revised Code, sub-division 6, "when the defendant is about fraudulently to dispose of his property"? or sub-division 7, "when the defendant has fraudulently disposed of his property"?

We think it is. In *Free v. Hukill*, (44 Ala. 197,) the word "effects" was held to be a sufficient appellation of "property," within the meaning of the statute. The term "goods" has as extensive a legal signification as "effects," and has even been applied in the civil law to real estate, though it has no such application in our law. The statute does not mean that the defendant must have disposed of, or be about to dispose of, all of his property. He may dispose of it all without giving ground for an attachment, if he does so honestly, and in good faith to all who are interested. But he cannot dispose of any of it fraudulently without subjecting his property to this process.

In *Napper v. Noland*, (8 Porter, 218,) the affidavit stated that the defendant was about to remove his "goods and effects" out of the State; and it was held to be defective, because it said that in consequence of such removal the ordinary process of law could not be served on him. There was no statement that the plaintiff would probably lose his debt, or have to sue for it in another State. Merely removing some of a debtor's property out of the State gave the plaintiff no right to the remedy of attachment. The fraudulent disposition of any of his property justifies the belief that the perpetrator will endeavor to make good his fraud against all of his creditors.

The judgment is reversed, and the cause remanded.

HARDIN & WILLIAMS *vs.* SWOOPE ET AL.

[BILL IN EQUITY TO SET ASIDE SALE OF LAND, &C.—MULTIFARIOUSNESS.]

Bill in equity; when multifarious.—Presley W. Hardin and John Williams, being indebted to Eliz. T. Swoope, a married woman, by two promissory notes, one made by Hardin & Williams, and the other by Williams & Hardin, sold their lands; the said Hardin sold and conveyed his lands to one Wm. C. Phillips, and the said Williams sold and conveyed his lands to his four children; thereupon said Eliz. T. and her husband, as her trustee, filed their bill against said Hardin and Phillips, and said Williams and his children, and charge that said Hardin and Williams were, both of them, insolvent; that said sales were made with the intent to hinder, delay, and defraud creditors, and void as to said Eliz. T.; and prayed that said sales might be set aside and declared fraudulent, and the said lands be decreed to be sold, and the said debts paid out of the proceeds, &c.—*Held*, that said bill was multifarious; that said sales were distinct and independent transactions, or matters, and that the parties to said sales were separate and different parties, having no connection the one with the other, and, therefore, could not be united as defendants in one and the same bill.

APPEAL from the Chancery Court of Lauderdale.
Heard before Hon. WM. SKINNER.

R. O. PICKETT, for appellant.—The bill is plainly multifarious, and the demurrer should have been sustained. It plainly seeks to join in one bill distinct and independent matters, having no necessary connection with each other. It does not make out even a *prima-facie* case of a community of interest; but is designed to enforce distinct rights, unconnected, and having no relation to each other. Phillips, the purchaser from Hardin, is in no way interested or connected with the sale by Williams to his children, and *vice versa*, &c. The defense of all the defendants "do not center in the same issue." This is at last the test. The court can look only to the answer in determining this. The following authorities sustain the above argument. 23 Ala. 558; 18 Ala. 439; Story's Eq. Plead., §§ 271–8–9;

Mitford's Equity, 181; 1 Daniel Chan. Prac. 379; 18 Vesey, 80; 17 Ala. 418; 5 Paige, 65; 10 Ohio, 456; 3 Howard, 40; 42 Ala. 279; 5 Ala. 342; 2 Ala. 571; 16 Ala. 89.

DAVID P. LEWIS, and E. A. O'NEAL, *contra*.—Tested by the true principles of equity jurisprudence, the bill is not multifarious. The bill shows that the different defendants claim different and separate parts of the property sought to be recovered, through the very same title which complainant asserts. They may all unite on common grounds of defense. It was, therefore, proper to join the defendants. It is not every case, where common interest and common liability are not shown, that is multifarious. *Waller v. Taylor*, 42 Ala. 297; *Halstead v. Shephard*, 23 Ala. Rep. 558; *Campbell v. McKay*, 13 English Chancery, 543, 544.

In case of dismissal, the court must dismiss without prejudice.—42 Ala. 297.

PECK, C. J.—The question that first presents itself for consideration on this record, arises on the demurrers and pleas of the defendants to the bill of complaint of the appellees for multifariousness, in improperly joining therein distinct and independent matters.

In disposing of this question, we can only look to the bill, without reference to the answers or proof.—*Halstead et al. v. Shephard*, 23 Ala. 558.

So much of the bill as seems necessary to a proper understanding of this question, may be briefly stated as follows: 1st. The complainant, Elizabeth T. Swoope, claims to be the owner of two promissory notes, one for $2,400, made by the defendants, John Williams and Presley W. Hardin, dated the 4th day of September, 1860, payable, presently, to one John Peters, or order; the other for $3,800, made by said Presley W. Hardin and John Williams, dated the 1st day of August, 1860, and payable to said Peters one day after date; credited the 19th day of July, 1866, with $3,500.

2d. That both said Hardin and Williams, before the late civil war, were men of large estates, and of good credit,

but that the results of said war left them much indebted, and ever since they have been, and still are, wholly unable to pay their debts, and are utterly insolvent; that they were, each of them, possessed of considerable bodies of valuable lands, but that said lands, and all their other property, are wholly inadequate to pay off the large debts which they then owed, and still owe.

3d. That on the 4th day of June, 1867, the said Presley W. Hardin and his wife made a deed of conveyance to the said defendant, William C. Phillips, of all his lands (describing them), containing eleven hundred and twenty acres, being the plantation on which he then resided, and still resides; that said deed purports to be a sale of said lands, for the sum of six thousand seven hundred and twenty dollars, cash in hand paid, &c.

The bill charges that said sale was a mere pretense, was wholly fictitious and simulated; that no money was, in fact, paid, and that the same was a mere device of covin and fraud, to keep the said lands from being made liable to the said Hardin's debts, and to enable him to defraud his creditors, &c.

4th. That the said John Williams and his wife, on the 4th day of June, 1867, made four deeds of conveyance, one to each of his children, the said defendants, Presley S. Williams, Phebe C. Blair, Andrew J. Williams, and Benjamin F. Williams, by which he conveyed separate portions of his lands to each of said children, said deeds including all of his lands, some twelve or fifteen hundred acres or more. The consideration in each one of said deeds is stated to be two thousand and thirty dollars, and paid as follows: Eleven hundred and ninety-five dollars, the interest of each one of said children in the estate of their deceased brother, Simpson Williams, in the hands of said John Williams, and eight hundred and thirty-five dollars paid by each one in cotton and corn, &c. The bill charges that the said deeds of conveyance, all and every one of them, are fraudulent in law, and void as to said complainants; that the considerations were simulated, and not real; that nothing was, in fact, paid; that the money

pretended to be due to the estate of Simpson Williams was simulated and fraudulent, and that the whole arrangement was a mere device of covin and fraud to defeat the satisfaction of the debts of the said John Williams.

5th. The bill prays that said conveyances, so made by the said Hardin and the said Williams, may be decreed to be fraudulent and void, as against the said Elizabeth T. Swoope, and that her said debts may be paid and satisfied by a sale of said lands; and that if the special relief prayed is not the relief to which said complainant is entitled, on the facts of the case, the proper relief may be decreed in the premises.

The foregoing statements, separated from the other matters contained in the bill, not relevant to the present question, will enable us the better to comprehend and understand the objection of multifariousness made by the defendants in this case. But, in the first place, let us see what the books teach us constitutes multifariousness, as that term is understood in proceedings in equity.

By multifariousness is meant the improperly joining, in one bill, distinct and independent matters against one defendant, or of several matters, of a distinct nature, against several defendants, in the same bill.—Story's Eq. Pleading, § 271.

It is a rule of equity, that if two or more distinct subjects be embraced in the same bill, it is multifarious. 1 Daniel's Pl. & Pr. 283. So, where a party is brought as a defendant, upon a record, with a large portion of which, and of the case made by it, he has no connection, the bill will be held to be multifarious.—Ib. 365.

So, again, where different matters, having no connection with each other, are joined in a bill against several defendants, a part of whom have no interest in, or connection with, some of the distinct matters for which the suit is brought, a demurrer to the bill for multifariousness will be sustained, and the bill will be dismissed.—*Waller et al. v. Taylor, Administrator*, 42 Ala. 297. And so, too, a bill is multifarious where several defendants are charged with distinct wrongful acts, relative to different slaves, to which

the complainant has an equitable title, although the title is the same to all the slaves; and even a general charge of fraudulent combination between the several defendants, is not sufficient to authorize a joint suit.—*Meacham v. Williams et al.*, 9 Ala. 842.

Judged by these authorities, this bill is clearly multifarious. Courts of equity are anxious, as far as practicable, to preserve some analogy to the comparative simplicity of proceedings at common law, and thus to prevent confusion in their pleadings, as well as in their decrees.—Story's Eq. Pl., § 271. They are also averse to multiplicity of suits; notwithstanding, a defendant has a right to insist that he is not bound to answer a bill containing several distinct and separate matters, relating to individuals with whom he has no connection.—1 Daniel's Pl. & Pr. 385.

In this case, the sale and conveyance made by Presley W. Hardin and wife of his lands to William C. Phillips, is one transaction, one matter, and the sales and conveyances made by John Williams and wife of his lands to his children, are altogether another and a different transaction, or matter; the two transactions are separate and independent, and have no connection or reference the one to the other.

The parties to the transaction are, none of them, parties or privies to the other, nor is there any common interest or connection between the respective parties to these separate and different transactions. Williams and his children have no interest in the lands bought by Phillips of Hardin, nor have Hardin and Phillips any interest in the lands sold and conveyed by Williams to his children, nor is there in the bill any charge of combination or confederacy between these several parties to hinder, delay, or defraud the complainant, the said Elizabeth T. Swoope, in the collection of her debt, or of the creditors generally of the said Hardin and Williams, or of either of them; and such a charge, if made, would not, on the authority of the case of *Meacham v. Williams et al.*, *(supra,)* avoid this objection. Where a party is able to say he is brought as a defendant, upon a record, with a large portion of which, and of the

case made by it, he has no connection, the bill is multifarious.—1 Daniel's Pl. & Pr., *supra*. This can be said in this case by Hardin and Phillips, as to the sales and conveyances made by Williams to his children, and by Williams and his children as to the sale and conveyance made by Hardin to Phillips; therefore, these two different and separate transactions, or matters, can not be embraced in the same bill; and to impeach them on the score of fraud, the complainants must file separate bills, one to set aside the sale made by Hardin to Phillips, and another to set aside the sales made by Williams to his children; they can not both be embraced in the same bill without violating and disregarding the well settled rules of equity pleading.

For these reasons, the chancellor should have sustained the demurrers and pleas of the defendants to the complainants' bill of complaint; and as no escape from this objection of multifariousness can be effected by any permissible amendment of the present bill, it must be dismissed, and the decree rendered here that should have been rendered in the court below.

As to the merits of this case, whether the said sales and conveyances by the said Hardin and Williams, respectively, were made in good or bad faith, or upon good and sufficient considerations, and for honest purposes, or the contrary, we carefully refrain from the expression of any opinion, as, otherwise it might have an improper influence upon any future litigation that may grow out of these matters between the present parties, or any of them.

Let the decree of the court below be reversed, and the bill of complaint be dismissed without prejudice. The appellees will pay the costs in this court and in the court below.

FROST ET AL. *vs.* BARNES.

[STATUTORY PROCEEDING FOR ERECTION OF PUBLIC GRIST-MILL.]

1. *Inquest of jury; requisites of.*—In a statutory proceeding for authority to erect a public grist-mill, (Revised Code, §§ 2481-2503,) it is not necessary that the inquest of the jury should be unanimous: if it is signed by a majority of the jurors, and otherwise conforms to the requisitions of the statute, it is sufficient.
2. *Sufficiency of evidence.*—On appeal from a decree of the probate court, authorizing the erection of a dam for a public grist-mill, (Rev. Code, §§ 2481-2503,) the judgment of the court below will not be disturbed, when it appears to be sustained by a preponderance of the evidence.

APPEAL from the Probate Court of Butler.
Tried before the Hon. H. W. WATSON.

This was an application by J. M. Barnes, (under chapter 3, title 6, part 2, of the Revised Code,) for authority to erect a dam across Hall's creek in said county, for the purpose of establishing a public grist-mill; which application was contested by Henry Frost and others. A jury of inquest was summoned, who reported in favor of the proposed dam; but their report was only signed by four of the seven jurors, the others adding conditions and restrictions to their signatures, as stated in the opinion of the court. On all the evidence adduced, the court below granted the application; and its judgment, with other matters, is now assigned as error.

GAMBLE & POWELL, for appellants.
HERBERT & BUELL, *contra.*

PETERS, J.—This is an appeal from the decree in a proceeding on an application before the judge of probate of Butler county, for the privilege of erecting a dam for a water grist-mill, to grind for toll, across a certain watercourse in said county, not being a navigable stream. The

privilege to erect the dam was allowed by the court, and the parties who contested the application bring the case to this court for review.

The errors assigned raise objections to the sufficiency of the inquest of the jury, on the writ of *ad quod damnum*, returned into the court below, and to the force of the evidence to show that the health of the neighborhood will not probably be endangered by the erection of the dam proposed. This inquest of the jury is strictly formal, and in full compliance with the requirements of the statute; but it is signed by only four of the jurors, out of the seven. The other members of the jury assent to this inquest of the majority, in these words, to-wit: "We, the undersigned, assent to the foregoing declarations," (the inquest,) "except the third (3d). To this we assent with the following qualifications: we do believe that the erecting of a mill at the point above described will endanger, in some degree, the health of the surrounding neighborhood, but not in an unusual or extraordinary degree; and we further believe that, inasmuch as the mill and dam hereinbefore mentioned have already been erected, their removal would be more hurtful to the health of the neighborhood, for the immediate future at least, than their continuance would be." On the proper return and notice of this inquest, the contestants appeared, and moved to quash it, and also demurred to it. Both of these objections were overruled by the court, and the contestants excepted. In this there was no error.

The inquest of the jury is *ex parte*, and not final. It is but a part of the process to reach the issue upon the merits. It is not required to be unanimous, as the verdict of a jury on the trial of an issue in a court of law, but it may be only the inquest of the majority. If it is sufficiently formal, and signed by a majority of the jury, this is enough. Rev. Code, § 2492. After it is returned into court, if in sufficient form, the court makes up the issue upon it required by the statute. And for this purpose, after the parties interested have due notice, the law directs, "If, on the day appointed to show cause, or any other day to which

the matter may be continued, it appear to such judge, from the inquest, or from any other evidence, that the residence of any owner, or the out-houses, enclosures, garden, or orchard, immediately belonging thereto, will probably be overflowed, or that the health of the neighborhood will probably be endangered, or any other mill or water-works probably overflowed, the judge must not grant the application; but if such results are not likely to ensue, the application must be granted."—Rev. Code, § 2495. Upon the "results" thus referred to there was no serious controversy, except two. The one was the overflow of other mills or other water-works, and the other was the effect upon "the health of the neighborhood."

In reference to the first result there needs little to be said. The proof shows that the only other mill or water-works, upon the stream on which the dam was sought to be erected, was above a mile below the place of erection, and the water could not pass to it without passing over the dam proposed to be erected. This was not in a situation to be overflowed, in the manner intended by the statute. The overflowing contemplated by the statute is that which is occasioned by the stoppage of the water of the stream by the dam, and forcing it back upon some structure above it, or the forcing it out of the banks, so as to overflow some point above or below the dam itself. Here the proof showed that the mill below the dam was occasionally flooded by the too rapid escape of the water above. If this was negligently or designedly done by the owner of the upper mill, it might subject him to an action for damages, but it would not be the overflowing intended by the statute. The proof upon this point was not such as would justify a refusal of the application.

The other question, as to the effect of the dam upon the health of the neighborhood, is one of much more difficulty, both because of the obscurity of the proofs upon the question of health, and the uncertainty of what really constitutes a "neighborhood." In such a case as this, the court may look, in settling the question, both to the "inquest"

of the jury, and to "any other evidence" which may be competent.—Rev. Code, § 2492, *supra*. The "inquest" is the result of a very grave and serious examination of the same questions on which the court is called to act. The jury who make it are disinterested and responsible citizens of the county, if not of the immediate neighborhood.—Rev. Code, § 2486. In their office, they act under oath, and become the unbiased representatives of the interests of the neighborhood committed to their examination. It would be a shameful betrayal of their trust and their oath to act falsely. This is not to be presumed. It may be for this reason that the statute lays so much stress upon the value of their inquest as evidence. It is thus made evidence of a very high grade, but not conclusive, if contested.

In this case there is much intelligent evidence, which supports the conclusions of the jury; and although this was much contested by other evidence of a persuasive nature, yet it does not appear to me that the learned judge, in his decree, mistook the preponderating force of the evidence on behalf of the applicant in the court below. Testimony upon the question of health and sickness is never very conclusive. Much of it is mere guess. Eminent physicians are often very much at variance among themselves upon such questions. It is not shown how large the community which constituted the neighborhood of the dam or mill-pond is, nor how the dam would affect the health of that whole community. It is certainly not shown that the health of the whole community, or the larger portion of it, would be injuriously affected by the erection of the proposed dam; yet it is the whole community, or the larger portion of it, that must have its health endangered, before the privilege to erect the dam can be denied. This is the language, and, I think, the meaning of the statute as above quoted. Some of the witnesses declared, that in the same neighborhood near the proposed mill-dam there was, in some families, more sickness before the dam was erected than there was afterwards. Others declared that in other places the contrary was the case. No doubt both sets of witnesses deposed the truth. But it could not be true that the mill-dam was the offend-

ing cause of the sickness in both cases. It certainly was not the cause in the first case, as it did not then exist; and it is but little better than a mere conjecture to say that it was the cause in the second. It is, in a great measure, but a guess. Taking the issue to apply to the health of the whole neighborhood, and the inquest and whole testimony into consideration, I am of opinion that the learned judge in the court below decided according to the preponderance of the evidence. If he did, his judgment should not be disturbed.

The judgment of the court below is, therefore, affirmed, with costs.

PRINCE *vs.* PRINCE.

[BILL IN EQUITY TO REMOVE SETTLEMENT OF DECEDENT'S ESTATE FROM PROBATE INTO CHANCERY COURT.]

1. *Insolvent estates; claim for family expenses, incurred under will, not required to be filed, nor entitled to share in distribution of assets with "debts of the estate."*—A claim against a decedent's estate, in favor of his widow, founded on a clause in his will in these words, "Out of the proceeds of my property directed to be sold, I desire my funeral and other debts first paid, including the expenses for the support and maintenance of my family, from the time of my death until the division of my estate," is not such a "debt against the estate," (Revised Code, § 2064,) as is required to be filed within twelve months after a decree of insolvency, nor is it entitled to share in the assets when distributed under the decree of insolvency.
2. *Same; nature of such claim.*—Such a claim can only be paid out of the residue of the estate, if any, after the payment of the preferred claims and debts which have been regularly filed against the estate, and it is not in any way affected by the proceedings under the decree of insolvency.
3. *Same; jurisdiction of probate court in such case.*—If there should be a residue after the payment of the preferred claims and debts against the insolvent estate, such a claim may be contested before the probate court, by any person interested in that residue, on an annual or the final settlement of the administrator.

4. *Decedent's estate; removal of settlement from probate into chancery court.* The final settlement of a decedent's estate can not be removed from the probate into the chancery court, under a bill filed by a portion of the heirs-at-law and legatees, alleging that the estate was regularly reported and declared insolvent, but, in consequence of the failure of creditors to file their claims, eventually proved solvent; that a large claim, filed against the estate by the widow, and partly paid by the administrator, was not properly a debt or preferred claim against the estate under the decree of insolvency, though, so far as it might be correct, it constituted a charge on the residue; and that the complainants had no notice of the filing of this claim, until after the expiration of twelve months from the declaration of insolvency, and no opportunity to contest its correctness. In such case, there is an adequate remedy in the probate court.

APPEAL from the Chancery Court of Tuskaloosa.
Heard before the Hon. A. W. DILLARD.

THE bill in this case was filed by John H. Prince and Charity P. Knott, claiming as heirs-at-law of Edmund Prince, and legatees under his will, against Mrs. Lavinia L. Prince, the widow, and Charles M. Foster, as the administrator with the will annexed of said Edmund Prince; and sought to remove the settlement of said decedent's estate from the probate court, in which it was pending, into the chancery court. The chancellor sustained a demurrer to the bill for want of equity, and his decree is now assigned as error.

VAN HOOSE & POWELL, and J. M. MARTIN, for the appellants.—The bill contains equity on several distinct grounds. The appellants, not being creditors, had no day in the probate court, to object to the claim filed by the widow, and no opportunity to contest its correctness there. Only the administrator, or any creditor, can file objections to claims against an insolvent estate.—Revised Code, § 2203. No objection to the claim having been filed within twelve months after the declaration of insolvency, it must be allowed, and can not be contested in that court.—*Walker v. Mock*, 39 Ala. 577; *Hardy v. Meachem's Adm'r*, 33 Ala. R. 457. Nor did the complainants, claiming only as heirs-at-law and legatees under the will, have any right or interest

to protect, which could give them a standing in the probate court while the proceedings under the decree of insolvency were pending. Their interest only accrued when it was ascertained that the estate was solvent.—Code, § 2196; *Puryear v. Puryear*, 34 Ala. 555; 39 Ala. 577. Having, then, an interest to assert and protect, and yet no standing in the probate court, their only remedy is in chancery. 5 S. & P. 133; 13 Ala. 144.

Again; the bill avers that the widow's claim was not presented to the administrator within eighteen months after the grant of letters, being thus barred by the statute of non-claim, but was regularly filed as a claim against the insolvent estate within the time allowed by law, and was not objected to. Now, section 2239 (Revised Code) declares, that all claims, "not so presented, are forever barred"; while section 2202 expressly enacts, that all claims against insolvent estates, regularly filed, and not objected to, must be allowed. Here are two sections, equally peremptory, and yet, in this case, totally inconsistent and irreconcilable. Which section shall prevail in the probate court? For the purposes of this bill it matters not which; it is sufficient for them that the question is doubtful and undecided, and one which the probate court, as a court of limited powers and jurisdiction, can not properly adjudicate. All the statutes relating to insolvent estates are based on the supposition, that creditors will protect their own interests by contesting the claims filed by other creditors, if incorrect; but there is no provision made for protecting the interests of the heirs-at-law, in the event of the estate becoming solvent, nor for allowing them to appear and protect their own interest. Hence, they have rights, but no remedies in the probate court; and the chancery court will interfere, to prevent a failure and perversion of justice.

Again; the claim filed by the widow grows out of a testamentary trust, and involves the construction of the testator's will, as to what are proper family expenses, and how long the will authorizes their continuance; questions which cannot be adjudicated in the probate court.—*Gould*

v. Hays, 19 Ala. 438; 9 Ala. 394; 15 Ala. 249; 1 Story's Equity, §§ 26, 463; 2 *Ib.* § 1065. And in this connection the allegation of the bill, "that the accounts are so complicated that the probate court can not do justice between the parties," becomes very material.

S. A. M. WOOD, and SOMERVILLE & MCEACHIN, *contra*. The object of the bill is to contest the validity of the claim filed by the widow against the testator's estate. There is no aspect in which this question can be presented, or any of the questions involved in and growing out of it, which can not be fully and speedily settled in the probate court. If the estate is not legally bound for the claim, the probate court must, and will reject it, without objection previously filed.—*Flinn's Adm'r v. Shackelford*, 42 Ala. 207. If the administrator, by fraud or collusion, has failed to urge a valid legal objection against the claim, there is an adequate remedy by action against him on his official bond. If he has only been guilty of such negligence or ignorance as would not sustain an action at law on his bond, neither will a court of equity hold him accountable.

The claim having been regularly filed against the estate, and no objections to it having been filed within the time allowed by law, it has acquired the force and effect of a judgment; the question of its correctness and allowance has become *res adjudicata*.—Revised Code, §§ 2203, 2196; *McDougald's Adm'r v. Dawson's Ex'r*, 30 Ala. 558. The averment of the bill as to the non-presentation of the claim, comes too late in any forum, though it might have been a valid objection to the allowance of the claim, if presented in proper time in the probate court.

There is no question involved in the construction of the will, which the probate court is not competent to decide; and no testamentary trust to be settled, which requires the extraordinary powers of equity.

The allegations as to complicated accounts between the parties, and fraud and collusion between the widow and the administrator, are entirely too loose and indefinite to sustain the equity of the bill on either of those grounds. Adams' Equity, 479, 637.

PETERS, J.—This is a bill filed by a part of the heirs and legatees of Edmund Prince, deceased, against the widow of said deceased, and Charles M. Foster, administrator *de bonis non* with the will annexed of his estate, to remove the final settlement of said estate from the court of probate to the chancery court. The grounds of this change of jurisdiction grow out of a provision of the will of said deceased for the support and maintenance of his family until his estate is divided, and certain complications which have happened in the administration of said estate since the probate of said will. This instrument was duly made and published on the 30th day of July, 1860, and the testator died on the 27th day of April, 1861, and the will aforesaid "was duly admitted to probate, in the probate court" of Tuskaloosa county, "on the 13th day of May, 1861." The testator, after directing how his estate should be disposed of by his will, goes on to declare that, "Out of the proceeds of my property directed to be sold, my funeral and all other debts I desire first to be paid, *including* the expenses for the support and maintenance of my family from the time of my death until the division of my estate." In the progress of the administration of this estate, it became insolvent, and was so reported, and declared by a decree of the proper court. And, in the mean time, a very considerable claim accrued in favor of Mrs. Prince, the widow of the testator, for support and maintenance of the family, under the clause of the will above quoted. This was presented to the representative of the estate, and filed as a claim against the estate, as a "debt" entitled to participate in the distribution under the insolvency. By a failure of the creditors of said estate to file their claims within twelve months after the declaration of insolvency, as required by law, the debts against the estate were so reduced as to restore the estate to solvency. The claim of Mrs. Prince aforesaid, for above $17,000, was one of the claims duly filed against said insolvent estate; and the bill is predicated upon the supposition that its accuracy can not now be contested in the court of probate on the final settlement of said estate; and for this reason, mainly, the

bill is filed to contest it in chancery, because the remedy in the probate court is uncertain and inadequate. There are, also, some allegations of fraud and conspiracy between the administrator and Mrs. Prince, which are too general and indefinite to avail in a change of the forum of the final settlement. The bill was dismissed, by demurrer, and the complainants in the court below bring the case here, and assign the judgment of the learned chancellor in dismissing the bill for error.

I think there can be no reasonable doubt that the judgment of the court below was correct. The statute governing the administration and distribution of insolvent estates is one that refers to claims of creditors, strictly so called, and certain preferred demands. By our statute law, the whole property of the deceased is charged with the payment of his debts, and the same must be sold for that purpose, if necessary, with certain specified exceptions.—Rev. Code, §§ 2060, 2061. If the whole property of the deceased, after deducting the exceptions thus allowed, is insufficient for the payment of the debts, then the estate is insolvent; and, when so declared by a proper decree of the court of probate, the assets of the estate, when reduced to money, must be distributed as directed by section 2064 of the Revised Code, in proportion to the amount due each class of creditors, in the order in such section specified.—Rev. Code, §§ 2177, 2178, 2187, 2064. Section 2064 aforesaid divides "the debts against the estate," which are to be paid on an insolvency, into six classes, as follows: 1st, the funeral expenses; 2d, the fees and charges of administration; 3d, expenses of the last sickness; 4th, taxes assessed on the estate of the deceased previous to his death; 5th, debts due the overseer, as such, for services rendered the year of the death of the deceased; 6th, the other debts of the deceased. It is very clear from this enumeration, that the claim here insisted on, in favor of Mrs. Prince, for the support and maintenance of herself and family until the division of the estate, is not one which can be included in any class in the foregoing catalogue. And these are all the claims entitled

to be considered on the distribution of an insolvent estate. Her claim is predicated upon a clause of the will of her husband. It is, therefore, a gift by the will to the family of the testator, for a certain purpose, in the nature of a specific legacy; and it must be postponed to the payment of the debts of the deceased and the preferred claims above enumerated. It is not a claim affected by the law regulating the settlement and distribution of insolvent estates. It is, nevertheless, true that it is, under the will, a charge upon the estate of the deceased, but only on that part of it which remains after the debts and preferred claims are paid or discharged. It can not be allowed to participate in the distribution of the estate, on a decree of insolvency, as a "debt against the estate." And for this reason, it is of no consequence whether it be filed or not, after a decree of insolvency, within the time or in the manner of other claims, that may participate in the distribution. But it is a claim that is entitled to payment out of the residue, after the debts and preferred claims have been paid or discharged. And as such, its allowance as a credit to the administrator may be contested in the court of probate, on his annual or final settlement, as other claims may be, by any person interested in the residue of the estate after the debts are paid.—Rev. Code, § 2147. The court of probate is fully competent to settle all the objections to the claim of Mrs. Prince that have been suggested in the bill, as a credit to be allowed to the administrator, and these inquiries are not barred by the proceedings in the insolvency.

The decree of the court below is affirmed, with costs, in this court and in the court below.

HALL'S HEIRS *vs.* HALL.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Probate of will; jurisdiction of probate court over.*—Courts of probate, in this State, have original, general, and unlimited jurisdiction of the probate of wills.
2. *Same; nature of proceeding.*—A proceeding for the probate of a will, is in the nature of a proceeding *in rem*, and is conclusive on all persons; and it can not be collaterally impeached, for any irregularity that may have intervened after the jurisdiction of the court attached.
3. *Same; notice to widow and next of kin.*—The failure to give the widow and next of kin the notice required by the statute, (Rev. Code, § 1951,) is a mere irregularity, which can only be taken advantage of in a direct proceeding to set aside the probate.
4. *Endorsement of certificate of probate.*—Every will, properly admitted to probate, must have endorsed on it the certificate required by the statute (Revised Code, §§ 1947-8); but it is not necessary that a transcript, properly certified, should show that such endorsement was made on the original will.
5. *Pending action by personal representative of testator, against person in possession of devised lands, no defense to action by devisee.*—In an action by a devisee, or his heirs-at-law, to recover devised lands, a subsequent action, brought by the personal representative of the testator, against the defendant, is not good matter for a plea *puis darein continuance;* and on a trial under the general issue, proof of the pendency of such action, and that there are outstanding debts of the testator unpaid, is irrelevant.
6. *Title to devised lands.*—On the death of a testator, the title to lands devised by him vests at once in the devisee; and he is entitled to the immediate possession thereof, and to hold the same until, when necessary, they are subjected by the personal representative to the payment of debts.
7. *Sale of decedent's lands; sufficiency of petition, and validity of order for.* A petition, filed by an executor, asking an order to sell his testator's lands, stating only that "he believes a sale necessary," and that he "wishes to make it under the order of the court," is not sufficient to authorize an order of sale; an order of sale, founded on such a petition, is a nullity; and a sale made under such an order confers no title on the purchaser.
8. *General charge on evidence.*—When the evidence is clear, and without conflict, and it is only necessary to draw a legal conclusion from it, the court may instruct the jury, that, if they believe the evidence, they must find for the party whose case is thus clearly made out.

APPEAL from the Circuit Court of Bullock.
Tried before Hon. J. MCCALEB WILEY.

THIS action was brought by Nathan A. Lewis and Mrs. M. R. Webster, against Matthew Hall, to recover a certain house and lot, known as the "drug-store," situated in the town of Midway in said county; and was commenced in September, 1867. The plaintiffs claimed as the heirs-at-law (being the brother and sister) of Mrs. Mariana E. Hall, deceased, who was the wife of James M. Hall, deceased, in his life-time, and to whom said house and lot were devised by his will; while the defendant, who was the executor of said James M. Hall's will, had sold the property under an order of the probate court, and derived title under a deed from the purchaser at that sale to him.

At the fall term, 1868, the defendant filed a plea *puis darein continuance*, "in short by consent," which averred, "that since the commencement of this suit, and since the last continuance thereof, one J. W. L. Daniel, in his capacity as administrator *de bonis non*, with the will annexed, of James M. Hall, deceased, duly appointed, qualified, and acting as such administrator, commenced his suit of ejectment against this defendant, in said circuit court, for the recovery of the said lands sued for in this action; that said Daniel was duly appointed, qualified, and is still acting as said administrator *de bonis non*, with the will annexed, of said James M. Hall; that said estate is still unsettled, and under his administration in the probate court of Barbour county, which had jurisdiction thereof; and that there are outstanding demands against said estate, which have come to the notice of said administrator *de bonis non*, and have been duly presented to him; and that said lands sued for were the property of said James M. Hall at the time of his death." The court struck this plea from the files, on motion of the plaintiffs; to which action of the court an exception was reserved by the defendant. Issue was then joined on the plea of not guilty, and a trial was had on that issue.

"On the trial," as the bill of exceptions states, "the

plaintiffs proved, that Mariana E. Hall was the widow of James M. Hall, deceased, who died in June, 1862, while an inhabitant of Barbour county, Alabama; that said Mariana died in Georgia in 1863, leaving no children surviving her, and that said plaintiffs were her brother and sister. They then offered in evidence a transcript from the records of the probate court of Barbour county," which was duly certified by the judge of said court to contain "a correct transcript of the will of James M. Hall, deceased, and the proceedings to probate said will." "The defendants objected to the reading in evidence of such portions of said transcript as purport to set forth a copy of the last will and testament of said James M. Hall, (the same being offered to show title to the lot in controversy in the plaintiffs, and they not proposing to offer any other evidence to prove the last will and testament of said Hall, or that the same was ever admitted to probate,) on the following grounds: 1st, because no notice of the application to probate said last will and testament was ever given to the heirs-at-law or next of kin of said Hall; and, 2d, because there was no endorsement, or certificate, signed by the probate judge, as required by section 1628 of the Code of 1853, (Revised Code, § 1947). In support of the first objection it was proved, that said James M. Hall left no children, or lineal descendants, surviving him, but did leave brothers and sisters, some of whom were adults, and some minors, all of whom were residing in said county of Barbour, at the time of his death, and at the time of the application to probate said will, and at the time said will purported to have been admitted to probate. The court overruled the objections, and admitted the transcript in evidence; to which ruling the defendant excepted. The plaintiffs then proved, that letters testamentary on the estate of said James M. Hall were issued by the probate court of Barbour county, on the 10th day of July, 1862, to said defendant; that he resigned said executorship, made final settlement, and was discharged on the 11th day of July, 1864. They also proved the value of the rent of the premises, and rested their case."

The transcript offered and read in evidence by the plaintiffs contained, in addition to the proceedings had on the application for the probate of the will, a petition by the said executor (the defendant in this action) for the sale of the premises here in controversy, and an order of sale granted by the probate court, founded on that petition; but the transcript nowhere shows the time when the petition was filed, nor the date of the order of sale. The petition was in the following words: "Your petitioner, Matthew Hall, executor of James M. Hall, deceased, respectfully shows unto your honor, that he believes it necessary to sell a house and lot in the town of Midway in said county, known as the drug-store lot occupied by the said James M. Hall in his life-time as an office and drug-store. He wishes to sell the same under order of this honorable court, and therefore prays an order authorizing the sale of real estate." The order of sale, which is copied in the transcript immediately after the petition, is in these words: "Ordered, that Matthew Hall, executor of James M. Hall, be allowed to sell drug-store in town of Midway belonging to James M. Hall, deceased."

"The defendant then proved, that he sold said drug-store lot, at public auction, in February, 1864, when one E. Y. Van Hoose became the purchaser, at and for the price of five hundred and twenty-five dollars; and also proved the execution of the deed made by him to said Van Hoose, and read the same in evidence." (The deed here set out in the bill of exceptions is dated the 8th day of July, 1864; and recites that the sale was made under an order of the probate court, was duly confirmed by that court, and that the purchase-money had been paid.) "The defendant then read in evidence, after proving its execution, a deed for the said premises, executed by the said Van Hoose and wife to said defendant"; which deed is dated the 24th day of August, 1865, is a simple quit-claim, in form, and recites the payment of a mere nominal consideration. The defendant then offered in evidence the original papers (there being no final record) in the suit brought against him by J. W. L. Daniel, which is referred to in the plea *puis darein contin-*

uance. The court excluded this evidence, on the plaintiffs' objection, and the defendant excepted. "The defendant then offered to prove, that there were debts outstanding and unpaid against the estate of said James M. Hall, to the amount of more than two thousand dollars, which were contracted by the said James M. Hall in his life-time, and had been duly presented to his personal representative; and, in connection therewith, he offered to prove that said drug-store lot was the only property belonging to the estate of said James M. Hall, unadministered, and that on his final settlement as executor there was a balance of several hundred dollars found due him, besides said outstanding indebtedness. The plaintiff objected to the admission of the evidence of said outstanding indebtedness, on the ground that the same was irrelevant; which objection the court sustained, and the defendant excepted."

"It was in proof, also, that said E. Y. Van Hoose paid no money to the defendant, for said house and lot, and that the defendant paid him no money on the re-conveyance. But it was in proof, also, that said defendant had made large advances in the payment of debts contracted by said James M. Hall previous to the year 1861; that he accounted for the same on his final settlement, at what said lot was sold for; and that said estate was still found to be indebted to him, in the sum of several hundred dollars, which has never been paid to him. It was admitted by the plaintiffs, that notice had been given to them, before the trial in this case, that said J. W. L. Daniel, as such administrator, claimed and demanded of said defendant the possession of the said house and lot, and the value of the rent thereof, to pay the debts of said estate.

"This was all the evidence in the case; and the court thereupon charged the jury, that the said order of sale was a nullity, and that the deed made by said defendant to Van Hoose, and the deed made by Van Hoose and wife to said defendant, were void, and conveyed no title to the defendant. And the court also charged the jury, at the request in writing of the plaintiffs, that, if they believed the evidence, they must find for the plaintiffs, and that the

plaintiffs were also entitled to recover the value of the rent of said house and lot. The defendant excepted to each of these charges."

All the rulings of the court, to which, as above stated, exceptions are reserved, are now assigned as error.

STONE & CLOPTON, and D. M. SEALS, for appellant.
LEWIS, WOOD, and RICE, *contra.*

PECK, C. J.—In this State, the probate courts have original, general, and unlimited jurisdiction of the probate of wills, whether of real or personal estate.—Rev. Code, §§ 790, 1939, 1944; *Gray's Admr's v. Cruse*, 36 Ala. 559. When a will is propounded and filed in the proper probate court, the court thereby acquires jurisdiction of the probate of such will. The common-law rule does not prevail here, which makes the validity of wills of real estate cognizable only in the common-law courts, and in the ordinary forms of suits, where the verdict and judgment are conclusive only on parties and privies as in other cases.—2 Gr. Ev. § 672.

A proceeding for the probate of a will is in the nature of a proceeding *in rem*, and, until set aside or reversed, is conclusive on all persons, and can not be collaterally impeached for irregularities which may have intervened in the proceedings after the jurisdiction of the court attached. *Deslonde & James v. Darrington*, 29 Ala. 92. Section 1951 of the Revised Code provides, that whenever application is made to prove a will in this State, at least ten days' notice must be given to the widow and next of kin, or to either of them, residing and being within the State, before such application is heard. If a will is proved, without notice to a party who is entitled to notice, the failure to give such notice is a mere irregularity; and the remedy for such party is to move the probate court to set aside the probate, or to procure himself to be made a party to the proceedings, by petition in said court, and then sue out an appeal.—*Roy v. Segrist*, 19 Ala. 810; *Stapleton v. Stapleton*, 21 Ala. 587; *Watson v. May*, 8 Ala. 177; 29 Ala. 92. Or he may contest its validity in chancery, under section 1972 of the Revised Code, within five years after the pro

bate thereof. We decide, therefore, that the probate of a will in the probate court of the proper county is not void, although notice to the widow or next of kin, or to both, be not given. The first objection to the probate of the will, as set out in the transcript, was, therefore, properly overruled.

The second objection to said transcript was not well taken. When the original will itself is offered as evidence, to make it admissible, it must have on it the certificate required by section 1947 of the Revised Code. But the latter part of section 1948 makes the record of such will, and the proof, or a transcript thereof, properly certified by the judge of probate, evidence to the same extent as if the original will was produced, and the same proof made.

Before proceeding to the examination of the questions arising on objections made and sustained to the evidence offered by the defendant, we will dispose of the exception taken to the ruling of the court in striking from the files the defendant's plea, filed at the fall term, 1868, in the nature of a plea *puis darein continuance*. The substance of that plea is, that after the commencement of this suit, and after the last continuance thereof, one J. W. L. Daniel, the administrator with the will annexed of said James M. Hall, deceased, had commenced an action of ejectment against said defendant for the recovery of the house and lot sued for in this case; that there were outstanding demands against said estate, which had come to the notice of said administrator, and had been duly presented to him; and that said house and lot were the property of said James M. Hall at the time of his death. This plea was manifestly bad. It did not state that said suit was pending when it was filed; and if it had contained that statement, it did not follow that the suit would ever be tried, or, if tried, that the plaintiff therein would recover. It did not aver, nor did the facts stated, if true, show that the title of the said administrator was superior to the title of the plaintiffs in this suit. It did not, in fact, show that he had any title at all. On the contrary, the facts stated showed that he had not. It would have been manifestly

unjust, to permit the defendant to retain the possession of the premises, defeat the present action on that plea, and then take his chances to defeat a recovery by the said administrator *de bonis non*. Such would have been the effect, if that plea had been sustained. Again: these plaintiffs were neither parties nor privies to that action, and, therefore, were not bound by it; consequently, it could not be pleaded to defeat them in this suit.

On the death of the testator, James M. Hall, the title to said house and lot vested immediately, by virtue of his will, in his widow as devisee; and, on her death, descended to her heirs-at-law. And they are entitled to recover the property, and to retain the possession thereof, until the personal representative of the testator subjects it, if necessary, to the payment of debts, in the way authorized by the statute.—*Chighizola v. LeBaron*, 21 Ala. 406; *Long v. McDougald's Adm'r*, 23 Ala. 43.

The principle settled in *Kennedy v. Holman & Howard*, (19 Ala. 734,) is, we think, an authority against the plea, although the facts of that case and this are, in many respects, unlike. In that case, it was held that a recovery of the premises by a stranger, in an action against the plaintiff, could not be pleaded *puis darein continuance* to defeat his recovery.

For these reasons we hold, that the court below committed no error in striking the plea from the files.

The evidence offered by the defendant under the plea of not guilty, and excluded by the court on the plaintiffs' objection, was irrelevant, and was, therefore, properly rejected. As we have already stated, the action commenced by the administrator *de bonis non*, against the defendant in this case, to recover the said house and lot, was no defense to the plaintiffs' action. The evidence offered in connection with that proceeding, that there were unpaid debts of said testator, James M. Hall, did not change its character as a defense in this case. These plaintiffs were neither parties nor privies to that action, and could not be prejudiced by it in this suit. Whatever the rights of the administrator *de bonis non*, as such, may have been, or may

be, to subject said house and lot, as a part of the testator's estate, to the payment of debts, need not now be considered. The defendant could not, and can not, set them up in this action, to protect himself in wrong-doing. If the defendant had title, he should have relied on it; but, if he had no title on his own showing, he should have yielded the possession to the plaintiffs, as the heirs-at-law of the devisee, Mrs. Mariana E. Hall.

It only remains to examine the charges given and refused by the court; and if no error is here found, the judgment below must be affirmed. The first charge given is manifestly right. The order of sale is a mere nullity. The petition of the executor conferred on said probate court no jurisdiction to make said order. It merely states, that "he believes it necessary to sell" the drug-store lot, and that "he wishes to sell it under an order of the court." This is the whole of it. It does not state that the will gave no power to sell, nor that a sale was necessary to pay debts; nor does it state the names of the heirs or devisees. The order itself appears to have been made on the filing of the petition. No day was appointed for a hearing of said application, and no hearing is shown to have been had. The order of sale is in these words: "Ordered that Matthew Hall, executor of James M. Hall, be allowed to sell drug-store in town of Midway." The executor sold said house and lot under this order, and one Van Hoose became the purchaser at the sale, to whom the executor made a deed, and who, shortly afterwards, re-conveyed the property to the defendant. The court charged the jury, that said order of sale, and both of said deeds, were void, and that no title was conveyed to the defendant. We think no time should be wasted to show the correctness of said charge.

The second charge, which was given on the written request of the plaintiffs, instructed the jury, that, if they believed the testimony, they must find for the plaintiffs, and that the plaintiffs were entitled to recover the value of the rent of said drug-store lot. It has been repeatedly held by this court, that when the evidence is clear, and

without conflict, and it is only necessary to draw a legal conclusion from it, the court may, without error, instruct the jury that, if they believe the evidence, they must find for the party whose case is thus clearly made out.—*Abney v. Pickett*, 21 Ala. 739; *Bryan v. Ware*, 20 Ala. 687; *McKenzie v. Stevens*, 19 Ala. 691. There is no conflict in the evidence in this case, and we think it clearly established the plaintiffs' right to a recovery; and if entitled to recover the premises, they were also entitled to recover the value of the rent, as damages for the detention.

From what has been said it follows, that there was no error in refusing the charges asked by the defendant.

Let the judgment be affirmed, at the costs of the appellant.

JAMES ET AL. *vs* MOSELEY ET AL.

[SUMMARY MOTION AGAINST SHERIFF AND SOME OF HIS SECURITIES FOR FAILURE OF SHERIFF TO PAY OVER MONEY OBTAINED FOR SALE OF PERISHABLE PROPERTY.]

1. *Motion; what notice of sufficient in proceedings under* § 2958 *of Revised Code. Judgment; what will support appeal.*—A motion entered on the motion docket in term time is sufficient notice of the motion to all officers of court and their sureties; and when the parties to such a motion appear and demur to the *notice* of motion, and such demurrer is sustained, and the motion is dismissed, the judgment thus rendered is final, and an appeal may be taken therefrom to this court.—Revised Code, § 3027.
2. *Revised Code*, § 2957; *motion under may be made against sheriff and any one of sureties*.—A motion against the sheriff and his sureties, under section 2958 of the Revised Code, for money received by him for sale of perishable property sold under section 2957 of the Revised Code, may be properly made against the sheriff and his sureties, "or *either* of them." It is not required to be made against the sheriff and *all* his sureties.

APPEAL from the Circuit Court of Perry.
Tried before Hon. M. J. SAFFOLD.

The facts are sufficiently stated in the opinion.

MOORE & LOCKETT, for appellants.
REID, and BAILEY & BRAGG, *contra.*

PETERS, J.—This is a summary proceeding, by the defendant, in an attachment suit which failed and was dismissed, instituted by motion against Moseley as sheriff and his securities, to compel said sheriff to pay over to the plaintiff in the motion a certain sum of money, and damages for detention of the same, which sum of money is the proceeds of the sale of certain perishable property of the plaintiff in said motion, sold by order of court, under section 2956 of the Revised Code. The motion was dismissed upon demurrer to the notice of the motion in the court below, and judgment rendered for costs against the plaintiff in the motion. From this judgment there is an appeal to this court.

The motion in this court to dismiss the appeal is denied, with costs. The judgment from which the appeal is taken is final. It dismisses the suit, awards judgment for costs, and directs execution to be issued on the judgment.—Revised Code, § 3485; Archb. Forms, p. 129, marg.; Tidd Pr. 930, marg.

In such a proceeding as this in the court below, the entry of the motion on the motion docket of the court is sufficient notice to the sheriff and his securities.—Revised Code, § 3027. This motion may be made against the sheriff and his securities, or either of them, "for any money thus received for the sale of perishable property, and judgment rendered against him for the amount and five per cent. a month from the time of the demand."—Revised Code, § 2958. The motion in this case sets forth all the facts which would authorize a recovery, though some of these facts are very untechnically and indefinitely stated. Yet I think an issue upon the merits might have been taken upon them. This is sufficient upon a general demurrer.—Rev. Code, § 2629; 41 Ala. 256; 40 Ala. 63. But the demurrer in this case is not only general, but also

special. Some of the objections are distinctly stated in the demurrer—three at least. The grounds specified are: 1st, that there are other securities to the sheriff's bond who are not sued in the motion; 2d, that the notice, motion or rule does not show the term of the court at which the motion will be made; 3d, that the notice fails to show in what county the motion will be made. I consider these objections in the reverse order to that in which they are made. The third objection is not well taken. It is an objection to the allegations of the notice. In this case no notice was necessary. The entry of the motion on the motion docket of the court is all that is required. This was done. The notice is not a part of the record unless made so by bill of exceptions, or by reference to it in the judgment of the court. This was not done. Its defects, then, can not be urged as an objection to the motion.—Revised Code, § 3027; *Bondurant et al. v. Woods & Abbott*, 1 Ala. 543; *Barclay, Adm'r, v. Barclay*, 42 Ala. 345. The second objection is not borne out by the record. The record shows in its caption that the court in which the proceeding was had was properly held at the proper place by the proper officers, and on Monday, the 5th day of September, 1870, it being the first Monday in that month. And the motion purports to have been made at that term of the court. And the judgment of the court shows that the parties, after mentioning them by name, "appeared by their attorneys." This was a waiver of notice, and a sufficient allegation of the term of the court at which the motion would be made.—1 Ala. 543, *supra;* 39 Ala. 184. There was no need of stating in the motion where it would be made or when. It was a proceeding in court, and the caption of the court showed all this, and by their appearance the parties dispensed with the notice, had any been required in the case. The first objection is also untenable. The statute under which this proceeding is instituted is in the following words: "The sheriff and his securities, or *either* of them, may be proceeded against by motion, on one day's notice, at the instance of the plaintiff, (or of the defendant, if the plaintiff fail in the action,) for any money

thus received for the sale of perishable property; and judgment rendered against him for the amount and five per cent. a month from the time of the demand."—Rev. Code, § 2958; ib. § 1. The bond of the sheriff, though joint in form, is several in effect, and the parties may be sued thereon seaparately or jointly, and judgment may be taken against such as have notice, or against those who appear and plead without notice, (Revised Code, §§ 2539, 3026), unless the statute under which the suit is instituted only authorizes a *joint* proceeding.—*Greene v. Ware*, 37 Ala. 494. But in this case this is not so. The words of the above recited act permit the motion to be made against the parties to the bond jointly or severally. This construction has been given by this court to a statute similar in words to this, in the case of *The Treasurer of Marion County v. Brown et al.*, 43 Ala. 112. Under this statute, the principle which governs in *Greene v. Ware*, (37 Ala. 494, *supra,)* does not apply.

The judgment of the court below is reversed, and the cause is remanded.

DAVENPORT ET AL. *vs.* PRESLEY ET AL.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY OF LAND.]

Vendor's lien; when enforced, and against whom.—Where W. sold lands to M. & Y., giving bond for titles; and Y. having become insolvent, and having left the State, without having paid the purchase-money, M afterwards assigned the title-bond to P., in consideration of his paying the balance of the purchase-money, and the satisfaction of a judgment recovered against M. by him; and afterwards M., as the agent of P., sold the lands to B., who paid the balance of the purchase-money due, and gave his notes to P. for the additional price; and W. then conveyed the legal title to P., from whom B. accepted a bond for titles when his notes should be paid,—*Held*, that the lands were subject to the payment of the notes.

APPEAL from the Chancery Court of Tallapoosa.
Heard before the Hon. B. B. McCRAW.

THE bill in this case was filed on the 30th August, 1867, by Evan Presley and Champion Marable, against Gideon Black and Louan Black, his wife; and sought, principally, to subject a certain tract of land to the payment of the notes given for the purchase. Gideon Black became a bankrupt while the suit was pending, and Luke Davenport was made a defendant as his assignee. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant; and his decree is now assigned as error.

WM. H. BARNES, for appellant.
GEO. W. GUNN, *contra*.

B. F. SAFFOLD, J.—The bill was filed by the appellees, to enforce the vendor's lien upon certain lands for the payment of three promissory notes, the principal of which amounted to $2,800. It further charged that the defendant, Gideon Black, had fraudulently obtained a deed for the lands from Presley, in whom was the legal title, and had conveyed a portion of them to his wife, in consideration of his pretended indebtedness to her on account of her separate estate.

The defendants, Black and his wife, deny any contract whatever with Presley about the lands. They say that G. Black bought them from Wagner, and paid for them with money derived from his mother's estate; that the conveyance from Wagner to Presley was made at the suggestion of the complainant, Marable, to shield the property from the assaults of Black's creditors; and that the notes given to Presley were a simulated indebtedness, without consideration, and intended to defraud the said creditors. They allege that the deed from G. Black to his wife, Louan, was made in consideration of property of hers received by him on their marriage, in 1852, and that the conveyance from Presley to Black was made as a matter of course, the said Presley having no interest in the property transferred.

From the testimony, there can be no doubt of the following facts: Wagner sold the lands to Marable and Yancey, for about $2,500, in 1856 or '57, giving them a bond for titles. In 1859, Black paid Wagner the balance due on this debt, about $2,150, in consideration of his further claim upon the property; and Wagner, in consideration of this payment, and the surrender of his bonds which had been indorsed to Presley, conveyed the legal title to Presley. About this time, Black executed his three promissory notes in favor of Presley, expressing in them that they were given for the lands which were to be bound for the purchase-money.

Marable and Presley explain these transactions thus: On account of Yancey's default and insolvency, Marable became embarrassed by his purchase from Wagner. He sold the property to Presley, in satisfaction of a debt of about $2,000 due from him to the latter, and the balance ($2,150) due to Wagner, assigning to him the bond for titles received from Wagner. Presley, not desiring the property, employed Marable to manage it, and authorized him to sell it on such terms as he chose, saving him harmless. Marable contracted with Black for its purchase, at $5,000, in pursuance of which agreement Black paid to Wagner the amount due to him, and gave his notes to Presley for the balance, taking Presley's bond for titles when it should be paid. The conveyance of Wagner was made to Presley for his protection. Marable was in possession of the lands at the time of the sale to Black.

In opposition to this statement, Gideon and his brother, B. F. Black, testify what has been stated above as the answer of the defendants, and say further, that B. F. Black was the custodian of the notes made payable to Presley, and he gave them to Marable to keep, because he was residing with the latter, and had no safe place to deposit them; and that Marable, when called on to return them, said he had destroyed them because they were useless. Several witnesses testify to Gideon Black's acknowledgment of indebtedness to Presley on account of this prop-

erty, but he says such declarations were made in support of his design to deceive his creditors.

It is singular that no evidence was taken on the part of the defense to prove the value of the lands and the improvements on them at the time of the sale to Black. The difference between what he says he was to obtain them for, and what it is alleged he agreed to pay, is so great, that his cause would be materially aided by proof of a value corresponding with his payment. He assigns no reason why Marable was willing to surrender his interest, and does not even allege that he was, although he received the possession from him. The account of these matters, as given by the Blacks, is incredible, and is overborne by the testimony of the other witnesses. The objection of Marable to a direct conveyance of the legal title from Wagner to Black, because it would subject the property to attacks from his creditors, was substantial, and not inconsistent with his other statements. Wagner could only substitute Black in his place, and Marable and Presley had the right to complete Marable & Yancey's purchase.

The decree is affirmed.

INMAN'S ADMINISTRATOR *vs.* GIBBS.

[PETITION BY PURCHASER TO SET ASIDE SALE OF LANDS UNDER ORDER OF PROBATE COURT.]

1. *Sale of decedent's lands; sufficiency of petition for.*—A petition for the sale of a decedent's lands, filed by his administrator, which alleges that a sale is necessary to pay the debts of the estate, and, if he should be mistaken in this, that it is more to the interest of the estate to sell the lands than to sell the slaves, (Code, § 1755,) sufficiently avers two statutory grounds for a sale, and is not objectionable because the two grounds are thus disjunctively stated.
2. *Same; what interest may be sold.*—A purchaser of lands, sold under an order of the probate court, has such an interest in them, after the confirmation of the sale, as may be sold by the probate court, after his

death, although he had not paid the purchase-money, and had not obtained a deed.

3. *Same; validity of order of sale, and confirmatory decree, rendered in* 1863.—An order of the probate court for the sale of a decedent's lands, and a subsequent decree confirming the sale, both rendered in 1863, are not void as being the acts of a court of the State while in insurrection against the United States.

APPEAL from Probate Court of Sumter.
Heard before the Hon. J. A. ABRAHAMS.

THIS was a petition by Jesse A. Gibbs, filed in the probate court on the 10th January, 1870, asking that court to set aside a sale of certain lands in the town of Gainesville, which had been made, under an order of that court, by F. P. Snedicor, as the administrator of the estate of James C. Inman, deceased, and purchased at that sale by the said Jesse A. Gibbs. The petition alleged the following grounds for setting aside the sale: "1st, because the application for the order of sale fails to show that said court had jurisdiction to grant the order of sale; 2d, because said application fails to show that said Inman had any interest in the house and lot therein mentioned, which the court could order to be sold; 3d, because the proof to show the necessity for the sale was not taken as required by law; 4th, because the proof taken did not establish the necessity for said sale; 5th, because the application for said sale did not authorize any decree thereon, said application being in the alternative; 6th, because the said order of sale is void, on the face of the proceedings in the matter of said application, so far as the property purchased by said Gibbs is concerned; 7th, because the decree ordered the sale of block No. twenty-two (22) on Monroe street, and the report of sale shows only a sale of block No. twenty-two (22) on Jefferson street; and, 8th, in point of fact, said Inman had no interest whatever in any of said property reported as having been sold to said Gibbs under said order of sale."

On the hearing, as the bill of exceptions states, the petitioner offered in evidence the records of the court, showing the administrator's petition for the sale, the order of

sale made thereon, the report of the sale, and the decree confirming the sale. The petition of the administrator, which was made under oath, and filed on the 18th November, 1862, alleged that said Inman died on the 13th September, 1862, "possessed of the following real estate, situated in the said town of Gainesville," &c., "also, the dwelling-house in which said intestate last resided, with the land thereunto attached, being the premises bought by him from Green B. Mobley, administrator of the estate of H. F. Eaton, and more particularly designated and shown by the map and survey of said town of Gainesville as lot No. 22 on Monroe street." The allegations of the petition in reference to the necessity for the sale, and the intestate's title to the premises, are in these words: "The said lot of land last above described has never been paid for by the said intestate, and the debt for the purchase-money is still out against the estate; and besides, from the claims which have already been presented to him, and which amount to nearly $1,500, besides the above note for the land, amounting to $1,750, with interest, and from those that he has heard of, your petitioner believes that it will be necessary to sell said lands, to enable him to discharge the debts of the estate; and he therefore alleges that a sale thereof is necessary, to pay the debts of the estate, and the expenses, &c., of administering the estate." The petition then averred facts showing the condition of the other lands and the slaves belonging to the estate, and concluded with the following allegations: "Your petitioner therefore alleges, that, even if he should be mistaken in the allegations made in the 4th paragraph," (copied above,) "it would be more to the interest of the estate to sell the real estate for the payment of debts, at this time, than the negro property. He therefore prays for an order, authorizing and empowering him to sell the real estate above described, at Gainesville, on a credit of twelve months from the date of sale," &c.

The order of sale, which was made on the 29th December, 1862, after reciting the filing of the petition, &c., proceeded in these words: "And it appearing to the satisfac-

tion of the court that due and legal notice of this application, and of the day set for hearing the same, has been given by publication for thirty days in the *Independent*, a newspaper published in said county; and the guardian *ad litem*, heretofore appointed to protect the interests of the minor heirs of said deceased, having denied in writing the allegations of said petition; and it appearing from the testimony of Eli O'Neal and J. W. Woodward, taken as in chancery cases, and filed in this cause, that it is necessary to sell said real estate to enable the said administrator to pay the debts against said estate, and that it would be more to the interest of said estate to sell the real estate than the negro property: it is therefore ordered by the court," &c., that the administrator be authorized to sell the real estate. The report of the sale, under oath, was returned to the court on the 9th February, 1863, and was confirmed by the court on the 11th March, 1863.

The petitioner then offered in evidence the records of said probate court showing the proceedings had therein, under and by virtue of which said lands were sold by Green B. Mobley, as the administrator of H. F. Eaton, deceased, under an order of said probate court, and were bought at the sale by the said Jas. C. Inman. The sale in that case was made by the administrator, on the 22d December, 1860, under an order of the probate court, for the purpose of making an equitable division among the heirs; was duly reported to the court, and by it confirmed in April, 1861. "It was admitted that said Inman's estate had been declared insolvent; and that said F. P. Snedicor was the administrator under the decree of insolvency; and that neither said Inman, nor his administrator, nor said Jesse Gibbs, had ever paid any thing on the notes given for the purchase-money of the property; and that the note against said Gibbs was in suit, and now pending in the circuit court of said county; and that the note against Inman was also in suit, and now pending in said circuit court against his sureties; and that the said note had been filed as a claim against said Inman's estate. The defendant then proved, that the lots mentioned in the petition and

decree as fronting on Monroe and Jefferson streets were identical, these streets being on two sides of the premises; also, that said Gibbs went into the possession of the said premises on the 10th February, 1863, the day of said sale, and had been in possession thereof ever since, having never been evicted or in any way disturbed."

"This was the substance of all the evidence, and the court thereupon rendered a decree," setting aside the sale on the ground that it was void "for the reasons set forth in the notice and motion"; to which an exception was duly reserved by the defendant, and which he now assigns as error.

WILEY COLEMAN, for appellant.—1. The probate court can, of course, set aside or annul, at a subsequent term, a void order or decree made at a former term.—*Johnson v. Johnson's Adm'r*, 40 Ala. 252; *Summersett v. Summersett's Adm'r*, 40 Ala. 596. But the proceedings of the probate court of Sumter, had in 1863, are not void because of the war then pending, but stand, at least, on the footing of foreign judgments.

2. The records introduced in evidence sufficiently show the facts on which depended the jurisdiction of the court to order the sale.—*Satcher v. Satcher's Adm'r*, 41 Ala. 26; *King v. Kent's Heirs*, 29 Ala. 542; *Field's Heirs v. Goldsby*, 28 Ala. 218; *Matherson's Heirs v. Hearin*, 29 Ala. 210; *Saltmarsh v. Riley & Dawson*, 28 Ala. 164; *Cox v. Davis*, 17 Ala. 716; *Wyman v. Campbell*, 6 Porter, 219.

3. The purchaser, being in the undisturbed possession of the land, can not move to set aside the sale, any more than he could defeat a suit on the notes for the purchase-money.

TURNER REAVIS, *contra*.—The order of sale, and the sale made under it, were void on several grounds. The petition attempts to allege two distinct grounds for a sale, neither of which is sufficiently alleged, and which can not be united so as to constitute one sufficient ground. The allegation that the decedent "died possessed," &c., does not

show that he had any title whatever to the land, either legal or equitable; and the evidence showed that, in point of fact, he had no interest whatever, because the order under which he purchased was void. The letters of administration granted to the administrator in 1862, conferred on him no authority to apply for an order of sale; the State being then in rebellion against the United States, its laws consequently suspended, and its courts not recognized as the rightful courts of the State. The application for the order of sale was, in effect, a suit against the heirs, to divest them of their title to the lands. As the administrator could not sue, he could not maintain such a proceeding. The order of sale, made by the same court, was void for the same reasons, even if the applicant had been rightfully appointed. The order of sale, being at most a foreign decree, can not now be enforced in the courts of this State, by coercing payment of the purchase-money, and ordering a title to be made to the purchaser. These positions are fully sustained by the following authorities: *Moseley v. Tuthill*, 45 Ala. 610; *Bishop v. Blair*, 36 Ala. 80; *Petitt v. Petitt*, 32 Ala. 288; *Burns v. Hamilton*, 33 Ala. 210; *Bibb & Falkner v. Avery*, 45 Ala. 691; *McSwean v. Faulks*, 46 Ala. 610; *Martin v. Hewitt*, 44 Ala. 418; *Noble v. Cullom*, 44 Ala. 554; *Strickland v. Hodge*, January Term, 1871; *Ex parte Bibb*, 44 Ala. 140.

B. F. SAFFOLD, J.—The appellee was the purchaser of land sold by the appellant, under order of the probate court, as the property of his intestate, Inman. He moved the court to set aside the sale, as void, on the grounds of want of jurisdiction in the court, want of such an interest in the property by the intestate as was the subject of sale by the probate court, and failure to comply with the law respecting proof showing the necessity of a sale.

It appears that the decedent had purchased this land at an administrator's sale, and had given his note, with security, for the payment of the purchase-money, and that that sale had been confirmed. But he had not paid any part of the purchase-money, and had received no title-

deed. The appellant, in his petition for the sale, alleged that it was necessary in order to pay the debts of the estate; and that, if he should be mistaken in this, it would be more to the interest of the estate to sell the land than the slave property, for reasons which he enumerated. His application included other land than this in question, which he said the intestate was "possessed" of; but he set out the facts in reference to this particular parcel, as stated above.

Two statutory grounds for a sale are sufficiently alleged to sustain the jurisdiction on a motion to set aside the sale as void.—Code, § 1755; *King v. Kent*, 29 Ala. 542.

In *Jennings & Graham v. Jenkins' Adm'r*, (9 Ala. 285), it was decided, that the orphans' court has power to order the sale of an equitable title to real estate, in all cases where it may order a sale of land. In that case, the land sold by order of the court was in an exactly similar condition to this respecting the title or interest of the decedent. The title was outstanding, waiting the payment by the original purchaser of the purchase-money. If this could not be done, the representative of such a purchaser might have to declare his estate insolvent, when it was not so, for his own protection. The vendor could proceed in enforcing the collection of his money. His execution could not be levied on the land.—Revised Code, § 2871. But, on return of "no property found" against the estate, he would have recourse on the administrator individually.

In *Vaughan & Hatcher, Adm'rs, v. Holmes' & West's Heirs*, (22 Ala. 593), the land, which was the subject of the suit, was in like condition with this. The court held, that the decedent's (West's) inchoate equity might be sold by the probate court. It further held, that the proceeds of such sale must be appropriated in the same manner as other assets belonging to the estate; and that neither the probate court, nor the court of chancery, would have the right to direct their appropriation to the payment of the notes for the purchase-money given by West, in preference to the other demands against his estate.

We regard the above authorities as sufficient to show that the estate of Inman had such an interest in the land bought by the appellee as might be sold by the probate court. This interest was shown by the statement of facts in the appellant's (Snedicor's) application for the sale, and therefore a sufficient ownership was averred to give jurisdiction.

The proceedings sought to be set aside are not void, as being the acts of a court of a State in insurrection against the United States.—*Griffin v. Ryland*, 45 Ala. 688.

The decree is reversed, and the cause remanded.

MILLER *vs.* PARKER'S ADM'RS.

[APPEAL FROM PROBATE DECREE IN CONTEST BETWEEN CLAIMANTS OF DEBT AGAINST INSOLVENT ESTATE.]

1. *Insolvent estate; claim filed by creditor afterwards becoming bankrupt; respective rights of transferee and assignee in bankruptcy.*—When a claim against an insolvent estate is duly filed and verified, by a creditor who afterwards becomes a bankrupt, but is transferred by him, by deed of assignment, before the proceedings in bankruptcy are instituted, the decree allowing the claim should be in favor of the assignee in bankruptcy, and not in favor of the transferee or trustee under the deed.
2. *When appeal lies.*—Where an issue was made up before the probate court, between the assignee in bankruptcy and the assignee by contract, of a creditor who had duly filed and verified a claim against an insolvent estate, touching their respective rights to the claim, and is decided by the court in favor of the latter, an appeal by the assignee in bankruptcy, against the administrator, without notice to the assignee by contract, will be dismissed.

APPEAL from the Probate Court of Perry.
Tried before the Hon. B. S. WILLIAMS.

MOORE & LOCKETT, and MORGAN, BRAGG & THORINGTON, for appellant.

WATTS & TROY, *contra.*

B. F. SAFFOLD, J.—E. A. Blunt, having a claim for several thousand dollars against the insolvent estate of King Parker, which he had filed and verified, assigned it to Geo. P. Massey on the 20th of October, 1868. On the 9th of December, 1868, Blunt became bankrupt, and William Miller was appointed his assignee. At the time appointed for the final settlement and distribution of the estate, Miller and Massey propounded their respective interests, and the court, holding that Massey had the better right, rendered a decree in his favor. From this decree Miller appeals, making the administrators the appellees. Massey has had no notice of the appeal.

Proceedings in the probate court are so devoid of form that it is difficult to apply the rules of practice to them. Filing a claim against an insolvent estate is in the nature of a suit commenced by the claimant against the administrator. In such a suit, Massey, having acquired his interest since its commencement, could not be made a party to the record.—*Agee v. Williams*, 30 Ala. 636; *Bowie v. Minter*, 2 Ala. 411. Miller, under the provisions of the bankrupt law of 1867, might become a party.—Section 14.

Section 2203, Revised Code, does not seem to contemplate the trial of any other issue than the correctness of the claim filed. Of course, the probate court must have jurisdiction to ascertain who are the creditors; and, for this purpose, it may hear the ordinary evidences of title. But it has not the means necessary to try complicated questions of right, especially those which entitle the parties to a trial by jury. In this case, an issue was presented whether the assignment of Blunt to Massey was not in fraud of the bankrupt law. It was not disputed that Parker's estate owed the debt to Blunt. There was, therefore, no issue as to an allowance of a claim against the insolvent estate. The court was bound to hear the suggestion of Blunt's bankruptcy, and, on proof of it, to render a decree in favor of his assignee, unless arrested by some other authority. It was as if his death had been suggested, and a proposition made to substitute his legal representatives.

If that were the case, Massey could not come in in preference, because between him and them issues might arise wholly foreign to the court—questions which Parker's estate had no connection with, and ought not to be charged with the cost of determining.

In *Graham v. Abercrombie*, (8 Ala. 552,) and *Petty v. Wafford*, (11 Ala. 143,) it was held that the assignee of the entire share of a distributee may assert his right in the probate court to the exclusion of the representatives of such distributee. But in *Smith & Loveless v. Hall*, (20 Ala. 777,) the court declared that the principle of the above decisions ought not to be extended, and decided that the purchaser of a devisee's undivided interest in real estate, at a sale under execution, could not petition the probate court for a distribution of the proceeds of sale, under the statute which allows a distribution after eighteen months from the grant of letters.

But we cannot reverse the judgment, because Massey is not in this court. If Miller had taken the appeal in the name of the administrators, and against Massey, we might do so. As the case is presented, the record shows no decree against the appellant susceptible of affirmation or reversal.

The appeal is dismissed.

STARLING *vs.* BALKUM.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Liability of guardian for compound interest.*—As a general rule, a guardian is not chargeable with compound interest, unless he has collected it.
2. *Liability for specie.*—He is not chargeable in specie, on final settlement, on the ground that he received specie or its equivalent in 1861; United States treasury-notes being a legal tender for debts contracted before as well as since the passage of the act of congress of February 25, 1862.

3. *Right to credit for expenditures beyond income, and for board.*—If a guardian commit the custody and control of a female ward to a person who compels personal services from her, while her education and culture are wholly neglected, he will not be allowed a credit for her board within the value of her personal services, nor for expenditures beyond the income of her estate, when she is able to maintain herself.

4. *Competency of guardian as witness for himself.*—A guardian is a competent witness for himself, on final settlement of his accounts, to prove the correctness of any vouchers claimed by him.

APPEAL from the Probate Court of Henry.
Heard before the Hon. J. B. APPLING.

IN the matter of the final settlement of the accounts and vouchers of James W. Balkum, as guardian of Frances J. Howerton (now Starling), an infant. Several items in the guardian's account were contested by the ward, and exceptions were reserved by her to the rulings of the court in reference to those contested items; and the rulings of the court on these several matters are now assigned as error. A full statement of the facts, as disclosed by the bill of exceptions, is not necessary to a correct understanding of the legal points decided by the court.

J. A. CLENDENIN, for appellant.
W. C. OATES, *contra*.

B. F. SAFFOLD, J.—The appeal is upon exceptions taken by the appellant to the final settlement of her guardian.

1. A guardian in this State, as a general rule, is not chargeable with compound interest unless he collects it. *Tyson v. Sanderson*, January term, 1871; Revised Code, §§ 2426, 2427.

2. He should not be charged in specie because the funds received by him in February, 1861, were equivalent to it. The treasury-notes of the United States are made a legal tender for debts contracted before as well as since the act of congress of February 25, 1862.

3. A guardian is not permitted, of his own authority, to break in upon the capital of sums belonging to an infant.

If the income of the estate is insufficient for the maintenance and education of the ward, it must be so made to appear to the satisfaction of the probate court, and its order for the use of the principal obtained.—Revised Code, § 2433; Tyler on Infancy, 292. But the necessity of such use is not shown, when the ward is capable of maintaining herself, and no sufficient reason appears why the guardian could not cause her to be employed in some becoming manner.—*Long v. Norcom*, 2 Iredell's Eq. R. 354.

Where a guardian, with the care and consideration of a parent, is mindful of his ward's mental and moral culture, and encroaches upon the *corpus* of a small estate in the proper education and training of the ward, the court should be more disposed to sanction his expenditures, than where he leaves her to grow up in ignorance, committing her, perhaps, to the care of unsuitable persons, and not seeing her for several years at a time. It is within the authority of the probate court to protect the expenditure, when it exceeds the income, in such a case as the court would have ordered it.—Tyler on Infancy, 292–295.

The testimony clearly proves that the guardian paid little or no attention to his ward, and committed her entirely to the control of her aunt, who treated her with more or less severity, and compelled her to labor for her beyond the ordinary assistance which might be supposed to have been voluntarily rendered. Her education was wholly neglected, while her time was spent in the service of another. She was a healthy child, and her guardianship continued from her eighth to her eighteenth year. This is not such a case as would justify any encroachment upon the capital of her estate, or any considerable allowance for her board.—*Montgomery v. Givhan*, 24 Ala. 568–588; *Stewart, Guardian, v. Lewis*, 16 Ala. 734.

4. The guardian is a competent witness for himself. He must prove his credits, and after he has adduced sufficient evidence to sustain them, the contestant may rebut it with contrary proof.

The judgment is reversed, and the cause remanded.

MOBILE & GIRARD R. R. COMPANY *vs.* PEEBLES.

[BILL IN EQUITY TO SET ASIDE AND CANCEL TAX-COLLECTOR'S SALE AND DEED.]

1. *Act of Feb.* 9, 1870, *amending revenue law of* 1868; *constitutionality of.* The act of the general assembly approved February 9, 1870, entitled "An act to amend an act entitled 'An act to establish revenue laws for the State of Alabama,'" is not violative of any constitutional provision; it does not invade the executive powers in remitting penalties already incurred in the non-payment of taxes for the year 1869; it does not exempt the property of railroads from taxation; it does not impair any vested right; it relates to but one subject, and that is sufficiently set forth in the title.
2. *Removal of cloud from title to land; when equity will entertain bill for.* Where the property of a railroad company has been sold by the tax-collector, for the non-payment of taxes which have been remitted, by act of the legislature, before the sale; and the purchaser makes no attempt to assert his right to the property, but allows the company to retain possession,—a court of equity will entertain a bill by the railroad company to annul the sale, cancel the deed made to the purchaser, and enjoin him from asserting any claim to the property.

APPEAL from the Chancery Court of Bullock.
Heard before the Hon. B. B. MCCRAW.

THE bill in this case was filed by the appellant against Howell Peebles, the county of Bullock, the probate judge, and the tax-collector of said county; and sought to annul and set aside a sale of the complainant's "right of way, main track, side track, and warehouses, lying in or running through said county;" which sale was made by the tax-collector of said county, on the 7th March, 1870, on account of an alleged default by the railroad company in the payment of county taxes assessed for the year 1869; and it also sought the cancellation of a deed, by which the said property was conveyed to said Howell Peebles as the purchaser at the tax-collector's sale, and an injunction to restrain any further proceedings by any of the defendants to collect said tax, or to enforce said sale. The complainant claimed that the tax was remitted by the act of

the legislature approved February 9, 1870, which is as follows:

"AN ACT to amend 'An act to establish revenue laws for the State of Alabama.'

"*Be it enacted by the General Assembly of Alabama*, That section twenty-four of 'An act to establish revenue laws for the State of Alabama,' approved December 31st, 1868, which is in the following words, to-wit: 'That the president and secretary of every railroad company, whose track or road bed, or any part thereof, is in this State, shall annually, in the month of April, return to the auditor of State, under their oaths, the total length of such railroad, the total length and value of such road, including right of way, road bed, side track and main track in this State, and the total length and value thereof in each county, city and incorporated town in this State; they shall also make returns of the number and value of all their locomotive engines, passenger, freight, platform, construction and other cars, and the value thereof shall be apportioned by the auditor pro rata to each mile of main track, and the auditor of state shall notify the assessors of each county through which such railroad runs, of the number of miles of track and value thereof, and the proportionate value of personal property, taxable in their respective counties, and to such values thus apportioned the assessor shall add the value of all other real property, except the land donated by congress and herein exempted, together with all fixtures, machinery, tools and other property within their respective counties; and upon the value thus ascertained taxes shall be assessed, the same as upon the property of individuals, and any agent of said company is authorized to pay such tax to the collector, and retain the amount out of any money in his possession belonging to such road,' be and the same is hereby amended so as to read as follows: Be it further enacted, That the president and secretary, or receiver of every railroad company, whose track or road bed, or any part thereof, is in this State, shall annually, in the month of April, return to the auditor of state, under their oaths, the total length of such railroad,

the total length and value of such roads, including right of way, road bed, side track, and main track in this State, and the total length and value thereof in each county, city and incorporated town in this State; they shall also make return of the number and value of all their locomotive engines, passenger, freight, platform, construction and other cars; and the total value so ascertained shall be submitted by the auditor to the board of equalization, as provided in section 24 of the act aforesaid, and the same shall be assessed for State purposes only, by the auditor, the same as the property of individuals, and the tax shall become payable by each railroad company to the auditor, and shall be subject to the same rules and penalties as are prescribed for payment of other State taxes, and the auditor shall be entitled to any and all remedies granted in the aforesaid act to tax collectors: *Provided, however*, The president, secretary or receiver of each railroad company shall make a full return to the tax assessor of each county through which the said road may be located, of all real property, except the lands donated by congress and herein exempted, together with station houses and machine shops, and also lands outside of the right of way.

"SEC. 2. *Be it further enacted*, That the tax now levied by the several counties of the State upon railroad property, as certified from the auditor's office for the tax year 1869, and all the penalties which may have been incurred therein, is hereby released; provided that the railroad companies shall pay State and county taxes upon the property enumerated for assessment by the county assessors, as described in the proviso to the first section of this act.

"SEC. 3. *Be it further enacted*, That all taxes provided for in this act shall become due and payable on the first day of January of each year, and shall become delinquent on the first day of February in each year, and on the second day of February there shall be added to, and collected with, all delinquent taxes, a penalty of ten (10) per cent. on the amount of such delinquent taxes; *Provided*, That the tax for 1869 shall become delinquent on the first day

of March, 1870, and the penalty shall attach from and after March 2d, 1870.

"SEC. 4. *Be it further enacted*, That no tax under the provisions of this act shall be assessed or collected upon any railroad now being constructed, or which may hereafter be constructed, until twenty miles of such road shall be completed and in operation. The provisions of this section, however, shall not apply to any railroads which are less than twenty miles in length.

"SEC. 5. *Be it further enacted*, That all laws or parts of laws now in force, in conflict with this act, are hereby repealed.

"Approved, February 9, 1870."

The chancellor held the act unconstitutional, and therefore dismissed the bill, on demurrer, for want of equity; and his decree is now assigned as error.

WATTS & TROY, for appellant.—1. The legislature, under our constitution, has all powers of legislation which any government can possess, except alone in those particulars in which it is prohibited either by the Federal constitution or by the State constitution.—*Dorman v. The State*, 34 Ala.

It is said that this second section of the law of 1870 violates the constitution, because the pardoning power and the right to relieve from penalties are vested in the executive department of the government; and the case of *Haley et al. v. Clark* (26 Ala. 439) is relied on to support this argument. It can not escape the attention of the court, that under our old constitution the right of the executive to remit fines and forfeitures was as to such forfeitures as were connected with the criminal law, and has no reference to forfeitures which may be incurred by failure to perform a duty, not amounting to a crime. This is the view of the court in the case of *Haley v. Clark*. But the present constitution is very different in the extent of the power given to the executive. The old constitution (Art. IV, § 11) gives the executive the power, except in cases of treason and impeachment, to grant reprieves and pardons,

and to remit fines and forfeitures generally. The present constitution of the State on this subject is as follows: "He shall have power, after conviction, to grant reprieves, commutations, and pardons for all offenses, (except treason and cases of impeachment,") &c. The power of relieving from forfeitures is not vested in the executive at all by the present constitution. In *Haley v. Clark*, the strong reason given why the legislature could not, either directly or indirectly, remit a fine, was that the power to remit being expressly given to the executive, the legislature was excluded, on the maxim, *expressio unius est exclusio alterius*. Under the present constitution, the power of pardon, reprieves, and commutations is confined expressly to cases "after conviction," and to offenses. The right to remit or relieve from a forfeiture is not given at all to the executive. The legislature, being the organ of the people to do whatever they could do if assembled in one body, except so far as restrained or prohibited by the State and Federal constitutions, therefore had the right to release a forfeiture.

2. But it is said again, that the tax having been assessed and levied for the counties, the right to collect the same was vested in the counties, and the legislature could not take away this vested right. This position is wholly untenable. The counties are parts of the municipal government of the State. The counties are, in other words, a part of the frame-work of the government of the State—a part of the State organization, and they are at all times subject to the control of the general assembly. Any laws made in reference to the counties, or cities, and, indeed, in reference to any public corporation, or *quasi* corporation of municipal character, are always subject to the general assembly, to be amended, modified, repealed, or abolished. The laws for the benefit of counties, cities, towns, and the like, never can create a contract beyond the control of the general assembly.—See *Mayor of Mobile v. Dargan*, opinion by Mr. Justice PETERS, 45 Ala. 310.

3. The right of the legislature to repeal the laws has never been questioned. The real effect of the section of

the law under consideration, is to repeal, or to amend so as to relieve the railroads from the payment of a special tax; and this repeal, independent of the express language of the act, relieves from the forfeiture or penalty. The repeal of a law imposing a penalty or forfeiture, destroys the right to enforce forfeitures or penalties under it, unless the right to enforce the same is expressly reserved in the repealing law.—See *Pope v. Lewis*, 4 Ala. 487.

4. There is nothing in the constitution of 1867 in reference to taxation which prevented the legislature from passing the act of the 9th of February, 1870.

5. It is said that the law of the 9th of February, 1870, is unconstitutional, because it amends a previous law without setting it forth in the amendatory law. This is not so. The section of the act to be amended is fully set forth in the amendatory law.

6. It is again said that the second section is unconstitutional, because it amends without setting forth the act to be amended. But there is nothing in this objection, because of the reason given above. And as a further answer, we cite the following authority: *Falconer v. Robinson*, 46 Ala. 340.

7. It is again said that the second section of the act of the 9th of February, 1870, is unconstitutional, because of alleged violation of the 4th subdivision of the 13th Article of the constitution. There is no discrimination between the property of corporations and individuals in the second section of the act of February 9, 1870. This clause of the constitution has no reference to any thing except a State tax. The right of the counties to tax is permissive, and may be withheld or controlled as the legislature may direct; or repealed, whenever the legislative will may so direct.

8. There can be no doubt of the power of a chancellor to grant the relief asked in this bill. The cloud thrown on the title of the complainant by the illegal sale, is sufficient to give the court jurisdiction, and to declare that the deed made by the tax collector shall be canceled. No other court could exercise the power of ordering the deed

to be canceled, and of removing the cloud cast on the title of complainant.

STONE & CLOPTON, *contra.*—We insist that the second section of the act is unconstitutional, for the following reasons:

1. It is in violation of the second section of the fourth article of the constitution. The title of the act is, "An act to amend an act entitled, An act to establish revenue laws for the State of Alabama." This title contains but one subject, which is clearly expressed; that is, the amendment of the revenue laws. The act contains two distinct subjects. The first section is an amendment to the revenue law, and the third and fourth sections are sufficiently germane to constitute, with the first section, but one subject; but the second subject is not an amendment to the revenue law, but an entirely separate and distinct subject—the release of the railroad companies from the county tax for 1869.

2. But, if the second section is an amendment to the revenue law, then it is obnoxious to that provision of the second section of Article IV of the constitution, which provides that no law shall be revised or amended unless the new act contain the entire act revised, the section or sections amended.

3. The section violates the 9th Article, section 1, and the 4th section of the 15th Article of the constitution.

The 1st section of the 9th Article was intended to be, and is, a limitation upon the otherwise unlimited power of the legislature over the matter of taxation. It is based upon the equitable principle that, as all enjoy the protection of the government, all shall share equally its burdens This rule of the constitution received a virtual and true construction in the case of *Mayor, &c., of Mobile v. Dargan, Ex'r*, 45 Ala. 310, in the following language: "Most clearly, all taxes are intended to be as nearly equal as possible. If they are local, and for community or local purposes, the whole community is supposed to be interested in their appropriation, and for this reason all are required to contribute to supply them. A tax levied for national

purposes is levied upon the whole people of the nation; a tax levied for a State falls on all its people; and, in like manner, a tax levied for a county is paid by the whole people of the county. So it must be with a tax levied on the people of a city or town, in order to make it just and equal. Such levies may include everything that may be called property, everything that can be owned. Such taxes, to make them just, must be in proportion to the value of the property upon which the burden is imposed, and they must be levied upon all, and not a few only. This is said to be an inherent principle of all taxation. It is the limit that use affixes to the word."

These principles, so eminently just and correct, in effect decide that, under the limitation of the 1st section of the 9th Article of the constitution, as well as by the inherent principle of taxation, the rate of taxation must be equal, and taxes must be levied upon all property and persons. The same principles have been also well settled in the construction of similar limitations in the constitutions of other States.—*Crow v. Missouri*, 14 Mo. 237; *McCreary v. People*, 34 Cal. 432; *Pike v. The State*, 5 Ark. 204; *Hunsacker v. Wright*, 30 Ill. 146; *Knowlton v. Supervisors*, 9 Wis. 410; *Zanesville v. Auditor of Muskingum*, 5 Ohio, 589; *Weeks v. Milwaukie*, 10 Wis. 258. The same principles and rule of construction have been held and sustained by the supreme court of the United States.—*Gilman v. Sheboygan*, 2 Black, 510; *Society for Savings v. Coite*, 6 Wall. 602.

And, as if apprehensive of the power and influence of large moneyed corporations upon legislation, the framers of the constitution provided further, that the property of corporations, except those for educational and charitable purposes, shall forever be subject to taxation the same as property of individuals.—§ 4, Art. XIII of Const.

Thus, the same rule of equal and proportional taxation is maintained and guarded as to the property of individuals and corporations.

From the foregoing principles and decisions, it follows, that an act of the general assembly taxing the property owned by citizens, and not taxing the same kind of prop-

erty owned by corporations, which are not for educational or charitable purposes, would be a departure from, and in violation of, the constitution. Hence, we can very properly contend that the entire act is void and unconstitutional, inasmuch as it provides that, after its passage, the property of railroad companies, with a small exception, shall be taxed for State purposes only; and, being an amendment of the general revenue law, the original provisions of the law are still in force, and counties still have the right to tax the property of railroad companies for county purposes.

The language of the constitution is, "*all taxes* levied on property *in this State*," &c. This is a limitation upon the assessment of taxes for county purposes, as well as for State purposes. It extends to all taxes in this State. As counties can levy taxes only by authority of the State legislature, it is the same as if levied by the State.—*Gilman v. Sheboygan*, 2 Black, 510; *Mayor, &c., of Mobile v. Dargan, Ex'r, supra; Hunsacker v. Wright*, 30 Ill. 146; *Zanesville v. Muskingum County*, 5 Ohio, 589.

As, then, the legislature can not, by a positive act, constitutionally authorize a county to levy a tax upon the property of individuals, and exempt the property of railroad companies, so it can not release railroad companies from a county tax levied alike upon the property of both under a constitutional act; for this is doing indirectly what the constitution forbids to be done directly. Yet this is what is attempted to be done by the second section of the act under consideration. If constitutional prohibitions can be thus evaded, they are powerless, and afford no protection to the citizens.

4. This second section is unconstitutional, because it deprives the county of a vested right. It is conceded that the power to tax is not a vested right, and, being given by law, may be taken away by law. But it is a very different question from the mere power to tax, when, by virtue of a granted power to tax, that power has been exercised by the county, a tax levied, assessed, and the day of its payment expired, and penalties incurred by reason of non-

payment. It becomes then a debt due to and vested in the county, and is the property of the county. The current expenses of the county, repairing its public buildings, erecting bridges, and keeping them in order, and for all other county purposes, have probably been incurred upon the faith of this tax; tax-assessor's and collector's commissions have accrued, and this kind of legislation either takes away from these officers these commissions, to which they have a vested right, or leaves the county liable, and deprives it of the means to pay. Has the legislature the power to take the courthouse of a county and give it to some individuals? If this tax had been paid, could the legislature have taken the money and given it to individuals? A county is a corporation, and the people are the corporators; it is authorized to hold property for its corporate purposes, and can sue and be sued. When its corporate existence ceases, then its property may go to the State; but so long as its corporate existence continues, then the State can not take away its property. Yet, by this second section, the legislature has taken away from the county the county taxes levied and assessed upon the property of railroad companies, and penalties incurred for the year 1869, and given it to the railroad companies under the disguise of a release. Thus, this case strongly illustrates the wisdom of that provision of the constitution which declares that the property of corporations shall be forever subject to taxation the same as the property of individuals.

5. This section, and, indeed, the entire act, is class legislation, which is opposed to the genius and spirit of our institutions, and the theory of the government, and the principles of our constitution.

All the prerequisites of the law in making the sale were complied with. If not, the burden is upon the complainant to prove the contrary.—Pamph. Acts, 1868, § 87, p. 324.

If there be personal property, it does not avoid this sale. But, if it did, the law never contemplated such personal property as a train of cars running through the county on

the complainant's track, but personal property located in the county. That the rolling-stock of a railway is a fixture, see Hill on the Law of Fixtures, § 61, p. 46.

The recitals of the decree waive all questions as to the validity of the sale, and simply require the complainant to do equity.

B. F. SAFFOLD, J.—The appellants filed the bill to remove a cloud from their title to certain property, and to cancel a deed obtained by the appellee, Peebles, under a sale of the property made by the tax-collector for the payment of taxes alleged to be due upon it.

The complainants aver that under the revenue law of 1868 they were liable to pay a stated amount of State and county taxes on their property in Bullock county for the year 1869, and on account of their default in paying ten per cent. damages on the amount, and certain costs and fees in addition, had accrued against them; that the general assembly, by an act approved February 9, 1870, remitted the tax due to the county, and all the penalties incurred, on conditions which they had fully complied with. But, notwithstanding this compliance, and against the protest of the complainants, both before and at the time of the sale, the tax-collector had sold the property for the payment of the tax and the penalties so released, and the defendant Peebles had become the purchaser, and had received a conveyance of the same from the proper officers. Peebles had notice of the matters alleged, and purchased not for himself, but for the county of Bullock. The purchase-money has not been paid, but the commissioners' court ordered the county treasurer to give a receipt to the tax-collector for the amount.

The chancellor held the act of February 9, 1870, amendatory of the revenue law of 1868, to be unconstitutional, and denied the relief asked.

It is claimed that this act violates the State constitution by encroaching upon the pardoning power vested in the executive department, (Art. 5, § 11); by withdrawing the property of a railroad corporation from taxation, (Art. 13,

§ 4); by amending an act without containing the act or section so revised, (Art. 4, § 2); and by depriving the county of the right to collect the tax which it had already assessed.

No elaborate argument is needed to dispose of these propositions. The power of the governor to reprieve, commute and pardon is confined to offenses for which there may be conviction and punishment. The non-payment of taxes is not made such an offense by any law of the State. The money penalty for the default is only an increased taxation.

The property of the corporation is not exempted from taxation. The State has only exercised its admitted power of selection and regulation of the subjects and mode of taxation, in a way peculiarly wise and just. The road bed and rolling stock are withdrawn from taxation for the use of the counties, because one is a highway, and the other can not be said to be property situated or belonging in any county. But both are taxed for the use of the State. The tax levied on these by the counties for 1869 is remitted.

A vested right which it is not competent for the legislature to take away is one springing from contract, or from the principles of the common law. The general expenditures of the county are incurred in the administration of the State government, and to meet these the State makes provision in its general revenue laws. The beneficial interest of a county in a tax collected for its use under this general law is nothing more than its share of a public fund apportioned by the State with reference to wealth and population. There is no element of a contract about it. The remission of the county tax did not impair the obligation of any contract.

The only amendment of the revenue act of 1868 made is the revision of its twenty-fourth section, which is set out. The revising law having changed the former one, its second section merely gives the change a retroactive effect.

2. The jurisdiction of chancery is sustained by reason and cogent authorities. The company remained in posses-

sion of its property, the purchaser making no attempt to assert his rights. In two years, the right of redemption might be lost. The invalidity of the sale was not apparent from the conveyance, and the proofs of it might be lost by time. In the meanwhile, a cloud was cast over the title of the complainants injurious to them, and significant of trouble in the future.—*Smith v. Pearson*, 24 Ala. 355; *Hamilton v. Cummings*, 1 Johns. Ch. R. 520: *Elliot v. Piersol*, 6 Peters, 95.

The decree is reversed; and a decree will be entered in this court, in accordance with the prayer of the bill.

SHARMAN *vs.* JACKSON.

[ACTION COMMENCED BY ORIGINAL ATTACHMENT.]

1. *Variance between writ and declaration, or complaint; how taken advantage of, and when immaterial.*—A departure in the declaration (or complaint) from the writ (or summons) by which the action is commenced, or a variance between the two, can not be taken advantage of by demurrer: a motion to strike the declaration (or complaint) from the files is the proper remedy in such case; and the motion should never be granted, unless there is a material variance, amounting to a radical departure: a mere variance in the amount of the debt claimed is immaterial.
2. *Statute of frauds, as to promise to answer for debt, &c. of another.* Where an administrator has advanced money and necessaries to an infant distributee, and claims an allowance for the same, as against her distributive share, on final settlement of his accounts; a promise by her guardian, present and representing her on the settlement, that if the administrator "would withdraw said claim, and not insist on the allowance of a credit for the same," he would pay it when certain lands belonging to the infant were sold, or when the purchase-money for them was collected, is a promise to answer for the debt, &c. of another, (Revised Code, § 1862,) and is void if not reduced to writing.
3. *General charge on evidence when conflicting.*—In an action on a verbal promise to pay a sum of money on a future day, if the evidence is conflicting as to the day fixed for the payment (*i. e.*, whether it was to

be paid on the happening of an event which occurred *before*, or of another event which happened *after* the commencement of the suit,) a charge which authorizes the jury to find a verdict for the plaintiff, without reference to the decision of this question of fact, is erroneous.

APPEAL from the Circuit Court of Macon.
Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Harriet Jackson, against Thomas S. Sharman; and was commenced by original attachment, sued out on the 5th day of December, 1859, on the ground that the defendant was a non-resident, and was indebted to the plaintiff in the sum of two hundred and twenty-two dollars. A complaint was filed in the cause at the Fall term, 1866, in these words: "The plaintiff claims of the defendant three hundred dollars, due by account on the 1st day of January, 1859; also, two hundred and twenty-two dollars due by defendant for money loaned by plaintiff to defendant on the 1st day of January, 1858; also, three hundred dollars due on an account stated between plaintiff and defendant on the 1st day of January, 1858; also, three hundred dollars, for goods, wares, and merchandise sold by plaintiff to defendant on the 1st day of January, 1859; which several sums of money, with the interest thereon, are still due and unpaid." The defendant craved oyer of the writ of attachment, and demurred to the complaint, and to each count separately, on the ground that there was departure, or fatal variance, in the description of the cause of action stated. The court overruled the demurrer, and the defendant then pleaded the general issue, and the statute of frauds; on which pleas issues were joined, and a trial had.

"On the trial," as the bill of exceptions states, "the plaintiff introduced proof conducing to show, that the defendant was the guardian of one Jane Ward, by appointment from a court in Georgia (having jurisdiction), where said defendant resided; that said defendant's ward, while still a minor, married a minor, and moved into the county of Macon, Alabama; that one W. S. Jackson (plaintiff's *witness?)* became guardian of said minor while in Macon

county, by appointment of the probate court of said county, and was such guardian at the time of the alleged promises by the defendant hereinafter mentioned; that while the said Jane Ward and her husband were thus residing in Alabama, and while said W. S. Jackson was thus acting as her guardian, the plaintiff, who was the administratrix of William Jackson, of said county of Macon, deceased, (in whose estate said Jane Ward was entitled to a distributive share,) made certain payments for her, part of which were for necessaries, and which amounted, in the aggregate, to the sum of two hundred and twenty-two dollars; that the said plaintiff, on the final settlement of said estate, asked a credit for such advancements, as against said Jane Ward; to which the defendant objected, he being her father-in-law and guardian, and representing her personally on said settlement; that the said plaintiff then asked to continue the settlement, for further proof; that the defendant mentioned, during the controversy which then arose, that his said ward had some lands in Macon county, which would be for sale, as she had moved back to Georgia, and that if the plaintiff would not insist upon a continuance, and would withdraw said claim, and not insist on a credit for the same, that then, when said lands were sold, (as understood by one witness,) or when the purchase-money for the lands was collected, (as understood by another,) he would pay plaintiff the amount of said claim; to which plaintiff agreed. The proof further showed, that the above promise was made in 1859; that said Jackson afterwards resigned, and another person was appointed guardian in his stead; that said lands were sold in November, 1859, on a credit 'until December 25, 1860; that in January, 1864, about $2,000 in Confederate treasury-notes was collected, and paid over to said defendant; that a bill was filed, before said payment was made, to subject said lands to the payment of the purchase-money; that a decree of sale was made after the payment of said sum of money, and the lands were sold under said decree, in September last, to pay the balance of the purchase-

money, (about $650,) and were bought at the sale by the defendant, who was now the owner of the same."

"The foregoing being all the evidence in the case, the court thereupon charged the jury, that if they believed, from the evidence, that the defendant promised, under the circumstances, that he would pay the debt mentioned, and that the plaintiff, in consideration of such promise, ceased to press the voucher for allowance, then the consideration was sufficient to support the promise, and they would find for the plaintiff; to which charge the defendant excepted."

The overruling of the demurrer, the charge given by the court, and the refusal of several charges asked by the defendant, (which require no particular notice,) are the matters now assigned as error.

WATTS & TROY, with GEORGE W. GUNN, for appellant. 1. The promise proved, taking the view of the evidence most favorable to the plaintiff below, did not authorize a recovery under any one of the common counts in the complaint.—4 Porter, 502; 10 Ala. 332.

2. The defendant's promise, under any view of the evidence, was within the statute of frauds, and, being verbal, was void on that account.—*Rigby v. Norwood*, 34 Ala. 129; *Martin v. Black*, 20 Ala. 309; *S. C.*, 21 *ib.* 721; *Brown v. Barnes*, 6 Ala. 694; *Click v. McAfee*, 7 Porter; *Williams v. Sims*, 22 Ala. 512.

3. The evidence was conflicting, as to the time when the money sued for should be paid. If it was not to be paid until the purchase-money for the lands was collected, the action was prematurely brought.—*Rainey v. Long*, 9 Ala. Rep. 754.

4. No matter when the money was to be paid, as the evidence was conflicting on that point, the charge of the court was erroneous.—Shep. Digest, pp. 459–60, cases cited in sections 13 and 30.

CLOPTON & LIGON, *contra*.—1. The variance between the attachment and the complaint, was immaterial. More-

over, a demurrer does not lie for such a defect.—*Roberts v. Burke*, 6 Ala. 348.

2. The defendant's promise, according to the proof, was an original, and not a collateral undertaking.—*Scott v. Myatt & Moore*, 24 Ala. 489; *Bates v. Starr*, 6 Ala. 697; *Oliver v. Hine*, 14 Ala. 590; *Blount v. Hawkins*, 19 Ala. Rep. 100.

3. The charge of the court does not invade the province of the jury, and is not based on an assumption of the facts. It is based on the hypothesis, "If the jury believe from the evidence," leaving to them the ascertainment of the facts. "Under the circumstances," as the words are used in the charge, means, whether the money was to be paid when the land was sold, or when the purchase-money was collected, that being the only point on which there was any conflict in the evidence. The plaintiff was entitled to recover in either contingency; for the land was sold before the attachment was sued out, and the money was collected before the trial. In the first case, it was an attachment sued out to recover a debt already due; in the other, to recover a debt not due, but which matured before the trial. The charge given, therefore, was not an invasion of the province of the jury, nor otherwise erroneous.—*Henderson v. Mabry*, 13 Ala. 713; *Williams v. Shackelford*, 16 Ala. 318; *Carlisle v. Hill*, 16 Ala. 398.

PECK, C. J.—The demurrer to the complaint was properly overruled. We know of no authority permitting a demurrer for an alleged departure in the complaint from the writ of attachment. The usual remedy, in such a case, is to move the court to strike the complaint from the files; but such a motion should not be sustained unless there is a total variance—a radical departure.—*Otis v. Thorn*, 18 Ala. 395; *Chapman v. Spence*, 22 Ala. 588; *Smith v. Wiley*, 19 Ala. 216; *Morrison v. Taylor*, 21 Ala. 797. The alleged departure, in this case, consists of an unimportant variance between the amount of the debt, as stated in the writ of attachment, and that stated in the complaint.

2. The statute of frauds declares every special promise

to answer for the debt, default, or miscarriage of another person, void, unless such promise, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing.—Revised Code, § 1862. Let it be admitted, that the money alleged to have been advanced to Mrs. Ward by the appellee, plaintiff below, as the administratrix of W. Jackson, created a debt that Mrs. Ward was legally bound to pay, or that might have been charged to her on the final settlement of said W. Jackson's estate; (which, however, on the evidence, we think by no means clear;) then, the promise of the appellant, to say the most of it, was a promise to pay that debt, a mere special promise to answer for the debt of another person; and as it was not in writing, is declared void by the section of the Revised Code above referred to. The charge given by the court is clearly erroneous. The statute of frauds was pleaded; and to sustain that charge, on the evidence in this case, will be utterly to disregard the plain language of the statute, and to permit a recovery on a promise to pay the debt of a third person, even without any evidence that the promise was in writing.

3. The said charge is erroneous for another reason. The evidence set out in the bill of exceptions left it altogether uncertain whether the alleged promise of the appellant, to pay the money said to have been advanced to Mrs. Ward by the appellee, was to be fulfilled by appellant when the lands referred to were sold, or when the purchase-money should be collected. One witness understood the promise to be, that appellant would pay the money when the said lands were sold; and the other witness understood that said payment was to be made when the purchase-money was collected. If the latter witness was correct in this, then the suit was commenced before the cause of action occurred, as it appeared by the evidence that the purchase-money for said lands was not collected, or any part of it, until some years after the suit was commenced. Considering this uncertainty, (if the statute of

frauds had not been in the way,) the court should have left it to the jury to determine, whether the promise was to pay when the lands were sold, or when the purchase-money was collected, and instructed the jury to find for the plaintiff or defendant, as they might determine this uncertain question of fact.

This objection is not avoided by the fact, that the suit was commenced by attachment; true, an attachment may be sued out on a debt not due, but the attachment in this case itself shows it was issued on a debt then past due.

The judgment is reversed, at the appellee's cost, and the cause is remanded for further proceedings, &c.

HAYS *vs.* MYRICK ET AL.

[ACTION BY ASSIGNEE AGAINST ASSIGNOR OF PROMISSORY NOTE, UNDER SECTION 2637 OF REVISED CODE.]

1. *Special plea, demurrer to; when not error.*—In an action of debt or assumpsit by the assignee against the assignor of a promissory note, if the general issue is pleaded, "with leave to give in evidence any matter that may be specially pleaded," the allowance of a demurrer to a special plea involving the same matter settled on the plea of the general issue so pleaded with leave as aforesaid, is error without injury, if error at all, and though the demurrer may have been wrongly sustained, a reversal will not be allowed for this reason.
2. *Suit by assignee against assignor of promissory note; measure of diligence required of.*—In such a suit, all the diligence necessary to bind the assignor is such as the statute requires; that is, the maker of the note must be sued by the holder to the first term of the court at which this can be done after the note falls due. And after such suit is so commenced against the maker by the holder, the continuance of the cause by consent, or other legal delay of the trial, is not such an improper suspension of the remedy against the maker as will discharge the indorser.

APPEAL from Circuit Court of Tuskaloosa.
Tried before Hon. W. S. MUDD.

This suit was commenced on the 4th day of January, 1867, and the complaint, omitting caption, &c., was as follows:

"1st. The plaintiffs claim of the defendant two hundred and fifty dollars, as the assignees of a bond executed on the first day of January, 1859, by one James Jackson, payable to S. A. M. Wood one day after date, for two hundred and five dollars and eighteen cents, and by said S. A. M. Wood assigned, on the 11th day of September, 1860, to William H. Hays, the defendant, and by him assigned, on the 1st day of January, 1861, to the plaintiffs, upon which suit has been brought according to law to charge the maker, and judgment obtained thereon—execution issued according to law, and returned 'no property found;' which said bond, with the interest thereon, is still unpaid.

"2d. The plaintiffs claim of the defendant three hundred dollars, as assignees of a bond executed on the 17th day of February, 1860, by one James Jackson, payable to S. A. M. Wood on the 1st day of January, 1861, for two hundred and seventy-five dollars, and by said S. A. M. Wood assigned to William H. Hays on the 16th day of August, 1860, and by said William H. Hays, the defendant, assigned, on the 1st day of January, 1861, to plaintiffs, upon which suit has been brought according to law to charge the maker—judgment obtained thereon—execution issued according to law, and returned 'no property found;' which said bond, with the interest thereon, is still unpaid."

To this the defendant (appellant) pleaded "the general issue, in short by consent, with leave to give in evidence any matter that may be specially pleaded." Defendant also filed six special pleas. Issue was joined on the plea of the general issue, and a demurrer sustained to each of the special pleas. No further notice need be taken of the special pleas, as in the opinion of the court all of the defenses available under the special pleas were equally available under the plea of the general issue.

It appears from the bill of exceptions, that suit was brought in March, 1861, against Jackson, the maker of the

notes, in the circuit court of the county of Lauderdale, where he resided, it being the first court to which such suit could be brought, but the court to which the writs were returnable convened within less than twenty days after the commencement of the suits. Jackson did not appear. Regular terms of court were held in the fall of 1861, twice in 1862, and also in 1863, and also in September, 1865. Judgment by default was rendered against Jackson at the fall term, 1866, for $480.18 debt, and $232.50 damages by way of interest and costs, and execution issued thereon duly returned "no property found," April 6, 1866. At the September term, 1865, of the circuit court, plaintiffs' attorney was present, and could have taken judgment. At the spring term in each of the years 1862 and 1863 the cause was continued. No court was held at the fall term, 1862, nor at the fall term, 1863, nor at the spring or fall terms, 1864, or at the spring term, 1865.

This was substantially all the evidence.

Defendant asked the following charges in writing:

1. "That although the jury believe from the evidence that the plaintiffs brought suit against the maker of the notes as required by statute, and to the proper court, yet the endorsers or assignors will not be liable unless the plaintiffs proceeded with due diligence to take judgment and issue execution thereon against the maker, unless they be excused by one of the statutory excuses mentioned in section 1854 of the Revised Code.

2. "If the jury believe that plaintiffs could have obtained judgment at the fall term, 1861, of the circuit court of Lauderdale against the maker of the notes sued on, merely by asking for said judgment, and he failed to do so, but continued said cause, then the assignor is not liable in this action.

3. "If the jury believe plaintiffs brought suit on said note against the maker in Lauderdale circuit court in March, 1861, and though said cause was not defended, that plaintiffs did not take a judgment against the maker until March, 1866, then plaintiffs can not recover in this action.

4. "If the jury believe the evidence, they must find for the defendant.

5. "That if the jury believe plaintiffs could have had judgment and execution against Jackson at either of the terms of the circuit court held in Lauderdale county in the years 1862-3-5, and that the suit was wholly undefended, then it was the duty of plaintiffs to take said judgment and issue execution thereon, and unless he did so, he can not recover in this action."

Each of these charges was refused, and defendant duly excepted.

The jury rendered a verdict for the plaintiffs for $997.00 and costs.

The refusal to give the charges asked is now assigned as error, and also that the amount claimed in complaint did not authorize the finding of a verdict for $997.00 and costs, or a rendition of judgment for that amount on the verdict of the jury.

S. A. M. Wood, and Somerville & McEachin, for appellant.—The plaintiffs have lost their recourse against the defendant, Hays, who is the assignor of the note, and he is legally released from all liability, by reason of the *laches* and want of due diligence on their part in prosecuting their suit against the maker.

Sections 1851 and 1854 of the Revised Code being *in pari materia*, are clearly to be construed together. And, as to the purpose of their enactment, we may observe of them what the supreme court, in *Reese v. White*, 2 Ala. 308, observes in reference to a similar statute in Aiken's Digest, page 383, §§ 12, 16: "These matters are evidently intended to stand in the place of demand of payment from the maker, and the notice to the endorser, which were previously required by the law merchant. It seems to have been intended, also, to establish a fixed and definite rule by which every one might easily know his own liability, or enforce his claims against others."

The statute clearly contemplates something besides the prompt commencement of the suit at the "first court."

The same diligence required by the law merchant in making demand and giving notice, is required here in "bringing the suit, *obtaining the judgment*, and issuing the execution thereon."

The bringing of suit would, of itself, involve something more than the mere issue of a summons and complaint, without the words of the statute, but the latter leaves us no room for doubt in the matter. If the bringing of suit in this limited sense is all that is required, why do the six enumerated excuses apply as well to "obtaining the judgment and issuing execution thereon"? Any other interpretation than that contended for leaves section 1854 a dead letter, without any proper legal signification. There are six excuses for not bringing suit to the first court; there are the same six excuses for not "obtaining the judgment, and issuing the execution thereon," and any want of proper diligence, or a failure to do one of these co-ordinate acts, applies with equal force to the others.

How would it comport with the purpose of the statute, or correct the evils intended to be cured, to hold that complainant could bring suit to the first court, and then wait for years before he obtained his judgment, issued his execution, and secured the *ultimatum* desired of "no property found," as a proof of the maker's insolvency?

There is an identical purpose contemplated in the old statute as it stood in Aikin's Digest, (p. 383, §§ 12, 16,) and the new as it stands now in sections 1851 and 1854 of the Revised Code. This difference is discernible, that the requirements of the Code, which are, in reality, but the incorporation of judicial interpretations of the other, are far more stringent in the exact letter.

Yet the supreme court has interpreted the old statute of 1828–30 in a manner which furnishes us a key to any doubt that can possibly arise on the point we are considering.

In *Bradford v. Bishop*, 14 Ala. 521, they say: "It is true, that the law requires no other evidence of the insolvency of the maker, than the commencement of the suit to the first term to which it can be properly brought, the recovery of judgment, then the issue of execution, and the return of

'no property' by the sheriff. But in our opinion, due diligence should be used, not only to recover the judgment, but after it is recovered, to have execution issued, and the return of 'no property' made by the proper officer. The statute does not prescribe at what time execution shall issue after the rendition of judgment, but we think the spirit and intent of the act is, that the indorsee shall use ordinary diligence in prosecuting the note to judgment, after the suit is commenced, and after judgment is rendered, in procuring the return of 'no property' on the execution; and that unreasonable delay, or negligence, in prosecuting the suit, or having the execution returned 'no property,' will discharge the indorser."

This case was, in effect, affirmed by the same court in 16 Ala. 770.

It is an important fact, that the letter of the statute in Aikin's Digest, required nothing further than that the suit should be "brought to the first court of the county where the maker resides, to which suit can be brought."—Aik. Dig. 383, § 12. It is judicial construction which applies the principle of the law merchant, that the doctrine of due diligence prevails in every step of the act that is to fix and settle the indorser's or assignor's liability.

It is clear from sections 1851 and 1854 of the Revised Code, that the plaintiffs must not only have brought suit against the maker to the first court after the maturity of the note, but that they must have used due diligence in proceeding to obtain judgment and issue execution; otherwise, that they can not recover in this suit against the assignor.

2. There was a want of due diligence on the part of the plaintiffs in not obtaining judgment in the fall of 1861, in 1862 and 1863, during which period five courts were held.

It is no objection that these courts were not legal, for the plaintiffs having chosen their own forum of litigation, are estopped from urging this defense. "So far as I know," observes Chief Justice PECK, in *Powell v. Boon & Booth*, 43 Ala. 471, "it has never been doubted, that if a party institutes a suit in a court, and prays the judgment of the

court on the case made by him, he thereby admits and acknowledges both its competency and jurisdiction. Therefore, the plaintiff in this court has, on the record, made an admission that precludes her from moving to set aside the said judgment on the ground of the illegality of the court, * * * or its want of jurisdiction."

Or, supposing the court illegal, and that the objection can be taken by the party selecting the forum of litigation, then there never was any legal suit commenced, no legal service of the process on the maker of the note, and hence no such legal judgment rendered as is contemplated by the statute, in order to fix the assignor's liability.

In short, if the courts held from 1861–3 were legal, judgment ought to have been taken; if illegal, no sufficient or proper suit was ever brought. Either "horn of the dilemma" defeats the right of recovery here.

3. There was, again, want of due diligence in not obtaining judgment at the fall term of the circuit court in 1865. No objection can be urged that this was not a legal court.

The case was not defended; there was not even an "appearance" on the part of the defendant, the maker of the note. Yet judgment was not taken, but the cause was continued.

Is this a release of the assignor? Is it a want of that due diligence which was intended to be required by our law-makers, in the prosecution of the maker to insolvency? See *Morr v. Smith*, 7 B. Monroe, (Ky.) 189, 192. In that case, it is held that "a delay to issue execution upon (such) an assigned note for seven days after it might have issued, wholly unaccounted for, is a forfeiture of recourse against the assignor."—p. 192.

4. There are several adjudications which serve to explain the character of that "due diligence" which is decided by our own supreme court, in *Bradford v. Bishop*, *supra*, to be requisite under the statute, in order to retain, without forfeiture, this recourse against the assignor.

In *Perrin v. Bradwell*, 3 Dana, 596, it is held that "if an assignee of a note omits to bring suit against a debtor until the time of service is nearly out, and then the process

is not served in time, in consequence of the debtor's absence, the *laches* will prevent the ultimate resort to the assignor."

In *Bronaugh v. Scott*, 5 Call. 78, it is decided that "in order to charge the assignor of a promissory note, the assignee must bring an effectual suit; a suit which fails on account of informality in the proceedings, is not a sufficient suit."

In *Bishop v. Yeazle*, 6 Blackf. 127, a delay of six months in issuing execution, unexplained by the assignee, was held to discharge the assignor from liability on the assignment.

All these principles of the law merchant, defining what is, and what is not due diligence, remain in full force, and the party plaintiff is to be held strictly up to these requirements. The only excuses for a failure to exercise this diligence in every step of the prosecution of the suit—whether in the issue of the summons and complaint, the obtaining of judgment, or the issue of execution—are found in section 1854 of the Code. The specific enumeration of these six excuses is an exclusion of all others not enumerated.

It is not contended that the plaintiffs have brought themselves within the letter, or even the spirit, of any one of these.

We contend, further, that plaintiffs can not recover against the assignor, because they failed to bring suit against the maker of the note in time to obtain judgment at the first court, and do not allege, or show any excuse, for not doing so. The letter of the statute (§ 1851, Rev. Code,) requires that suit be brought against the maker to the "first court" after maturity of the note. This view is sustained by authority directly in point: *Perrin v. Bradwell*, 3 Dana, 597; 2 J. J. Marshall, (Ky.) 218.

The highest sum claimed in any one of the counts—that is to say, $300—is all that can be recovered. If there are two separate notes, each count ought to have claimed enough to cover the principal and interest of both demands.

There certainly can be no recovery of any larger amount than that claimed in the complaint. The first count claims

$250, the second $300. The judgment can not be for more than $550, or the sum of these two. It is for $997, or $447 more than what is claimed.

If the judgment of the circuit court is not reversed and the cause remanded on other assignments of error, this court will at least correct the judgment by reducing it to the proper amount, such as may be sustained by the complaint.

W. R. SMITH, and RICE & CHILTON, *contra.*

PETERS, J.—No notice will be taken of the special pleas and the demurrers thereto, for the reason that the same questions arise upon the plea of the general issue pleaded with leave as above shown. No question can arise on the evidence in the cause that may not be determined on that plea. And as all the evidence introduced on the trial is set out in the bill of exceptions and several charges asked upon them, which involve a consideration of the same matters as are pleaded in the special pleas, which were overturned by the demurrers, the decision must be the same, whether made in the one or the other mode. And if the allowance of the demurrers was error at all, it was error without injury, which is not sufficient to justify a reversal for that cause.—*Powell v. Asten*, 36 Ala. 140; *Rodgers, Adm'r, v. Brazeale*, 34 Ala. 512; *Kennady v. Lambert*, 37 Ala. 57; *Lawson v. Hicks*, 38 Ala. 279.

Then, passing by the demurrers to the main question in the litigation, I think there was no error committed in the proceedings in the court below as shown by the bill of exceptions, which would entitle the appellant to a reversal, notwithstanding the ingenious and able argument of the learned counsel for the appellant in this court. It is true, that an assignor or an indorser of a note or bill is by the law-merchant regarded to some extent as the surety of the maker, who is to be regarded as the principal debtor. And if the holder of the note or bill either discharge or improperly suspend his remedy against the maker, the assignors and indorsers will be discharged. This is a general

rule of law in favor of mere securities which applies to all contracts.—Smith Merc. Law, 268, Holc. & Ghol. ed., 1847. But this principle can not be said to apply in this case. There was no evidence of any improper suspension of the remedy which the law did not permit. The maker of the notes was sued to the first term of the court by the holder, after the notes fell due. This fixed the assignor's liability to pay the notes, in the event they were not paid by the maker, and upon his insolvency, ascertained in the manner prescribed by the statute. This suit is in lieu of protest and notice of non-payment, and of demand on the maker, by the law-merchant. It was intended to have no other effect.—*Goggin v. Smith, Adm'r*, 35 Ala. 683. Here, the evidence introduced by the plaintiffs, on the trial, fully sustains the allegations of the complaint. This was all the diligence required by the Code. The language of the law is this: "On all contracts assigned by writing, except bills of exchange, or other instruments and notes payable in money at a bank or private banking house, when the amount due is over fifty dollars, to charge the indorser or assignor, suit must be brought against the maker in the county of his residence to the first court to which suit can properly be brought after making the indorsement or assignment; and if judgment is obtained, execution must be issued returnable to the next court thereafter, and his inability to answer such judgment proved by the return of "no property."—Rev. Code, § 1851. To fix the liability of the assignor, the first step is to bring the suit against the maker within the proper time. After this is done, the progress of the cause in court, until the final judgment, is a matter wholly within the control and discretion of the court. Whether a cause is tried or continued, is a matter of discretion. And the presumption is, that the continuance has been allowed upon sufficient showing.—*Lucas v. Hitchcock*, 2 Ala. 287. And that which has been done in court with due and legal dispatch, can not be said to be negligence. At least, it can not be said to be such negligence as the statute forbids in this case. To fix any other, would be legislation. It would go beyond the words or

the purpose of the statute. The statute above quoted very clearly fixes all the prerequisites of diligence necessary to bind the assignor. This court can neither add to these, nor diminish their number. In this case, the proofs show that they were all complied with, in due course and process of law. This was enough.—Const. Ala. 1867, Art. I, § 15; Rev. Code, § 1851; *Bates v. Ryland*, 6 Ala. 668.

The objection that the verdict in the court below was for a larger sum than was justified by the claim set up in the complaint, and that the judgment follows the verdict, can not be made for the first time in this court. It is such an error, if it exists, that might have been corrected in the court below, and its correction ought first to have been sought there.—*Evans v. Bridges*, 4 Port. 348; *S. C.*, Smith Cond. 221; *Moore v. Coolidge*, 1 Port. 280; *S. C.*, Smith Cond. 477.

The judgment of the court below is affirmed.

SMITHA ET AL. *vs.* FLOURNOY'S ADM'R.

[PETITION TO SET ASIDE SALE OF DECEDENT'S LANDS UNDER ORDER OF PROBATE COURT.

1. *Sale of decedent's real estate by order of probate court; jurisdiction of court, and validity of proceedings.*—The case of *Satcher v. Satcher's Adm'r*, (41 Ala. 26,) which this court approves and adheres to, decides that, under the act of February 7, 1854, as under the former statutes, the jurisdiction of the probate court, to order a sale of the lands of a deceased person, attaches on the filing of a petition by the administrator, alleging that a sale is necessary, either for the payment of debts, or for equitable division among the heirs; and that when the jurisdiction of the court has thus attached, mere errors and irregularities in the proceedings do not render the order of sale, or the sale, absolutely void.
2. *Same; sufficiency of petition in description of lands.*—Although the statute requires that the application for the sale "must describe the lands accurately," (Revised Code, § 2222,) and although the lands

must, in point of fact, be situated in the county; yet an imperfect description of them in the petition, which is true so far as it goes, and which may have been amended in the probate court, or perfected by the aid of facts judicially known to the courts, is not fatal to the validity of the proceedings.

3. *Judicial notice of cities, incorporated towns, post-offices, and public lands.*—The probate court of Barbour county may take judicial notice of the facts, that Eufaula is an incorporated city in said county; that it is a railroad terminus, and the location of a post-office, the only one by that name in the State; also, the boundaries of the county, and the numbers of the lands within its limits, as described in the records of the land-office of the United States.
4. *Who may file petition to set aside sale.*—An administrator *de bonis non* may make application to the probate court to set aside an order of sale and sale of lands belonging to his intestate's estate, which were made on the application of the administrator in chief for the purpose of equitable division among the heirs-at-law.

APPEAL from the Probate Court of Barbour.
Heard before the Hon. H. C. RUSSELL.

THE facts of this case are thus stated in the opinion of the court, as delivered by Mr. Justice PETERS.

"The facts upon which this cause was determined in the court below, are briefly these: On the 7th day of October, 1859, the personal representatives of the estate of Thomas Flournoy, deceased, filed their application in the court of probate of Barbour county, in this State, for an order of sale of the real and personal property of said deceased for the *payment of his debts.* The allegations of the petition are sufficiently formal, except it does not appear that there is any positive averment that the lands mentioned in the petition are situated in the county of Barbour, or in the State of Alabama. Otherwise, they are accurately described by the land-office designations usual in the public surveys of lands in this State. Evidence was taken in support of this application, in conformity with the statute; and the cause was heard on the 10th day of December, 1859, when the court of probate made a decree in conformity with the prayer of the petition, ordering the sale of said lands for *distribution.* This sale was ordered to be made 'on the premises, or in Eufaula.' The lands were sold, and reported to the court; the sales confirmed, and

titles ordered to be made to the several purchasers. Afterwards, on the 27th day of August, in 1870, O. R. Flournoy, as administrator *de bonis non* of the estate of Thomas Flournoy, deceased, filed his petition in writing in the court of probate of said county of Barbour, praying that the order of sale of said lands made by said court of probate on the 10th day of December, 1859, and said sales made under authority of the same, be declared void, and set aside. On the hearing of said last named petition, the prayer of the same was granted, and said sales were declared void, and set aside. From this order the appellants bring the case to this court by appeal, and here assign for error the order of the court below declaring said order for said sales to be void, and that said O. R. Flournoy, as administrator *de bonis non* as aforesaid, had no right to make said application to set aside said sales and said order for the same."

JAS. L. PUGH, and S. H. DENT, for appellant, argued the case orally at the bar, and submitted written arguments, which have never come to the hands of the Reporter; and an "additional brief," which was printed, and from which the following points are condensed, was afterwards submitted by Mr. PUGH.

The law in this State is certainly settled, that when a petition to sell a decedent's lands is filed in the probate court, by an administrator, alleging that a sale is necessary for the payment of debts, or for distribution, the jurisdiction of the court attaches to the *rem*, if it is shown to be within the State; and if minors are interested, the jurisdiction of the court to order the sale depends on proof by deposition, taken by the probate court, showing the necessity for a sale.

1. Does it sufficiently appear in this case that the lands are in Barbour county, Alabama? "Allegations of import equivalent to those required by the statute, will sustain jurisdiction; and in determining whether the allegations are of equivalent import, the court should select the signification of words favoring the validity of the order."—*Satcher*

v. Satcher, 41 Ala. 40; *King v. Kent*, 27 Ala. 542. The petition for the sale shows that the lands were city lots in Eufaula, described by streets, blocks, and numbers; and other lands, described as sections, quarter-sections, &c., by numbers; and the proceedings had under the petition show that all the lands are situated in Alabama. This court judicially knows, and said probate court was bound to know judicially, that Eufaula is an incorporated city in this State, situated in Barbour county; that city lots "in Eufaula" are in Barbour county; that "section thirty-two," or "section thirty-three," or any other subdivision of lands which once belonged to the United States, and which are embraced in the public records and maps in the land-office at Washington, are located in the county in which they are in fact situated. Moreover, as matter of fact, the lands in controversy are in Barbour county, and are so alleged to be, both in the petition to set aside the sale, and in the decree setting it aside. If a demurrer had been interposed to the petition for the sale, on account of the imperfect description of the lands, the defect might have been amended. If a plea had been interposed to the jurisdiction of the court, on the ground that the lands were not in the county, it could not have been sustained.

2. The petition alleged a necessity to sell for the payment of debts, while the other proceedings in the case, with the proof and decree, are based on a necessity to sell for the purpose of equitable division; and the decree itself recites that the petition also went on that ground. "The proceedings on which the action of the probate court is founded, are usually kept on separate papers, which are often mislaid or lost."—*Florentine v. Barton*, 2 Wallace, 216. The petition copied in the transcript, which was filed to pay debts, might have been amended, so as to allege that the necessity to sell was for distribution; and in order to uphold the validity of the order and sale, this court will indulge the presumption, that the recitals in the order are true; that the original petition must have been amended, and the amendment lost or mislaid.—*Moseley v. McGuire*, 45 Ala. 621. It is important to observe the distinction

between recitals which initiate jurisdiction, and recitals to support, or prevent the failure of jurisdiction, which has already attached. Facts necessary to initiate jurisdiction, must be alleged by the pleader, when he invokes jurisdictional power, or calls jurisdiction into exercise; but facts which the court is charged by law with the duty of ascertaining, in order that its initiated jurisdiction may not be defeated, are conclusively established by recitals in orders, decrees, or judgments of the court. In the first case, the recitals are not judicial; in the second case, they are.

3. The most important question in the case is, whether there was a *substantial* compliance with the requirements of the 5th section of the act of 1854, which makes the authority of the court to order a sale depend upon proof of the necessity to sell, where minors are interested. The attention of the court is particularly invited to the consideration of this question, as there is speculative litigation now pending in Barbour county, and in the city of Eufaula, involving property to the amount of probably half a million of dollars, which has been induced by the opinion of Judge PETERS, or some expressions in it, in the case of *Strickland v. Hodge et al.*

By whom is the proof required to be taken? By the probate court. How must it be taken? By "depositions as in chancery proceedings." Why taken by the probate court? Because the necessity to sell must be shown to that court by that proof; because the duty of taking the proof, and of passing judgment on it, is expressly enjoined on that court by the law. In the discharge of this duty in this case, the probate court appointed a commissioner, and issued to him a commission, which authorized him to take the answers of the witnesses, under oath, to the written interrogatories which were annexed to the commission. The commissioner certified, that he took the depositions of the said witnesses, under the said commission, "on oath." The probate court accepted, and passed its judgment on the proof so taken; and held that the proof was taken "as in chancery proceedings," and that it showed to the court the necessity for the sale. This proof was taken un-

der the authority, and by the sanction, of the court whose duty it was to take and act upon it; it was taken under oath, legally administered, and in a judicial proceeding, and was pertinent to a material issue in that proceeding; and it would have been perjury, if knowingly and corruptly false. It is in the shape of written depositions to written interrogatories, all of which appear in the record and proceedings of the probate court, in support of the recitals of the judge himself in his judicial order. Are these proceedings absolutely void, because the record does not show that the interrogatories were filed ten days before the commission was issued, nor served on the guardian *ad litem* for that length of time, as required by the rule of chancery practice? In other words, the question is squarely presented, are answers of witnesses, under oath legally administered by an authorized commissioner, and by him certified to have been so taken, in answer to written interrogatories filed with the judge, and by him annexed to the commission which he issued, and the action of the probate court thereon, ratifying the action of the commissioner, and adjudging the proof to have been taken as in chancery proceedings, and to show the necessity for the sale,—are these proceedings a substantial compliance with the requirements of the 5th section of said act of 1854?

The case of *Satcher v. Satcher*, 41 Ala. 26, is the first, and the only well-considered judicial construction of the said act of 1854. The author of this brief was of counsel for the appellees in that case, and he well knows its history from the judge who delivered the opinion. The case was held under advisement for a long time, and the opinion of Chief-Justice WALKER, which was finally delivered as the opinion of the court, was written as a dissenting opinion; the other two judges holding, that the word "act," as used in the 5th section, meant literally the whole act, and made the jurisdiction of the court depend upon a compliance with all the requirements of the five sections contained in said act. The case of *Johnson v. Johnson*, (40 Ala. 247,) was decided by the same judges who decided *Satcher v. Satcher*; and in that case, as in the late case, two of the

judges favored the construction of the act of 1854 above mentioned, but, knowing the mischief which would be produced by such a construction, plainly announced, they purposely left the matter in such uncertainty as to be able to escape upon more mature deliberation. Hence the remark of Chief-Justice WALKER, in *Satcher v. Satcher*, that "the decision in *Johnson v. Pynes*" (or *Johnson*) "could be sustained, *without disturbing any principle settled in Satcher v. Satcher.*" The case of *Johnson v. Johnson*, then, must not be considered as an authoritative exposition of the statute of 1854. But, even if it were so considered, the record in that case shows that there was no commissioner, and no witness sworn; and further, that the petition was to sell 'a house and lot in Woodville, Henry county,' which means, of course, any house and lot in said town; and, of course, the jurisdiction of the court never attached, as to any particular house and lot. The case of *Johnson v. Johnson*, therefore, is not to be considered as conflicting with the case of *Satcher v. Satcher.*

"The jurisdiction of the probate court appearing on the petition, the same presumption of law arises, that it was rightly exercised, as prevails with reference to the action of a court of superior and general authority."—*Comstock v. Crawford*, 3 Wallace, 396. "The evidence of the necessity to sell was to be determined by the order of the court, and the order of sale declares that it was made to appear. This necessity was the jurisdictional fact. If a court of limited jurisdiction is charged with the ascertainment of jurisdictional facts, and its proceedings show that these facts were ascertained, they can not be denied; because making the jurisdiction of the court depend upon a preliminary fact, implies authority to ascertain that fact." *Reynolds v. Kirkland*, 44 Ala. 312; citing *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

The case of *Satcher v. Satcher*, which has been cited approvingly by this court in five subsequent decisions, conclusively settles, upon irresistible reasoning and authority,—1st, that a proceeding in the probate court, to sell the lands of a decedent, is *in rem;* 2d, that the jurisdiction of

the court attaches, when a petition is filed alleging a statutory ground of necessity to sell; 3d, that a compliance with all the requirements contained in the five sections of the act of 1854 is not necessary to the validity of an order of sale and sale; 4th, that nothing required by the first four sections of that act is jurisdictional, or necessary to sustain jurisdiction; 5th, that the said act makes no change, "which affects the decisions of this court, as to what is necessary to sustain the jurisdiction of the probate court to order the sale of lands of decedents"; that "those decisions are eminently rules of property, and ought not now to be disturbed"; 6th, that the validity of an order to sell, in such case, "can never depend upon the fact that the court has acquired jurisdiction of the persons of the parties"; and that to hold otherwise would upset the distinction between proceedings *in rem* and proceedings *in personam*, and antagonize rules of jurisdiction universally recognized.

The distinction between proceedings *in rem*, and proceedings *in personam*, is well stated by Chief-Justice MARSHALL, in *Rose v. Hinely*, 4 Cranch, 277; see, also, 2 Wallace, 216.

WATTS & TROY, *contra*.—1. The main question arising is, whether the probate court, in 1859, acquired jurisdiction by the petition filed on the 7th October, 1859, to order a sale of the lands asked to be sold. We say that the allegations of said petition did not give the court jurisdiction to act in the premises, and that the administrator *de bonis non* had the right to ask, by petition, that the alleged void order of sale should be set aside. Whenever any court renders a decree or judgment, which it has no *jurisdiction* to render, such void decree or judgment may be set aside at any time; and it is proper that it should be set aside by the court on motion of any person having an interest. See *Johnson v. Johnson*, 40 Ala. 247; *Summersett v. Summersett*, 40 Ala. 596.

2. The courts of probate, under the old constitution and laws, were courts of *statutory*, *limited*, and *special* jurisdic-

tion, and especially as to their powers over the real estate of an intestate. The statutes gave them jurisdiction to exercise the power of ordering sales of real property, on application in writing for that purpose, setting forth the facts on which the court has the right to act.—Rev. Code, §§ 2221-2. If the court were to make an order of sale of lands belonging to an intestate, without such written application, the sale would be void. And so, if any one of the facts required to be set forth in such application to authorize the court to act, be omitted in the application or petition, the order of sale based on such defective application or petition, would be equally void. It is clear that the court can not acquire jurisdiction to act, until the jurisdictional facts are shown in the application. The application containing such facts is the very ground-work of the jurisdiction of the court.—*Wightman v. Karsner*, 20 Ala. 457; *Com'rs Court of Russell v. Tarver*, 25 Ala. 480; *Lamar v. Com'rs Court*, 21 Ala. 772; *King v. Kent*, 29 Ala. 552; *Wyatt v. Rambo*, 29 Ala. 510; *Matheson v. Hearin*, 29 Ala. 210; *Pettit v. Pettit*, 32 Ala. 304; *Com'rs Court v. Bowie*, 34 Ala. 463; *Hall v. Chapman*, 35 Ala. 557-8.

The jurisdiction of the court must appear affirmatively, either in the petition or application, or certainly in the order taking jurisdiction on the petition; and facts outside the petition, or the judgment entry made on the petition, can not give jurisdiction.—See, especially, *Howell v. Gunn*, 27 Ala. 663; *Douthit v. Mathews*, 27 Ala. 272; *Wyatt v. Rambo*, 29 Ala. 510. This last decision is a review of all the authorities in Alabama, and it overrides and annuls the decision in *Wyatt v. Steele*, and it holds that there can be no intendment, or presumption, in favor of the jurisdiction of such a court, in the exercise of power to sell lands belonging to an intestate's estate.

Upon the death of an intestate, his lands descend to his heirs; and the title of the heirs must there remain, until it is clearly shown that such title has been divested out of them. The probate court can not, without the consent of the heirs, divest such title, unless it is clearly shown that some one of the grounds, on which the statutes authorize

the court to act, exists. And this ground must be affirmatively shown to exist on the record. The record here meant is that which properly belongs to the record of such case, to-wit, the petition or application, and the judgment of the court on that petition or application. No presumption can be indulged against the owners of the title to the property ordered to be sold, for the purpose of sustaining the decree of such court. The presumption is, and must be, in favor of the owners of the property, viz., the heirs, until it is made clearly to appear that some power is authorized to divest, and has, under such authority, divested legally, the rights of the owners of the property. Especially is this the case when the owners of the property are minors.

3. The probate court never could acquire jurisdiction over these lands, until the petition showed the jurisdictional facts. Now, the first jurisdictional fact to be shown is, that the lands asked to be sold were within the jurisdiction of the court; 2d, that the lands sought to be sold were the property of the estate of the deceased at the time of his death, *i. e.*, that he died seized and possessed of them; and, 3d, that some one of the grounds on which the probate court is authorized to act by statute, exists; *i. e.*, either that the lands could not be equitably divided amongst the heirs of the intestate without a sale, or that a sale is necessary for the payment of the debts of the intestate? Unless these facts all appear in the petition, the court can never take the first step to order a sale. That the first must be shown, see *Kent v. King*, 29 Ala. 542; *Com'rs Court of Russell v. Tarver*, 25 Ala. 480; *Collins v. Johnson*, 45 Ala. 548, opinion by Justice PETERS. That the second fact must be shown, see *Pettit v. Pettit*, 32 Ala. 288. It is unnecessary to cite authorities to support the third point.

Now, it does not appear by the petition, or in the judgment or order of the court granting the sale, that the lands lie in Alabama. This fact must appear, either in the petition for the order, or in the order of sale. It appears in neither. Nor does it appear by the allegations of the pe-

tition, that the intestate died seized and possessed of the lands ordered to be sold. The language used is, that "the following comprises the whole of the personal as well as the real estate of said Flournoy," viz: (Here follows a list of personal property and lands.) Now, we submit, that this language is not sufficient to show that the intestate died seized and possessed of the real estate, or of such interest therein as could be sold.—*Pettit v. Pettit, supra.*

4. But we say that this sale was void, because there never was any petition filed setting forth that the lands could not be equitably divided amongst the heirs of the estate.

The only petition which appears in the record is the one filed 7th October, 1859, which alleges that a sale of both personal and real estate is necessary to pay the debts of the intestate. Was there any other petition ever filed? We say there never was. Was this one amended? The counsel for appellants say that it was. We deny this. These questions must be settled by the record.

Now, if the court will look at the order of sale, it will be seen that the judge, in reciting that a petition was filed, states that it was filed on the 7th of October, 1859, and that it was so entered on the minutes of the court on that day, viz., the 7th of October, 1859. Now, this language excludes the idea that any petition but one was filed. We see the one filed on that day, and that sets forth the ground for the sale, that a sale of both personal and real estate was necessary for the payment of debts of the intestate. This language in the judgment entry of the order of sale, also excludes the idea that any amendment of the petition filed the 7th of October was made. The record nowhere shows, or alludes to, any amendment of the petition filed on the 7th of October, 1859. In the absence of any statement of record that an amendment was asked for, or made to the petition so filed, and in the absence of any allusion, in any part of the record, to an amendment of that petition, it must be held that none was made. What then? That the judge of probate, (in the order of sale, when reciting what had been done, stating that the petition had

been filed on the 7th of October, 1859, and that an entry on the minutes was made that day,) when he states in this order the purpose of filing the petition, misstated it. He refers to the petition filed on the 7th of October, 1859, and states that an entry was made on the minutes on that day of the filing of such petition, and then he proceeds to state the purpose of said petition, viz., "praying an order of sale of the same for the purpose of division among the heirs of said estate."

5. Again: even if we could conclude that there was another petition filed, (although no mention of such thing is made in any part of the record,) that petition is not in the record. How are we to ascertain what was in that petition? By the judgment entry ordering the sale. If we look to it, we see that the court has no jurisdiction, because no such ground is there stated as authorizes the judge to take jurisdiction. The only language used in this entry is, that the administrators had filed a petition on the 7th of October, 1859, "praying an order of sale of same, for the purpose of division among the heirs of said estate." Now, if this was the language of the petition, it is clearly not sufficient to give the court jurisdiction. It does not allege that "the lands can not be equitably divided amongst the heirs or devisees." Unless these, or equivalent words, are inserted in the petition, the court does not acquire jurisdiction.—*Wyatt v. Rambo*, 29 Ala. 510; *Satcher v. Satcher*, 41 Ala. 26. But we say that there was no petition alleging that the lands could not be equitably divided amongst the heirs or devisees; and the order of the judge of probate being thus shown to be made without any petition alleging such jurisdictional fact, the sale is void.—*Wyatt v. Rambo, supra.*

6. There was no proof taken as in chancery cases, that the ground of the petition actually filed was true—the one alleging that a sale was necessary to pay debts, and showing the necessity of the sale; and the sale was void for this reason.—Code, § 2225; *Strickland v. Hodge et al.*, decided at the January Term, 1871, which is directly in point.

We contend that, since the statute of 1854, (the 5th section thereof,) which is incorporated into the Code as section 2225, the sale is void, unless everything required by that section is shown by the record to have been done. And so it is held in *Strickland v. Hodge et al., supra.* In *Fields' Adm'rs v. Goldsby,* (28 Ala. ——,) it is held that the worst of such matters would be held as mere irregularities, not affecting the validity of the sale in a collateral attack. But this case was under the old law. And this statute was intended to protect the rights of minors, married women, persons *non compos,* &c. And hence a different rule must now be held, as was rightly done in *Stricklen v. Hodge et al., supra.* This was the only point really decided in *Strickland v. Hodge.*

The consequence of this must be that the sale of the lands was ordered by the judge without any petition asking for a sale of the lands on the ground on which proof was taken. The witnesses were not examined to establish the ground stated in the petition, and do not prove the ground stated in the petition. The necessity for the sale is, therefore, not shown by the deposition of witnesses, as in chancery cases. The record shows that there were both minors and married women; so that the section of the Code quoted is strictly applicable, and it declares that every order of sale, and sale made not conforming to its provisions, is void, and not merely voidable. It may be that, under the old law, a mere failure to take depositions as in chancery cases, showing the necessity of the sale alleged in the petition, would be a mere irregularity, not rendering the order of sale and the sale void; but to hold so, after this statute was passed, would be to disregard and ignore the positive injunctions of the statute.

Again: if we are right in the construction of the record, the case stands as if the judge of probate had, of his own motion, without petition in writing, had testimony taken and ordered a sale on that testimony. Such sale would, under all the authorities, be void.

7. It is nowhere shown in the record, that the interrogatories were filed, and a service on the parties for ten days

before the commission issued. There are no cross-interrogatories, and no notice appears ever to have been given the heirs of the intestate, and there is no waiver of such notice.

8. The heirs of the intestate were never notified, in any way, that the lands were asked to be sold for an equitable division amongst them. They were notified that a sale would be applied for for the purpose of paying the debts of the intestate.

Can the rights of the heirs of the intestate to the lands, the title of which had descended to them, be taken away without any notice whatever? Such action must be held wholly void under every system of law.—*McCurry v. Hooper*, 12 Ala. 823; *Summersett v. Summersett*, 40 Ala. 596. The contest of which the heirs were notified never took place, and they have never had any day in court as to the order of sale which was made, by the judge of probate, without any petition asking for a sale, on the ground on which he made the order of sale.

9. The statute requires that the judge of probate, when he makes an order of sale of lands belonging to an intestate, shall designate in his order the place of sale.—Rev. Code, § 2090. In *Brown v. Brown*, (41 Ala. 215,) this section is construed, and it is there held that an order of sale, which did not designate the place of sale, was void. "No power exists in the administrators to select the place; consequently no legal sale can be made under the decree." It is true that *Brown v. Brown* was decided on appeal from the order; but the above language could not have been used unless the court held the order of sale void. The order of sale in this case leaves it discretionary in the administrators to sell at one of two places named.

The following cases show clearly that the administrator *de bonis non*, if the sale is void, as we contend, has the right to make the motion.—See *Swink's Adm'r v. Snodgrass*, 17 Ala. 656; *Samson's Adm'r v. Say's Ex'r*, 24 Ala. 184. The administrator *de bonis non* has as much power over the estate which has not been administered, as the administrator in chief. It will certainly not be disputed

that the administrator in chief has the right to sue for real estate belonging to his intestate, because his is a paramount right (at law) to that of the heirs, whenever it is necessary to pay debts or whenever it is necessary to sell for an equitable distribution.—*Patton v. Crow*, 26 Ala. 426. If the order of sale and the sale thereunder were void, as we contend, it is as though no order of sale and sale had ever been made. The action of the probate court was a mere nullity.—*Summersett v. Summersett*, 40 Ala., *supra*. And if so, then the only question would be, whether an administrator *de bonis non* has not the right to petition the probate court for an order of sale of lands on either of the grounds stated in the statute. It needs no further argument to show this. The administrator *de bonis non* has, then, such an interest as authorized him to make this motion.

But there was no such objection as this made in the court below.

11. The record in this case shows no exception to the action of the court in setting aside the sale.

PETERS, J.—This proceeding involves but one question of importance. That is this: Are the allegations of the petition for the order of sale for said lands sufficient to give the court of probate jurisdiction in the case made in the application; or, in other words, does the petition make any case at all?

This must depend on the construction of the statute under authority of which the proceedings in the court of probate were conducted. This statute is the Code of Alabama, as amended and altered by the act of the general assembly of this State, entitled "An act to regulate the sale of real and personal property by executors and administrators," approved February 7, 1854.—Pamph. Acts, 1853–54, Act No. 58, p. 55.

This important act has been carefully examined by this court, and construed; and the result of this construction is, that "mere errors and irregularities in the proceedings do not render void the order of sale."—*Satcher v. Satcher's*

Adm'r, 41 Ala. 26. Such constructions enter into the law itself, and form a part of the title of such estates as depend upon it; and it is of the highest importance that they be adhered to, at least so far as those estates are concerned, which have grown up under the statute so construed. The construction, in this way, necessarily becomes a part of the law, and the law is a part of the judgment of the court.—Ram. on Leg. Judg., 2 *et seq.*; *Gelpcke v. The City of Dubuque*, 1 Wall. 175; *The Ohio Life and Trust Co. v. Debolt*, 16 How. 432.

The above mentioned statute enacts, "That no application for the sale, for any purpose, of the lands of deceased persons, shall be acted upon by any judge of probate, unless such application shall conform to the requirements of section 1868 of the Code."—Pamph. Acts, 1853–54, p. 55, § 2. The section of the Code thus referred to is in these words: "The application for that purpose must be made by the executor or administrator; must describe the lands accurately; and give the names of the heirs or devisees, and their places of residence; and such application must also state, if any, and which, of such heirs or devisees are under the age of twenty-one years, or married women, or of unsound mind."—Code of Alabama, § 1868; Rev. Code, § 2222. The court must also be entitled, in fact, to take jurisdiction of the persons and the thing, which are to be affected by its judgment, before its proceedings can have validity. Without this, the judgment is void.—*Williamson v. Berry*, 8 How. 495, 541, *et seq.*

Here, the application to declare the order of sale void, and to set aside the sale, shows that the lands were, in fact, within the jurisdiction of the court. But it is contended that the court of probate, being one of special jurisdiction, the averments of the application must show this fact. This is not, however, the language of the law above quoted. It requires that the lands shall "be accurately described." Jurisdiction is a fact that may be put in issue by a plea. If the right to take jurisdiction in fact exists, then such a plea would be of no avail. It could not be sustained. The application in this case avers all the facts

required by the Code, and the description of the lands, if not perfectly accurate, is accurate as far as it goes. It would be sufficient in a deed, and possibly in a will. *Hawkins v. Hudson*, 45 Ala. 482. Such a description is sufficient to bring the subject within the jurisdiction of the court. The description may have been corrected and made perfect. It entitled the court to proceed. This was all that was needed to give validity to its judgment, when the proper parties had notice.—*Comstock v. Crawford*, 3 Wall. 396; *Satcher v. Satcher's Adm'r*, 41 Ala. 26, *supra*, and cases there cited; *Grignon v. Astor*, 2 How. 319, 338.

But, besides this, the court of probate may judicially take notice that "Eufaula" is an incorporated city in the county of Barbour, in this State; that it is a railroad terminus, and the location of a post-office, and that there is but one post-office so named in this State; and consequently that lots situated in said city of Eufaula are in the county of Barbour, and in the State of Alabama.—Pamph. Acts, 1855-56, p. 224, No. 278; Pamph. Acts, 1869-70, p. 186, No. 183; Pamph. Acts, 1832, act Dec. 18, 1832; 1 Greenl. Ev. § 6. It may also judicially know the boundaries of said county, and that said county includes lands coming within the land-office description of the lands mentioned in the petition for the sale. This, although very irregular, and very careless, is sufficient to sustain the jurisdiction of the court.

The courts of the State exercise one branch of the sovereign power of its government, and their authority to act is called their jurisdiction.—Const. Ala. 1867, Art. III, § 1; Art. VI, § 1; Const. Ala. 1819, Art. II, § 1; Art. V, § 1; Rev. Code, §§ 660, 698, 745, 790. This is but an agency appointed by the people for the common good. And such irregularities as might have been objected to in the progress of the proceedings in the court below, and corrected there, should not be allowed to be interposed to render the action of the court itself nugatory and injurious, and to deceive and betray all who have necessarily been required to rely upon the instrumentality of the court. I, there-

fore, feel strongly urged to repel such constructions of the important law above quoted, as shall force the court to defeat its own judgments, when, of right, the jurisdiction was clearly justified by the facts. Here, the lands sold brought a fair price in sound funds, which have doubtless been properly applied to the legitimate purposes of the estate, or have gone into the hands of the heirs and distributees of the deceased; and all those who were of sufficient age and capacity have consented to the sale by a long acquiescence, and it does not appear that justice can be done to all the parties by a re-sale.

An administrator *de bonis non* has such an interest in the estate of a decedent, whom he represents, as to authorize him to make an application in the court of probate to set aside a void sale of the lands of the deceased, made by order of said court.

For the error above pointed out, the judgment of the court below is reversed, and the cause remanded, and the court below is directed to dismiss the appellee's petition in that court. And the appellee will pay the costs of this appeal in this court and in the court below.

LEHMAN, DURR & CO. *vs.* MARSHALL.

[TROVER FOR CONVERSION OF COTTON.]

1. *Custom; what not good.*—A custom in the city of Montgomery, among merchants, factors and planters, dealing in, or buying or selling cotton, that warehouse receipts to deliver to a certain person, or his order, or the bearer, the number of bales of cotton specified in said receipts, are transferable by delivery, as money or bank bills, without any indorsement, and that such transfer passes the cotton, without further inquiry or evidence of title than what arises from the possession of such receipts, unless notice is given that the receipts have been lost, or got into the hands of some one who is not the owner, or entitled to hold the same, is not a good custom.
2. *Crop; when may be subject of mortgage.*—A growing crop may be mort-

gaged, and when matured and gathered, if not before, the mortgagee is entitled to the possession, and may maintain an action to recover it, or its value.

3. *Note secured by mortgage; what contract as to note does not destroy effect of mortgage as security for note.*—A contract between mortgagee and mortgagor, that if the mortgagor will deliver, in the name of the mortgagee, at a warehouse to be named by him, a sufficient quantity of cotton, at a certain number of cents per pound, to pay the note secured by the mortgage, the mortgagee will accept the cotton in payment of the note, does not destroy the legal effect of the mortgage as a security for the note.

4. *Warehouse receipt for cotton; subject to order of storer, or bearer.*—A warehouse receipt for cotton, subject to the order of the person in whose name the receipt is given, or the bearer, is an admission that the cotton belongs to such person, and in an action to recover the cotton, or its value, it is no defense that it has been shipped and sold by direction of a party who had obtained possession of the receipt, without indorsement by the person stated to be the storer in the receipt, and without authority from him to dispose of the same.

5. *Usury; who only can set up defense of.*—The defense of usury can only be set up by a party to the usurious contract, or by some one having an interest in, or prejudiced by the same.

6. *Witness, misstatement of fact by; when jury may discredit whole testimony of.*—It is the province of a jury to determine the credibility of evidence, and, if conflicting, to reconcile it, if it can be reasonably done. If a fact is misstated by a witness, his evidence as to other matters is not to be altogether rejected, unless the jury believe the misstatement was wilfully and deliberately made, knowing it to be untrue.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

This was an action of trover brought by appellee against appellants, to recover damages for the conversion of twenty-three bales of cotton, on the 1st of December, 1868.

The suit was commenced on the 8th of September, 1869, and at the October term, 1870, there was a jury trial and verdict in favor of the plaintiff.

From the bill of exceptions, it appears that G. W. Marshall, the plaintiff, on the 5th day of April, 1867, loaned to one Hamner, and McCoy and Turner, jointly, $1,300, to enable them to make a crop. To secure this loan, the borrowers jointly gave Marshall a mortgage on some personal property, and also on "their entire crop of cotton for the

present year." The mortgage itself does not show where the cotton crop was, or specify any land upon which it was to be grown; but it does appear from the evidence that the crop which was mortgaged was then planted on a plantation in Elmore county, which Hamner rented from one Holtzclaw, Hamner retaining and cultivating a portion himself, the remainder being sub-let to McCoy and to Turner, all of whom cultivated their several portions, each on his own account. The mortgage was duly acknowledged and recorded in Elmore county on the 4th day of May, 1867.

There was evidence that in the fall of 1867, the plaintiff agreed with Hamner, McCoy and Turner, if they would deliver in his name, at any warehouse in the cities of Montgomery or Wetumpka, to be selected by him, a sufficient quantity of ginned cotton, at eleven cents per pound, to pay said note and interest, he would accept the cotton in payment of the note, to which they agreed, and that plaintiff afterwards directed them to deliver the cotton at the warehouse of defendants, in the city of Montgomery; that before the 16th of December, 1867, Turner hauled twelve bales of cotton, six for himself and six for Hamner, all marked G. W. M., and stored them in the warehouse of defendants in the city of Montgomery, and took receipts from defendants in name of plaintiff. The first receipt was as follows:

"LEHMAN, DURR & CO.'S COTTON WAREHOUSE,

Montgomery, Ala.

Marks.	Nos	W'hts.	Ropes.
G.W.M.	1	567	
	2	574	
	3	612	
	4	512	
	5	556	
	6	555	

MONTGOMERY, Dec. 5, 1867.

Received from G. W. Marshall six square bales of cotton, marks, &c., as per margin, subject to his order, or the bearer of this receipt, on paying the customary expenses and advances.

A. W. WILLIAMS,
For the Proprietors."

All the other receipts were like the above, except as to the weights, &c.

There was evidence that Turner hauled Hamner's six bales and stored them as aforesaid, and took receipts therefor as aforesaid by Hamner's direction, and stored and took receipts for his six bales as aforesaid, to comply to that extent with the agreement; and that Turner delivered the receipt for Hamner's cotton to Hamner, and the receipt for his cotton to McCoy, with instructions to deliver it to plaintiff; that Hamner also handed the receipt for his six bales to McCoy, to be delivered by him to plaintiff.

It was also in evidence that McCoy hauled to the same warehouse eleven bales of cotton, marked G. W. M., and took the defendants' receipts therefor. The dates of all the receipts were the true dates of the delivery of the cotton, and all said cotton was raised on said plantation rented and planted by said Hamner, McCoy and Turner. There was evidence that McCoy, on the 16th or 17th of December, 1867, delivered all said receipts to one Blum, then doing business in the storehouse of Loeb & Brother, in the city of Montgomery, with instructions to give them to Loeb & Brother, and that the cotton should be shipped to Lehman Brothers, New York, and the proceeds go to the credit of Loeb & Brother, and that the cotton was accordingly, on that day or the next after the receipts were delivered to Blum, shipped by defendants to Lehman Brothers, New York, under instructions from Loeb & Brother, and the said receipts were all delivered to the defendants; that McCoy took a receipt of some character relating to said cotton from Loeb & Brother, and offered it to plaintiff, who refused it, stating that he wanted the warehouse receipts for the cotton, and that McCoy immediately went to one of the firm of Loeb & Brother, and told him that he wished to see the receipts given by defendants—that there was some error in the receipt given by Loeb & Brother, and he wished to compare them—and this member of the firm of Loeb & Brother got the receipts from defendants and showed them to McCoy, who put them in his pocket and walked off, leaving the receipt of Loeb & Brother on the desk in their store, and went to the plaintiff, and delivered all the receipts of defendants to plaintiff.

It was also in evidence, that about the 5th of February, 1868, plaintiff demanded the cotton of defendants, producing their receipts therefor, and defendants went to Loeb & Brother, and Loeb & Brother told defendants not to settle for the cotton, and they would indemnify defendants against plaintiff's claim, and defendants refused to settle with plaintiff.

There was evidence of the weights of the cotton, and that at eleven cents per pound it did not quite pay the plaintiff's note and interest. The value of the cotton at the time of said demand was proved.

It was also in evidence that Lehman Brothers, New York, sold the cotton, and paid the proceeds through the defendants to Loeb & Brother, and that defendants had notice on the same day that McCoy carried off the receipts from Loeb & Brother that McCoy had so carried them off.

It was further in evidence, that another note bearing the same date, and written on the same piece of paper as the $1,300 note, was made by said McCoy, Hamner and Turner for the sum of $52, and there was evidence that this last note was given for usurious interest on the loan of said $1,300, but on this question of usury the evidence was conflicting.

There was evidence that the receipts were taken back by McCoy on the same day that he delivered them to plaintiff, but there was also evidence conflicting with this, and tending to prove that McCoy did not get them back and deliver them to plaintiff until several days had elapsed.

There was evidence that said Holtzclaw, before the delivery of said twenty-three bales of cotton at defendants' warehouse, had sued out an attachment in Elmore county against Hamner to collect his rent, and that a branch of said writ had been sent to Montgomery county, and was in the hands of an officer in the city of Montgomery, who was watching for cotton raised on said plantation to levy said writ thereon, and while said writ was in the hands of said officer in said city, the said twenty-three bales were delivered at defendants' warehouse, and that said Hamner

afterwards compromised Holtzclaw's demand for rent by delivering to him twenty bales of cotton, six of which were marked G. W. M., and this compromise was made previous to the 1st day of January, 1868. There was no evidence that the plaintiff had anything to do with the marking of last said six bales as aforesaid, or knew anything about it.

It was in evidence that the plaintiff formerly resided in the same neighborhood as his present residence in Elmore county; that he resided there for fifteen years immediately preceding and until just after the war in 1865, when he moved to Texas, and in the fall of 1866 returned and settled where he now resides; that his former residence was fifteen miles from the city of Montgomery, and six miles from the city of Wetumpka, and planted and sold cotton; that plaintiff did his principal business and trading in Wetumpka, and still does; that during the period of his said residence before the war he was frequently in Montgomery, and on one occasion before his removal to Texas he made a bill of goods with Robinson & Wright, merchants in Montgomery, and brought some cotton to Montgomery and got Robinson & Wright to sell it for him and pay themselves from the proceeds; and this transaction of plaintiff in the city of Montgomery was many years ago.

It was in evidence that plaintiff's residence since his return from Texas had been in Elmore county, about fifteen miles from Montgomery and ten miles from Wetumpka, and that he was and had been a cotton planter.

It was also in evidence, that at the time McCoy delivered said receipts to Blum, McCoy owed Loeb & Brother $1,510.56, Turner owed them $3,187.47, and Hamner owed them $1,269.60, besides interest on these sums.

It was in evidence, that the neighbors of plaintiff in 1866 and 1867 traded in Montgomery and sold their cotton in Montgomery.

The defendant then offered evidence tending to prove that it was then, and had been for more than twenty years last past, the common and general usage and custom of trade in said city of Montgomery with merchants, factors,

and planters dealing in or buying or selling cotton in said city, that cotton receipts in the form of those offered in evidence, agreeing to deliver to a certain person, or his order, or to the bearer of the receipt, the number of bales in the receipt specified, were transferable by delivery as money or bank bills, without any indorsement, and passed the cotton specified in such receipt without any further inquiry or evidence of title than what arises from the possession of said receipt, unless notice was given that the receipt had been lost, or had got into the hands of some one who was not the owner, or entitled to hold the same.

And on the motion of plaintiff, the above testimony as to the usage and custom aforesaid was excluded from the jury; to which action of the court the defendants excepted. Upon this evidence, as shown in the bill of exceptions, the court, on motion of the plaintiff, excluded from the consideration of the jury all the evidence which had been offered to prove such usage and custom of trade; to which exclusion the defendants excepted.

This was the substance of all the evidence relating to the errors assigned.

The plaintiff asked, among other charges which were refused, the following charges, which were given:

"1. If the jury are satisfied from the evidence that the plaintiff lent to McCoy, Hamner and Turner thirteen hundred dollars, and they gave him therefor the note of $1,300 in evidence, and that to secure the payment of said note they executed to him the mortgage offered in evidence, and said mortgage was recorded in the office of the probate judge of Elmore county, on the 4th day of May, 1867, and the cotton stored in the warehouse of defendants, for the conversion of which this suit is brought, was produced on the plantation cultivated by the makers of said note and mortgage in the year 1867, and this plantation was situated in Elmore county, and the said cotton, the subject of this suit, was delivered to the defendants and stored in their warehouse, in the city of Montgomery, in the name of the plaintiff, then the title to said cotton was in plaintiff; and if the said cotton was shipped by said defendants to

New York without the authority or consent of the plaintiff, either on their own account, or on account of Loeb & Brother, before this suit was brought, the plaintiff is entitled to a verdict, unless they are satisfied from the evidence that by some act of the plaintiff, or some act done by his authority, this title was divested.

"2. If the jury are satisfied from the evidence that the plaintiff had a title to the cotton for the conversion of which this suit is brought, under his mortgage, and it was agreed between him and the makers of the note to secure which the mortgage was made, that if they would deliver in his name, at the warehouse of defendants in Montgomery, a sufficient quantity of cotton in bales to pay said note at eleven cents per pound, he would accept the same in payment of said note, and if they did deliver the cotton in plaintiff's name, as agreed on, to the defendants at their said warehouse, then such delivery vested the title to the cotton so delivered in the plaintiff, and this title can not be divested out of the plaintiff, unless by some act done by him, or by his authority.

"3. That unless the jury are satisfied from the evidence that McCoy delivered the cotton receipts to Blum, or Loeb & Brother, by the authority, or with the consent of the plaintiff, such delivery can not affect the plaintiff, if the title to the cotton was in the plaintiff.

"4. If the debt of the makers of the note in evidence was in fact owed by them, and the cotton for the conversion of which this suit is brought, was delivered to defendants at their warehouse, by said makers, to pay said note, under an agreement between them and the plaintiff that he would receive the cotton in payment of said debt, and was stored in the name of the plaintiff, and the receipts were given in his name, then the title to said cotton vested in the plaintiff, and the terms of the receipt can not authorize the defendants to deliver the cotton to another person, the holder of the receipts, or to ship the cotton to the order of the said third person, unless said receipts were delivered to the said third person by the authority or consent of plaintiff.

"5. That the possession by McCoy of the two receipts for twelve bales of cotton, if they were delivered to him by Turner to hand to plaintiff, and the possession of the other receipt for eleven bales of cotton, unless the receipts were delivered to him by the plaintiff, did not constitute McCoy the agent of plaintiff to dispose of said receipts, or any of them, to any person, or for any purpose, and his delivery of said receipts to Blum for Loeb & Brother, or to Loeb & Brother, can not bind the plaintiff, unless the jury are satisfied from the evidence that the plaintiff had authorized McCoy so to dispose of these receipts.

"7. That in the matters set up by defendants as a defense to this suit, the burden of proof lies on the defendants, and the jury must be satisfied from the evidence that those facts relied on as defense have been severally established as relied on, according to what the court charges are defenses in this suit.

"10. That although the plaintiff in lending the money secured by the $1,300 note, if he did so lend it, reserved or took usurious interest at the rate of 16 per cent., or other rate, this fact can not affect the rights of the plaintiff in this suit, and can not be considered by the jury by itself, or in connection with any other facts of the case, in arriving at their verdict.

"11. If there is any apparent conflict in the testimony of the witnesses, it is the duty of the jury to reconcile this testimony upon any hypothesis they believe to be reasonable, but the law will attribute to a witness a want of recollection, or mistake, rather than a deliberate falsehood.

"13. That if the cotton receipts were given in the name of the plaintiff, this was notice to Loeb & Brother of the claim of plaintiff to the cotton, if Loeb & Brother received those receipts at the time of the receipt; and if Blum, as the agent of Loeb & Brother, ordered the cotton shipped, and proceeds to go to Loeb & Brother, and they received the proceeds, and have indemnified the defendants against this suit, and if the plaintiff, at the time said receipts were given, had the title to said cotton, then the verdict must be for the plaintiff, unless they are satisfied from the evidence

that the plaintiff, by some act done by him or by his authority, had divested himself of the title.

"14. If the jury are satisfied from the evidence that the $1,300 note in evidence was given for a loan of money by the plaintiff to that amount, and that the mortgage in evidence was given to secure the payment of said note, at the time of its date, and that said mortgage was recorded in the office of the judge of probate of Elmore county, on the 4th of May, 1867, and that the cotton for the conversion of which this suit is brought, was produced in the year 1867, on the plantation planted by the makers of said mortgage, in Elmore county, and the defendants shipped said cotton to New York without his authority or consent, then the plaintiff is entitled to a verdict, unless the jury are satisfied by the evidence that the plaintiff and the makers of said note agreed that if said makers of said note would deliver at defendants' warehouse, in Montgomery, enough cotton, at eleven cents per pound, to pay said note, the cotton to be stored in his name; and unless they further believe from the evidence, that the makers of said note did so deliver a sufficient quantity of cotton to pay said note, principal and interest, but if, on calculating the principal and interest due at the time of the delivery of the cotton, and the value of the amount of the cotton so delivered at eleven cents per pound, there is a balance still due on said note, no matter how small, the plaintiff is still entitled to a verdict, unless by some act done by him, or his authority, he discharged or released his right to said cotton as held by him under his said mortgage.

"15. That although a witness may mistake a fact in his evidence, yet the jury are not bound to reject his testimony as to all other parts, unless they believe the witness has sworn a deliberate falsehood as to some fact."

To the giving of each of these charges defendants excepted.

The errors assigned are, exclusion of the evidence of custom, and the charges given.

RICE, CHILTON & JONES, and JUDGE & HOLTZCLAW, for

appellants.—(Appellants' brief did not come into Reporter's hands.)

ELMORE & GUNTER, *contra*.—Most of the cases in which evidence of a custom has been allowed, were upon mercantile contracts; but even in those cases, parol evidence of a custom is not always admitted. If it "can be heard by the court consistently with the rules which have been established for the ascertainment of truth," then it will be admitted. If the terms of the contract are all expressed, and have a plain ascertained meaning, then to permit evidence of a custom would violate the rule that parol evidence shall not be admitted to vary, add to, or explain the written contract.—*Sampson v. Lindsay & Gazzam*, 6 Port. 123.

In the case of the schooner *Reeside*, in 2 Sumner's Reports, Judge Story lays down the rule as follows: That the appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character; and he denies that it can ever be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori*, never in order to contradict them.—See, also, 12 Ala. 349; ib. 513; 17 Ala. 744; 23 Ala. 420; 27 Ala. 77; 25 Ala. 472; 9 Ala. 566; 28 Ala. 704; 32 Ala. 617.

In 32 Ala. 621, the court says: "In all cases of mercantile contracts, which are partly express and in writing, and partly implied and oral, a distinction is established on the soundest principles, that evidence received must not be of a particular which is repugnant to or inconsistent with the written contract."

In *Smith & Holt v. Mobile Nav. and Mutual Ins. Co.*, 30 Ala. 167, the court held that the words "beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board the said vessel or boat at New Orleans aforesaid," could not,

by evidence of a custom, be explained to mean that the risk began with the transportation on the road, and before the goods were put upon the boat.

So, in *Thorpe v. Sughie*, 33 Ala. 330, parol evidence was not allowed to explain that the words, "the said house is to be furnished with gas," as used in the lease, meant that the landlord should apply gas fixtures, and not that he should pay for the gas consumed.

The evidence of this custom would either have varied the contract in an essential particular, and was, therefore, on the principles above educed, properly rejected, or the custom, as proposed to be proved, corresponded with the contract; and in this latter view the rejection of the evidence was without injury to the appellants, and, in either view, the testimony was properly rejected. If the evidence was admissible, still it was necessary to bring home to Marshall notice of the custom, and should have been offered in connection with proposed testimony to charge Marshall with this notice. This was not done, and there was no testimony tending to bring home to him such notice. He had but one transaction prior to this, in cotton, in the city of Montgomery, and the sale of this was effected by his creditor for him, and this single transaction occurred many years ago. His general dealings while he was in the State were transacted in Wetumpka. There was no evidence of any dealings, in any way, by him, in Montgomery, except that with Robinson & Wright, and this comprised a single bill of goods. He lived fifteen miles from Montgomery; and nearer to Wetumpka. Knowledge of the custom, by him, can not be presumed. It was not a general, but a local custom. In *Fulton Ins. Co. v. Milner et al.*, 23 Ala. 420, the parties all resided in the city where the custom prevailed, and were presumed to contract with reference to it. "If the usage is purely local, still if notice of the existence is brought home to the parties, they will be bound by it, and, unless otherwise provided in the policy itself, it will form a part of the contract of insurance," &c. If the party who is sought to be bound by the custom does not reside in the place where it exists, then

evidence of notice to him of the custom must be offered to bind him thereby. None such was offered, and none proposed to be introduced.

The receipts were given in the name of Marshall, and were notice to all persons that he, or some one for him, had stored the cotton in the warehouse of appellants, and that the cotton so stored was once his cotton, and that the title thereto was still in him, unless some act had been done by him, or by his authority, to divest him of that title, and that the possession and transfer of the cotton receipts by any person would not pass Marshall's title to the cotton, unless it was done by his authority.

The effect of such a custom would be to deprive the owner of his title to cotton if the receipts should be stolen from him. It is no answer to this, to say that the owner should give notice to the warehouseman of the loss, because, if the receipts passed as bank bills, the first man who obtained them from the thief would be the owner, and the warehouseman could not resist his claim; nor would a publication in the papers be sufficient, because the thief might deliver them before the papers are published.

Independently of the above question, under the evidence and the law, as charged, the appellee was entitled to a verdict.

The evidence shows that Hamner, McCoy and Turner borrowed $1,300 of Marshall, and gave him their note and a mortgage on their crop of cotton, then planted in Elmore county, to secure the note. The mortgage was duly recorded. The cotton delivered to the appellants was part of the cotton crop mortgaged. This cotton was not removed from Elmore county until December, and at the time it was shipped by the defendants, was covered by the mortgage; unless by the agreement made as to the delivery at the warehouse, between Marshall and his mortgagors, the mortgage was discharged. The evidence showed this agreement to be, that if they would deliver to appellants' warehouse in Montgomery, cotton enough, at eleven cents per pound, in appellee's name, to pay the debt, he would accept the cotton as a payment.

The evidence further shows that there was not quite enough cotton delivered to pay the note. Unless the note was paid, Marshall had a right to refuse the cotton, as the agreement had not been complied with, and to rely on his mortgage and his title thereunder, or he could have accepted such delivery as a payment *pro tanto*. In either event the title was in him, and he had done nothing to divest the same. If it be said there was no consideration for the agreement to deliver the cotton, the answer is, that the promise to deliver, the delivery being the transportation of the cotton for some fifteen miles, is a valuable consideration. But whether there was a consideration for the agreement or not, it was executed, and this passed the title upon delivery at the warehouse.

The usury alleged to have been received for the loan of the money was no defense. It would have been no defense to McCoy, Hamner and Turner if an action of detinue or trover had been brought by Marshall against them for the cotton. They might have gone into chancery to make Marshall cut down his claim, but then he would have obtained the principal and legal interest; but the usury would have been no defense in a suit at law for the cotton, based on his title through his mortgage.

These appellants can derive no benefit from the usury. The defense is a personal one to the borrowers, and can not be made by third parties.

The attachment of Holtzclaw, for rent, had still less to do with the case. The appellants derived no title through him, or any claim to the cotton, and he himself had no title or claim of title. He had not even a lien on it until he had levied his attachment.

PECK, C. J.—1. The evidence offered by appellants (defendants in the court below) to prove the alleged custom in the city of Montgomery, was properly rejected. None but good customs have any validity. A custom that has a tendency to tempt parties to acts of wrong doing, bad faith, or dishonesty, can not be a good custom. A bad

custom ought to be abolished. *Malus usus est abolendus.* 1 Wend. Blackst. 76.

It is certainly an act of bad faith and dishonesty for a party intrusted with a warehouseman's receipt for cotton, to be handed to the owner, to transfer it by delivery to a third person, without the owner's knowledge or consent. The offer to prove this custom was an admission that such instruments could not be transferred by delivery, either by the common-law, or the law-merchant; and that is undoubtedly the case. Furthermore, this alleged custom is inconsistent with the spirit, if not with the letter, of section 1838 of the Revised Code, which provides that "all bonds, contracts and writings for the payment of money, or other thing, *or the performance of any act or duty*, are assignable by indorsement." A warehouseman's receipt is a contract for the performance of a duty, and, therefore, can only be assigned by indorsement.—*Skinner v. Bedell's Adm'r*, 32 Ala. 44; *Henley v. Bush*, 33 Ala. 636.

2. A growing crop may be mortgaged, and when matured and gathered, if not before, the mortgagee is entitled to the possession, and may maintain an action to recover it, or its value.—*Adams v. Turner & Horton*, 5 Ala. 740.

3. The contract between the mortgagee and mortgagors in the fall of 1867, that if the mortgagors would deliver, in the name of the mortgagee, at a warehouse in the city of Montgomery, or Wetumpka, to be selected by the mortgagee, a sufficient quantity of ginned cotton, at eleven cents per pound, to pay the note secured by the mortgage, the mortgagee would accept the cotton in payment of the note, did not destroy the legal effect of the mortgage. Such was manifestly not the intention of the parties. At most, it only amounted to an agreement to receive cotton at eleven cents per pound, if delivered, in payment of the note, instead of money, extending the time of payment to the end of the fall, but the mortgage still remained a security for its payment.

4. As between the plaintiff and defendants, the receipts copied into the bill of exceptions were an admission, on the part of the defendants, that the cotton belonged to the

plaintiff, (*Kennedy, &c., v. Strong*, 14 I. R. 128,) and it was no defense that it had been shipped and sold by direction of parties who had obtained possession of the receipts from a person who had no legal right to indorse or dispose of them.

5. The defense of usury can only be set up by a party to the usurious contract, or by some one having an interest in, or prejudiced by, the same. The defendants were not parties to the contract alleged to be usurious, had no interest in it, and had not in any wise been injured or prejudiced by it, and, therefore, could not make it a defense to this action.—*Cook & Kornegay v. Dyer*, 3 Ala. 643.

6. It is the province of a jury to determine the credibility of evidence, and if conflicting, it is their duty to reconcile it, if it can reasonably be done. If a fact be misstated by a witness, his evidence as to other matters is not to be altogether rejected, unless the jury believe the misstatement was wilfully and deliberately made, knowing it to be untrue.—*The Sanctissama Trinidad*, 7 Wheat. 338-9.

Taking these principles as the law of this case, we do not discover any available error in the charges given by the court, and excepted to on the part of the defendants.

The judgment of the court below is affirmed, with five per cent. damages. The appellants will pay the cost.

[Note by Reporter.—After the delivery of the foregoing opinion, appellants' attorneys applied for a rehearing, and made the following argument in support thereof:]

Petitioners respectfully urge, that by the rulings of the court below, they were plainly deprived of an important provision of a valid and lawful contract, without any fault, or bad faith, or breach of contract, or breach of duty on their part; and were held responsible for the misconduct of plaintiff's own agent, of which they had no notice when they exercised their right secured by contract to deliver the cotton to the order of "the bearer" of the cotton receipts, (which are in law contracts.)—*Bush v. Bradford*, 15 Ala. 317.

Bad usage is not insisted on by petitioners. Let all mere usage be put aside.

Petitioners, however, do insist that no court ought to deprive them of the benefit of any portion of a lawful contract.

Petitioners insist that no court ought to treat the contract (evidenced by the cotton receipt,) precisely as if it did not contain the words, "or to the bearer of this cotton receipt." The law of the land does not deny effect to such plain words when found in a lawful contract.

The supreme court, in the opinion delivered, entirely overlooked the plain and rational distinction between the case where there is "an express agreement to return the property to the plaintiff," and the case where, as here, the agreement is evidenced by a receipt, and is, that the bailees receive the thing bailed from the plaintiff expressly "subject to his order, or the bearer of this receipt."

In the case where the express agreement of the bailee is to deliver to the plaintiff, and nothing is agreed or said as to delivery to the bearer of the agreement, or other person, the delivery by the bailee, through mistake or negligence, to another person, without the consent or authority of the plaintiff, is a conversion, and renders the bailee liable. That was precisely the case in *Esmay v. Fanning*, 9 Barb. 190. And that is the principle asserted in sections 414 and 450 of Story on Bailments, and in the cases cited in the notes to those sections.

But when, as here, the agreement is different, a different principle or rule must govern the case. A bailee certainly has the legal right to agree with the bailor, that the bailee shall have the right to deliver the thing bailed either to the bailor or to "the bearer" of the written agreement or receipt. This was the very agreement which the parties to this suit did make, and did reduce to writing. There was no fraud in this written agreement. This written agreement is a lawful and binding contract, and is the sole expositor, the conclusive evidence, of the terms of their contract.—*Cole v. Spann*, 13 Ala. 537.

Yet, the plaintiff is permitted to recover in the very teeth

of this lawful contract. Yes, he is permitted to recover, simply because the bailees did precisely what this lawful contract secured them the right to do, that is, delivered the thing bailed to "the bearer" of the written agreement or receipt.

In the class of cases first above noticed, (and of which *Esmay v. Fanning*, 9 Barb. 190, is one,) the bailee was held liable for making a delivery not provided for in the contract; for delivery to some other person, when his express contract required a delivery to the bailor, and made no further provision as to delivery. His liability arose from his going beyond and outside of the contract.

But in the present case the bailees have not gone beyond or outside of their written contract; they have made no delivery which was not clearly provided for and authorized by their written contract; and yet, for an act clearly within the limits of their contract, and clearly authorized by it, they are held liable for a large sum in favor of their bailor. Reason, justice, principle and authority all forbid such a thing.

Though the written contract here is in the form of a receipt, it is not a mere receipt; it is a contract, a contract between competent parties, and lawful in every respect. *Bush v. Bradford*, 15 Ala. 317, and cases there cited.

It is a contract which certainly secured to the bailees "the option" to deliver to "the bearer" of the contract, or to his order; and it is settled, that "a contract may be optional with one of the parties, in part or in whole, and obligatory on the other."—*Disborough v. Neilson et al.*, 3 Johns. Cases, 81; Doug. 23, 1 Term Rep. 132–33; Cowp. 218; *Giles v. Bradley*, 2 Johns. Cases, 252; see, also, cases cited in last sentence of opinion on page 63 of *Murrell v. Whiting*, 32 Ala.

It is of the highest consequence to all the people, that courts of justice should hold all parties to contracts lawfully made by them, as they made them; that courts should not practically expunge any part or term of such contracts by refusing to allow any effect to it, or by any other way of treating the subject.

The contract here under consideration is one of a class vast in number, and involving vast amounts of money. It is written in plain and unambiguous language. The plaintiff himself here treats it as a valid contract. The defendants have never violated that contract as it was made, written, delivered and accepted. No violation of that contract by defendants can be made out, without first practically expunging from it the words "or the bearer of this receipt."

With all deference it is urged, that courts of law have no authority or jurisdiction to thus practically expunge from such contract such plain, lawful, and important provisions. To do this, is really to make for these defendants a new contract, and one they never made and were never willing to make.

The error in the opinion of the court is, in treating this contract precisely as if it did not contain the important words, "or the bearer of this receipt."

If the contract did not contain these words, then the delivery to a third person would be a conversion. But as the contract does contain those words, the cotton was plainly just as "subject" to the order of "the bearer of this receipt," as it was to the order of the plaintiff himself. To deny this, is nothing short of denying to these parties the right to insert in their own contract such lawful terms and stipulations as they choose.

If the rulings of the court below are to be affirmed as good law, then logic demands that the affirmance should be accompanied by the following head note:

"A warehouseman who, for cotton stored with him, signs and delivers therefor a contract in writing in the form of a receipt, wherein he states that he has received the cotton from its owner, (naming him,) 'subject to his order, or the bearer of this receipt,' becomes guilty of conversion, and liable in trover to the owner, by the bare exercise of his contract right to deliver the cotton to 'the bearer of this receipt,' or to his order. The exercise of this contract right is, *per se*, a breach of the contract, and makes the warehouseman guilty of a conversion *(a tort)*."

Any close examination of this contract, and of section 1838 of the Revised Code, must result in convincing every judge that there is nothing in that section which has, or can have, the slightest bearing upon, or application to, the present case. True, the contract here is one "for the performance of an act or duty;" true, this contract is "assignable by indorsement;" true, no other person than plaintiff can, in his own name, maintain an action upon the contract itself, without assignment or indorsement of that contract by the plaintiff. But admitting all this, yet the plaintiff has never assigned this contract by indorsement, and no one but the plaintiff is here sueing; and the plaintiff himself is not sueing upon the contract itself, but is sueing for a supposed *tort*. He can not possibly recover without showing that the delivery to "the bearer" of the receipt was a breach of the contract.

Even if the plaintiff had assigned or indorsed the contract to a specified third person, that act of plaintiff could not expunge from the contract the option thereby secured to defendants to deliver the cotton to "the bearer" of the receipt. This option of the defendants, thus secured by their written contract, is not affected by anything contained in section 1838 of the Revised Code, nor by any other section of that Code; nor can that option of defendants be destroyed or impaired by any act of the plaintiff proved or brought to view in this case.

Now, no fair man ever disputed that the contract was an admission by defendants that the cotton did belong to the plaintiff at the time the contract was made. But surely, it ought not to be claimed that it was an admission also that it would continue to be the property of plaintiff forever. A like admission implied from a replevy bond, was held not to conclude the party as to the actual facts twenty-four days afterwards.—*Wallis v. Long*, 16 Ala. 738.

Suppose a banker, on the 1st day of January, 1872, received the money of A, and on that day executed to him a certificate of deposit, stating that the money so deposited was "subject to the order of A, or the bearer of this certificate." Suppose A loses the certificate, and it is found

by B, and that on the 24th of January, 1872, B presents the certificate to the banker, who, without notice from A forbidding payment to any person but himself, pays the money to B: can any lawyer contend, upon such facts, that the banker is thereby guilty of a conversion, or that he remains liable to A? Of course not. The banker has paid the money to "the bearer of the certificate," as authorized to do by its terms, and that payment was clearly good, because A, after losing the certificate, did not prohibit payment to any person but himself.

The plaintiff in this case did not prohibit the defendants from delivering the cotton to "the bearer of the receipt;" he gave no notice to the defendants that there was any wrong in delivering to such "bearer;" and in the absence of all such notice, the defendants delivered to the order of "the bearer of the receipts." The contract authorized this delivery, and therefore such delivery was neither a *tort* nor a conversion.

The assignability of the contract has nothing to do with this case. The contract itself, upon its face, secured to defendants the right to discharge it by a delivery to "the bearer" of the contract. This right was exercised, without notice from plaintiff forbidding such exercise. There is no law of this land which makes the defendants tort-feasers for such exercise of their right secured by contract. It is a legal impossibility, that any party to a lawful contract can become a tort-feaser by simply exercising the very right secured to him by the contract. And this is true, whether the contract be assignable or not.

No negligence is shown against the defendants. No breach of contract is shown. No bad faith is shown. In good faith, and without negligence, they delivered the cotton to "the bearer" of the receipts, in strict accordance with their contract. It is confidently believed that there is not a principle or an adjudged case which declares warehousemen liable on such facts.—*Runyan v. Caldwell*, 7 Humph. 134; *Willard v. Bridges*, 4 Barb. 361.

The contract itself secured the right to defendants to make this delivery to "the bearer." This right certainly

continued of full force until the plaintiff might give notice to defendants not to deliver to "the bearer." No such notice was given, nor anything of the kind. In the absence of such notice, the plaintiff must be the loser by any misconduct of his own agent. He can not hold the defendants responsible for the misconduct of his own agent, of which misconduct the defendants had no notice when they delivered the cotton to "the bearer" of the receipts. *Nelson v. Iverson*, 17 Ala. 216.

The several rulings of the court below are in conflict with the sound principles and positions above stated. The charges given to the jury rendered it impossible for the defendants to have "a trial by jury," upon the very matters on which the law of the land made the liability of defendants to depend. The charges make them liable simply for delivering to "the bearer" of the receipts, without fault, bad faith, negligence, or notice from plaintiff that he did not wish such delivery made.—*Nelson v. Iverson, supra.*

The attempt to prove the custom in the court below was cumulative, and no waiver of the rights of appellants under the contract.

In *Ray v. Wragg et al.*, decided at this term, this court uses the following language: "In construing contracts, the intention of the parties will be carried into effect so far as the rules of language and the rules of law will permit. A court would not, by construction of a contract, defeat the express stipulations of the parties."

Yet, in the present case the court has, by construction of a contract, defeated one of the "express stipulations of the parties."

The contract here expressly stipulates that the cotton shall be "subject" to the order of "the bearer of this receipt," or to the order of the plaintiff. The court says, no, the cotton shall not be subject to the order of "the bearer of this receipt," but shall be subject only to the order of the plaintiff.

The court, in this case, disregard that sound and universal rule of "sound exposition" which imperiously demands that such construction shall be put upon a written con-

tract, or any other written instrument, as allows some meaning, operation and effect to every word and clause thereof, rather than a construction which silences or denies effect to any clause or word thereof.—Smith on Stat. 710; *Spivey v. The State*, 26 Ala. 101; Smith on Contr. 407–8, marg., where "the most important of all the rules of construction" is stated and elucidated.

BY THE COURT.—The application for a rehearing is denied.

ESLAVA *vs.* AMES PLOW COMPANY.

[ACTION BY FOREIGN CORPORATION, ON COMMON COUNTS.]

1. *Foreign corporation; action by.*—A foreign corporation is entitled to sue in the courts of this State; and if the complaint describes the plaintiff as a "corporate body duly incorporated by the laws of Massachusetts," the description is sufficient after judgment by default.
2. *Same; security for costs; practice in Mobile circuit court.*—The rule of practice adopted by the judge of the circuit court of Mobile, under the authority conferred on him by the 4th section of the act "to regulate the practice in the circuit court of Mobile county," (Session Acts 1869–70, p. 209,) which forbids attorneys to become securities for costs, is not applicable to a suit which was commenced before the adoption of the act.
3. *Same; same; exception necessary.*—In an action commenced by a corporation, the failure to give security for the costs, as required by the statute, (Rev. Code, § 2804,) is not available on error, unless objection was raised in the court below, and an exception reserved.
4. *Return of service of summons and complaint.*—A return of service of a summons and complaint, issued from the office of the clerk of the circuit court of Mobile in January, 1870, signed "A. M. Granger, S. M. C., B. H. Hamilton, D. S.," shows a sufficient service by the sheriff, by his deputy.

APPEAL from the Circuit Court of Mobile.
Tried before Hon. JOHN ELLIOTT.

The action in this case was commenced on the 19th of January, 1870; the complaint being as follows:

"AMES PLOW COMPANY vs. CELESTINE ESLAVA, Late partner in firm of Elder & Eslava. } Circuit Court, Spring Term, 1870. The plaintiff, the Ames Plow Company of Boston, a corporate body duly incorporated by the laws of the State of Massachusetts, claim of the defendant, who was a partner with one James Elder in the firm of Elder & Eslava, $1,097.20, due from said firm of Elder & Eslava, by account, on the 16th day of February, 1867; also, the further sum of $1,097.20, for merchandise, goods, and wares, sold by plaintiff to said firm of Elder & Eslava, at their request, from December 31, 1866, to February 16, 1867, at sundry times; also, the further sum of $1,097.20, on an account stated between plaintiff and said firm of Elder & Eslava, on 16th February, 1867. Plaintiff claims, also, the interest due on said several sums."

The acknowledgment of liability for the costs, endorsed on the summons and complaint, was signed by "T. N. & M. E. Macartney," who were the plaintiff's attorneys; and the return of service was signed thus: "A. M. Granger, S. M. C., B. H. Hamilton, D. S." On the 5th May, 1870, a judgment was rendered in the cause, in these words: "This day came the plaintiff, by attorneys; and the defendant having failed to file her plea herein, as required by law, it is considered, that the plaintiff have and recover of the defendant; but, as it is unknown to the court what damages have been sustained, let a jury come, and assess the same." On a subsequent day of the term, a writ of inquiry was executed, and the jury returned a verdict, assessing the plaintiff's damages at $1,368.14; and judgment final was thereupon rendered for the plaintiff, for that amount.

The errors assigned are—"1st, that there is no personal plaintiff; 2d, that the supposed company, called a plow company, are residents of the State of Massachusetts, and their attorneys and counsellors are sureties for the costs;

3d, that the return is by one 'B. H. Hamilton, D. S.,' without saying what it means, or who he is; 4th, that the judgment by default is rendered without any authority of law."

ALEX. MCKINSTRY, for appellant.
T. N. & M. E. MACARTNEY, *contra.*

B. F. SAFFOLD, J.—The appeal is upon the record only, without a bill of exceptions.

1. A corporation is a person for the purpose of a suit. Rev. Code, § 1; Const. Art. XIII, § 15.

2. By an act of the legislature "to regulate the practice in the circuit court of Mobile county," approved February 28, 1870, and Rule 14, made in pursuance of it by the judge of that court, no attorney, or officer of the court, is permitted to be surety for costs, or surety on any bond required to be given in any case in that court. In this case the rule is inapplicable, as the suit was commenced before the passage of the act.

3. Even if it was applicable, the judgment entry recites that the defendant, who is the appellant, failed to file her plea; leaving it uncertain whether the judgment should be regarded as one by default, or by *nil dicit*. It is unnecessary to determine what the presumption should be. Section 2804 of the Revised Code, in requiring corporations to give security for the costs, directs that, on failure to do so, the suit, on motion of the defendant, must be dismissed. The requirement seems to be one for the benefit of the defendant, which he may waive; and this view is strengthened by the provision of section 2806 of the Revised Code, making the attorney who directs the issue of the summons, without such security, and the clerk issuing it, liable to the defendant, on motion, for the costs of the suit. In the *Tuskaloosa Wharf Co. v. Mayor, &c., of Tuskaloosa*, (38 Ala. 514,) it was held that, notwithstanding a motion to dismiss was made and overruled, the objection can not be made in this court without an exception. As the statute only requires the suit to be dismissed on the motion of the

defendant, we decide that the objection can not be made for the first time in this court, whether the judgment is by default or not.

4. The summons and complaint appear to have been executed by the sheriff by B. H. Hamilton, D. S. This is sufficient.—*Briggs & McClure v. Greenlee*, A. R. 123.

The judgment is affirmed.

JAMES RIVER INSURANCE CO. *vs.* MERRITT & ROBERTSON.

[ACTION ON POLICY OF INSURANCE AGAINST LOSS BY FIRE.]

1. *Construction of application for policy, as to property included.*—A written application for insurance, in which the property is described as "a frame steam saw-mill, covered with sheet iron, situated," &c., "boiler, engine, machinery, and belting contained therein," includes a planing machine in the building on the same floor with the machinery proper of the mill, about twenty-five feet distant, but attached to it by the belting, and plainly visible.
2. *Same; charge to jury as to.*—In an action on an insurance policy, to recover damages for a loss by fire, a charge which instructs the jury, that, if the defendant's agent wrote the application for the insurance after an inspection of all the machinery in the building, and wrote it in such form as to include a planing machine with other machinery insured to which it was attached, and that such was the understanding of the agent and the plaintiff, then the defendant was liable for the insurance of the planing machine as well as the rest of the machinery, does not necessarily leave to the jury the construction of the writing, when there is conflicting oral evidence respecting the inclusion of the planing machine.

J. LITTLE SMITH, for appellant.
JAMES BOND, *contra*.

B. F. SAFFOLD, J.—The suit was by the appellees, against the appellant, to recover the amount for which certain property had been insured that was destroyed by fire.

The defendant pleaded specially, in substance, that the insurance was obtained on the written application of the plaintiffs, and there was a misrepresentation or concealment of the presence of a planing machine in the building insured, which was not included in the property insured, but was of the class or kind of articles for which a higher rate of insurance was charged, and for that reason the policy was void by its terms. The plaintiff replied to this, that the application referred to was written by the defendant's agent after an inspection of the property, and the planing machine was intended to be included in the property insured. They denied any misrepresentation, concealment or omission on their part. A demurrer to this replication was overruled.

The application was as follows:

"James River Ins. Co., Mobile, March 12, 1868, C. W. Dorrance, agent, No. 39 St. Nicholas street, Mobile, Ala.: Insurance is wanted against fire by Merritt & Robertson, for account of themselves, loss, if any, payable to them, on the frame steam saw mill covered with sheet iron, situated on the east side of Water street, between Augusta and Savannah streets, $400. On boiler, engine, machinery and belting contained therein, $1,000. It is understood and agreed that the premises are at no time to be left without a watchman, for one year.

"$700 on building, Jefferson Ins. Co.

"$700 on machinery, Jefferson Ins. Co.

"Your obedient servants,

MERRITT & ROBERTSON.

"$1,400, at 5 per cent. - 70

"Policy, - - - 1

"Stamp, - - - 11."

It was proved that the planing machine was in the building in a sort of shed, on the same floor with the machinery proper of the saw-mill, about twenty-five or thirty feet distant from it, but connected with it by the belting, and plainly visible. The agent, Dorrance, saw it, and inquired about it before the written application was made, but on his inspection with the view of insuring. Upon the evi-

dence thus far, we think the planing machine is included in the term machinery, as used in the written application. The reference to, or description of, the machinery, is that contained in the building, and not that attached, or belonging necessarily to the saw-mill.

But if there be ambiguity, and we resort to the parol evidence introduced, for its explanation, the substance of the proof is as follows: The plaintiff, Robertson, stated verbally to defendant's agent that he desired insurance on his saw-mill and machinery, and told him where it was. The agent visited it for the purpose of examination, and inspected it to his satisfaction. He saw the planing machine, and made inquiries about it. Afterwards, he wrote the application which the plaintiffs made. He insured other planing mills at the same rate, because other companies had done so, though the rate of insurance on them was one per cent. higher.

Upon this evidence, the charge excepted to was, in effect, that if the defendant's agent wrote the application, and did so in such form as to include the planing machine, and such was the intention of the plaintiff, Robertson, and the agent, the defendant was liable for the insurance on the machinery, including the planing machine. There is no error in this charge of which the defendant can complain. The burden of his defense was, that he did not insure the planing machine, and that he was imposed on by its presence in, or about, the building. The construction of the writing was not necessarily left to the jury, but they were to say, from all the evidence, whether the planing machine was insured or not.

The judgment is affirmed.

JEMISON ET AL. *vs.* GOVERNOR OF ALABAMA.

[ACTION ON PENAL BOND, GIVEN BY PLANK-ROAD COMPANY, FOR MONEY LOANED BY STATE FROM TWO-PER-CENT. FUND.]

1. *Amendment of complaint; premature commencement of action.*—Where a plank-road company gave two bonds to the State, in consideration of the loan of a portion of the two-per-cent. fund, bearing even date, and executed by the same parties; one conditioned for the faithful application of the money, annual reports to the governor, and the completion of the road within a specified period, and the other conditioned for the return of the money when due,—*held*, in an action on the first bond for a breach, that the complaint could not be amended so as to include in the cause of action the second bond, which became due after the commencement of the suit, without the averment of some breach having the effect to make it due before that time.
2. *Measure of damages, for breach of penal bond.*—In an action on a penal bond, given to the State by a plank-road company, in consideration of a loan of a portion of the two-per-cent. fund; conditioned for the faithful application of the money, annual reports to the governor, and the completion of the road within a specified time, but containing no condition for the return of the money,—the measure of damages for a breach is the damage proved to have been actually sustained, and not the amount of the money loaned.
3. *Payment in Confederate currency, in* 1864, *for money loaned by State in* 1853.—A payment in Confederate currency, in 1864, to the acting treasurer of the State at that time, is not a proper credit on a debt due to the State by an incorporated plank-road company, for a portion of the two-per-cent. fund loaned to said company in 1853.
4. *Release by creditor of one of several co-sureties on penal bond.*—A release by the creditor, for valuable consideration, of one of several co-sureties on a penal bond, is not a release or discharge of the others, except to the extent of his liability to them for contribution under the statute, (Revised Code, § 3072,) when some of them are insolvent; but, to that extent, it is a release and discharge of the others, although it contains an express stipulation, that it "is not in any manner to affect or operate as a discharge of the liabilities of the other obligors in said bond, or to affect or discharge any action or right of action against them."

APPEAL from Circuit Court of Marengo.
Tried before the Hon. LUTHER R. SMITH.

THIS action was brought by "the governor of the State of Alabama," against Robert Jemison, H. A. Tayloe, Gotlieb Breitling, Nathan Bradley, James Manning, and William H. Roberts; and was commenced on the 6th September, 1860. Breitling, Manning and Roberts died pending the suit, and the action was prosecuted to judgment against Jemison and Tayloe, who alone defended it. The action was founded on a penal bond, of which the following is a copy:

"The State of Alabama, } Know all men, by these pres-
Marengo County. } ents, that we, the Marengo Plank or Covered Road Company, as principal, and Henry A. Tayloe, Robert Jemison, jr., Gotlieb Breitling, Nathan Bradley, James Manning, and William H. Roberts, as sureties, are held and firmly bound unto Henry W. Collier, Governor of the State of Alabama, and his successors in office, in the penal sum of eighteen thousand nine hundred and fifty-four 94-100 dollars; for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents: In witness whereof, I, Gotlieb Breitling, the President of said Marengo Plank or Covered Road Company, have hereunto put my hand, and affixed the seal of said company; and we, the remaining obligors, have hereunto put our hands and seals, this thirteenth day of December, 1853.

"*Whereas*, under the provisions of an act entitled 'An act to dispose of the unappropriated portion of the two-per-cent. fund,' approved the 9th day of February, 1850, the Governor of the State of Alabama is authorized to loan such portion of said fund as is designated in said act, to such company or companies as may have been or hereafter shall be chartered by the State, and organized to construct a rail-road or plank-road extending any portion of the route from Cahaba, in the direction of Jackson, Mississippi, in the same manner, and on the same conditions, and upon complying with the same terms, as was authorized and required in respect to the loan made to the Montgomery and West Point Rail-Road Company, accord-

ing to the first, fourth, fifth, sixth, seventh, and tenth sections of an act entitled 'An act to loan the two-per-cent. fund to the Montgomery and West Point and West Point and Tennessee and Coosa Rail-Road Companies,' approved 23d January, 1845: *And whereas*, on the first day of March, 1851, an association was made and entered into, by the name and style of the Marengo Plank or Covered Road Company, under the provisions, and by the authority of an act, entitled 'An act to incorporate the Marengo Plank or Covered Road Company,' approved 5th of February, 1850: *and whereas*, under and by virtue of said act of incorporation, books were opened for subscription for stock in said company, within ninety days after the passage and approval of said act of incorporation: *and whereas*, twenty thousand and nine hundred dollars was subscribed, and ten per cent. of said sum paid in cash by the subscribers, at the time of subscribing: *and whereas*, the stockholders, after the said sum of twenty thousand nine hundred dollars was subscribed, met and organized said company, by electing a president and other officers of their body, proceeded to conduct and manage the business of said company: *and whereas*, the Governor of the State of Alabama was authorized to loan to such company a portion of the unappropriated two-per-cent. fund, equal to the distance from Woodville to Demopolis, compared to the distance from Cahaba to the Mississippi line, upon certain bond being given: *and whereas*, this bond is given under the first and tenth sections of the act specially referred to in the act approved the 9th day of February, 1850, loaning said fund to such company:—

"Now, therefore, the conditions of this bond are, that if the Marengo Plank or Covered Road Company shall complete and put into operation their road within fifteen years from the date of their charter, or act of incorporation, as required by the fourteenth section of the said act of incorporation, approved on the 5th day of February, 1850, as aforesaid; and if the President and Directors of said Marengo Plank or Covered Road Company shall make an annual report to the Governor of the said State for the

time being, immediately preceding the session of the legislature, of the extent of the construction, and condition of said road, and the amount of said fund expended, to whom paid, and for what purpose applied; and if the said Marengo Plank or Covered Road Company shall faithfully apply said money loaned, with due and proper diligence, to the construction of said road, and shall fully and faithfully comply with and fulfill all the conditions and provisions contained in the fourth, fifth, sixth, and seventh sections of said act referred to, so far as applicable to them: then this bond shall be null and void, otherwise to be and remain in full force and virtue.

"And it is further agreed, that if there shall be a failure to comply with the conditions above expressed, and contained in the fourth, fifth, sixth, and seventh sections of the said act, or should the President and Directors of the Marengo Plank or Covered Road Company, after a demand made of them by the Governor of the State aforesaid for the time being, fail to give additional security within sixty days after such demand, this bond shall be considered due, and may be sued forthwith."

(Signed by said Breitling, as president of said plank-road company, and by all the defendants individually.)

The complaint contained three counts, each of which averred the execution of the bond, and set out its conditions and provisions, but not *in totidem verbis;* and each specified four breaches of the bond, which were, in substance, the same, namely, the failure of said plank-road company to make annual reports to the governor. The defendants demurred to the complaint, and assigned the following causes of demurrer: "1st, that the writing obligatory sued upon does not impose an obligation on the defendants to repay or refund to plaintiff the amount of money therein specified; 2d, that the breaches assigned in said declaration, and in every count thereof, are defective in this, that they do not state the amount of damages claimed by plaintiff, for the alleged failure of said plank-road company to make an annual report to the governor

of the State of Alabama for the time being, of the construction and condition of the road for the building of which said money was loaned or advanced, the amount of said fund expended, to whom paid, and for what purpose applied; 3d, that there is no breach alleged in said declaration, or any count thereof, of any breach of a promise or obligation to repay said sum of money mentioned in said writing obligatory; and, 4th, because plaintiff's said declaration, and the breaches assigned in each of said counts, would not authorize a judgment for the recovery of the amount of said writing obligatory."

The court overruled the demurrer, and allowed the plaintiff to amend his complaint, "by inserting therein the following words: 'For that whereas, the plaintiff, *by* (?) the governor of the State, heretofore, to-wit, on the 13th day of December, 1853, lent to the Marengo Plank or Covered Road Company, a corporation, the sum of $9,170 47, of the fund hereinafter specified, under and by virtue of the acts of the legislature of the State, and the bond of defendants hereinafter specified." The defendants excepted to the allowance of this amendment, and demurred to the complaint as amended, on the following grounds: "1st, that the suit, as shown by the writ and declaration, is founded upon a writing obligatory, under seal, against sureties, and no fact can be alleged outside of said writing obligatory, and inconsistent with the terms thereof, to add to the obligation of the contract in writing; 2d, that the defendants, being sued as sureties, as shown by the writing sued on, have the legal right to stand upon the written contract as made, and the amendment allowed is inconsistent with the written contract sued on."

The court overruled this demurrer, and the defendants then filed five pleas, "in short by consent;" the first of which was payment and satisfaction, the last performance, and the others in the following words: "2. Defendants plead and aver, that they are and were accommodation sureties only of G. Breitling, president of the Marengo Plank or Covered Road Company; that by deed of assignment in trust, made by said plank-road company, to

one Alex. M. McDowell as trustee, a security to the plaintiff was provided, consisting of choses in action, promissory notes made by said G. Breitling, the principal in said bond, and money in the hands of said Breitling, of value fully sufficient to pay said bond now sued on; and by a contract and arrangement between said plaintiff and the legal representatives of said Breitling, he having died, the estate of said Breitling has been released and discharged from the payment of said bond; whereby these defendants were deprived of the legal application of the security aforesaid, and are discharged therefrom as such sureties. 3. Defendants further plead and aver, that the amount of money specified in said bond was fully secured to the plaintiff by said plank-road company, in a transfer and assignment of choses in action, debts, and promissory notes, made by G. Breitling, of value and amount sufficient to pay said bond; and the said plaintiff has released and discharged the estate of Breitling from the payment of said bond, and thereby deprived these defendants of the benefit of said security. 4. Defendants further plead, that the plaintiff was not damnified by any failure to make the report referred to and complained of in the breaches assigned in the declaration." A demurrer was interposed to the second and third pleas, but the record does not show what action was had on it.

On the trial, at the October term, 1870, as the bill of exceptions states, "the plaintiff read in evidence to the jury the bond described in the complaint, and then offered in evidence another bond, or written obligation, not the foundation of the suit, in the words and figures following, to-wit:" [The bond here set out is identical with the former, except in the conditions, which are in these words:]

"The State of Alabama, } Know all men by these presents,
Marengo County. } that we, the Marengo Plank or Covered Road Company, as principal, and Gotlieb Breitling, Henry A. Tayloe, Nathan Bradley, James Manning, Robert Jemison, Jr., and William H. Roberts, as sureties, are held and firmly bound unto Henry W. Collier, Governor of the State of Alabama, and his successors in

office, in the penal sum of eighteen thousand nine hundred and fifty-four 94-100 dollars; for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. In witness whereof, I, Gotlieb Breitling, the President of said Marengo Plank or Covered Road Company, have hereunto put my hand, and affixed the seal of said company; and we, the remaining obligors, have hereunto put our hands and seals, this 13th day of December, one thousand eight hundred and fifty-three (1853).

"*Whereas*, under the provisions of an act, entitled 'An act to dispose of the unappropriated portion of the two-per-cent. fund,' approved the ninth day of February, 1850, the Governor of the State of Alabama is authorized to loan such portion of said fund as is designated in said act, to such company or companies as may have been or hereafter shall be chartered by the State, and organized to construct a rail-road or plank-road, extending any portion of the route from Cahaba, in the direction of Jackson, Mississippi, in the same manner, and on the same conditions, and upon complying with the same terms, as was authorized and required in respect to the loan made to the Montgomery and West Point Rail-Road Company, according to the first, fourth, fifth, sixth, seventh and tenth sections of an act, entitled 'An act to loan the two-per-cent. fund to the Montgomery and West Point, and Tennessee and Coosa Rail-Road Companies,' approved 23d of January, 1845: *And whereas*, on the 1st day of March, 1851, an association was made and entered into, by the name and style of the Marengo Plank or Covered Road Company, under the provisions and by the authority of an act, entitled 'An act to incorporate the Marengo Plank or Covered Road Company,' approved February 5th, 1850: *and whereas*, under and by virtue of said act of incorporation, books were opened for subscription for stock in said company, within ninety days after the passage and approval of said act of incorporation: *and whereas*, twenty thousand nine hundred dollars was actually subscribed, and ten-per-

cent. of the said sum paid in by the subscribers, in cash, at the time of subscribing: *and whereas*, the stockholders, after the said sum of twenty thousand nine hundred dollars was subscribed, met and organized said company, by electing a board of directors, on the first day of March, in the year one thousand eight hundred and fifty-one, who, after electing a president, and other officers of their body, proceeded to manage the business of said company: *and whereas*, the governor of the State of Alabama was authorized to loan to such company a portion of the unappropriated two-per-cent. fund equal to the distance from Woodville to Demopolis, compared to the distance from Cahaba to the Mississippi line, upon certain bond being given: *and whereas*, this bond is given under the first and tenth sections of the act specially referred to in the act approved the 9th day of February, 1850, loaning said fund to such company:

"Now, therefore, if faithful payment of the sum of nine thousand four hundred and seventy-seven 47-100 dollars, being the amount of the sum so loaned to the Marengo Plank or Covered Road Company, be made by said obligors, or any, or either of them, at the expiration of ten years from the date of this bond, together with the interest which shall accrue thereon, payable annually, at the rate of five per cent. per annum, for the last five of the said ten years: And if the president and directors of the said Marengo Plank or Covered Road Company shall, within sixty days after a demand made of them by the governor of said State for the time being, give additional security upon this bond, and shall in all respects fully and faithfully perform and comply with the provisions contained in the first and tenth sections of said act referred to, then this bond shall be void, else shall remain in full force and virtue: and if additional security be not given, as required, within sixty days as aforesaid, then this bond shall be considered as due, and may be sued forthwith by the governor of the State for the time being."

(Signed by all the parties to the first bond.)

The defendants objected to the introduction of this bond

as evidence in this suit; but the court overruled their objection, and allowed said bond to go to the jury; to which ruling the defendants excepted.

"The defendants introduced A. M. McDowell as a witness, who testified, that said plank-road company, somewhere about the year ——, (G. Breitling, the president, being present, and participating in the act,) adopted a resolution, which was copied upon their minutes, and by which they assigned or transferred to him, as trustee, certain assets of the company, consisting in part of a debt against O. B. Boddie, amounting to some $4,000, notes of said Breitling to said plank-road company, amounting to several thousand dollars, and other assets; that these assets, at the time of the adoption of said resolution, were of value about sufficient to repay the amount of said loan by the State to said plank-road company; and that he was instructed, by the resolution of the board, to first pay the debt due to the State for said loan. Witness said, that the assets were about enough to pay that debt, if he could have collected all, but that he had collected very little besides the Boddie debt; that this debt was collected in Confederate currency; that, on the 7th day of March, 1864, he paid over to Duncan Graham, who then claimed to act as treasurer of the State, the sum of $3,758 50, in Confederate treasury-notes, and took his receipt therefor." The treasurer's receipt for this payment was produced by the witness, and expressed on its face that the money was "in part payment of loan to said company from two-per-cent. fund." The witness further testified, that the books of said plank-road company, showing said assignment or resolution, had been lost or destroyed.

The defendants then read in evidence to the jury, after proving its execution, a receipt in the following words: "Received, this 27th February, 1868, of Alfred Breitling, as executor of the estate of G. Breitling, deceased, the sum of one thousand dollars, in compromise and full payment and discharge of the liabilities of said deceased, and of his executor, on or for a certain bond executed by the Marengo Plank or Covered Road Company, and by Henry

A. Tayloe, Robert Jemison, Nathan Bradley, James Manning, William H. Roberts, and the said G. Breitling, to H. W. Collier, governor of the State of Alabama, in the penal sum of $18,954 94, bearing date the 13th December, 1853, and now in suit in the circuit court of Marengo county, Alabama, against some of the obligors. But this compromise and discharge of the liability of the said Breitling and his executor, is not in any manner to affect or operate as a discharge of the liabilities of the other obligors in said bond, or to affect or discharge any action or right of action against them." (This receipt was signed by W. M. Brooks and W. E. Clarke, "attorneys for the plaintiff in said suit, and for the State of Alabama, and the parties entitled to the money specified in said bond.") "The defendants also offered testimony to prove that the estate of said G. Breitling was solvent when said release was given, and is now solvent, and able to pay its debts"; but the court excluded this testimony, and the defendants excepted.

The defendants also offered in evidence to the jury two notes signed by said G. Breitling, of which the following are copies:

"Demopolis, Ala., Sept. 25, 1854.

"On or before the 21st day of January, 1855, we jointly and severally promise to pay to the president and directors of the Marengo Plank or Covered Road Company twelve hundred dollars, for value received; it being for twenty-eight shares of stock in said road, transferred to G. Breitling, W. H. Roberts, and A. M. McDowell, under the style of Gotlieb Breitling & Co., by Nathan Bradley, in consideration of their assuming the above amount due the two-per-cent. fund by said N. Bradley; of which the said McDowell has paid his part to the said G. Breitling, which leaves one-third of the above amount to be paid by Wm. H. Roberts, and two-thirds to be paid by said G. Breitling, for which they have given this note."

(Signed by G. Breitling and Wm. H. Roberts.)

"$1,530 74. One day after date, I promise to pay to Alex. M. McDowell, as treasurer of the Marengo Plank or

Covered Road Company, and for the use of said company, the sum of fifteen hundred and thirty 74-100 dollars, being part of the two-per-cent. fund borrowed by said company from the State, and placed in the hands of W. W. Allen & Co., subject to the orders of the president of said company, and paid to me, as shown by the account-current of the said W. W. Allen & Co., including interest to date, as per account rendered me by said treasurer; it being my intention to bind myself to pay the said Alex. M. McDowell, as treasurer, the amount above specified, with lawful interest from this date till paid. August 9, 1858."

This last note was signed by G. Breitling, and had endorsed on it a credit, signed by said McDowell as secretary and treasurer, in these words: "Credit, August 9, 1858, by G. Breitling's note, of this date, to the secretary and treasurer of the Marengo Plank or Covered Road Company, for this amount, $389 63, for sum of S. S. Boddie's draft, with interest." Each one of said notes also had two other endorsements, one acknowledging presentation as a claim against said Breitling's estate, which was signed by his executors; and the other, which was signed, "A. M. McDowell, trustee, &c., by J. T. Jones, attorney," in these words: "Settled by A. Breitling, executor of G. Breitling, Feb. 18, 1867." The witness A. M. McDowell testified, "that he had compromised these two notes, with Breitling's executor, before the estate was released from liability on the bond." The court rejected these notes as evidence in the cause, and the defendants excepted.

"Upon the foregoing facts, the court charged the jury—

"1. That if said corporation, called the Marengo Plank or Covered Road Company, had failed to comply with the provisions in the bond, requiring said company to make annual reports, then the said bond was forfeited, and the plaintiff had the right to recover the amount of money lent by the State to said corporation, with interest thereon from the time of the session of the legislature at which said company had failed to make said report; and that they might look to the bonds in evidence, to ascertain the amount of money lent by the State to said company.

"2. That if they believed, from the testimony, that the money paid by McDowell to D. Graham, on the debt now sued for, was paid in Confederate currency, no credit could be allowed for the amount so paid, because Confederate currency was illegal, and said D. Graham was not the treasurer of the State at that time."

The defendants excepted to each of these charges, and then requested the following charges in writing:

"1. That the obligation sued on, and described in the plaintiff's declaration, and set out on oyer, is the foundation of this action, and the one to be examined and considered by the jury, as containing the defendant's liability.

"2. That if the jury believed, from the evidence, and from an inspection of the bond sued on, that it contained no obligation or promise on the part of the defendants to repay the plaintiff any fixed or specified sum of money, then the plaintiff can only recover such damages as the proof may show the State has sustained under the several assignments of breaches in the plaintiff's declaration; and if no proof has been adduced of the extent of damages sustained by the State, then only nominal damages can be recovered by the State in this suit.

"3. That there being no statement in the bond, as to the amount of money loaned to the said plank-road company, or as to the terms of the loan, or as to the rate of interest to be paid, or stipulations for the return or repayment of the money, the sureties are not liable, in the present action, for the money loaned.

"4. That if the jury believe, from the evidence, that the plaintiff has released Breitling's estate from all further liability to the State on the bond, such discharge [operates] as a release of the defendants Jemison and Tayloe.

"5. That if the jury believe, from the evidence, that the sum sued for was loaned by the State to said plank-road company, under an act of the legislature authorizing the same to be loaned for ten years, five of which were without interest, and five at the rate of five per cent. interest, and the suit was brought before the expiration of ten years from the date of the loan, then the plaintiff has no right

to recover in this action, unless the proof shows that, before the suit was brought, the said plank-road company was notified by the governor to give new security, and failed to do so.

"6. That the absence of proof that the defendants failed to make reports to the general assembly of the progress of the work, and to perform the other breaches assigned in the declaration, did not, in the absence of notice and demand by the governor for new security, authorize a suit to be maintained for the sum loaned, before the expiration of ten years."

The court gave the first charge asked, and refused each of the others; to which refusals exceptions were reserved by the defendants.

The errors assigned in this court embrace all the rulings of the court below, which, as above stated, were adverse to the defendants.

LYON & JONES, for appellants.—1. The bond sued on contains no condition whatever for the repayment of the money, and the complaint contained, of course, no breach alleging a non-payment. The amendment to the complaint ought not to have been allowed. The action being founded on a penal bond with condition, assigning breaches, the declaration must be confined to the bond; and the plaintiff can not recover on proof of any facts outside of the condition and the breaches assigned.

2. The only breaches assigned in the complaint, were the failure of the corporation to make annual reports to the governor, or to the general assembly, as required by the condition of the bond; and there was no proof whatever of such failure. Consequently, the plaintiff could not recover at all under his complaint.

3. The second bond, which was introduced in evidence to the jury against the defendants' objection, was not, by its terms, due until several years after the commencement of the suit. Of course, no recovery could be had under it, even if an appropriate breach had been assigned.

4. The penalty of the bond was not, in any event, the

measure of the plaintiff's damages. He could only recover the damages averred and proved.—Sedgwick on Damages, 396, 416.

5. The release of Breitling's estate operated as a discharge of his sureties and co-sureties.—2 Amer. L. Cases, 146; 1 Ala. 23; *Hays v. Ward*, 4 Johns. Ch. 123; 11 Wendell, 312; 2 Bailey, 531; 2 Grattan, 144; 1 Blackf. 392.

6. The defendants were entitled to a credit for the Confederate currency paid to the State treasurer in 1864, as those funds were proved to have been accepted in part payment.

W. M. Brooks, *contra*. (No brief on file.)

B. F. SAFFOLD, J.—The facts of this case pertinent to the issues to be decided are these: The Marengo Plank or Covered Road Company, incorporated February 5, 1850, applied for and received a proportion of the two-per-cent. fund, under an act passed February 9, 1850, disposing of the portion unappropriated at that time, subject to the conditions prescribed in an act passed January 23, 1845, to loan the two-per-cent. fund to the Montgomery & West Point and Tennessee & Coosa Railroad Companies. In consideration of this loan, the said company executed two bonds, with the defendants as sureties, on the 13th of December, 1853. Both recite that they are made under the 1st and 10th sections of the act of January 23, 1845. The first of these sections required a bond or bonds, with sufficient security, for the payment of the money at the end of ten years from the date of the bond, with five per cent. interest for the last five years of the time. The second authorized the governor to demand additional security at any time, if he deemed it necessary, and on the failure of the company to give the additional security within sixty days, the bond or bonds already given should be considered due, and the governor should institute suit for the recovery of the money.

The bonds, however, differed from each other in some important particulars. One of them, the foundation of

this suit, was conditioned, that the said Plank Road Company should complete their road within fifteen years from the date of their charter, make an annual report to the governor of the extent of the construction of the road, and of its condition, and the amount of said fund expended, to whom paid, and for what purpose applied; for the faithful application of the money, with due diligence, to the construction of the road; and the fulfillment of the conditions expressed in the fourth, fifth, sixth and seventh sections of the act of 1845. The substance of the fourth section (the report to the governor) has already been stated. The fifth section, after enumerating the terms above stated, contains the additional provision, that if the money loaned should not be faithfully applied, with due and proper diligence, to the construction of the road, the governor is required to institute suit upon the bond or bonds mentioned in sections two and three for the recovery of the money loaned. The said sections require bonds for the completion of the road within the time specified by the charter. The sixth section authorizes the company to give bond for the ultimate payment of the money. The seventh section makes all the bonds given under the act a lien upon the road.

The other bond stipulated for the return of the money within ten years. In default for sixty days of additional security on demand of the governor, both bonds were to become due. The first was also, by its terms, to be considered due on a breach of any of its conditions.

The suit was commenced September 6, 1860, and was founded exclusively on the first bond. The only breach averred was the failure to report annually to the governor, as required by the fourth section. At a term of the court held in October, 1860, the complaint was amended by inserting therein these words: "For that, whereas the plaintiff, by the governor of the State, heretofore, to-wit, on the 13th day of December, 1853, lent to the Marengo Plank or Covered Road Company, a corporation, the sum of $9,470.47 of the fund hereinafter specified, under and by virtue of the acts of the legislature of the State and the

bond of the defendant hereinafter specified." Under this amendment the second bond was given in evidence.

From the above statement, it is plain that the second bond was not due at the time the suit was commenced, whether by the expiration of the time for which the money was lent, or the failure to give additional security, none having been required. If the amendment of the complaint was intended as an incorporation of this second bond into the foundation of the suit, it would present the case of a suit upon a cause of action accrued after its commencement, at least, without the averment of some breach by which it became sooner due.

Both of the bonds might have been considered as one, because together they scarcely comply with the provisions of the act under which they were executed. They might have been included in the same complaint, with averments of proper breaches, if such existed. The only breach assigned is the failure to make annual reports to the governor. This was a breach of the first, but not of the second. The first contained no provision for the repayment of the money. It was a penal bond, falling due on its breach, and recoverable upon to the extent of the damage sustained.

The act of 1845 required the recovery of the money before the time for which it was loaned, in two instances only. One, when the governor became satisfied that the company was not faithfully and diligently applying it to the construction of the road. This was to be a condition of a bond to secure the completion of the road within the time required by the charter, as provided in section 2. The other, when default was made in giving additional security. The money being due on the commission of these breaches, the most evident course seems to be to include in the complaint the bond securing the payment of the money, and, regarding both as one, allege the reasons why it has become due. This may be done by amendment of the complaint, if the facts justify it.

Sedgwick says, that in the case of an agreement to do, or refrain from doing any particular act, secured by a pen-

alty, the amount of the penalty is in no sense the measure of compensation; and the plaintiff must show the particular injury of which he complains, and have his damages assessed by a jury. It may, therefore, be laid down as a settled rule, that no other sum can be recovered under a penalty than that which shall compensate the plaintiff for his actual loss.—Sedgwick on Damages, 396, 410. Section 2633, Revised Code, requires the assignment of such breaches as the plaintiff may deem proper, and authorizes a verdict and judgment for such as he may prove; and if judgment be rendered for the plaintiff on demurrer, or by default, a writ of inquiry of damages must be awarded. The court erred in charging the jury, that the failure of the company to make annual reports authorized the recovery of the money lent with interest from the date of the first default.

3. There is no error in the charge that the payment made by McDowell to Graham, as treasurer of the State, in Confederate currency, in 1864, was not a proper credit. The fund loaned was one which the State held in trust, and it was against public policy to allow an insurrectionary government, not recognized by the political department of the United States government as *de facto*, to dispose of the credits of the State.

4. The release of the estate of G. Breitling from further liability on the bonds, did not have the effect to discharge his co-sureties, any further than his liability to them under section 3072, par. 2, of the Revised Code; but to that extent it did. They had a right, under that section, to regard him as a solvent co-surety, and to require of him his proportion of any excess over their respective shares of the common liability which they should pay. From this obligation the creditor could not release him against the other sureties, and, consequently, his demand must be credited, in favor of the co-sureties, with the full amount of Breitling's share as ascertained by section 3072, Revised Code. *Ex parte Gifford*, 6 Vesey, 805; *Klingensmith v. Klingensmith's Ex'rs*, 31 Penn. St. 460; Burge on Suretyship, 386; *White v. Banks*, 21 Ala. 705. The right of sureties

to contribution from each other is the result, not of any implied contract between the parties, but of justice, which divides in equal proportions a common burden voluntarily assumed.

The plaintiff could not deprive the defendants of their interest in the assignment made by the plank-road company to McDowell, and we do not think the release given to Breitling extended so far, or was intended to do so. The discharge was of the liabilities on the bonds. The assignment was of debts due from Breitling to the company.

The judgment is reversed, and the cause remanded.

DeKALB COUNTY *vs.* SMITH.

[ACTION UNDER SECTION 6 OF ACT OF DECEMBER 28, 1868, TO SUPPRESS MURDER, LYNCHING, AND ASSAULTS AND BATTERIES, TO RECOVER DAMAGES FOR WOUNDS INFLICTED BY DISGUISED MEN.]

1. *Act of December 28, 1868; constitutionality of.*—The act to suppress murder, lynching, and assaults and batteries, approved December 28, 1868, is not unconstitutional.
2. *Same, damages given by; need not be presented for allowance.*—The damages given by it against a county are not such claims as must be presented to the commissioners court before suit is brought.
3. *Witness, impeaching or sustaining of; to what examination may extend.* In impeaching a witness, or sustaining him the examination is not confined to his general character for truth, but may extend to his general character.
4. *Same; what question may be asked of impeaching witness.*—In a suit against a county for damages for assault and battery, under the act of December 28, 1868, the plaintiff having given evidence of an assault and battery upon him by unknown and disguised persons, and the defendant having assailed his character for truth, it is not error to allow him, in support of his testimony, to prove by the impeaching witness, on cross-examination, that although he did not know of any enemies the plaintiff had in the neighborhood, he was *of the opinion, from rumor*, that he did have some.

APPEAL from Circuit Court of DeKalb.
Tried before Hon. W. J. HARALSON.

This was an action commenced on the 6th of December 1869, by appellee against the county of DeKalb, under the provisions of section 6 of "an act to suppress murder, lynching, and assaults and batteries," approved December 28, 1868, to recover $1,000 damages for the beating and wounding of the plaintiff, on the 22d of May, 1869, by one or more persons, unknown and in disguise, to force plaintiff to consent to leave the neighborhood, &c., &c.

The defendant demurred—1st, because the complaint does not aver that the claim sued on was presented to the commissioners court of DeKalb county, as required by section 2537 of the Revised Code; 2d, because the complaint discloses no valid cause of action, the statute under which it is brought being unconstitutional. The demurrer was overruled.

The defendant then pleaded, in short by consent—

"1. The general issue.

2. That the claim sued on is barred by the statute of limitations of twelve months, under section 909 of the Revised Code, for non-presenation for allowance.

3. That the claim sued on was not presented to the commissioners court of the county of DeKalb, as required by sections 909 and 2537 of the Revised Code.

4. That the plaintiff hath not sustained damage to the value or amount claimed.

5. The beating and wounding of plaintiff complained of, if done at all, was done by one in defense of a prior assault made by the plaintiff upon the person of said ——.

6. The wounding complained of, if any was inflicted upon plaintiff, was done by himself."

The plaintiff took issue upon the first plea, and demurred to the other pleas upon the following grounds:

As to the second and third pleas, because there is no law requiring the presentation of the claim sued on to the commissioners court.

As to the fourth plea, because the amount of the recovery is fixed by the statute authorizing the suit.

As to the fifth plea—1st, because it is void for duplicity; 2d, it denies and avoids, instead of confessing and avoiding; 3d, there is no justification in the matter alleged.

As to the sixth plea, because it is void for duplicity, and is a departure.

The court sustained the demurrer, and the cause proceeded to trial on issue joined on plea of the general issue.

The plaintiff, who was examined as a witness in his own behalf, testified that while plowing in his field on the 25th day of May, 1869, some twenty or thirty disguised persons came to plaintiff where he was plowing in his field, and fired upon him, one shot wounding plaintiff in the thigh, disabling him for several weeks. The physician called in to attend the wound, testified that plaintiff then stated in substance what plaintiff testified on the trial; that he (the physician) visited the ground shortly afterwards, and saw tracks of a considerable number of men; that he saw bullet marks on the trees, which came from the direction of the assailants and struck the tree behind which plaintiff stated he took refuge. This was the substance of the testimony offered by the plaintiff.

After this, one Lankford was called to the stand, and, as the bill of exceptions states, testified that "he knew plaintiff, and knew plaintiff's general character for truth and veracity in the neighborhood in which plaintiff lives; that his said character is bad; that from his knowledge of plaintiff's general character for truth and veracity, he (witness) could not believe plaintiff upon his oath."

"Plaintiff then asked said witness if plaintiff did not have many enemies in his neighborhood; to which question defendant objected, the court overruled the objection and allowed witness to answer, and defendant excepted; witness answered that he did not know. Plaintiff then asked said witness if he did not know from rumor that plaintiff had many enemies in his neighborhood; to which defendant objected, the court overruled the objection, and de-

fendant excepted; witness testified that from rumor he was of the opinion that plaintiff had some enemies in the neighborhood; to which defendant objected, the court overruled the objection, and defendant excepted."

"Defendant examined one J. Cunningham as witness, who testified that he knew plaintiff; knew his general character for truth and veracity in plaintiff's neighborhood, and that his general character for truth and veracity was bad; and that from his knowledge of plaintiff's general character for truth and veracity, witness could not believe plaintiff upon his oath."

"On cross-examination of said Cunningham, plaintiff asked him if he had not heard persons in plaintiff's neighborhood say that plaintiff would be attacked. Defendant objected, the court overruled the objection, and witness answered he had not. Plaintiff then asked said witness if he had not heard a good many persons in plaintiff's neighborhood say they expected plaintiff would be attacked by violence; to which defendant objected, the court overruled the objection, and witness testified that he had heard some persons say they expected he would be attacked, and defendant objected and excepted. Plaintiff asked witness if he had not heard some persons say they did right in shooting plaintiff; to which defendant objected, the court overruled the objection, and witness testified that he had heard some say they approved of it; to which defendant objected and excepted. Plaintiff then asked witness if, in his opinion, a good many approved of it, and witness was permitted, against defendant's objection, to testify that in his opinion some approved of it, and defendant excepted."

"Plaintiff placed one T. J. Nicholson on the stand, as witness to sustain plaintiff's character, and asked witness if he knew plaintiff's general character in the neighborhood where he lived for truth and veracity, and for honesty and dishonesty; to which defendant objected as asked, upon the ground that defendant had confined the examination as to character to plaintiff's character for truth and veracity alone, although the court ruled the predicate to be, was his character good or bad? and plaintiff should not be

allowed to show plaintiff's character as to honesty or dishonesty. The court overruled the objection, and allowed witness to answer that the general character of plaintiff was good; to all of which several rulings of the court the defendant objected and excepted."

The errors assigned are—

1. Overruling demurrer to complaint.
2. Sustaining demurrer to pleas.
3. Allowing witnesses to answer questions to which defendant objected, as shown in the bill of exceptions.

M. J. TURNLEY, for appellant.—(Appellant's brief did not come into Reporter's hands.)

FOSTER & FORNEY, *contra*.—The act is constitutional. 44 Ala. 639.

The claim is not required to be presented.—46 Ala. 118.

Argument is hardly necessary to show that the other pleas of the defendant to which a demurrer was sustained were fatally defective.

In impeaching or sustaining a witness, the inquiry is not limited to his general character for truth, but may extend to his general moral character. The sustaining witness answered the precise question which this court say is the correct one.—*Ward v. The State*, 28 Ala. 53.

An impeaching witness may be cross-examined as to the grounds of his opinion. How long the unfavorable reports have prevailed, from what particular persons he has heard them, whether the persons who spoke against the witness are not his personal enemies.—*Lower v. Winters*, 7 Cow. 265: see, also, cases in Phil. on Ev. Pt. 2, vol. 4, p. 757.

B. F. SAFFOLD, J.—The act "to suppress murder, lynching, and assaults and batteries," approved December 28, 1868, is not unconstitutional.—*Gunter v. Dale County*, 44 Ala. 639.

The penalties given by it against a county are not such claims as are required to be presented to the court of county commissioners before suit is brought.—*Dale County v. Gunter*, 46 Ala. 118.

The demurrer of the plaintiff to the defendant's pleas was properly sustained. The fourth, fifth and sixth pleas amounted to the general issue. The second and third presented the same issues contained in the demurrer to the complaint, and considered in the first two propositions above stated.

The rule of examination in respect to an impeached witness, as declared in *Ward v. The State*, 28 Ala. 53, seems to be just and proper. The general character of a witness for truth and veracity is often so intermixed with his general moral character in the mind of an impeaching or sustaining witness as to be undistinguishable by himself. Besides, the point and purpose of the examination is attained by the concluding portion of the question, whether, from such knowledge, he would believe him on his oath.

The plaintiff, who was examined as a witness in his own behalf, was allowed to ask a witness called to impeach his testimony, on cross-examination, whether he did not know from *rumor* that the plaintiff had many enemies in his neighborhood? The answer was, that from *rumor* he was of the *opinion* that the plaintiff had some enemies in the neighborhood. The plaintiff had sworn that while in his own field he had been shot at and severely wounded by twenty or thirty persons in disguise. The defendant sought to discredit this story, by showing that he was unworthy of belief. The question and answer objected to certainly tended to corroborate his statement under very peculiar circumstances. His complaint was, that he had been injured by persons unknown and disguised, and he proved by this impeaching witness that he had unknown and concealed enemies. Those who would select such a mode of injuring or killing another, would also conceal their animosity towards him, as well as their participation in the crime; and the fact that there was a popular report, or current story, with or without any known authority for the truth of it, that a person had such enemies, would tend greatly to strengthen his evidence that he had been attacked by such persons.

The judgment is affirmed.

GAINES ET AL. *vs.* SHELTON.

[ACTION ON PROMISSORY NOTE.]

1. *Promissory note; what instrument may be declared on as such.*—A contract in the form of a promissory note for the hire of a slave may be declared on as a promissory note, notwithstanding, besides the promise to pay a sum certain in money, there is also a promise in the same instrument to furnish the slave with certain articles of clothing, pay his taxes, and return him to the owner at a stipulated time. Nor is it necessary that any notice be taken in the complaint of the latter stipulations, where no recovery is sought upon these stipulations.
2. *Written contract; what questions tend to vary, modify, and change.*—In such a suit, the pleas, being in short by consent, "general issue, failure of consideration, want of consideration and frauds", the plaintiff having offered in evidence the note and rested his case, the defendant, having offered at the time of asking the questions no evidence in support of his pleas, offered to ask a witness the following questions: "State the contract in full that was made between you and plaintiff in reference to the hire of this negro, at said time and cotemporaneous with the signing of said instrument. Was there a warranty of soundness given by plaintiff? Did not said warranty form, in part, the consideration of said agreement or contract? Was not said warranty a part of contract?" &c.,—*Held*, that the court properly refused to permit an answer to the questions, as they tended to add to, vary and change the written contract between the parties.
3. *Consideration; when inquiry as to precluded.*—Where the parties have fixed the consideration, and stated it in the contract as a part of the agreement, this precludes an inquiry into the question of a failure of consideration, unless there is fraud, misrepresentation, or deceit.

APPEAL from the Circuit Court of Greene.
Tried before the Hon. LUTHER R. SMITH.

THIS was an action of debt by the payee against the makers of a promissory note, for $200, dated 28th of January, 1860, and payable January 1st, 1861. The complaint pursues the form laid down in the Revised Code in such a case.

Defendants pleaded in short by consent, "general issue; want of consideration; failure of consideration, and

frauds." There was a jury trial, and verdict for the plaintiff.

Plaintiff offered in evidence an instrument, of which the following is a copy:

"'$200 Greene County, Ala., 28th January, 1860.

"'For the present year's hire of a negro man, Jackson, we promise to pay Mr. John C. Shelton, on the 1st of January next, two hundred dollars, and to provide the said slave with two suits of summer clothes, one suit of winter clothes, two pairs of shoes, a hat and blanket; also, to pay his taxes, and return him to the said Shelton the 25th of December, 1860. This negro is hired to work on the plantation now occupied by Fountain Gaines, and not elsewhere. (Signed,) Fountain Gaines and Robert Taylor.' To the introduction of said instrument defendant objected, because the same did not support the cause of action declared on. The objection was overruled, and plaintiff read said instrument to the jury, and without other evidence rested his case. The defendant was then placed upon the stand as a witness, to whom the following questions were propounded: State the contract in full that was made between you and plaintiff in reference to the hire of this negro? At said time, and cotemporaneous with the signing of said instrument, was there a warranty of soundness given by plaintiff? Did not said warranty form, in part, the consideration of said agreement or contract? Was not said warranty a part of the contract? What was the consideration of said contract? Has or not the consideration of the same wholly failed? Has it partially failed? To each of these said several questions the plaintiff objected. 1st, because the answers to same tended to add to, vary and change the written contract between the parties, and that the same could not be so added to, varied and changed by parol evidence. His objections were sustained, to each and all of said questions, by the court. To all these several rulings of the court the defendant excepted. This was all the evidence. The court then charged the jury, 'that the instrument read to them by plaintiff was sufficient to sustain said cause of action, as

declared on; that all other understandings and agreements between the parties were merged in the written contract read to them; that the same could not be varied, changed or altered by parol testimony; and that the defendant must prove fraud to make it a defense, and that no warranty was expressed in the face of the instrument.' To all of which defendant excepted."

The matters excepted to, and the charge, are now assigned as error.

PIERCE, MORGAN & JOLLY, for appellant.—1. The rule is, that the contract must be stated correctly, and if the evidence differ from the statement, the whole foundation of the action falls.—See 1 Chit. Pl. 304, note 1, and authorities cited.

This contract is not correctly described in the complaint, nor stated according to its legal effect. Hence, the court erred in permitting the same to go to the jury as evidence.

2. The defendant Gaines should have been permitted to state the contract in full between the parties, and what the full consideration of the same was, as understood and agreed at the time of the execution of the written instrument.—*Corbin v. Sistrunk*, 19 Ala. 203; *Newton v. Jackson*, 23 Ala. 335; 2 Par. Contracts, note *y*; 5 Md. 121; 12 Texas, 49.

It is evident that the object of the testimony was not to change or alter the terms of the written contract in any particular, but to show to the jury what the contract really was between the parties, and the entire consideration thereof.

3. The court certainly erred in not permitting the questions to be asked as to whether the consideration of the contract had failed in whole or in part.—*Long v. Davis*, 18 Ala. 801; *Corbin v. Sistrunk*, 19 Ala. 203.

4. The court erred in his charge to the jury. It is certainly a novel idea that fraud in a contract must be proved before a party can get the benefit of the legal defenses of want and failure of consideration.

J. B. CLARK, *contra.*—The declaration was well laid. *McRae v. Raser*, 9 Porter, 122, and the authorities there referred to.

The answers to the questions put to the witness tended to add to, vary and change the written contract between the parties.—*Cowles v. Townsend & Milliken*, 31 Ala. 133, 428; *Mead v. Steger*, 5 Porter, 498.

PETERS, J.—1. There can be no doubt, that such an instrument as this contains several stipulations, a breach of any one of which would constitute a cause of action; and in declaring on it the plaintiff may assign a breach on any single one of them.—Rev. Code, § 2633. The first stipulation of the contract above set out is a promissory note, and it has been so treated by this court from an early day.—*McRae v. Raser*, 9 Port. 122; *S. C.* 5 Smith Cond. Ala. Rep. 435; *Winston v. Metcalf*, 7 Ala. 837; Story on Prom. Notes, p. 1. There was, then, no error in overruling this objection.

2. The language of the bill of exceptions as to the evidence proposed is somewhat uncertain. In such case it will be so construed, if possible, as to sustain the ruling of the court.—23 Ala. 345.

The plaintiff objected to the defendant's attempt, as is shown in the bill of exceptions, "because the answers" to the defendant's questions "tended to add to, vary and change the written contract between the parties, and that the same could not be so added to, varied and changed by parol evidence." On these grounds the court sustained the objection. This was certainly correct.—Shepherd's Digest, p. 599, § 1.

It is true, that all contracts are subject to be impeached for a *want* of consideration in the first instance; because where there is no consideration, there is no contract. It is *nudum pactum*, and has no obligation which the law will enforce.—2 Bl. Com. 446; *Sturgis v. Crowningshield*, 4 Wheat. 197, MARSHALL, C. J.; 1 Pars. Con. p. 52; *Beal v. Ridgeway*, 18 Ala. 117; *Holt v. Robinson*, 21 Ala. 106; Rev. Code, § 2632. And so me contracts may be impeached

for failure of the consideration, in whole or in part.—*Long v. Davies*, 18 Ala. 801; 1 Pars. Con. 462, 5th ed. and notes. It is presumed, however, that this latter rule is not general, but only applies where the consideration consists of several parts, which can be apportioned. Where the consideration is entire, as is the case here, (18 Ala. 441), if it is sufficient at the making of the contract, it cannot fail, because the consideration turns out to be less valuable than was expected. In such a case, where the parties have fixed the consideration themselves, and stated it in the contract as part of the agreement, this precludes an inquiry into the question of a failure of the consideration, unless there is fraud, misrepresentation or deceit.—1 Pars. Con. 456, *supra*. Because there can be no failure of consideration, when a party gets what he contracted to receive. The hiring of a slave for a fixed period of time imposes upon the hirer a liability to pay the price agreed on at the time it may fall due, unless the person who hired out the slave defeats the contract by his own conduct. The consideration in this instance is the right to use the slave for the time agreed upon. It is a sale of his services for the time fixed by the agreement of the parties.—*Ricks v. Dillohanty*, 8 Port. 133; *Perry v. Hewlett*, 5 Port. 319. If the right to convey this exists at the time of the hiring, and it is actually conveyed, there can be no failure of consideration afterwards; because it cannot be said that the party, to whom the slave was hired, did not get what he purchased.—1 Pars. Con. 465, *supra*. Here it was not attempted to be shown that the consideration mentioned was not the true one, or that there was a total want of consideration in the beginning, or that the contract had failed by the conduct of the plaintiff, or that there was any fraud or deceit; but it was attempted to be shown by parol that the written contract was different from its written terms, so as to defeat it. This is not allowable, where the consideration, as in this instance, is entire and expressed in the face of the instrument.—*Evans v. Bell*, 20 Ala. 509; *Paysant v. Ware et al.*, 1 Ala. 160.

The action of the court below was in conformity with these principles. Its judgment is, therefore, affirmed.

WILEY, BANKS & CO. *vs.* EWING ET AL.

[BILL IN EQUITY FOR REDEMPTION OF MORTGAGED LANDS.]

1. *Right of redemption, as between several mortgagees.*—Where a debtor executes two or more mortgages on the same tract of land, at different times, to different persons, and for the security of different debts, the junior mortgagee has the right to redeem from the senior mortgagee, by paying his debt, with interest and costs.
2. *Same.*—This is an equitable right, founded on common-law principles, and is entirely independent of the statutory right of redemption given to judgment creditors; and it applies equally to deeds of trust to secure the payment of debts, and to mortgages proper.
3. *Same.*—If the lands have been sold under a decree of foreclosure on the senior mortgage, the junior mortgagee not being a party to the suit, he may redeem from the purchaser at the sale, on paying the amount of his bid, with interest and costs, and the value of all permanent improvements erected by him up to the time of the tender, or offer to redeem; and if the tender is refused, the purchaser is chargeable with the value of the rent from the time of the tender and refusal.
4. *Same; limitation of.*—The right to redeem, in such case, is not governed by the limitation of two years, which is the prescribed bar to proceedings under the statute, but may be asserted at any time while the mortgage is operative.

APPEAL from the Chancery Court of Cherokee.
Heard before the Hon. B. B. McCRAW.

THE bill in this case was filed by the appellants on the 14th March, 1868, against W. T. Ewing, Edith Shehan, (who was the widow of John Shehan, deceased,) Thomas Hollingsworth, and George S. Walden; and sought the redemption of certain lands, which had been mortgaged by said Hollingsworth, at different dates,—first, to D. C. Turrentine, to secure the payment of a debt due to said John Shehan; and afterwards to said Walden, as trustee, to secure the payment of a debt due to the complainants. All the material facts of the case are thus stated in the opinion of the court, as delivered by PETERS, J.:

"Thomas Hollingsworth, of Cherokee county, in this State, incumbered a certain portion of his lands, in said county of Cherokee, in this State, by two deeds in trust, to the trustees therein named, in order to secure the payment of sundry debts therein named. These deeds were executed at different times, to different persons, and for the security of wholly different debts. The first deed, in the order of its execution, was made on the 5th day of July, 1852, and was intended to secure a debt to John Shehan, for $1,961 52, due by promissory note, on the 25th day of March, 1853. This deed was to Daniel C. Turrentine, as trustee. The second deed, in the order of its date, was executed on July 6, 1855, and was made to secure a debt to Wiley, Banks & Co., for $4,659 53, owing by promissory note of like date with the deed, and falling due in six months from the date of said note last said. Both these deeds were acknowledged, and recorded; the former on the 10th day of August, 1852, and the latter on the 31st day of January, 1856. It does not appear when the second deed was deposited in the office of the proper county office for record. This deed was to Walden as trustee.

"On the 5th day of March, 1863, Ewing purchased the lands mentioned in said deed to Walden, for the security of the claim of Wiley, Banks & Co., from Hollingsworth, and paid him $7,000 in Confederate money for the same, as is shown by his deed; but the debt to Shehan, and some other debts, were to be discharged out of this sum. Confederate treasury-notes were then worth about thirty-three and one-third cents in the dollar. Under his purchase thus made, Ewing went into possession of said lands, and has so remained since. Shehan died; and after his death, on the 27th day of May, 1863, his widow, Mrs. Shehan, as his executrix, and said Turrentine, said trustee, filed their bill in the rebel chancery court of said county of Cherokee, in this State, to foreclose the deed to Turrentine as trustee by a sale of the lands therein conveyed. Wiley, Banks & Co., and said Walden, their trustee, were not made parties to this suit, so instituted in said rebel court. There was a decree in this suit last said in favor

of the complainants, and the lands aforesaid were ordered to be sold by the register. At this sale by the register under said decree, Ewing became the purchaser, and took the deed of the register. This deed last said bears date October 5, 1863. Before this, on October 3, 1863, Ewing had purchased from Mrs. Shehan, and her trustee, Turrentine, said decree under which said lands were sold to him by the register as aforesaid. Ewing appeared at the register's sale, and, as owner of said decree, demanded specie from the purchaser, and bid off the lands sold for himself for the sum of $2,782 28, 'principal and interest, with interest from decree, together with costs." This sale was not reported by the register to said rebel court, as required by the decree ordering it, but it was reported and confirmed on petition of Ewing in the court of chancery of said county of Cherokee on January 5, 1869. Ewing paid no money on the sale to him by the register, which was returned into court, but took the register's receipt for $2,782 28 in gold. But it does not appear that any gold was really paid, otherwise than by said receipt. Neither Wiley, Banks & Co. nor their trustee, Walden, were parties to this proceeding on petition, or in anywise assented to it, or had any proper notice thereof.

"After this, on the 2d day of August, 1867, as the proof shows, Wiley, Banks & Co. offered to redeem the lands thus sold to Ewing, and tendered to Ewing, when said offer was made, the amount of his debt or decree purchased by him from Mrs. Shehan and her trustee as aforesaid. In the bill this offer to redeem and tender is stated in the following words: "Complainants state, 'that on the —— day of September, 1867, they, by agent, J. L. McConnell, tendered to the said W. T. Ewing an amount of money more than sufficient to pay back to him his bid at said register's sale, with ten per cent. thereon from the time of said sale, and all lawful costs and charges connected with the redemption of the same, and more than the value of all the improvements made by said Ewing on said land, and offered to credit orators' deed in trust with a sum of money at least equal to ten per cent. on the amount bid by said

Ewing for said lands, and proposed to said Ewing to redeem said lands on said terms; which said offer and tender the said Ewing then and there refused. Orators state that the amount of money so tendered by them was the sum of four thousand dollars in legal currency, which said sum, or any other amount found due, orators propose to pay into court, as your honor may direct, and propose to credit their deed in trust with ten per cent. or any other sum your honor may direct.' The prayer was for any relief applicable to the facts of the complainants' cause.

FOSTER & FORNEY, for appellants.—1. Ewing's claim as a purchaser, under his deed from Hollingsworth, is subordinate to the complainants' mortgage, of which he had notice, both actual and constructive.

2. His purchase under the decree of foreclosure does not bar the complainants from relief. They were not parties to that suit, and their rights are not affected by it. They have the right to redeem from the purchaser, on paying him the amount of his bid.—*Haines v. Beach*, 3 John. Ch. 469; *Swift v. Edson*, 5 Conn. 531; 2 Hilliard on Mortgages, 151, § 154; 2 Ala. 422; *Judson v. Emanuel*, 1 Ala. 598; 11 Paige, 28.

3. The complainants' demand was not barred by the statute of limitations, nor obnoxious to the charge of staleness.—*Johnson v. Johnson*, 5 Ala. 90; 2 Hilliard on Mortgages, pages 6–26.

WALKER & MURPHEY, *contra*.—1. On the facts set forth in their bill, the complainants have no equitable right of redemption, and no statutory right of redemption. To entitle them to redeem, they must perform all the acts which would have been required of Hollingsworth, as they can have no other or greater rights than he had.

2. The allegation of tender is insufficient. It does not aver the tender of any specific amount, and it applies only to improvements made by Ewing. The tender should have been of a precise sum, and should have covered all im-

provements made by Ewing and those from whom he purchased, with all lawful charges, &c.—Rev. Code, § 2511.

3. The complainants were not judgment creditors; consequently, they were not entitled to redeem under the statute.—Rev. Code, § 2513; *Branch Bank v. Furniss*, 12 Ala. 367; *Thomason v. Scales*, 12 Ala. 309; *Freeman & Warren v. Jordan*, 17 Ala. 500.

4. Whatever statutory right ever existed in them, was barred by the limitation of two years.

5. Ewing, by his purchase at the sale under decree in chancery, superadded the right of a purchaser under a foreclosure suit to his rights as the owner of the prior incumbrance in favor of Shehan, by transfer of the decree of foreclosure to him. His rights, both as purchaser under the decree of foreclosure, and purchaser of the mortgage debt secured by the decree of foreclosure, were as complete in him as they would have been in him as purchaser at the sale and Mrs. Shehan as owner of the mortgage debt, in the absence of his purchase of the mortgage debt and decree of foreclosure. As a preliminary to the redemption by Wiley, Banks & Co., as subsequent incumbrances, it is indispensable that they shall extinguish the two prior rights existing in Ewing as a purchaser at the register's sale, and as a purchaser of the decree of foreclosure and mortgage debt of Mrs. Shehan. Before redemption, Wiley, Banks & Co. must perform unto Ewing the same duty which they would have been required to perform unto Mrs. Shehan, in the event Mrs. Shehan had remained the owner of the mortgage debt and decree of foreclosure; and also to perform unto Ewing all that was due to him as a purchaser at the register's sale. Where a sale has been made under such a decree as was had in this case, a subsequent incumbrance can only sustain a bill of redemption upon the payment to the purchaser of the purchase-money paid by him on the register's sale, and the further payment of so much of the mortgage debt as remains unsatisfied by the sale. This proposition is sustained by the decision in *Gliddon v. Andrews & Bros.* (14 Ala. 733.) To sustain such a bill for redemption, it would

be further requisite that Wiley, Banks & Co. should pay all expenses incurred in a chancery suit. Furthermore, a tender of the payment of these liabilities was requisite to be made before filing complainants' bill.—*Daughdrill v. Sweeny*, 41 Ala. 310.

6. The complainants have forfeited whatever rights they once had, by their own laches, which has resulted in the loss of a portion of the property covered by their deed, on which Ewing had no claim. Having lost their separate security, through their own fault, they can not be allowed to participate in the common security embraced by both deeds.

7. The deed of trust to Wiley, Banks & Co. is fraudulent and void, both on its face, and under the proof.—Revised Code, § 1861; *Reynolds v. Crook*, 31 Ala. 634; *Beall v. Williamson*, 14 Ala. 55; 10 Ala. 137.

PETERS, J.—A deed in trust, for security of the payment of a debt, is to be treated as a mortgage. It is, in fact, a conveyance of an estate, by way of pledge, for the security of a debt, to become void on its payment.—4 Kent, 147; 1 Hilliard on Mort. 1, 2, 3; Adams' Eq. 122 (126). Where there are several mortgages on the same land, all the mortgagees are entitled to the benefit of the security. The first (or senior) mortgagee may foreclose, and sell the land for the payment of his debt; but it is also the right of the second (or junior) mortgagee to redeem from the first, or pay off his debt, and then foreclose and sell the pledge, for the payment of his own debt; and so on to the end of any number of mortgagees.—*Cullum v. Ewing*, 4 Ala. 452. Hence, in a suit for foreclosure, all the mortgagees must be made parties, in order that they may, if they choose, exercise this right of redemption.—2 Ala. 415, 420; Story Eq. Pl. 177, *et seq.* This is the legal purport of the contract. And every person who buys or sells property in this State, must be presumed to know the law governing the contract by which the title passes, and that in such case he buys a defeasible title. *Ignorantia juris, quod quisque tenetur scire, neminem excusat.*—2 Bl. Com.

(Cooley's Ed.) p. 313, at bottom; Broom's Max. 190, *et seq.* The law of such contract enters into it, as if it were a stipulation of the contract itself.—4 Wall. 535, 550.

The common law, as modified by our constitution and our statutes, is a part of the law of this State, so far as applicable to our institutions and government.—*Barlow v. Lambert*, 28 Ala. 704; Shep. Dig. p. 475, and cases there cited under title, COMMON LAW. At common law, the rule in reference to mortgages applies. And if the senior mortgage has been foreclosed by a decree and sale, and the junior mortgagee has not been made a party to the foreclosure suit, he is not barred of his right to redeem. In such case, the junior mortgagee, notwithstanding the decree and sale under the senior mortgage, can file his bill against the purchaser to redeem. This is an equitable right, that has nothing to do with our statute of redemptions.—*Haines v. Beach*, 3 John. Chan. R. 459; *Swift, Ex'r, v. Edson*, 5 Conn. 531; 2 Hilliard Mort. p. 131, § 48; *Judson v. Emanuel et al.*, 1 Ala. 598, 601; ORMOND, J., *arguendo*, 2 Ala. 420, *supra.*

In the case of *Haines v. Beach (supra)*, Beach made two mortgages on the same lot of land: one to Gardner, in December, 1804; the other to Brazier, in March, 1811. In April, 1815, Gardner, the senior mortgagee, filed his bill for foreclosure and sale; and a decree for sale was made in September, 1815; and the premises were sold by the master, under the order of the court, in November, 1815, and Field became the purchaser, and took the master's deed. Brazier died. Then a bill was filed by the executors and heir and devisee of Brazier, the junior mortgagee, against Field, the purchaser under Gardner's foreclosure and sale. Field put in his answer and plea, admitting the senior mortgage to Gardner, and the bill and decree and sale of the premises to him by the master for $1,508, and the deed of the master to him for the premises, of which he was put in possession, and pleaded the same in bar of the suit against him. This defense was deemed insufficient by Chancellor Kent, who presided on the trial, and the junior mortgagee was permitted to re-

deem, notwithstanding the sale by the register, and his deed to Field. This case is almost precisely parallel with the case at bar.

The purchase by Ewing from Hollingsworth, the mortgagor or grantor in the deeds in trust, does not alter the case. Both the trust deeds, in this case, were recorded long before the accrual of the right of Ewing, under his purchase from Hollingsworth.—Rev. Code, § 1558; *Gimon v. Davis*, 36 Ala. 592, 589; Shep. Dig. p. 700, § 24, *et seq.* Besides, the proofs satisfy my mind that Ewing had sufficient actual notice of these deeds, at the time of his purchase, to put him on his guard. This was enough.—Adams Eq. 158, and notes. Hollingsworth swears that he gave Ewing actual notice of the trust deed to Wiley, Banks & Co., at the time of the sale; Ewing admits, in his first answer, that he was told by Hollingsworth, "prior to the purchase of said lands, that the deed in trust upon said lands, held by the complainants, had been fully paid off and satisfied." Cain's evidence corroborates this statement. Ewing's *amended* answer and *his* own deposition can not be permitted to overturn this deliberate admission and the testimony of two witnesses, who establish its truth. The evidence overbears his denial that he had no notice.

The proofs show that the trust deed to Wiley, Banks & Co. was not a conveyance to secure a debt *created* at the date of the conveyance. Though the note and the mortgage bear the same date, it is very evident that the debt had been created and contracted long before, as a mercantile debt for goods purchased from the complainants. It is not, then, affected by the Code.—Rev. Code, § 1557.

It is also insisted, that the right of Wiley, Banks & Co. to redeem is barred by the statute of limitation, or by the staleness of their claim. I do not think so. The claim under the deed is not barred short of ten years. It is an instrument under seal.—Rev. Code, § 2900. After deducting the period of time covered by the supremacy of the rebellion, ten years had not elapsed before the bill was filed.—*Coleman v. Holmes*, 44 Ala. 124. The right to re-

deem, in this case, depends upon the mortgage or trust deed, not upon the statute, and it subsists as long as the mortgage is not barred. The note was not barred, as there were partial payments made upon it as late as July, 1860, and by Hollingsworth himself in March, 1858. These payments remove the bar of the statute.—Revised Code, § 2914.

The limitation of two years, which applies to redemptions under the statute, does not apply to such a case as this. The two cases are not at all the same. Under the statute, only *judgment* creditors can redeem.—Rev. Code, §§ 2513, 2515; *Thomason v. Scales et al.*, 12 Ala. 309. Here, the *mortgage* creditor only can redeem, because the right is dependent on the mortgage.—4 Ala. 452, *supra*. Under the statute, a tender of the bid of the purchaser and ten per cent. thereon per annum, together with all lawful charges, and an offer to credit the debtor with ten per cent. on the original bid, upon some subsisting judgment against him, is required to perfect the right to redeem. This may be a very small sum, as it is admeasured by the bid of the purchaser, and not by the whole debt of the mortgagor.—Revised Code, §§ 2509, 2513, 2515. But here, the second or junior mortgagee must pay off the whole mortgage debt of the senior mortgagee, if the redemption is from him, with costs and charges; and if from the purchaser, then the sum paid by him on his purchase, at the register's or master's sale under the decree of foreclosure, and interest thereon up to the offer to redeem and tender, with his costs, and also the value of the permanent and useful repairs made by such purchaser (Ewing) on the mortgaged premises, since his purchase and prior to the offer to redeem and tender. This is quite different from the proceedings under the statute. The statutory remedy is, therefore, only cumulative, and not intended to repeal the remedy in chancery at common law. Both are intended to favor the debtor, and prevent the sacrifice of his property at much less than its real value. And the right is dependent on the contract of mortgage.

An offer to redeem and tender in the legal-tender treas-

ury-notes of the United States is sufficient.—Legal Tender Cases, 11 Wall. 682.

Nothing is intended to be said about the validity or the invalidity of the decree of the rebel court, under which Ewing purchased, nor of the irregularities of the sale or its confirmation. These are questions that need not be considered in this case. It would have been equally the right of the complainants in the court below to redeem from Ewing, had the court been legal and the proceedings regular.

On the facts of this bill, and the foregoing authorities, there can be no reasonable doubt that the complainants in the court below, who are the appellants in this court, have the right, in this case, to redeem. The learned chancellor will make the proper orders in the court below to enable them to do so, and proceed, in the future disposition of this cause, in conformity with the principles laid down in this opinion.—5 Johns. Ch. R. 459, 466; Abbott's Forms, p. 573.

The judgment of the court below is reversed, and the cause is remanded. The said Ewing, appellee, will pay the costs of this appeal in this court and in the court below.

[Note by Reporter.—The following application for a modification of the foregoing opinion was made by appellees' counsel:]

Ewing had two distinct rights in this case—1st, as the purchaser and owner of the Shehan deed of trust; 2d, as the purchaser at the register's sale. It is obvious justice, and also decided law, that to a redemption, it is necessary that redemption should be had from both rights; and such redemption is accomplished by tendering the bid made at the purchase, and also the balance of the senior mortgage debt remaining after deducting the net proceeds of the bid remaining upon judgment of costs and expenses. The law is so settled in *Gliddon v. Andrews*, 14 Ala. 733. I do not suppose that the court intended to decide that there could

be a redemption upon the mere tender of the amount bid at the sale, but I fear the opinion is susceptible of that construction. I therefore respectfully request that the court set forth distinctly in the opinion, that in taking the account Ewing shall be allowed the amount of the net proceeds of the bid, and the balance of the mortgage debt.

PETERS, J.—I have carefully examined the application of the appellee, Ewing, for a modification of the opinion in this case, but I am not able to discover any necessity for it. Ewing is the owner of the decree in favor of Mrs. Shehan, and as such he is entitled, on redemption by Wiley, Banks & Co., to have the full amount of his debt, principal and interest, paid to him, up to the offer to redeem and tender, and his costs. He is also entitled, as purchaser at the register's sale, to the value of all permanent and useful repairs made by him upon the premises after his purchase at the register's sale and his possession under it, and prior to the offer to redeem and tender. 5 Johns. Ch. R. 459, 466. And Ewing should be charged with rents after the offer to redeem and tender.—*Powell v. Williams*, 14 Ala. 476. And if Wiley, Banks & Co. fail to pay Ewing his debt and costs, and for value of repairs, within the time that they shall be ordered to do so by the chancellor—a reasonable time to do so being allowed—then their bill should be dismissed with costs.—2 Abbott's Forms, p. 573.

DUNLAP *vs.* NEWMAN ET AL.

[BILL IN EQUITY BY NON-RESIDENT TO SUBJECT TO PAYMENT OF PROMISSORY NOTE THE ESTATE OF MAKER IN THE HANDS OF HEIRS-AT-LAW.]

1. *Administrator, promissory note payable to; when may maintain action thereon in his own name.*—If an administrator in North Carolina, on his final settlement there, is charged with, and accounts for a note, given to him as administrator, by a resident of Alabama, for property purchased at a sale of his intestate's estate, the note thereby becomes his property, and he may maintain an action on it, in his own name, whether the sale was or was not made by authority of law.
2. *Bill in equity; when may be filed to subject estate of maker of such note, in hands of heirs.*—On the death of the maker of such a note, in this State, if his children, without administration, take possession of and convert his estate to their own use, it becomes a fund in their hands, which the payee of said note may subject to its payment, by a bill in equity filed for that purpose. In such a case, there is no adequate remedy at law.
3. *Administration, court granted by; what allegation sufficient as to.*—In such a bill, it is sufficient to state that the complainant was *duly appointed* administrator in North Carolina, without stating the particular court or authority by which the appointment was made.
4. *Final settlement; what allegation as to, sufficient.*—Where the bill states that the final settlement, &c. was made in the court of pleas and quarter sessions of Moore county, North Carolina, this is sufficient, without stating the said court had jurisdiction to make said settlement. *Prima facie*, it is to be presumed the court had jurisdiction.

APPEAL from the Chancery Court of Clarke.
Heard before the Hon. A. W. DILLARD.

THIS was a bill in equity exhibited by Joseph T. Dunlap, in his own right, against the heirs-at-law of Thomas Boroughs, deceased, and sought to subject the estate of said Boroughs, "which was in the custody and control" of defendants, his children and heirs-at-law, to the payment of a note given by said Thomas Boroughs to said Dunlap, as administrator of Bryan Boroughs, in payment of property purchased by said Thomas at a sale of the effects of said Bryan, on 3d of January, 1855, said Dunlap

having been charged with said note on his final settlement, and there having been no administration or letters testamentary taken out upon the estate of said Thomas Burroughs.

The bill, which was filed October 5th, 1868, omitting the formal parts, was as follows:

"Sheweth unto your honor, your orator, Joseph F. Dunlap, a resident of the county of Moore, and State of North Carolina,—

1st. That one Bryan Boroughs died prior to 1855, in the county and State aforesaid, and that your orator was duly appointed in said State administrator of his estate.

"2d. That at a sale of the effects of the estate of the said decedent, made on 3d day of January, 1855, one Thomas Boroughs, then a resident of the county of Clarke, and State of Alabama, became a purchaser to the amount of eleven hundred and fifteen dollars, and to secure the payment of the purchase-money he delivered to your orator his writing obligatory, executed by him and one E. W. Boroughs, for the said sum of eleven hundred and fifteen dollars, payable to your orator, as administrator as aforesaid, bearing date 3d day of January, 1855, and due six months after the date thereof, which said writing obligatory is hereto attached, marked 'Exhibit A.' [This note was under seal.]

"3d. Your orator further charges, that no part of said note has ever been paid; but that, on the final settlement of the estate of the said Bryan Boroughs, deceased, made in the court of pleas and quarter sessions of Moore county, and State of North Carolina, at the January term of 1860, a decree was rendered against your orator as administrator as aforesaid, in favor of the said Thomas Boroughs, who was one of the heirs-at-law of the said Bryan Boroughs, deceased, for the sum of eight hundred and sixty 78-100 dollars; and on said settlement the amount due your orator by said Thomas Boroughs was accounted for as so much cash in his hands; and your orator further admits, that no part of said decree has been paid by him, because the said Thomas Boroughs, at that time and ever

since, has been owing him a larger amount than the said decree, as is shown by his writing obligatory hereto attached as an exhibit, and marked 'A'; and your orator further states, that he has been willing at all times since the date of the said decree to allow the same as a set-off and a credit on the said writing obligatory, and is now willing to allow the same as a set-off and credit on his said claim, provided the defendants hereinafter named will execute and deliver to your orator a release and receipt in full of said decree.

"4th. Your orator further charges, that the said Thomas Boroughs died in the county of Clarke, and State of Alabama, in the early part of the year 1867, and that there have been no letters testamentary or of administration granted on his estate, and that, therefore, there being no legal representative, your orator is remediless at law to enforce the collection of his claim.

"5th. And your orator further charges, that all the property, both real and personal, which the said Thomas Boroughs left at his death is in the custody of and under the control of his children and heirs-at-law hereinafter named.

"8th. Your orator charges the truth to be, that the said Thomas Boroughs died possessed of real and personal estate, in said county of Clarke, abundantly sufficient to pay all his just debts and funeral expenses, and that the said heirs have possessed and converted the same to their own uses, without making any satisfaction to your orator for his said claim; all which actings and doings of the said heirs are contrary to equity and good conscience, and tend to the manifest injury and oppression of your orator.

"Your orator therefore prays that it may be referred to the register of this court to state an account between your orator and the defendants, and ascertain what may be due your orator on his said claim; and further, that the said heirs may be required to set forth in their answer a full and correct description of all the property, both real and personal, which the said Thomas Boroughs had at the time of his death; and that all of said property, or so much

thereof as may be necessary, except that which is exempt from administration, may, by a decree of this honorable court, be condemned to the satisfaction of your orator's claim; and your orator further prays for such other and further relief as to your honor shall seem meet."

The heirs-at-law were made parties defendant, and required to answer the several paragraphs on oath.

The bill was demurred to on the following grounds:

"1st. That the complaint does not state any good and sufficient reason why the said Dunlap could not and can not assert, at common law, all the rights which he claims under said bill of complaint.

"2d. And because the allegations in said bill furnish no ground for the interference of a court of chancery, a perfect and complete remedy being given by the common law courts.

"3d. And because said bill does not state that the effects of the estate of the said Bryan Boroughs were sold at public sale, and under and by virtue of an order and decree of the court of pleas and quarter sessions of Moore county, and State of North Carolina.

"4th. That the claim set forth in said bill of complaint is a stale one, and on its face exhibits the fact that it is neither recoverable in a court of law, nor in a court of chancery, even if the court of chancery had jurisdiction.

"5th. That said bill is uncertain, informal, and defective, and on its face offers no reason for the interposition of a court of equity, and because there are not sufficient allegations to support it.

"6th. That said writing obligatory was merged in the decree of the court of pleas and quarter sessions of North Carolina, at the January term of said court, 1860, and that no suit in a court of equity can be maintained upon said writing obligatory, but if said Dunlap has any claim or remedy against the estate of the said Thomas Boroughs, deceased, which this defendant does not admit, it would be due and recoverable in a court of law, and not in a court of chancery."

The court sustained the demurrer, and dismissed the bill, and hence this appeal.

WATTS & TROY, for appellant.—The bill has equity, because it was necessary to have a discovery from the heirs of Thomas Boroughs, who had converted the property of Bryan's estate, and they held this property in trust for the benefit of the creditors of said estate.—Story's Eq. vol. 2, §§ 1250, 1251; *ib.* vol. 1, §§ 455, 456, 457; see, particularly, the case of *Ex parte Walker*, 25 Ala. 100, opinion by Judge LIGON; Story's Eq. vol. 2, §§ 827, 828.

The property of the estate of Thomas Boroughs was certainly liable to pay his debts. This property is held in trust by the heirs and distributees of Thomas Boroughs for the payment of debts; the division amongst themselves and the use of it is a conversion by them of a fund which is a trust fund, first, for the payment of debts; and, secondly, for the distributees and heirs of the estate. The heirs have none but an equitable right; the creditors' right is superior to theirs.

Under such circumstances, it is not necessary that the legal remedy should have been exhausted. A simple contract creditor may file a bill for a discovery, and to prevent the heirs from wasting this trust fund.

The fact that the heirs and distributees had refused, for more than two years before the filing of this bill, to have administration granted on the estate, and have taken possession of the whole estate of Thomas Boroughs, gives the court of equity jurisdiction, even although there is no administration. It was the duty of the heirs to have administration.

The complainant in this case was a non-resident of the State, and could not legally be appointed administrator of the estate of Thomas Boroughs.

In the case of *Ex parte Walker, (supra,)* the creditors who filed the bill were simple contract creditors. The fact that some of them had judgments in the State of Georgia, would give them no lien on any property in this State. The fact that the property in the hands of Walker be-

longed to the estate of Watson, of whose estate the complainants were creditors, and was a trust fund, first for the payment of debts, gave the court jurisdiction even against Walker, who was the husband of one of the heirs and distributees of Watson.

Whenever a court of equity takes jurisdiction, even for the purpose of discovery, the court will go further, and render a decree settling the whole equities.—Story's Eq. vol. 1, § —.

The complainant was not barred by the statute of limitations. The note was due 3d July, 1855, and was a note under seal. The remedy was not barred on such a note until ten years had elapsed.—See old Code, § 2476.

Thomas Boroughs resided in Alabama, as the bill shows, and the statute of this State governed.

The time elapsing during the war must be taken out, four years, eight months and ten days, to 21st September, 1865, under ordinance of 1865, and then six months after the death of Thomas Boroughs must also be taken out. So that it is clear that, on the 19th August, 1869, when this bill was filed, the remedy was not barred.

That the right to sue in his own name on the note vested in the complainant, after having been charged with the same on final settlement, is well settled.—*Tompkies v. Reynolds*, 17 Ala. 109; *Waldrop v. Pearson et al.*, 42 Ala. 636.

The court of equity had the right to entertain jurisdiction for the purpose of having the judgment or decree rendered in North Carolina against complainant settled by setting off the note against it.

The distributees of Thomas Boroughs could have asserted a right to this decree, and the only remedy of the complainant to have the note applied to its satisfaction, was in equity.

The facts stated in the bill are sufficient to authorize such relief under the prayer for general relief, especially as the complainant proposes in his bill to set off the note to the decree to the extent of the decree.—*Sharp v. Watson*, 11 Ala. 325.

The court of equity, having this right, could then go

further, and do full justice between the parties, without compelling the complainant to look to another court for the balance of his rights.

A court of equity has jurisdiction for a discovery of assets of an estate, and to prevent their waste.—*Hunly v. Hunly*, 15 Ala. 91; *Ex parte Walker*, 25 Ala., *supra*; *Dement v. Boggess*, 13 Ala. 140.

The distributees of Thomas Boroughs took this property, subject to the rights of creditors of the estate. Their division of the property was equitable and right, and will not be disturbed, except at the instance of creditors. If an administrator were appointed, he could recover the property from each distributee, only for the benefit of the creditors. This bill effects all that an administrator could do, and at much less expense to the heirs. Under this bill each will contribute his share of this debt. *Carter v. Owens*, 41 Ala. 217.

MORGAN, BRAGG & THORINGTON, *contra*.—General certainty is usually sufficient in pleadings in equity, but an exception to this rule exists where the plaintiff states his title to the relief he seeks. The plaintiff's title to the relief he seeks should be stated with great clearness.—Story Eq. Pl., Redf. ed., § 508*a*; *Jerdein v. Bright*, 2 Johns. & H. 325. The exception to the general rule in this respect is one of great strictness. The title of the plaintiff is not shown. The bill shows that he was appointed administrator of the estate of Bryan Boroughs, deceased, but does not show that he was so appointed by any court or authority in law having jurisdiction to appoint him administrator of said estate, nor does the bill show that appellant ever qualified as administrator of said estate.—1 Dan. Ch. Pl. and Pr. pp. 368, 363, 364, 412, note 410; *Comber's case*, 1 Peere Williams, 768; *Humphreys v. Ingledon*, 1 Peere Williams, 752, 753.

2. The bill is strikingly economical of facts in other respects: 1, it does not show who were the heirs-at-law of said Bryan Boroughs, beside said Thomas Boroughs. 2. It does not show that appellant ever made any effort what-

ever to collect the amout of said writing obligatory from said Thomas Boroughs in his life-time, and that said Thomas Boroughs ever refused to pay the same, or any part thereof. 3. It does not show that appellant, prior to the filing of his bill against appellees, ever made any effort whatever to collect the amount of said writing obligatory, or any part thereof, from appellees, or either of them, and that appellees refused to pay the same, or any part thereof; and further than this, that the said bill does not show that prior to the time it was filed in this cause, the appellees, or either of them, ever knew of the existence of said writing obligatory, or of the indebtedness therein mentioned. 4. It does not show that appellees, or any single one of them, are unwilling to pay to appellant the amount of the said writing obligatory. 5. It does not show that the alleged final settlement of the estate of Bryan Boroughs was made by the appellant under the compulsory process of any court whatever, or that appellant was compelled from any cause to make said alleged final settlement at the time the bill alleges he did so. 6. It does not show that said alleged final settlement was made in the proper court having jurisdiction thereof. 7. It does not show that said alleged final settlement was in any sense duly made. 8. The contents of said alleged decree of final settlement are not stated in said bill, nor is the said alleged decree of final settlement of said estate anywhere in said bill referred to, with leave to make it a part of said bill, or that it is treated or considered as a part of said bill, nor is any copy of said decree of final settlement attached to said bill, or annexed thereto. 9. The said bill does not show that there was anything to prevent appellant from getting credit on said alleged final settlement for the amount of $860.78, therein alleged to have been decreed against him, or that the said Thomas Boroughs, or appellees, had refused for appellant to have credit on said final settlement for said last named amount. 10. The said bill does not show that appellees have converted, or attempted to convert to their use, the property of the estate of Thomas Boroughs, or that appellees have wasted, or attempted to waste, any of the

property of said estate of Thomas Boroughs, but simply states that said property "is in the custody and under the control" of appellees, as the children of said Thomas Boroughs. 11. The said bill does not show that the facts as to which discovery is sought are material to make out the right of appellant to relief. 12. The said bill does not show that the facts as to which a discovery is sought can not be proved without the answer of the appellees. 13. The said bill fails to show that there was any necessity whatever for filing it in this cause. 14. Admitting every allegation of the bill to be true, it is wholly without equity. 15. No excuse is shown in the bill why the appellant did not, or could not, avail himself of the set-off in the decree of final settlement.

3. The allegations of the bill in this cause are wholly insufficient to authorize relief. The matters essential to the appellant's right to relief must appear, not by inference, but by direct and unambiguous averment. Tested by this rule, the bill in this case is fatally defective.—*Duckworth v. Duckworth's Adm'r*, 35 Ala. 70; *Cockrell v. Gurley*, 26 Ala. 405; *Spence v. Duren*, 3 Ala. 251; Story Eq. § 242, *et seq.*; 1 Dan. Ch. Pl. and Pr. 411, *et seq.*

4. The bill can not be maintained for the purpose of establishing, as equitable set-off, a demand which was available as a legal set-off in the court of quarter sessions of Moore county, North Carolina.—*Carroll v. Moore*, 7 Ala. 615; *Landreth v. Landreth*, 12 Ala. 640; *Duckworth v. Duckworth's Adm'r*, *supra*.

Some "sufficient excuse" must be shown why the appellant did not, or could not, avail himself of the set-off in the court that made the final settlement of the estate of Bryan Boroughs.—*Pearce v. Winter Iron Works*, 32 Ala. 68.

A bill of this description must show some equitable ground of protection, or it can not be maintained.—*Tusc., Courtl. & Dec. R. R. Co. et al. v. Rhodes*, 8 Ala. 220-21; *White v. Wiggins*, 32 Ala. 425. Here it is not shown that appellees are endeavoring to enforce, or have ever endeavored to enforce, the said alleged decree against appellant,

or that they are unwilling to pay him the balance, and it is not shown that they are insolvent.

5. The bill can not be maintained as a bill of discovery—1. Because it does not appear that the facts as to which discovery is sought are material to make out a right to relief.—*Dickinson v. Lewis, Garthwaite & Co.*, 34 Ala. 639. 2. Because the bill fails to allege that the facts in regard to which discovery is sought can not be proved without defendant's answer.—*Horton v. Moseley*, 17 Ala. 794; *Perrine v. Carlisle*, 19 Ala. 686; *Crothers v. Lee*, 29 Ala. 337. 3. Because it does not state the facts with sufficient certainty, and allege that the defendants are capable of making the discovery sought.—See *Horton v. Moseley, supra.*

6. A pleading is always construed most strongly against the pleader, and for aught that appears by the bill, the appellant could, and should, have obtained the relief of set-off that he here seeks as one of the grounds of equitable interference in the final settlement of the estate of Bryan Boroughs in the court of quarter sessions in the State of North Carolina. The bill does not allege that the court of quarter sessions was the proper court having jurisdiction of the final settlement of the estate of Bryan Boroughs.

It is not shown by the bill that there are other debts of the estate of Thomas Boroughs unpaid by appellees; or that appellees have been guilty of, or attempted, any fraud or conversion of the assets of the estate, or any waste of the same, or are insolvent. Where, then, is the excuse for arguing, as counsel for appellant does, that the facts make this a case of a trust cognizable in equity? It is not every trust, even, that will be enforced in a court of equity. This is no more of a trust than a bailment, yet a bailment may be enforced at law. Admitting every allegation of the bill to be true, there is not one single ground for the interposition of a court of chancery to enable appellant to obtain every right he claims in this cause.

7. Appellant's counsel seem to dwell with much stress upon *Ex parte Walker*, 25 Ala. 81, as an authority in this case. In that case the court say: "It is enough if it be

shown, by some person having an interest, that the subject matter is within the jurisdiction of the court, and that the danger and injury sought to be averted are real and pressing." That was a case of fraud, waste, and insolvency on the part of Walker.

Hunly v. Hunly, 15 Ala. 91, is another authority cited by appellant's counsel in favor of the jurisdiction of the court. In that case the administratrix had failed to return, in her inventory, certain assets belonging to the estate of Hunly, and the supreme court decided that a bill for the discovery of these assets would lie.

In *Dement et al. v. The Adm'rs of Boggess*, 13 Ala. 140, another authority cited by appellant's counsel to sustain the jurisdiction of the court, it was a case in which the aid of the court was invoked to correct a "mistake" made in the settlement of an estate of a character highly injurious to the complainant, and peculiarly calling for the interposition of a court of equity.

PECK, C. J.—As, on the complainant's final settlement of the estate of Bryan Boroughs in North Carolina, he was charged with, and accounted for, the promissory note of Thomas Boroughs, described in and made an exhibit to the bill of complaint, the note became his property, and thereby he became a creditor of said Thomas Boroughs, and might have maintained an action on the said note in his own name.—*Tompkies et al. v. Reynolds*, 17 Ala. 109; *Waldrop v. Pearson et al.*, 42 Ala. 636.

2. On the death of said Thomas Boroughs in Alabama, his estate, real and personal, became a fund for the payment of said note.—Rev. Code, § 2060. And, as the heirs-at-law, the children of Thomas Boroughs, without administration, took possession of said estate and converted it to their own use, they hold the same in trust for the benefit of complainant, as a creditor of said estate, and it may be subjected to the payment of his debt by a bill in equity, filed for that purpose.—Story's Equity, § 546. No administration having been taken out on said estate, the complainant has no adequate remedy at law.

3. The complainant's bill was demurred to, and many causes of demurrer assigned, presenting, in substance, the following objections: 1, that the bill was without equity; 2, that there was a perfect and complete remedy at law; 3, that the effects of the estate of Bryan Boroughs were not sold at public auction, or by virtue of any authority of law; 4, that complainants' claim was a stale demand; 5, that said claim was merged in the decree of final settlement; and 6, that the statements of the bill were uncertain and insufficient, &c. The demurrer was sustained and the bill dismissed; but it does not appear whether for all, or for which of the causes assigned, the chancellor dismissed the bill.

After a careful examination, we are satisfied the bill is not without equity; and, although it is not as skilfully framed, nor its statements as full and carefully made as they might be, yet that they are not so defective as to justify its dismissal.

Many objections are made to the sufficiency of the bill in the brief and argument of appellees' counsel. We will consider such of them only as it seems to us need to be noticed.

1. First, it is objected that the bill does not show the complainant was appointed administrator of the estate of said Bryan Boroughs by any court or authority in law competent to appoint him administrator of said estate.

The bill states that said Bryan Boroughs died in the county of Moore, in the State of North Carolina, prior to 1855, and that the complainant was *duly appointed* his administrator. We think this sufficient, without naming the particular court or authority by which the appointment was made. In a note to the case of *Humphries v. Ingledon*, 1 Peere Williams, 752, it is said that Lord Keeper North, when he first came into the court of chancery, was of the opinion that a plaintiff administrator ought to show by his bill where he had taken out administration, to the intent the defendant might be informed in what court to look for it, as it might be void if taken out under a wrong jurisdiction; but of late, the general allegation *duly taken*

out administration has been held good, especially where (as on demurrer) the cause is not to be determined, but that the plaintiff must show his letters of administration at the hearing.

This note is referred to as authority in Story's Eq. Pl. § 525, and in Daniell's Pl. and Pr., vol. 1, 364. Therefore, we hold this statement sufficient. It is the province of pleading to state facts, not the evidence necessary to prove them.

The statement here made is, that complainant was duly appointed administrator, &c. If this statement is put in issue, then on the hearing it must be shown the appointment was duly made; that is, made by an authority competent to make it.

2. That the bill does not state that said final settlement was made in the proper court having jurisdiction thereof; that it does not allege that the said court of quarter sessions had jurisdiction of the final settlement of the estate of said Bryan Boroughs. The statement of the bill is, substantially, that said final settlement was made in the court of pleas and quarter sessions of Moore county, in the State of North Carolina, at the January term, 1860. This is sufficient. Judgments and proceedings in the several States do not stand on the same footing as the judgments of foreign courts proper, consequently the same strict rules are not to be applied to them. By the constitution of the United States, (Art. IV, § 1,) they are placed upon much higher grounds, and, in many respects, are to be regarded and treated as domestic judgments; and in pleading, it is not necessary to set out affirmatively the authority and jurisdiction of the courts by which they are rendered. Especially is this the case when rendered by courts of record.—*Gunn v. Howell*, 27 Ala. 663. *Prima facie*, it is to be presumed that the court of pleas and quarter sessions of North Carolina has jurisdiction of the settlement of the estates of deceased persons.

3. The objection that the note in this case is a stale demand, is without force. It is under seal, and not barred

by the statute of limitations until ten years after its maturity. That period had not elapsed before the filing of this bill, after deducting the time the statute of limitations was suspended in this State by reason of the late civil war. *Coleman v. Holmes*, 44 Ala. 124.

4. It is further objected, that it is not stated in the bill that the effects of the estate of Bryan Boroughs were sold at public sale, under and by virtue of any order or decree of the court of pleas and quarter sessions of Moore county, North Carolina. This was not necessary. When the said note, given by Thomas Boroughs for property of the estate of Bryan Boroughs, purchased by him of the complainant, as administrator, &c., was, on said final settlement, charged to the complainant, and accounted for by him, the said note became his property, whether the said sale was, or was not, made by authority of law.—*Tompkies et al. v. Reynolds, supra.*

5. The equity of complainant's bill is not made to depend on the question of set-off, or of discovery. Its equity is based upon the complainant's right to have the said note paid out of the assets of the estate of Thomas Boroughs in the hands of the defendants, and as no administration has been taken out on said estate, there is no adequate remedy at law. The statement in the bill, that complainant is, and always has been, ready and willing to permit the decree rendered in favor of Thomas Boroughs to be set off against said note, has the effect merely to show that the complainant is ready and willing to do equity.

The other objections made by appellees' counsel do not seem to us sufficient to justify the decree of the chancellor in sustaining the demurrer and dismissing the complainant's bill.

The decree is reversed, and the cause remanded for further proceedings, at the cost of the appellees.

FIELD ET AL. *vs.* GAMBLE, ADM'R.

[APPEAL FROM ORDER OF PROBATE COURT CONFIRMING SALE OF LAND.]

1. *Appeal from order of probate court confirming sale of land; in what time may be taken.*—An appeal from an order of the probate court confirming a sale of lands made by order of that court, on the *nineteenth* day *after* the day of the rendition of the order of confirmation, is in time to save it from the bar of the statute of limitations of twenty days.—Rev. Code, §§ 14, 2095, 2246, 2247.
2. *Sale of land under order of probate court; what order as to, court can not make.*—When a sale of lands made by order of the probate court is returned unto said court as required by law, and the same is vacated or set aside on account of the inadequacy of the price bid at the sale, it is error for the court to permit the purchaser to increase his bid from $125 to $150, and then confirm the sale. In such a case, a re-sale should be ordered.—Rev. Code, § 2094.

APPEAL from the Probate Court of Butler.
Tried before Hon. H. W. WATSON.

The facts are sufficiently stated in the opinion.

HERBERT & BUELL, for appellant.—It seems clear that the court erred in allowing the administrator to amend his return so as to show that the land sold for a price different from what it actually did sell for, and in allowing the purchaser to come into court and raise his bid to the price for which the land ought to have sold, and this more than two years after the sale. The court did decide, as shown in its decree, that the sale ought not to be confirmed, and refused to confirm it as it actually took place. That was, or ought to have been, an end of the matter. The court had then exhausted the powers conferred upon it by law. But the court did not stop there. It went on to fix a price at which it said the administrator might have the land. It was as if the court had said to the purchaser, "You did not buy the land from the administrator when he offered it, more than two years ago. I decide that upon the proof,

and under the law, as I have a right to do; but then I will sell it to you, if you will raise your bid, or give one hundred and fifty dollars, instead of one hundred and twenty-five dollars. I, the probate judge, will now sell it to you; I will let you bid, and I will not let any one else bid at this sale. I am now conducting the sale, and I will sell it you on the basis of what it was worth two years ago, and will not take into consideration what it is worth now."

One very obvious objection to such a sale by the probate judge would be that, (aside from his want of power,) it might work great injustice, because peradventure the land might have very greatly advanced in value between the time when the administrator tried to sell, and the time the probate judge did sell.

It may be said that there is no great difference between one hundred and twenty-five and one hundred and fifty dollars; that if there was only this difference, then the land did sell for a sum "not greatly less than, or disproportionate to, its value," (Code, § 2093,) and therefore the sale should have been confirmed. In reply to this, we say that the court had this statute in mind when it decided not to confirm the sale that did take place, and it must be intended that it decided that one hundred and twenty-five dollars was "greatly disproportionate to its real value," but that one hundred and fifty dollars was a sum "not greatly less than its value."

Again: the additional sum was just one-fifth more, and though it was only the widow's mite, the principle was the same as if the question had been one of the difference between five and six thousand dollars.

Again: an administrator "must" report a sale within sixty days, for confirmation.—Rev. Code, § 2091. This sale was not reported for more than two years. To allow such a palpable violation of a peremptory mandate, when not even a shadow of excuse is shown for it, would be to totally disregard the will of the legislature, and to allow room for the grossest frauds.

JUDGE & HOLTZCLAW, *contra*.—1. Before the passage of

the act of the 12th of December, 1857, an appeal did not lie to the supreme court on an order of the probate court for the sale of real estate belonging to a decedent.—*Devany's Heirs v. Devany's Adm'r*, 25 Ala. 722.

2. The act of the 12th of December, 1857, gives the right of appeal "from any final judgment, order or decree of the probate court."—Rev. Code, § 2246. And since the passage of said act, numerous appeals have been taken to this court from such orders of sale by probate courts.

3. Conceding, therefore, that the order of sale in the present case was defective, still, it not having been appealed from within the time prescribed by the Code—never having been appealed from—it can not now be collaterally assailed. .

4. Would this court entertain an appeal from said order now? Clearly not, the right of appeal having been barred. Will the court, then, allow the appellants to accomplish by indirection, what they could not accomplish in a direct proceeding by appeal? It is respectfully suggested that it would be an anomaly so to hold. As to the jurisdiction of the probate court in such a case, see *Satcher v. Satcher's Adm'r*, 41 Ala. 26.

5. As to the order confirming the sale: It is conceded that the action of the court was irregular in allowing the purchaser to increase his bid, in effect, before the order of confirmation was made; but if irregular and erroneous, it was not only without injury, but error to the benefit and advantage of appellants.

Was the price bid for the land, when it was sold, "greatly disproportionate to the real value"?—Rev. Code, § 2092. It was not; the proof showed that the land, when sold, was worth only $150; it sold for $125, and this sum not being "greatly disproportionate to the real value," it was the duty of the court to have confirmed the sale without anything further being done; and if it had refused to confirm the sale on this evidence, its action could have been reversed. But the purchaser, not wishing to hold the land at one cent less than its real and full value at the time he purchased it, voluntarily offered to pay the additional

twenty-five dollars, to make up the full value; this action being prompted, doubtless, by the fact that the lands had belonged to an estate, and he did not wish to hold the lands of the widow and children at one cent less than their full value at the time he purchased them. And this is magnified by counsel for appellants into something improper in the court and purchaser—into a re-sale of the land by the court, and shutting out all bidders but the original purchaser! This is a strained and improper conclusion from the premises, and casts an improper reflection upon the probate court.

PETERS, J.—This is an appeal from a final order of the court of probate of Butler county confirming a sale of land made by an administrator for the payment of the debts of the deceased. The sale was made under authority of a decree of said court of probate, on the 30th of December, 1867, but the report of the sale, if made, was not acted on by the court until the 10th day of March, 1871, when its confirmation was contested by the heirs and distributees of the decedent. The proof shows that at the time of the sale, the market value of the lands was $150. The court vacated the sale on account of the inadequacy of the price bid at the sale by the purchaser, but afterwards permitted the purchaser, who was in open court, to increase his bid from one hundred and twenty-five dollars to the sum of one hundred and fifty dollars, which was paid to the administrator, and the sale was confirmed. These facts are introduced into the proceedings in the court below by way of an amended report of the sale. But the amendment made in this manner was objected to by the contestants. The contestants in the court below bring the case here by appeal, and assign the order and proceedings on the confirmation of the sale as error.

There is a motion in this court made by the appellee to dismiss the appeal. This motion seems to be founded upon the supposition that the appeal is barred by the limitation of twenty days, and upon the fact that Long, the purchaser of the land at the sale which was confirmed, is

not made a party to the proceedings in this court. There can be no doubt that an appeal is permitted in such a case as this, if taken in twenty days from the time of rendering the final order confirming the sale. The confirmation of a sale made by an administrator under an order of the court of probate is such a final order as will support an appeal to this court, if taken within twenty days from its rendition.—Rev. Code, §§ 2246, 2095. Excluding the day on which the order of confirmation was rendered, which was on the 10th day of March, 1871, and including the day on which the bond for the appeal was approved, which was the 30th day of March, in the same year, there was only a period of nineteen days from the day on which the order was rendered to the appeal. The statute allows twenty days to bar the appeal. The appeal, then, was taken in time.—Rev. Code, §§ 14, 2246. Long, the purchaser, is not a necessary party in this court. And if a party at all, he should have suggested his interest in the court below, and made himself a party there. The only indispensable parties in such a proceeding are the representative of the decedent and the heirs and devisees or distributees of the decedent's estate.—Rev. Code, §§ 2079, 2080, 2081, 2082, 2222, 2223, 2227. The motion to dismiss the appeal is overruled, with costs.

The next question presented by the assignment of errors, which can arise on this appeal in this court, is the regularity of the final order confirming the sale in the court below. When such a sale is made and reported as required by law, it is made the duty of the court to examine the proceedings touching the same, and "he may examine witnesses in relation thereto." And "if upon such examination the court is satisfied that the sale was not fairly conducted, or that the amount for which the land, or any portion of the same, sold, was greatly disproportionate to the real value, the court may vacate such sale, either in whole or in part."—Rev. Code, § 2092. If the sale is vacated in whole or in part, the court must direct another sale to be had, in like manner that was required in the first sale.—Rev. Code, § 2094. But if the sale has been fairly

conducted, and the price to be paid for the land is not greatly disproportionate to its real value, the sale should be confirmed.—Rev. Code, § 2095.

If, then, the original sale is vacated, or is such an one as the court refuses to confirm on account of the inadequacy of the price offered at the bidding, as was the case in this instance, the court should order a re-sale, as the statute requires. Here this was not done, but upon the refusal of the court to confirm the sale, because of the disproportionate value of the price offered at the sale, the purchaser was permitted to increase his bid from one hundred and twenty-five dollars to one hundred and fifty dollars. This increase of price was accepted by the court in lieu of a re-sale, and the first sale was confirmed, against the objection of the contestants in the court below. For such a procedure the court of probate had no authority. The law forbids it, by prescribing a different one. It was a sale forced upon the creditors, the heirs and distributees, which had not been made in a manner sanctioned by law. Such a departure from the plain words of the statute can not be derived from any rational construction that may be put upon it, and the court of probate has only statutory powers. Its jurisdiction is confined to the narrow limits of a power to confirm the sale, or to vacate it in whole or in part, and to order another sale. It ends in one of these results. If it goes beyond this, it is an assumption of power not authorized by law. It is a judicial usurpation, and a disregard of a positive legal enactment that can not safely be sustained. And the rule, of error without injury, does not apply to such a case.—*Miller v. Hampton, Adm'r*, 37 Ala. 342. After refusing to sanction the first sale, the court of probate should have ordered a re-sale, as required by the statute in such case made and provided.

The order confirming the sale in the court below, from which this appeal is taken to this court, is reversed and set aside, and the court below will order another sale as required by law. The appellee, said John Gamble, administrator of the estate of J. J. Gardner, deceased, will pay the costs of this appeal in this court and in the court below,

out of the assets of said deceased in his hands to be administered.

HICKSON ET AL., EX'RS, *vs.* LINGOLD ET AL.

[ACTION BY EXECUTOR, AGAINST MAKERS OF PROMISSORY NOTE, GIVEN FOR PURCHASE OF LAND OF TESTATOR, THE MAKERS DEFENDING WITHOUT SURRENDERING POSSESSION.]

1. *Purchaser of land at executor's sale; when can not resist payment of notes for purchase-money at law.*—Where executors sell the lands of their testator, under an order of sale by the probate court for that purpose, if the vendee gives his notes for the purchase-money, and is let into, and retains the possession of the premises, he can not, at law, defend an action by the executors on said notes, on the ground that the order of sale is erroneous; even its utter invalidity is no defense to such an action.
2. *Same; when vendee may retain possession and resist payment of purchase-money.*—If, however, the vendee has paid a part of the price, or made necessary and permanent improvements, where fraudulent representations have been made, to the injury of the vendee, or the vendor can not make good titles, and in some other like cases, the vendee may, without restoring the possession, within a reasonable time, file his bill in a court of chancery to rescind the sale, and to enjoin the collection of the purchase-money. In such cases, the vendee is permitted to retain the possession as a security for the money paid, and to indemnify him for necessary and permanent improvements made, in good faith, upon the premises.

APPEAL from Circuit Court of Pike.
Tried before Hon. J. MCCALEB WILEY.

THIS was an action brought by appellants, as executors of the last will and testament of Samuel Hickson, deceased, against the appellees to recover amount due on promissory notes given by them for the purchase-money of lands of appellants' testator, sold under the order of the probate court, on the ground that they "could not be fairly and equitably divided among the heirs without a sale."

The parties went to trial on the plea of the general issue, "with leave to give in any matter not required to be sworn to." It was admitted that Lingold, the principal in said notes, went into possession of the land at the time of sale, and so continued at the time of the trial, and that the sole consideration of the notes was the purchase-money of lands belonging to appellants' testator, and sold as above stated. Plaintiffs, after reading in evidence the notes mentioned in the complaint, rested, and defendants offered in evidence, without objection, a transcript from the probate court of Pike, which the probate judge certifies is a "complete transcript of the will, probate, reports and orders in relation to the sale of land." This was all the evidence, and "about which there was no controversy"; and upon this evidence the court charged the jury, at the request of defendants, if they believed the evidence they must find for defendants. Plaintiffs excepted to the charge, and took a nonsuit, with leave to move to set aside the same in the supreme court. It is unnecessary to notice more specifically the transcript of the proceedings in the probate court, as this court, declining to pass upon their validity or regularity, held that their utter invalidity would not constitute a defense to the action.

WATTS & TROY, and J. N. ARRINGTON, for appellants.
SEALS & WOOD, *contra.*

PECK, C. J.—Where executors sell the lands of their testator, under an order of sale by the probate court for that purpose, if the vendee gives his notes for the purchase-money, and is let into, and retains the possession of the premises, he can not, at law, defend an action by the executors on said notes, on the ground that the order of sale was erroneous; even its utter invalidity is no defense to such an action. This, we think, is the rule to be derived from all the decisions of this court on this subject. *Ogburn v. Ogburn*, 3 Porter, 126; *Calloway v. McElroy & Flannagan*, 3 Ala. 406; *Harbin v. Levi*, 6 Ala. 399; *Lampkin et al. v. Reese et al.*, 7 Ala. 170; *Worthington, Adm'r, v.*

McRoberts & Porter, 7 Ala. 814; *Rhodes, Adm'r, v. Storr*, 7 Ala. 347; *Jennings & Graham v. The Adm'rs of Jenkins et al.*, 9 Ala. 285.

In some of these cases the sales were made by individuals; in some, by personal representatives. In some, the sales were of personal, and in others, of real property. Some of them are cases at common law, and others in the court of chancery; but the principle to be extracted from all of them is, that where the vendee is in the possession of the property purchased, he can not, successfully, resist and defeat an action for the purchase-money, on the ground that the vendor's title is defective, or that he had no legal authority to make the sale, or that the sale was void. In other words, that it is inequitable to permit the vendee to retain the property purchased, and not pay for it.

We know of no exception to this rule in the common law courts. In chancery, however, if the vendee has paid a part of the price, or made necessary and permanent improvements, where fraudulent representations have been made, to the injury of the vendee, or the vendor is unable to make good titles, and in some other cases not necessary to be here specified, the vendee may, without restoring the possession, file his bill within a reasonable time, to rescind the sale, and to enjoin the collection of the purchase-money. In such cases, the vendee is permitted to retain the possession, as a security for the money paid, and to indemnify him for necessary and permanent improvements made, in good faith, upon the premises.—*Read v. Walker*, 18 Ala. 323; *Foster v. Gressett's Heirs*, 29 Ala. 3 3.

On the trial of this case, after the notes described in the complaint had been read to the jury, the defendants introduced the written agreements of the parties, by which it was admitted that the said notes were given by the defendant Lingold, for lands sold by the plaintiffs, as the executors of the last will and testament of Samuel Hickson, deceased, and that the other defendants were his sureties; that the sale was made under an order of sale made by the probate court of Pike county, and that said Lingold

went into the possession of the premises, and still retained the same.

The defendants also introduced and read in evidence, without objection on the part of the plaintiffs, a certified transcript from the probate court of said county of Pike, purporting to contain the entire proceedings had in said court, at the instance of the plaintiffs, touching the probate of said last will and testament, and their administration of the estate of said deceased under the same, including proceedings for the sale of the personal and real estate of said testator, &c. We do not deem it necessary to decide as to the regularity or validity of said proceedings. It is enough to say that, under the circumstances of this case, if admitted to be invalid, they constituted no defense to this action, and might, without error, have been excluded as evidence, on the objection of the plaintiffs.

Retaining the possession of the lands purchased, the defendants were in no condition to resist a recovery in this case. The court, however, on the written request of said defendants, charged the jury, that, if they believed the evidence, they must find for the defendants.

The plaintiffs excepted to this charge of the court, and, under section 2759 of the Revised Code, suffered a non-suit, and have appealed to this court to have said non-suit set aside.

The said charge is erroneous. The non-suit, therefore, must be set aside, and the cause remanded for another trial, at the costs of the appellees.

BULGER *vs.* HOLLY ET AL.

[BILL IN EQUITY TO SUBJECT LAND FOR PAYMENT OF PURCHASE-MONEY.]

Bill to enforce vendor's lien on land; when not without equity.—B. purchased certain lands of S., gave his notes for the purchase-money, and received T.'s bond for titles, when the said notes were paid. A few days after said purchase, and before B. was let into possession, with the knowledge and consent of S., B. sold said lands to C. and C. at an advance of a thousand dollars, and by an understanding between all of said parties, C. and C. were to take up and cancel B.'s notes, and give their note to S. for said advance, expressing that it was given in part payment of said lands, and S. then and there delivered said note to B., and B. transferred said bond for titles to C., and C. and they went into possession of said lands, and continued in possession for several years, and then moved away, and H. went into possession, whether under a purchase from C. and C. was not known to B., but claiming some interest in said lands. In the meantime, S. died; afterwards B. filed his bill, making the widow and heirs of S., C. and C., and said H. defendants, and prayed that said thousand dollar note be declared a lien on said lands, and, if necessary, that said lands be decreed to be sold for its payment. On motion of H. the bill was dismissed for want of equity.—*Held*, 1st, that said note was a lien on said lands; 2d, that the bill was improperly dismissed for want of equity; and, 3d, that if H. purchased said lands, in good faith, for valuable consideration and without notice, after a conveyance by S. to C. and C., it would defeat B.'s lien, and be a good defense to his bill.

APPEAL from the Chancery Court of Tallapoosa.
Heard before the Hon. B. B. MCCRAW.

The facts are sufficiently stated in the opinion.

GRAHAM & ABERCROMBIE, for appellant.
WM. H. BARNES, *contra*.

PECK, C. J.—The bill of complaint states, that appellant, the complainant below, a few days before the sixth day of January, 1858, purchased certain lands, described in said bill, lying and being in Tallapoosa county, of Creed T. Strong, then in possession and residing on said lands,

for the price or sum of $2,500, and, to secure the payment of the purchase-money, gave his two promissory notes for the sum of $1,250 each, one due in twenty days, and the other six months after date, and received from said Strong and wife a bond to make titles, on the payment of the purchase-money; that a few days after said sixth day of January, the said Strong and George W. and W. M. Chatfield came together to complainant's residence, for the avowed purpose of making a trade with complainant about said land; that complainant, then and there, with the consent of said Strong, sold said lands to said George W. and W. M. Chatfield, for the sum of $3,500; that said Chatfields were to take up complainant's two notes, and deliver them to him canceled, and for the remainder of the $3,500 the said Chatfields made their joint and several note, for one thousand dollars, of the following tenor and effect, to-wit:

"$1,000. On or by the first day of April next, we, or either of us, promise to pay to C. T. Strong, or bearer, one thousand dollars, in part payment for his plantation on Tallapoosa river, and on which he now resides. This 3d day of January, 1858.

(Signed,) "G. W. CHATFIELD,
"W. M. CHATFIELD."

That said note was, then and there, delivered to complainant, (the said Strong and said Chatfields being present and agreeing to the same,) as an inducement to him to make said trade; that said note thereby became his property, and was transferred to him *bona fide;* that pursuant to said understanding between said complainant and said Strong and said Chatfields, complainant's said two notes were delivered to him, and were canceled or destroyed, and, to carry out said trade, complainant transferred or assigned said bond for titles to said Chatfields. That at the time of said sale said Strong was in possession and living on said lands, and soon thereafter moved away, and put said Chatfields in possession of the same; that they remained in possession thereof for several years; that one John Holly was, at the filing of said bill, in pos-

session, pretending that he had bought said lands, or had some other claim to them.

That said one thousand dollar note was given in consideration and in part for the purchase-money of said lands, and was made payable to said C. T. Strong, in whom the legal title was, and that said note was transferred to complainant, with the distinct understanding that the same was a lien to that extent, upon said lands, for the purchase-money thereof.

The bill states that said Strong had died, leaving no estate that complainant knew of, and that he had no administrator; that he left a widow, and several children, his heirs, naming them, &c.

The said Holly, the widow and said children, and said Chatfields, are made defendants. The complainant prays that said note may be declared to have a lien on said lands, and, if necessary, that they may be decreed to be sold for its payment, and for general relief.

On motion of defendant Holly, the chancellor dismissed the complainant's bill for want of equity. He appeals to this court, and assigns the decree dismissing the bill, for want of equity, for error.

1. On a motion to dismiss a bill for want of equity, its statements are to be taken to be true.—*Bryant v. Peters*, 3 Ala. 160.

Taking the statements of this bill to be true, the said Chatfields must be regarded as the purchasers of the said lands, in the place of complainant; and that instead of making a new bond for titles, the bond given to complainant was, by the understanding of the parties, transferred or assigned to them. We think this the true interpretation of this transaction, as the said thousand dollar note was made payable to said Strong, and purports on its face to be given in part payment of his plantation, on which he then resided, thus showing that the plantation mentioned in the said note consisted of the same lands which, a few days before, were sold to complainant. As this note was given in part for the purchase-money agreed to be paid for said plantation, it was, in the hands of Strong, the vendor,

a lien on the same; and the transfer of said note to the complainant, in equity, transferred the lien with it.—*Conner v. Banks*, 18 Ala. 42; *Kelly v. Payne*, 18 Ala. 370, and *Edmunds v. Torrence*, decided at this term. And complainant may, in his own name, file a bill to enforce said lien.—*Center v. P. and M. Bank*, 22 Ala. 743; *Edmunds v. Torrence, supra.*

2. If Strong had conveyed the said lands to the Chatfields before Holly purchased; if he had, in fact, purchased said lands of them, and his purchase was made in good faith, for valuable consideration, and without notice, then his purchase would defeat said lien, and be a good defense to the complainant's bill; but, on its face, the said bill is not without equity. Therefore, the decree dismissing the bill, on motion, must be reversed, and the cause remanded for further proceedings; and the said Holly will pay the costs of this appeal, in this court and in the court below.

ELLETT *vs.* WADE.

[BILL IN EQUITY TO ENJOIN EJECTMENT SUIT AT LAW, AND FOR SPECIFIC PERFORMANCE OF CONTRACT.]

1. *Married woman; statutory separate estate; what property constitutes.* Real estate purchased by, and conveyed to a married woman in 1861, although paid for by her with money derived from the income and profits of property settled in the hands of a trustee to her separate use, by an ante-nuptial agreement made in 1839, is her separate estate by force of section 2371 of the Revised Code, and not by the common law.
2. *Same; how only can be conveyed.*—The separate estate of a married woman, whether by the common law, or by the Revised Code, can only be sold and conveyed by husband and wife jointly, in the manner prescribed by the Revised Code, unless the will, deed, or other instrument by which the separate estate is created, otherwise provides.
3. *Power, defective execution of; general rule in equity as to.*—As a general rule, equity will not help, aid, or carry into effect the defective

exection of a power created by statute; especially, defects which are of the essence or substance of the power, will not be aided.

4. *Specific performance of contract for sale of real estate; when will not be decreed.*—Courts of equity will not decree the specific execution of a contract for the sale of real estate, where the contract is founded in fraud, imposition, mistake, undue advantage or gross misapprehension, or where, from a change of circumstances or otherwise, it would be unconscientious to enforce it.

5. *Same, improvements upon real estate; when compensation for will not be allowed.*—Generally, equity will not grant relief to a complainant, by way of compensation, who has made improvements upon lands, the legal title to which is in the defendant, where there has been neither fraud nor acquiescence on the part of the latter, after he has knowledge of his legal rights.

APPEAL from the Chancery Court of Madison.
Heard before Hon. WM. SKINNER.

The facts are sufficiently stated in the opinion.

ROBINSON & WALKER, for appellants.—(Appellant's brief did not come into Reporter's hands.)

BRICKELL and RICE, *contra*.—1. By section 2371 of our Revised Code, all property to which a wife becomes entitled after the marriage, in any manner, except only by a transaction or instrument the terms of which are so clearly in opposition to the provisions of the Code as to separate estates, as to show that those provisions of the Code were not to govern the property acquired, is her separate estate under the Code.—*Molton v. Martin*, 43 Ala. 651.

2. The separate estate of a wife in lands, can not, in this State, be conveyed or divested, by a deed executed during her husband's life, by her only, and to which she and the supposed purchaser are the sole parties.—*McBryde v. Wilkinson*, 29 Ala. 662; *Waddell v. Weaver*, 42 Ala. 293.

3. A court of equity will not aid the pretended purchaser, claiming under such deed, to divest the wife of her separate estate; especially when it is shown that all he agreed to pay for the property, and all he did pay for the property, was in Confederate treasury-notes, and in the year 1864, when such notes were almost worthless. It is

against conscience for a court to deprive a married woman of her separate estate, by giving an effect to a transaction in 1864 for Confederate treasury-notes, which the parties did not give to it by what they actually did. In such a case, the court is passive, and does nothing in aid of the man who asks it to give him the married woman's land for the Confederate treasury-notes.—*Houston v. Deloach*, 43 Ala. 364; *Johnson v. Johnson*, 5 Ala. 97.

4. In *Smith v. Clay*, reported in a note in 3 Brown's Ch. Rep. 639, after stating that a court of equity is never active in relief against conscience or public convenience, it is said: "Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing." *Johnson v. Johnson*, 5 Ala. 97.

In *Boney v. Hollingsworth* (23 Ala. 698), this court held, that where the relation of attorney and client, guardian and ward, principal and agent, exists, the duty devolves upon the party in whom the trust is reposed, of showing that the contract (between those sustaining these relations to each other) is in every respect just, fair, and equitable;" and that the same principle "applies to all cases (or relations) from which confidence or influence naturally results."

In *Trippe v. Trippe*, 29 Ala. 643, the point thus decided in *Boney v. Hollingsworth* was re-affirmed; and this court held that "chancery will not sustain a conveyance made through a mistake as to a matter which constitutes a material inducement to the act, if that mistake resulted from the misrepresentation of the other contracting party, though innocently made."

In *Thompson v. Lee*, 31 Ala. 305, this court quote with approval from very high authority the following propositions: "If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and overreaching bargains. * * * The relief (which in such cases the court will certainly grant,) stands upon a general principle, applying to all the variety

of relations in which dominion may be exercised by one person over another."

5. Married women, as well as minors, "are the peculiar objects of the law's care." The very disabilities which it imposes upon them, are imposed for their protection and benefit."—*Houston v. Deloach*, 43 Ala. 370; *Bibb v. Pope*, ib. 190.

PECK, C. J.—The appellee, a married woman, through her brother as her agent, in 1861 purchased the premises described in appellant's bill of complaint, lying in the county of Madison, for the sum of $1,800, and the same was conveyed to her by the name of Sarah A. Wade, the wife of Littleberry Wade.

The appellant states in his said bill, that in 1864 he purchased said premises from the appellee for the sum of $2,800, the husband of the appellee being then alive, and received from her a deed for the same, in her own name, her husband not being a party thereto, and went into the possession of said premises, and still has the possession thereof.

In 1867 the appellee, her husband then being dead, commenced her action under the Revised Code, in the nature of an action of ejectment, against the complainant, in the circuit court of said county, to recover the possession of said premises; thereupon, in 1868, the said action being then pending and undetermined, the complainant filed his bill in the chancery court of said county, to enjoin said appellee from the further prosecution of her said action, and prayed that she might be decreed specifically to execute said contract of sale, and required to convey said premises to him, and that the legal title might be divested out of appellee and vested in complainant, and for general relief.

The complainant in his bill, among other things, states that in 1839, the appellee and said Littleberry Wade, in contemplation of marriage, made an ante-nuptial agreement and settlement, by which all the estate and property of said appellee, with what she might receive from her

father's estate, was conveyed to her brother, Allen Christian, in trust; that said property should be held by said Allen Christian for the use and support of said appellee, and not for the use and benefit of said Littleberry Wade, and if she should die without leaving issue, the said property, both real and personal, should belong to said Allen Christian exclusively, for his use and benefit; that said ante-nuptial agreement was executed under the hands and seals of all three of said parties. That said Allen Christian was dead, and complainant was unable to learn whether any other person had been appointed trustee in his place. That said appellee was permitted to have the possession of said trust property, and to use and take the income and profits of the same to her own use. That said premises so purchased by her, were paid for out of the income and profits of her separate estate, and complainant avers that said appellee having so bought and paid for said premises with the proceeds of her said separate estate, under said marriage settlement, she took and held a contract separate estate in said premises in the same way and manner, and to the same extent, that she held said property under said marriage settlement; that she held therein, and had all the rights, and possessed all the powers, which she had in and over the estate secured to her by said marriage settlement, and had the same right and power to sell, dispose of and convey the same, that she had to sell and convey the property settled to her separate use, &c., as aforesaid.

The bill further states that complainant paid said $2,800 for said premises in Confederate treasury notes; that appellee was willing to accept the same; that she declared she had confidence in that kind of money, and was perfectly willing to receive it in payment for said land; that said Confederate treasury notes were then greatly depreciated, yet, depreciated as they were, $2,800 in such notes was a full and fair compensation for said land; that appellee said she preferred said notes to any other money than gold.

The appellee's deed for said land to complainant is mead

an exhibit to his bill, and appears to have been executed with her mark and seal, and is attested by Lazarus H. Vann, J. P., and acknowledged before him. Said bill also further states that appellee's husband, Littleberry Wade, was present when said purchase was made, and when said deed was executed, and assented thereto, and also assented to the payment in Confederate treasury notes. That complainant did not know it was necessary for the husband to execute the said deed with his wife; that he believed her deed alone was sufficient to give him a good title, and he did not believe that appellee or her said husband knew it was necessary that the deed should be executed by the husband as well as the wife; that if he and they had known a joint deed by husband and wife was necessary, he believed they would willingly have made such a deed.

The answer of the appellee was required to be, and is on oath, and very fully denies all the alleged equities of the bill. The following brief synopsis is all that is deemed necessary to be stated for the purposes of this opinion:

It admits the marriage settlement; that the trustee therein named had been dead many years; that several successive trustees had been appointed, but that the last one appointed died some years before; that she had been permitted to have the possession of and use of the trust property, and that the lands purchased and sold as stated to the complainant were paid for out of the income and profits of the said trust property; that said lands were purchased for her by her brother, as her agent, and the deed was made to her in her own name. She admits the sale to complainant, but says it was made by her husband, and not by herself, and that she unwillingly made the deed to complainant, by the request of her husband, to whom the Confederate treasury-notes were paid. Denies that she was willing the lands should be sold for Confederate treasury-notes, or that she said she had confidence in that kind of money, or that she had rather have it than any other money except gold, but alleges that complainant said it was better than any other money than gold; and that complainant persuaded her husband to sell said lands for that

sort of money; that she and her husband were old people, her husband being over eighty years old, and lived by themselves, and that at the time of the sale they had but little intercourse with their neighbors, the country being in the possession of the United States troops, and that it was dangerous to go much about; that they did not know the value of Confederate treasury-notes, but that complainant did, and, as she believed and states, falsely represented them to be better than United States currency, and that when the war closed would be equal to gold; that said Confederate currency was worthless, and was never used, or of any benefit to them; that she offers to return the same, and files it in court with her answer. Admits that neither she nor her husband knew it was necessary for both of them to sign said deed to complainant; that if they had, she supposes they would have so signed the same. Admits that when she found out that said deed did not convey her title to said lands to complainant, as she was advised by counsel it did not, she determined, considering the circumstances, she would recover said lands of complainant, if she could. Insists that complainant is not entitled to the relief he asks, because she says said purchase and deed were obtained by fraud, and that the consideration of said deed is illegal, and said deed void, &c.; and demurs to said bill for want of equity.

The complainant and appellee were examined as witnesses, each in his own behalf, and a large number of other witnesses were also examined by both parties. The deposition of complainant sustains the bill, and that of appellee sustains her answer. But little of the evidence of the other witnesses is pertinent to the case. One of the witnesses of the complainant, said Lazarus H. Vann, says he was present when the said deed was executed, but not when the contract of sale was made, and that appellee took the Confederate money without objection, and said she preferred Confederate money to greenbacks. Another of complainant's witnesses says he was present at the same time, the witness Glass, and that appellee said nothing about the money, nor her preference for Confederate

money to greenbacks. Some of the witnesses say Confederate money was uncurrent, some that it passed among the people, some that it was worth only ten cents in the dollar, and others that it was worthless and could not be used; that it was against the law to pass it. Complainant in his evidence testified that he had put up six log cabins and dug a well upon the place, the whole of the improvements being valued at $400. No mention of these improvements is made in the bill.

On the hearing, the chancellor dismissed the complainant's bill. He appeals to this court, and assigns said decree dismissing said bill for error, and that the chancellor erred in refusing to allow complainant compensation for the improvements put upon the land, &c.

1. The complainant insists in his bill, that, inasmuch as the land sold to him by the appellee was purchased by her, and paid for with the income and profits derived by her from the estate settled upon her by the said ante-nuptial agreement, made in 1839, she held the same as a separate estate by contract, and not under the Revised Code, and that she had in and over the same all the powers that she had in and over the estate secured to her by said deed of marriage settlement; that she had the same power to sell, dispose of, and convey the same, as she had to sell and convey the property so secured to her by said ante-nuptial deed.

We can not yield our assent to the correctness of this proposition. This land was purchased by appellee in 1861, and it was conveyed to her by her name of Sarah A. Wade, wife of Littleberry Wade. This land became her separate estate by force of section 2371 of the Revised Code, and not by the common law. This section is in the following words: "All property of the wife, held by her previous to the marriage, or which she may become entitled, after the marriage, *in any manner*, is the separate estate of the wife, and is not subject to pay the debts of the husband." The deed, by which this land was conveyed to the appellee, does not convey it to her as her separate estate. Independent of said section of the Revised Code, it would have

belonged to her by the common law, but not as a separate estate, and the marital rights of the husband would have attached to it, as at the common law. The mere fact that she paid for it with money derived from the income and profits of the separate estate settled upon her by said antenuptial deed, would not, in such a case, have changed the character of her estate in said lands. Being her separate estate, by virtue of said section of the Revised Code, it vested in her husband as her trustee, and could only be sold and conveyed by the joint deed of both, attested by two witnesses, or acknowledged before some officer authorized to take the acknowledgment of deeds and conveyances of real estate.—Rev. Code, §§ 2372, 2373, 1552.

The power to sell and convey the real estate of a married woman, held to her separate use, whether by the common law or the Revised Code, is a special statutory power, unless the will, deed, or other instrument by which the separate estate is created otherwise provides, and this power must be strictly complied with, as to all matters that are of the essence or substance of the power. Courts of equity will rarely interpose to correct, aid, or carry into effect the defective execution of such powers. This court has held, that a court of equity can not relieve against the defective execution of a power created by law, as distinguished from a power created by the act of the parties. *McBryde's Heirs v. Wilkinson*, 29 Ala. 662; *Waddell v. Weaver's Adm'rs and Heirs*, 42 Ala. 293. We are not willing to go quite to this extent, though, as a general proposition, it may be admitted to be correct; yet, we think a court of equity, where its aid might seem to be necessary, to prevent fraud, would struggle hard to find an exception to this general rule. Judge Story, in his 1st volume of Equity Jurisprudence, § 90, says: "But, in cases of defective execution of powers, we are carefully to distinguish between powers which are created by private parties, and those which are specially created by statute; the latter are construed with more strictness; and whatever formalities are required by the statute, must be punctually complied with, otherwise, the defect can not be helped, or, at least,

may not, perhaps, be helped in equity; for courts of equity can not dispense with the regulations prescribed by statute; at least, where they constitute the apparent policy and object of the statute."

Whatever may be said on this subject, the case in hand is not one that can be helped, aided or carried into effect. It is a case that does not commend itself to the conscience of the court. It not only fails to conform, in any respect, with the requirements of the statute, but is also repugnant to, and in conflict with, the plainest principles of justice and equity. Real estate, worth eighteen hundred dollars, was purchased for a consideration wholly inadequate. The currency received, if not utterly worthless, to say the most of it, was not worth more than ten cents in the dollar; besides, it was a currency that it was against public policy to permit it to be used at all; a currency that was not only illegal in itself, but was, also, issued by a government in open rebellion against the United States; a currency issued to sustain a government instituted and organized for an unlawful purpose—the destruction and overthrow of the legitimate constitution and laws, both of this State and of the United States.

2. The complainant's case is not bettered by treating it as a case for the specific performance of a contract for the sale of said premises. Courts of equity will not decree the specific performance of a contract for the sale of real estate, where the contract is founded in fraud, imposition, mistake, undue advantage, or *grave misapprehension*; or, where, from a change of circumstances, or otherwise, it would be unconscientious to enforce it.—1 Story's Equity, § 750. So, also, courts of equity will not decree a specific performance of hard or unconscionable bargains; or where it would produce injustice, or where it would be against public policy; and, generally, not in any case where such a decree would be inequitable *under all the circumstances*.—Story's Eq. § 769. On the ground, therefore, that this sale to the complainant was a hard and unconscionable bargain, and under all the circumstances, it would be inequitable to decree its specific execution, as

well as on the ground of public policy, the chancellor properly declined to decree its specific execution.

3. This is not a case where the bill should have been retained for the purpose of compensation for the improvements alleged to have been made by the complainant. If the land sold to the complainant had been conveyed in conformity to the Revised Code, and the appellee had filed her bill to set the sale aside, as obtained by fraud, or on the ground that it was a hard and unconscionable bargain, or other cause, then, if compensation was proper, the court might have required the complainant, seeking equity, to do equity. In the case of *Putnam v. Ritchie* (6 Paige Rep. 390), Chancellor WALWORTH says: "I have not been able to find any case, either in this country or in England, where the court of chancery has assumed jurisdiction to give relief to a complainant, who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud, nor acquiescence on the part of the latter, after he had knowledge of his legal rights." Where a party, lawfully in possession under a defective title, has made permanent improvements, *beneficial and valuable to the true owner*, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements.—2 Story's Eq. 1237, note 3.

If the complainant is entitled to compensation for improvements in this case, he can have his remedy on the trial of the action at law, by making the suggestion authorized by section 2602, Revised Code, and then the question as to improvements can be determined by the jury. Upon the whole case, we think the chancellor committed no error in dismissing the complainant's bill. His decree is, therefore, affirmed, at the appellant's costs.

HALL ET AL. *vs.* GLOVER.

[APPEAL FROM DECREE IN CHANCERY ON SETTLEMENT OF TRUST ESTATE.]

1. *Trustee; when liable as for devastavit.*—Where a trustee applied the trust funds to the use of an estate of which he was administrator, and afterwards bought cotton of that estate, a portion of which he designed for the trust, but never set apart, and then sold the cotton for Confederate bonds, which he also sold, and made a partial settlement without any reference to these transactions,—*Held*, that on his final settlement he was properly charged with the amount of the trust funds appropriated, with interest, in lawful money.

APPEAL from the Chancery Court of Choctaw.
Heard before Hon. A. W. DILLARD.

The opinion states the facts.

JOSHUA MORSE, for appellant.

BROOKS, HARALSON & ROY, and GLOVER & COLEMAN, *contra*, cited 43 Ala. 371; ib. 460; ib. 489; 42 Ala. 656; ib. 410.

B. F. SAFFOLD, J.—The appeal is taken from the final settlement of the appellant's accounts as trustee of Lavinia A. Hart, and the objection is to the refusal of the court to allow him a credit for $600.

From the testimony of the appellant himself, it is shown that he used the funds of the trust estate for the benefit of the estate of Abney, of which he was the administrator. He afterwards sold some cotton belonging to that estate, and became the purchaser. Of this cotton, he considered that six bales were paid for with the trust funds, but he had never set them apart. In 1863 he sold the cotton, including the six bales, to the Confederate government, and received payment in Confederate bonds. Afterwards he sold the bonds, but he never reported any of them as the

property of the trust estate until after his partial settlement made in 1866.

From this statement, we think there is no error in the decree of the court. As the appellee, Glover, has died since the submission of this cause, the judgment of this court will be entered as of the term at which it was submitted for decision.

The decree is affirmed.

ESLAVA *vs.* DEPEYSTER.

[ACTION ON PROMISSORY NOTE.]

1. *Action on negotiable note; what plea may be stricken out.*—A plea to a complaint, by an indorsee against an indorser, on a promissory note payable in bank, that the note was given for a balance due on a purchase of real estate made since May 1st, 1865, and that a part of the purchase money was paid, is irrelevant, and should be stricken out.

APPEAL from Circuit Court of Mobile.
Tried before Hon. JOHN ELLIOTT.

The cause of action was a promissory note, dated May 13, 1866, payable to the appellant, at the First National Bank of Mobile, and due two years after its date. The complaint was substantially in the form prescribed in an action by an indorsee against an indorser. To this, the defendant pleaded that the note was given for the balance of the purchase-money of real estate, in this State, upon a purchase made in this State since the 1st of May, 1865, and that part of the purchase-money was paid. On motion of the plaintiff this plea was stricken out, and this action of the court is the error assigned.

J. LITTLE SMITH, for appellant.

P. HAMILTON, *contra.*—The plea is founded on the act of 1868 (Pamph. Acts, pp. 134–5).

1. It presents no defense to the action. The statute does not pretend to have any effect upon the recovery on notes given in purchase of land; it has no influence upon the amount for which judgment in such case shall be rendered. In truth, the act (see § 4) contemplates judgment being rendered for the whole amount due on the contract, and is directory to the sheriff as to the amount which he may annually collect upon the execution in such case, to-wit, one-fourth of the principal and interest found to be *due;* but this is not matter of plea.

2. The plea was frivolous, and properly stricken out by the court.—30 Ala. 562, 572; 39 Ala. 96.

3. Every intendment will be made in favor of the ruling of the court below. It may be that the plea was not filed in time, or that some other rule had been violated, and for that reason stricken out by the court.—Revised Code, §§ 2662–3; 38 Ala. 506.

4. At most, it was error without injury, even if the objection should have been taken by a demurrer. The defense, if any, was presented by the plea of the general issue.—35 Ala. 361; 32 Ala. 536; 38 Ala. 291.

5. The plea was worthless, because the act on which it was founded is unconstitutional; it impairs the obligation of the contract. The record shows that the note sued on was made 15th May, 1866, and was payable two years after the date thereof, to-wit, 15–18th May, 1868, and payable at bank. Yet the act, which was made after the maturity of the note, to-wit, on the 12th of August, 1868, declares the holder of such note shall not collect his debt, as contracted to pay, but only at the rate of 25 per cent. per annum, and so extend the time of payment four years beyond the time contracted for.—*Weaver v. Lapsley*, 43 Ala. 224; 1 How. 311; 2 ib. 612; 3 ib. 716; 24 ib. 461; 2 Wall. 10.

B. F. SAFFOLD, J.—The plea is founded upon a provision of an act "to regulate judicial proceedings in certain cases," approved August 12, 1868. This act authorizes a

stay of execution in favor of purchasers of land since May 1st, 1865, under certain circumstances. Even if it were not unconstitutional—about which there is no necessity for an expression of opinion—it has no reference to the rendition of judgment in the cases to which it was intended to apply. The plea was properly stricken out as irrelevant. Rev. Code, § 2630.

The judgment is affirmed.

BLACKWELL *vs.* HAMILTON.

[ACTION ON PROMISSORY NOTE.]

1. *Sealed instrument; what is not.*—A promissory note containing only the word "seal," surrounded by a scroll, appended to the signature of the maker, is not a sealed instrument.
2. *Witness; what may be permitted to state.*—The reason, whether good or bad, for the positive knowledge expressed by a witness of a fact about which he is examined, may be stated by him, as it only affects the credibility of his testimony.
3. *Evidence; what irrelevant in suit on promissory note on issue as to date of execution.*—In a suit on a promissory note, the issue being whether it was executed on Sunday or not, evidence that the plaintiff, the payee, was the superintendent of a sabbath-school, which he invariably attended, unless he was sick or absent from home, is not admissible.
4. *Evidence, illegal and irrelevant; admission of, when is error without injury.*—Where evidence irrelevant or illegal is simply redundant or superfluous, the judgment being fully sustained without it, its admission is error without injury.

APPEAL from the Circuit Court of Madison.
Tried before Hon. W. J. HARALSON.

The facts are sufficiently stated in the opinion.

WALKER & BRICKELL, for appellant.

CABANISS & WARD, *contra.*—The instrument sued on was

a promissory note, and not a bond.—*Moore's Adm'r v. Leseur and Wife*, 18 Ala. 606; *Carter & Carter v. Penn*, 4 Ala. 140.

Hamilton's business habits would have enabled him to prove that the transaction occurred on some other day than Sunday, if he had no recollection of the fact.—Greenleaf, §§ 436-7; Starkey, § 175; *Follett's Heirs v. Rose*, 3 McLean, 332; *Carson v. The Bank of Alabama*, 4 Ala. 148. They are admissible, therefore, to corroborate his recollection.

If there was any error in the admission of the evidence objected to by appellant, it was error without injury to him.

The record contains all his testimony, and the appellee's cause of action was proved without the evidence objected to. It was, therefore, superfluous.

B. F. SAFFOLD, J.—The complaint was a special count on a promissory note made by the defendants, on the 18th of September, 1862. There was a verdict and judgment for the plaintiff. During the progress of the cause, the suit was abated by death, &c., except as to Blackwell. The plaintiff offered in evidence as the foundation of his action, a writing as follows:

$2,500. Triana, Ala., 18th Sept., 1862. On or before the first day of January, eighteen hundred and sixty-four, we, or either of us, promise to pay to Alexander Hamilton, or order, the sum of twenty-five hundred dollars in gold, or its equivalent, for value received of him. The above note to draw interest at the rate of eight per cent. per annum from date.

(Signed,) "GEO. WILKINSON, [SEAL.]
"J. H. JONES, [SEAL.]
"W. H. BLACKWELL, [SEAL.]"

The defendants objected, on the ground that, being a sealed instrument, it did not conform to the complaint. This objection was overruled.

A promissory note may be under seal.—Chit. on Bills, p. 190; Story on Bills of Exc. § 62. A writing is not made

a sealed instrument by annexing to the signature of the maker the word "seal," enclosed in a scroll.—*Carter v. Penn*, 4 Ala. 140; *Moore's Adm'r v. Leseur*, 18 Ala. 606. Our statute dispenses with a seal, and makes a writing a sealed instrument when it imports on its face to be such. Rev. Code, § 1585. The instrument above set out not only purports, but declares itself, to be a note. There was no error in its admission.

The defendant Blackwell pleaded that the said note was executed on Sunday. On this issue the court allowed a witness for the plaintiff, in reply to a question why she remembered whether a certain visit of the defendants to the plaintiff was made on Sunday or not, to say that the plaintiff's wife came to her house on the day of the visit much distressed, and crying about the purpose of the visit. Another witness for the plaintiff, in reply to the same question, was allowed to say that her aunt, the plaintiff's wife, "very earnestly opposed her husband in letting Wilkinson have the gold," and that her aunt's opposition to letting the gold go had impressed the whole affair on her mind. This testimony was objected to by the defendant as irrelevant. We do not so consider it. The time of the visit had become important, and both of these witnesses testified emphatically that it was not Sunday. Any reason for the positive knowledge they expressed, whether good or bad, could only affect the credibility of their evidence.

The plaintiff, as a witness in his own behalf, was permitted to testify that during the year 1862, and for several years before, he was superintendent of a sabbath-school, and that he attended the school with great regularity every Sunday, never having been absent, unless he was sick or not at home, which was seldom the case. This was objected to as irrelevant. We see no other purpose of this testimony than to show that the religious and moral convictions of the plaintiff would restrain him from violating the Sabbath, and that it was not his habit to do so. He has the benefit of the presumption that he would not accept a void note. That the note was made on Sunday, must be proved.

In civil cases, evidence of character is not admitted, unless the nature of the action involves the general character of a party, or goes directly to affect it. It is not sufficient that it is involved by plea only.—Greenl. on Ev. vol. 1, §§ 54, 55. If the plaintiff may present his usual manner of spending the Sabbath as proof that he did not, in a particular instance, desecrate it, the defendant must be permitted to combat that evidence by such testimony as he can adduce in opposition. Thus, the simple fact of the day on which a promissory note was executed would involve an interminable examination into the private life of an individual to the detriment of society.

Such an inquiry is not within that rule of evidence which admits the conviction of a witness that a certain fact transpired, though he has no recollection of it, because of something else dependent on or connected with it which he knows, as in the case of *Follet v. Rose* (3 McLean, 332), where a witness who took the acknowledgment of a deed was allowed to testify, that, from his uniform practice in taking acknowledgments, he could not have taken it had no seal been attached to the instrument, as his reason for saying with great confidence that the instrument was sealed. In this case, the evidence partakes too much of an inquiry into general character to be admissible.

The testimony of the witness Arnett is not subject to the objection made to it. He had stated, on his direct examination, that the note was signed on Saturday, and that he saw defendant at Hamilton's house on that day on witness' return from fishing. Witness was allowed to state, on cross-examination, against objection of defendant, that upon the occasion spoken of, when he examined the note upon entering the house, he found plaintiff engaged in counting and putting away the balance of his gold. The time when he saw the plaintiff putting away his gold was immediately after the defendant's visit to him on Saturday. The incident is confirmatory of all the evidence tending to show that the note was not executed on Sunday. Plaintiff had testified that after lending Wilkinson

the money he had some $500 left, which was on his table when Wilkinson and Blackwell left.

Notwithstanding the error above mentioned, the judgment is fully sustained by other legitimate evidence. There is no conflict in the testimony that the note was signed by Blackwell at the plaintiff's house, and there delivered, and that this was the only occasion on which Blackwell and Wilkinson were there together. Four witnesses say this visit was not made on Sunday, two say it was, and Wilkinson says the note was signed by Blackwell and delivered to the plaintiff on the same Sunday, but he can not assert positively that it was delivered on Sunday. Where evidence irrelevant or illegal is admitted, which is simply redundant or superfluous, the party's case being made out without it, it is error without injury.—*Frierson v. Frierson*, 21 Ala. 549; *Kyle v. Mays*, 22 Ala. 692.

The judgment is affirmed.

NOTE BY REPORTER.—At a subsequent day of the term, appellant's counsel, Messrs. Walker & Brickell, applied for a rehearing. The argument in support of the application admitted the correctness of the opinion in all the other points, except as to the effect of the admission of plaintiff's evidence, which was objected to; and on account of this admission a reversal was claimed. The argument was, in substance, as follows:

On the question of fact, as to when the note was executed, the evidence was in direct conflict, requiring the jury to pass on the credibility of the witnesses to determine on which of the witnesses they could place the greatest reliance. The appellee, to induce the jury to accord greater credibility to his own evidence, to strengthen and corroborate that evidence, is permitted to prove that during the year in which the note was executed, and for several years prior thereto, he was superintendent of a sabbath-school, regular in the discharge of his duties, &c.; thus, putting in evidence the manner in which he spent his sabbaths, to impart greater strength to his evidence, which was in di-

rect conflict with two other witnesses of equal opportunities of knowing the facts to which they testified, and, so far as the record discloses, of equal credibility. This evidence the court decided was irrelevant and inadmissible, but holds that it was redundant and superfluous, and its admission, therefore, error without injury. We do not deny that the admission of redundant, superfluous evidence is not an error, for which a judgment will be reversed; but we respectfully submit that this evidence is not of that character. Evidence having a tendency to influence the jury in the determination of any material question of fact, which is controverted, and upon which the evidence is conflicting, can never by a court be deemed redundant or superfluous. The court could not deem it such without weighing the evidence, which is the exclusive province of the jury. The evidence which has been deemed by this court redundant and superfluous, and for the admission of which, when illegal, has declined to reverse, has been evidence of an immaterial fact, or evidence not having a tendency to influence the jury in the determination of a fact material, or additional evidence of a fact, of which there was conclusive evidence. The cases in which illegal evidence has been deemed merely superfluous and redundant, and its admission not a reversible error, are: 8 Ala. 725; 20 Ala. 112; 22 Ala. 209; 22 Ala. 692; 32 Ala. 353; 36 Ala. 85; 37 Ala. 185; 41 Ala. 283. An examination of these cases will show that we have stated correctly the extent of the rule.

In no one of these cases was the evidence deemed redundant, calculated to influence the jury in the determination of any material controverted fact. If the evidence objected to referred to a material fact, it was a fact either not controverted, or which was, without such evidence, conclusively proved. *Fant v. Cathcart*, *Seabury v. Stewart & Easton*, and *Boynton v. Sims*, are all cases in which the objectionable evidence referred to immaterial facts, and could exert no influence in the determination of the material fact. In *Fant v. Cathcart*, the material fact, and the only fact to be proved, was the defendant's promise,

after he attained majority, to pay the bill single. The form of the pleading was an admission of the sufficiency of its consideration. The plaintiff having given evidence tending to establish the subsequent promise, other evidence, though illegal, of the sufficiency of the consideration, was redundant, having no relevancy to the material fact, and no tendency to influence the jury in determining that fact. But if the evidence had referred to the fact of the promise, and could have influenced the jury in determining that question, it would not have been deemed redundant. Evidence offered and admitted of a material fact is never redundant. Such evidence, if illegal, and duly objected to, can never be admitted without error. In *Seabury v. Stewart & Easton*, the evidence offered was to repel the existence of an outstanding title in a stranger. The existence of that title did not prejudice the plaintiff's right of recovery. Evidence to repel its existence was, therefore, evidence the plaintiff was not bound to offer. The same thing is true of *Sims v. Boynton*. Of *Jemison & Sloan v. Deering*, it is only necessary to say, the fact to which the evidence referred had been established by other "admissible and uncontroverted evidence," and other evidence could, therefore, be nothing else than redundant. The other cases, except *Bishop v. Blair*, were all cases in which the fact to be proved was proved by conclusive evidence, independent of the evidence objected to. In *Bishop v. Blair*, the fact sought to be proved by the objectionable evidence had been proved by the plaintiff. Hence, the objectionable evidence offered by the defendant was unnecessary.

The difference between these cases and the case under consideration, will be apparent on an examination of the record. The question was, when was this note executed? Was it executed on Sunday? On this question, the onus of proof was on the appellant, the note not bearing date on Sunday. The appellant offered direct evidence, and evidence having a tendency to prove this note was made on Sunday. This cast on the appellee the duty of rebutting that evidence to the satisfaction of the jury. And no

evidence which has a tendency to influence the jury in determining this fact, can be considered redundant. We know the court did not intend to say that without the objectionable evidence, the appellee had successfully and satisfactorily rebutted the evidence offered by the appellant. That, the court could not say, without assuming to pass on the weight of the evidence, and the degree of credibility which could be accorded to the opposing witnesses. This would be to assume the province of the jury. Unless the court can affirm that the appellee, independent of, and without the objectionable evidence, had repelled the evidence of appellant, the court will not declare that evidence redundant. That it was irrelevant to the fact to be proved, and should have exerted no influence in the determination of that fact, does not make it redundant, but renders it obnoxious to the objection which was interposed.

While this court has rigidly adhered to the rule, that error without injury will not work a reversal, it has also adhered rigidly to the rule, that error raised the presumption of injury, and unless the record clearly rebuts that presumption, must reverse the judgment.—See authorities collected in Shep. Dig. §§ 82, 83, 568.

Time and again the court has announced that the admission of irrelevant evidence will reverse, unless the record clearly shows that no injury could have resulted from it. "It is not enough that the court is not able to discover injury; it must see, and see clearly, that none could have resulted."—*Frierson v. Frierson*, 21 Ala. 549; *Bilberry v. Mobley*, ib. 277; *Cox's Adm'r v. McKinney*, 32 Ala. 461; *Shields & Walker v. Henry & Mott*, 31 Ala. 53; *Buford v. Gerald*, 35 Ala. 265; *Smitherman v. State*, 40 Ala. 355. To these citations others could be added, affirming the same rule. The court has never declared that the admission of such evidence would not work a reversal, unless the record disclosed affirmatively other admissible, uncontroverted evidence, entitling the party offering the evidence to the verdict and judgment he has obtained. It has never so declared when the evidence was conflicting, and depended

on the credibility the jury would attach to opposing witnesses, and the weight they would give their respective testimony. Can this court affirm that the record clearly discloses that this objectionable evidence had no weight in inclining the jury to render a verdict in favor of the appellee? Can the court affirm it did not turn the scale in his favor? The court may see and affirm that it should not have any weight in determining the fact; that renders it irrelevant; but the court can not see that it had none, and not seeing it, the presumption of injury from error must prevail, and entitle appellant to a reversal.

To this application the following response was made:

B. F. SAFFOLD, J.—We are asked to re-hear this case on the ground that the evidence respecting the manner in which the plaintiff was accustomed to spend the Sabbath day, was not superfluous or redundant, but was calculated to mislead the jury. I do not know that any precise rule can be made applicable to the subject. Of course, when conclusive evidence of any fact had already been given, any more of a cumulative character would be superfluous. On the other hand, a mere preponderance of testimony, after the exclusion of illegal testimony on the side prevailing, would not authorize this court to affirm the judgment of a jury court. But if the testimony in favor of the judgment was such that, after the illegal evidence was abstracted, a contrary verdict ought to be set aside, and a new trial granted, might we not affirm? If not, ought we not to do so in a case where the evidence in favor of the judgment was very strong, after the withdrawal of what was illegal, and the opposing evidence was weak and insignificant? *Fant v. Cathcart*, 8 Ala. 725, and *Jemison & Sloan v. Dearing*, 41 Ala. 283, are cases governed by the last proposition.

In this case, the illegal evidence admitted is of so slight and vague a character, and the preponderance of the other testimony is so decidedly in favor of the judgment, that we feel constrained not to reverse.

A re-hearing is denied.

TOWNSEND *vs.* JONES ET AL.

[DETINUE TO RECOVER MULES.]

Debt of another; promise to answer for; what is.—J. gave a mortgage to T. on two mules and his crop of cotton, to secure the payment of $500. He was indebted to him about the same amount in addition. He and T. disputing about the debt to which the cotton should be applied, D. proposed to give his note to T. for the unsecured debt, and take a mortgage on the mules for his reimbursement, the existing mortgage to be satisfied with the cotton, and J. to join with him in renting land from T. for the next year. T., in pursuance of the agreement, received the cotton in satisfaction of his mortgage, and J., after promising to execute the agreement on a subsequent day, and obtaining the credit on his mortgage debt, refused to consummate it. He insisted all the time that his payment should be so appropriated.—*Held*, that the agreement was void, because not in writing, and that J. had the right to apply his payment as he preferred.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

THE appellees sued to recover two mules which were in the possession of the appellant.

The plaintiffs were the tenants of the defendant during the year 1869, and were indebted to him $500 for the purchase of the mules, and about the same amount for advances made to procure supplies for the year. The purchase-money for the mules was secured by a mortgage on them, and also on the crop to be raised by the plaintiffs in that year. The advances were unsecured, except by a verbal agreement to that effect, which was controverted.

Towards the close of the year, the parties met at the store of Dreyfus, in Montgomery, when a dispute arose between them about the disposition of five bales of cotton which the plaintiffs had with them. The defendant insisted that the proceeds of their sale should be credited on his account for the advances, while the others claimed that the credit must be given on the mortgage debt. Dreyfus

then proposed that he and the plaintiffs should rent land from the defendant for the next year, 1870, he should give his note to the defendant for the amount of the advances, and take a mortgage on the mules, the existing mortgage on them to be satisfied with the proceeds of the cotton. This proposition was assented to by all of the parties. But a future day being appointed to consummate the agreement, the plaintiffs refused to do so.

They, however, obtained from the defendant a receipt for $500, expressed to be in satisfaction of the mortgage. He says it was given in pursuance of the agreement. They say it was not. After the agreement was abandoned, the defendant went upon the premises of the plaintiffs and took the mules.

The court charged the jury, at the instance of the plaintiffs, that a mortgage of mules may be satisfied verbally; that a debtor has the right to direct on which of two debts his payment shall be credited; that a promise to answer for the debt of another is void, unless in writing, expressing the consideration, and subscribed by the party to be charged; that if Dreyfus promised verbally only to assume the debt of Jones, already contracted, the promise was void. The possession by the mortgagor of a note secured by mortgage, is *prima-facie* evidence of the satisfaction of the mortgage, and the payment of the note is a satisfaction. If, at the time of the supposed verbal agreement between the parties and Dreyfus, the plaintiffs paid the defendant a sufficient sum of money to extinguish the mortgage debt, with directions to apply it to that debt, the mortgage was discharged; that if the plaintiffs owed the defendant in addition to the mortgage debt, and paid him money intending to satisfy the mortgage debt, and the defendant took the money with a knowledge of the intention of the debtors, and at the time of the payment, as a part of the transaction, the plaintiffs agreed to secure the other debt by a note of a third person, or otherwise, the subsequent breach of this agreement by the plaintiffs would not give validity to the mortgage satisfied by the payment of the debt it was intended to secure.

The defendant appeals, and assigns the charge as error.

STONE, CLOPTON & CLANTON, and JUDGE & HOLTZCLAW. for appellant.

WATTS & TROY, *contra.*

B. F. SAFFOLD, J.—We see no error in the charge given. The agreement proposed by Dreyfus was not executed. The defendant acquired no right against Dreyfus, nor did the latter obtain any against the plaintiffs. The defendant's consent, under the supposition of the charge, was not necessary to a credit of the payment received by him on the mortgage debt. If he had a superior claim to appropriate the payment to his other debt he ought to have propounded it.

The judgment is affirmed.

RIVES *vs.* FLINN ET AL.

[BILL IN EQUITY AGAINST SURETIES OF DECEASED ADMINISTRATOR TO TRANSFER FINAL SETTLEMENT OF ADMINISTRATION IN CHANCERY COURT.]

1. *Statute of limitations; when begins to run.*—The statute of limitations of six years in favor of the sureties of executors, administrators and guardians, (Rev. Code, § 2901,) begins to run from the date of the final settlement of the trust.
2. *General guardian, appearance by for minor; effect of.*—The general guardian of a minor may appear and represent him on the final settlement of the succession by the administrator, and such appearance cures the want of notice.

APPEAL from Chancery Court of Montgomery.

Heard before Hon. ADAM C. FELDER.

This was a bill in equity, filed by the appellant, as heir-at-law and distributee of the estate of Mary A. Rives, deceased, against the sureties of her administrator, and

against one Flinn, administrator of Bozeman, who had administered upon said Rives' estate, praying that Bozeman's administration be finally settled in the chancery court, and that on such settlement decree be rendered in favor of complainant for his proper distributive share of said estate.

It appears from the bill, which was filed October 6, 1870, that about the 10th of September, 1857, Bozeman was appointed by the probate court of Montgomery county, administrator of the estate of Mary A. Rives, who had died intestate in the State of Texas, leaving some estate in Montgomery county, but by far the larger portion in the State of Texas; that said estate owed no debts; that from time to time the estate in Texas was converted into money, and came into the hands of the administrator here, who duly qualified and administered upon said estate, and reduced the assets thereof into money in the year 1857. In 1859 Bozeman filed his accounts and vouchers for a final settlement. Due notice and publication was given of this settlement, and the court appointed one John M. Shields guardian *ad litem* for complainant, who was then a minor under eighteen years of age, but who became of age on the 19th of March, 1862. Shields never acted as such guardian, nor appeared in any manner at such final settlement, but one W. H. Rives, complainant's general guardian, appeared, and consented, for complainant, to the decree rendered in favor of complainant against said Bozeman on said final settlement, which was had on the 14th day of December, 1859. The proceedings in the probate court are made an exhibit to the bill. The decree of final settlement, omitting that part of it relating to publication, advertisement of day set for hearing, the names and residence of heirs, &c., is as follows:

"It appears that the following are the heirs-at-law and distributees, to-wit: Thomas E. Rives, husband of the deceased, who is of full age, and whose residence is unknown, and H. G. Rives, a son, who is a minor under the age of twenty-one years, and who resides in the city of Montgomery, State of Alabama, and of whom one William H.

Rives has qualified and given bond as guardian in this court; and the court proceeding to examine and state said account, and William H. Rives, guardian of W. H. G. Rives, a minor as aforesaid, coming into open court, and having examined said account, consents to its correctness as stated, and said account thus stated appearing to be correct: It is ordered, adjudged and decreed by the court, that said account be allowed; and it appearing to the court that the said Mary A. Rives died intestate in the State of Texas, being at the time of her death a resident citizen of said State of Texas; and it appearing to the court that the entire estate of the deceased now in the hands of said administrator, to distribute, is composed of cash. * * * * * * * * * * * * * * * * *

"It is also ordered, adjudged and decreed by the court, that William H. G. Rives aforesaid recover from Jesse A. Bozeman, administrator as aforesaid, the said sum of four thousand two hundred and sixty-seven 89-100 dollars, to be credited with the sum of three hundred and 70-100 dollars, heretofore paid out and appropriated and expended by the said administrator for the use and benefit of said minor, which leaves still due the sum of three thousand nine hundred and seventy-seven 19-100 dollars, for which let execution issue."

The bill also alleges that Bozeman, before his final settlement, had received and converted to his own use $5,000 in goods, money and chattels belonging to said estate, and for which he did not account on his final settlement, and also, that Bozeman "commingled the assets of said estate with his own funds, and appropriated the same to his own use, and has wasted and misappropriated the assets of the estate, and converted the same to his own use, with a corrupt intent." Bozeman died in 1863, and Flinn was appointed his administrator. The bill alleges that the settlement on the 14th December, 1859, was void, and alleges error in said final settlement, and that the court allowed the father of complainant a larger distributive share than he was entitled to. There is no allegation that the general guardian did not collect the amount of the decree in favor

of complainant. Bozeman's administrator, the sureties on Bozeman's administration, and Thomas E. Rives, father of complainant, are made parties defendant.

The sureties demurred to the bill, among other grounds, because it showed on its face that it sought relief on a stale demand, against which the sureties were protected by the statute of limitations of six years. The chancellor sustained the demurrer and dismissed the bill. By agreement of counsel, the only question presented is, whether the sureties are liable on the facts stated in the bill. The error assigned is, that the court erred in sustaining the defense of the statute of limitations.

WALKER & MURPHEY, for appellant.—The entry on the 14th of December, 1859, recites that William H. Rives was the general guardian of the minor, and that he came into court and consented to the correctness of the account as filed, and thereupon the account was allowed.

The decree in that case is utterly void, for the following reasons: 1, there was no acceptance of his appointment by the guardian *ad litem;* 2, it does not appear that the guardian *ad litem* was ever informed of his appointment; 3, no defense whatever was made for the infant, and no proof required, but one William H. Rives, represented to be general guardian, admitted the correctness of the account and vouchers.—See *Laird v. Reese*, 43 Ala. 148; *Frierson v. Travis*, 39 Ala. 150; *Searcy v. Holmes*, 43 Ala. 608; *Darrington v. Borland*, 3 Port. 23. An infant, upon the settlement of an estate of which he is a distributee, must be represented by a guardian *ad litem*, and can not be represented by one who is merely general guardian. Rev. Code, § 2138; Rules of Ch. Prac. 20, 23, pp. 825–6.

2. The decree of the probate court being utterly void, the administration of Bozeman on the estate of Mary A. Rives is unsettled, and the question arises here, whether the statute of limitations of six years in favor of the sureties of an administrator can run before the rendition of a decree on final settlement. We insist that it can not, and refer to an elaborate discussion of the subject in the case

of *Bunting v. Grigg*, now in the hands of the court for decision. It is insisted that the liability of a surety is not fixed until there is a decree against the principal.

3. The defense of the statute of limitations is available on demurrer where it affirmatively appears that the equity is barred by the lapse of the prescribed period. If it does not so affirmatively appear, the defense must be set up by way of plea.—Story Eq. § 751, p. 710. Now, it is impossible to affirm that the bill shows upon its face that the complainant's equity was barred when the suit was commenced, no matter what view be taken as to the time when the statute begins to run. If the date of the decree against the administrator be adopted as the time when the operation of the statute begins, then the bill shows that the equity is not barred, for it demonstrates that the only decree ever rendered is void. If the time at which the conversion or waste of the assets occurred be fixed upon as the commencement of the bar, then it does not appear from the bill that the bar was complete when the suit was commenced, for the bill does not show that the waste or conversion occurred at such a time as to make up the bar of the statute. It can be inferred from the bill that the waste or conversion occurred before the death of Bozeman, for the bill says that he wasted the assets, but even upon that argument the bar would not be complete, for Bozeman died during the war, and the statute would not begin until the 21st of September, 1865, which was less than six years before the commencement of the suit. For aught that appears in the bill, the waste or conversion may not have occurred until about the time of Bozeman's death.

The bill is not to be taken most strongly against the complainant on the question of the statute of limitations, because it is properly a pleadable defense, and it can only be made available on demurrer when the fact of the bar is plainly apparent from the bill itself.

By agreement, the court is to decide but one single question, and that is, whether the bill is demurrable by the sureties on the ground of the statute of limitations.

WATTS & TROY, and GRAVES & RHEA, *contra*.—1. Under ordinary circumstances, the statute of limitations commences running from the time when a right of action accrues. From whatever day the party plaintiff has a right to sue, the statute of limitations commences running.—See *Neal v. Cunningham*, 2 Porter, 171; Chitty on Bills, top page 608, and notes 1, 2, on that page; *Hopper v. Steele*, 18 Ala. 828; *Lucas v. Thorington*, 7 Ala. 605. But under the statute made for the benefit of sureties of sheriffs, administrators, &c., the statute would seem to run in favor of the surety, even before any right of action could be maintained against the sureties. The language is, that the time must be computed from the act done, or omitted, by the administrator, which fixes the liability of the sureties.

This is the interpretation given to the old statute with similar language, fixing the liability of the sureties of sheriffs.—*Governor v. Stoneum et al.*, 11 Ala. 679. The statute of limitations in favor of sureties may, under this particular language, commence to run even before a suit could be brought against the administrator.

3. Every bill in equity, on demurrer, must be construed most strongly against the complainant, and if it does not appear from the facts stated in the bill that the suit, under this construction, is brought within the time limited, there can be no recovery, and the bill must be dismissed on demurrer; and it is not necessary to plead the statute of limitations in courts of equity.—Story Eq. Pl. §§ 484, 485, 503; *Duckworth v. Duckworth*, 35 Ala. 70; *Humphries v. Terrell*, 1 Ala. 650; *Sims v. Caulfield*, 2 Ala. 555; *Byrd v. McDaniel*, 33 Ala. 18; *Nimmo v. Stewart*, 21 Ala. 682. If there be anything which will prevent the statute of limitations from running, the fact or facts having this effect must be stated in the bill.

A general demurrer will raise the question of the statute of limitations.—*Nimmo v. Stewart*, 21 Ala. 682.

2. To determine the question of the statute of limitations fully, it may be necessary to ascertain what effect is to be given to the decree of final settlement made on the 14th December, 1859. If this settlement was a valid set-

tlement, if it was not void, although it may abound in errors and irregularities, it can be made clear beyond dispute that the remedy against the sureties was barred by the statute of limitations before the commencement of this suit. Was, then, the settlement made by Bozeman on the 14th December, 1859, void?

The infant may be represented by his general guardian; and whenever this is shown to have been done, it dispenses with any necessity for appearance by a guardian *ad litem*. The general guardian is the proper representative of the ward, and he feels a higher degree of responsibility in protecting the rights of the ward than the guardian *ad litem* appointed by the court.—See *Smith v. Smith*, 21 Ala. 761, and especially on pages 764 and 765. In the case cited, it was held not even to be an irregularity—no error on appeal that the general guardian appeared for the ward, and not the guardian *ad litem*, and the appearance of the guardian was conclusive of the jurisdiction of the court to proceed with the settlement. The case of *King et al. v. Collins, Adm'r*, (21 Ala. 363), and especially on pages 369 and 370, recognizes the same doctrine.—See, also, *Morgan's Adm'r v. Morgan's Dist.*, 35 Ala. 307, 308, and especially the third point made in page 308. If a decree is made in favor of the guardian *ad litem*, he can not receive the money; it must be paid to the general guardian.—*Haynes v. Wheat*, 9 Ala. 243. This settlement was conclusive on all parties to it.—*Watt v. Watt*, 37 Ala. 543; *Modawell v. Holmes*, 40 Ala. 391; *Griffin v. Griffin*, 40 Ala. 296. The cases of *Laird v. Reese*, *Searcy v. Holmes*, and *Frierson v. Travis*, cited by the counsel for appellant, are not like this. In all of them the ward was unrepresented, either by a guardian *ad litem* or general guardian, and for this reason the court was without jurisdiction of the parties.

3. The record from the probate court of Montgomery county shows that Wm. H. Rives, the guardian of complainant, did appear and represent the complainant on that settlement.

There is no averment in the bill that Wm. H. Rives was not the regularly appointed guardian of complainant. The

record from the probate court states that W. H. Rives was the guardian. This record is made part of the bill of complaint, and it must be taken as true, unless its statements are charged to be untrue.—*Minter & Gayle v. Branch Bank*, 23 Ala. 762.

It was certainly the duty of the administrator, Bozeman, to pay the decrees on this final settlement, December 14th, 1859. His failure to do so was an omission of his duty, which fixed a liability; and from that day, if not before, the statute of limitations commenced running in favor of the sureties.

At any day after the rendition of that decree the sureties could have been sued for the failure of the administrator to pay the amount decreed to be paid, and, therefore, the statute commenced running in favor of the sureties. They could have paid the decree without waiting for execution.—See authorities before cited, and *Taylor and Wife v. Kilgore*, 33 Ala. 221; *Eiland v. Chandler*, 8 Ala. 783; *Snedicor v. Davis*, 17 Ala. 472; *Wheat v. Haynes*, 9 Ala. 239; *Dean v. Portis*, 11 Ala. 104.

4. But the bill shows a commingling of the assets of the estate with his own by Bozeman. It further alleges, that Bozeman, before the settlement of 14th December, 1859, converted the assets to his own use.

From the acts of misfeasance the sureties become liable, and from that day the statute of limitations commenced in favor of the sureties.—See *Governor v. Stoneum*, 11 Ala. *supra*, and the authorities there cited.

5. The complainant became of age on the 19th March, 1862, and he never filed this bill until the 6th day of October, 1870. Now, if we take out the time elapsing between the 11th day of January, 1861, and the 21st of September, 1865, under the ordinance of the convention of 1865, we have more than six years before the filing of this bill. From the 14th of December, 1859, to the 11th of January, 1861, is one year and twenty-eight days. From the 21st September, 1865, to 6th October, 1870, the time of filing the bill, is five years and fifteen days. Now, add the one year and twenty-eight days to the five years and fif-

teen days, and we have six years one month and thirteen days.

6. But as the bill is to be taken most strongly against the complainant, the statute of limitations commenced running in favor of these sureties from the time it is alleged that Bozeman commingled the assets of the estate with his own; from the time he wasted and converted the assets of the estate, and that was before he filed his account for final settlement of the estate. He filed this account on the 16th November, 1859.

The case of *Dean v. Portis* (11 Ala. 104), holds that an action may be brought against the sureties of an administrator on the bond whenever the administrator has wasted or converted the assets of the estate, although the *devastavit* has not been fixed in a separate suit. The judgment against him *de bonis intestatis* is sufficient evidence of a *devastavit*.—See, also, *Haynes v. Wheat*, 9 Ala. 239.

Debt suggesting a *devastavit* is maintainable after judgment against the administrator, even before or after issue of *fi. fa.*—*Burke v. Adkins*, 2 Porter, 236; *Thompson v. Scarcy*, 6 Porter, 393; *Read v. Nash*, 23 Ala. 733.

In the case at bar, no act of the administrator amounting to waste, conversion, or other *devastavit*, is charged to have occurred after the decree on final settlement, the 14th December, 1859.

The bill charges that the estate was ready for final settlement before the administrator filed his accounts for final settlement. This readiness to settle, and the failure to do so, was an act of omission which fixed the liability on the administrator; and from that day the statute of limitations commenced to run in favor of the sureties.

Suppose the sureties had made application to the probate court to have the administrator removed, or for the purpose of requiring of him an additional bond, under section 2019 of the Code, and this application had been granted, and a new bond required and given; under the facts stated in this bill, would not the sureties have been liable for all acts occurring prior to the settlement of December 14th, 1859?

Section 2036 declares that when an additional bond is given on the application of the surety, such surety is discharged as to all breaches subsequent to the execution and approval of the additional bond.

Now, if the administrator had commingled the funds of the estate with his own; had converted them to his own use; had wasted them, and was ready for a settlement before he filed his account on the 16th of November, 1859, as alleged in the bill; and the sureties had filed their application to have additional bond; and on the 16th November, 1859, the court had required the additional bond, would the old set of sureties have been discharged from liability for these acts of waste and conversion? Would the new sureties have been liable for this past waste and conversion? Clearly not; but the old sureties would have been liable. If so, how can the conclusion be resisted that the statute of limitations commenced running from the time of the commission of the waste and conversion, which is alleged to have been done before the 16th November, 1859?

The fact that the sureties, by requiring the additional bond, could not have discharged their liability if an additional bond had been given, is conclusive to show that the administrator had done some act of malfeasance or misfeasance, or omitted some act or duty, which fixed his liability; and the time of the statute, under section 2901, must be computed from the act done or omitted by the administrator, which fixes the liability of the surety.

Section 2901, and the section 2036, must be construed together; the latter defines what is meant by "the act done or omitted" which fixes the liability of the surety; and the former provides that the time of the statute of limitations shall commence from the act done or omitted by the administrator, which fixes the liability of the surety.

B. F. SAFFOLD, J.—The bill is filed by the appellant, as the heir and distributee of the estate of Mary A. Rives, against the sureties of her administrator, Bozeman, for a final settlement of his administration in the chancery

court. By agreement of the counsel for both parties, the single question is presented for our consideration whether the sureties are protected against the account by the statute of limitations of six years in favor of the sureties of executors, administrators, guardians, &c.—Revised Code, § 2901, ¶ 6.

The bill charges that Bozeman was appointed administrator in 1857. He received property of the estate, and in December, 1859, made a pretended final settlement, a transcript of which is appended as an exhibit. From this transcript it appears that Bozeman filed his accounts and vouchers for a final settlement, and a day was appointed for the hearing. On that day the general guardian of the complainant, Wm. H. Rives, appeared to represent him. With his consent and concurrence, a decree was rendered against the administrator in favor of the complainant for a considerable sum of money. This decree was for his distributive share of the estate, there being only money to be divided, in accordance with section 2158, Revised Code, and upon it execution was ordered to issue.

The matters of complaint charged in the bill are all such as relate to a time anterior to the final settlement. The chief grievance is that the administrator wasted the property, and failed to account for all for which he was liable. The property being in money at the time of the settlement, could not afterwards be commingled, or wasted, in the sense usually attached to those words. The final settlement was an ascertainment of the extent of the administrator's liability, which fixed the liability of the sureties. They were then equally bound with himself to satisfy the decree.—*Yonge v. Ward*, 45 Ala. 474.

But the appellant says the final settlement was void, because the minor was not properly represented. Notice of the day fixed for the settlement is given by publication. Rev. Code, § 2140. When special notice to the infant is required, as in chancery, it is served on the general guardian.—Rule 20, Chan. Prac. The general guardian may appear for the minor, and such appearance dispenses with notice.—*Smith v. Smith*, 20 Ala. 761; *Morgan v. Morgan*,

35 Ala. 307. There is no reason why the law should be otherwise, except in cases where the guardian is adversely interested. The final settlement is not void.

The settlement was made on the 14th of December, 1859. The bill was filed on the 6th of October, 1870. The statute declares that actions against the sureties of executors, administrators, or guardians, for any misfeasance or malfeasance whatever to their principal, shall be barred in six years, the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety.—Rev. Code, § 2901, ¶ 6. It does appear from the bill that six years had elapsed between the date of the final settlement and the filing of the bill, after deducting the time between the 11th of January, 1861, and the 21st of September, 1865. The demurrer was properly sustained.

The decree is affirmed.

WESCOTT *vs.* WALLER, GUARDIAN.

[ACTION ON JUDGMENT—ACCORD AND SATISFACTION.]

Accord and satisfaction; what may be pleaded as.—Where a debtor pays the principal of his debt, which is received by the creditor, in full satisfaction, whether the debt be passed due, or running to maturity, it is a good defense, and may be pleaded as an accord and satisfaction.

APPEAL from the Circuit Court of Montgomery.
Tried before Hon. MILTON J. SAFFOLD.

THIS was an action by Waller, as guardian of Sarah V., Abram C., and Virginia Vickers, minors, against Wescott, upon a judgment recovered by Ann E. Allsover against appellant, Wescott, at the fall term, 1861, of the circuit court of Montgomery, for the sum of $760 32, which judg-

ment had been transferred to and was the property of Waller, as guardian, &c.

The parties went to trial upon "the plea of the general issue, with leave to give in evidence any matter that could be specially pleaded in bar of said action." The plaintiff read in evidence the complete record of the judgment described in the complaint, and then rested.

Defendant set up two defenses to the action:

1st. That said judgment was recovered on a bill of exchange made by one D. J. Bunting, for a negro slave bought by him of Ann E. Allsover, and that one James W. Powell and defendant were parties to said bill of exchange as sureties; that in 1866 defendant, without any knowledge that said judgment had been transferred to plaintiff, compromised the same with Ann E. Allsover by the payment of $880; the costs and interest on said judgment to May, 1862, having been previously paid, which was received, and was intended by the parties to be received, in full satisfaction and discharge of said judgment.

2d. "That in the year 1869, on defendant's petition, the circuit court of Montgomery set aside said judgment, and granted a new trial, which resulted in a verdict and judgment for the defendants; that when the cause was called for a second trial, defendant proposed to have the order for a new trial set aside, and the cause stricken from the docket, but that plaintiff objected to this, and insisted upon having a trial, under said order of the circuit court, and defendant was required to go on with the trial, which resulted as aforesaid."

Defendant introduced and read in evidence an entry on the sheriff's execution docket, as follows:

"Ann E. Alsover vs. Wm. R. Wescott. } *Fieri facias* from Montgomery Circuit Court, Fall Term, 1866. Judgment dated 19th November, 1861, issued Aug. 1st, 1866. Judgment, $760 32; interest up to compromise, with interest as follows, $40 00; clerk's fees, $1 30; sheriff's fees, $24 00. This judgment is satisfied by a compromise between plaintiff and defendant, as stated by plaintiff's attorneys, Aug. 11th, 1866.

"Received, Aug. 11th, 1866, of A. H. Johnson, sheriff, eight hundred and eighty dollars, in full of this case.

"SANFORD & FULLER,
"Plaintiff's Att'ys."

Defendant also offered in evidence the record of the proceedings in the circuit court setting aside the judgment sued on, granting a new trial thereon, and the judgment and verdict in favor of defendant on the new trial.

It appeared from the evidence that at the time of the compromise and payment of the judgment, Bunting and Powell were insolvent; that Wescott's means had been greatly impaired by the result of the late war; that he had but little property left, except his land, and that it was thought this would be confiscated by the United States, and if his land had been taken from him he could not have paid his liabilities. It was proved that the compromise was made, through her attorneys, at the special instance and direction of Mrs. Allsover, and that at the time of the settlement and compromise Wescott did not know, and had no reason to believe, that any person other than Mrs. Allsover claimed or had any interest in the judgment. It was also in evidence that plaintiff's attorneys received, and intended to receive, the $880 in full settlement and compromise of said judgment; that Waller, hearing of said payment to Mrs. Allsover's attorneys, informed one of them that he was entitled to the money paid, and that thereupon Mrs. Allsover, her husband and said Waller came to Montgomery, and talked over their respective claims in the matter in presence of one of plaintiff's attorneys, and settled the same by Waller giving Mrs. Allsover $800 of the money, the other $80 being paid the attorneys, and she gave him a receipt as guardian for so much money to reimburse her for that amount paid out for the minor children represented by plaintiff; that during this interview none of the parties objected to the compromise and amount obtained in any manner, except that Waller denied Mrs. Allsover's authority to make the compromise. Another of Mrs. Allsover's attorneys testified that the compromise was made in exact accordance with Mrs. Allsover's

written instructions, and that at the time none of the parties knew anything of Waller's claim. Wescott testified, on cross-examination, that, "so far as he knew, he was generally regarded in the community as a debt-paying man, and as one who did not owe much, and as being able to pay all his debts."

The court charged the jury, at the request of plaintiff, as follows:

"That if they found the facts as above set forth [as given above], that the payment made on the compromise, as set forth, of $880, was a good payment to that extent on the original judgment, but did not amount to a full satisfaction of the original judgment; that they should not regard the verdict and judgment rendered on the new trial; and that, under the above state of facts, the plaintiff was entitled to recover the amount of the original judgment described in the complaint, with interest thereon, less the said sum of $880, with interest thereon from the date of its payment."

To this charge the defendant excepted, and assigns the same here for error.

FALKNER & MOLTON, for appellant.
WATTS & TROY, *contra.*

PECK, C. J.—We shall dispose of this case on the first defense made in the court below, without saying anything as to the merits of the second. In the first place, the judgment recovered by Mrs. Allsover was rendered by a court of the rebel State of Alabama, and, as we have held, it had only the force and effect of a foreign judgment, and constituted a cause of action merely, and no execution could be legally issued upon it after the rebellion was suppressed. Foreign judgments can only be enforced by the law of comity, and in actions brought for that purpose the merits and justice of such judgments may be examined into.—*Martin v. Hewitt*, 44 Ala. 418. The question, then, arises, does the evidence, if true, make out a good defense to the action, either as a payment sim-

ply, or as an accord and satisfaction, or as the compromise of a doubtful debt? We think it may well operate either way. It is not alleged that there were any false representations, deceit or fraud, on the part of the defendant. The plaintiff in the judgment was of full age, and acted with a knowledge of all the circumstances, and, as the evidence shows, the compromise was made by her attorneys, at her instance, and by her direction, and that the $880 paid, after deducting the attorneys' commissions, was received by her in full satisfaction of the judgment; and, further, that the sum paid exceeded the original amount of the judgment by more than one hundred dollars. There is no doubt, in this case, as to the intentions and expectations of the parties to this transaction. The plaintiff in the judgment intended to receive, and did receive, the $880 in full payment and satisfaction of the judgment, and the defendant expected to obtain, by said payment, a good and legal discharge from the same. Is there any good reason, either legally or morally, why these intentions and expectations should be defeated or disappointed? We are unable to see any.

The rule undoubtedly is, that "the payment of a part of a debt is, in general, no legal satisfaction of the remainder, although the creditor receive the smaller sum in full discharge of the whole demand, and give a receipt accordingly."—Chitty on Contracts, 747, and cases cited. This rule, however, to say the least of it, is a hard rule, and defeats the clearly expressed intentions of the parties, and, therefore, should not be extended to embrace cases not within the very letter of it. In the case of *Brooks et al. v. White* (2 Metcalf, 283), speaking of this rule, it is said: "This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied." And in the case of *Johnson v. Brannan*, 5 I. R., the court speaks of it as "that rigid and rather unreasonable rule of the old law." Being a rigid rule, and the reasons for it not altogether satisfactory, it might be expected that cases

would arise that would constrain the courts, to prevent injustice and a violation of good faith, to treat as exceptions to it. This we find to be the case.

A composition by a debtor in failing circumstances, by which the creditors agree to accept a certain percentage of their debts, whether past due or running to maturity, in discharge of the whole, is a well settled exception to this rule.—*Milligan v. Brown*, 1 Rawle, 397. So, if a debtor give his note, indorsed by a third person as further security, for a part of the debt, which is accepted by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt, and may be pleaded as an accord and satisfaction.—*Boyd v. Hitchcock*, 20 I. R., 76. So, again, the acceptance of a collateral thing, if of any legal value, in satisfaction of a pre-existing debt, is a good defense as an accord and satisfaction.—*Williams v. Stanton*, 1 Root, 426; *Blenn v. Chester*, 5 Day, 360; *Anderson v. Highland Turnpike Co.*, 10 I. R., 86. And, once more, the payment and acceptance of the principal of a debt, without the interest due thereon, if received by the creditor in full satisfaction, is a good accord and satisfaction.—5 I. R., *supra*.

In the present case, the payment, as the evidence shows, exceeded the sum for which the judgment was rendered by more than a hundred dollars, and it was received in full satisfaction of the same; therefore, it operated as a legal discharge of the whole judgment. Interest is, really, no part of the debt, but is a mere incident to the debt, given by statute, and is only recoverable as damages for its detention. If a party accepts the principal of his debt, he can not, afterwards, sue for the interest. This is especially so where the principal is received in satisfaction.—*Tillotson v. Preston*, 3 I. R. 229.

In addition to what is already said, we hold that the circumstances of this case presented good reasons to make the payment of the $880 a good defense to the action, as the compromise of a doubtful debt. The defendant was only surety for the original debt. The principal and the defendant's co-surety had become insolvent, and the defendant himself, by the disasters of the civil war, had been

brought to the very verge of insolvency, and at the time the payment was made had but little property left, except his real estate, and if that had been confiscated, as it was thought it might be, he would not have been able to pay his liabilities. These circumstances were sufficient to have induced a prudent creditor to compromise his debt, and, it seems to us, the compromise in this case was by no means unreasonable, and, being made in good faith, without any false representations, or any suppression of the truth on the part of the defendant, fair-dealing and common honesty require that he should be discharged from all further liability. As the charge of the court is inconsistent with this opinion, the judgment is reversed, and the cause is remanded for another trial. The appellee will pay the costs, &c.

McNEIL *vs.* THE STATE.

[INDICTMENT FOR LIVING IN ADULTERY.]

1. *Oath of jury; what recital as to, sufficient.*—On appeal from a sentence in a criminal case, where the judgment entry recited that the jury was "sworn to well and truly try the issue joined",—*Held*, apparent that the oath administered to the jury was not attempted to be set out, and this court will presume the proper oath was administered.
2. *Counsel, instructions, &c. given in absence of; when error.*—Where, during the trial of a criminal cause, the court, at a recess, gave additional instructions to the jury, received their verdict, and discharged them, in the absence of the prisoner's counsel,—*Held*, error, when it appeared from the record that no attempt to give them notice was made, but that it would be sufficient notice to call them at the court-house door or other place, as witnesses and other persons are usually called.

APPEAL from the City Court of Mobile.
Tried before Hon. C. F. MOULTON.

THE appellant was convicted of living in adultery, &c., and fined one hundred dollars.

The judgment entry, so far as relates to the oath administered the jury, was as follows:

"November 29th, 1871. This day came the State of Alabama, by its solicitor, and the defendants, with their counsel, and said defendants were arraigned on an indictment charging them with the crime of adultery, to which charge they severally pleaded not guilty; and thereupon came a jury of lawfully qualified men, to-wit, T. A. Malone and eleven others, who, being impanneled and sworn well and truly to try the issue joined, and having heard the evidence, the arguments of counsel, and the charge of the court, retired to consider the case and make their verdict."

From the bill of exceptions, it appears that the jury retired to consider of their verdict at 2 o'clock one afternoon, and remained out until 8 o'clock next morning, when, still being unable to agree, they sent for the judge and "asked for further instructions"; and thereupon the court, in answer to a question, gave the jury additional instructions in the presence of the prisoners. The question and the additional instructions given in reply thereto, need not be further noticed. The bill of exceptions then concludes as follows:

"This being the last case open and undisposed of on the court docket, for the term, the court sentenced each of the defendants, in addition to the fine, to thirty days' imprisonment in the county jail, after asking the usual question, if they had anything to say why they should not be sentenced. And the foregoing instructions were given and proceedings had in the absence of counsel for the prisoners, who were not called at the court-house door, nor was any effort made by the court in any manner to notify them to be present. At about nine o'clock, being about one hour after the court had instructed the jury as aforesaid, the jury returned into court with a verdict of guilty against both of the defendants, they being present in court. The said verdict was received by the court and the jury discharged, in the absence of the counsel for the prisoners, and they were not called at the court-house door, nor was

any effort made by the court in any manner to notify them to be present. The regular hour for the court to convene is at ten o'clock of the morning. Immediately upon the convening of the court on the second day of December, the first day of court after conviction, the defendants, by their counsel, excepted to the action of the court in giving additional instructions to the jury, and afterwards receiving their verdict, whilst the attorneys for the prisoners were absent from the court-room, without having them called, or making any effort in any manner to notify them to be present. The exception was allowed by the court, and the said action of the court is now here assigned as error. And the defendants now present this as their bill of exceptions, and pray that it may be signed and sealed as their bill of exceptions, which is accordingly done," &c.

It is now assigned for error that the jury was not sworn according to law, and that the court erred in giving additional instructions to the jury in the absence of prisoners' counsel.

GEORGE TURNER, and A. MCKINSTRY, JR., for appellant. The main question presented is, does the 8th section of article I of the constitution of Alabama, which says, "that in all criminal prosecutions the accused has a right to be heard by himself and counsel, or either," give the accused the right to have, in addition to himself, the presence of his counsel in court at every stage of the prosecution? There is no doubt but the prisoner himself must be present at every important stage of the prosecution, and there are no more important stages of a case than when the jury receive additional instructions, when they render their verdict, and when sentence is passed by the court.—See *Ex parte Bryan*, 44 Ala. 402; *State v. Hughes*, 2 Ala. 102, 104; *Henry v. State*, 33 Ala. 389; *Hall v. State*, 40 Ala. 698. Does this same right attach to his counsel? Or if not to the same extent as with reference to the prisoner, how far does it extend? It would seem, to argue from analogy, that the right of the prisoner to have his counsel in court, and to have them heard in his behalf, under the

section of the constitution above quoted, would be as strong as to have the right to be in court and be heard himself. The necessity for the presence of the counsel is certainly much greater than for that of the accused. The counsel is one supposed to be learned in the law, one who can speak knowingly and understandingly, and who can take advantage of any point which may arise in his client's favor, while the accused, being generally a man not learned in the law, would not know what to do, and, consequently, would be no better in than out of court. The accused could not except to the additional instructions of the court, because he would not know whether they were right or wrong, and would not probably know that he had a right to except, even if they were wrong. He would not know how to proceed to poll a jury upon the reception of their verdict, and if sentenced immediately after the reception of the verdict, would not have time, even though he knew how, to make a motion in arrest of judgment. And a motion in arrest of judgment must be made and heard before the sentence is pronounced.—*Hood v. State*, 44 Ala. 81. His counsel could and would probably do all this. Especially would he poll the jury to see if they all agreed upon their verdict, after they had been unsuccessfully trying to agree upon it for the space of eighteen hours; and would most probably make a successful motion in arrest of judgment, after the proceedings described in the record had been taken, in his absence, without his knowledge, and without any action upon the part of the court to secure his presence.

The case of *Collins v. State*, (33 Ala. 434,) is an authority against the action of the court in this instance. The decision rendered in that case is put upon the ground that it does not appear that the court was in fault in not having prisoner's counsel in court. The intimations plainly are that if it did appear that counsel were not called, the court would reverse.

The other and only remaining case, *Cruzen v. The State*, (10 Ohio, 258,) sustains the position that reasonable diligence must be used to secure the attendance of counsel,

when any act in the prosecution of the case is necessary and about to be performed. This was a case of perjury. After the evidence had been heard in the case, and the instructions of the court had been given, the judge informed the defendant's counsel that the court would take a recess until the jury had made up their verdict, and instructed the sheriff, in the hearing of counsel, to ring the courthouse bell when they had agreed. The judge and counsel then retired from the court-room, the judge going to his boarding-house, and the counsel going to their homes, which were little more distant than the judge's boarding-house. About half an hour after the recess the jury returned into the court-room, having agreed upon a verdict. Whereupon, the courthouse bell was rung by the sheriff, as directed, and responded to by the judge, who was at his boarding-house, and who immediately upon coming into court had the defendant's counsel called, and who waited a sufficient length of time for the counsel to reach the court-room before he instructed the jury that they might return their verdict, which they finally did in the counsel's absence, finding the defendant guilty. The prisoner afterwards, through his counsel, excepted. The court says, in ruling upon the question, page 270: "It is the undoubted constitutional right of a party accused to be present, with his counsel, at every stage of his trial. But the right to counsel is in the nature of a personal privilege. * * * It is their duty when they have cases pending to be in attendance at the regular sessions of the court; and if a public announcement is made in open court, that upon the ringing of the bell, during a temporary recess, the court will convene to receive the verdict, and a reasonable time is given for counsel to attend after such signal, the party has no cause to complain of the court."

When a right is conferred upon the accused by the constitution, it must certainly impose the obligation upon the court at the same time of seeing that he has the full benefit of the right thus conferred, especially when the right is connected with the trial pending before the court. The obligation imposed upon the court by section 8, article I,

of the constitution, is to take proper steps to secure the attendance of the counsel of the accused, when absent. This is the doctrine of the two cases above cited and commented upon.

As to the oath, see *Joe Johnson* case, at this term.

JOHN W. A. SANFORD, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The defendant appeals from a sentence for living in adultery.

The first objection is, that the jury was not properly sworn. The recital of the record is, "thereupon came a jury of lawfully qualified men, to-wit: T. A. Malone, and eleven others, who being impanneled and sworn well and truly to try the issue joined, and having heard the evidence," &c. In *McGuire v. The State*, (37 Ala. 161,) and *Pile v. The State*, (5 Ala. 72,) the recital in the judgment-entry was the same as in this case, and was held to be sufficient. It is manifest that the oath administered was not attempted to be set out in full, and nothing is shown from which we can infer that any portion of the oath required was omitted. In the case of *Jo. Johnson v. The State*, and of others, at this term, reversed on the ground of error in the administration of the oath to the jury, there was a completeness about the description of the oath administered that forbade any presumption at all.

There was no refusal of the court to hear the prisoner by himself and his counsel, nor denial of his right to be so heard, but the court being called on by the jury to repeat its instruction concerning a certain point, during an interval in the session, did so, in the absence of the prisoner's counsel, without sending for or calling them. It also, afterwards, in like manner received the verdict, and discharged the jury. The counsel could not have been expected to be present at these times, as there was a recess to an appointed time beyond. It does not clearly appear from the bill of exceptions whether the sentence was rendered during the intermission or not.

Collins v. The State, (33 Ala. 434,) was a case in which

the court gave additional instruction to the jury during a recess in the absence of the prisoner's counsel. Some stress was laid upon the fact, that it did not appear but the counsel had been called or sent for. It was said that to deny the right of the court to give instruction to the jury when the counsel was willfully absent, would lead perhaps to more evil than good. It is manifest that the prisoner himself might be greatly prejudiced. But we think an opportunity should have been given to them, and it is so intimated in the above case. It was once the custom of the common law not to permit the defendant in a criminal case to be aided or represented by counsel at all. The right to have such assistance is now guaranteed by both the Federal and State constitutions. It is the duty of the counsel to be constantly attendant upon the court during the trial of causes in which they are engaged. During the recesses of a term neither the parties, nor others concerned; are expected to be present. If at such times the court should deem it necessary to proceed with the business in any respect, the usual notice given to a particular individual when his presence is needed, should be given to the counsel of a prisoner. In this State this notice is given by calling them at the court-house door or other convenient place.

The judgment is reversed, and the cause remanded.

AVERY'S ADMINISTRATOR *vs.* AVERY'S HEIRS.

[PETITION TO PROBATE COURT FOR ORDER TO SELL LANDS, &C.]

1. *Administrator; petition by to sell land for distribution; what should allege.*—A petition by an administratrix for an order to sell the lands of a decedent for distribution among those persons entitled to the same, should not only state that the lands sought to be divided can not be equitably divided amongst the heirs or devisees, but it should also show that some one of the heirs or devisees desired or requested that division should be made.
2. *Same; when order of sale should be denied.*—On such a petition, a sale for division should not be made, when there are minor distributees, and no one interested in the distribution desires it to be made, and when the proofs show that it would not be to the interest of the minors that the partition should not be made in that way.

APPEAL from the Probate Court of Chambers.
Tried before Hon. JOHN APPLEBY.

The facts are sufficiently stated in the opinion.

W. H. BARNES, for appellant.—The appellant relies on section 2221 of the Revised Code, and *Costly v. Tarver*, 38 Ala. 107; *Pettit v. Pettit*, 32 Ala. 288; *Johnson v. Collins*, 12 Ala. 322; *Broome v. Monck*, 10 Ala. 607; *Rhem v. Tull*, 13 Iredell, 57; *Buckmaster v. Hairob*, 7 Vesey, 342.

E. G. RICHARDS, *contra.*—If the court erred in anything, it was in not visiting the petitioner's demurrer to defendant's answers to petition back on the petition, and dismissing the petition for the want of an averment of the necessity to sell said lands. As the law required that fact to be proved, (there being minors,) it ought to have been averred in the petition. But as the court dismissed the petition on the proof, no injury was caused by refusing to dismiss on the demurrer.—See 1 Porter, 107; 2 Porter, 249.

The whole case may be solved by answering the follow-

ing question: Is it the duty of the probate court to order the sale of lands on the petition of the administrator, for division, when the estate is large, and not indebted, so as to require a sale of any part of the real estate, either for the payment of debts, or for charges of administration, and where the heirs, both adults and minors, are opposed to a sale, and protest against a sale, and the proof is full and clear that it will be a sacrifice of the interests of the heirs for the lands to be sold, merely to gratify the wishes of the administrator, and to give him his commissions for selling, or to give him an opportunity to buy up, or to have the lands bought up, at a sacrifice?

Sections 2225, 2307, and 3123 of the Code all show that it is the duty of the court to protect the interests of minors and persons of unsound mind.

PETERS, J.—This is a proceeding in the probate court by an administratrix to cause the lands of the estate which she is administering to be sold for distribution among the heirs of her intestate. The petition was filed by the administratrix on the 24th day of September, 1868, in the probate court of Chambers county, in this State. It shows that the petitioner is the administratrix of the estate of Benjamin B. Avery, deceased, and that said decedent died seized and possessed in his own right of the lands sought to be sold, and that said lands are descendable to his heirs. The lands are particularly described, and it is alleged that they "can not be equitably divided amongst the heirs of said estate without a sale thereof." The petition also shows that there is a large number of heirs of the said decedent who are entitled to distributive shares in said lands, some of whom are of full age, and others are minors.

The petition does not show that there is any necessity for the sale of said lands, or that any of the heirs and distributees of the same request or desire the lands to be sold. It is properly verified by affidavit.

A guardian *ad litem* was appointed for the minors, who answered and denied the allegations of the petition, and demanded proof of the same. All the adult heirs appeared

by attorney, who also appeared as such for the minors, and they pleaded five pleas or exceptions in bar of the relief sought in the petition, and in objection to the sale. The *gravamen* of these pleas is, that the sale of said lands would not be for the benefit of said heirs, and it would be a sacrifice of the interests of contestants in said lands, and such a sale would be made against their wish and protestation. The petitioner demurred to each of these pleas or exceptions, and assigned several causes of demurrer, which deny the sufficiency of the pleas, inasmuch as they do not deny any of the allegations of the petition. The court below overruled the demurrers, and the petitioner thereupon replied, and took issue on the said pleas, and went to trial on the same.

The evidence taken in the cause shows that all the allegations of the petition were true, but that it would be to the injury of the contestants to sell that portion of the lands mentioned, which was covered by the widow's dower, before her death; that she was between fifty and sixty years old, and in poor health; that the whole quantity of the land was about twenty-three hundred acres, and of this, dower had been assigned to the widow, the petitioner, of eleven hundred and twenty acres; and that it would sacrifice the lands covered by the dower to sell them at the time of the application. It was also proven that several of the adult heirs objected to the sale, because it would result in a sacrifice of the lands covered by the dower.

Under this proof, the court below refused to grant an order for the sale, and dismissed the petition, with costs. From this judgment the petitioner appeals to this court, to have the action of the probate court reviewed and corrected.

Under the laws of this State, an administratrix is a trustee, and as such she is entitled to possession of all the property of the decedent not exempt from administration by statute, to hold the same, if there is no will, *first*, for the payment of such decedent's debts, and *second*, to distribute the residue, left after payment of debts and the expenses of administration, amongst those persons entitled

to the same. If all the distributees are of age and capable of acting for themselves, the final distribution may be made without an order of court, if all the parties in interest consent to it; and their release to the administrator on such a distribution is sufficient for his discharge on his final settlement. But if some of the parties are minors, or incapable of acting for themselves, or will not consent to a distribution without an order of court, then the distribution must be made by application to the probate court, and proceedings under the statute for that purpose. This is particularly the case with respect to the personal property. Rev. Code, §§ 2060, 2047, 2106, 2157, 2158; *Feagan v. Kendall*, 43 Ala. 628; *Willis' Adm'r v. Heirs of Willis*, 9 Ala. 330, 334; 1 Williams Ex'r, p. [436]; *Perryman v. Greer*, 39 Ala. 138; *Marshall v. Crowe*, 29 Ala. 278.

The lands of the deceased descend at once to the heirs as tenants in common, subject to the statutory burden of paying his debts, if the personalty should be insufficient for that purpose. The title passes instantly to the heir on the ancestor's death, where there is no will. But notwithstanding this, there is a statutory power over the real estate given to the administrator for certain purposes; that is, a power, under an order of the probate court, to sell the same for the payment of debts and for distribution amongst the heirs.—Rev. Code, § 1909; *Patton v. Crow*, 26 Ala. 426, 432; *Pettit's Adm'r v. Pettit's Heirs*, 32 Ala. 288, 311; *Anderson, Adm'r, v. McGowan et al.*, 42 Ala. 280, 288; Rev. Code, § 1888. Then, the administrator's power over the lands of a decedent, for distribution, is merely a statutory trust in favor of the heirs. This trust may be executed under an order of the probate court. This is a power conferred upon that court by statute.—Rev. Code, § 2221. It can hardly be pretended that the legislative authority designed that the power so conferred should be so exercised as to injure the persons for whose benefit it was bestowed, particularly if these persons should be minors, as in the great majority of instances must necessarily happen. Undoubtedly, a bill lies in chancery to partition lands held by tenancy in common.—*Deloney v. Walker*, 9 Port. 497; *S. C.*,

5 Smith's Cond. R. p. 568. Then, this is a power of jurisdiction, that passed from the court of chancery to the court of probate. In such case, the practice in the latter court is governed by the practice in the former.—*King v. Collins*, 21 Ala. 363; Mitf. Pl. marg. p. 119, top p. 170. In such instances, the bill should show that the interests of the infants would not be injured by a sale for distribution, or that they desired the distribution to be made, and a sale for that purpose was necessary.—Mitf. Pl. marg. p. 120, 121; ib. [27]; 1 Story Eq. § 1327, 1333. Then, the petition should not only allege that there was a heritable seizen in the ancestor in the lands sought to be sold for distribution, but also that one of the heirs desired the distribution, and that there was such *necessity* for a sale as would justify it. This would render all the sections of the Code governing the practice in such applications harmonious and intelligible, and enable the probate court to protect the interests of minors in such cases, as a court of chancery would do. 1 Story Eq. §§ 1353, 1357; Rev. Code, §§ 2221, 2222, 2225, 2228; ib. 3105, 3106, 3108, 3120-21.

Under this construction of the statute and the powers of the probate court to decree sales of the lands of minor heirs for distribution, the application of the administratrix was insufficient, in failing to allege that some one of the heirs of her intestate desired a distribution of the lands in controversy, and that a sale was necessary, and would not injure the interests of the minors; and the demurrer to the pleas of the contestants should have been visited upon it, and it should have been dismissed, if the petitioner declined to amend it.—*Sommerville v. Merrill*, 1 Porter, 107; *S. C.*, 3 Smith Cond. R. 409; *Rodgers et al. v. Smiley et al.*, 2 Porter, 249; *S. C.*, 3 Smith Cond. R. 581.

The court, then, committed no error in overruling the demurrers.

The evidence objected to as to the mode of proving dower was immaterial, and being addressed wholly to the court, it can not be presumed that it had any effect in producing an improper judgment. Whether there was a dower incumbrance on the lands sought to be sold, was not

a question in the case. But the issue was, whether, in such an application by the administratrix, a sale ought to be ordered against the protest of all the parties in interest and to the injury of the minors. There was testimony quite sufficient, beside this, to have justified the court in coming to the conclusion that an order for a sale ought to be refused. In such a case, a reversal will not be allowed, although there might have been error in the ruling of the court below.—*Henderson v. Renfro*, 31 Ala. 101. The allotment of dower is a matter of record, and the only competent proof is a production of the record, or a properly certified copy, and parol proof to show that the lands named in the decree for the allotment of the dower was a portion of the lands mentioned in the petition for the order of sale for distribution.—Rev. Code, § 1636; 1 Greenl. Ev. § 501, *et seq.*

All the powers of an administrator over the lands of an intestate estate are those of a trustee. When the purposes of the trust are fully accomplished, these powers necessarily cease. It follows, then, if the estate is solvent, and all the debts of the deceased with the payment of which the land is charged by statute, are paid, that the power to sell for the payment of debts is gone. And for a like reason he is not bound to rent, because the lands, on the payment of the deceased's debts and the expenses of administration, become the absolute and uncharged property of the heirs. The administrator, in such a case, is not bound to distribute the lands, unless he is requested to do so by some of the heirs. And if he fails even then, it is not a *devastavit* for which he can be charged on his final settlement. Even after final settlement, the distribution may be effected by a direct application of the heirs, or any one of them, to the court of probate for that purpose.—Revised Code, §§ 3105–6, *et seq.* The administrator, then, in this case, could not claim that the trust to distribute the lands of the decedent was a right vested in her, which she was bound to execute in opposition to the wishes of the beneficiaries, and to their injury. I think this necessarily results from the reason of the authorities above quoted, and

the whole law upon the subject of the partition of lands held by tenancy in common in this State.

The judgment of the court below is therefore affirmed, with costs.

[NOTE BY REPORTER.—The opinion in this case was delivered at the January Term, 1871, but did not come into the Reporter's hands until the 5th of June, 1873.]

HARBOR MASTER AND PORT WARDENS OF MOBILE *vs.* CAPTAIN SOUTHERLAND.

[ACTION TO RECOVER FEES, &C., BY HARBOR MASTER AND PORT WARDENS.]

1. *Presumption in favor of correctness of court below.*—The judgment of an inferior court is presumed to be right, and if the record is so defectively made up that it can not be told whether it is right or wrong, the judgment will be affirmed.
2. *City corporation, ordinances of; supreme court can not take judicial notice of.*—This court can not judicially know what the laws and ordinances of a city corporation are, and if not set out in, and made a part of the record, they can not properly be considered in disposing of a case on appeal.
3. *Harbor master's fees, as fixed by ordinances of Mobile and act of March 3, 1870; when can be recovered.*—By the ordinance of the city of Mobile passed the 22d of April, 1870, entitled "An ordinance regulating and fixing the harbor master and port wardens' fees, in the port of Mobile, as per act passed by the legislature authorizing the same, approved March 3d, 1870," the harbor master's fees specified in said ordinance are only to be paid when the services of the harbor master and port wardens become necessary, and are actually rendered or offered to be rendered.
4. *Act of 3d March, 1870, and ordinances thereunder; mere police regulations.*—The said act of the 3d March, 1870, and the said ordinance, properly interpreted and understood, are police regulations merely, and are not in conflict with or repugnant to the constitution of the United States.

APPEAL from Circuit Court of Mobile.
Tried before Hon. JOHN ELLIOTT.

THIS is an appeal from a judgment rendered by the circuit court on a case brought in that court, on appeal of the appellee, to reverse a judgment by default recovered against Southerland by the harbor master and port wardens of Mobile before a justice of the peace. There was no complaint filed in the circuit court, but the appellee pleaded as follows:

"1. General issue in short by consent.

"2. That no service or duty of any kind was ever rendered by said plaintiffs for said ship.

"3. That no service or duty was ever requested by said defendant, or by any one, on behalf of said ship, of, or from, said plaintiffs, and none was necessary; that said ship is an American ship, owned in New York, and came into this port with freight to consignees in Mobile; that she was piloted over the lower bar and anchored in said lower bay by a licensed pilot; that said anchorage is twenty-five miles from Mobile, not within the corporate limits of Mobile, and is from four to seven miles in width and breadth, and ships lay at great distance from each other; that no police regulations in said lower bay are necessary or proper; and that the fees claimed in said complaint are illegal, of no value, and the said act of the legislature of the State of Alabama, is as to the defendants in this case, inoperative and void; wherefore, &c."

There also appears in the record an ordinance, which is as follows:

"An Ordinance, regulating and fixing the harbor master and port warden's fees in the port of Mobile, as per act passed by the legislature authorizing the same, and approved March 3d, 1870.

"Sec. 1. For every steamer or sailing vessel of any description whatever that may come within the bay of Mobile, or within the corporate limits of the city of Mobile, for the purpose of either discharging or loading, or both, of freight of any description, and anchor in the lower bay, or proceed to the city, shall be subject to the following rates of harbor master's fees, independent of surveys, in-

spections, certificates, &c., already provided in the city charter."

Then follows various items of fees allowed, according to tonnage.

"Sec. 2. *Be it further ordained*, That all other port fees for surveys, inspections, certificates, &c., shall be the same as now provided for by that part of section 81 of the city charter designating the same.

"Approved 22d April, 1870."

There is an agreed statement of facts, which is as follows

"That by the act of March 3d, 1870, and all the laws and ordinances of the city of Mobile which are in evidence, the harbor master of the port of Mobile went on board of the ship H. Cook, of which Henry Southerland is master, and offered his services to regulate and station said ship in the bay of Mobile, and did regulate and station said ship, while said ship was not employed in receiving or discharging her cargo; that at the time this occurred, the ship was within the bay of Mobile, and in the port of Mobile, between the outer bar and Dog river bar, about four miles north from Fort Morgan, which is at the mouth of Mobile bay; that the said captain said that he did not wish the services of the harbor master, and that his services were not necessary; the harbor master, however, did regulate and station the said ship, by assigning her the place she occupied when the harbor master acted; that the ship was brought into the lower bay by a pilot, and anchored where she was; that the anchorage where she lay was twenty-five miles from Mobile city, not within the corporate limits, and the anchorage where she lay is from four to seven miles in width and length, and the service charged for has always, until the passage of said act, been performed by the pilots; that these facts apply to the case of the H. Cooke, which is an American ship, and to the barque Moreno, captain John Hopkins, an English ship. These three cases are brought here by appeal from the judgment of T. J. Burns, a justice of the peace for Mobile county, and if the court is of opinion that the harbor master is entitled to claim fees,

under the acts and ordinances, for services as herein set forth, then the judgment shall be rendered for the plaintiffs in all of the cases; if not, then judgment shall be rendered for the ship captains, and either party may appeal."

This is a full report of everything contained in the transcript which has any bearing whatever in the case.

The court rendered judgment in favor of the appellee, and hence this appeal.

ALEX. MCKINSTRY, for appellant.
JOHN T. TAYLOR, for appellee.

(Neither brief came into Reporter's hands.)

PECK, C. J.—The record in this case is so imperfect and so defectively made up, that it is impossible to tell whether the judgment of the circuit court is right or wrong. Where it does not manifestly appear from the record that the judgment is wrong, we are bound to presume it is right. This judgment must, therefore, be affirmed.

The statement of facts says, "That by virtue of the act of March 3d, 1870, and all the laws and ordinances of the city of Mobile which are in evidence, the harbor master of the port of Mobile went on board the ship H. Cooke, of which Henry Southerland is master, and offered his services to regulate and station said ship in the bay of Mobile," &c. Now, we do not judicially know what "all the laws and ordinances of the city of Mobile" on this subject are, and, as they are not set out in the statement of facts, they can not properly be considered in disposing of the case. But, as we understand the main purpose of this appeal is to obtain a construction of the said act of the 3d of March, 1870, referred to, and an ordinance of said city having reference to said act, and copied in the record, approved by the mayor on the 22d of April, 1870; and as it is manifest, from this case, that doubts are entertained as to the meaning of and validity of said act and ordinance; to prevent future litigation, as far as possible, we proceed to state what appears to us to be the proper interpretation and legal effect of said act and ordinance.

The act is entitled, "An act to extend the jurisdiction, powers and duties of the harbor master and port wardens of Mobile." The first section enacts that "from and after the passage of this act, all laws and parts of laws creating a harbor master and port wardens for the port of Mobile be, and the same are hereby made to extend to and include all vessels coming into the bay of Mobile; and the said harbor master and port wardens shall discharge the same duties to, and receive from said vessels the same fees, as though they were lying at the wharves of the city of Mobile."

The second section is as follows: "That from and after the passage of this act, the words 'tonnage dues,' whenever they occur in the city charter and code of ordinances, and in all the acts relating to the harbor master and port wardens of the city of Mobile, shall be stricken out, and in lieu thereof, the words "harbor fees" inserted; and that the number of such port wardens, their fees and rates of compensation in the city and bay of Mobile, shall be changed and fixed by the corporate authorities as they may deem necessary and expedient."

The said ordinance referred to is entitled, "An ordinance regulating and fixing the harbor master's and port wardens' fees in the port of Mobile, as per act passed by the legislature authorizing the same, and approved March 3d, 1870." The first section is as follows, to-wit: "For every steamer or sailing vessel of any description whatever, that may come within the bay of Mobile, or within the corporate limits of the city of Mobile, for the purpose of either discharging or loading, or both, of freight of any description, and anchor in the lower bay, or proceed to the city, shall be subject to the following rates of harbor master's fees, independent of survey, inspection, and certificates, already provided for in the city charter." Then follows a list of fees, ranging from one to fifty dollars, according to the tonnage of the different vessels.

If this act, and the said ordinance passed by the city authorities of Mobile, really mean that every steamer or sailing vessel that comes into the bay and harbor of Mo-

bile for the purpose named in said ordinance, must pay the fees therein specified, whether the services of the harbor master and port wardens, or either of them, become necessary, or not, and when no services are in fact rendered, then we are prepared to pronounce the said act and ordinance unconstitutional. If no other reasonable construction can be given to said act and ordinance, then they amount to a regulation of commerce, and are in conflict with the constitution of the United States on this subject. *Steamship Company v. Port Wardens*, 6 Wall. 31.

But, we think a different construction may be reasonably given to said act and ordinance—a construction that will relieve them from any constitutional objections.

Courts are bound, if possible, to give a statute such a construction as will enable it to have effect, and in doing this, they may lean in favor of such an interpretation of the language used as may not, at first view, seem to be its most obvious and natural import.—Cooley Con. Lim. 184.

An act of the legislature is to be so construed, if possible, as to make it consistent with, and not repugnant to, the constitution (*Dow v. Norris*, 4 N. H. 17); therefore, whenever an act can be so construed and applied as to avoid a conflict with the constitution, it should be done, and never declared unconstitutional, if it can be upheld by any reasonable intendment or allowable presumption.—*The People v. The Supervisors of Orange*, 17 N. Y. 241.

Applying these rules of construction to the said act and ordinance, we think they may reasonably be interpreted to mean, that every steamer or sailing vessel that may come within the bay of Mobile, or within the corporate limits of the city of Mobile, for the purpose of either discharging or loading, or both, of freight of any description, and anchor in the lower bay, or proceed to the city, and the services of the harbor master or port wardens, or either of them, become and are necessary to station said steamer or sailing vessel, or, when stationed, to change its location, or when any other services usually rendered by such officers become necessary, and are actually rendered, or offered to be rendered, then such steamer or sailing vessel shall be

subject to the rates of harbor master's fees mentioned in said ordinance, and not otherwise. So construed, said act and ordinance become police regulations merely, and are relieved from all constitutional objections.

The fact that the said ordinance calls these charges *harbor master's fees*, is, it seems to us, an index to its intent and meaning, and justifies the interpretation we have put upon it. Why call them harbor master's fees, unless the harbor master is required to render services to entitle him to receive them? The meaning of the word "fees" is, a recompense allowed by law to officers for their labor and trouble, &c.—2 Bac. Abr. 463. Therefore, where there is no labor or trouble, no necessary services rendered, or offered to be rendered, no fees should be, or can be, properly allowed.

Let the judgment of the court below be affirmed at the appellant's costs.

SNEDICOR ET AL. *vs.* MOBLEY.

[PETITION TO SET ASIDE SALE OF DECEDENT'S LANDS UNDER ORDER OF PROBATE COURT.]

1. *Sale of decedent's lands; jurisdiction of probate court to order, for division between widow and only heir.*—The probate court has no jurisdiction to order a sale of real estate belonging to a decedent, for the purpose of making an equitable division among the heirs or devisees, (Revised Code, § 2221,) when the facts stated in the petition negative the existence of the ground on which the sale is asked; as where it alleges that the widow and an only child are the heirs; nor can the widow's consent to the sale of her dower-interest, in such case, give the court jurisdiction to order the sale.

2. *Same; who may move to set aside sale.*—An administrator, on whose petition real estate is sold under an order of the probate court, can not afterwards move the court to set aside the sale for want of jurisdiction, although the estate is afterwards declared insolvent, and he is continued in the office of administrator: the estoppel operates against the person, and not against his official capacity.

APPEAL from the Probate Court of Sumter.
Heard before the Hon. J. A. ABRAHAM.

IN the matter of the estate of H. F. Eaton, deceased, on the petition of Green B. Mobley, the administrator, asking the court to vacate and set aside, as null and void, a sale of certain lands belonging to said decedent, and the order of the court under which said sale was made. The order of the court, under which said lands were sold, was granted on the petition of the said administrator, which was filed on the 14th day of November, 1859, and which alleged that said lands could not be fairly and equitably divided among the heirs without a sale. The petition further alleged, "that the deceased left the following heirs, to-wit, Amanda Eaton, widow of said deceased, and Alice Eaton, an only child, under the age of twenty-one years." The widow waived her right to have dower assigned, and consented to take one-sixth of the purchase-money in lieu of dower. On the fourth Monday in December, 1859, the court granted an order of sale. The sale was made by the administrator on the 22d day of December, 1860, J. C. Inman, Evan Allen, and the administrator himself becoming the purchasers of the different parcels. The sale was reported to the court at its April term, 1861, and was confirmed, without objection, at that term. The administrator afterwards sold the lands bought by himself at the sale, to one Edward Herndon, who paid the purchase-money, and was in possession when the petition to set aside the sale was filed. Inman gave his notes for the purchase-money of the portion bought by himself at the sale, went into possession of the lands, and continued in possession up to the time of his death, but paid no portion of the purchase-money. After his death, F. P. Snedicor, as his administrator, sold the lands under an order of said probate court, and one J. A. Gibbs became the purchaser. In March, 1866, said G. B. Mobley, as administrator of Eaton, brought suit against Inman's sureties on the note given for the purchase-money, and that suit was pending and undetermined when these proceedings were instituted

to set aside the sale. Inman's estate was reported and declared insolvent in 1866, and the note for the purchase-money was not filed as a claim against his estate within the time required by law. Eaton's estate was also declared insolvent, but at what time does not appear from the record; the only recital in reference to it being the statement in the bill of exceptions, that "the plaintiff introduced in evidence the record of the report and declaration of insolvency of the estate of said H. F. Eaton, and the continuance of said G. B. Mobley as the administrator of said estate"; but the record of these matters is not copied into the transcript. The petition to set aside the order of sale, and all the proceedings had under it, was filed in January, 1870; said Snedicor, as the administrator of Inman's estate, and Gibbs, the purchaser at his sale, being notified, and made defendants. The grounds alleged in the petition for setting aside the sale, and the grounds on which it was set aside, are stated in the opinion of the court. The proceedings to set aside the sale seem to have been confined to the lands purchased by Inman. The decree setting aside the sale, and some other matters which require no particular notice, to which exceptions were reserved, are now assigned as error.

Bliss & Snedicor, Coleman & Little, for appellants. 1. The petition for the sale of the lands was filed by the administrator, and alleged a statutory ground for the sale. The petition gave the court jurisdiction to order the sale, and no subsequent irregularities can render the sale void, no matter what might be their effect on error or appeal. *Satcher v. Satcher*, 41 Ala. 26; *Saltonstall v. Riley & Dawson*, 28 Ala. 184; *Field's Heirs v. Goldsby*, 28 Ala. 218; *Cox v. Davis*, 17 Ala. 714; *Wyman v. Campbell*, 6 Porter, 219; *Lightfoot v. Lewis' Heirs*, 1 Ala. 475; *Hall v. Chapman*, 35 Ala. 553; 29 Ala. 210; 29 Ala. 542.

2. The widow's dower is a vested interest in the lands, and the law provides the means for ascertaining its value. If the dower can not be set off by metes and bounds, she can only get her rights by consenting to a sale, and taking

an agreed part of the purchase-money. It may be as necessary to sell, in order to get the widow's dower-interest out of the land, as to get a child's share on distribution among several; and each case is equally within the purview of the statute.

3. Under the circumstances shown in this case, Mobley can not be heard to ask that the sale should be set aside. He procured the order of sale; he made the sale, and reported it to the court by which it was confirmed; he purchased a portion of the lands at his own sale, and sold them to an innocent purchaser, who has made valuable improvements, and who is still in possession; he failed to file the note for the purchase-money against Inman's estate, (thereby rendering himself liable for negligence in the event of its loss,) and he is now prosecuting a suit against the sureties on the note. Under these circumstances, he is estopped from setting aside the sale, for no man can take advantage of his own wrong.—*Hopper v. Steele*, 18 Ala. 828; *Lawson v. Lay*, 24 Ala. 184; *S. C.*, 25 Ala. Rep. 543.

4. The administrator who makes the motion to set aside the sale, is the same person who procured the order of sale. On the declaration of insolvency, he gave no new bond, and received no new appointment; he was simply continued in his office. The doctrine of estoppel, as established by the authorities above cited, applies to him personally, and not to the office which he held.

Turner Reavis, *contra*.—1. The application shows that Eaton's heirs were his widow and an only child. The widow was not an heir, and, therefore, was not entitled, either to a division of the land, or to any part of the proceeds of a sale of it. She was only entitled to dower, or (in case a sale could legally be made) to a part of the proceeds of sale, not exceeding one-sixth, in lieu of her dower. The widow not being an "heir," and the intestate having only one child, and that child being the only heir, and a minor, it is manifest that the court had no power, on the facts stated in the application, to order a sale for the

purpose of division. There being but one heir, there could be no division, nor any necessity for it. The order of sale, therefore, was wholly void for want of jurisdiction; and it was competent for the court to vacate it, on motion of a party interested, at any time.—Code of 1852, §§ 1555, 1867, 1868, 1873, 1874, 1875; 1 Bouv. Law Dic., p. 582, title "*Heir*"; *Johnson v. Johnson*, 40 Ala. 247; *Summerselt v. Summerselt*, 40 Ala. 596; *Satcher v. Satcher*, 41 Ala. 26; *Wilson v. Armstrong*, 42 Ala. 168; *Hall v. Chapman*, 35 Ala. 553; *Bishop v. Hampton*, 15 Ala. 761, and cases cited; *McSwean v. Faulk*, 46 Ala. 610.

2. The estate of Eaton having been decreed to be insolvent, and Mobley having been continued in the office of administrator under the decree, he was the only person who could move to set the sale aside; and it was his duty to do so, inasmuch as he could not collect the purchase-money on account of the sale being void, and it was therefore necessary to re-sell the land for the benefit of the creditors of the estate. If he could not take the steps necessary to effect a re-sale, no one could. He, having settled his administration in chief, and having been continued in the office of administrator under the decree of insolvency, on account of the failure of the creditors to elect another administrator, had all the rights that any other person elected or appointed administrator *de bonis non* of Eaton's estate would have had. Though the same individual who obtained the order of sale, his official character and duties were not the same as they were when he was administrator in chief. In legal effect, he was a different person.—Revised Code, §§ 2189, 2195; *Wyatt v. Rambo*, 29 Ala. 510, and cases cited; *Waller v. Bibb*, January Term, 1871.

3. Between the 14th of November, when the application was filed, and the third Monday (19th of December), the time appointed by the court for a final hearing upon it, were only thirty-five days. The court had no power to appoint a day for a final hearing less than forty days from

the filing of the application. The appointment of a guardian *ad litem* for the minor heir, at the time the application was filed, and set for a hearing at a time less than forty days from the filing, and all subsequent proceedings, were unauthorized and void. The fact that the order of sale was not in fact made until after the expiration of forty days from the filing of the application, could not remedy this defect.—Code of 1852, § 1869; Acts of 1853–4, p. 55, § 3.

4. There being a minor heir interested, and the time set for hearing the application not being authorized by law, it was impossible to take "proof by deposition, as in chancery proceedings, showing the necessity of a sale," as required by the fifth section of the act of February 7, 1854, (Session Acts of that year, p. 56.) The application could not properly be brought to an issue at any time less than forty days from the time it was filed. Depositions in chancery proceedings can not be taken until the cause is at issue. Consequently, the proof, if taken, was not taken as required by law; and the order of sale was, therefore, void, for want of conformity to section five of the act referred to.—*Strickland v. Hodge*, January Term, 1871.

B. F. SAFFOLD, J.—The appellee, Mobley, as the administrator of the insolvent estate of Eaton, filed a motion in the probate court to set aside and declare null and void a decree of the said court, rendered in 1859, ordering a sale of certain lands belonging to the said estate, the sale itself, and the decree confirming the sale. The grounds of this motion were—1st, the application for the sale shows on its face the want of jurisdiction in the court to order the sale; 2d, no guardian *ad litem* for the minor heir was appointed, and no one acted as such guardian until the day the decree of sale was rendered; 3d, less than forty days intervened between the filing of the petition and the day appointed for its hearing; 4th, the proof of the necessity of a sale was not taken as required by law. The court rendered a decree in conformity with the motion, basing it upon the 1st and 4th grounds above stated.

It seems that this estate was rendered insolvent by damage sustained during the late war. The application for the sale of the land was made in 1859, by the same person, as administrator, who now moves to set aside the order of sale he obtained and the subsequent proceedings consequent upon it. In *Satcher v. Satcher*, (41 Ala. 26,) the doctrine is clearly and emphatically declared, as the result of the decisions in this State, that a sale of a decedent's real estate, under an order of the probate court, rendered upon a proper petition stating therein a statutory ground for a sale, is not void, except only where there are minors or persons of unsound mind interested, proof by deposition, as in chancery cases, showing the necessity of a sale, must be taken. In this case, the record recites that proof was taken as in chancery cases; and the petition alleges that the said real estate can not be fairly and equitably divided amongst the heirs of the deceased without a sale. But the petition further discloses, that "the said deceased left the following heirs, viz., Amanda Eaton, widow of said deceased, and Alice Eaton, an only child, and under twenty-one years of age." The action of the court was invoked under its authority to order a sale of the lands of an estate when the same can not be equitably divided amongst the heirs or devisees.—Rev. Code, § 2221. Is the statement in the petition, that the widow of the decedent, and his infant daughter, were the heirs of his estate, so inconsistent with the allegation that the land could not be equitably divided between the heirs, and the recital of the record that proof was made of the necessity of such sale, as to destroy them? Or, may the probate court, under section 2221, separate the interests of the widow and infant child by a sale with the consent of the widow?

A sale of the real estate of a decedent, under a decree of the probate court, vests in the purchaser only the title which the ancestor had, and which descended upon his heirs-at-law. The widow's right to dower is unaffected by the sale. She is entitled to have her dower set off by metes and bounds, when it can be done; and when it can not, as in the case of a city lot where there are improve-

ments, equitable dower must be assigned.—*Owen v. Slatter*, 26 Ala. 547. The probate court has no jurisdiction to extract from the estate the dower-interest of the widow, except in two instances —1st, where the dower can be assigned by metes and bounds; 2d, where, in a proper case of sale, she signifies in writing her consent that her dower-interest may be sold.—*Snodgrass v. Clark*, 44 Ala. 198; Rev. Code, §§ 1631, 2229; *Barney v. Trowner and Wife*, 9 Ala. 901. She is not an heir or devisee, nor is she a tenant in common with the heirs or devisees. The mere allegation of a ground of jurisdiction can not confer and support the jurisdiction of the court, when the facts required to be stated, and upon which it depends, refute the allegation.

2. Should Mobley be allowed to make this motion? It is claimed for him that he is in office under another appointment. We think the objection is to the person. It rests upon the doctrine, that no one should be allowed to take advantage of his own wrong. An unauthorized and void sale supposes some improbity of the vendor. Besides, when the administrator in chief is continued, after the declaration of insolvency, he is not required to give a new bond, or to qualify again in any respect. There is not a new appointment, but a continuation of the old. That an administrator can not avoid a sale of property made by himself, has been repeatedly decided by this court.—*Pistole v. Street*, 5 Porter, 64; *Fambro v. Gantt*, 12 Ala. 298. On this ground, the judgment is reversed, and the cause remanded.

COCHRAN *vs.* MARTIN.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Ancillary administration; distribution of proceeds of sale of lands.* Where the testator died in Georgia, the place of his residence, and his will was there duly probated; and an ancillary administration was granted in this State; and the administrator here, having sold certain lands, under an order of the probate court, for divison among the devisees, remitted the proceeds of sale to the principal administrator in Georgia, and, on the final settlement of his accounts, was allowed a credit for the amount so remitted, on the production of the receipt of the principal administrator,—*Held*, that the decree of the probate court would not be reversed, at the instance of a devisee resident here, unless injury was affirmatively shown.
2. *Administrator's liability for debt due from himself to intestate; presumption in favor of judgment.*—When administration is granted to a person who is indebted to the decedent's estate, the administrator is chargeable with the amount of the debt, as assets collected, although he is only the surety of another person; but, to reverse a decree of the probate court, refusing to charge him with the amount of such debt, enough of the evidence must be set out to show error.

APPEAL from the Probate Court of Russell.
Tried before Hon. T. L. APPLEBY.

IN the matter of the final settlement of the accounts and vouchers of Abram Martin, as administrator with the will annexed of Alfred Welborn, deceased. The testator died in Meriwether county, Georgia, the place of his residence, in 1857, and his will was duly probated there. In January, 1858, a certified copy of the will, with the probate thereof, was admitted to record in Russell county, where the testator owned certain lands; and letters of administration, with the will annexed, were granted to Abram Martin. In July, 1858, the administrator filed his petition in said probate court of Russell, asking an order to sell said lands, on the ground that they could not be equitably divided among the devisees without a sale; and an order of sale was granted in November, 1858. The lands were sold under

this order, the sale reported to said probate court, and confirmed at the April term, 1859. The administrator transmitted the proceeds of sale to the principal administrator in Georgia; and on the final settlement of his accounts and vouchers, in August, 1870, he produced the receipts of said principal administrator, and asked a credit for the amounts thereby shown to have been paid over. "Thereupon," as the bill of exceptions recites, "came A. W. Cochran, the only surviving descendant of the testator's deceased daughter, Mary Jane Cochran, who was a legatee and devisee under the will, over twenty-one years of age, and had resided in this State during the whole time of said administration, and objected to said receipts being allowed as credits in favor of said administrator; which objection the court overruled, and allowed said receipts as a credit; to which ruling the said A. W. Cochran excepted."

"Said A. W. Cochran also exhibited a note for $5,400, belonging to the estate of said Alfred Welborn, dated May 24, 1854, payable one year after date, and signed by H. M. Elmore, Rush Elmore, Abram Martin (said administrator), and J. M. Newman; on which note were endorsed the following payments, or credits: May 1, 1857, $3,633.51; March 31, 1857, $997.50; and there was also another payment, not endorsed on said note, for about $950, made about the 1st January, 1859. Said A. W. Cochran claimed that said note ought to be charged against said administrator—1st, because he had negligently allowed the statute of limitations to bar the same; 2d, because he was liable as administrator for the amount of the same. Said A. W. Cochran moved that said note be charged against said administrator; which motion the court overruled, and said Cochran excepted. The court then proceeded to render a decree, discharging said Martin from further liability; to which decree said Cochran also excepted."

These two rulings of the court are now assigned as error.

Rice & Chilton, and John Cochran, for appellant.

1. Abram Martin being a debtor of the estate, upon his appointment as administrator became chargeable with cash

to the extent of his indebtedness from the time it became due.—*Childress v. Childress*, 3 Ala. 754; *Kennedy v. Kennedy's Adm'r*, 8 Ala. 395.

2. Since the plaintiff did not seek to charge the administrator with the said note as a claim against the estate, but as a debt due from him to the estate, the plea of the statute of non-claim was insufficient in law, and could have no application to the case.—Rev. Code, § 2239.

3. When administration is taken out in this State on the estate of any person who, at the time of his death, was an inhabitant of any other State or country, his personal estate, after the payment of his debts, and charges on the estate, must be disposed of according to his last will, if probated in this State; and if no such will is probated, according to the law of the State or country of which he was an inhabitant.—Rev. Code, § 2163. Upon the settlement of such an estate, and after the payment of all debts for which the same is liable in this State, the residue of the personal estate may be distributed and disposed of according to the provisions of the preceding section; or it may be transmitted or paid over to the executor or administrator of the State or country where the deceased had his domicil.—Rev. Code, § 2164. The title of executors and administrator, derived from a grant of administration in the country of the domicil of the deceased, can not *de jure* extend, as a matter of right, beyond the territory of the government which grants it, and the moveable property therein. As to such property, situate in foreign countries, the title, if acknowledged at all, is acknowledged *ex comitate*; and of course it is subject to be controlled or modified, as every nation may think proper, with reference to its own institutions and policy, and the rights of its own subjects; and where new letters of administration have been granted the foreign executor or administrator by the proper domestic authority, though the new administration is treated as merely ancillary, or auxiliary to the original foreign administration, so far as regards the collection of the effects and the proper distribution of them, still the new administration is made subservient to the rights of

creditors, legatees and distributees resident within the country; and the residuum is transmissible to the foreign country only when the final account has been settled in the proper domestic tribunal upon the equitable principles adopted in its laws.—Story Confl. Laws, §§ 512, 513; *Harrison v. Mahorner*, 14 Ala. 834; *Bradley v. Broughton*, 34 Ala. 709. According to the authorities above cited, it was the duty of Abram Martin, upon the final settlement of the estate, and after the payment of all the debts and charges for which the same was liable in this State, to dispose of the residue of the personal estate according to the last will and testament of the deceased, which was probated in this State, or transmit the same to the administrator in Georgia. This transmission, however, was in no event to take place until after final settlement, and not even then, if such a course would work a hardship upon the legatees and distributees resident within this State.

4. All the authorities, both in England and America, recognize the principle in its fullest import, that real estate is exclusively subject to the laws of the government within whose territory it is situate.—Story Confl. Laws, § 428, and authorities there cited. In the consideration of wills of immoveable property, the doctrine of the common law is clearly established, that the law of the place where the property is locally situate, is to govern as to the capacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will its due attestation and effect.—Story Confl. Laws, § 474. It was, therefore, the duty of Abram Martin to dispose of the real estate of the deceased in this State according to his last will, which was probated in this State, and to be guided in that disposition by the laws of Alabama; and it is not to be permitted him to escape such responsibility by a sale of the said lands and a transmission of the proceeds to the administrator in Georgia. The heirs-at-law resident within this State, have a right to insist upon a disposition of the proceeds of the sale of lands of the estate in this State according to the laws of this State, and the court therefore erred in allowing the introduction of the receipts from the

administrator in Georgia as vouchers to account for the proceeds of the sale of the said lands in this State, their introduction being objected to by one of the heirs-at-law of the estate who was and is, as the record shows, a resident of this State. Said land was sold under Rev. Code, Part II, Title 4, chap. 8. Now, did the mere fact that the administrator was ordered to perform the ministerial duty alter its character as realty, and fix upon it that of personalty? So to hold would be to permit the probate judge, by arbitrarily changing real to personal property, to sport with the rights of devisees, as these very material results depend upon its character as real or personal property: 1st, wills of personal property are to be construed *lex domicilii;* 2d, wills of real property are to be construed by *lex loci rei sitæ.* For the purpose of giving effect to this rule, as well as for many other reasons, domestic tribunals invariably take control of all real property situate within their jurisdiction. It is therefore the right of devisees vesting immediately upon the testator's death to have the property distributed by a domestic court, especially so of a minor, as the record shows plaintiff in error to have been. This right could not be divested by an order of sale, but only by legislative enactment. True, this enactment we have in Revised Code, § 2132, but that law was passed long after (28th January, 1867,) the transactions in question, and consequently can not affect the foregoing reasoning.

MARTIN & SAYRE, *contra.*—The bill of exceptions does not purport to set out all the evidence on which the court below acted; and the invariable rule of this court, in such cases, is to affirm the judgment, unless enough of the evidence is set out to show error affirmatively.—*Morgan v. Morgan*, 35 Ala. 307; *Taylor v. McElrath*, 35 Ala. 333; *Griffin v. Bland*, 43 Ala. 544; *Ward v. Cameron*, 37 Ala. 691; *Southern Ins. Co. v. Holcombe*, 35 Ala. 327; *Rupert v. Elston*, 35 Ala. 79–87; *Bradley v. Andress*, 30 Ala. 80; *Lovett v. Chisolm*, 30 Ala. 88; *Fleming v. Ussery*, 30 Ala. 282; *Kirksey v. Hardaway*, 41 Ala. 327.

B. F. SAFFOLD, J.—The appeal is taken by a devisee from the final settlement of the administration of an estate which was ancillary to one in Georgia. The appellee was the administrator, in this State, of Alfred Welborn, a citizen of Georgia, who died there, leaving a last will and testament, which was duly probated in the county of his residence. As such administrator, he sold lands for division among the devisees of the will, some of whom were citizens of Alabama. On his final settlement, he accounted for the proceeds of the sale with the receipts of the administrator in Georgia, to whom he had transmitted the money. The allowance of these credits is assigned as error. The appellant is an heir and devisee of the testator, and seems to claim in the latter capacity, as he makes no objection to the will. Sections 2163 and 2164 of the Revised Code direct what shall be done with the personal estate of the testator in such a case as this. After the payment of his debts and the charges on the estate, the residue may be either distributed according to the will, if probated in this State, as has been done here, or paid over to the executor or administrator of the State where the deceased had his domicil.

In *Harvey v. Richards*, (1 Mason, 381,) the court said that whether distribution ought to be decreed, or the property remitted abroad, is a matter, not of jurisdiction, but of judicial discretion, depending upon the particular circumstances of each case. In *Porter v. Heydock*, 6 Vt. 374, it was decided, that after the accounts for the effects received were settled, it was discretionary with the courts either to order distribution, or remit the effects to the principal administration; the latter being the usual course, but not to be adopted to the prejudice of parties interested. To the same effect is *Heydock's Appeal*, 7 N. H. 496. From the nature of the case, it is impossible that there should be a fixed rule concerning the final disposition to be made of all the property over which the administrator may exercise authority. Some discretion must remain to the court, in behalf of justice, and the proper protection of those interested living within its jurisdiction. Neither administra-

tion can always be entirely concluded, without reference to the other.—See *Dawes v. Boylston*, 9 Mass. 337; *Jennison v. Haygood*, 10 Pick. 77.

The *lex loci rei sitæ* governs the disposition of immovable property, and also the capacity or incapacity of a testator, to the extent of his power to dispose of the property, and the forms and solemnities to give the will its due attestation and effect.—Story on Conflict of Laws, § 474. The price of land does not become personalty, when the sale is for division. It may be very necessary that a court, in which an ancillary administration is conducted, to proceed to a distribution. But, when it acts contrarily, such necessity should be shown to induce a reversal of its decree.

If this land had been susceptible of partition, the proportion to be allotted to each distributee would have been set out in the application, and the division effected in this State, from necessity and the express law. But, as it had to be sold for division, and was distributable under a will, there may have been eminent propriety in referring the distribution to the court of Georgia. In the absence of proof of injury, we can not say that the court committed error in allowing the credits.

2. The bill of exceptions states, that the appellant moved the court to charge the administrator with a note for $5,400, made by himself and others, payable to the testator—1st, because he had negligently allowed the statute of limitation to bar the same; and, 2d, because he was liable as administrator; and that the motion was overruled. It does not say that the court refused to charge the administrator with the amount of the note, in opposition to the reasons assigned why he should be so charged, or that there was not some other reason which justified its action. The note was not barred by any limitation when the administrator was appointed, and, as he was a principal obligor so far as the estate was concerned, he became chargeable with the amount of it, as assets collected. *Childress v. Childress*, 3 Ala. 754; *Kennedy v. Kennedy's Adm'r*, 8 Ala. 395. But, as the transcript does not pur-

port to set out all of the facts connected with the action of the court, we can not assume that some valid defense was not adduced.

The decree is affirmed.

NOTE BY REPORTER.—The following opinion was afterwards delivered, in response to an application for a rehearing by the appellant's counsel, which has never come to the hands of the Reporter :

PER CURIAM.—We are asked to rehear this cause, on the proposition to charge the administrator with the note for $5,400, made by himself and others to his testator. It is claimed that the certificate of the probate judge, that the transcript contains "a full, true and correct transcript of all the proceedings" had in said cause, is equivalent to a statement that all the evidence in reference to the note was set out. The certificate applies only to such proceedings as were properly matters of record, or were made so by the bill of exceptions. The bill of exceptions does recite that the contestant exhibited a note belonging to the estate of the testator, for $5,400, with several payments indorsed thereon, besides one of $950 not indorsed, made after the appointment of the administrator, and moved the court to charge him with it, which the court refused to do. But it states nothing more that is material on the subject, especially the reason of the court's refusal. It is not stated by whom the last payment was made, or whether the entire balance had not been paid. Everything pertaining to the note would be without the record, but for the bill of exceptions, and it does not tell us enough to show error.

The rehearing is denied.

ESPY *vs.* THE STATE.

[INDICTMENT FOR CARRYING ON BUSINESS OF WHOLESALE DEALER IN SPIRITUOUS LIQUORS, &C. WITHOUT LICENSE.]

Wholesale dealer of spirituous liquor, in the meaning of the revenue law; what acts do not constitute.—A person, charged by indictment under the revenue law of this State as a wholesale dealer in spirituous liquors, should not be convicted, although he has no license, if the proofs only show that he is a country merchant, keeping a variety store, a miller and a farmer; that the sale of spirits is a minor part of his business; that he only sells whisky by the quart or gallon, which is not drank on or about his premises, and that the sale is to his customers for domestic purposes.

APPEAL from the City Court of Eufaula.
Tried before Hon. E. M. KEILS.

THE appellant was tried upon the following indictment:

"The State of Alabama, } Eufaula City Court, June Term,
Barbour County. } 1871. The grand jury for said county charge, that before the finding of this indictment, Seaborn Espy, being engaged in the business of selling vinous or spirituous liquors, did sell vinous or spirituous liquors by the wholesale, without license, and contrary to law, against the peace and dignity of the State of Alabama. A. V. LEE, Solicitor,

"Barbour County, Alabama."

He was convicted, and fined forty-five dollars.

He afterwards moved, in arrest of judgment—

"1st. That the indictment fails to charge any offense; 2d, that it fails to allege that the defendant engaged in the business of selling whisky by wholesale; 3d, because the indictment fails to allege that the defendant sold whisky in violation of law since the 3d Monday in March, 1869."

The motion was overruled, and defendant sentenced. From the bill of exceptions, it appears that—

"The State introduced John W. Johnson as a witness, who testified that within the period covered by the indictment, the defendant, in Barbour county, had sold to him and others on a few several occasions, whisky by the quart and gallon; that the same was never drank on or about the premises, and that the defendant would never permit it to be drunk on or about the premises. The said Johnson further testified that the defendant, prior to and while he was selling said whisky, as stated above, and since, was engaged in the business of selling goods and dealing in general merchandise as a merchant; that he had dry goods, groceries for family use, drugs, tobacco, whisky, and a general assortment of goods; that this was the kind of business he was engaged in, so far as his merchandising was concerned; that the whisky kept and sold formed a very small or minor part of the business; that it was kept by way of variety in his other business, and defendant kept and sold it, both for the accommodation of his neighbors and customers as in his other merchandising, and for profit to himself.

"The defendant then introduced F. M. Wood, who testified that he is a practicing attorney, and has been for about fourteen years; that he had, as the attorney of the defendant, been consulted by the defendant as to whether or not he would be required to take out a license, and upon the statement of the defendant as to what he desired to do in respect to selling whisky, which was in substance just what the witness Johnson stated he had done, as above, and the said Wood gave it as his legal opinion that the said defendant could sell in that way without a license, and without any violation of law. This all took place just before the selling, as testified to by said Johnson was done, and under this opinion of said Wood said defendant proceeded to sell whisky as stated.

"It was also proved that said defendant was a miller and farmer, and that the mill business and farming formed the greater part of his vocation.

"This was all the testimony in the case, and the court, upon this testimony, *ex mero motu*, and without request,

charged the jury: 'If the jury believe, from the evidence, that the defendant was in the habit of selling liquors to any one who called for them, in any quantity wanted, and that he had no license, then he is guilty as charged.' To the giving of which charge the defendant excepted.

"Defendant requested the court to give the jury the following charges in writing: '1st. If the jury believe, from all the evidence, that the defendant sold whisky by the quart or upwards by way of variety in his general merchandising business, and that selling whisky formed only a small part of his merchandising business, they must find him not guilty. 2d. That if the jury believe all the evidence, they must find the defendant not guilty.' Each of which charges the court refused to give, and to refusal to give each of which charges the defendant excepted. The jury having returned a verdict, the defendant moved an arrest of judgment, for the reasons stated in his motion in arrest of judgment, which motion the court overruled; and judgment and sentence was passed on defendant, and the defendant excepted."

Overruling the motion in arrest of judgment, the charge given, and the refusal to give the charges asked, are now assigned for error.

SEALS & WOOD, for appellant.—1. The motion in arrest of judgment should have been sustained. The violation of law aimed at, is engaging in the particular business or employment mentioned in the statute, without a license; not the mere selling or dealing occasionally in the business.—See § 3, Revenue law, and also *Moore v. The State*, 16 Ala.; *Carter v. The State*, 44 Ala., and cases there cited; *Bryant v. The State*, 46 Ala. 302.

The indictment is fatally defective in two particulars—1st, it fails to aver that the selling of the whisky took place since the third Monday in March, 1869, as required by said 3d section of the act of 1868, above cited; 2d, it fails to state that the defendant engaged in the business of selling liquor or whisky without a license. The averment is, that defendant, being engaged in the business of selling

whisky, &c., did sell vinous or spirituous liquors without a license, and contrary to law. There is no averment that defendant was being engaged in the business without a license, and if, as the indictment charges, he was engaged in the business of selling, (not stating that it was without license,) the presumption is that he was being engaged in the business of selling whisky lawfully, and thus following a lawful business or employment, it was no violation of law to sell whisky, as alleged in the indictment, without a license. The degree of certainty required in indictments is, "certainty to a certain intent in particular." This rule is entirely ignored in the charge against the defendant.

2. The proof shows that defendant sold whisky, by way of variety in his other business, for the accommodation of his customers, and that he was advised by his attorney, whom he consulted, that he could thus sell without a license and in no violation of law; and these facts fail to make out any offense.—See *Carter v. The State*, 44 Ala. 29, and cases cited.

3. The charge of the court given on its own motion was clearly wrong. It was on the effect of the evidence, and without request; it ignored venue, and time, and intent, and in effect stated that the habit of the defendant in selling whisky made him guilty, independently of the question whether he engaged in or carried on the business of selling whisky as a wholesale dealer or a retail dealer, and this, too, in the face of the indictment, which charged, or attempted to charge, a violation of law as a wholesale dealer in whisky.—*Frank v. The State*, 40 Ala.; *Edgar v. The State*, 43 Ala.

Upon all the facts, under the indictment, each of the charges asked by the defendant should have been given, as they asserted correct propositions of law applicable to the facts of the case.—See authorities above cited.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The indictment is not defective.—*Lillienstein v. The State*, at last term.

2. The correctness of the decision in the case of *Carter*

v. The State, (44 Ala. 29,) is not questioned. The language of the statute in reference to dealers in tobacco or cigars, indicates that the license was required only of those whose chief business was trading in tobacco, and not to those in whose trade it was merely an incident. But paragraph 5 of section 112 of revenue law, Acts 1868, p. 332, does not so limit the requirement of a license from those whose sole business is wholesale dealing in liquor. Any one who sells or in any way disposes of such liquor in any quantity greater than one quart, habitually or repeatedly, is a wholesale dealer. This is true, whether he sells other articles of merchandise or not. Certainly, it can not be pretended that because a person has other articles of traffic in his store, he can not be a wholesale liquor dealer. The statute includes every person who frequently sells liquor in quantity greater than a quart. The case of *Bryant*, at last term, merely decided that a single act of selling by a farmer or mechanic did not constitute the person a retailer. But *Johnson v. The State*, (44 Ala. 414,) establishes the rule, that "to constitute occupation some time is a necessary ingredient." * * * And, "if profit is the inducement, a very little time will suffice." Here it can not be doubted that the accused repeatedly sold liquor in a wholesale manner, and that profit was the inducement.

3. The record shows that the venue of the offense was proven. This court has reversed cases in which the record set out all the evidence, and proof of venue was not made, but in no instance when the proof was made, because the court in its charge did not mention the fact.

PETERS, J.—1. The motion in arrest of judgment assails the sufficiency of the charge laid in the indictment. The indictment is sufficient. It follows the form laid down in the Revised Code. These forms have been repeatedly held sufficient by this court.—Rev. Code, p. 811, No. 30; *Elam v. The State*, 25 Ala. 53; *Gabriel v. The State*, 40 Ala. 357. The motion in arrest of judgment was, therefore, properly overruled.

2. It is quite obvious that the charge given by the court,

ex mero motu, is a charge upon the effect of the evidence. It was given without being "required to do so by one of the parties."—Rev. Code, § 2678. This is error.—*Edgar v. The State*, 43 Ala. 312.

3. It is also very evident that the law under which this indictment is presented was not intended to prevent the sale of spirituous, vinous or malt liquors, but only to raise a revenue from their sale when engaged in or carried on as a "business."—Pamph. Acts 1868, p. 329, § 105; ib. p. 330, § 112; ib. p. 331, cl. 4; ib. p. 332, cl. 5. The construction given to this statute in the case of *Carter v. The State*, 44 Ala. 29, and in *Johnson v. The State*, 44 Ala. 414, is not so narrow as that given by the learned judge in the charge above set forth. The offense here charged is a misdemeanor.—Rev. Code, §§ 3541, 3542; Pamph. Acts 1868, p. 330, § 111. The limitation of prosecution for misdemeanors is twelve months next after the commission of the offense.—Rev. Code, § 3952. Then, the time covered by the indictment is twelve months next before the date of its presentment to the court. To sell whisky on a "few several occasions" within a period of twelve months, could not be justly esteemed the being engaged in or carrying on of the business of a wholesale dealer in the business of selling whisky. The proof does not show that it was the purpose of the accused to engage in the business of a wholesale dealer of spirituous liquors in the sense of the statute. Yet this was one of the facts necessary to be shown, before he could have been convicted. To do a thing on a "few several occasions" within twelve months, without any proof that the acts were consecutively done, is not sufficient to prove a habit. There is no proof of habit in the evidence, except the number of times the whisky is sold. These sales might have been spread out over a period which could have raised no just presumption of that frequency necessary to create a habit. The charge of the court, then, was faulty in being broader than the evidence. Such charges separate themselves from the evidence, by extending beyond it, and giving it a force not justly due to it. A merchant who keeps a variety store, and sells such

articles, of all kinds, as his neighbors need, could hardly be denominated, in any strictness of language, a wholesale dealer in spirituous liquors, because he sells, during a twelve months, several quarts or gallons of whisky to his customers, which are not drank upon, or near the premises. The gains thus derived are not freed from taxation. They are subject to be taxed as the profits and income on his other wares.—Pamph. Acts 1868, p. 305, § 13. The proof is, that the sales were never less than a quart, and the whisky was not permitted to be drank on the premises, or about them. This, then, did not make the vendor a retailer under the Revised Code.—Rev. Code, § 2618, and cases there cited. The statute is not intended to cut off all trade with a country merchant in spirituous liquors for domestic purposes, nor to forbid the people to use spirits for domestic purposes, but to impose a tax, by way of license, on the sale of such articles, for purposes of revenue, when the sale as "a business" was engaged in and carried on in a particular way. It is not a prohibitory liquor law, nor intended to operate as such, nor to compel all vendors of spirits to pay for and take out a license, but only those of a particular character. This distinction would not have been made, had it been the purpose of the legislature to include all. Where there is a specific enumeration, those not mentioned are intended to be excluded. This is the construction adhered to in *Carter v. The State*, 44 Ala. 29, *supra*. The charge of the learned judge was too broad, and was calculated to mislead the jury. His substitution of the word *habit* for the word *business*, is scarcely legitimate. If doing a thing once or twice is not illegal when so done, its repetition can not make it illegal, unless the law forbids the repetition and the habit thus created. Before the vendor can be made guilty under this statute, the selling must be done with the purpose of carrying it on as a business. When this is the purpose, the quantity sold makes no difference as to guilt, but only as to the grade of guilt and the *quantum* of the punishment.

Under this construction of the statute, both the charges asked by defendant below should have been given.

The conviction and judgment of the court below are reversed and the cause remanded, and the defendant, said Seaborn Espy, will be held to answer the charge against him until discharged by due course of law.

SMITH *vs.* THE STATE.

[INDICTMENT FOR RAPE.]

1. *Oath to jury; recitals as to, what insufficient.*—In a criminal case, the omission of an essential portion of the oath required to be administered to the jury, apparent from the record, is a reversible error. The record shows such omission in this case.
2. *Particular acts of accused; when can not generally be inquired into.*—The general rule is, that the prosecutor can not enter into an examination of particular acts of the accused, even when the latter has called witnesses in support of his general character.
3. *Rape, complaint as to; what competent evidence to prove.*—In a prosecution for rape, the request of the female, alleged to have been injured, to the witness to go before a magistrate and report the offense, is competent evidence to prove complaint made.
4. *Election by State; may be required at any time before jury retire.* Where the indictment charges but one offense, and the evidence tends to prove several repetitions of it, the defendant may require the State to elect on which it will proceed at any time before the jury retire.
5. *Rape; duress as to; definition of.*—Duress in a case of rape is a reasonable fear of serious personal injury, the age, sex, state of health, temper and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, being taken into consideration.

APPEAL from the Circuit Court of Wilcox.
Tried before Hon. P. O. HARPER.

THE appellant, Isaac Smith, (colored), was convicted of rape upon the person of his daughter, Judy Smith, and sentenced to the penitentiary for life.

The judgment entry, so far as it relates to the oath administered the jury, was as follows: "Thereupon came a

jury of good and lawful men, to-wit, John Moore and eleven others, who, being duly elected, tried and sworn and impanneled well and truly to try the issue joined between the State of Alabama and the prisoner at the bar, upon their oaths do say," &c.

The bill of exceptions states that Judy Smith was introduced as a witness in behalf of the State, and testified "that the defendant was her father, and that about three weeks before Christmas, 1870, at a gin-house in Wilcox county, Alabama, the defendant made her lie down, and he pulled up her clothes and got on her; and the solicitor asked her if the defendant penetrated her; and defendant's counsel objected to the question, because it was leading, and the court told her to go on and state what he did, and she went on and stated that defendant, by force, threw her down, and had his will of her against her consent; the court at the same time stating that the question put by solicitor was leading, and then the court told the witness to go on, &c., as above stated, and the defendant excepted to the ruling of the court; and she went on and stated that about two weeks after that time Isaac Smith came into the window where witness was sleeping, in the night, when her mother was gone and witness was alone, except some young children who were sleeping in another bed in the same room; that defendant got on the bed and attempted to have connection with witness, when witness jumped from the bed; defendant got up and got his knife, and said if witness would not yield to him he would cut her throat, and, fearing that if she did not yield, defendant would kill her, she consented, to save her life. This transaction was sworn to by a younger sister, who was lying in the same room on another bed, and heard the conversation; heard said Judy crying, and begging her father, said defendant, to desist; and further, that on Monday night, the 26th day of December, 1870, he whipped her and made her lie down again for him in the cotton patch, near his house, and both times he had connection with her, as well as he did at the gin-house. Upon cross-examination, she said, at the gin-house there was no one present, but the time two weeks

after her sisters were in the house at the time; and said it was late at night, and that it was in a negro quarter where there were three other families living, though not in the same house, and she supposed they were there, but did not see them, and the reason she did not halloo was that she was afraid of defendant.

"The State then introduced Irena Smith, who knew nothing of the gin-house scrape, but said that she heard her father tell Judy he would cut her throat if she did not let him do what he wanted to do with her, and that Judy consented, and that she heard him talking to Judy the night in the house and in the cotton patch, and that he whipped Judy with a stick and beat her with a fire shovel before she would consent to go with him, and that it was a month before she recovered from the injuries received at the hands of defendant to make her consent; that Judy said she was whipped into consent.

"The State then introduced two doctors, who said they were called to see Judy Smith, and found her suffering with pains in her side, and complaining of great soreness. The State then closed.

"The defendant introduced evidence tending to show that he whipped Judy Smith, on the 26th of December, 1870, because she stayed away from home three days with his horse; and that four weeks before, and it might have been six or seven weeks to Christmas, defendant went to an old negro to be cured of a venereal disease, in the first stages, and on Monday of the 26th of December, defendant was still bad off with the disease, but better than he was when he first went to the old negro to be cured."

The defendant then introduced medical witnesses who had attended him, who testified that his disease was most likely to be communicated to any female with whom he might have connection; but that it might be that he could have such connection and not communicate his disease. There was no evidence whatever as to whether Judy Smith had a venereal disease at any time.

"The defendant then introduced evidence tending to show that the character of Judy Smith was not good.

One witness proved that, and then the defendant introduced five or six witnesses who said they had known the defendant from ten to twenty years, and that she always had a good character, and that this charge was the first that they had ever heard against him; and one of the witnesses who testified thus was the son of defendant's old mistress in slave times. The defendant then closed, and the State then introduced one Susan McLeod, an older sister of said Judy, to rebut defendant's good character, and she was asked as to one act of the defendant alone, and defendant objected. The court overruled his objection, and the defendant excepted. The defendant then crossed the witness, and asked her if she did not set this prosecution on foot. She said she did go to the justice and report the defendant; and on being asked by defendant's counsel why she went and reported defendant, she answered that she went at said Judy's request, and because said Judy was afraid to go. Defendant then closed, and the State then asked her why she reported the defendant, and she went on to say that Judy Smith, the girl said to have been raped, asked her to go. This answer was given to the question by defendant's counsel as to why she went and reported the case to the magistrate, and defendant objected to her telling what Judy said. The court overruled the objection, and let her tell the jury all that Judy told her, and the defendant excepted to the ruling of the court. The State then introduced Dr. Smith to support Judy Smith, after being assailed by defendant; he said he knew her character as well as he did any girl of her condition, and that it was as good as any girl's character of her condition; that she had lived in his family. Defendant objected to this statement going to the jury as evidence of Judy Smith's good character; the court overruled the objection, and defendant excepted.

"This was all the evidence in the case. After the evidence was closed, and the solicitor had commenced his argument, and had spoken for several minutes, defendant moved to compel the solicitor to elect as to which time and transac-

tion he would ask for a conviction upon; which motion the court refused, and the defendant expected.

"The defendant asked the court to charge the jury—

"1. That duress is that state of the mind of the woman raped as induces her to believe that there is no assistance near to relieve her.

"2. That if they find from the evidence, that for four weeks before the twenty-sixth of December, 1870, defendant was diseased with the pock in the first stages, and the woman said to be raped had no pock at the time she complained, nor any other time since that time, that is a circumstance to be considered by the jury, as to whether she be entitled to credit or not.

"3. That the good character of defendant is sufficient to generate a doubt.

"The court refused the several charges asked, and the defendant excepted."

(Neither the docket nor record gives the name of appellant's counsel.)

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The court did not err in its refusal, after the entire evidence was before the jury, and the argument had commenced, to compel the solicitor to elect for what rape he was prosecuting. The defendant should have objected to the admission of the evidence of the several rapes.

2. The first charge asked by the defendant was properly refused. "The question is, did the prisoner have such intercourse, against the consent of the victim of his brutish passions, and by force. If he did, then he is guilty." *Waller v. The State*, 40 Ala. 325, 331, and authorities.

3. The charge asked in reference to the character of the accused was calculated to withdraw from the jury the consideration of all evidence other than that of character. The proof of good character may be sufficient to generate a doubt; the charge stated that it was sufficient, and, invading the province of the jury, it was properly refused.

4. Although the statement of the particulars of a rape

can not be given in evidence by third persons, unless it be of the *res gestæ*, there is nothing in the record to show the statements of Judy Smith to her sister were of this character. The record does not show what she said to her sister when she asked her to make the complaint before the magistrate. For aught that appears, they may have been about business engagements, her sickness, a fatigue, or any other cause that prevented her from seeking the officer. The appellant ought to have shown by his bill of exceptions of what he complained as wrongfully admitted testimony.

B. F. SAFFOLD, J.—The appeal is from a conviction and sentence for rape.

The record recites that the jury was "sworn and impanneled well and truly to try the issue joined between the State of Alabama and the prisoner at the bar." An essential portion of the oath required to be taken was omitted. *Joe Johnson v. The State*, 47 Ala. 9.

The question objected to as leading, is not so. It is a direct inquiry concerning the existence of an indispensable fact.

The general rule is, that the prosecutor can not enter into an examination of particular acts of the accused, even when the latter has called witnesses in support of his general character. Nothing appears in the record to show that the act inquired about is an exception.—Archb. Crim. Pl. p. 123, n. 4.

The declarations of the party charged to have been injured, which a witness was allowed to state, are not set out, beyond her request to the witness to go to the magistrate and report the offense. It was competent to prove that she made speedy complaint of the injury done her.

It was competent to sustain the general character of the female injured, which had been assailed by the defendant, especially as she was a witness.

The indictment charges but one offense, though the evidence tended to prove several repetitions of it. The rule in such a case is to hold the State to the act to which the

testimony relates, if it can be covered by the indictment. After the election is once made by offering evidence on the part of the State, it holds through all future stages.—*Elam v. The State*, 26 Ala. 48. This is necessary in order not to confuse the prisoner in his defense. and also to leave him subject to indictment for the other offenses. It can not prejudice the prosecution to require the election to be made at any stage of the trial before the jury retires, because some one act must be proved beyond a reasonable doubt.

It is not necessary to consider minutely the charges asked by the defendant which were refused. Whether proper or not, they lack precision of expression. For instance, it is not clear whether the last one means that the good character which the defendant had proved on the trial was sufficient to generate a doubt of his guilt, notwithstanding the evidence against him, or that the proof of good character may be such as to generate a doubt. The latter conforms to the rule in *Felix v. The State*, 18 Ala. 720. The second is defective in the expression of the time when the defendant was diseased. As to the first, duress, in a case of this kind, is a reasonable fear of serious personal injury; the age, sex, state of health, temper and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, being taken into consideration.

The judgment is reversed, and the cause remanded.

HARPER *vs.* BIBB & FALKNER, Ex'rs.

[BILL IN EQUITY BY EXECUTORS TO OBTAIN AID OF COURTS IN CONSTRUING WILL AND EXECUTING THEIR TRUST.]

1. *Legacy, what creates a general.*—The clause of a will in the following words: "I give to my friend P. O. H. ten thousand dollars, in notes or in Confederate States bonds, at the option of my executors, hereinafter named," creates a *general*, and not a specific legacy.
2. *Same; how paid.*—Such a legacy, after ascertaining its pecuniary value at the time it became due and payable, is entitled to be paid out of the general assets of the estate liable to be applied to the payment of general legacies, either in whole or *pro rata*, in proportion to the sufficiency of such assets. It can not be defeated because of the failure of the notes or Confederate States bonds, in which it was directed to be satisfied.
3. "*Option of executors*"; *what can not defeat.*—"The option of the executors" in such a case can not be permitted to be exercised to defeat the gift.

APPEAL from the Chancery Court of Montgomery.
Heard before the Hon. N. W. COCKE.

THIS was a bill in equity, filed by the executors of W. B. S. Gilmer, deceased, to obtain the aid of the court in construing the will of their testator, so as to enable them properly and safely to execute their trust. The case was brought to this court by appeal from a final decree rendered at the May term, 1867, of the chancery court, and the decree of the court was reversed and the cause was remanded.—*See Gilmer's Legatees v. Gilmer's Executors*, 42 Ala. 11.

Afterwards, the chancellor rendered a decree in accordance with the opinion of the Supreme Court, adjudging, among other things, that the legacy to Harper must either fail or be paid in notes, in whole or in part, at the option of the executors. The clause of the will giving the bequest to Harper is as follows: "Item 13. I give to my friend P. O. Harper ten thousand dollars, in notes or

in Confederate States bonds, at the option of my executors, hereinafter named."

The testator executed his will on the 26th of June, 1863, and the testator died January 5th, 1865, and letters testamentary were duly granted upon his estate, in July; 1865. The testator was a man of wealth, owning a number of rail-road bonds, notes and Confederate bonds, besides real estate. The other clauses of the will need not be here referred to, as they were not of such a character as to influence the decision upon the 13th item.

The decree of the chancellor is now assigned as error.

JUDGE & HOLTZCLAW, for appellant.—1. The decision of the court below, upon the bequests in the 13th, 14th, 15th and 22d items of the will, was erroneous, though based upon and in conformity to the opinion of this court as to the proper construction of said items, when this cause was first in this court.—42 Ala. 9.

When this cause was first here said items of the will received but slight consideration, both from the court and the counsel who argued the cause. The court cited but one authority, (2 Sugden on Powers, 161,) in the brief paragraph of its opinion devoted to these items; and it is respectfully suggested that that authority is but little in point—does not tend to elucidate the true question involved.

2. We contend, 1st, that items 13, 14, 15 and 23 of the will give general, not specific legacies. The testator does not say, "I give to ——— ten thousand dollars, in my notes, or in notes held by me, or in Confederate States bonds held by me, at the option of my executors"; but the phraseology is, "I give to my friend ——— ten thousand dollars, in notes, or in Confederate States bonds, at the option of my executors," &c. This, according to the weight of authority, makes the legacy general, not specific. In North Carolina, it has been held that a bequest of "twenty-five shares of the capital stock of the State Bank of North Carolina," the testator owning at the time that number of shares in the bank, is a general, not a specific leg-

acy. If the testator had said, "my twenty-five shares," &c., the legacy would have been specific.—*Davis and Wife et al. v. Cain's Ex'r*, 1 Iredell's Eq. 304. This case can not be distinguished in principle from the one now before the court, and it is fully sustained by authority.—1 Roper on Leg. 73, cited in the opinion; see the case of *Barton v. Cook*, 5 Vesey, Jr., t. p. 463, note *a*, and authorities there cited; see, also, same case, t. p. 461, and authorities cited in note *a* on said page, showing that the late decisions "have leaned much against specific legacies."

The criterion of a specific legacy is that it is liable to ademption.—*Coleman v. Coleman*, 2 Vesey, Jr., t. p. 641, note 1, and authorities there cited.

It can not be contended, successfully, that the legacies we are considering would be liable to ademption.—See, especially, *Roberts v. Bocock*, 4 Vesey, Jr., t. p. 150; *Kirby v. Potter*, 4 Vesey, Jr., t. p. 747, and note *a* on said page, and authorities therein cited.

In the opinion of Chief-Justice WALKER, delivered in this case when it was first in this court, it is demonstrated, both by argument and authority, that the bequests of the will of "dollars in Confederate States bonds" are general, not specific legacies. The conclusion, then, announced in that opinion, that such legacies have failed, because Confederate States bonds have failed, is a *non sequitur*.—See opinion of WALKER, C. J., as to the legacy given to Thomas L. Gilmer. If these legacies had been specific, then a failure of the fund would have worked a failure of the legacy. But, being general legacies, with a demonstration of the fund out of which they were to be paid, they do not depend for their validity or value on the sufficiency or existence of the fund specially dedicated for their security. *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 15-22.

The conclusion, then, attained by WALKER, C. J., speaking for the court, that these legacies have failed, because the particular fund which was pledged as collateral security for their payment has failed, is erroneous, is, we repeat, a *non sequitur*.

4. But if the above view is erroneous, the legacies here-

inbefore specifically named are valid, at least as to the notes, and they must be good notes, the executors having no right of election which will justify them in paying nothing, the Confederate States bonds being worthless and illegal. The testator intended to give a legacy of value; to say that because the Confederate States bonds are worthless, the executors may, in their discretion, give nothing, would be authorizing them to defeat the will of the testator. The Confederate States bonds were a nonentity from the beginning, and there was nothing upon which the right of election could attach. And the legatees, under the items of the will named, are entitled to their legacies, in good notes, or in money.

JEFFERSON FALKNER, *contra*.—This case stands as on a rehearing. The rule that the former decision is to be the law of the case in all subsequent proceedings has been repealed by the legislature; I presume, however, that this court will not depart from the construction or rule laid down in a previous decision of the same case, and overrule it, unless the former decision is clearly wrong. The able, exhaustive, and lucid opinion of Chief-Justice WALKER in this case, above cited, is a correct exposition of the law.

In this case the appellant presents but a single question, to-wit, the question as to the discretion of the executors under the 13th, 14th, 15th and 22d items of the will. These several sections, in one of which the appellant, Harper, is mentioned, gives legacies to various parties, payable at the discretion of the executors, either in notes or Confederate States bonds. When the case was here before, the supreme court said: "Confederate States bonds being worthless, these legacies must fail, at the option of the executors. The courts will not interfere with the exercise of a discretion," and cites as an authority 2 Sugden on Powers, 161, and says: "The legatees are not entitled to payment in notes, unless by the choice of the executors." We think this is a correct exposition of the law

arising on these several clauses of the will, and is fully sustained by the authorities.

The appellant contends, however, that if it should be concluded that such is the law in reference to "discretion," the law on this subject does not apply in this case.

The language of the 13th item is: "I give to my friend P. O. Harper ten thousand dollars, in notes or in Confederate States bonds, at the option of my executors, hereinafter named." The word "option," according to Worcester, means—"1st. A wish. 2d. Power or right of election, a choice, election, preference. Option is spoken of only as it regards one's freedom from external restraint in the act of choosing. It is left to a person's option, and he may make his choice." According to this definition, an election or choice is conferred on the executors by the will itself, which is to be exercised by them, and no one else; and unless they refuse to exercise the power thus conferred, no one else, not even a court, can control it or exercise it for them.

In this case the acting executors have not refused to exercise the power conferred upon them, but, on the contrary, the legatee objects to their making the election or choice, or to the carrying out of their "wish" in the case, but insists that the "election" or "choice" shall be made by the legatee.—See 2 Sugden on Powers, 161.

The cases relied on by appellant to support his view of the case are not like the case at bar.

In those cases the legacy is regarded as vested in the legatee, and the trustee having failed to make the election, the courts always in electing, instead of the trustee, (where the trustee fails, and is either dead or has resigned, or has become in any way incapable of making the election,) make such election as is most advantageous to the *cestui que trust*, or legatee. But in this case the executors are still acting, and still represent the estate, which is still in process of settlement; and the object of the bill in this case is to obtain instructions and a judicial construction of the will. And one of the main questions in the case is the proper construction of the class of legacies to which this

one belongs.—See par. 8 of the bill, on pp. 5 and 6; see, also, the answer of appellants to this paragraph, on p. 36 of the record; see Hill on Trustees, t. p. 740, 741; *Waldo v. Colby*, 16 Vesey, Jr., 206, 208, 210; *Castabodie v. Castabodie*, 6 Ware, 510; Hill on Trustees, t. p. 734, 735, and notes.

The case of *Keates v. Burton*, (14 Vesey,) is not authority in this case, because there one of the executors being dead, and the others having renounced, there was no one left to exercise the discretion.

In this case the legacy is not given in money, but is "ten thousand dollars in notes or Confederate States bonds," not "ten thousand dollars" in currency or coin, but it is to be paid in notes or bonds, and not in dollars; and we contend that a payment in gold coin would not be a payment under the will. To illustrate: Suppose the will had given the legatee ten thousand dollars in bank stock of some particular bank, and the bank stock had been worth a premium of fifty per cent. It would then have been worth fifteen thousand instead of ten thousand. Now, will any one contend that the executors could have paid such a legacy with ten thousand dollars in gold coin? We suppose not.

This is a general legacy, payable in a specific thing, and not payable in money, and is, therefore, not like a general legacy with a demonstration as to the fund out of which it is to be paid.

A demonstrative legacy, properly so called, is payable in any event, although the fund mentioned fail, but that is where the legacy is payable in money; and we insist, therefore, that this case is not within the rule laid down as to demonstrative legacies.

We apprehend that no case can be found where a discretion is vested in an executor or other trustee, that such discretion can be taken from him, if he is capable and willing to act. In this case the legacy is payable at the "option" of the executors, either in notes or Confederate States bonds, and to take that "option" or discretion from them,

would be to set aside the will of the testator, and to substitute for it the will of the court or of the legatee.

If the executors were dead, or had refused to act, then a different rule might apply; but as above stated, in this case the object of the bill is to ascertain the extent of their discretion in the administration of the estate, and we contend that their discretion as to whether they will pay in notes or bonds can not be controlled as long as they are capable and willing to act.

See brief of appellees in this case when here before, 42 Ala. 11, 13, 14, 15.

PETERS, J.—This is a bill in equity filed by the executors of the last will of William B. S. Gilmer, deceased, for the purpose of obtaining the aid of the court in its construction, so that the said executors may be able safely and properly to execute the duties of their trust. The will bears date the 26th day of June, 1863, and it was made and published in this State, and the testator died on the 5th day of January, 1865, in Chambers county, in this State. The clause of the will sought to be construed in this case is in the following words:

"Item 13. I give to my friend P. O. Harper ten thousand dollars in notes or in Confederate States bonds, at the option of my executors hereinafter named."

The first question that presents itself is the technical character of the bequest here intended to be made. Is it to be regarded as a specific or a general legacy? A specific legacy is one that can be separated from the body of the estate and pointed out so as to individualize it, and enable it to be delivered to the legatee as a thing *sui generis*. The testator fixes upon it, as it were, as a label, by which it may be identified and marked for delivery to the owner, and the title to it, as a separate thing, vests at once, on the death of the testator, in the legatee.—*Innis v. Johnson*, 4 Ves. jr., 568, 573; *Kirby v. Potter*, ib. 748, and note *a*, Sumner's ed. When such individualization is not effected by the language of the will, the legacy can hardly be said

to be specific. The above *formula* of words does not do this. Then it does not create a specific legacy. We may therefore dismiss any further discussion of bequests of this character, except, perhaps, to add, that courts are averse to construing legacies as specific, when it can be helped.—4 Ves. jr., 568, *supra;* 2 Williams Ex'rs, 840; 2 Harris, 451.

It is also said that legacies are divided into two other classes. These are *demonstrative* legacies and *general* legacies. The former consist of bequests payable out of a particular fund named or *demonstrated* in the will itself. The latter consist of those of "quantity merely, and include all cases not embraced in the other two."—*Myers' Ex'rs v. Myers*, 33 Ala. 85, 88, 89; 2 Williams Ex'rs, marg. p. 993, 994, *et seq.*, 4th Am. ed., and notes; 1 Roper Leg. marg. pp. 190, 191, 192, *et seq.*, 2d Am. ed. 1848. But Mr. Williams, in his learned work on Executors, above referred to, makes only two classes of legacies; the one *specific*, and the other *general*. And upon the distinction thus laid down, depends the solution of many of the very difficult questions attendant upon the construction of wills. The will of the testator is the law of the court; and the intention of the testator, so far as his intention is lawful, is his will. It is, therefore, this intention that we must look for, when we seek to construe his testamentary disposition of his estate. In construing a will, the court is authorized to put itself in the testator's place at the time he made it, and view the surrounding circumstances as the testator probably viewed them himself. If we do this, it is obvious that he intended to make a very considerable gift of his personal property to his "friend P. O. Harper." He did not propose to make the enjoyment of this gift depend upon a contingency, except upon a deficiency of assets. This is the nature of a general legacy. If there is a sufficiency of assets, it must be paid. If not, then it is to be abated or lessened in proportion to such deficiency of assets to pay legacies.—2 Williams Ex'rs, marg. pp. 996, 997, and notes, Am. ed., *supra*. When this case was here be-

fore, it was determined that this was a general legacy, and not a specific legacy.—*Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9, 15, 23. That such a legacy is *demonstrative*, does not seem to alter its character. It is still to be treated as a general legacy.—2 Williams Ex'rs, marg. p. 995, and cases cited; *Balliet's Appeal*, 2 Harris, 451. It is true that the executors were authorized, at their "option," to pay this legacy in one of two ways, but they were not authorized to defeat it altogether. This was not the testator's intention, because the character of the gift forbids it, as I think the foregoing authorities abundantly show. In such a case, if the fund provided for the payment of such a legacy be called in, or fail, the legatee will not be deprived of his legacy, but permitted to receive it out of the general assets.—2 Harris, 451, *supra; Chaworth v. Beech*, 4 Ves. jr. 555, 564; 2 Williams Ex'rs, 995, and authorities in note *q*. Here there were two funds. If one failed, it did not defeat the gift. The executors should have paid it out of the other. If that failed, then they should have paid it out of the general assets for the payment of legacies. *Davis and Wife v. Cain's Ex'r*, 1 Iredell Ch. R. 304; and cases *supra*. It is very evident that the testator did not look upon the "notes" mentioned in his will, or the "Confederate States bonds," as wholly worthless securities. He thought them about equal in pecuniary estimate. And he did not intend to impose either upon his "friend" as things wholly destitute of any money value whatever. He did not intend that if he died without "notes" or "Confederate States bonds" to satisfy this bequest, his benefaction to his "friend" should wholly fail, because this would have made the legacy specific, and not general, as it evidently is.

The court here intervenes and directs the execution of a trust upon like principle that it does upon the execution of a power; that is, to prevent a legacy from failing which the testator, at the time he made his will, did not intend should fail. Besides, if the executors can use their "option," as contended for by appellees' counsel, they may pay some of the legacies, like this mentioned in the will,

with "notes," and defeat others with a simulated payment in the worthless "Confederate bonds." This is certainly not the power intended to be given by the testator.

This legacy may be paid in "notes," if there are "notes" belonging to the estate of said testator, with which the executors may satisfy the same. And if there are no "notes" available for this purpose, the learned chancellor in the court below will ascertain the pecuniary value of said legacy to said P. O. Harper at the time the same became due and payable to said legatee, and cause the same to be paid, in whole or in part, according to the sufficiency of assets for the payment of general legacies, under the directions of said will of said testator.

CHILDRESS, Pro Ami, *vs.* HARRISON, Ex'r, et al.

[BILL IN EQUITY TO ENFORCE PAYMENT OF PECUNIARY LEGACY.]

1. *Bill to enforce payment of pecuniary legacy; when should not be dismissed for failure to allege payment of testatrix's debts.*—Where a bill filed by a female minor, to enforce payment to her of a pecuniary legacy, is submitted for final decree on bill and exhibit, and decrees *pro confesso* against all the defendants, the chancellor should not, *ex mero motu*, dismiss the bill; even without prejudice, no defense being interposed by plea, answer, or motion to dismiss, because the bill omits to allege that all the debts of the testatrix have been paid, if it appear that the administration has been pending for ten years, and that sufficient assets have been received by the executor to pay the legacy. In such case, the chancellor should direct the bill to be amended, or proceed to decree any relief appropriate to the facts stated.
2. *Judgment on reversal; when will not be rendered.*—Where a defendant may have relied upon the dismissal of the bill on account of technical defects in its frame, and on this account fails to defend, this court will not render judgment upon reversal, but will remand the cause, to give an opportunity for defense on the merits.

Appeal from the Chancery Court of Greene.
Heard before Hon. A. W. Dillard.

THIS was a bill in equity, exhibited on the 21st of June, 1869, in behalf of Maria Childress, a minor, by next friend, to enforce the payment of a pecuniary legacy, &c. bequeathed her by the last will and testament of Catherine Harrison, deceased.

The bill alleges, in substance, that the will was duly admitted to record and probate on the 19th of May, 1859; that one Joseph H. Harrison duly qualified as executor of said estate on the same day, and being exempted by said will from giving bond, took all the property of his testatrix into his possession, and administered thereupon without ever having given bond or security for the faithful performance of his trust.

2d. That said Harrison's testatrix bequeathed to oratrix a pecuniary legacy of $1,000, to be paid out of said estate, and that Harrison, though often requested to do so, has utterly failed and refused to pay said legacy; that at various times said Harrison received and collected, as executor, large sums of money, as much as $10,000, and under the power in the will sold and conveyed all the property, both real and personal, belonging to the estate; that, disregarding complainant's rights, he had used the money received by him, partly for his own benefit and partly to pay the other residuary legatees under said will; that on or about the — day of ——, 1859, he sold a house and lot, situate in Greensboro, Alabama, and that Laura P. Simmons, wife of J. C. Simmons, a daughter of testatrix and one of the residuary legatees, became the purchaser, at the price of $3,600, executing to Harrison, as executor, her promissory note therefor; that said Laura has never fully paid said note, nor has the executor ever received full payment of the purchase-money from any one in her behalf; that said Harrison has surrendered said notes to her without collecting the whole amount due thereon, and that a portion of the note is still due testatrix's estate, and liable to the payment of complainant's legacy and interest thereon; that Harrison has removed to Florida without making any final settlement, and is hopelessly insolvent.

The will is made an exhibit to the bill. The bill prays a discovery from two of the defendants as to certain allegations of the bill, and contains various interrogatories, the answers to some of which were required to be given under oath; but it did not contain the appropriate allegations, that the discovery by defendants was indispensable as proof, or that plaintiff was unable to make proof by other witnesses, &c.

The prayer of the bill is as follows: "That oratrix may have relief against said Harrison as executor, &c., for the recovery of said legacy, as also against the property now held by Laura P. Simmons, as to the matters inquired of in this bill of complaint," &c. There was also a prayer that the house and lot sold to Laura P. Simmons be sold for the payment of the amount due for the purchase thereof, and that the proceeds be applied to the payment of the principal and interest due complainant on account of the legacy, and for account, &c., and for general relief.

The executor, Harrison, and said Laura P. Simmons, and her husband, were made parties defendant.

There was a decree *pro confesso* against all the defendants, and the cause was submitted for final decree on bill, exhibit, and decrees *pro confesso*. The chancellor held that an administrator *de bonis non* was the only party entitled to a discovery against the purchaser of the house and lot as to the balance due on the purchase-money, and dismissed the bill without prejudice for this, and the further reason that there was no allegation that all the debts of the estate had been paid.

W. & W. J. WEBB, for appellant.—1. The jurisdiction of a court of equity to enforce the payment of a legacy, in such a case, is fully sustained by the authorities.—18 Ala. 348–51; 32 Ala. 314; 1 Story's Equity, § 540, p. 512, old edition; 1 Story's Eq. Jur. § 80; 7 Ala. 906.

2. The decree was erroneous dismissing the bill as to any of the defendants, all of whom were in contempt of court for failure to answer, with decrees *pro confesso* each.

In the case of *Hogan et al. v. Smith et al.*, (15 Ala. 600), the court says: "Where the allegations of a bill authorize any decree whatever against a defendant who is in contempt, it is error with the chancellor to dismiss it as to him."

3. The chancellor should not have dismissed the bill for want of a party, even a necessary party, without affording the complainant an opportunity to amend. To do so was error.—*Colbert v. Daniel*, 32 Ala. 314; 1 Daniel Chancery Practice, pp. 334, 336, and notes; Story's Eq. Plead. § 541, and note; *Rugeley v. Harrison*, 10 Ala. 703, opp. 745–46; *Hobson v. Andrews*, 23 Ala. 219, opp. 232.

4. But an administrator *de bonis non* could not be appointed until the executor was legally removed from office. His removal from the State did not work his removal from the office of executor, though it would be a sufficient cause for his removal by the court that appointed him. Therefore, an administrator *de bonis non* could not be a necessary party. The right of complainant to recover from this executor, who had gone on in the administration, and violated his duties by paying over large sums of money to the residuary legatees, remained to her unaffected by his further delinquency of having removed from the State without making a settlement.

An administrator *de bonis non* could only administer on the property of the estate remaining in specie, or undisposed of by the executor.—17 Ala. 653; 21 Ala. 739; 20 Ala. 345; 5 Randolph, 56, 126.

5. It was not necessary to allege that all the debts of the estate had been paid; for if there were any such debts, they were barred by the statutes of limitations and of non-claim, more than ten years having elapsed from the granting of the letters to the filing of the bill. And this would be matter of defense to be set up by the executor. *Magee v. Gregg*, 11 Smedes & Marshall, 76; 2 *ib.*, 527, 530.

5. The seventh section of the bill charges the executor with having collected assets, viz., $10,000, which he in part converted, and in part paid to the other residuary lega-

tees, and his sister, L. P. Simmons, of the number, which is enough of itself to charge the executor with the payment of this legacy.

7. The bill does not ask for a decree or recovery against Laura P. Simmons, but seeks a sale of the lot (sold by executor) for the balance of the purchase-money, and the application of the proceeds to the payment of the legacy.

The executor had a lien on the lot for the purchase-money, and the complainant may be, in a court of equity, subrogated to that lien without the appointment or intervention of an administrator *de bonis non*. It would be useless to have an administrator *de bonis non* appointed, unless it were shown that there were outstanding liabilities of the estate, and a court of equity will not require a useless thing to be done.—20 Ala. 482.

8. The facts stated in this bill, and as they stand confessed by all the defendants, constitute a fraud perpetrated by the defendant, Josiah H. Harrison, as executor of the will, upon the rights of complainant. This of itself alone authorized the complainant to go into equity, and to seek the aid of the court she did for relief against that fraud.

9. In such a case as this, the supreme court may, and will proceed to render such decree as ought to have been rendered.—Rev. Code, § 3502; 32 Ala. 149.

COLEMAN & SEAY, *contra*.—1. The bill should have been dismissed, because the complainants did not make such a case as, if admitted by answer, or proved on the hearing, would have entitled her to a decree. Every fact which is essential to the complainants' title, and which authorizes the relief asked, must be alleged, or the defect is fatal. The court pronounces its decree *secundum allegata et probata*.—1 Danl. Chan. Prac. 412; Story's Eq. Pl. 257.

The allegation that the debts of the estate had been paid, and upon denial, proof thereof, is essential to entitle the complainant to the relief sought. For the debts of the decedent must be paid before the legacy can be paid. There is no such averment in the bill; indeed, the allega-

tion of maladministration by the executor, his removal from the State, &c., justify the inference that there were debts against the estate outstanding and unpaid. This presumption should not only be negatived, but there should have been a distinct averment that the debts had been paid. To allow a legatee, by a proceeding against the executor and only one of several other legatees, to realize a fund which neither the complainant nor the register could administer, and which may be chargeable with outstanding unpaid debts of the decedent, would be in direct violation of the rule we invoke, and authorize that injustice to creditors against which the rule was leveled. *Worthy et al. v. Lyon*, 18 Ala. 784; 2 Redfield on Wills, 547; Tiff. & Bullard on Trusts, 308, *et seq.*; 7 Pick. 1; 10 Pick. 75.

The probate court should appoint an administrator *de bonis non*, who can dispose of unadministered assets. 7 Pick. 1.

We admit that the chancery court may, in all cases, take jurisdiction, though that of the probate court has attached, where the interests of parties are varied and complicated, and the condition of the estate renders the powers of the probate court inadequate to a proper adjustment of conflicting interests; but this will only be exercised on a bill filed for the purpose of removing the administration to the chancery court, with all parties before the court, and with distinct averment of these "peculiar facts" which alone confers the jurisdiction and authorizes the decree. This is not such a case.—18 Ala. 348; 8 Port. 381; 15 Ala. 264; 8 Ala. 744; 14 Ala. 270; 6 Ala. 423, 743.

3. The bill should have been dismissed by the chancellor, because the result of the relief asked would have been to have placed in her hands a fund which she could not administer or properly dispose of. The complainant could not apply the proceeds of the sale sought to be had so as to adjust the rights of the defendants to the bill, or to pay the debts of the estate, nor could the chancellor authorize

the register so to do.—*McCattney v. Calhoun*, 11 Ala. 110; *Scott v. Abercrombie*, 14 Ala. 270.

4. The legatee can not pursue assets in the hands of a purchaser, except where he has been guilty of fraud; and this the law will not presume. It must be distinctly alleged.—2 Redfield on Wills, 558.

5. In this cause one legatee only sues. If a legatee sue alone, he must bring all parties in interest before the court and ask for an administration of the estate.—Story's Eq. Pl. 104, and note 1.

6. This bill was dismissed without prejudice. In *Goodman, Ex'r, v. Benham*, (16 Ala. 631,) the court says: "It is not indispensable to the action of the court that the want of parties should be presented by demurrer. It is allowable for the chancellor to notice, in *mero motu*, even at the hearing, and order the bill to stand over on leave to amend, or to dismiss it without prejudice."—4 Ala. 350; 10 Ala. 703; 1 Smith's Chan. Prac. 203, 512, 513; 20 Ala. 477; 32 Ala. 322.

An unqualified dismissal for want of proper parties is erroneous, but a dismissal without prejudice to complainant is allowable.

No inference can be drawn that the debts are paid. There must be a distinct allegation that the debts are paid. *Bliss v. Anderson*, 31 Ala. 612, and particularly page 625.

PETERS, J.—This is a bill in chancery to enforce the payment of a pecuniary legacy. There was no defense whatever interposed in the court below. The case was submitted upon the bill, exhibits, and decree *pro confesso* against all the defendants. But on the hearing it was dismissed by the learned chancellor without prejudice, because it was not alleged that the debts of the estate had all been paid. From this decree the complainant in the court below appeals to this court.

There can be no doubt that chancery will take jurisdiction to enforce the payment of a pecuniary legacy. This is a branch of its original jurisdiction, which has never been

taken away.—*Pearson et al. v. Darrington, Adm'r*, 18 Ala. 348; 1 Story's Eq. § 80.

Generally, such a bill should show that the debts of the testator have all been paid, as these are a charge upon the whole property of the deceased.—Revised Code, § 2060; 7 Ala. 906. But as courts of chancery will take notice of the effect of the statutes of limitations and non-claim in their proceedings, where the bill shows that the administration has been pending for ten years before the commencement of the suit in chancery for the recovery of a specific legacy, and that the executor has received large amounts of the assets of the estate, which he has converted to his own use, and used in the payment of the residuary legatees, to the neglect of a *minor* special legatee, the bill should not be dismissed, when it appears that the special pecuniary legacy had been demanded, and its payment postponed without excuse, for ten years after the grant of letters testamentary, because there was an omission to allege in the bill that all the debts of the deceased had been paid. The omission of this allegation in such a case does not defeat the jurisdiction of the court, and render the decree void. If there is no defense interposed by answer, plea, or motion to dismiss, the court has jurisdiction, and the chancellor should not, *mero motu*, repudiate the cause; but he should direct the bill to be amended, or proceed to decree the relief appropriate to the facts stated in the bill.—Rev. Code, §§ 3327, 3356; *Hogan et al. v. Smith et al.*, 16 Ala. 600. The English rules and orders of practice in courts of chancery are not peremptory with us, but only advisory.—Chan. Rules, No. 7; Rev. Code, p. 824. The great purpose of our whole judicial system is, that "right and justice shall be administered without sale, denial or delay."—Const. Ala. 1867, Art. I, § 15. Under such a system, the courts should give the largest scope to our very liberal statutes of amendments. I, therefore, think, that under the facts of this case, and the state of the pleadings, the cause should not have been dismissed in the court below. But, as the defendants may have relied upon the

technicality upon which the bill was dismissed for a sufficient defense, the cause will be remanded, that a defense upon the merits may be interposed, if any such exists, in the court below.—Rev. Code, §§ 2105, 2106.

The judgment of the court below is reversed, and the cause is remanded, at the costs of the appellees, in this court and in the court below.

MARTIN *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *General charge of court; requisites of.*—The charge of the court should always be not only a correct exposition of the law governing the issue, but it should also be applicable to the whole evidence, when it is a general charge.
2. *Same; when erroneous.*—When a general charge of the court, in a criminal prosecution, may be divided into two propositions not naturally connected, if either proposition, when so separated, is not applicable to the evidence, such charge is erroneous.
3. *Same; what will not cure error in.*—A qualification appended to the second proposition of such a charge will not be applied to the first, in order to remove the objection of too great generality, when it is only true without the limitations suggested by the evidence.
4. *Charge to jury in criminal case; what erroneous.*—A charge, that if the jury believe "from the evidence that the defendant killed the deceased by shooting him with a pistol, the law presumes it was done with malice," when the evidence tended to show that the pistol was resorted to in self-defense, is erroneous. It is too broad, and ignores all the evidence of self-defense.

APPEAL from the Circuit Court of Lauderdale.
Tried before Hon. JAMES S. CLARK.

Appellant, Martin, was indicted in the circuit court of Franklin for the murder of John W. Norman. The venue was changed to Lauderdale county, where appellant was

tried, found guilty of manslaughter in the first degree, and sentenced to five years imprisonment in the penitentiary.

From the bill of exceptions, it appears that Martin and Norman were neighbors, and that the difficulty commenced about the right, claimed by both, to gather peaches from trees on a vacant lot near Norman's house. The evidence establishes that Martin sent his servant to gather peaches from these trees, and tended to show that deceased, after some words had passed between the servant and deceased's wife, ordered the servant away, who obeyed, but shortly afterwards returned with Martin. There was testimony in behalf of the defense, that deceased remarked about this time that "he would kill him (Martin) before he should get the peaches; that Norman had an open knife in his right hand, and at the time caught Martin by the shirt collar, with his knife in his right hand, and that after this defendant shot deceased." There was some testimony introduced by defendant going to show that the pistol was fired so close to deceased that powder was driven into the wounds.

The testimony on behalf of the State tended to show that Norman greeted Martin in a friendly manner when Martin came, asking "if that was the way for one neighbor to treat another;" that deceased did not draw his knife until after he was shot; that at the time, his hands were down by his side; that Martin ran towards deceased, and then shot him. The dying declaration of deceased was, "that he did nothing to Martin to cause him to shoot; that when he saw Martin draw the pistol, and about to shoot him, he jumped at it to catch it, but it was too late." The evidence in behalf of the State tended to show that there were no powder marks upon the wound.

There were several witnesses examined both on behalf of the State and the defendant. Some of the witnesses, both for the State and for the defense, were contradicted as to material statements and attempted to be impeached. There were several exceptions reserved to rulings of the court, which need not be further noticed.

The evidence being substantially as above stated, the

court, at the written request of the solicitor, gave the following charge: "If the jury believe from the evidence that the defendant killed deceased by shooting him with a pistol, the law presumes it was done with malice, and the *onus* of showing excuse, mitigation or justification rests on the defendant, and unless he has shown such mitigation, excuse or justification by *a* [the] evidence, he is guilty as charged in this indictment."

The general charge of the court is not set out in the bill of exceptions, nor does it show that any other charge than the one given was asked by either party.

The defendant excepted to the giving of this charge, and it is the chief and only error assigned which need be further noticed.

WM. COOPER, and E. A. O'NEAL, for appellant.—"Malice *vel non*" was a question dependent on all of the proof, not on selected parts of it, and it matters not who showed the excuse—whether it came out from the State's evidence, or from the proof by defendant of "*a* evidence," or from defendant at all.—See *Ogletree v. The State*, 28 Ala. 693, 702, where this court ruled that "a charge which selects a portion of the facts proven, and instructs the jury that if these facts are proved, then the law presumes malice, and that defendant intended to kill, is error, because it shifts the burthen of proof, and loses sight of the distinction between civil and criminal cases as to the measure of proof." The court goes on to say in that case, "Nor is such error cured by a further charge of the court, that such presumptions only arise in the absence of evidence tending to qualify or explain the selected facts, and may be rebutted and explained away by evidence, so that if they find the facts on which these presumptions arise in law, with other evidence tending to qualify or explain them, it will then be their duty to consider all the evidence in connection, and if upon the whole evidence, they entertain a reasonable doubt, they should acquit the defendant."

Thus, a hypothetical charge, on a selected or any isolated

statement of part only of the proof, was repudiated and discarded by this court as being contrary to law.

In Martin's case, the court did a greater wrong by charging, on the point of legal presumption of malice, as above, that if defendant did not, by "*a* evidence," explain it away, he was guilty in manner and form as charged in the indictment; that is, that Martin was guilty of the murder of John W. Norman in the first degree. The extravagance of such a charge was so observed and apparent, that the jury on their oaths discarded it, and showed the great advantage of a trial by twelve men over a trial by one.

The charge was erroneous—1st, because it was a hypothetical charge on a selected portion of the evidence against the defendant; 2d, the hypothetical charge was not on all the evidence; 3d, it was a shifting of the burthen of proof from the State to the shoulders of defendant, which is expressly ignored in Ogletree's case, and that case is cited as law and reaffirmed by this court in *Moorer v. The State*, 44 Ala. 15.

In 3 Yerger (Tenn.) 283, 287, CATRON, J., ruled, and put the question, "Suppose the jury should, on a charge of legal implication of malice, find a special verdict that the defendant killed deceased with a gun, in manner and form as charged in the indictment, but as to the malice they are not satisfied: could the court go on to pronounce sentence on the defendant upon the legal implication of malice, which the court charged the jury was the law?" Surely not; and yet such would seem to be the inexorable legal logic, if such charge was correct. Then, is not a charge wrong which the court can not pass judgment upon when the jury turns back upon the court by special verdict?

Every material fact must be proved by the State. This is now universal law, and needs not a further citation. *Ogletree v. The State, supra.* In 24 Pick. 366, 373, the court charged that, the State having proved a *prima facie* case, it was incumbent on defendant to restore himself by proof of presumptive innocence. That case was reversed, and the higher court decided that the State must make

out its entire case. And that, too, was only a retailing case. How much more needful is such ruling when life and liberty are at stake!

In Martin's case the charge was asked in writing, and at the foot of the charge requested was a citation to the case of *The People v. Schroder*, 1 Amer. Rep. 480, where it is decided that "if the evidence adduced by the State tends to show the homicide was excusable, the prisoner has the right to avail himself of such circumstances in his defense, and thus defend without on his part calling in or introducing evidence of excuse or justification;" thus reversing the charge which has been given below, that defendant should prove circumstances of excuse, &c.

That was exactly the error committed in Martin's case, only that our court below was more emphatic in its error, by charging that Martin must excuse himself from the implication of malice which the law raised from the killing with a pistol, and that Martin must so explain by "the evidence." And thus it is clear from the case of *The People v. Schroder*, that the case is with defendant Martin, and that the charge below was erroneous.

In *Murphy v. The State*, 37 Ala., relied on by the State, the court charged the jury to look to all the evidence as touching the killing; this, too, before they could imply malice from a want of circumstances of excuse or justification. Not so in Martin's case; for there the court charged the jury that the mere fact of killing with a pistol was in law proof of malice, and unless Martin removed this implication by evidence, he was guilty as charged in the indictment; that is, of murder in the first degree,—thus cutting Martin off from all justification shown by the evidence. In Murphy's case, the court charged the jury to look to all the evidence; in Martin's case, the court selects the fact of killing with a pistol, and hypothetically charges on that, and that alone, cutting Martin off from all the facts. The great wonder is, that under the charge the jury did not find Martin guilty of murder, and deprive him of

all the facts so fully proved in mitigation. Verily, the trial by jury is a bulwark of defense!

It is remarkable that this bloody charge was given low, in the face of all the extenuating circumstances of the evidence as shown by the bill of exceptions. And yet, such was the charge given as to ignore all these circumstances, and in fact to be abstract, and not conformable to the evidence, as shown by the bill of exceptions. In *Lyon & Co. v. Kent, Payne & Co.*, 46 Ala., this court refused to give a charge that did not conform to all the testimony, because it was select and abstract.

JOHN W. A. SANFORD, Attorney-General, and J. B MOORE, *contra.*—In Roscoe's Criminal Evidence, the law is thus stated: "In every charge of murder, says Mr. Justice FOSTER, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, for the law presumes the fact to be founded in malice until the contrary appears."—Roscoe's Cr. Ev. marg. p. 21, citing Foster, 255; 1 Hale P. C. 455; 1 East. P. C. 340; Wharton's Cr. Law, 265–6.

In *Murphy v. The State*, (37 Ala. 144,) the court below, amongst other things, charged: "So regardful is our law of human life, that whenever it is proved that one person has taken the life of another, the law presumes it was done with malice, and imposes on the slayer the *onus* of rebutting this presumption, unless the evidence which proves the killing itself shows it to have been done without malice." This charge was decided by our supreme court to be correct.—See 37 Ala. 144; *Olney v. State*, 18 Ala. 601; 2 Greenl. 594.

If the most stringent criticism was applied to the charge given in this case, now before the court, it could only have required that the court should have added to the charge given the words, "unless the evidence adduced by the State shows such excuse, mitigation or justification."

Would such addition have been proper when construed with reference to the evidence adduced by the State, as shown by the bill of exceptions? We say it would not. There was not a single mitigating circumstance shown by the State's evidence—not one. Why, then, could it be required to charge with reference to a fact about which there was not a particle of evidence arising out of the State's evidence? Such an addition to the charge would have been abstract, and calculated to mislead the jury. That such is the law, and that a charge has to be considered with reference to the facts set out in the bill of exceptions, is clearly settled in *Harrison v. The State*, (24 Ala. 70.) That the court properly charged, on the State's evidence, "as a matter of law," in the absence of a single mitigating circumstance in the State's evidence, so as to show upon whom the *onus* then settled, see *Nat Gray v. State*, 43 Ala. 51; Roscoe's Cr. Ev. 21; Wharton's Cr. Law, *supra*.

That the *onus* of proof is on the defendant to show excuse, mitigation or justification, after the killing is proved, particularly with a deadly weapon, has very recently been decided in the States, see *State v. Lawrence*, 57 Maine, 574; *People v. Scryner*, 42 N. Y. 1; Law Review, April, 1871, p. 483; see, also, *State v. Murphy*, 37 Ala. 144.

PETERS, J.—This is a prosecution by indictment for murder, found at the fall term of the circuit court of Franklin county, in the year 1869.

The principal question in the case arises upon the charge of the court to the jury on the trial below. The correctness or incorrectness of this charge depends upon the evidence offered in the circuit court. It is now well settled, that the charge, in such a case, must not only be a correct enunciation of the law governing the issue, but it must also be correct when applied to the whole evidence delivered on the trial. That is, the charge in any of its expositions of the law must not ignore any portion of the testimony, if it is a general charge.—*Ogletree v. The State*, 28 Ala. 693. This court places itself in the position of the court below at the trial. And where there is conflict in the evidence,

as there is here, it does not look to its force or its weakness on either side, or to its truth, or the want of it. These considerations are for the jury alone.

In this case there is some testimony tending to show that the accused had killed the deceased in a violent and angry rencounter between them, in which the accused used his pistol, and the deceased attempted to use his knife, in a fatal manner, but that the pistol was used in self-defense. Upon this evidence, the court below charged the jury, upon the motion of the prosecution, as follows:

"If the jury believe, from the evidence, that the defendant killed the deceased by shooting him with a pistol, the law presumes it was done with malice, and the *onus* of shewing excuse, mitigation, or justification, rests on the defendant, and unless he has shown such mitigation, excuse or justification by the evidence, he is guilty as charged in the indictment."

This charge divides itself into two propositions, not necessarily connected. The first proposition is, that a homicide effected by shooting with a pistol is, in law, to be presumed to have been done with malice, in any case whatever. The second proposition is, that, in a criminal prosecution, the *onus* of showing excuse, mitigation or justification rests upon the defendant. The latter proposition is true in all cases, whatever may be the state of the proofs, if there is any evidence showing guilt.—3 Greenl. Ev. § 14. But the first proposition is only true where there is no excuse or justification shown, or where there is no evidence offered on the trial tending to show such excuse or justification.—*Oliver v. The State*, 17 Ala. 694. If, however, there is proof tending to show that the pistol was used in the necessary defense of the life or limb of the defendant, then this presumption of law is suspended. The use of the pistol or any other weapon in self-defense is not evidence of malice; because there can be no malice in self-defense.—17 Ala. 587, *supra*. A presumption of law is conclusive, if not rebutted by other evidence; and where there is any rebutting proof, the court ought so to charge as to recognize its effect. Here there was such evidence,

and the court should have instructed the jury that the use of the pistol was a sufficient ground for a presumption of malice, unless it appeared from the evidence that it had not been used in self-defense. The charge would then have been free from error in both its propositions.—Stark. Ev. pp. 666, 667, 8th Amer. ed. by Sharswood, 1860. The qualification appended to the second proposition of the charge logically and naturally applies to that portion of the charge only. Its separation from the other shows that it was not intended to be referred to it, and without it the exposition contained in the first proposition of the instructions is not free from error, under the facts of this case. The impropriety, or, rather, doubtful fairness, of such a charge is strongly put by CATRON, Chief-Justice of the Supreme Court of Tennessee, in the case of *Coffee v. The State*, (3 Yerg. 283, 287.) "Suppose," says that distinguished jurist,—"suppose they (the jury) had returned a special verdict, and that they found the defendant slew the deceased as laid in the indictment; but of the fact, that he slew him with malice, they were not convinced; could the court lawfully have pronounced judgment of death upon this finding? I think clearly not." Yet this is the exposition of the law deducible from the instructions contained in the charge in this case. Besides the objection above urged, such a charge is obnoxious to the further impeachment of seeming unfairness, against the effects of which the law intends most sedulously to guard the accused, in all prosecutions where life and limb are at stake and in peril.—*Ex parte Chase*, 43 Ala. 303; *Hampton v. The State*, 45 Ala. 82.

The judgment of the court below is reversed, and the cause is remanded for a new trial. And, in the meantime, the appellant, said Edwin D. Martin, shall be held to answer the indictment in this case, until discharged by due course of law.—Rev. Code, § 4316.

KELSOE *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Criminal act, slight evidence of motive for doing; should not be excluded.* In a criminal case, slight evidence to show a motive for doing the act, is not to be excluded, but should be left to the consideration of the jury. For example, in a case of murder, it may be shown that a relative and friend of the accused had, on two successive days, difficulties with deceased, which *originated* about the accused; that in the first of said difficulties accused was present, *and sided* with his relative and friend, and in the second his relative and friend was killed by deceased.
2. *Conversations and oral declarations; evidence as to; for what reason should not be excluded.*—Conversations and oral declarations are to be received at all times with great caution, but when the witness hears all the conversation, although he may not remember all of it, his evidence for that reason is not to be altogether excluded, but it should be permitted to go to the jury to determine its credibility and effect.
3. *Witness; judgment alone renders incompetent.*—It is the judgment, *and that only*, that renders a party infamous, and incompetent to testify as a witness.
4. *Admissions of defendant against co-defendant; when are competent evidence.*—Where two parties are tried together, on a joint indictment, the admissions of one of the parties, not made in the presence of the other, are only admissible as evidence against the party making them. If they are of such a character that what tends to prove the guilt of the party, by whom they were made, can not be stated without implicating the other, they may, notwithstanding, be received, but the court must, at the time they are received, instruct the jury that they are evidence only against the party by whom they were made.
5. *Flight of accused; charge as to; what erroneous.*—The following charge in a criminal case should be refused, to-wit: "If the facts proved render it doubtful whether the flight of the accused was from a consciousness of guilt, then the jury ought not to regard it as an evidence of guilt."

APPEAL from the Circuit Court of Butler.
Tried before Hon. P. O. HARPER.

Appellant, Kelsoe, James Myers and Randall May were jointly indicted for the murder of William C. Otts. The venue as to Myers having been changed to Conecuh

county, Kelsoe and May were tried together. May was acquitted, and appellant, Kelsoe, found guilty of murder in the first degree, and sentenced to the penitentiary for life.

On the trial, a lengthy bill of exceptions was reserved, which shows numerous exceptions to the ruling of the court below, but does not state that it contains all the evidence.

It appears from the bill of exceptions, that the State introduced testimony tending to show that Wm. C. Otts was killed in the county of Butler, on the 3d day of September, 1869, by persons who shot with guns from behind a log near a road, along which said Otts was riding. The facts thus proven tended to show that the persons who killed Otts had been lying in wait behind said log for some days, and had left signs by tramping, and otherwise; that two persons had participated in the killing. The testimony showed that Otts was shot in the head and in the thigh, one shot, supposed to be buck-shot, in the head, and one in the thigh, from which he died, and that his horse, on which he was riding, was found dead fifteen or twenty yards from his body; the horse having seven or eight shot in his body.

The State introduced one Bazor as a witness, who testified that John Myers was a nephew by marriage of defendant, Kelsoe. The State then asked this witness whether, in March, 1869, W. C. Otts was not attacked by John Myers, at Garland, in said county, the witness having previously testified that defendant, Kelsoe, was present at this rencounter, *siding* with Myers. To this question defendant, Kelsoe, objected, but his objection was overruled, and he excepted to this ruling of the court, and the witness was permitted to state that W. C. Otts was attacked on one Sunday evening, and the defendant, Kelsoe, objected and excepted to this action of the court. It was proven in this connection that defendant, Kelsoe, was present on the occasion, but he had no fight or difficulty with Otts, though the evidence showed the fight originated about Kelsoe. The State offered to prove by this same

witness, that about the time Myers attacked Otts, Kelsoe came up with a stick in his hand. To this defendant, Kelsoe, objected, but his objection was overruled, and the witness allowed so to state, and to this action of the court defendant, Kelsoe, excepted.

The witness was asked what Myers said to Otts. Defendant, Kelsoe, objected, but this objection was overruled, the court saying that until it heard what the witness said, it could not say whether the declaration of Myers would be legal or not, and defendant, Kelsoe. objected to the court permitting the witness to state these declarations *in the presence of the jury*, and excepted to this action of the court. The witness was then permitted to state that Myers said to Otts, "You have abused me and called me a damned coward." The court then sustained the objection, and excluded this declaration, but Kelsoe excepted to the court hearing the testimony and then determining afterwards whether it should be excluded. This witness was permitted to prove, against the objection of Kelsoe, that on the same occasion Kelsoe presented a pistol at one Andrew Jackson, who, during the fight and at the time, was taking the part of said Otts, and defendant, Kelsoe, excepted to this action of the court. The State proved, against the objection of defendant, Kelsoe, that on the next day, Monday, at a time when defendant, Kelsoe, was not present, John P. Myers and Willie C. Otts, the deceased, had a difficulty, in which John P. Myers shot at Otts twice, and that W. C. Otts shot at Myers three times, and that said John P. Myers was killed in said difficulty, which evidence the State offered solely for the purpose of proving the death of Myers, a kinsman and friend of Kelsoe, at his (Otts') hands, which the court admitted only for the purpose of showing cause of enmity towards deceased by Kelsoe. To this evidence the defendant, Kelsoe, objected, but his objection was overruled, and he excepted to this action of the court. It was proven that said Jackson was the friend of said Otts, and that Kelsoe was a friend of Myers.

The State introduced as a witness one E. T. Durden, and

proposed to prove by him a conversation between the defendant, Kelsoe, and one F. M. Walker, which he said occurred during the same year Otts was killed, and before he was killed, but witness could not remember when. The witness stated that he did not remember the whole of the conversation so as to repeat it all, but could repeat the beginning and end of it, though he heard it all. Defendant, Kelsoe, thereupon objected to the witness stating any of the conversation, but his objection was overruled, and he excepted to this action of the court. The witness Durden was then permitted to state, against the objection of defendant, Kelsoe, that in the commencement of the conversation, said Walker and Kelsoe were talking about W. C. Otts, and then there was some conversation for near five minutes that the witness could not remember, and then he heard Walker ask Kelsoe, "What are you going to do about it?" and Kelsoe replied, "If I live I'll kill him, if it takes me a life-time to do it." This was all the witness could remember. The defendant, Kelsoe, objected to this evidence, but the court overruled the objection, and he excepted to this action of the court. The witness stated that he did not know of whom said Kelsoe was speaking; understood Kelsoe to be speaking of Otts, the deceased, when he said, in reply to the question of Walker above stated, that "If I live I'll kill him, if it takes me a life-time to do it"; and the defendant, Kelsoe, moved to exclude this declaration from the jury, but the court overruled his objection, and the defendant, Kelsoe, excepted."

Amongst others offered by the State as witnesses was one John P. Moseley. When he was offered as a witness the defendant, Kelsoe, objected to him being sworn as a witness, and offered the verdict of a jury of the present term finding Moseley guilty of horse-stealing, but no judgment had then been rendered thereon or sentence passed by the court. The court overruled the objection made to this witness, and permitted him to be sworn and testify as a witness against defendant, and the defendant, Kelsoe, excepted.

Moseley then testified, against the objection of both the

defendants, each making his objection separately, that defendant, Randall May, (who was in jail with witness Moseley,) said to witness, "What is necessary to enable me to turn State's evidence?" Witness replied, "By telling all you know, and, if it is sufficient, you can turn State's evidence." To this question and answer each defendant separately objected, separately to the question and answer, and to both question and answer, but the court overruled the objection of each defendant, and admitted the evidence, as it was offered solely as against defendant May, and each defendant separately excepted to this action of the court, and the question and answer above quoted were permitted to go to the jury as evidence only against May. The witness Moseley then proceeded to state the conversation between him and said defendant, Randall May, (Kelsoe was not present at such conversation.) "Defendant, Randall May, then said, 'I am not guilty of killing Otts, and I don't know that I know enough to make me a State's witness; I am tired of staying in jail.'" To this defendant, Kelsoe, objected, but his objection was overruled for the reason that the evidence was not offered against him, and he excepted. The witness then said to Randall May, "If I could get out of jail that way, I would turn State's evidence." To this defendant, Kelsoe, objected, but his objection was overruled for the reason that the evidence was not offered against him, and he excepted. These statements were permitted to be made to the jury solely as evidence against May, against the objection of defendant, Kelsoe, and he excepted. The witness then testified further, that Randall said, "Mr. Kelsoe came to borrow my gun." Kelsoe moved to exclude this, but his objection was overruled, and the evidence admitted, as it was offered solely against defendant, May, and he excepted. "I asked Kelsoe what he wanted with my gun. He said, 'I want to go hunting.'" To this defendant, Kelsoe, objected, and moved to exclude the same as any legal evidence against him, which the court did, but admitted it as to May, and to this action of the court defendant, Kelsoe, excepted. Witness Moseley testified fur-

ther: "Kelsoe said, 'I don't know what I may hunt, but I may hunt some damned rascal.'" To this declaration of May, as proved by witness Moseley, Kelsoe objected, but his objection was overruled, and it was admitted only as evidence against May, and Kelsoe excepted to this action of the court. Witness Moseley proceeded: "Randall said, 'Mr. Kelsoe went off, I suppose, hunting. The next time I saw Mr. Kelsoe he was at the place where W. C. Otts was killed. I saw Mr. Kelsoe and George Myers sitting on a pine log blown up by the roots. They said, "Have you seen Willie Otts?" I said, "I have seen him at Mrs. Holmes'." I then started to Garland, but after I saw them, I expected what was going to be, and I went towards home.'" It was in proof that Mrs. Holmes lived but a short distance from where Otts was killed. Kelsoe objected to these declarations of Randall May, as stated by witness Moseley, and the court admitted them only as evidence against May, and Kelsoe excepted to this action of the court. Witness Moseley further testified, in relation to said conversation, that "Randall then said, 'I went to my field; I heard the guns fire, and I said to Zade Stinson, "There! Willie Otts is killed."'" To this defendant, Kelsoe, objected, and the court permitted these declarations to go to the jury only as evidence against May, and Kelsoe excepted. The court said, however, that this last declaration was only admitted as evidence against Randall May, but the defendant, Kelsoe, objected, and his objection was overruled, and he excepted. The witness Moseley said this was the whole of the conversation witness had with Randall May, defendant, in November, 1870. Thereupon, the defendant, Kelsoe, moved to exclude the whole of this conversation, as detailed by witness Moseley, from the jury, but the court overruled this objection, and the defendant, Kelsoe, excepted to this action of the court.

The same witness, Moseley, then said, "that he had another conversation in jail with Randall, in March or April, 1871." The State proposed to prove this second conversation as evidence against defendant, May; defendant, Kelsoe, objected, but his objection was overruled, and he

excepted. The witness Moseley was permitted, against the objection of defendant, Kelsoe, to state what Randall said (the defendant, Kelsoe, not being present,) about turning State's evidence, &c., his motive therefor, and why he had not done so. To this statement of the conversation Kelsoe objected and excepted, but the court overruled the objection, and Kelsoe excepted. The statements as to how the conversation came about are not necessary to be further noticed. Witness Moseley was permitted to state said conversation, and stated that "He went on then to tell me what he knew about the case. He said: 'Mr. Moseley, if you had a son, and I knew who killed him, and wouldn't tell, you would think mighty hard of me.'" Witness said, "I would; and if you know who killed Mr. Otts' son, you had better tell it." Defendant, Kelsoe, objected to this, and the evidence was admitted only against May, and Kelsoe excepted. "Randall then said: 'I am going to, and the reason I have not done it before, I thought I had to prove what I said. Mr. Kelsoe and Mr. Myers were sitting there, and they undoubtedly must have done it.'" To this Kelsoe objected, and the court said the court would exclude it as to Kelsoe, but would admit it as to Randall May, and Kelsoe objected to said last declaration going to the jury as evidence at all, but his objection was overruled, and he excepted to this ruling of the court. The court here asked the witness Moseley, "Did you say that Randall stated to you in this conversation that Myers and Kelsoe were at the log?" To this question by the court the defendant, Kelsoe, objected, but his objection was overruled, and he excepted. The witness replied, "*He did.*" To this answer of the witness, the defendant, Kelsoe, objected, and the court admitted the evidence only against May, and Kelsoe excepted. The witness further testified, that Randall told him in this second conversation, that Myers and Kelsoe asked him if he had seen Willie Otts, and he told them he had at Mrs. Holmes'; and to this defendant, Kelsoe, objected, but the court said it would let it go the jury as evidence, not against Kelsoe, but as against Randall, and to this action of the court defendant, Kelsoe,

excepted, and moved to exclude this last named declaration from the jury as any evidence against either defendant, but the court overruled the objection, and the defendant, Kelsoe, excepted. Witness said this was the whole of the second conversation with Randall. The defendant, Kelsoe, thereupon moved to exclude the whole as being illegal and irrelevant, but the court overruled this objection, and admitted it as evidence as against May only. Defendant, Kelsoe, excepted to this refusal.

The State asked the witness Moseley, "if he had at any time had any conversation in jail with defendant, Kelsoe, in which he voluntarily made any confessions of guilt as to this case?" The defendant, Kelsoe, objected to this question as illegal and irrelevant, but his objection was overruled, and he excepted, and the witness thereupon was permitted, against the objection of Kelsoe, to state a conversation which the witness said he had with defendant, Kelsoe, in jail, in which he confessed that he had killed Otts, which conversation witness repeated at length, and said the confession was voluntarily made by Kelsoe. To this conversation the defendant objected, but his objection was overruled, and he excepted.

The State offered to swear one Leah May as a witness. The defendants showed to the court that said witness was the wife of the defendant, Randall May, and objected to her competency as a witness in this case, but the court overruled this objection, and allowed her to give evidence against the defendant, Kelsoe, and stated that nothing she should say should be weighed by the jury against defendant, Randall May. The defendant, Kelsoe, objected to this action of the court, but his objection was overruled by the court, and he excepted. The witness then testified, that on Thursday of the same week Willie Otts was killed, (he being killed on a Friday,) defendant, Kelsoe, borrowed a shot-gun of Randall; never promised to return it at all, but did return it on Sunday morning afterwards, and after Otts had been killed. It was a small single-barrel gun. Randall got the gun from Mr. McCure. To this evidence

each defendant objected separately, but the objection was overruled, and defendant, Kelsoe, excepted.

The State then introduced evidence tending to show that about three weeks after Otts was killed Kelsoe left the State of Alabama, and did not return until he was arrested by the officers of the law in Georgia, and brought back; that his family remained in the neighborhood three-quarters of a mile of where Otts was killed; and further introduced evidence tending to show that Kelsoe left the State in consequence of being charged with the killing of Otts. There was also evidence to show that there had been unkind feelings and expression on the part of Kelsoe to Otts and his family, and that this continued from spring time, 1869, to the time of Otts' death. The evidence was conflicting as to whether or not Kelsoe had attempted to break jail since his imprisonment on the present charge.

Defendant introduced a witness who testified that he advised Kelsoe, on account of the excitement then existing, to leave until it had blown over, and that Kelsoe left soon after. The defendant asked this witness if he had heard any expressions of kindness and friendship made by the defendant, Kelsoe, towards the deceased, Otts, between the difficulty in March, 1869, proven by the State, and the time of W. C. Otts' death, and if so, to state what those expressions of kindness and friendship were. To this question the State objected, and the court sustained the objection, and refused to permit the defendant, Kelsoe, to prove that he had made such expressions of kindness and friendship between March, 1869, and before the killing of Otts, and the defendant, Kelsoe, duly excepted.

Defendants introduced as a witness, without objection by the State, James Myers, their co-defendant, who swore that he was not guilty, and knew nothing of the killing of Otts until the next day after he was killed, and that he knew no fact tending to show that either of the other defendants was guilty of the charge in the indictment. The State asked this witness, on cross-examination, after laying the proper predicate as to time, place, &c., if Kelsoe, on the occasion named, had not come to him to get him to

aid in killing Otts, &c., and if Kelsoe did not say, upon his refusal, "that witness was as big a coward as May." The witness answered that he did not.

The State introduced one Perdue, and proposed to ask him if said witness, James Myers, had not made the declarations above referred to. The defendant, Kelsoe, objected to Perdue stating that said James Myers had made such statements, but the court overruled his objection, and permitted said Perdue to prove that said James Myers had made such declarations as those enquired of, and the defendant, Kelsoe, excepted to this action of the court. The court said these declarations would be introduced solely for the purpose of contradicting the witness, Myers, and the defendant, Kelsoe, objected to the introduction of said declarations for this purpose, but his objection was overruled, and he excepted.

Defendants, in addition to the evidence heretofore spoken of, showing that John P. Moseley had been found by a jury guilty of horse-stealing, also introduced many witnesses who proved his character as an honest man and a man of truth to be very bad, and that they would not believe him on his oath. Defendants also introduced witnesses to contradict said Moseley.

The State, by way of rebuttal, also introduced evidence tending to contradict W. P. Myers, one of the defendant's witnesses, by whom he attempted to prove an alibi.

The court being required to charge the jury in writing, gave a very lengthy written charge, which, after stating the duties of the jury, their province, the rules for their examination of testimony, &c., is as follows:

"I will now speak of John P. Moseley, one of the witnesses introduced for the State. *I will remark, first, that John P. Moseley is not legally infamous. What I mean is this, that, although he may have been tried for horse-stealing, yet he is not rendered incompetent as a witness until there is a judgment of conviction. There has been no judgment of conviction against Moseley, and, therefore, I admitted him as a competent witness.* After he was admitted as a competent

witness, then, of course, the defendant may show him unworthy of credit, if he can."

The court then charged the jury as to the methods of impeaching a witness, and to this no exception was reserved.

The court then went on to charge the jury upon the law of circumstantial evidence, quoting at length from Greenleaf and other works on evidence, and then proceeded:

"Now, the evidence of Mr. Perdue and Dr. Peacock, in regard to conversations between Mr. Perdue and Mr. James Myers, and Dr. Peacock and Wm. P. Myers, were admitted by the court as competent, to show that these witnesses had made contradictory statements, and what they said in these conversations is not evidence against the defendants. Being admitted only for the purpose of showing contradiction, you must regard this testimony for this purpose, and this purpose alone, but I leave it to you to determine whether they made any contradictory statements, this being a matter belonging to you to determine. *The evidence of an accomplice, says the law, is to be viewed with suspicion, unless they are supported by other witnesses or corroborating circumstances.*"

The defendant excepted to the whole charge, and especially to those portions which are italicised.

"The court also charged the jury orally, by consent of the defendant, and amongst other things said, in reference to the weight of the evidence of James Myers, (introduced as a witness for the defendant, and who was jointly indicted with the defendants Kelsoe and May,) that 'the fact that a witness is charged in the indictment creates a suspicion against the witness.' To this part of the charge defendant excepted."

"The defendant asked the court to give the following charge in writing, which charge was refused, and the defendant excepted:

"10. That the flight of a defendant, although a circumstance to be weighed by the jury as evidence against the defendant, is of weak and inconclusive character; that it may not be evidence of guilt at all, if it be shown that any

other motive for the flight than that of the sense of guilt. Flight may proceed from an unwillingness to stand a public prosecution, or from fear of the result; from an inability to explain certain false appearances, or from advice of friends to avoid public excitement, or other reasonable motive; and if from any cause it may be that the flight was produced by anything other than a sense of guilt, the flight would be no evidence of guilt; or if the facts proven render it doubtful whether the flight was from conscious guilt, the jury ought not to regard it an evidence of guilt."

The court gave the following charges at the request of the State, to each of which defendant excepted:

"1. The question for the jury to decide is, whether they believe from the evidence, beyond a reasonable doubt, that the defendants are guilty of committing the offense in this county, before the finding of the indictment. You can not, if your belief is the result of the evidence, separate your belief as men from your belief as jurors; and if as men you believe from the evidence, according to the rules of law given you in charge, that the defendants are guilty, then you are bound to convict; and you may convict one and acquit the other, if it should appear that one is guilty and the other not; you may acquit one and convict the other, or you may acquit both.

"2. When the law says you must be convinced to a moral certainty, it does not mean an absolute certainty. Nothing more is meant than that you must be convinced beyond a reasonable doubt.

"3. It does not matter to you what the theory of the counsel for the State may be, or what the theory of the counsel for the defendant may be; you are to go by the facts, and not to be governed by the theories of anybody. If, according to the rules that have heretofore been laid down, you believe either of the defendants, beyond a reasonable doubt, to be guilty, you must so find; and if the defendants, or either of them, did the killing, it does not matter whether it was with a rifle or a shot gun.

"4. Although the witness Mosely may have been successfully impeached, yet the jury are not therefore bound

to set aside and disregard his testimony, but they may still look at it in connection with the other evidence of the cause, and if they find it is corroborated in its material points by other evidence, and if they find points of coincidence between Mosely and other witnesses, which coincidences the jury believe could not have been the result of design or accident, then to such coincidences they will give such weight as they may be entitled. They may also look at the manner in which Mosely testified, the conversations which he relates, the circumstances under which he says they came up, the reasonableness or unreasonableness of the conversations themselves, the probability or improbability that Mosely could have manufactured these conversations; and if, under all the circumstances, the jury, as common sense men, believe that Mosely has told the truth, then it is the duty of the jury to act on his evidence so far as they may have no reasonable doubt of its truth. Your object is to get at the facts, come from whatever sworn witness in the cause they may.

"5. If the evidence shows that up to the time of the murder the defendant, Kelsoe, was evading arrest by the officers of the law, yet, if there is any evidence tending to show that from the date of the murder he began to conceal himself more carefully from the public than before, then the jury may look to that circumstance in deciding on the weight and effect of his subsequent flight, if the evidence shows he did subsequently flee."

The defendant makes forty-four assignments of error, to-wit: each of the matters excepted to, the charge of the court, the charges refused, and the charges given at the request of the State.

T. H. Watts, and John Gamble, for appellant.—The witness Bazor was permitted to detail the facts constituting the previous difficulty. The fact that there had been a difficulty was competent, but the particulars of that difficulty were not competent and legal evidence.—*Tarver v. The State*, 43 Ala. 354; *Martin and Flinn v. The State*,

28 Ala. 71; 26 Ala. 44. These authorities apply to all the objections made to the different parts of Bazor's testimony admitted against the objection of defendant, except the 7th assignment of error.

2. It is clear that the evidence of Bazor was merely the unproved statements and acts of third parties, made in the absence of the defendant, and these statements and acts were *res inter alios actu*, and wholly incompetent and illegal evidence against the defendant.

3. The witness Durden did not remember, and did not hear, all that was said between Walker and defendant, Kelsoe, and he supposed he was alluding to Otts. This supposition of the witness was wholly illegal. The rule is well settled, that if you undertake to prove what a witness has sworn on a former trial, the witness must be able to remember the substance of the whole, or he is not permitted to testify as to any part.—*Thorp v. The State*, 15 Ala. 749; *Davis v. The State*, 17 Ala. 354. There is no reason why this rule should not apply to a detail of a conversation. Here the witness did not pretend to remember, or even to have heard the whole conversation. The conversation lasted for five minutes, and the witness could only remember the first words and the last; he did not hear what occurred in the *interim*, and then he was permitted to give his mere inference or supposition that Kelsoe, by the last remark made, alluded to Otts, the deceased. It needs no authority to show that this supposition of the witness was wholly illegal as evidence.

4. Mosely was a convicted horse-thief, and was incompetent. At common law he was legally infamous, and therefore incompetent. The statute which once existed in this State, (§ 2302 of Code of 1853,) declaring that a conviction, except for perjury and subornation of perjury, shall not disqualify a witness, never applied to any except civil cases, and it is repealed by the act of 1867.—Revised Code, § 2704.

5. That portion of the written charge in reference to the witness Mosely was erroneous, being calculated to mislead the jury as to the weight to be given to his evidence.

It was peculiarly the province of the jury to determine what his testimony was worth. The effect of the charge was to bolster him up.

6. The portion of the written charge excepted to in reference to the witness Myers, was clearly erroneous. The oral charge in reference to the same witness was as follows: "The fact that a witness is charged in the indictment creates a suspicion against the witness." The first one quoted assumes that James Myers was an accomplice, merely because he was jointly charged in the indictment. This assumption was directly the reverse of the law. Every man is presumed to be innocent, until his guilt is proven. The finding of an indictment by a grand jury is no proof of his guilt, and therefore is no proof that he is an accomplice. The charge assumes, also, that the defendants on trial were guilty, because James Myers could not be an accomplice of the defendant unless they were guilty. The very language of the charge is, therefore, but an expression of the opinion of the judge that the defendants on trial were guilty of the charge made, and also, that James Myers, who is jointly charged, was likewise guilty, and therefore, according to the judge, his evidence must be viewed with suspicion. A charge more directly invading the province of the jury could not well be conceived. Even when a defendant is on trial, the indictment creates no suspicion of his guilt. The presumption of innocence continues through the whole progress of the trial, and any charge which ignores the presumption of innocence, or which treats it as overcome, even by evidence, is erroneous. *Ogletree v. The State*, 28 Ala., particularly pages 701, 702.

This charge had the double error of telling the jury that Myers was guilty, because charged in the indictment, and therefore that he should be viewed as an accomplice and with suspicion; and also, that the defendants then on trial were guilty, because charged in the same indictment with Myers, and, therefore, they must be viewed with suspicion, and held *prima facie* guilty, because charged by a grand jury with crime. It is true, that the testimony of an accomplice is to be viewed with suspicion; but who is to de-

termine whether he is an accomplice? The jury, and not the judge.

It sometimes happens that the State introduces as a witness an avowed accomplice. In such a case, it is quite proper for the court to charge the jury that the testimony of such witness is to be viewed with suspicion, and that no conviction should be made on his uncorroborated testimony. But when a witness is introduced by the defendant, and he swears that he is not guilty, and testifies as this witness did, it is trifling with justice for a judge to charge the jury that such witness is an accomplice, and that the mere finding of an indictment against him creates a suspicion against the witness.

7. The refusal of the judge to give the charge asked by defendants in the following words, viz: "The proof of an *alibi* by defendants is to be looked at like any other fact proven in the cause," was erroneous.—*Williams v. The State*, 45 Alabama Reports, 57. It was proper to give this charge, in reply to the general written charge given by the court on the subject of *alibi*. This charge, as asked by defendants' counsel, does not assume that defendants had proved an *alibi*. It simply asked that it (*alibi*) should be looked at by the jury like any other fact in the case.

8. The refusal of the charge No. 10, asked by the defendants, was erroneous. Why is flight (in a case of circumstantial evidence, as this,) regarded as competent evidence against a defendant? It is because, in accordance with the experience of mankind, guilty persons frequently flee. This flight is supposed to result from, and be prompted by, a sense or consciousness of guilt in the mind, which compels the person to avoid the scene of his crime and the faces of his accusers. It is therefore admitted in evidence as a circumstance from which a jury may infer guilt. If it can be shown that the flight arose from something else than a sense or consciousness of guilt, it ceases to be evidence of guilt, and the presumption arising from flight is thus rebutted. It is consequently always the privilege of the defendant, in order to rebut the inference to be drawn from flight, to introduce any evidence which tends

to show that the flight did not arise from a sense of guilt. *Smith v. The State*, 9 Ala.; *Oliver v. The State*, 17 Ala., and other authorities hereafter cited under this point.

Now, the charge asked and refused, asked the court to announce as a legal proposition, that if the flight arose from any other motive than a sense of guilt, the flight would not be evidence of guilt. This charge is almost entirely in the language of the best legal authorities, and if there is any truth in logic, it should have been given. To refuse it, was in effect to say to the jury that the flight of the defendant was evidence of his guilt, although his flight did not proceed from a sense of guilt, but from some lawful and innocent motive.—See the following authorities: Roscoe Cr. Ev. p. 17, note 2, and authority cited in note; and the remark on p. 18, ib.; see, also, Wharton Cr. Law, § 714, and authorities cited in notes; *Smith v. The State*, 9 Ala., especially on p. 995; *Oliver v. The State*, 17 Ala. 595, near bottom.

9. In every case of circumstantial evidence, there is a theory of guilt contended for by the State, as explaining every material fact, and reconciling it with every other well established fact; and there is a theory of innocence contended for by the counsel for the defendant, as explaining and reconciling every well established fact proven. In such cases, (those of circumstantial evidence,) the theory of the State and the theory of the defendant are made up of hypotheses more or less numerous, according to the number of independent facts proven. It is essential (in order to convict,) that all the facts should be consistent with the hypothesis or theory of guilt as advocated by the State. 1 Starkie Ev. p. 504, the 2d rule for government of courts and juries in cases of circumstantial evidence. It is essential that the circumstances proven should, to a moral certainty, actually exclude every hypothesis but that of the guilt of the defendant, the one proposed to be proved by the State.—1 Stark. Ev. 510, § 77. It is therefore of the highest importance in arriving at truth, to inquire, with the most scrupulous attention, what other hypothesis or theory

there may be which may agreee wholly or partially with the facts in evidence.

"In criminal cases, the statement made by the accused (through his counsel) is, in this point of view, of the most essential importance. Such is the complexity of human affairs, so infinite the combinations of circumstances, that the true hypothesis (or theory) which is capable of explaining and reconciling all the apparently conflicting circumstances of the case may escape the utmost penetration; but the prisoner, so far as he alone is concerned, can always afford a clue to them. His account of the transactions (through his counsel) is for this purpose always most material and important. The effect may be to suggest a view of the case which consists with the innocence of the defendant."—See 1 Stark. Ev. pp. 511, 512, top page, (marg. p. 513,) § 78.

It is also well settled, that if there be two reasonable constructions which can be given to facts proven, one favorable and the other unfavorable to a party charged with fraud or crime, it is the duty of the judge or jury to give that which is favorable rather than that which is unfavorable to the party accused of crime or fraud.—*Ala. Life Ins. Co. v. Pettway*, 24 Ala. 566, 8th head-note.

The law of Alabama—the constitution of Alabama—gives to every defendant in a criminal case the right to be heard by himself and counsel. And the law provides counsel for him if he be too poor to employ one. Now, why is all this? It must be on the supposition that lawyers, by long experience and study, have become able to aid courts and juries in ascertaining the truth, by their arguments, illustrations, and theories, especially in every case of circumstantial evidence.

Now, what is the effect of the charge No. 3, on page 43 of record, which tells the jury that "it does not matter to you what the theory of the counsel for the State may be, or what the theory of the counsel for the defendants may be"? It is, that it matters not what arguments—what reasonable construction to these facts—what light may be thrown on the complicated facts of this case by the counsel; you, gentlemen, have nothing to do with them. "It

matters not to you what reasonable theory the defendant may suggest, through his counsel, which explains and reconciles all the apparently conflicting facts of this case—disregard it; and you look to the facts yourselves, and pay no attention to the theories of any body! Take no aid in your investigations after truth from the suggestions or theories or arguments of any body!"

How can a defendant be heard, if the theories of his counsel matter not to the jury trying his case!

10. The court erred in admitting the wife of Randall May to be a witness.—Amer. Crim. Law, § 767; 1 Greenl. Ev. §§ 407, 335, and note 4. In this case the defense of each defendant was the same—not guilty; and each defendant attempted to prove an *alibi*.

11. The court erred in admitting the declarations of May, as proven by Moseley, to be introduced as evidence. If these declarations in any manner tended to prove May's guilt, they would have been competent against him. But if these declarations do not tend to prove May's guilt, then they could serve no purpose except to prejudice the minds of the jury against Kelsoe.

These declarations of May were all against Kelsoe, and not against himself. They were therefore irrelevant and illegal. They were simply hearsay.—*Smith v. State*, 9 Ala. *supra*.

The remark of the court that these declarations were introduced for the sole purpose of proving that May was guilty, did not prevent them from doing injury to the other defendant. The error was in the impression made on the minds of the jury, which could not be wiped out by the remark of the judge. In a case of circumstantial evidence a very slight circumstance may become great in its influence. These small influences are beautifully illustrated in the couplet of the poet—

> "A pebble in the streamlet scant
> Has changed the course of many a river;
> A dew-drop, on the baby plant,
> Has warped a giant oak forever."

12. The court erred in refusing to allow the defendant to prove his expressions of friendship and kindness to Otts,

The State had proved enmity to Otts. This hostile state of his mind might be presumed to exist until a different state was shown. Now, how could the defendant prove a change of mind from hostile to friendly?

All the books agree that the fact of a previous difficulty, old grudges, may be competent for the State, in order to prove malice—motive. And all the books agree that the defendant, in order to rebut this presumption of malice, may prove a reconciliation of the old grudge, at any time before the killing; and then the rule not to attribute the killing to the old grudge.

How is a reconciliation to be proved? By the acts and declarations of the defendant made before the killing. Reconciliations are frequently proven by the declarations of the defendant and of the other party to the difficulty. If these declarations of the defendant are made in the presence of the deceased, it is admitted by the counsel for the State that they are competent evidence. Does the fact that they are made in the presence of the deceased make any difference as to their competency? None whatever. If otherwise incompetent, the presence of the deceased would not make them competent. The State is the party to the suit, and not the person with whom the previous difficulty was had. You can not prove a reconciliation by proving the declarations of the deceased, not made in the presence of the defendant. The declarations of the deceased, when made in the presence of the defendant, showing a reconciliation, are competent. On what principle? Simply because his declarations, made in the presence of the defendant, when acquiesced in or assented to, not denied, by the defendant, are, in the eye of the law, the declarations of the defendant as to his state of mind. What difference can it make, then, whether the declarations of the defendant, showing his state of mind, are made in the presence of the deceased or in the presence of some other person?

Whenever the state of the defendant's mind at any given time is to be proved, it can only be done by his acts and declarations. His state of mind can not be proved by any

other person. I can not know, and therefore can not swear to another's mind, except by proving his acts and declarations. Whenever, therefore, the state of mind or body is to be proven, the bodily or mental feelings of an individual are to be proved the usual expressions of such feelings made at the time in question, are original evidence, and not hearsay; nor is it making evidence for himself by the defendant.—1 Greenl. § 102; *Phillips v. Kelly*, 29 Ala. pp. 632–3; *McHugh v. State*, 31 Ala. ——; Wharton's Amer. Crim. Law, § 664.

Whether these declarations are feigned or not, the weight to be given to them must be left to the jury. The court can not exclude them.

JUDGE & HOLTZCLAW, and HERBERT & BUELL, *contra*.—1. When one is charged with a crime, and the circumstances point to the accused as the perpetrator, facts tending to show a motive for the commission of the act, however remote, are competent.—17 Ala. 457.

The evidence of Bazor, therefore, was competent. The details of the difficulty, testified to by Bazor, were not gone into. The attack was made by Myers on the deceased. Kelsoe was present, and sided with Myers; and it was competent to show this as evidence of hostility on the part of Kelsoe to the deceased, before the deceased was murdered, and as tending to show a motive in Kelsoe to commit the murder, especially when it was shown, as the witness stated, "that the fight orginated about Kelsoe."

The admission of the evidence to prove the second difficulty between Myers and Otts, the deceased, was proper. It was the next day after the first difficulty, which occurred on Kelsoe's account—was in effect a continuation of the first difficulty—although Kelsoe was not present, and was admitted for the "sole purpose of proving the death of Myers, a kinsman of Kelsoe, at the hands of Otts, and to show cause of enmity towards deceased by Kelsoe." This was competent, though remote, to show a motive in Kelsoe for killing Otts subsequently.

No attempt was made to prove who was right or who was

wrong, in the two difficulties to which Bazor testified; nor were the particulars gone into, further than to show that the Myers' and their friend and relative, Kelsoe, were engaged in them on one side, and the deceased, Otts, on the other side, and that one of the friends and a relative of Kelsoe was killed in the second difficulty, the origin of them having been on Kelsoe's account; which would show, or tend to show, a motive on the part of Kelsoe for afterwards killing Otts.

2. The testimony of Durden, referred to by appellant, was properly admitted.

There is no rule of evidence or law, of which we are advised, which will exclude evidence of the declarations of a party, because the witness can not remember all that was said. If he can not remember all, it is a question for the jury to determine whether what he did hear is worth much or little.

A different rule prevails in proving what the testimony of a deceased witness was on a former trial, and for obvious reasons.

The conversation commenced by talking about the deceased, Otts. It continued for some minutes without break or pause, when Kelsoe said: "If I live I'll kill him, if it takes me a life-time to do it in."

The witness said he understood Kelsoe to be speaking of Otts when he made this declaration. The accused "moved to exclude this declaration from the jury." He made no objection to the witness saying he "understood" that the accused was speaking of Otts.—*Townsend v. Jeffries, Adm'r*, 24 Ala. 329; *Walker v. Blassingame*, 17 Ala. 810; *Garrett's Adm'r v. Garrett*, 27 Ala. 687; *King v. Pope*, 28 Ala. 601; *Newton v. Jackson*, 23 Ala. 335.

3. The witness Moseley was a competent witness. It may be questionable whether the offense of larceny is of the species of the *crimen falsi* which, at the common law, would render incompetent as a witness one convicted of it. 2 Russell on Crimes, marg. p. 973; 1 Greenl. on Ev. § 375.

But however this may be, a verdict of guilty, as in the case of the witness Moseley, is not sufficient to render a

witness incompetent. It is the judgment only which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify.—1 Greenl. § 375.

But further still. Section 2302 of the Code of 1852 provides that no objection must be allowed to the competency of a witness for conviction of any crime, except perjury and subornation of perjury.

This section of the Code of 1852 has never been repealed.

In the Revised Code, between sections 2703 and 2704, it is stated in brackets, "(2302) [Repealed by section 2 act 14th February, 1867, p. 435.]"

On looking at the act of 14th February, 1867, p. 435, it will be perceived that section 2302 of the Code of 1852 is not repealed—is not even mentioned.

We contend that the statement in brackets in the Revised Code, above quoted, does not repeal section 2302 of the Code of 1852, nor did the omission to insert that section in the Revised Code repeal it.

4. The declarations of one of the defendants on trial, Randall May, as proved by Moseley, were all competent evidence as against May; were offered as evidence against May alone, and were admitted by the court (notwithstanding the multitude of objections) as evidence against May alone.

May was acquitted; and if there was any error in allowing any of the questions to, and answers of, Moseley, relating exclusively to May, and not offered or admitted against Kelsoe, Kelsoe can not avail himself of the error.

5. Some of the early English decisions seem to hold that the wife, in such a case, would not be competent for or against a co-defendant of her husband. For a reference to the cases, see Wharton's Amer. Crim. Law, p. 358.

Mr. Phillips, in his work on Evidence, in commenting on one of these cases, says, that it "must be understood as having been decided on its own particular circumstances, and not as warranting the conclusion, that where prisoners set up a separate and distinct defense, the wife of one pris-

oner can not in any case be a witness for another prisoner."—1 Phillips on Evidence, 75; see, also, 1 Greenleaf on Evidence, § 335.

And further. Mr. Greaves, in a note to 2 Russell on Crimes—(Mr. Greaves was of Lincoln's Inn and the Inner Temple)—says: "The authority of these cases [Early English Cases] seems open to some doubt, as they infringe the the rule, as it is only when there is a certain interest in the result that the witness is incompetent, and the utmost that can be said is, that in such cases the evidence has a tendency to produce such a result. It is also a great anomaly that a witness should be competent for a prisoner, if tried separately, but incompetent for him, if tried jointly with the witness' husband."—Roscoe's Crim. Ev. m. p. 158.

6. The declarations of Kelsoe, sought to be proved by the witness Chancellor, were incompetent, because not a part or parts of the *res gestæ*.—*Oliver v. The State*, 17 Ala. 587; *Spivey v. The State*, 26 Ala. 90; *Lawson & Sweeney v. The State*, 20 Ala. 65; *Starr v. The State*, 25 Ala. 49; *Barthelmy v. The People*, 3 Hill, (N. Y.) 248. See, also, 1 Greenl. Ev. §§ 131, 132, 133.

7. The testimony of the witness Perdue was competent for the sole purpose for which it was offered, viz: To impeach defendants' witness Myers. Myers was not contradicted as to an immaterial matter.

The foregoing disposes of all the objections relating to testimony.

In considering the objections relating to testimony and charges of the court excepted to, the court will note that the bill of exceptions does not purport to set out all the evidence. And it is well settled by this court, by numerous adjudications, that no intendment will be made to put the court below in error; error must be affirmatively shown.

"An affirmative charge of the court, which upon any supposable state of facts would be correct, will be presumed to have been justified by the evidence, unless such presumption is rebutted by the record."—*Tempe v. The State*, 40 Ala. 350.

This court will presume that facts were in evidence to

authorize any affirmative charge given which is relevant to the case, when all the facts in evidence are not set out in the record.—40 Ala. 355.

That part of the affirmative charge relating to the evidence of James Myers was not erroneous, for the reason that none of the evidence showing him to have been an accomplice is set out in the record; save and except that he was jointly indicted with the defendants on trial. And not only is the evidence not set out, but the oral charge itself is garbled; only a portion of the entire oral charge is given in the bill of exceptions.

But the portion given was, on its face, free from error. Although James Myers' being joined in the indictment would be no evidence against him on his trial, yet, being indicted jointly with the defendants for the same alleged offense, when offered as a witness, he was to be regarded as an accomplice, because jointly indicted, so far as his testimony was concerned.

A case has never been known or heard of, where evidence was taken to show a person an accomplice before he could be called an accomplice when offered as a witness. Being jointly or separately charged with the commission of the offense in an indictment, has always been sufficient to authorize him to be regarded and called an accomplice when offered as a witness.

The charge requested as to the *alibi*, was clearly erroneous. It assumed that an *alibi* had been proved as a fact in the case, which alone it was the province of the jury to determine.

Charge numbered 10 requested by defendent was properly refused, because the larger portion of it was abstract, lugged in matters about which there was no proof. The only testimony showing any excuse for flight was Champion's. There was no evidence about "an unwillingness to stand a public prosecution."

PECK, C. J.—1. A bill of exceptions was signed in this case at the instance of the appellant. It does not state that all the evidence is set out; but contains thirty-seven

exceptions to the rulings of the court below, besides the exceptions to the charges given by the court and refused to be given; and forty-four errors are assigned to the rulings of the court on the trial.

It will be a useless piece of labor to examine all these numerous exceptions separately. To do so, will render our opinion obscure and confused, rather than plain and intelligible, as many of them are nearly alike and depend upon the same principles.

The offense was committed secretly, and, as the evidence tended to show, by lying in wait. Offenses so committed can rarely be proved, except by circumstantial evidence. All such cases are surrounded with difficulties, and great carefulness and discrimination are necessary; otherwise innocent parties may be convicted, or guilty ones escape.

In this case, the State first introduced evidence tending to show that the deceased was shot as he was riding along a road, by persons lying in wait behind a log. To show that the appellant was one of these persons, and was the enemy of deceased, as a motive for the act, the State was permitted, against the objection of appellant, to prove by one Bazor, that in March, 1869, two difficulties had occurred between one John P. Myers, a nephew by marriage and friend of appellant, and deceased; that said difficulties happened on two succeeding days; that in the first difficulty said Myers attacked deceased; that appellant was present with a stick in his hands, and, in the language of the witness, sided with said Myers; that appellant had no fight or difficulty himself with deceased, though the evidence showed the fight originated about him. The appellant was not present at the second difficulty, on the next day. In this difficulty said Myers shot twice at deceased, and deceased shot three times at said Myers, and said Myers was killed. This evidence was admitted by the court, only for the purpose of showing a cause of enmity on the part of appellant towards deceased.

Although these difficulties may be regarded as slight evidence of the purpose they were offered to prove, yet, as they terminated in the death of appellant's relative and

friend, who had engaged in them on his account, we think there was no error in permitting the evidence to go to the jury.

2. The conversation between appellant and F. M. Walker, deposed to by the witness E. F. Durden, was properly permitted to go to the jury. It took place, as is manifest, after the difficulties above mentioned, and before deceased was killed. It was a conversation about deceased, and, in answer to the following question asked by said Walker: "What are you going to do about it?" appellant replied, "If I live I'll kill him, if it takes me a life-time to do it." The witness stated that he heard the whole conversation, but did not remember the whole of it so as to repeat it all, but he could repeat the beginning and end of it.

Oral admissions or declarations are to be received with great caution.—1 Greenl. Ev. § 200. There are many good reasons for this stated by the author, which need not be here repeated; but I know of no authority for excluding the declarations of a party altogether, because the witness may not remember all that was said. It often happens that some parts of a conversation make a stronger impression on the mind than others, and such parts may be remembered, and other parts, less impressive, may be forgotten. To exclude conversations and verbal declarations in all cases where witnesses do not remember and can not repeat the whole of them, will be substantially to exclude such evidence from the courts and juries altogether. The true rule in all cases of verbal admissions and declarations is, to leave them to the jury to determine the credit and effect to be given to such evidence, under all the circumstances. In some cases such evidence may be very satisfactory, and in others worth but very little. Much must depend upon the intelligence of the party by whom the admissions or declarations are made, and the intelligence and recollection of the witness by whom they are proved.

3. The court committed no error in overruling the objection to the competency of the witness Moseley, because he had been indicted for horse-stealing, and the jury had at that term of the court returned a verdict of guilty. We

do not decide that, even if judgment had been pronounced on the verdict, it would have rendered the witness incompetent on the ground of infamy, as it is not necessary. But we think it very clear that the witness did not, in legal contemplation, become infamous by the rendition of the verdict, before judgment was pronounced against him on the verdict. Until that was done, it could not be known that a new trial would not be granted, or that the judgment would not be arrested; and in either case the verdict would become a mere nullity, as though it had not been rendered. Mr. Greenleaf, in his work on evidence, (vol. 1, § 375,) says: "We have already remarked, that no person is deemed infamous in law until he has been legally found guilty of an infamous crime. But the mere verdict of the jury is not sufficient for that purpose; for it may be set aside, or the judgment may be arrested on motion for that purpose. It is the *judgment, and that only*, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify."—See, also, the authorities referred to in note 5 to this section.

This witness was introduced to prove alleged conversations with the said Randall May, when he and the witness were in the jail together, in the absence of appellant. These conversations were objected to by appellant, but admitted by the court, as was stated, only against said May; and in this there would have been no error, if the evidence of the witness had been confined to such portions of said conversations as tended to prove the guilt of said May only, or such parts as tended to prove the guilt of both, if of such a character that what tended to prove the guilt of May could not be stated without implicating the appellant also. In such case, there would have been no error, if the court at the time the evidence was received had instructed the jury it was evidence against May only, and was not to be considered by them as evidence against the appellant. This, under such circumstances, would have been the best, and all that could be done for the appellant. The State could not be deprived of the benefit of May's statements,

if necessary to prove his guilt, although they might to some extent implicate the appellant.

But no one, it seems to us, can read the evidence of this witness, and fail to see that much of it not only did not tend to prove the guilt of May, but to prove his innocence, and, if true, tended strongly to show that appellant was guilty. Let two or three examples be here given. In one place this witness states that May said, "*I am not guilty of killing Otts*, and I don't know that I know enough to make me a State's witness. I am tired of staying in jail." In another place he states that May said, "Mr. Kelsoe came to borrow my gun. I asked Kelsoe what he wanted with my gun; he said, I want to go a hunting. Kelsoe said, I don't know what I may hunt, but I may hunt some damned rascal." Again, this witness says, May stated that "Mr. Kelsoe went off, I suppose hunting. The next time I saw Mr. Kelsoe, he was at the place where W. C. Otts was killed. I saw Mr. Kelsoe and George Myers sitting on a pine log blown up by the roots. They said, have you seen Willie Otts? I said, I have seen him at Mrs. Holmes'. I then started to Garland, but after I saw them I expected what was going to be, and I went towards home. May then said, I went to my field; I heard the guns fire, and I said to Zade Stinson, There! Willie Otts is killed."

It was proved that Mrs. Holmes lived but a short distance from where Otts was killed. At another time this witness states, that May then went on to tell what he knew about the case; "he said, Mr. Moseley, if you had a son, and I knew who killed him, and wouldn't tell, you would think mighty hard of me." Witness said, "I would, and if you know who killed Mr. Otts' son, you had better tell it." May then said, "I am going to; and the reason I have not done it before, I thought I had to prove what I said. Mr. Kelsoe and Mr. Myers were sitting there, and they undoubtedly must have done it."

All these several statements were objected to by appellant, and, notwithstanding his objections, admitted; the

court saying they were admitted only against May. As the only effect of these statements must have been to prejudice the jury against the appellant, and to benefit, rather than injure May, who was acquitted, they should have been excluded; and for this error the judgment must be reversed.

4. The question, as to the competency of May's wife as a witness against appellant, need not be decided. As May has been acquitted, the question can not arise on another trial of the appellant.

5. The evidence of the witness Perdue, introduced by the State to impeach the said James Myers, one of the defendants named in the indictment, who was examined by appellant without objection, was rightly admitted. It was clearly admissible for that purpose.

After the evidence was closed, the court having been requested by the defendants to do so, charged the jury in writing and at length, which charge is set out at length in the bill of exceptions. After the written charge was given, sundry special charges were asked by the State, which were given. The defendants also asked several charges, some of which were given, and others refused. These charges have been carefully examined, and we are unable to discover any errors in the charges given, and we think the rulings of the court correct as to the charges refused to be given. We shall, therefore, say nothing further as to any of the charges refused to be given, except the charge in reference to the flight of the appellant. That charge would have been a very proper charge if the last clause had been omitted, to-wit: "If the facts proven render it doubtful whether the flight was from conscious guilt, the jury ought not to regard it an evidence of guilt." Although the evidence may have been more or less doubtful as to the cause of the flight, that was no sufficient reason for the jury to disregard it altogether. As this charge was asked in writing, the court was required to give or refuse it altogether, and as the latter part of the charge was improper, the whole charge was correctly refused.

Let the conviction and the judgment of the circuit court

be reversed, and the cause remanded for a new trial. The appellant will remain in custody until discharged by due course of law.

FIELDS *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Deceased, evidence of bad character of, as blood-thirsty, turbulent, &c.; for what purpose admissible.*—On a trial on an indictment for murder, under our statutes, the jury are not only required to pass upon the guilt or innocence of the accused, but also, on conviction, to find by their verdict whether it be murder in the first or second degree, and determine the character, the extent, and severity of the punishment to be inflicted. Evidence, therefore, of the general bad character of the deceased as a turbulent, blood-thirsty, revengeful, dangerous man, is competent, relevant and proper evidence, (although, under the circumstances of the particular case, it may not be sufficient to reduce the offense from murder to manslaughter,) to enable the jury to determine the degree of the offense, and the character and measure of the punishment.
2. *Good character, as man of peace; effect of proof of.*—Where the general good character of the accused as a peaceable man is proved, the following is a correct charge, to-wit: "If the prisoner has proved a good character as a man of peace, the law says that such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed, but for such good character;" and if asked in writing, it is error to refuse it.

APPEAL from Circuit Court of Russell.
Tried before Hon. LITTLEBERRY STRANGE.

Appellant was indicted and tried for the murder of Jesse Dumas, found guilty of murder in the second degree, and sentenced to the penitentiary for ten years.

On the trial, it was proved that the killing took place in the public highway, in front of defendant's gate, in the month of December, 1870. It seems that defendant had attached some property belonging to deceased's sister, a

short time before the killing. A little after mid-day on the day of the killing, defendant was at the house of a neighbor named Sarter. Shortly after this, deceased, who was a powerful man, came there and commenced abusing and cursing defendant; deceased's conduct, according to the evidence, being overbearing, and indicative of a determination to force a difficulty with defendant. Finally, deceased called defendant a gin-house burning, thieving son of a bitch, twisted his nose, struck him in the face with his hat, and pulled defendant off the steps where he was sitting, jerking him by the collar. A nephew of deceased had a pistol drawn during part of the difficulty. Defendant made no resistance; "said that he did not want to fight." After this the parties separated, deceased going to Society Hill, where he remained two or three hours drinking whisky, and defendant started home. As soon as defendant got to his house, which was about three o'clock in the afternoon, he went to his room, got his gun, firing off the old loads, and reloaded it with buckshot in each barrel, remarking that he would kill the d—d rascal before morning.

The proof as to what occurred at Sarter's was made by the defendant, without objection on the part of the State.

The deceased, toward sundown, left Society Hill on horseback to go home, passing by defendant's house. Deceased was shot at defendant's gate. How the parties met there does not appear.

The witness who proved the shooting testified, that he was at Mr. Sarter's, about one hundred and fifty yards from defendant's house; that he heard loud talking in the direction of defendant's house; that he did not see any one at first, but only heard loud talking; that he heard deceased say, "Fields, I am not afraid of you," and heard defendant say, "You accused me of burning your gin-house." When the witness reached a point where he could see the parties, deceased was on his horse in front of defendant's gate, leaning forward on his horse, and the horse's head was in the direction of deceased's home. Defendant, with his gun in his hands, was in front of deceased. Defendant shot, and deceased fell dead from his horse. Another witness

testified, that about sundown she heard defendant say, "You called me a gin-house burner, and I'll shoot you;" and deceased then said, "go into your yard," about the time the gun fired. Witness could not see the position of the parties at the time, as she was behind a tree. Defendant remarked to persons at his house, shortly after the gun fired, "I have shot the d—d devil, and would kill any man who would charge me with burning his gin-house and call me a thief."

There was no proof that deceased had any weapon about him when he was shot. Defendant proved his character as a peaceable and law-abiding man to be good. There were several witnesses examined on either side, but the foregoing is the substance of all the testimony.

The defendant asked of several witnesses, some of whom he introduced, and of others on cross-examination, whether they were acquainted with the general character of deceased, &c., for turbulence, violence, bloodshed, and recklessness of human life. The court, upon the objection of the solicitor, refused to permit this question to be answered, and defendant excepted.

The bill of exceptions further states, that the defendant, on cross-examination of a State's witness, proposed to ask of the witness the same question as stated above, with the additional inquiry, if he, "witness, had, before the shooting, communicated to the prisoner any instance of the exercise of such character by deceased." Upon objection by the solicitor, the court would not permit an answer to either question, and defendant duly excepted. The bill of exceptions does not state the purpose for which defendant desired to make the proposed proof, nor the ground upon which the solicitor objected.

The court gave a charge to the jury, at the instance of the State, which need not be further noticed, to which defendant excepted. The defendant requested the court, in writing, to charge the jury as follows: "If the prisoner has proved a good character as a man of peace, the law says that such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such

doubt would have existed but for such good character." The court refused to give this charge, and defendants duly excepted.

L. W. MARTIN, for appellant.
ATTORNEY-GENERAL, and HOOPER, *contra.*

[No briefs on file.]

PECK, C. J.—1. Was the evidence offered by the defendant, that the general character of the deceased was that of a violent, turbulent, revengeful, blood-thirsty, dangerous man, and reckless of human life, properly excluded by the court? I feel constrained to answer this question in the negative.

By the common law, the jury determined merely the guilt or innocence of the prisoner; and, if their verdict was guilty, their duties were at an end. They had nothing whatever to say as to the punishment to be inflicted. The court alone determined what the punishment should be, its extent and its severity; with that the jury had nothing to do. Their whole duty was discharged when the verdict of guilty was pronounced.

The common law, on this subject, has been greatly changed by our statutes, and the duties and responsibilities of juries largely increased; consequently, evidence that would have been irrelevant and impertinent at the common law, becomes proper and necessary, under our statutes, to enable juries to discharge their newly imposed duties rightly and properly.

By our statutes, the crime of murder is made one of degrees, divided into murder in the first and second degree. Rev. Code, § 3653. Section 3654, Revised Code, enacts, that "any person who is guilty of murder in the first degree, must, on conviction, suffer death, or imprisonment in the penitentiary for life, *at the discretion of the jury;* and any person who is guilty of murder in the second degree, must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than

ten years, *at the discretion of the jury*." Section 3657 provides, that "when the jury find the defendant guilty, under an indictment for murder, they must ascertain by their verdict, whether it is murder in the first or second degree; but, if the defendant, on arraignment, confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of testimony, and pass sentence accordingly."

Here, we see that the degree of the crime must be determined by the verdict of a jury, upon an examination of testimony, and the punishment to be inflicted on the defendant rests in the discretion of the jury. If the crime be murder in the first degree, the jury must determine whether the punishment shall be death, or imprisonment in the penitentiary for life. If in the second degree, the defendant must be imprisoned in the penitentiary, or be sentenced to hard labor for the county, for not less than ten years, *at the discretion of the jury*. Testimony is as necessary and important, to enable the jury to exercise this discretion prudently and properly, as to enable them to determine the guilt or innocence of the defendant. The jury have two important duties to perform, and both are to be governed and controlled by the evidence, and neither can be wisely or rightly discharged without evidence. As these duties are different, the evidence must necessarily be different. After the guilt of the defendant is settled, the proper evidence, to determine the degree of his crime, and what should be the extent and severity of his punishment, must, in great measure, depend upon a careful examination of the circumstances, not those only immediately attendant on the killing, but those also which may reasonably be supposed to have led to it; and these circumstances should be considered in connection with the good, or bad character, both of the defendant and the deceased. Who is prepared to say the punishment should be the same where a turbulent, revengeful, blood-thirsty, dangerous man, reckless of human life, has been slain, who had recently, only a few hours before, violated and outraged the person of his slayer, as though the party slain had been a man of

good character, and of a peaceable disposition? For myself, I can not, conscientiously, say so. Although the violence and outrage committed upon the person of the defendant, in this case, might not have been sufficient to reduce the offense from murder to manslaughter, yet, we hold it was clearly proper for the consideration of the jury in determining the turpitude of the crime, and what should be the measure of the punishment to be inflicted. If the evidence of the general bad character of the deceased was proper, only in the latter case, it should have been received, and not excluded by the court.

2. The charge in writing, which the defendant requested the court to give to the jury, we think was improperly refused. The good character of the defendant as a peaceable man was proved by several witnesses. In the case of *The Commonwealth v. Hardy*, 2 Mass., Chief-Justice PARSONS said he was of the opinion that a prisoner ought to be permitted to give in evidence his general good character, in all criminal cases; Justices SEWALL and PARKER said they were not prepared to say that testimony of general good character should be admitted in behalf of the defendant in all criminal prosecutions, but they were clearly of the opinion that it might be admitted in capital cases, in favor of life. In Roscoe's Cr. Ev. p. 96, it is said, "In trials for high treason, for felony, and for misdemeanors, where the direct object of the prosecution was to punish the offense, the prisoner was always permitted to call witnesses to his general character; and in every case of doubt, proof of good character was entitled to great weight." In the case of *Felix (a slave) v. The State*, 18 Ala. 720, it is decided that "in criminal cases, evidence of previous good character is proper for the consideration of the jury, not only where a doubt exists upon the other proof, but even to generate a doubt as to the guilt of the accused."

The evidence of good character was admitted in this case, but the error of the court consists in refusing to give a proper charge based upon said evidence. I do not say the evidence of good character should have created a rea-

sonable doubt in the minds of the jurors, in this case, when considered in connection with the other evidence. But as the law permits evidence of good character in criminal cases, it certainly intends it for the consideration of the jury, and it is for the jury alone to determine whether, when considered with the other evidence, it does or does not create a reasonable doubt as to the defendant's guilt.

It is manifest that a part of the charge given at the request of the solicitor, and excepted to by the defendant, is left out in copying it into the transcript. As the charge there appears it is unintelligible, and we can not tell whether it was right or wrong.

For the errors in excluding the evidence of the general bad character of the deceased, as a violent, blood-thirsty man, &c., and in refusing to give the charge asked, the judgment and sentence of the court below is reversed, and the cause is remanded for another trial; and the defendant will remain in custody until acquitted, or discharged by due course of law.

Ex parte SCOTT.

[PETITION FOR PROHIBITION, &C.]

1. *Revised Code*, §§ 193–199; *to what cases apply.*—Sections 193–199 of the Revised Code, to compel the delivery of the books, papers, &c., of an office, were not intended to provide a mode for trying the right to the office. They apply only to cases where the title of the applicant to the vacated office is free from doubt, and his predecessor, or some other person, without reasonable claim thereto, willfully, contumaciously, or negligently, withholds the property of such office.
2. *Prohibition; when will not be granted.*—When an appeal to the circuit court has been taken from the judgment of the probate court in favor of the contestant in a case of contested election for sheriff, and the successful party is proceeding under sections 193–199 of the Revised Code to recover from the incumbent the books, papers, &c., of the office, this court will not issue a prohibition against an injunction from

the chancery court restraining the further prosecution of the summary remedy, until decision upon the appeal.

THIS was a petition in this court by Scott for a prohibition, &c. The facts material to an understanding of the motion will be found in the opinion.

RICE, CHILTON & JONES, *pro motion.*
STONE & CLOPTON, and WATTS & TROY, *contra.*

[No briefs reached Reporter.]

B. F. SAFFOLD, J.—At an election held in Montgomery county in November, 1871, for sheriff of that county, Paul Strobach received the largest number of votes cast, and obtained the certificate of election. He also gave bond, took the oath of office, and received a commission as such officer. Charles H. Scott contested the election with him in the probate court, and judgment was given in his favor, and against Strobach. Strobach appealed from this judgment to the circuit court, giving bond as required by the statute. Notwithstanding the appeal, Scott made application to the probate court to recover the books, papers, property, &c., of the office from Strobach, as provided by art. 6, chap. 1, title 5, par. 1, of the Revised Code, p. 125. Strobach sued out an injunction from the chancery court to restrain this proceeding, until decision upon the appeal. On motion to dissolve the injunction, the chancellor refused to do so, and an appeal was taken to this court by Scott, which is now pending. Scott now, also, petitions for a writ of prohibition, or other remedial writ, which shall have the effect to permit him to proceed under his application for the recovery of the books, papers, &c.

The effect of the appeal taken by Strobach to the circuit court was to transfer the cause to that court, and to supersede the judgment of the probate court. The statute prescribes the bond to be exacted.—Election Act 1868. Such is the general effect of either a writ of error or an appeal.

3 Wend. Blackstone, 411; 1 Chit. Plead. 720; 3 Chit. Plead. 1207; *Petition of Berry*, 26 Barb. 55.

If this were not the case, as the petitioner contends, he would be permitted to oust the other party from his office under a judgment which might be reversed, without remedy to the latter, because no provision existed by which he could supersede that judgment. This of itself would call for the supervision of some superior tribunal. On the other hand, if Strobach's appeal does supersede the judgment, and the bond required by him is too small, as is alleged, Scott can not complain that he has resorted to an injunction, because he has thereby been compelled to give a sufficient bond.

It can not be supposed there is no remedy in our law for Strobach to maintain his possession of the office until the pending litigation concerning the right to it shall be finally adjudicated. It is the province of chancery to provide a remedy, if no other that is adequate exists. It has interfered by injunction when one of two claimants of an office, pending an action to test the title, has sought by suit to collect the salary.—*Mayor, &c., v. Flagg*, 6 Ala. 296. Why not in this case restrain the recovery of property without which the incumbent can not perform necessary public duties?

The judgment of the probate court in the matter of the books, papers, &c., is as binding, in a proper case, as any other adjudication until reversed. Might not Strobach recover the office in the circuit court, and Scott retain the property of the office by equally valid and binding judgments.

In *People v. Peabody*, (26 Barb. 437–440,) it is said an officer acting under a statute of like import, has no right to grant the order prayed for, until the title of the applicant is clear and free from all doubt. This summary remedy was never intended to try the right to the office. If it did so, it would be unconstitutional, because not providing for an appeal or a trial by jury. It was only designed to operate in cases where an office is vacated, and the predecessor, or other person, without any rational claim, willfully,

contumaciously, or negligently withholds the specified property.

It is clear, that this case is not one in which the probate court should entertain the application. The controversy is in the best condition for both parties that it can be placed at this time.

The prohibition is denied.

COWLES *vs.* MARKS.

[BILL IN EQUITY TO REMOVE CLOUD FROM TITLE TO LAND, AND TO FORECLOSE MARRIED WOMAN'S RIGHT OF REDEMPTION TO LAND BOUGHT BY HER PARTLY ON CREDIT, AND SOLD UNDER MORTGAGE FOR BALANCE OF PURCHASE-MONEY.]

1. *Married woman with separate statutory estate; can not purchase land partly on credit, and take title to herself.*—A married woman, in this State, since the passage of the act of the general assembly of March 1, 1848, entitled, "An act *securing* to married women their separate estates, and for other purposes," has no legal capacity to purchase lands and take title to herself. And if she attempts to do so, and enters into such a contract, and pays a part of the purchase-money and gives her promissory notes for the balance of the purchase-money, and secures the notes by a mortgage on the lands thus attempted to be sold to her, she may go into chancery and have such sale to her set aside, and have her money paid back to her.
2. *Same; what relief chancery will give to.*—In such case, if the lands should be sold under a power in the mortgage, and the purchaser at the mortgage sale comes into chancery against the married woman to foreclose her right of redemption, and to have her deed given up and cancelled as a cloud upon his title, upon a cross-bill filed by such married woman setting up her rights as a married woman under our statute, the court will direct her debt to be held as a charge upon the land, and decree her money to be paid back to her, within a reasonable time, or in the event of failure, that the land be sold, and her debt paid out of the proceeds of such sale.
3. *Same; for what married woman will be held to account.*—But such married woman will be held to account for the value of the rents and profits, if any, which accrued to her out of said land during her use and occupation, which have been used by her "for articles of comfort

and support of the household, suitable to the degree and condition in life of the family of said married woman, and for which the husband would be liable at common law."

APPEAL from the Chancery Court of Montgomery.
Heard before Hon. A. W. DILLARD.

All the facts necessary to a proper understanding of the case will be found in the opinion.

ELMORE & GUNTER, for appellant.—1. It is sought to sustain the chancellor's decree in this case by the authority of the case of *Shepherd v. Shafaer*, 45 Ala. But that case has no application; here, the trade is alleged to have been with the wife, and for her, and the money is alleged to have been paid (in effect) by her. John B. Scott, who made the sale to Mrs. Cowles, can not claim that he did not have notice with whom he was dealing. And the complainant, having taken a transfer of the notes, not payable in bank and after maturity, takes them subject to all the equities between the original parties.—7 Port. 541.

The notes are not signed by Mrs. Cowles in the presence of two witnesses, and can in no sense be called her debt. *Smyth v. Oliver*, 31 Ala. And Mrs. Cowles having a deed to the land, and being in possession of the land, all persons are charged with notice of the character of her title and interest in the land, and of all of her equitable rights which are binding on her vendor.—*Burns v. Taylor*, 23 Ala. 255; *Garrett v. Lyle*, 27 Ala. 486; *Brewer v. Brewer and Logan*, 19 Ala. 482.

2. But even if the case of *Shepherd v. Shafaer, supra*, is applicable, the decree of the chancellor is wrong, for Mrs. Cowles should at least be paid, after the complainant's notes are satisfied.

3. The case of *Smyth v. Oliver*, 31 Ala., defines the nature of the use the husband can make of the wife's money and property.

4. The bill and answer to the cross-bill clearly show that this transaction was made for the wife, and with her means. Pleadings are to be taken most strongly against the pleader.

See *Quarles v. Winter*, 43 Ala. 692. The mere fact that the husband, who was the legal custodian of the wife's money and estate, delivered the money to the seller of the land, amounts to nothing, for he was the proper person to have done it for her; and if he did it even out of his own means, it would be good and valid as a gift, and create at the instant a separate estate in her.—*Molton v. Martin*, 43 Ala. 651.

But the bill and the answer to the cross-bill clearly show that the sale was to the wife; that she bought; that she had a separate estate, and that this land was bought as an adjunct to her plantation; and on the pleadings, "the allegations of the bill being taken most strongly against the complainant, and in favor of the defendant," (43 Ala. 696,) there being no averment by the complainant that the money used did not belong to the trust estate, this court must hold that it was the wife's money that made the cash payment, and the five hundred dollars subsequently paid.

The only question, then, is, can the partial payment made by the husband out of the wife's estate be sold out and lost by reason of a mortgage, or vendor's lien, for the credit payments?

The wife's disabilities are not removed by any statute. She can not make a valid contract, except as expressly authorized. The notes taken, are not hers, unless the statute makes them so, and we know of no statute that attempts it. Section 2373 of the Code only provides a way in which the estate of the wife may be conveyed when the exigencies of the family require a conveyance. Her assent to the purchase, therefore, is nothing, being at the time incapable of contracting, and the notes are those of the husband.—*Wilkinson v. Cheatham*, 45 Ala.

The object of the law was to preserve the wife's estate free from the speculations and disasters of the husband, and to bind it only for necessaries for the family; which would be defeated, it seems to us, if the husband could contract for the purchase upon credit of an estate, and mortgage the wife's property for the credit payments. The law only allows the husband to invest, and declares the

property acquired by the investment the separate estate of the wife; which clearly contemplates what the word "invest" means, the exchanging of money for property, and not a purchase upon credit.

The proper decree, it seems to us, is to have the land sold under decree of the court to foreclose mortgage of husband, and to direct that Mrs. Cowles shall be refunded the $2,250 paid upon the purchase, and that the remainder be applied to the discharge of the complainant's notes against the husband.—*Martin v. Molton*, 43 Ala.; *Bibb v. Pope*, ib.; Code, §§ 2371–4. This works no hardship, for the creditor knew well where he stood, and was aware of the rights of Mrs. Cowles by the contract he made, and the deeds and notes made and taken, and if he did not, there can be no one with a higher equity than a married woman, who is incapable of protecting herself, and can not be guilty of *laches*.

The cross-bill was filed merely because Mrs. Cowles prayed relief upon the case made by the complainant in his bill, the rule being that there must be a cross-bill whenever relief is prayed. There is no necessity for testimony to sustain the allegations of a cross-bill which are admitted expressly or impliedly by the original bill.

MARTIN & SAYRE, *contra*.—The record in this case presents a state of facts not before brought before this court. In *Bibb v. Pope*, (43 Ala.) and *Wilkinson v. Cheatham*, (January term, 1871,) the decision of the court is, that the wife can not mortgage her separate statutory estate, for the benefit of her husband.

In *Martin v. Molton*, (43 Ala.) the only question determined was, that the separate statutory estate of the wife could not be converted into a contract estate, and be subjected to the payment of a note given for the land by her and her husband, not executed in the presence of two witnesses.

There is no averment in the cross-bill and no proof of the "defendant's knowledge, that the use made of the money of Mrs. Cowles by her husband was in derogation

of her right.—*Shepherd v. Shafaer*, 45 Ala. 233. That case conclusively establishes the proposition that Mrs. Cowles was entitled to no relief on the cross-bill. The allegations in the answer of Marks are fully sustained by the evidence, to which the attention of the court is respectfully invited.

There is no pretence that Mrs. Cowles did not know that the title to the land was in her name, and that the land itself was in her possession and used for her benefit.

The single allegation in the cross-bill, upon which its equity must depend, is, that the cash payments were made with moneys belonging to her statutory estate. This allegation is not admitted by the answer, and there is no proof to establish that proposition. The cross-bill, then, stands as if no such allegation had been made.

The original bill contains no such averment, and there is no averment in it from which that inference can be made.

The property was purchased for the benefit of Mrs. Cowles' statutory estate; was used for that purpose, and was of the annual value of five hundred dollars, besides adding greatly to the value of her original estate. She quietly holds and enjoys this property. It is advertised for sale under the mortgage, and purchased by Mr. Marks at the sale. No complaint is made between the day of the purchase and the day of the sale, and no word, on that day, is heard, giving word that a law-suit would result to the purchaser. But now she appears, and claims, what she calls her money, with interest. She makes no offer to pay for what she has actually received.

If a decision be rendered in her favor, the result would be, that for ten years she would have had the use of the land free, and still be entitled to recover the amount of the money paid, with interest thereon.

The court will certainly hesitate before pronouncing an opinion which would produce such monstrous results.

But, under section 2374, the property of the wife, when it is money, "may be used by the husband, in such manner as is most beneficial to the wife." This power is given

exclusively to the husband. Its exercise does not require the co-operation of the wife. The husband is the sole judge of the time and manner of investment. The statute only requires that it shall be for the benefit of the wife. The investment can not be for his own benefit, nor for the benefit of a third person; but whenever the transaction is a *bona-fide* one for the benefit of the wife, it will be upheld.

The court can not enquire whether or not a better investment could have been made. It can not review the judgment of the husband on that question. He may have acted wisely or unwisely, but whether he has done so or not, is not left to the court to ascertain. The only question for the court is, has the husband, in good faith, exercised the power conferred upon him by law? The facts in this case abundantly prove that the investment of Mrs. Cowles' money was for the benefit of her statutory estate; that the land purchased was indispensable to the enjoyment of her adjoining plantation, and added largely to its value.

In reference to her having a separate estate, the allegation is that she had a plantation adjoining the land, which was her separate estate.

The conveyance of the land to Mrs. Cowles, by Scott, was, in legal effect, a sale to Mrs. Cowles. The purchase-money might have been paid by her, or some third party.

Marks had no connection with the land until his purchase at the sale under the mortgage.

The mortgage is executed in the presence of two witnesses, and is, in effect, an acknowledgment of a debt due. So that, even if notes were void, the debt upon which the mortgage is based is sufficiently established, not only by the mortgage itself, but by other proof. The notes did not constitute the debt—they were merely evidence of the debt.

The execution of the mortgage had the same effect as if the notes had been properly executed. It was not necessary to introduce the notes as evidence.—*Fenno et al. v.*

Sayre & Converse, 3 Ala. 469; *Gillett v. Powell*, 1 Speer's Eq. Rep. (S. C.) 155.

Mrs. Cowles is bound by her admission in the mortgage *Hartwell v. Blocker*, 6 Ala. 586.

PETERS, J.—This is a bill filed by William M. Marks, as complainant, against Laura S. Cowles and her husband, Thomas W. Cowles, as defendants, in the chancery court of Montgomery county, on the 16th day of August, 1869. The main purpose of the bill is to quiet the title of the said Marks to a certain tract of land lying in said county of Montgomery, and particularly described in the pleadings. The material facts are these: On the 13th day of September, 1859, John B. Scott attempted to sell the tract of land mentioned in the bill to the appellant, Mrs. Cowles, wife of Thomas W. Cowles, for the sum of $7,000. Seventeen hundred and fifty dollars of this sum was paid in cash by Mrs. Cowles at the time of the purchase, out of the moneys of her statutory separate estate, and she and her said husband gave their four promissory notes, each for the sum of $1,312.50, due at different dates, for the balance of the purchase-money for said land. These notes were payable to Scott, and were secured by a mortgage in his favor executed by Mrs. Cowles and her said husband on said lands, which bears date said 13th day of September, 1859. Cotemporaneously Scott and wife executed a deed to Mrs. Cowles. It is also alleged, "that though the name of Thomas W. Cowles appears on said notes and mortgage, he was not taken as surety thereon, but to comply with what was supposed to be the law in reference to married women." These notes were not attested in the presence of two witnesses. This mortgage contained a power of sale in favor of Scott, upon a failure to pay said notes and interest thereon, or either of them, as they fell due. There was a failure to pay the notes, except the sum of $500 paid on the 4th day of January, 1861. On the 13th day of February, 1868, Scott sold the said lands, under the power in his mortgage, and said Marks (appellee) became the purchaser at the sum of $4,000; and on the 11th day of March,

1868, Scott, as mortgagee, made a deed to said Marks, as purchaser at said sale, for said lands; and afterwards, on the 9th day of October, 1868, Scott and wife also made their deed to said Marks for said lands, in consideration of the sum of $1,000. And upon the title thus derived Marks brought his suit to recover said lands of Mrs. Cowles. Marks avers that he has the legal title to said lands, but that he "is willing, if the said Laura S. Cowles and Thomas W. Cowles so elect, to let said sale be considered as of no effect, and that said lands may be sold under a decree" of the chancery court. It does not appear with certainty that the said four promissory notes given by Mrs. Cowles to Scott for the purchase-money of said lands were assigned to Marks by Scott; but Marks avers, that if said mortgage is invalid, then "he is entitled to a vendor's lien" on said lands. And Marks insists, that he is entitled to have the deed executed by Scott to Mrs. Cowles delivered up to him and cancelled, so that there may be no cloud on his title; and he prays that Mrs. Cowles may be foreclosed of her equity of redemption, and for general relief.

Mrs. Cowles answers, and admits the allegations of the bill, and by way of cross-bill she elects to have the land sold, but insists that on account of her coverture, and under the laws of this State, she is not liable as the maker of said notes, and that the sale of said lands to her by Scott was unlawful and void, and that she is entitled to a resulting trust in said land to the amount of the money she had paid Scott for the same, with interest thereon, as her separate estate under the laws of this State; and prays that said lands be sold, and the proceeds applied first to the payment of her debt until that is satisfied. Marks and the husband of Mrs. Cowles are made defendants to the cross-bill, and each puts in a separate answer, and admits the coverture of Mrs. Cowles, and the sale to her of the lands as shown in the original bill. And Marks alleges that the lands sold to Mrs. Cowles were adjacent to lands owned by her as her separate property, and were necessary for the use of her plantation, and that large quantities of timber had been taken therefrom by her and her said husband; but it is not

shown that this happened since his title and right to the possession had accrued. He demurs to the cross-bill.

There was some testimony taken, but it does not materially alter the character of the case as made in the pleadings. The learned chancellor in the court below, by his decree, ordered the lands to be sold as upon a foreclosure of a mortgage, and the proceeds of the sale to be paid over to Marks, and paid no attention to the cross-bill, so far as appears from the decree. Mrs. Cowles appeals to this court from this decree.

Under the facts the question arises, what are the rights of all the parties before the court? Did the transaction between Scott and Mrs. Cowles give him any right to hold on to her money obtained from her under sanction of the attempted sale, after she elected to repudiate it? Will the court, dealing with the land only, permit it to pass from its jurisdiction and leave her unpaid? Can Marks be treated as an innocent purchaser without notice of her equity, if she has any; and to what extent, if at all, is she liable to account for rents and profits of said land?

One who deals with a married woman in this State about her property, must take notice of her powers and her disabilities. These are the creatures of the law, and every one is bound to take notice of the law. The ignorance of the individual does not suspend the law.—*Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233; 2 Kent, 655, and notes, (11th ed. by Comstock, 1866); Story's R. 353; 1 Story Eq. § 116; Broom's Max. 190. This is so with regard to all the statutes of the State. A person can not lend out his money at usurious interest.—Rev. Code, § 1831. So, likewise, a person can not be bound to perform a contract founded on a gambling consideration.—Rev. Code, § 1874. So, also, a person can not loan his money on a "Sunday, unless for the advancement of religion, or in the execution or for the performance of some work of charity, or in case of necessity."—Rev. Code, § 1882. If this is done, and a note is taken on the sabbath for its repayment, the lender, when he finds himself confronted by a plea of the illegality of his contract, can not answer such plea, by replying that

he did not know the law, and that to disallow his plea was to swindle him. The rights of a married woman are just as sacred as the rights of an infant, or the law for the protection of the sabbath. It is not by her means or by her device that her powers over her estate are hampered by disabilities. The sovereign power, in which she has no voice to speak, and which intends all its regulations for the best, has so fixed it. It is not, then, her fault that she clings to all the disabilities which afford her protection. It is her right to do so, and it is among the highest duties of the courts to see that this right is upheld. Since the *first* of March, 1848, the general assembly of this State, upon repeated occasions, has attempted by a peculiar system of regulations to *secure* to married women their estates as their separate property. In this effort they have not attempted to patch up the old system with amendments, as by pouring new wine into old bottles, but by devising a wholly new system which is *unique* and *complete* in itself. And to make this more secure, they have stricken down the old system by a sweeping repeal "of all laws and parts of laws in conflict with the provisions" of the new system.—Acts 1849–50, p. 65, § 11; Rev. Code, §§ 2370 to 2388, both inclusive. In conformity with these enactments, now of more than twenty years' standing, it has been settled by this court that a married woman with a statutory separate estate can not go into the market as a *feme sole* trader or free-dealer; she can not contract debts as such trader, or execute a mortgage for the security of such debts.—*Wilkerson v. Cheatham*, 45 Ala. 337; *Bowen v. Blount*, in MSS. Then, the sale of the lands named in the complainant's bill by Scott to Mrs. Cowles, her notes for the purchase-money, and her mortgage to secure them, were all made without authority, and they are without any legal validity, unless she chooses to affirm them; and this she refuses to do. Therefore, the notes and the mortgage were invalid, and the sale under the mortgage can not effect her rights. And Marks does not show that he has done more than to step into Scott's shoes. He must be visited with a knowledge of all the facts and all the law connected with his title.—

Thweatt v. Johnson, 18 Ala. 781. His equities and Scott's are the same. He comes into court and says that he "is willing, if the said Laura S. Cowles and Thomas W. Cowles so elect, to let said sale be considered as of no effect, and that said lands be sold under a decree" of the chancery court. He also alleges, "that although the name of Thomas W. Cowles appears on said notes and mortgage, he was not taken as a surety thereon, but to comply with what was supposed to be the law in reference to married women." It is also insisted by Marks, "that he is entitled to the vendor's lien." These allegations are not denied by Mrs. Cowles, and she elects to have the land sold, and insists that she shall have returned to her the money, with interest, which she paid to Scott on the abortive sale, out of the proceeds of the sale thus to be made under decree of the chancery court.

This is the main question in the case. And the learned chancellor in his decree in the court below acted without due regard to her rights. There was no controversy as to the balance of the sums due upon the notes, and there can be none, if the notes and the mortgage to secure their payment are voidable and illegal, and no controversy about the land. Mrs. Cowles does not claim it, but the proceeds of the sale under the chancellor's decree are before the court within its potential jurisdiction. Then, as between Mrs. Cowles and Marks, the sole question is, what shall be done with it? Shall she lose her money, which can not be legally taken from her in this way, and turn it over to Marks, because he did not know the law, or because he acted under a misapprehension of her powers and her rights? or shall justice, administered according to law, be done her in the first instance, and leave him, and others like him, to grow wiser by their mistakes? I think the latter course is the true one. It is vain to say that the wife can defend herself against the solicitations, or more often against the gentle restraints, of the husband, when he wishes to use her estate. "All know and feel," says Chief-Justice MARSHALL, "the plaintiff, as well as others, the sacredness of the connexion between husband and wife. All

know, that the sweetness of social intercourse, the harmony of society, the happiness of families, depend on that mutual partiality which they feel, or that delicate forbearance which they manifest, towards each other."—*Sexton v. Wheaton*, 8 Whea. 239, 229. And all know, that in a great number of instances, this marital congeniality would soon end, and that thorns and thistles would soon spring up in suffocating abundance, where but yesterday the rose and the lily bloomed, if the wife should be so luckless as to oppose the husband in the control and the management of her estate. Women are naturally amiable and yielding; and it is only by the impassable and impregnable barriers of the law that their estates can be defended and *secured* against the powerful and often fatal influence of the husband. On this important conviction our law is founded. It is a grant to the married women of the State not less important to the protection of their interests than *Magna Charta* itself has been to all who speak our native tongue. The husbands of the State have made this pledge to their wives; let it be kept in sacred good faith, and in the fullest protective power of its generous intent. I therefore think that the learned chancellor fell into grave error, both in the spirit and in the legal principles of his judgment in the court below. He should have ascertained, in a proper way, the amount of money of the separate property of Mrs. Laura S. Cowles which went into the hands of said John B. Scott on said abortive sale by him to her, as mentioned in said bill of complaint, and interest thereon, whether the moneys had been paid by her, or by her said husband, or by any one else for her, on said abortive contract of sale of said lands to her, and also the value of the rents and profits derived from the use and occupation of said lands by her, if any such rents and profits there were, which were used by her, or her said husband as her trustee, for her, for articles of comfort and support of the household, suitable to the degree and condition in life of the family of her, said Laura, for which the husband would have been responsible at common law, and deducted the sum so ascertained for rents and profits, if any, from the

sum so paid by her on said abortive sale aforesaid, and decreed the balance, if any, in favor of said Laura, a charge upon said lands, and order the said lands, or so much thereof as may be necessary to pay and satisfy the charge so raised, if the said Marks shall fail or refuse to pay the same within such time as the court below shall appoint.

I am unable to consent to the position of the learned counsel for the appellee, said Marks, that the transaction between said Scott and Mrs. Cowles in reference to said abortive sale of said lands mentioned in the bill and cross-bill was "re-investment" of "the proceeds" of a sale of the separate estate of Mrs. Cowles, under section 2374 of the Revised Code. The protective force of that statute depends upon its literal enforcement. Where this is insufficient, the husband, as trustee, or the wife, must resort to a court of chancery.—2 Story Eq. §§ 1327, 1366, *et seq.*

Let the decree of the court below be reversed, and the cause remanded for further proceedings in the court below in conformity with the principles announced in this opinion. The appellee (Marks) will pay the costs of this appeal in this court and in the court below.

LANG *vs.* WATERS' ADMINISTRATOR.

[ACTION ON PROMISSORY NOTE.]

1. *Plea; when sufficient as to form and substance.*—Pleas, in this State, have no technical forms as at common law. A succinct statement of the facts relied on in bar or abatement of the suit is sufficient, if the facts are so stated that a material issue can be taken thereon.—Rev. Code, §§ 2629, 2638.
2. *Set-off, plea of; what sufficient.*—Pleas of set-off which allege that the plaintiff is indebted to the defendant in a certain sum falling due on a day named, "by liquidated demand," or "by unliquidated demand," on which debt or assumpsit may be maintained, and which insist upon

such demand as offset against the plaintiff, is sufficient, if the facts are stated as required in the forms prescribed in the Code.—Code, §§ 2642-3.

3. *Same; what evidence improper under.*—Under such pleas, evidence of an unliquidated demand sounding in damages merely, is improper, and should not be admitted.

4. *Note payable in dollars; how only can be discharged.*—A promissory note payable in "dollars" can only be discharged by a tender of "dollars in legal tender currency," unless there is an agreement between the parties that it may be discharged in something else. A tender in "baled cotton" on such a note is not sufficient without such an agreement.

5. *Pleading; discretion of court as to time allowed for.*—The court trying a cause may enlarge the time of pleading, or permit additional pleas to be filed, when this tends to the administration of right and justice. Such power is discretionary, and not the subject of revision in this court.

6. *Witness; re-examination of; matter of discretion.*—The court may also permit the re-examination of a witness, or the admission of additional testimony, after a party has closed the examination of his witnesses. This is also a matter of discretion, to be exercised in favor of right and justice, and is not revisable in this court.

7. *Wife; in what case may be agent and witness for husband.*—The wife may lawfully become the agent or attorney of the husband, and as such she is a competent witness for him, except in "criminal cases," and in certain suits against executors and administrators.—Rev. Code, § 2704.

8. *Same; agency of wife for husband, how may be proved.*—The wife, being the agent of the husband, may prove her agency, in a suit against him.

APPEAL from the Circuit Court of Choctaw.
Tried before Hon. LUTHER R. SMITH.

THIS was an action by the payee against the maker, founded on a promissory note, dated December 26, 1859, and due January 1, 1862, for ten thousand four hundred and forty dollars.

Defendant pleaded four pleas—1st, payment, upon which issue was taken. The other pleas were as follows:

"2d. Defendant says, as a defense to the action of plaintiff, that at the time said summons was sued out, the plaintiff was indebted to him in the sum of $15,000, by an unliquidated demand amounting to $15,000, stated above, the 1st day of March, 1863, and due at that date to the

defendant, which he hereby offers to set-off against the demand of the plaintiff, and he claims the judgment for the residue."

The third plea was identical with the second, except that the demand offered to be set-off was stated to be "liquidated."

The fourth plea (marked in the record as the fifth,) was as follows:

"The defendant for [answer to] said complaint, says that he tendered to the plaintiff two hundred bales of cotton, worth fifteen thousand dollars, in payment of the amount he claimed to be due before this action was commenced, and that he has always been ready and willing to perform this contract with the plaintiff, and offered to do so before this action was commenced."

Plaintiff demurred to the second, third and fourth pleas on the following grounds:

To the second plea, because it purports to be a plea by way of set-off, but fails to show a cause of action thereon against the plaintiff; 2d, because it does not show any unliquidated demand, or upon what said claim was based, so that plaintiff could prepare to disprove it; 3d, because it presents a conclusion of law, and does not show whether or no the claim of defendant is one sounding in damages merely.

The grounds of demurrer to the third plea were substantially the same as those to the second, the grounds being varied so as to assail the sufficiency of the plea of liquidated demand.

The plaintiff demurred to the fourth plea on the following, among other grounds: 1st, it is no answer to the complaint; 2d, it does not set up or show any agreement on the part of plaintiff to receive *cotton*, this being an action for *money;* 3d, said plea is informal and insufficient.

The court overruled the demurrer to each of the pleas, and thereupon plaintiff took issue thereon, and the parties went to trial.

The judgment entry recites that the jury being duly

"sworn to try the issues joined in this case, upon their oaths do say, we, the jury, find for the defendant."

It appears from the bill of exceptions, that defendant set up, and partly proved by several witnesses, as a defense to the action, that he set apart two hundred bales of cotton on his plantation, some time in 1862, to pay the note, and told his wife the purpose; that this was done on account of a message to that effect from plaintiff; that plaintiff was notified of this in 1862, and made an agreement with defendant's wife, as his agent, and in his absence, to accept the cotton, and that afterwards the wife of defendant, under and in pursuance of an agreement and understanding with plaintiff, sold the cotton for Confederate money, and transmitted the proceeds thereof to Boykin & McRae, who held the notes for collection, at Mobile, Alabama; that they refused to receive it, and that the identical money was then placed with Gates & Pleasant, at Mobile, on special deposit for plaintiff, &c. The bill of exceptions then states:

"The plaintiff objected to the introduction of defendant's wife as a witness on behalf of defendant, on the ground that she was incompetent; which objection the court overruled, and plaintiff excepted. The witness was asked, 'Did your husband leave an agent in his absence?' to which she answered, 'He did; I was his agent.' The question and answer was objected to by the plaintiff, upon the ground that she was not competent to prove herself to be the agent of her husband; but the court overruled the objection, and plaintiff excepted. She was then asked, 'Do you know of any settlement between plaintiff and defendant?' to which she answered, 'I know that defendant owed plaintiff a note; plaintiff told me so, and I knew it before.' The question and answer were objected to by plaintiff, which was overruled by the court, and plaintiff excepted upon the same ground as the above stated objection. Witness stated that she received a message from plaintiff, on his return from the army, that he wanted his money; a few days after, he called to see her, and asked her if she could pay defendant's note? She replied that

she did not have the money, but had two hundred bales of cotton. He replied that he did not want the cotton, but it would be an accommodation if she would sell the cotton and pay him before he went to Texas; if not paid before he left, he wanted the money paid to Boykin & McRae, in Mobile, and he would instruct them to receive it. She replied that she would sell it if he wanted it sold. Plaintiff said it would be an accommodation, and that if he had left for Texas when she received the money, she could pay the money to Boykin & McRae, in Mobile. She sent the money to them, and they replied that plaintiff passed through Mobile a few days before, and gave them no instructions to receive Confederate money. Told plaintiff she would sell the cotton and pay the money to Boykin & McRae. The witness could not say that she would know the same money. She gave the money to Mr. Hill to send to Gates & Pleasants, in Mobile, for safe keeping; did not use any of the money; told her husband where it was, and that it should be bonded; he replied that the cotton money must not be bonded. He afterwards brought it up home, and has had it, that which is in court, in possession five or six years just as it is. The cotton was sold in eight or nine days, and weighed and paid for in about three weeks after the interview with plaintiff."

"On cross-examination, witness stated that about three weeks after the interview with plaintiff, the cotton was sold and the money started to Mobile. Defendant told her the cotton was set apart to pay plaintiff. Defendant told her that [if] plaintiff required it, to sell the cotton and pay the debt. She sold the cotton in opposition to her feelings. Did'nt know, of her own knowledge, that the money was tendered; she was told so. She had special instructions from defendant to take good care of the cotton, that it was plaintiff's. Defendant told her the money was not to be bonded. Had all the cotton sold in 1863 shipped in 1864, except twenty-five bales that were torn to pieces; that was out of the two hundred bales. The cotton was shipped to Battle & Co., and to John Scott. In 1863 defendant made about one hundred bales; in 1864, some fifty or sixty; in

1865, did not know. The cotton shipped was signed A. G. Waters, by me, as his agent in the same to the contract of shipment. She had no cotton of the kind. She only sold two hundred bales; did not remember, and did not believe she sold any more, and this was sold at the request of Lang, the plaintiff, to pay his debt. Plaintiff did not tell her he did not want to leave so much money behind.

"Defendant's attorney asked the witness, Mrs. Waters, if she or her husband used the money, the proceeds of the sale of cotton. Plaintiff objected, upon the ground that she was not a competent witness to prove what use was made of the money by her husband. The court overruled the objection, and plaintiff excepted. Witness answered that they did not use the money; that she told her husband the money should be bonded, and he told her it must not be bonded, but must be kept for Lang.

"The plaintiff's attorney objected to the answer—1st, because she was not competent to make such proof; 2d, because Lang could not be bound or prejudiced by any such conversation; 3d, because it was not responsive to the question. The court overruled the objection, and plaintiff excepted. Plaintiff moved to exclude the answer from the jury, for the same reason; the motion was overruled, and plaintiff excepted. Witness testified that her husband told her he owed a debt to Lang, and also instructed her, if Lang desired it, to sell the cotton and pay him.

"To each several question propounded to the witness, Mrs. Waters, and to which responses were made as hereinbefore set out as her evidence, the plaintiff objected—1st, upon the ground that she, being the wife of defendant, was not a competent witness for him to prove the facts inquired after; 2d, because said witness testified to conversations with, and statements by, her husband, had and made when plaintiff was not present. The court overruled each several objection, and plaintiff excepted to each several ruling of the court overruling his said objections."

The bill of exceptions then states that the "defendant proposed to introduce George F. Smith as a witness; the

plaintiff objected on the ground that he had closed his evidence, but the court overruled the objection, and permitted the witness to testify, and plaintiff excepted."

From the bill of exceptions it appears that A. G. Waters, the defendant, was examined as a witness in his own behalf, testified, and was cross-examined. After this two or three other witnesses were examined in behalf of the defense, and the bill of exceptions states, "A. G. Waters was again introduced, plaintiff objected, which objection the court overruled, and permitted Waters to testify, and plaintiff duly excepted." Neither the purpose for which the witness was put upon the stand a second time, nor the grounds of the objection to him, are referred to in any manner, except as stated in the above quotation from the bill of exceptions. It would appear, from reading his testimony as set forth in the bill of exceptions, that Waters was recalled to testify as to what was done with the Confederate money, the proceeds of the cotton, and his instructions as to the disposition of it after the refusal of Boykin & McRae to receive it; which were matters about which he did not testify on his first examination.

Appellee having died during the pendency of the appeal, his administrator was made a party in his stead.

Plaintiff took a bill of exceptions on the trial, and reserved numerous exceptions to the rulings of the court. It is only necessary, however, to notice such of the exceptions as were passed upon by this court.

The rulings excepted to, and the action of the court in overruling the demurrer, are now assigned for error.

Brooks, Haralson & Roy, and Glover & Coleman, for appellee.—I. The court erred in overruling plaintiff's demurrers to the pleas numbered 2, 3, and 5.

The second plea was bad for uncertainty. "A plea of set-off must describe the debt intended to be set off, with the same certainty as in a declaration for like demand." 1 Chit. Pl. 607. A declaration on a demand, describing it as "an unliquidated demand for $15,000, dated about the 1st of March, 1863, and due at that date," would have

been a bad declaration even under the liberal rule of pleading established by the Code. It would have shown no cause of action.

II. The third plea is also bad—1st, for uncertainty; 2d, as stating a legal conclusion.

1. It shows no cause of action which would have supported a declaration.—Authority *supra*. If the term "liquidated demand" be considered equivalent to the term "account stated," it would still have been necessary, in order to secure the certainty in pleading required by law, to set out when and by whom the demand was liquidated, (Forms in the Code, 674,) that the opposite party may have an opportunity to disprove the same. The rule as to a declaration is—

"That these and all other circumstances essential in law to the action, must be stated with such certainty, precision and clearness, that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea; and that the jury may be enabled to give a complete verdict upon the issue; and that the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises."—1 Chit. Pl. 286.

And we have seen that a plea of set-off must describe the demand with the same certainty as a declaration. 1 Chit. Pl. 607, 267, 268.

2. The third plea is bad as stating a legal conclusion in the use of the term "liquidated demand." The terms "liquidated and unliquidated demands," are used in section 2642 of the Code to express legal conclusions, and the plea, to be good, must have stated the facts from which to draw the legal conclusion of a "liquidated demand." The jury can not define a "liquidated demand," nor the court determine the fact of liquidation; and the plea should have stated the particular facts which, if true, would have constituted a "liquidated demand."—1 Chit. Pl. 574; Gould Pl. ch. 3, § 12; *Darrington v. Walsh & Emanuel*, 26 Ala. 619.

The fifth plea is bad. It is no answer to a declaration on a moneyed demand, to say that defendant tendered

plaintiff two hundred bales of cotton worth $15,000. The admission of every fact stated in the plea would in no wise affect the plaintiff's rights as set forth in the declaration. "A plea must be adapted to the nature of the action, and conformable to the declaration, and must deny, or admit and avoid, the facts stated in the declaration."—1 Chit. Pl. 552, 554, 556.

A plea of tender of cotton would only be good in a suit for cotton; and a plea of tender of nothing except money is good to an action on a contract for the payment of money.—2 Parsons Contr. 149, 163. If the plaintiff had agreed to receive cotton in payment of the note, such agreement should have been set out, and made the basis of the plea.—1 Chit. Pl. 267–8, 607.

The wife was incompetent to prove her agency. In *Robinson v. Robinson* the court *permitted* the trustee *forced by law upon the wife*, to be a witness for her as to what he did with the trust property. The defendant was not forced to appoint his wife agent. Public policy forbids the stretching of the rule further.

A. J. Walker, and Reavis & Cooke, *contra*.—The second and third pleas are good. They conform to the form prescribed. The second plea alleged the set-off of an unliquidated demand, and gives its amount, date, and the person to whom it was due. The third special plea varies from it only in setting up a liquidated demand. It may be conceded that these pleas would have been bad at common law, but if conformable to the form prescribed in the Code they are good. Even indictments in the prescribed form are good, although not stating the constituents of the offenses charged. The form will be found on pp. 678–9 of the Revised Code.

The overruling of the demurrer to the plea marked No. 5 would not have prejudiced the plaintiff. The bill of exceptions, as will be seen by reference to the transcript, sets out all the evidence. The court having all the evidence before it, must see that no testimony was introduced to support the plea of the tender of cotton. The strongest

tendency of the evidence was to show an offer to pay in cotton, which was rejected, and met by a counter proposal that Mrs. Waters should sell the cotton and pay the money to Boykin and McRay, if the plaintiff had left for Texas.

A party can not be injured by the allowance of an improper plea, when no evidence is introduced to support it. An injury results from an improper plea, only when a recovery is had or may have been had under it. If no evidence is introduced in reference to it, it is practically abandoned, and should be treated as abandoned. In fact, the evidence conduced to show a payment.

Mrs. Waters was a competent witness for her husband. The objection of interest is swept away, and now the competency of the wife to testify for her husband is the clear result of the reasoning and authorities of this court in *Robison v. Robison*, (44 Ala. R. 227.) A wife may be the agent of her husband, and there is a necessity that she should be a witness in matters of agency and trust.—1 Greenleaf on Ev. page 383, § 334, note 3; *State v. Neal*, 6 Ala. 685.

The conversation between Mrs. Waters and her husband, in which the latter informed the former of his debt to the plaintiff and instructed her to sell the cotton and pay it, was a fact in the case establishing the agency, and was therefore admissible.

While a tender could not legally be made in Confederate money without the plaintiff's authority, it could be made with such authority. The question, whether there was such authority, was a proper one for the determination of the jury. The evidence of such tender was, therefore, admissible.

PETERS, J.—The action of the court below upon the demurrers will be first considered. The pleadings in this State are regulated by statute. Pleas with us can hardly be said to have any technical names or technical forms, as at common law. A succinct statement of the facts relied on in bar or abatement of the suit is sufficient, if the facts

are so stated that a material issue can be taken thereon. This is the rule that must govern in their construction.—Rev. Code, §§ 2629, 2638. In this case there is no controversy about the first plea. It is only the second, third, and fourth pleas that are objected to by the demurrers. The statement of facts made in the second and third pleas are set up by way of set-off. These will be considered by themselves. They are substantially in the form prescribed by the statute, and use the language given for such pleas in the schedule of forms appended to the Code. In such a case, a statement of facts that would support an action of debt or assumpsit would be enough to make such pleas good. We think the facts in these pleas are sufficient for this purpose. In the first, the allegation is, that the plaintiff, at the commencement of the suit, was indebted to the defendant in the sum of six thousand dollars, due March 1, 1863, "by an unliquidated demand" of that date, and the defendant insists upon this debt as an offset. The other plea in this series is almost in the same words, except it is stated that the set-off is founded on a "liquidated demand" for fifteen thousand dollars, which is also insisted on as a set-off to the plaintiff's debt. Such pleas are very clearly within the purpose and the language of the statute, and according to the form of pleas prescribed in the Code. This is enough.—Rev. Code, § 2642; *ib.* p. 673, Form *Set-off*. The demurrers to these pleas were properly overruled. If, under such pleas, the defendant should offer proof of an unliquidated demand sounding in damages merely, it should be rejected; because such demands are not the subject of set-off under our statute. And there is no set-off at common law.—Revised Code, § 2642; *White et al. v. The Governor, use, &c.*, 18 Ala. 767.

The fourth plea, which is numbered *five* in the record, is defective. It does not show any indebtedness on the part of the plaintiff to the defendant, or any agreement by the plaintiff with the defendant to receive the two hundred bales of cotton in discharge or satisfaction of the debt sued for. This is necessary. A suit at law for the payment of a certain sum of money on a contract, is, in effect, a suit

for a specific performance.—*Robinson v. Bland*, 2 Burr. pp. 1077, 1086; *Rudler v. Price*, 1 H. Bl. 547. The answer to such an action should show performance, or that the contract was such that the defendant was not bound to perform it, or had been excused or discharged by the plaintiff's agreement, or by operation of law. Therefore, the plaintiff could not be required to receive the cotton on a contract to pay money, unless he had in some way bound himself to do so, or unless the law so compelled him; and the facts stated in the plea should show this.—Rev. Code, §§ 2648, 2649. A note payable in dollars can only be discharged by a payment or tender of legal tender funds. And baled cotton is not such funds.—Const. U. S., art. 1, § 10, cl. 1; Paschall's Const. U. S. p. 153; *Legal Tender Cases*, 11 Wallace, 682. To the defects of this plea, one of the demurrers is especially directed. The court therefore erred in overruling it. It is, however, contended by the learned counsel for the appellee, that this was error without injury. It does not so present itself to us. For aught that otherwise appears, or can be legitimately inferred from what is exhibited in the record, it may have been upon this plea that the jury founded their verdict. A general finding, on all the pleas, supports such a presumption upon the evidence in this case.

There are one or two other objections made to the ruling of the court below, which need to be settled in order to free the case from their embarrassment in the future. One of them was the objection to filing additional pleas after issue joined on the first plea. There was no error in this. The defendant is authorized, by leave of the court, to file as many several pleas as he may be advised are necessary for his defense. If the court permits the pleas to be filed, this is sufficient leave to bring its action within the statute. Rev. Code, § 2639; Shep. Dig. p. 727, §§ 305, 306. The court has also clearly the power to enlarge the time of the pleading. This is a matter of discretion, and it should not be refused, when it tends to the administration of right and justice.—Rev. Code, §§ 2662, 2663; Const. Ala. art. 1, § 15. And in the exercise of this discretion, the court be-

low must be the judge whether it is properly or improperly administered. It is not a subject of error and revision here.—*Bobe v. Frowner*, 18 Ala. 89; *Newman v. Pryor*, 18 Ala. 186. The allowance, then, of the additional pleas was not erroneous.

The recalling the witness who had been examined, under the facts in this case, and his re-examination, was also matter of discretion in the court below. So was the admission of additional evidence by the defendant after he had closed the examination of his witnesses. There is no peremptory statute upon this branch of practice which forbids the court so to act. It is a discretionary power, and it is not to be presumed that it will be used otherwise than in furtherance of right and justice; and this is the end of all law. *Ipsæ leges capiunt ut jure regantur.*—3 Chitt. Gen. Pr. pp. 901–2, marg.; Coke's Litt. 174, *b.*

The wife may lawfully become the agent or attorney of the husband, and her acts will bind him, when she acts as such within the compass of her authority.—Story's Agency, § 7, and cases cited; *Lyon & Co. v. Kent, Payne & Co.*, 45 Ala.

The wife is also a competent witness for the husband in all "suits and proceedings before any court or officer, other than criminal cases," except in certain instances, in suits or proceedings by or against executors or administrators.—Revised Code, § 2704; *Robison v. Robison*, 44 Ala. R. 227. There was no error, then, in permitting the wife to testify as a witness for the husband in this case in the trial in the court below. It hardly needs remark, that the wife's conversations with the husband are incompetent, unless they are a part of the *res gestæ*. What she told him to do with the cotton or the Confederate money was not of that character. Such declarations were improperly admitted.—*Thompson v. Bowie*, 4 Wall. 463; 1 Greenl. Ev. §§ 108, 109, *et seq.*

There can be no doubt, under the law as settled by this court before the statute of February 14th, 1867, an agent was competent to prove his own authority.—*Gayle v. Bishop*, 14 Ala. 552, 554. But since the statute, any reasons which

might then have existed against it are certainly removed. Interest does not now disqualify a witness in any way. In civil cases all are competent, unless executors or administrators are parties, under certain circumstances.—Revised Code, § 2704. The wife, then, was a competent witness to prove her agency, in a suit where her husband was a party.

We purposely omit any notice of the charges given or refused by the court, because the case will have to be sent back for a new trial, and the charges can not be discussed without the expression of some opinion on the evidence, which might be misconstrued or improperly used on a new trial.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

HINES *vs.* CHANCEY.

[EJECTMENT.]

1. *Deed, certified transcript of under sections 1548-49 of Revised Code; when only can be received in evidence.*—The duly certified transcript of a deed, acknowledged or proved, substantially in the form given in the Revised Code, sections 1548-49, can only be received as evidence of the execution and contents of the original deed, after the original is shown to be lost or destroyed, or that the party offering it has not the custody or control of it.
2. *Deed; what proof does not sufficiently show loss of.*—The loss or destruction of a deed, left in the office of the judge of probate for registration by the grantor, without paying the fees of registration, is not sufficiently proved, by showing it can not be found in said office, where the said judge of probate is shown to have been succeeded by another, who on turning over to his successor the books and records of his office, took away the deeds recorded by him for the purpose of collecting his fees, there being no proof that it can not be found in the hands of the said outgoing judge of probate.
3. *Deed, probate of; what insufficient.*—The probate of a deed does not substantially comply with the form given in the Revised Code, when it omits to certify the subscribing witness was known to the officer be-

fore whom the proof was made; or, that fails to show that the grantor voluntarily executed the deed, in the presence of said witness and of the other subscribing witness, on the day the same bears date; or, that fails to state that said witness attested the same, in the presence of the grantor and of the other witness, and that such other witness subscribed his name as a witness in his presence.

4. *Plaintiff in ejectment; what must prove as to possession and claim of his vendor, before entitled to recovery.*—A plaintiff who makes title under a deed from a third person can not recover, even as against a party in possession without claim of title, unless it be shown that his grantor was in possession, claiming title to the premises at the time the deed was made.

APPEAL from Circuit Court of Coffee.
Tried before Hon. J. MCCALEB WILEY.

THIS was an action in the nature of ejectment under the Code, brought by Lucretia D. Chancey against Wm. Hines, to recover certain lands mentioned in the complaint. Defendant pleaded not guilty, and went to trial on that plea. The jury found a verdict in favor of the plaintiff, and judgment was rendered accordingly.

The bill of exceptions recites, that plaintiff was introduced as a witness in her own behalf, and testified that "Wilkerson Ezell, some time in the year 1859, made to witness a deed of conveyance to the lands described in plaintiff's complaint; and that (she) witness had left said deed in the office of the judge of probate of Coffee county to be recorded, in the year 1859, and that she had never seen said deed since; and that her name was Lucretia D. Chancey. The plaintiff further introduced B. M. Weekes as a witness, who testified, that he was now the probate judge of Coffee county, and that he had made diligent search for such a deed among the papers on file in his office, and that the deed could not be found. The said witness further testified, that B. W. Starke was his predecessor in said probate office, and that when Judge Starke left the probate office, and turned over to witness the books and records of said office, that the said Starke took out all the deeds that had been recorded in his office for the purpose of collecting his fees, and that witness had never seen the deeds since.

"B. W. Starke then testified, that he was elected judge of probate, and took charge of the records of the probate court of Coffee county in the year 1862; that P. D. Costello was his predecessor, and was probate judge of Coffee county during the years 1858, 1859, 1860, and 1861; that when the said Costello turned over to witness the books and records of said office, that the said Costello took out all the deeds that had been recorded in said probate office, for the purpose of collecting his fees; that he (witness) had seen some of the deeds in the hands of Mr. Moody, as agent of Judge Costello, while Mr. Moody was acting as witness' clerk in said office, and that witness had never seen any of said deeds since. He does not know where they are. The witness further testified, that he had no recollection of ever seeing the particular deed spoken of. The plaintiff then offered to read to the jury, as evidence, the following transcript of a deed from Wilkerson Ezell to plaintiff for the land sued for, from the records of the probate court of Coffee county."

The deed [as set forth in said transcript] was attested by two witnesses, G. B. Clark and Jeremiah Sutherlin, but the name of the grantee, as therein written, was *S.* D. Chancey.

The form of probate of the conveyance was as follows:

"The State of Alabama, } I certify that on this day
Coffee county. } personally appeared before me G. B. Clark, and after being duly sworn says, that after being informed of the within contents of the within conveyance, that Wilkerson Ezell, for himself, and F. F. Ezell, whose signature appears to the same, assigned it voluntarily on the day the same bears date, as did himself and Jeremiah Sutherlin as witnesses.

"April 3d, 1860. WM. F. BEARD, J. P."

It was also marked—

"Received for record April 3d, and recorded April 12th, 1860. P. D. COSTELLO, Register."

"The defendant objected to said transcript being read to the jury as evidence—1st, because said transcript purports to be made to *S.* D. Chancey, and not to *L.* D. Chancey; 2d, because the deed had never been probated, acknow-

ledged, and proven, as required by law; 3d, that there was no proof that the transcript offered in evidence was a copy of the deed spoken of by plaintiff; 4th, that there was no proof of the execution of this deed, of which the transcript purported to be a copy; and, 5th, that there was no proof of the loss or destruction of the original deed. The court overruled defendant's objections, and allowed the plaintiff to read said transcript to the jury as evidence, and the defendant excepted.

"The defendant then introduced as a witness B. M. Weekes, who testified, that he (witness) was judge of the probate court of Coffee county, and was the custodian of the records of said court, and who brought the original records into court, and after an inspection of said records in open court, testified that the records showed that the original deed which had been put upon record was made to *S.* D. Chancey, and not to *L.* D. Chancey."

"The defendant then introduced G. B. Clark, who, according to the said transcript, was one of the subscribing witnesses to said deed, who testified that he had no recollection of ever signing said deed as a witness; that he never heard any contract between the plaintiff and Wilkerson Ezell about the sale of any land; and that if witness ever signed the original deed, it was brought to him some time and he signed it without knowing what it was; that witness had no recollection or knowledge of ever proving said deed before Wm. F. Beard."

"The defendant then moved the court to exclude said transcript from the consideration of the jury; but the court overruled defendant's motion, and the defendant duly excepted."

The bill of exceptions does not state that it contains all the evidence.

The action of the court to which defendant excepted is now assigned as error.

W. D. Roberts, for appellant.—Section 1544 of the Revised Code is the only authority for introducing the transcript of a conveyance of property, when properly recorded,

as evidence when the original conveyance is lost or destroyed. Section 1550 of the Revised Code requires the proof or acknowledgment to comply substantially with the forms in sections 1548 and 1549 of the Revised Code. The proof of the execution of the conveyance is not a substantial compliance with the form in section 1549 of the Revised Code. There was no proof of the loss or destruction of the original deed, and the objections of the appellant to the introduction of the transcript as evidence should have been sustained by the court below.

W. C. OATES, *contra*.—A bill of exceptions is always construed most strongly against the party excepting.—*Andress v. Broughton*, 21 Ala. 200; *Gillespie's Adm'r v. Burleson*, 28 Ala. 552.

The party excepting must set out in his bill so much of the evidence as will show affirmatively that the court erred to his prejudice in the rulings complained of.—*Brazier & Co. v. Burt*, 18 Ala. 201; *Southron v. O'Riley*, 21 Ala. 228; *Lewis v. Paull*, 42 Ala. 136; *Thomason v. Groce*, 42 Ala. 431.

In the case at bar the bill of exceptions fails to show that all the evidence on the trial is set out in it.—*Owens v. Calloway*, 42 Ala. 301; *May v. Lewis*, 41 Ala. 315; *Kirksey v. Hardaway*, 41 Ala. 330; *Bridges v. Cribbs*, 41 Ala. 367.

PECK, C. J.—The transcript of the deed from Ezell to the appellee, the plaintiff below, was improperly admitted in evidence.

1. The loss or destruction of the original was not sufficiently proved. The plaintiff was examined as a witness on her own behalf, and stated that she left the original deed in the office of the probate judge of the county for registration in 1859, and had never seen it since.

The probate judge then in office had been succeeded by another, and it was shown that when he turned over the books and records of the office to his successor, he took away with him the deeds that he had recorded, for the purpose of collecting his fees. As it did not appear the plaintiff had paid for recording her deed, the presumption is, it

was taken away by the outgoing judge with the other deeds, that he might collect his fees. The probability, therefore, is, the deed is still in his hands, and may be had by the use of the proper means.

2. The certificate of the probate of the said deed on the transcript does not show that the same was proved, substantially in the form given in the Revised Code.—§ 1549. 1. It does not state the name and style of the officer by whom the proof of the said deed was taken. 2. It does not show that the subscribing witness, by whom the proof was made, was known to the said officer. 3. It is not stated that the grantor executed the deed in the presence of said witness, and in the presence of the other subscribing witness. 4. Or that said witness attested the same, in the presence of the grantor and of the other witness, and that such other witness subscribed his name as a witness in his presence.

The form of probate given in the Code is intended, as far as possible, to protect parties from deception and imposition, against whom the transcript of a deed is offered as evidence, in place of the original, without proof of execution, in open court.

If the officer fails to certify that the witness by whom the proof of execution is made is known to him, what security is there that the deed itself may not be a forgery, a mere simulated paper; or, if not a forgery, that the witness by whom it was proved did not personate the real subscribing witness? This, perhaps, is the most essential requisite of the form given, but they are all important to protect suitors and prevent injustice.

The judgment must be reversed, and the cause remanded for another trial. In the mean while, the plaintiff, by the proper diligence, may be able to recover the original deed, or to show its loss or destruction, and thereby lay the foundation for secondary evidence.

Again: The transcript, on the proof made, without more, was irrelevant to show title in the plaintiff. It should have been proved that the plaintiff's vendor, Ezell, at the time the alleged deed was made, was in possession of the land

conveyed by it, claiming the same or exercising acts of ownership over it. Without this, no recovery could be had, even as against a party in possession, without any claim of title, without any paper title.—*McCall v. Pryor*, 17 Ala. 533; *Cox v. Davis*, 17 Ala. 714.

We lay no stress on the discrepancy in the initial letter of the plaintiff's christian name, and of the christian name of the grantee, as it appears in the transcript. The L was no doubt mistaken for an S by the register in recording the deed, and should be treated as a mere clerical misprision.

If the original deed proves to be lost, the transcript, notwithstanding the defective character of the certificate of probate, although not competent to prove the execution of the original, that being otherwise proved, may be admissible to show its contents.

Let the judgment be reversed, and the cause remanded for further proceedings, at the cost of the appellee.

[NOTE BY REPORTER.]—The opinion in this case was delivered at the June term, 1871, but was left out of the 46th volume of Reports, on account of a want of space.

FOSTER *vs.* THE STATE.

[INDICTMENT FOR RESISTING OFFICER, &C.]

1. *Evidence, what is a charge on effect of; when erroneous.*—A charge of the court, in a criminal case, that "if the jury believe the evidence, they are bound to find the defendant guilty," is a charge upon the effect of the evidence. If the court gives such a charge without being required to do so by one of the parties, it is such an error as will cause a reversal of the judgment.

APPEAL from Circuit Court of Pickens.
Tried before the Hon. LUTHER R. SMITH.

THE indictment in this case was framed under section 3580 of the Revised Code, for resisting officer in execution of process. The second count, under which the conviction was had, charged that "Joseph S. Foster did, knowingly and willfully, resist an officer in attempting to execute a legal process against Monroe Clark, charged with burglary," against the peace, &c.

Defendant having pleaded not guilty and gone to trial on that plea, the State introduced one R. G. Parker, who was permitted, against objection of defendant, to testify that he (witness) was elected justice of the peace in the year 1864 for Pickens county, and then duly qualified and commissioned and gave bond, and under such election and qualification has been acting as justice of the peace up to the present time. Parker further testified that he acted as justice of the peace from 1864 up to the present time, without any other election, or appointment, or authority, than that conferred by his election and qualification thereunder in 1864; that on the 5th of February, 1870, witness, as such justice of the peace, issued a warrant for Monroe Clark, charged with burglary; that after hearing the evidence on preliminary investigation, witness decided to bind over said Clark, and in default of bail issued a *mittimus* requiring the jailor to imprison said Clark, and turned over this *mittimus* and the prisoner to one C. McCartney, as deputy sheriff, to execute. The witness further testified, that at the time of handing the warrant to McCartney, witness ordered him verbally to arrest said Monroe Clark.

The sheriff testified, that "he had never appointed McCartney as a deputy sheriff in any way pointed out by law, and had not especially deputised him to execute process in this case, but had given him verbal authority to execute process as a deputy sheriff."

"The State then proved, that within twelve months before the finding of the indictment, and in Pickens county, the defendant resisted McCartney with a double barrel shot gun, and prevented McCartney from imprisoning said Clark under the *mittimus*."

This being all the evidence, the court charged the jury,

that if they believed the evidence, they were bound to find defendant guilty under the second count of the indictment. To this charge defendant excepted.

TERRY & WILLET, and M. L. STANSEL, for appellant.—1. McCartney, the person resisted in the execution of the process, was not a deputy sheriff, for the reason that he had never been appointed or qualified as such.—Revised Code, § 155. And he was not an officer.—*Kavanaugh v. The State*, 41 Ala. 399. Hence, there can be no conviction in any possible phase of this case, under either count of the indictment.

2. The charge given is not shown to have been requested by either of the parties, and is a charge upon the effect of the evidence, and erroneous.—*Edgar v. State*, 43 Ala. 313.

3. McCartney, under the evidence, was neither an officer *de jure* or *de facto*. The decision in *Heath's Case*, therefore, does not apply.

ATTORNEY-GENERAL, and J. A. BILLUPS, *contra*.—The official acts of an officer *de facto* are valid, so far as the rights of the public or of third parties are concerned, and can not be called in question in a proceeding to which he is not a party.—*Heath v. State*, 36 Ala. R. Foster was a stranger to this proceeding, and therefore will not be permitted to question the validity of the acts of McCartney as deputy sheriff, nor of Parker as justice. Neither the title of an officer, nor the validity of his acts as such, can be indirectly called in question in a proceeding in which he is not a party.

"This doctrine dates as far back as the Year Books, and it stands confirmed, without any qualification or exception, both in England and in the United States.—*Heath v. State*, 36 Ala., and authorities there cited.

PECK, C. J.—The judgment in this case must be reversed. The charge of the court was a clear invasion of the province of the jury. It was a charge upon the effect

of the testimony, and was given without being required by either of the parties.—Revised Code, § 2678.

The evidence, if believed, did not prove that McCartney was a deputy sheriff, or other legal officer.

The sheriff testified that he had never appointed him a deputy sheriff in any way pointed out by law. Had not specially deputed him as deputy sheriff, to execute the papers in this case, but had verbally authorized him to execute process as deputy sheriff. This did not make him a deputy sheriff.—Code, § 155.

The witness Parker, by whom the process was issued, testified he had verbally ordered the said McCartney to arrest the prisoner named in the writs set out in the bill of exceptions. This did not make him a deputy sheriff or a constable, nor authorize him to perform the duties of a constable.—Revised Code, § 852. There was no evidence of a vacancy in the office of constable, or that the constable of the precinct or beat was interested, or otherwise prevented from executing the process.

The evidence, if believed by the jury, was by no means sufficient to justify the charge of the court, "that if they believed the evidence, they were bound to find the defendant guilty, under the second count in the indictment."

Let the judgment be reversed, and the cause remanded for another trial.

[Note.—The opinion in this case was delivered at the June term, 1871.]

THEDFORD *vs.* McCLINTOCK.

[ACTION ON PROMISSORY NOTE.]

1. *Promissory note; what consideration does not defeat collection.*—It is no defense to a suit upon a promissory note, that the consideration was a horse purchased from the plaintiff for the military service of the Confederate States, within the knowledge of the plaintiff, and that the horse was so used.
2. *Secus*—If an intention or purpose of the plaintiff to have the horse so used be shown.
3. *Same; what evidence admissible to show purpose of contract.*—Upon the trial of such an issue, any evidence is admissible to show the purpose of the parties in making the contract.

APPEAL from the Circuit Court of Clay.
Tried before Hon. CHARLES PELHAM.

Appellant, Thedford, sued the appellee, McClintock, upon a promissory note made on 26th day of November, 1865.

Defendant, among other pleas, pleaded the following:

"3d. That the plaintiff's cause of action is founded on the sale of a horse by plaintiff to defendant for the purpose of using said horse in the Confederate service, of the late Confederate States, and was actually used for said purpose in said service," &c.

"4th. That the note mentioned in plaintiff's complaint was given in renewal of a note made by defendant to plaintiff, in Randolph county, Alabama, in the year 1863, for a horse to be used by the defendant in the military service of the late Confederate States, which were at that time engaged in rebellion and waging war against the United States; and said horse was actually used in said unlawful service, and died therein; and said plaintiff well knew before and at the time of said sale of said horse that said horse was purchased for the purpose of being used in the aforesaid military service of the Confederate States, which

were then in rebellion and waging war against the United States," &c.

The 5th plea was the same in substance with the 4th, except that it alleged that the horse "was sold to defendant for the purpose and with the intention on the part of plaintiff to be used in said military service, and for the purpose and with the intention of assisting the same on the part of plaintiff; and that plaintiff well knew that said horse was being purchased for the purpose and with the intention of being used in the military service aforesaid."

The court sustained a demurrer to the third plea, and overruled it as to the fourth and fifth pleas. The parties then went to trial on issue joined on the fourth and fifth pleas, and on the plea of *non assumpsit.*

The plaintiff having introduced the note in evidence, rested. Defendant testified in his own behalf, that he was at the time of the purchase of the horse a first lieutenant in the 7th Alabama (C. S.) Cavalry; "that he went out in plaintiff's neighborhood to purchase horses for the Confederacy;" that he purchased one horse of plaintiff for which he paid in Confederate currency, when plaintiff offered to sell another, and upon defendant's answering that he had no money, plaintiff replied that it made no difference, as witness could give his note and pay plaintiff when witness drew his money on his return to camp. Under this agreement defendant purchased said horse, and gave his note therefor. At the time of the purchase, witness had on the regular uniform of a first lieutenant of Confederate cavalry. Witness did not remember having shown plaintiff any papers authorizing defendant to purchase horses for the Confederate service. He, however, told plaintiff that he was getting up horses for his company.

Plaintiff asked defendant the following questions:

1st. "Was not that mare your property?"

2d. "Did you not buy her and give your note for her?"

3d. "Was not that mare your property after you gave your note for her?"

The court, upon the objection of defendant, refused to

allow the witness to answer either of these questions, and plaintiff duly excepted.

There was some evidence that in 1865 plaintiff and defendant agreed upon a considerable reduction upon the amount of the first note, and thereupon defendant executed the note sued on, and promised to pay it in a short time. The bill of exceptions recites, that "defendant introduced a witness who proved that when a horse was taken into the Confederate service the quartermaster always valued him."

The above was all the evidence. The court charged the jury—1st, that "if they believed from the evidence that plaintiff sold the defendant the horse in 1863, and that the defendant gave him his note therefor, and that at the time the note was given the horse was intended for the military service of the Confederate States, and that plaintiff knew it, and the horse was used in that service,—then said note, first given, was void; 2d, "that if the jury believed from the evidence that the note sued on had no other consideration than the sale of the mare as shown, then the second note is void, and the jury should find for the defendant."

Plaintiff excepted to these charges, and brings the case here by appeal, assigning as error the overruling of his demurrer, the refusal of the court to permit the defendant to answer the questions asked of him, and the charges excepted to.

Lewis E. Parsons, for appellant.—The note first given was not void, there being no agreement that the horse should be used, and the plaintiff not aiding in any way in carrying into effect the unlawful intention of the purchaser. *Krup v. Seligman*, 8 Barbour, 439; *Armstrong v. Toler*, 11 Wheaton, 258.

But if that note was void, the horse itself constituted a valuable and lawful consideration to support the new promise—*i. e.*, the note sued on.—*Oxford Iron Co. v. Quinchett*, 44 Ala. 487; *McElvain v. Mudd*, 44 Ala. 48.

James Aikin, *contra*.—The contract was void.—*Oxford*

Iron Co. v. Quinchett, 44 Ala. Rep. 487; *Oxford Iron Co. v. Spradley*, 46 Ala.; *Shepherd v. Reese*, 42 Ala. 329.

Whether a contract against public policy be executory or executed, no action can be brought either on the contract, or to recover back the consideration, or to recover judgment on a promissory note made in consideration of a cancellation of said contract.

There can be no rescision of a contract against public policy. Such contract is void at its inception, and there is nothing to rescind.—*Martin v. Ward*, 37 Cal.; Amer. Law Reg. (1870) 319.

B. F. SAFFOLD, J.—There can be no doubt that the defense set up would defeat the plaintiff's suit if sustained by the proof. The questions asked by the plaintiff, which the court would not allow to be answered, tended to elicit answers that might disprove this defense. While it would be manifestly illegal to have sold a horse to any one with the intention and purpose on the part of the seller to have it used in the Confederate service, there was no impropriety in merely selling a horse to a Confederate lieutenant. A contract, to be valid, must be founded on a consideration which is not *contra bonos mores*, nor against the principles of sound policy or the positive provisions of some statute law. Kent says the general and more liberal principle of discrimination is, that whether any matter, void by statute or by the common law, be mixed up with good matter, which is entirely independent of it, the good part shall stand, and the rest be held void; though if the part which is void depends on that which is bad, the whole instrument is void.—2 Kent's Com. 468; *Howe v. Synge*, 15 East, 440.

In *Armstrong v. Toler*, (11 Wheat. 258,) the following illustration of the law was declared: "Where A, during a war, contrived a plan for importing goods on his own account from the enemy's country, and goods were sent to B by the same vessel. A, at the request of B, became surety for the payment of the duties on B's goods, and became responsible for the expenses on a prosecution for the illegal importation of the goods, and was compelled to pay them: *Held*, that A might maintain an action on the promise of

B to refund the money. But if the importation is the result of a scheme between the plaintiff and defendant, or if the plaintiff has any interest in the goods, or if they are consigned to him with his privity, in order that he may protect them for the owner, a promise to repay any advances made under such understanding or agreement is utterly void." The mere knowledge of one party of the illegal conduct or intention of the other, is not sufficient to vitiate a contract between them. Some participation in the illegal act done or contemplated must enter into the consideration of the contract to have that effect. In *Bowery v. Bennett*, (1 Camp. N. P. C. 343,) where an action was brought against a prostitute to recover the value of some clothes which had been furnished by the plaintiff, Lord Ellenborough said, that the mere circumstance of the defendant being a prostitute, within the knowledge of the plaintiff, would not render the contract illegal. In order to defeat the action, it must be shown that the plaintiff expected to be paid out of the profits of the defendant's prostitution, and that he had sold her the clothes in order to carry it on.

If the sale of the horse was attended with such circumstances as were inconsistent with any other intention or purpose of the plaintiff than to have it used in hostility to the United States, the contract of sale would be void. Whether such purpose existed or not, must be determined by the jury. In this particular is the difference between this case and *The Oxford Iron Co. v. Quinchett*, (44 Ala. Rep. 487).

The judgment is reversed, and the cause remanded.

MICOU ET AL. *vs.* TALLASSEE BRIDGE CO.

[BILL IN EQUITY TO ENJOIN INVASION OF TOLL-BRIDGE FRANCHISE, AND FOR ACCOUNT, &C.]

1. *Act incorporating persons to build toll-bridge; creates a contract governed by the then existing law.*—An act of the general assembly of this State incorporating a company of persons, with authority to erect a toll-bridge across a river in this State, is a contract, which must be construed in reference to the laws as they existed at the date of its passage.
2. *Same; how such contract can not be impaired.*—Such a contract the general assembly can not impair by a second grant made some years after, to other parties, conferring upon them authority to erect another toll-bridge within three miles, by water, from the one first erected, over the same stream, when the first act was passed in 1837.
3. *Chancery; when will take jurisdiction to enjoin erection of toll-bridge.* If such second toll-bridge is erected within the distance prohibited by law, at the date of the first act, chancery will enjoin its use and abate it as a toll-bridge.
4. *Final decree; what not sufficient reason for disturbing.*—A decree disposing of the equities of the case and ordering a reference to the master, where the bill was filed in 1858, and the cause was brought to a hearing in 1860, will not be set aside as a nullity, because the case was not finally disposed of until after the end of the late war. If otherwise regular, such decree is valid.
5. *Same.*—In such a case, a final decree rendered after the restoration of the legal State government, will not be held void or irregular, because the reference upon which it is founded was commenced before the rebellion, and not concluded until after the restoration of the legal State government, when such order of reference was renewed after the restoration, and the report made under the authority of the renewed order.
6. *Same; what sufficient to support decree.*—A report on such a reference, after it is confirmed without objection or exception in the court below, will be held sufficient to support the final decree, for the amount of principal and interest ascertained and stated by the master on such renewed reference.
7. *Rehearing, application for; what questions will not be considered on.* On an application for rehearing, this court will not consider a question that raises a new assignment of error not insisted on in the court below, and not before insisted on in this court.
8. *Same; assignment of error; when held to be waived.*—An assignment of error not made or not insisted on in this court at the hearing, is to be regarded as waived.

APPEAL from the Chancery Court of Tallapoosa.
Heard before the Hon. JAS. B. CLARK.

The facts are sufficiently stated in the opinion.

JNO. W. A. SANFORD, and GOLDTHWAITE, RICE & SEMPLE, for appellant.
W. P. CHILTON, and G. W. GUNN, *contra*.

[No briefs reached Reporter.]

PETERS, J.—This is a suit in chancery, commenced by the Tallassee Toll-Bridge Company as complainants, in the 14th district of the middle chancery division, on the sixth day of September, 1858. The parties were all brought into court, and the cause submitted upon the pleadings and proofs as to some of the defendants, and upon the decree *pro confesso* as to others, at the November term, 1859, of said court, and held up for consideration and decree in vacation or at the next term. And at the May term, 1860, the decree was rendered disposing of the equity of the case, and directing a reference to the master to take and state an account as ordered in the decree. The master took this account and made a report at the November term of said court in the year 1860. This report was allowed to stand over without confirmation, and the master was ordered to make a further report at the next term, which was the May term, in the year 1861. At this term the register read a report, which was ordered to lie over. The report thus taken is set out in the record. But it merely shows that the reference ordered had been deferred by the register to enable the complainant to make application to the court respecting the same. At the May term, 1861, of the court, the order of last term was vacated, and the register was directed to report as required by the complainant to this term, if practicable; but if not, then at the next term of said court. At the May term, 1862, there was some further reference directed, and a report made at the November term, 1862, when a further reference was ordered, and the cause was continued. In 1863, at the May term of said court, the register read a re-

port, which was ordered to lie over. This report is set out in the record, but it only shows that the register had been unable to hold the reference ordered. The cause was then continued from term to term until the May term, 1867, when, on motion of complainant, it was "ordered that the register may hold the reference ordered and directed by a former decree of this court, at Tallassee, and the cause is continued under former order." The register reported that he was unable to hold this reference. This report was confirmed, and a further reference was ordered, with instructions to the register, which are set forth in the decree directing the reference. Under authority of this order, the register made a report, which is dated November, 1867. This report was read, and the cause continued until November term, 1868, when the final decree was made. There was no objection or exception to the report thus made, and the same was confirmed.

Upon this state of the record, the learned chancellor, in the court below, based his final decree, which is dated November 25, 1868. And I recite so much of it below as I suppose is intended to be assailed by the errors assigned by the appellants, that is to say: "It having been referred to the register of this court, as master in chancery, at the June term, 1862, to take and state an account for *principal and interest* due complainants, in the bill mentioned, and the register at the same term of the court having reported that there was the sum of $2,578 79; and it having again been referred to the register to ascertain and report at the November term, 1867, the amount of interest that had accrued on the amount reported by the register of the court as aforesaid, and the said register having reported that there was interest to the amount of $846 65 accrued on said amount, *and that the amount for principal and interest amounted to the sum of $3,425 39, and the said several reports having been confirmed by the court,* It is therefore ordered and decreed by the court, that the complainants recover of defendants the sum of $3,425 39, and the costs of this court," &c.

From this decree the appellants, who were the defend-

ants in the court below, appeal to this court, and here assign the following errors:

"1. The overruling the demurrer to the complainants' bill of complaint.

"2. The decree against the defendants and the order of reference to the register to take the account.

"3. That there was no lawful court in Alabama from January 11th, 1861, till the rightful government was established, and all the decrees and decretal orders rendered during that time are void.

"4. The rendition of the final decree is based upon the pretended reports of persons who were not registers of the court."

This bill is filed to enjoin the defendants from keeping open, for toll, an opposition toll-bridge, within two miles of the toll-bridge of the complainants, and to have said opposition bridge abated, and to compel the defendants to account for the improper receipts for tolls received at said opposition bridge.

The allegations of the bill show that the complainants, as a body corporate, created by act of the general assembly of this State, approved June 30, 1837, built a toll-bridge at Tallassee, across the Tallapoosa river, in this State, at very considerable expense to themselves, under the terms and conditions prescribed in said act, and gave bond to keep the same in repair, as required by law. Said act is made an exhibit to the bill. After the complainants had erected their said bridge under authority of said act, and had the same in successful and profitable operation for some years, the defendants, under pretense of authority of a certain act of the general assembly of this State, approved January 30, 1850, entitled "An act to incorporate the Central Plank Road Company," erected an opposition toll-bridge over the same stream within two miles of their bridge, by means of which the complainants were greatly injured in their business by loss of tolls thus occasioned, so that the receipts from their bridge had been barely sufficient to keep it in repair, and had yielded them nothing in the way of net profits. And it was also alleged that if

said bridge is allowed to stand and withdraw the custom and toll from complainants' bridge, that they will be greatly damaged in future as they have already been in the past.

The act of June 30, 1837, establishing a bridge company to build the toll-bridge over the Tallapoosa river, is a contract by which the State grants certain franchises to the corporators, in consideration that they agree and bind themselves to erect the bridge and keep it in repair, and permit the passage of the citizens of the State and their property over it at certain specified rates of toll.—*Dartmouth College v. Woodward*, 4 Wheat. 629. This contract, like all other contracts, includes the laws defining its stipulations at the time it is entered into.—*Von Hoffman v. City of Quincy*, 4 Wall. 535, 550; *Bronson v. Kinzie*, 1 How. 319; *McCrakin v. Hayward*, 2 How. 612; *Planters Bank v. Sharp et al.*, 6 How. 327; *Beers v. Houghton*, 9 Pet. 359; *Ogden v. Saunders*, 12 Wheat. 231; *Mason v. Haile*, 12 Wheaton, 373; *Sturgis v. Crowningshield*, 4 Wheaton, 122; *Green v. Biddle*, 8 Wheat. 92; *Terret v. Taylor*, 9 Cranch, 43; *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 Cranch, 164; *People v. Bond*, 10 Cal. 570. Then, the legislature can not alter or impair such a contract without the consent of the corporators, unless this power was reserved at the time it was made.—Const. U. S., Art. I, § 10, cl. 1; Paschall's Const. U. S., pp. 153, 155, 156, and cases there cited. At the time the act last above referred to was passed, the law of this State forbid any toll-bridge to be established within three miles of one already erected. Aik. Dig. p. 514, § 29. This being the law, it follows that the legislature could not give authority to set up a second toll-bridge within the prohibited distance of three miles from the one already established. And if such second bridge was so set up, a court of equity would restrain the owners from using it as a toll-bridge, to the injury of the owners of the one already established.—*Gates v. McDaniel et al.*, 2 Stew. 211; *Harrell & Croft v. Ellsworth et al.*, 17 Ala. 576; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 146. The complainants' bill was not without equity, and the de-

murrer was properly overruled. This disposes of the first assignment of error.

The allegations of the bill are fully sustained by the proofs. The defendants offered no evidence in support of their answer. And the evidence for the complainants fully overturns the denials of the answer. In such case the complainant is entitled to relief. Here the decree does not go beyond the allegations and the proofs. There was no error, then, in the decree fixing the complainants' equity and making a reference to the master. This decree was made before the passage of the ordinance of secession, and was valid. This disposes of the second assignment of error.

The decrees taken in this cause during the supremacy of the rebellion were all interlocutory orders, and there was no final action taken on any of them. They amounted to so many continuances. This would have been the legal effect of the interposition of the insurgent authority, even if no continuances had been granted. There was no court to try the cause, and it necessarily stood continued. After the restoration of the rightful State government, there was a new reference to the master, to state an account between the parties therein named. If the directions given for the taking and stating this account were not satisfactory to the defendants, other directions should have been asked, and the report should have been excepted to before its confirmation. It is too late to raise the objection here for the first time, when the report is not on its face erroneous. *Gerald v. Miller's Distributees*, 21 Ala. 433. The final decree was made after the suppression of the rebellion and the restoration of the legal State government on the 25th of November, 1868, and it is based upon the master's report made to the court and confirmed at that term. And it supplies the facts upon which the final decree rests. Such a decree is not erroneous for the reasons assigned in the third and fourth assignments of error. It appears that appellants gave bond suspending the decree in the court below —Rev. Code, § 3489.

The decree of the chancellor in the court below is there-

fore affirmed, with damages, and costs of this appeal in this court and in the court below.

[NOTE BY REPORTER.—An application for rehearing was made by appellants' counsel shortly after the delivery of the foregoing opinion, to which the following response was made:]

PETERS, J.—The ground relied on for a rehearing in this case is the defective service of the process upon the minor defendants, who were under the age of fourteen, when the bill was filed in the court below.

This allegation is but a new assignment of error, not insisted on in this court before. The record shows that the minor defendants answered the bill by guardian *ad litem;* and although this was not very regularly done, no objection was made to the irregularity in the court below or heretofore in this court. The rule of practice requires that the error complained of shall be concisely stated in writing, so as to point out in what the error consists. Errors not so assigned are to be regarded as waived. And the assignment will not be sufficient if it is merely general, and not particular, and directed to that portion of the record in which the error complained of is supposed to exist.—*Eslava v. Lepretre*, 21 Ala. 504; *Freeman v. Swan*, 22 Ala. 106; *Curry v. Woodward*, 44 Ala. 305. And when the error is properly assigned, this court will not feel bound to notice it, unless it is pressed in the brief or the argument of the counsel for the appellants on the hearing, except, perhaps, a want of jurisdiction.—*Arrington et al. v. Roach, Adm'r*, 42 Ala. 155; *Henderson, Adm'r, v. Huey et al.*, 45 Ala. 275, 284; *Long v. Rodgers*, 19 Ala. 321; *Withers v. Spears*, 27 Ala. 455; *Howard v. Coleman*, 36 Ala. 604. There were four assignments of error made upon the record at the hearing. There are none of them that raise the objection insisted on in this application. An objection not insisted on is an objection waived.—*Evans v. St. John*, 9 Port. 186, and cases *supra*. Governed by the practice

established by the foregoing authorities, the rehearing is denied, with costs.

[NOTE BY REPORTER.—After the denial of the first application for rehearing, the appellants made another, which was denied, with costs. The main opinion in the case was delivered at the June Term, 1871.]

RACHEL WILLIAMS *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Bill of exceptions; part of record in criminal case.*—In this State, a bill of exceptions taken and signed in a criminal prosecution, as required by law, is a part of the record.
2. *Same; appeal in criminal case, duty of court as to.*—On appeal to the supreme court from the judgment in such a prosecution, no assignment of errors or joinder in error is required; but the court examines the whole record, and gives judgment upon the whole record, as the law demands. If the errors apparent on the record are injurious to the accused, the cause will be reversed.
3. *Charge to jury; what erroneous.*—Where the presiding judge in the court below enumerates a portion of the witnesses for the State, and charges the jury upon this testimony of the witnesses thus enumerated. "if you believe the balance of *this* testimony for the State, (leaving out the testimony of Susan Williams, who had been impeached,) then the defendant is guilty of murder in the first degree." Such a charge is erroneous, if there is any testimony for the accused and the testimony is at all conflicting.
4. *Charges asked in writing; must be given or refused as asked.*—The accused in a criminal case is entitled to have the charges moved for by him in writing given in the very terms of the written charges, if such charges are not abstract and are proper enunciations of the law applicable to the case. It is error to refuse such charges, though charges similar in principle have already been given. The rule of error without injury does not apply in such a case. The right is absolute, and must be enforced.
5. *Alibi; charge as to, what erroneous.*—A charge that "the law regards evidence to prove an *alibi* among the weakest and most unsatisfactory of all kinds of evidence," is illegal. An *alibi* is a fact, and its existence in a criminal case is established by like weight of evidence that may be required as to any other fact.
6. *Court and jury; province of as to evidence.*—The court judges what evi-

dence has been delivered to the jury, but the jury are the judges of its weight, and its weight upon their own minds.

7. *Jury; duty of, as to weighing and rejecting testimony of witness.*—The jury can not capriciously reject the testimony of a witness that has been delivered to them on the trial; but they may reject the evidence of a witness who has been successfully impeached. But even in this they must be governed by reason. Reason is the soul of the law.—Coke Litt. 232; 28 Ala. 71.

APPEAL from the Circuit Court of Butler.
Tried before Hon. P. O. HARPER.

THE appellant, Rachel Williams, was indicted for the murder of Jack Jones, tried, found guilty of murder in the first degree and sentenced to imprisonment in the penitentiary for life.

The record is voluminous, setting out at length the testimony of some twenty-five witnesses, besides a lengthy written charge of the court. It would serve no useful purpose to attempt to give even an abstract of this testimony, or of the charge of the court; the errors mainly discussed being based upon portions of the written charge, which, together with the evidence upon which it was based, are fully set forth in the opinion, and upon the refusal to give certain written charges which will be found below.

The bill of exceptions recites: "When the court had finished reading to the jury its written charge, the defendant excepted to the charge as follows: To the charge as a whole, and to each sentence and paragraph thereof separately. Defendant's counsel stated to the court in this connection, and before the jury had retired, that it would consume time to examine the charge minutely and specify the particular parts thereof to which separate exceptions were taken; that portions of the charge might be unobjectionable; and that if it should become necessary defendant would thereafter specify the particular portions, or each portion separately of the charge, to which a separate exception was taken. The court assented to this proposition, and defendant's counsel did not then specify each portion separately of the charge to which a separate exception was taken; and it was under the understanding aforesaid that the foregoing sep-

arate exceptions to the charge are stated." Here follow specific objections setting forth the particular parts objected to.

The defendant requested the court to give the following written charges, each of which the court refused to give; to each of which refusals the defendant duly excepted. It may be proper to add, however, that the subject-matter of these charges had been enunciated in the general charge:

"1st. That the jury are to determine for themselves what evidence has been introduced in the cause, and what the evidence proves; and that they are not to take the statement of the court in its charge as to the evidence as being what the evidence is in the cause, as contended for by the State; but are to determine for themselves what the evidence is.

"2d. That it is for the jury exclusively to determine whether they will believe any witness who has been examined in the cause or not; and this, whether the witness be black or white.

"3d. That the law considers it better that ninety and nine, or any number of guilty persons should escape, than that one innocent person should be convicted.

"This charge the court refused to give, saying it was good law, but not proper to be given to the jury; to which refusal the defendant excepted.

"4th. That unless the evidence against the prisoner, Rachel Williams, should be such as to exclude, to a moral certainty, every supposition but that of her guilt of the offense imputed to her, the jury must find her not guilty.

"5th. That the jury must find the defendant not guilty, unless the evidence against her is such as to exclude, to a moral certainty, every supposition but that of her guilt."

JOHN GAMBLE, and THOS. J. JUDGE, for appellant.
HERBERT & BUELL, *contra*.

PETERS, J.—This is a criminal prosecution by indictment against Rachel Williams, the appellant, upon a charge of murder. The accused was found guilty of murder in

the first degree on the trial in the court below, and sentenced to confinement in the penitentiary for life. From this sentence she appeals to this court.

The questions chiefly argued at the bar here arise upon the bill of exceptions to the charge of the court on the trial in the court below, and to the refusal of the charges asked by the accused.

In all criminal prosecutions, in this State, the constitution secures to the accused "a speedy public trial by an impartial jury of the county or district in which the offense was committed."—Const. Ala. 1867, art. 1, § 8. The judges of the courts are sworn to support and defend this right, as a part of the constitution of the State.—Const. 1867, art. 15, § 1. This oath is best kept by a strict enforcement of the law governing the procedure in criminal prosecutions. This law requires that the accused shall be tried by a jury who are sworn a true verdict to render "according to the evidence."—Rev. Code, § 4092. This verdict, then, must rest upon the whole evidence deposed upon the trial, and not on a part of it only.—*Ogletree v. The State*, 28 Ala. 693. The rule upon the discharge of this duty has been laid down by this court. It is this: "In civil cases, where there is conflicting testimony as to the existence of any fact necessary to be established by either party, the jury are under the necessity of weighing the evidence, and deciding in favor of the party on whose side the evidence preponderates. But in criminal cases, the humanity of our law requires that the guilt of the accused should be proved. It is not sufficient that the weight of evidence points to his guilt. The jury must be satisfied beyond a reasonable doubt of his guilt, or he must be acquitted."—*The State v. Marler*, 2 Ala. 43, 47. This can only be done when all the evidence delivered in the cause is considered by the jury, and allowed to have its due weight. Therefore, a charge of the court which has the effect to withdraw a portion of the evidence from the jury, or ignore it, and instructs them to base their verdict on the "balance of this testimony," is erroneous; because it violates the above rule of law. In this case, including the record offered by the State, there

were about twenty-five witnesses examined on both sides; fifteen by the prosecution and ten by the accused. The learned judge, in his charge on the trial, enumerates eight of these witnesses for the State, and calls attention to their testimony, leaving out all mention of the evidence for the accused, which, if it should be credited, proved quite a different state of facts. Then he charges the jury: "If you believe the evidence of *this* testimony for the State, (leaving out the testimony of Susan Williams,) then the defendant is guilty of murder in the first degree." "This testimony" means that of the eight witnesses enumerated by the court, omitting entirely the ten witnesses examined for the accused, six of whom had testified that the persons supposed to have done the actual killing, and with whom Mrs. Williams, the accused, was supposed to have confederated, were six miles away from the scene of the killing on the night of its perpetration. And it was through the agency of these persons that Mrs. Williams was connected with the criminal act. The evidence of these ten witnesses for the accused may have been very slight, yet it was error so to charge as to withdraw it from the jury.—*Upson v. Raiford*, 29 Ala. 188; *Allman v. Gann*, 29 Ala. 240; *Cain v. Penix*, 29 Ala. 370.

The theory of the prosecution is, that Mrs. Williams, the accused, procured Lewis Ashford and Solomon Murphy to take the life of Jack Jones. The proof shows that Jones was shot and killed in the fall of the year 1869. There was conflict in the testimony, whether Ashford and Murphy, or either of them, were at the house of Jones where he was killed on the night of the killing, or whether they were not six miles away in another place when Jones was shot and killed. On such a state of the evidence, it is error for the court to charge the jury, "if they believe *all this* testimony for the State, the defendant is guilty of murder in the first degree. There can be no ground for a reasonable doubt, if *this* tesmony is true." This charge, besides ignoring all the conflicting evidence in favor of the defendant, is a charge upon the effect of the evidence, which is not permitted where there is any conflict in the testimony.—

Walker, Adm'r, v. Walker's Adm'r, 41 Ala. 353; *Hall v. Morris*, 41 Ala. 510; Rev. Code, § 2678. This charge was therefore erroneous.—*Nelson v. Stanley*, 28 Ala. 514; *Edgar v. The State*, 43 Ala. 312; *Dill v. The State*, 25 Ala. 15.

The court also charged the jury that "the law regards evidence to prove an *alibi* among the weakest and most unsatisfactory of all kind of evidence." In this case, an *alibi* of two of the persons supposed to have perpetrated the murder was a question of material importance as to the guilt or innocence of the accused. Such a charge was incorrect. It was calculated to mislead the jury. An *alibi* is a fact, and its existence is established just as any other fact may be, and the testimony to support it needs the same weight of evidence; no more, and no less.

It was ingeniously contended by the learned counsel for the State, that the exceptions to the written charge can none of them be considered here, because no specific objections were made at the time of the trial. And he rests this position upon what he conceives to be the practice of the supreme court of the United States.—See *Lincoln v. Claflin*, 7 Wall. 139; also, *Graham v. Crystal*, 2 Keys, 21; 37 How. Pr. R. 279.

In this State, since the adoption of the Code, the practice has been governed by the law as found in that compilation. The Code prescribes that "any question in law arising in any of the proceedings in a criminal case, tried in the circuit or city court, may be reserved by the defendant, but not by the State, for the consideration of the supreme court; and if the question does not distinctly appear on the record, it must be reserved by bill of exceptions duly taken and signed by the presiding judge as in civil cases." Rev. Code, §§ 4302, 2754, 2755. When the bill of exceptions is so taken and signed as required and allowed by the statute, it becomes a part of the record in the case in which it is taken. Such bill of exceptions "must state the point, charge, opinion, or decision wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible."—Rev. Code, § 2755. When the case comes to this court upon appeal, "no assignment of errors

nor joinder in error is necessary; but the court must render such judgment on the record as the law demands."—Revised Code, § 4314. The court here looks to the whole record as it comes up to the court, and if that shows an error in any part of it injurious to the accused, there should be a reversal. The record must show that the court, in the trial below, has proceeded as the law demands. If the whole charge is wrong, or if any part of it is wrong, it is error. The law intends that no innocent person shall be convicted. This result is supposed to be secured by proceeding according to the process of law; that is, by an enforcement of the law in a lawful way.—*Weatherford v. The State*, 43 Ala. 319, 322. The whole record should show that this has been done.—Const. Ala. 1867, art. 1, §§ 8, 9, and 10. It is not to be presumed, in a criminal case, that any part of the record of the proceedings have been omitted by the consent of the accused. Then, what the record does not show, has not been done. And what it shows has been done illegally, should be corrected. The rule relied upon as governing the practice of the United States supreme court has never been adopted in this State, at least since the enactment of the Code.

But besides this, the objections to the charge of the court below are sufficiently intelligible. This appears from the record itself. The learned counsel for the State is mistaken in supposing that this does not appear from the record.

Besides the foregoing objections to the charge given by the court, there were five charges in writing moved for by the accused, which were refused by the court below, and exceptions taken.

It is the right of a party to a suit to have such charges as he may ask in writing "given or refused in the terms in which they are written." If such charges are correct expositions of the law, and not abstract, they must be given as the statute requires. And it is not a sufficient ground to refuse such charges, that the same legal propositions embraced in them have been substantially enunciated in other

charges already given by the court. It is the right of a party to have the law charged in his own language, if the legal principle it contains is correct. The rule of error without injury does not apply in such a case. It is error to refuse such charges, if correct.—*Polly v. McCall*, 37 Ala. 20, 31, 32; Revised Code, § 2756; *Edgar v. The State*, 43 Ala. 45.

The first charge asked and refused was erroneous. It was too broad. The jury are the sole judges of what the evidence proves, because they alone judge the weight of the evidence and its effect upon their minds; but they are not the sole judges of what evidence has been introduced. This is the province of the court. There was no error in refusing this charge.

The second charge was also wrong. The jury can not capriciously refuse to believe a witness who is not impeached or contradicted. But where there is conflict, they may believe which they please. Yet, even in this, they should be governed by reason. *Reason is the soul of the law.*—Coke Litt. 97, 183, 232; 7 Coke, 7. The third, fourth and fifth charges should have been given. They announce admitted legal propositions, which are applicable to the evidence in this case.—*The State v. Newman & Lever*, 7 Ala. 69, 70; *The State v. Murphy*, 6 Ala. 845, 852.

The judgment of the court below is reversed, and the cause is remanded for a new trial. The appellant, the said Rachel Williams, will be held in custody until discharged by due course of law.

[Note by Reporter.—The opinion in this case was delivered at the June term, 1871, but did not come into the Reporter's hands in time to be reported earlier.]

WARE, ADM'R, *vs.* ST. LOUIS BAGGING AND ROPE COMPANY.

[ACTION ON JUDGMENT.]

1. *Pleading; nul tiel corportion, when irrelevant.*—A plea of *nul tiel* corporation to a complaint which describes the plaintiffs as "The St. Louis Bagging and Rope Company," without more, is irrelevant, and may be stricken out.
2. *Same; parties plaintiff, imperfect description of, not available on error or in arrest of judgment, if not previously objected to.*—When the complaint contains a substantial cause of action, and judgment is rendered on the plea of the general issue, the imperfect description of the character in which the plaintiffs sue, not previously objected to, is not available in arrest of judgment, or on error.
3. *Presumptions on appeal; when demurrer presumed withdrawn.*—A demurrer copied into the transcript, upon which no action of the court appears to have been taken, will be presumed to have been withdrawn.
4. *Evidence; waiver; admission of evidence without objection below, not available on error.*—Where the minutes of a court and the original papers in a cause are used in evidence in another court without objection, and admitted to be correct, exception to the irregularity of their admission can not be made for the first time in this court.
5. *Amendments; judgment amended, on appeal.*—A judgment against the defendant individually, when sued as administrator on a cause of action against his intestate, will be amended to conform to the complaint.
6. *Constitutional law; Art. IV, § 2, of the State Constitution, not violated, when statute complete within itself.*—An act of the legislature, complete in itself, intelligible without reference to any other, and not purporting to be amendatory of another, does not violate Art. IV, § 2, of the State constitution.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

THIS action was brought on a judgment rendered in the circuit court of Montgomery county, at the June term, 1867, by default, in favor of appellee, and against appellant's intestate, James H. Ware. It was commenced on the 4th day of March, 1869. On the 12th day of July,

1869, the plea of the general issue was filed, and on the 17th day of July, 1869, the defendant filed two other pleas, viz.: 2. *Nul tiel record;* 3. *Nul tiel corporation.* In both cases the appellee sued simply in the name of the St. Louis Bagging and Rope Company. At the trial, the court, on motion, struck the third plea from the file, and the defendant excepted, and thereupon the defendant withdrew his second plea, and the cause was tried on the general issue alone. A demurrer was also interposed, but it seems to have been abandoned. There was nothing tending in anywise to show that appellee was a corporation, except the following endorsement on the complaint in this case: "The plaintiff being a corporation, I acknowledge myself as security for the costs of this cause," to which entry the name of one of the attorneys of plaintiff was signed. After a trial by jury, and verdict and judgment for plaintiff, the defendant moved in arrest of judgment upon the following grounds: 1. The complaint does not show that the plaintiff has any cause of action as against the defendant. 2. Said complaint failed to show that the plaintiff had any right to sue in its own name. 3. Said complaint showed on its face that the alleged judgment upon which this suit is brought is null and void, because it appears from said complaint that said judgment, if any such exists, was rendered against a deceased person. 4. Said complaint does not purport to be brought in the name and in behalf of any person capable of suing. 5. Said complaint purports to be in behalf of a company, and there is no averment of the incorporation of said company, or their right to sue as such, or that said company was a copartnership. The motion was overruled, and defendant excepted. Appellant assigns as error, the overruling of said motion in arrest of judgment; the striking out of the plea of *nul tiel corporation;* the admission, by the court below, of certain record evidence of the judgment sued on; the rendition of judgment against defe ndant personally, when the judgment should have been *de bonis intestatis;* and the unconstitutionality of the law authorizing a term of said court to be held at the time this judg-

ment was rendered, because it does not set out the act in full which it purports to amend.

MORGAN, BRAGG & THORINGTON, for appellant.—1. The third plea was good as a plea *in bar*, and should not have been stricken from the files of the court. It was a matter of defense of which the defendant was entitled to take advantage, and the plaintiff should have met it either with a demurrer or a replication.—Angell & Ames on Corporations, § 634, and authorities cited; *Carpenter v. Jeter*, 4 Stew. 326; *Morgan v. Rhodes*, 1 Stew. 70.

The Revised Code, § 2630, enumerates the cases in which pleas may be stricken from the files on motion. This plea is not faulty for any reason mentioned in said section, and being good in form, the motion to strike out was improperly made. In other cases than those enumerated in said section, the legislature contemplated that pleas which conformed substantially to the schedule of forms contained in the Code should be met by demurrers or replications. But it is said we were estopped from pleading *nul tiel* corporation, because this was a suit upon a judgment. But does it follow that because there was such a corporation when the first judgment was rendered, that, therefore, the appellant should be precluded from showing that there was no such corporation at the trial when a suit is brought upon that judgment? *Non constat*, the corporation might have been dissolved during this intervening period. Such a plea was a good plea.

The court below must have proceeded upon the idea that said third plea was a plea in abatement; if so, this was an error.—Angell & Ames on Corporations, § 634, and authorities there cited.

If the court below proceeded upon the idea that by demurring to the complaint the defendant admitted the corporate capacity of the plaintiff, so as not to be able afterwards to deny its corporate capacity by a plea in bar, this was also error. A defendant, under our statute, may plead as many several pleas as he may deem necessary to his de-

fense, and that these pleas are inconsistent, is no objection to them.

Plaintiff being a private corporation, even if it had been chartered in this State, no court could have taken judicial notice of its charter and corporate capacity, and upon the issues made in this case it would have been compelled to have proved its corporate capacity.—*Ala. Conf. Meth. E. Church v. Price, Ex'r*, 42 Ala. 39, and authorities there cited; Angell & Ames on Corporations, §§ 633–4, and authorities there cited; *Selma & Tenn. R. R. Co. v. Tipton*, 5 Ala. 787; *Duke v. Cahaba Nav. Co.*, 10 Ala. 82.

But the plaintiff, being a foreign corporation, the plea of the general issue called in question its corporate character, and devolved upon it proof of its corporate character. Angell & Ames on Corporations, § 633, note 3, and authorities there cited.

When a foreign corporation appears in court it must establish its right to bring the suit and to make the contract it seeks to enforce.—*Marine Ins. Co. v. Jauncey*, 1 Barb. 436; *Bank of Michigan v. Williams*, 5 Wend. 478; Angell & Ames on Corporations, § 633, note 4, and authorities there cited; *U. S. Bank v. Stearns*, 15 Wend. 314.

But no proof whatever was made of the corporate existence of plaintiff, or that plaintiff was authorized to make the contract which it sought to enforce in this case. The judgment is *de bonis propriis;* it should be *de bonis testatoris*, if rendered at all.

The judgment appealed from in this case is null and void, because the term of the court at which it was rendered was held under and by virtue of an act of the legislature approved November 28, 1868; which act is uncon-
[illegible]tional in this,—it amends and revises another act of
[illegible] and fails to contain said act, amended, as
[illegible] of holding said court.—Cooley on
[illegible]*Bridge Co. v. Armstead*, 41
[illegible] *Weaver et al. v.*

et al. v. Pearsall et al., 1 Peters, 340; *Wilcox v. Jackson*, 13 Peters, 511; *Lessee of Hickey et al. v. Steward*, 3 How. 762; *Wightman v. Karsner*, 20 Ala. 451; *Lamar v. Com'rs Court Marshall County*, 21 Ala. 772; *Cullum v. Casey & Co.*, 1 Ala. 351; *Garlick v. Dunn, Ex'r*, 42 Ala. 404–5.

As this suit was properly pending in the said city court before the erroneous and void judgment was rendered, a reversal by appeal is the proper remedy, because the effect of a reversal will be to leave the parties where they were before said erroneous and void judgment was rendered. *Cullum v. Casey & Co.*, 1 Ala. 351; *Garlick v. Dunn*, 42 Ala. 404; *Dred Scott v. Sanford*, 19 How. 394.

An objection like that which is here made to the above judgment may be taken at any stage of the proceedings, for it goes to the power of the court over the parties or the subject matter, and the defendant need not, for he can not give the plaintiff a better writ or bill.—*Rhode Island v. Massachusetts*, 12 Peters, 657; Cooley on Const. Lim. p. 398; *Hill v. People*, 16 Mich. 351.

The above amendment and revision of said statute is not made by implication; it is an express amendment and revision. Such is its effect, and it is within the mischief of the constitutional inhibition. This court has decided that the legislature is presumed to know the law, and to know the extent of its powers. Whatever, therefore, the legislature does is done knowingly, and is expressly done, and any violation of an express provision of the constitution by the legislature can not be maintained and upheld on the ground that it was impliedly and not expressly done.—*Ex parte Selma & Gulf R. R. Co.*, 45 Ala. 696.

And reluctant as this court may be to pass upon the constitutionality of a statute unless necessity requires it, yet when that necessity exists, this court has a duty to perform from which it will not shrink, let the consequences be what they may.—*Ex parte Selma & Gulf R. R. Co.*, 45 Ala. 696; *Dorman v. The State*, 34 Ala. 216; *Sadler v. Langham et al.*, 34 Ala. 335; *Oakley v. Aspinwall*, 3 Coms. 547, 568.

What the legislature can not do directly and expressly,

it can not do indirectly by implication.—Cooly on Const. Lim. pp. 95, 160, note 3, 285, 289.

If the provision of the constitution in question is anything, it is a form prescribed for legislative action. "The forms prescribed for legislative action are in the nature of limitations upon its authority. The constitutional provisions which establish them are equivalent to a declaration that the legislative power shall be exercised under these forms, and shall not be exercised under any other. A statute which does not observe them will plainly be ineffectual."—See Cooley on Const. Lim. p. 177. If this be a true construction, and unquestionably it is, then how can the courts excuse a disregard of these provisions on the part of the legislature by saying that if the amendatory law is original in form, complete in itself, and intelligible without reference to any other law, in that event it is not a violation of the constitutional provision? This court has never so decided.

It is respectfully submitted, that the remark made to that effect, and the authorities cited by Chief-Justice WALKER, in his dissenting opinion in the cases of *Ex parte Pollard* and *Ex parte Woods*, in the 40th Alabama Reports, p. 100, was not essential in any point of view to the decision of that cause; and that the same is true of the same remark made by the majority of the court in the case of the *Tuscaloosa Bridge Co. v. Olmstead*, (41 Ala. 18.)

SAM'L F. RICE, and FITZPATRICK, WILLIAMSON & GOLDTHWAITE, *contra*.—1. Was it proper for the court to strike from the file the plea of *nul tiel corporation?* It was, for two reasons. 1st. The plea of the general issue admits the character in which plaintiff sues.—Angell & Ames on Cor. § 633; *Prince v. Bk. of Columbus*, 1 Ala. 241; *Walker v. Mobile Ins. Co.*, 31 Ala. Rep. 529; *Litchfield Bank v. Chenk*, 29 Conn. 148; *Monumoi Ex. Bank v. Rogers*, 1 Mass. 159; *School Dist. v. Blaisdell*, 6 N. Hamp. 197; *Bank v. Allen*, 11 Vt. 302; *Penobscot Cor. v. Lamson*, 4 Shep. 224. 2d. The two other pleas should have been stricken out, because

they were filed five days after the plea of the general issue, and without leave of the court.—Rev. Code, § 2639.

2. The demurrer does not seem to have received any attention by the court, and if it was ever filed, must be considered as waived by pleading to the merits.

3. In addition, the right of the plaintiff to sue was admitted in the judgment against James H. Ware. This suit being on that judgment, against the administrator of J. H. Ware, nothing determined in that suit can be re-examined in this.

4. It is insisted, that the city court of Montgomery had no right to hold a term at the time this judgment was rendered, on the ground that the act of 1868 (Acts of 1868, page 351,) is unconstitutional, in that it seeks to amend a former statute, and does not set that former statute out in full. This provision of the constitution (art. 4, § 2,) is only intended to prohibit amending or revising laws by additions or alterations which, without referring to the law amended, would not be intelligible. If the law in itself, without reference to any other law, is complete, original in form, and intelligible, it does not fall within the meaning and spirit of the constitution. The above rule is the test, and if the new law bears this test, it is not obnoxious to the provision of the constitution. This law of 1868 is complete in itself, is intelligible without reference to any other law, and is original in form.—*Ex parte Pollard*, 40 Ala. 100; *Com. v. Dewey*, 15 Grattan, 1; *Davis v. State*, 7 Md. 151; *Parkinson v. State*, 14 Md. 18–21.

B. F. SAFFOLD, J.—The suit is by the appellees upon a domestic judgment recovered against the intestate of the appellant. The summons and complaint contain no other description of the plaintiff than as the "St. Louis Bagging and Rope Co."

The pleas of the defendant were—1st, the general issue; 2d, *nul tiel* record; 3d, *nul tiel* corporation. On motion of the plaintiff, the third plea was stricken out, upon which the defendant excepted, and withdrew his second plea. The proceedings and judgment in the suit against the decedent

were given in evidence, and are made a part of this record by the bill of exceptions. It appears that in that suit, the plaintiffs were described in the same manner as in this, and that judgment was by default.

It does not appear from the record that the plaintiffs sued as a corporation. The plea of *nul tiel* corporation was therefore irrelevant, and subject to be stricken out.—Rev. Code, § 2630.

The defendant can not make any objection to the judgment, the foundation of the suit, that his intestate could not have made. Section 2684 of the Revised Code says: "When suit is brought by a firm, or in the name of a partnership, the plaintiff must not be required to prove the existence of the firm, or the individuals composing it, unless the same is denied by plea, verified by affidavit." The name or firm used by a partnership is arbitrary and conventional. They may use the name of both, or of one of them alone, or any distinct designation, by which all will be included or bound, as if their names were used.—Par. on Part. p. 128. The judgment sued on, being by default, might have been reversed on error, under the authority of *Reid & Co. v. McLeod*, (20 Ala. 576). But in the present suit, as the defect in the complaint was neither demurred to, nor pleaded in abatement, and the cause was tried on a plea to the action, the defendant must be deemed to have waived it.—*Ortez v. Jewett & Co.*, 23 Ala. 662.

The demurrer set out in the transcript seems not to have been acted on. We presume it was waived. The matters assigned as ground for arrest of judgment are such as might have been, but were not, objected to before; the complaint contains a substantial cause of action, and therefore the judgment could not be arrested.—Rev. Code, § 2811. The third ground of the motion is not sustained by the record.

The record evidence objected to in the assignment of errors, was received without objection on the trial, and admitted to be the proceedings of the courts they purported to be. No objection can now be taken to it.

The judgment is entered against the defendant individually. He was sued as administrator on a cause of action

against his intestate. It will be amended so as to conform to the complaint.—Rev. Code, §§ 3505, 3502; *Hicks v. Barret*, 40 Ala. 491.

The act approved November 28, 1868, "to fix the time of holding the city court of Montgomery," is an independent law, not purporting to be amendatory of another. It does not, therefore, violate article 4, section 2, of the State constitution.—*Ex parte Pollard*, 40 Ala. 77.

The judgment is amended, and affirmed.

Ex parte HALL.

[INDICTMENT FOR MURDER—DISCONTINUANCE.]

1. *Criminal prosecution; how may be discontinued.*—A criminal prosecution, as well as a civil suit, may be discontinued by the act of the State, or of the court, or of the attorney who prosecutes in behalf of the State.
2. *Discontinuance; definition of.*—A discontinuance is defined to be, *a gap or chasm* in the proceeding, occurring while the suit is pending.
3. *Same; what amounts to waiver of.*—If, notwithstanding the discontinuance, the defendant continues to appear, and suffers the suit to progress without objection on his part, the discontinuance is waived, and he loses the benefit of it.
4. The petitioner was indicted for murder in the circuit court of Cherokee county, in 1865. In 1867, on his application, the venue was changed to the county of Baine. Afterwards, in December, 1867, the county of Baine was abolished by an ordinance of the constitutional convention. In 1868 said ordinance was repealed by an act of the general assembly, by which it was provided "that said county shall be known as the county of Etowah." The cause was then entered upon the State docket of Etowah, and the petitioner continued to appear, without objection, and the cause was continued from term to term until the fall term of the circuit court of Etowah county, 1871; at which term petitioner moved the court to strike said cause from the docket, on the ground that the same had been discontinued. His motion was overruled, and he excepted, and now makes an application to this court for a *mandamus* to compel the circuit court to strike said cause from the docket,—*Held*, 1st, that the said ordinance, abolishing the county of Baine, was a discontinuance of said prosecution; 2d, that the said

act of the general assembly, repealing said ordinance, did not create a new county, but re-established the county of Baine, with another name; 3d, that the continued appearance of said petitioner, without objection, and the continuance of said cause from term to term, until the fall term of the circuit court of Etowah county, 1871, was, on his part, a waiver of said discontinuance. (PETERS, J., *dissenting*, held that the abolition of the county of Baine did not work a discontinuance of the prosecution.)

THIS was a petition of William M. Hall for a rule *nisi* to be directed to the presiding judge of the circuit court of Etowah, commanding said court to strike from the docket the case of the State of Alabama v. William M. Hall, on an indictment for murder, on the ground that the case had been discontinued. The facts material to an understanding of the case will be found in the opinion of the court.

COOPER & REEVES, for the petition.—Under the laws of England, whence our system of jurisprudence is derived, since the time of Edward I, the king was recognized as the fountain of justice and supreme magistrate of the kingdom, intrusted with the whole execution of the law. No court whatsoever can claim any jurisdiction, unless it some way or other derive it from him.—2 Bacon's Abr. 618.

In time of Edward I, that it might seem that justice flowed from the king, the king himself sat in person in the court of king's bench. Hence the power of this court, which it still retains, of exercising a superintendence over other jurisdictions. But the king was sometimes present, yet the chief-justice gave the rule, that the king might not decide his own cause.—*Ib.*

At common law, all courts derived their authority from the king. For more convenient administration of justice, the king appointed, by letters patent to be revoked at his pleasure, the judges of the several courts, to administer the law according to the power committed to and distributed among said several courts. The king himself being intrusted with the whole executive power of the law, sits not in judgment in any court.—2 Bacon's Abr. 619, "B."

Hence, it has been determined that at common law the patents of judges, sheriffs, &c., are determined by the death

of the king in whose name they are made.—Bacon's Abr. p. 622, (C).

Hence, by parity of reasoning, the county of Baine having been created—composed of detached portions taken from other counties—into a separate jurisdiction, having elected its officers, organized its courts, under and by virtue of the act of 1866–7, was recognized as one of the counties of Alabama, having a lawful jurisdiction co-extensive with the boundaries prescribed in the act by which it was created. One year afterwards that act was repealed. By that repeal the separate jurisdiction was taken away, and re-attached or reverted to the counties whence taken; and by operation of law the several county offices became vacant and the officers became *functus officio.*

By the 3d article of the declaration of rights, all political power is inherent in the people, and all free governments are formed on their authority and established for their benefit; and that, therefore, they have at all times an inherent right to change their form of government in such manner as they may deem expedient.—Const. Ala. art. 1.

The people in their convention had the right to reorganize their judicial system, and to create or abolish counties. The county of *Baine* being abolished, no inherent jurisdiction remained, and no authority, direct, or inherent, or constructive, remained with the officers of *Baine county.* The clerk could issue no process, the sheriff had no authority; no one was authorized by law to give transcripts of or to certify records. The courts once existing were wiped out, and no creative power existed to impart vitality to actions pending.

It was an act of the State in the exercise of her sovereign power; and in all criminal prosecutions the legislature, as well as the people in convention, may grant pardons for offenses against the State either before or after prosecution; and in all cases where the due administration of the laws are interrupted by voluntary intervention of the State, or by any of its constituted agents having the authority to control that prosecution, it operates as a discontinuance,

and is equivalent in its consequences to a release of the defendant.

Baine county was *de facto et de jure* vested with the necessary functions for the administration of law and order. The powers and functions with which Baine was invested were not inherent, but derivative; integral parts of an inherent sovereignty in the State delegated for the convenience of administrative justice, resumable at the pleasure of the delegating power. Baine county was but the creature of the State, invested with administrative, but no inherent sovereignty. Her jurisdiction and territory were coterminous; her boundaries confined her jurisdiction. Her boundaries and jurisdiction depend upon the legislative will. The legislature creates and may destroy. The object of dividing a State into counties is the convenience in the administration of the laws. When Baine county was created, all the incidents of a county attached to it; when it was abolished, all the incidents which conspired to constitute the functions of a county fell *eo instanti* the county was abolished, unless the repealing act should otherwise provide.

There were no provisions giving direction as to the disposition of unadjudicated business, further than to provide the jurisdiction over the territory of which it was composed should re-attach to the counties whence taken.

A county is the creature of an act of the legislature; the repeal of the act by the convention abolished the county.

A prosecution by indictment is a suit in which the State is plaintiff and the accused is the defendant.—*Drinkard v. State*, 20 Ala. 9, 594; see brief of counsel in above case.

The rights of a defendant in a civil cause can not be greater than those of a defendant in a criminal case.—See opinion of the court in case of *Drinkard v. State*, 20 Ala. Rep. 10.

It is well established by all the authorities that every suit, whether civil or criminal, may be discontinued.—*Ib.* 13.

The question then arises, what will produce a discontinuance?

In answer to this question, we think that the authorities

fully sustain the position that any active and unlawful interference amounts in law to a discontinuance.—*Drinkard v. State*, 20 Ala. 9; *Forrester v. Forrester*, 39 Ala. 320; see opinion of the court, 323; *Ex parte Rivers*, 40 Ala. 712; see opinion of court, 714.

The State being the party plaintiff, did take such an active and unlawful interference, (by its convention of 1867,) in abolishing the county of Baine, as to produce a discontinuance in this cause.

There was no waiver; there can be none in a capital felony by implication. No act of the State has been predicated upon the delay in making the motion.—40 Ala. p. 1; *Cancenci v. People*, 4 Smith's N. Y. 128.

JOHN FOSTER, *contra*.—The ordinance of the convention of 1867, abolishing the county of Baine, is void, because that convention possessed no legislative power.—Jemison on Conventions, p. 391.

If the ordinance was valid, it had no vitality until the constitution was adopted by the people of Alabama and ratified by congress. This was the opinion of the military authorities who then controlled the State. They, by their orders, still recognized the county of Baine.—See Orders of Gens. Pope and Swayne.

There was no failure to hold a court which could operate as a discontinuance of this cause.

If the ordinance was valid, it is only as the exercise of legislative power, and no act of a legislature can discontinue a cause pending in court. The county of Baine was established, if not by continuing the Code in force, certainly by the act of the legislature of December, 1868. Changing the name and boundaries is immaterial. If by virtue of the ordinance the jurisdiction of the case was transferred to Cherokee, then the re-establishing of the county re-transferred the cause to Etowah.

Each term of the courts of Baine were held after the ordinance, by at least a *de facto* judge.

Plainly the petitioner has waived the discontinuance, if there was one. His motion to strike the cause from the

docket, was based on facts which he knew several terms before his motion was made.—See *Ex parte Rhodes*, 43 Ala. Rep. 373.

PECK, C. J.—A criminal, as well as a civil suit, may be discontinued. A discontinuance is defined to be *a gap or chasm* in the proceeding after the suit is pending.—Hawk. Pleas of the Crown, vol. 2, 416; Chitty's Crim. Law, 346; *Drinkard v. The State*, 20 Ala. 9. In that case, the defendant below was indicted for gaming. Two writs of *capias* were issued against him, which were returned "not found." Thereupon, on motion of the solicitor, with the leave of the court, the case was withdrawn from the docket, with leave to reinstate the case, if necessary. No further step was taken in the cause for several terms, when, upon order of the solicitor, a *capias* was issued and the defendant was arrested. At the trial, the defendant moved the court to strike the cause from the docket, on the ground that it had been discontinued. The motion was overruled, and the defendant excepted. This court held that the cause was discontinued.

In the case of *Ex parte Rivers*, (40 Ala. 712,) the petitioner was indicted in the circuit court of Barbour county, for an assault with intent to murder. After the cause had been continued several times, upon the ground that the presiding judge had been of counsel; and on that ground, on motion of the prosecuting attorney, the court ordered the cause to be transferred to the circuit court of Macon county. A transcript of the proceedings, as in change of venue, together with the papers of the cause, were forwarded to the clerk of the circuit court of Macon county. The defendant objected to the ruling of the court, transferring the cause from Barbour to Macon county. His objection was overruled, and he excepted. After said order was made, the cause disappeared from the docket of the circuit court of Barbour county for several terms of said court; when the solicitor moved the court of said county to vacate the order transferring said cause to Macon county. To this defendant objected; his objection was overruled,

and he excepted. The court vacated said order of transfer, and directed said cause to be continued until the next term of said court. To all this defendant objected; his objection was overruled, and he excepted.

At the next term of said court, the defendant moved the court to strike said cause from the docket, for the reason that the prosecution had been discontinued. The court overruled his motion, and he excepted, and on defendant's application the cause was continued. Thereupon, defendant made an application to this court for a rule on the judge of said circuit court to require him to show cause why a *mandamus* should not issue, commanding him to strike said cause from the docket. This court held that the cause was discontinued, and the defendant's application was granted.

In this case, the petitioner, at the fall term of the circuit court of Cherokee county, 1865, was indicted for the crime of murder. At the fall term of said court, 1867, on petitioner's application, the venue was changed to the circuit court of Baine county. Afterwards, on the 12th day of October of the same year, a transcript of the proceedings, with the papers in the case, was forwarded to the clerk of the circuit court of Baine county, and the cause was entered upon the State docket of said county. Afterwards, at the fall term of the circuit court of Baine county, 1867, the petitioner states in his petition, he was put upon his trial on said indictment, and after the trial had progressed for some time, the court, for reasons satisfactory to the presiding judge, continued the case to the next term of said court. After this, on the 3d day of November, 1867, the constitutional convention of this State passed an ordinance, entitled "An ordinance to abolish the new county, called the county of Baine, formed by the last general assembly of this State." Said ordinance is as follows:

"*Be it ordained by the people of the State of Alabama in convention assembled*, That the new county, called the county of Baine, formed out of portions of the counties of Cherokee, DeKalb, Marshall, Blount, St. Clair and Cal-

houn, in this State, by an act of the general assembly of this State, purporting to have been approved on the seventh day of December, 1866, and numbered 92 among the published acts of said general assembly, be, and the same is hereby abolished, and the territory and jurisdiction of said new county of Baine is restored to the counties out of which it was formed, as the same existed before the formation of said new county."

Afterwards, on the 1st day of December, 1868, by an act of the general assembly, said ordinance was repealed, and in said act it is provided and declared that said county of Baine shall be known as the county of Etowah. By said act the territory of said county is somewhat, but not materially changed. Notwithstanding the said ordinance abolishing the said county of Baine, circuit courts appear to have been held in said county up to the passage of said act of the 1st of December, 1868, the last court being held in the fall of said year, 1868. The transcript of the proceedings had in said cause is made a part of petitioner's petition, which contains the following entry, to-wit: "Baine County—Fall Term, 1868. State v. Wm. M. Hall. Came the State by her solicitor, J. L. Cunningham, and the defendant in person, and the court having been of counsel, this cause stands continued." The next entry in said transcript is as follows: "Spring Term, 1869—Etowah County. State v. Wm. M. Hall. The court having been of counsel, cause stands continued by operation of law." Similar entries appear in said transcript up to the spring term, 1871.

At the fall term, 1871, the court was held by the Hon. Wm. S. Mudd, one of the judges of the circuit court of this State. At this term of the said court, the said transcript states, petitioner, said Wm. M. Hall, came in his own person, and by counsel, and moved the court to strike said cause from the docket, and that he be discharged.

Several grounds are stated in the motion why the same should be granted, all, however, amounting to this, that said ordinance abolishing said county of Baine was a discontinuance of said prosecution. The transcript states

that said motion was heard upon the statutes, said ordinance, and military orders, in reference to said counties of Baine and Etowah, and upon proof that the judicial and other officers of said county of Baine had, in fact, continued to perform their duties and functions up to the repeal of the said ordinance of the convention of 1867, by which the county of Baine was abolished.

What said military orders referred to were, is not stated, and we do not judicially know what they were. The said motion was overruled, and petitioner excepted. The cause was then continued by consent, without prejudice, &c.

On the authority of the cases of *Drinkard v. The State*, and *Ex parte Rivers*, *supra*, it seems to us, the said ordinance abolishing said county of Baine, was a discontinuance of said prosecution. From the abolition of said county until the same was re-established, with the name of Etowah, a period of nearly twelve months elapsed, during which period the proceedings in said cause were interrupted, and no step could legally be taken in the same. This was a gap or chasm in the proceedings occasioned by the plaintiff, the State, and was a discontinuance. But the continued appearance of the petitioner, and the continuance of said cause, as stated, without objection on his part, was a waiver of said discontinuance. It is said in Blackstone's Commentaries, vol. 3, p. 296, that "where the plaintiff leaves a chasm in the proceedings of his cause as by not continuing the process regularly from day to day, and from time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend, but the plaintiff must begin again." The clear inference from this is, if the defendant does attend, and permits the cause to proceed without objection, the error or irregularity is waived, and he thereby loses the benefit of it. In practice, it is required of every one to take advantage of his rights at the proper time, and neglecting to do so, will be considered a waiver.—Bouv. Law Dic. vol. 2, p. 648. This rule of practice we think as applicable to a criminal as in a civil proceeding.

If it be said the petitioner was a prisoner, and appearance was not a matter of option or choice with him, it is a sufficient answer to say, the transcript shows he was a prisoner enlarged on bail, and was as free to have made his motion to strike the cause from the docket eighteen months or two years before as at the time it was made.

It is argued by petitioner's counsel that Etowah county is not the county in which the indictment was found, nor the county to which the venue was changed; that the venue was changed to Baine county, and that Etowah is, essentially, another and different county; that the abolition of Baine county was a discontinuance of the prosecution; that the cause was improperly, and without authority of law, transferred to the docket of the circuit court of Etowah county, and, therefore, his motion to strike the same from the docket of Etowah county should have been sustained.

This argument may be apparently plausible, but it is apparently only. The act to repeal the ordinance abolishing the county of Baine did not create a new county, but, in reality, merely re-established the county of Baine, with another name. The county of Etowah embraces, substantially, the same territory embraced in the county of Baine, and the courts were to be held at the same place. The petitioner having neglected to make his motion in proper time, and permitted the cause to proceed from term to term, for some three years, the discontinuance must be held to be waived. For these reasons, no error was committed in overruling the petitioner's motion to strike the said cause from the docket; consequently, the application for a *mandamus* must be denied. The petitioner will pay the costs of said application.

PETERS, J., *(dissenting.)*—I assent to the judgment of the court pronounced by the Chief-Justice in this case, refusing the rule *nisi;* but I do not feel content with all the conclusions which seem to grow out of the argument in its support. I am not prepared to admit that the mere abolition of a county by the legislative power of the State is,

in fact, or in effect, a *discontinuance* of all the causes depending in the courts of the county thus abolished. The rule of discontinuance is the same in civil and in criminal cases. In a civil cause there must be some voluntary act of the plaintiff, which discontinues the suit, before this can be done.—1 Tidd's Prac. 679; 2 Archb. Prac. 234; 20 Ala. 9; 26 Ala. 52, 72; 24 Ala. 354; 43 Ala. 255, 268; 44 Ala. 324, 273. In a civil suit it can not be said that the abolition of the county in which the suit is pending is a voluntary act of the plaintiff in such suit. It may be done very much against the wish and the objection of the plaintiff. It is, then, no discontinuance, if we are to be governed by the technical definition of discontinuance. I think that this distinction is important, and should not be lost sight of.

I also think the safer and sounder opinion is, that the State, as the sovereign, may suspend the courts in which suits may be pending without at all affecting the rights of the suitors therein. And such courts may be revived, or others may be created in their stead, and the causes depending therein may be transferred to such new courts, without prejudice to the rights of the litigants in such courts, and this transfer may be made at such time and in such manner as the sovereign power may choose to declare. The sovereign power has no limit but its discretion, when there is no constitutional restraint.

[NOTE BY REPORTER.—After the delivery of the foregoing opinion, petitioner applied for a rehearing. Only two sheets (and those the last) of the application came into the Reporter's hands; he is therefore unable to give a synopsis of the argument in support of the petition. The following response was made by

PECK, C. J.—I have re-examined the opinion in this case, in connection with the petition for a rehearing. I see no reason to be dissatisfied with the opinion, and think it correct. The application for a rehearing is, therefore, denied, with costs.

LYMAN *vs.* THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

1. *Former jeopardy, plea of; what must state.*—A plea of former jeopardy, where there has been neither a conviction nor an acquittal, must state that the defendant had been put upon his trial on a good indictment, and also that the jury had been duly impanneled and sworn, and charged with his trial, and without his consent, and without any pressing necessity, discharged without rendering a verdict.
2. *Charge of court; when will be presumed to be warranted by the proof.* If all the evidence is not set out in the bill of exceptions, a charge of the court which is excepted to, will be presumed to have been warranted by the proof. So, also, where a charge is refused, it will be presumed, if necessary to sustain the ruling of the court below, that the charge was abstract, the bill of exceptions not showing to the contrary. Error must affirmatively be made to appear in such a case.

APPEAL from Criminal Court of Dallas.
Tried before Hon. GEORGE H. CRAIG.

Appellant was tried and convicted for an assault upon Andrew J. Baxley, with intent to murder, &c., and sentenced to the penitentiary for ten years. On his appeal, this court reversed the judgment and sentence, and remanded the cause for a new trial, at the January term, 1871. In the opinion then delivered, the indictment was held sufficient, it being in the form given in the Revised Code, but this court held that the court below erred in excluding, at the instance of the State, one Parsons, a juror, who had been accepted by the State and the defendant, though not sworn in chief, both parties having exhausted their peremptory challenges.—See *Lyman v. The State*, 45 Ala. 76.

Appellant being again put upon his trial, pleaded former jeopardy. To this plea, as first filed, the court sustained a demurrer. Appellant, by leave of court, then amended it, and the court again sustained a demurrer to it. The plea was then amended a second time, and upon

the plea as thus amended the State took issue. The last plea, omitting formal parts, was as follows:

"Defendant says that the said State of Alabama ought not further to prosecute said indictment against him, because he says that heretofore, to-wit, at the December term, 1870, of this said honorable court, begun and holden on the first Monday in December, 1870, the grand jurors sworn, impanneled and charged in and for said court, at said December term, presented in open court the following bill of indictment, to-wit." [Here follows a copy of the indictment.] "To which said indictment the said James Lyman pleaded not guilty to the offense therein charged against him, and thereby and thereof put himself upon the county, and the said State did the like; and thereupon, on the same day, and at the same term of the said honorable criminal court, a jury of twelve men were duly impanneled and sworn to try said issue, of which said jury one Henry Parsons was one of the number, who was then and there, against the objections of the said James Lyman, and at the request and instance of the said State, set aside and removed from the said jury which had been thus legally impanneled and sworn to try the issue between the said State and the said James Lyman; and that the said Henry Parsons, who was one of the said jury thus impanneled and sworn, was set aside without any legal cause, and was not permitted by the said court to sit upon the said jury as one of the said James Lyman's triers, when in law the said James Lyman had a right to be tried by the said jury as it stood, with the said Henry Parsons making one of the number of said jury, and the said jury of which the said Henry Parsons was a member being then and there legally drawn and legally impanneled and sworn to try said issue between the said State and the said defendant, James Lyman; he, the said James Lyman, was then and there put in legal jeopardy under the said indictment, as by the record thereof more fully appears. And the said James Lyman further says, that though no verdict was reached in the case by the said jury, the failure thereof was not owing to any consent made or given by

him, the said James Lyman, or any interposition of providence, or any other thing which in law should subject the said James Lyman to be again put in jeopardy; and the record of the said former jeopardy still remains in no way reversed or made void. And the said James Lyman further says, that he is the same identical James Lyman and person mentioned in the said former indictment, and that the said offense for which he now stands indicted is one and the same offense mentioned in the said former indictment, and no other, and this he is ready to verify; wherefore," &c.

The first plea, and the amended plea, set up nearly the same facts as those contained in the above plea, except that neither states the jury had been sworn, or charged with the trial of defendant.

In support of the plea, defendant introduced the record of the former trial, and the bill of exceptions then reserved, so much of which as is material to the exclusion of the juror Parsons may be stated as follows:

After the State and defendant had exhausted all the challenges allowed by law, and had accepted the jurors then impanneled, the jury not being complete, one Parsons, who had been regularly summoned and drawn as a talesman, was called, and after being duly sworn, asked by the court all the questions contained in §§ 4180, 4182 and 4183 of the Revised Code, and among the questions the following: "Have you a fixed opinion against capital or penitentiary punishment, or that a conviction should not be had on circumstantial evidence?" The court did not fully understand the answer to the question as to conviction on circumstantial evidence, and the question was again asked Parsons, but before he could answer, the defendant's counsel interposed by saying that Parsons had answered that "he would convict on circumstantial evidence, if strong enough," and asked him if such was not the case; but the court stopped the counsel, and again asked Parsons the question, and he answered that "he would convict on circumstantial evidence, if strong enough;" thereupon the

court ruled that he was competent, and he took his seat upon the jury.

The solicitor for the State objected, and asked the court to protect the State and prisoner by setting aside the juror, on the ground that he was incompetent and unfit to sit in the case, stating that Parsons had sworn positively that he would *not* convict on circumstantial evidence, and afterwards, on the suggestion of defendant's counsel, stating to the contrary. The court being doubtful as to the statements made by Parsons, again called the juror, against defendant's objections, and swore him to answer questions. Parsons was then asked by the court what answer he had given to the question when first interrogated, and answered that "he aimed to say that he would convict on circumstantial evidence, if strong enough;" the court then told the juror that he must tell what answer he made, and not what "he aimed to say." Parsons answered that "he made a blunder," and "did not say so, but meant it;" the court required the juror to state explicitly what he said in answer to the question, when Parsons stated, "I did say I would convict on circumstantial evidence." Thereupon the court excluded Parsons from the jury, on the ground that it was the right and duty of the court to protect the State and the prisoner from a juror who was unfit to sit on the jury, he having made three different and contradictory statements, under oath, relative to a question put to him only a few minutes before, thereby showing to the court that he either did not know his own mind, or was willfully corrupt. To all of which second examination of Parsons, and his exclusion from the jury, defendant excepted. Another talesman was then called, questioned, sworn, &c., and took his seat as a juror, thereby completing the jury, and defendant excepted, &c.

It was admitted that defendant was the identical person mentioned in the indictment, and that the indictment is the identical indictment, and for the identical offense, upon which defendant was formerly tried. This being the only evidence in support of the plea of former jeopardy, the court, at the request of the State, charged the jury that

the evidence was insufficient to sustain defendant's plea, and defendant duly excepted.

The defendant then asked the court to give three written charges to the jury. These charges, though varying in form, asserted the proposition, that if the jury believed the evidence, they should find in favor of defendant on his plea. The court refused to give any of these charges, and defendant duly excepted.

The jury having found in favor of the State on the plea of former jeopardy, defendant pleaded not guilty, and went to trial before a jury. The bill of exceptions does not state that it contains all the evidence delivered on this trial.

After the argument of counsel, the court delivered a lengthy written charge to the jury, which could not well be set out without unnecessarily cumbering the report of the case. The bill of exceptions recites that "to this charge, and each part thereof separately, defendant excepted;" but it does not contain any specific objection to particular parts of the charge.

The defendant then asked the court to give the following written charge to the jury: "If the jury believe from the evidence that the defendant had a general felonious intent, and desired to commit murder, or other high crimes generally, and acted notoriously, and made threats and other demonstrations of a belligerent character, evidencing a reckless disposition to violate law and order, even then they can not find defendant guilty, unless he made an actual assault upon the person of Andrew J. Baxley to murder him." The court refused to give this charge, and defendant excepted.

Defendant was convicted, and sentenced to ten years in the penitentiary. He now appeals, and assigns for error—1st, that the court erred in the charge given and the charges refused as to the plea of former jeopardy; 2d, the general charge of the court; 3d, the refusal to give the last charge asked by defendant.

JASPER N. HANEY, for appellant.—1. The judgment re-

versing this case when it was here before, is not tantamount to deciding that defendant had not been in jeopardy. The plea of former jeopardy was pleaded in that case, and in the opinion of the supreme court it is expressly stated that the court intended no expression of opinion on the plea, or the facts necessary to sustain it. To appeal was the only way defendant could rid himself of the effects of the erroneous ruling of the court below. On that appeal, this court could only reverse. The court did hold that it was the duty of the court below to submit the question of former jeopardy to a jury on a proper plea being filed. This court then had the facts before it as to the exclusion of the juror Parsons, and they were fully set out in the bill of exceptions. The court reversed that case and sent it back for trial, knowing that this very question would arise on a new trial. It is the uniform custom of the court, on reversing a case, to settle all questions on the record which will probably arise on the new trial. If the reversal was intended to decide that on the facts set forth there had been no jeopardy, how easy would it have been for the court to have said, "upon the facts disclosed in the bill of exceptions as to the exclusion of the juror Parsons, it is plain that defendant has not been in jeopardy." The silence of the court on this point is suggestive of the belief, to say the least of it, that the court did not by any means consider its judgment as settling, or even touching the question.

It is true, the jurors had not been sworn in chief, but they had been impanneled and selected. The defendant had pleaded not guilty, and he had the right to be tried by these jurors; he was entitled to take his chances for liberty with these very triers. He had gone on so far that he could not withdraw; his case and his liberty were then in the hands of the court and this jury. Defendant could not, without the permission of the court, withdraw his case from this very jury. If he was thus in the power of the jury and the court, can it be said he was not in jeopardy? So jealous is the law of life and liberty, that it will not deprive any man of his *chances* of life and liberty at the

hands of a jury to whom his case has been entrusted. Is the principle as to the chance allowed a prisoner before a jury sworn and charged with his case, different because the jury has not been charged with the case? It is the *chance* of acquittal that the law says a defendant shall not be deprived of. This chance the defendant had the right to demand at the hands of the twelve jurors selected, including Parsons.

JOHN W. A. SANFORD, Attorney-General, *contra.*—The jeopardy of the accused begins when a traverse jury has been impanneled and sworn to try the issue between him and the State. As neither of the first two pleas alleged that a judgment had been entered or a verdict had been rendered, or that even a jury had been impanneled and sworn in the case, the demurrer to each of them was properly sustained.—1 Bish. Cr. Law, § 659; *Blackwell v. The State*, 9 Ala. 79; *Williams v. The State*, 3 Stew. 476.

The court did not err in its charge to the jury upon the trial of the issue of former jeopardy.—Authorities *supra.*

The action of the court below upon a former trial of this case in excluding a juror for a cause not mentioned in the Code, was revisable at the instance of the prisoner by this court. All reversible errors are of equal importance. No class confers higher privileges on the accused than another. All cause the judgment against him to be reversed on his appeal to this tribunal. But the reversal of the judgment at his instance does not discharge the prisoner, or exempt him from another trial for the same offense.—*Jeffries v. The State*, 40 Ala. 384; *State v. Abram*, 4 Ala. 272; *Cobia v. The State*, 16 Ala. 781; *Phil v. The State*, 1 Stew. 31; *State v. Hughes*, 2 Ala. 102.

PECK, C. J.—The eleventh section of the bill of rights declares, "that no person shall, for the same offense, be twice put in jopardy of life or limb."

To constitute jeopardy, in the sense here used, it is not necessary there should be an actual conviction or acquittal.

The rule on this subject, as I understand it, is, that in a

case of felony a prisoner is put in jeopardy, in a legal sense, when he is put upon his trial on a good indictment, has been arraigned and pleaded not guilty, or the plea of not guilty has been entered for him by the court, and a lawful jury is duly impanneled and sworn *and charged with his trial.*

There is no formal, uniform mode with us in charging a jury with the trial of a prisoner. The usual way is, when the jury is impanneled and sworn, and the trial is *actually* ready to proceed, for the solicitor, before any witness is examined, to read the indictment to the jury. When this is done, the prisoner is then in jeopardy.—1 Bish. on Crim. Law, § 856.

A solemn form of charging the jury with the trial of a prisoner, may be seen in Wharton's fourth and revised edition of his American Criminal Law, § 590.

When the jury is duly charged with the trial of a prisoner, he is entitled to have a verdict returned by them, and they can not be discharged by the court, unless in cases of pressing necessity; and if discharged without such necessity, it is equivalent, so far as the prisoner is concerned, to a verdict of acquittal, and he can not be subjected to another trial.

In the case of *Ned, a slave, v. The State,* (7 Porter, 187,) it is decided, "that courts have not, in capital cases, a discretionary authority to discharge a jury after evidence given.

"2d. That a jury is, *ipso facto,* discharged by the termination of the authority of the court to which it is attached.

"3d. That a court does possess the power to discharge a jury in any case of pressing necessity, and should exercise it whenever such a case is made to appear.

"4th. That the sudden illness of a juror, or of the prisoner, so that the trial can not proceed, are ascertained cases of necessity, and that many others exist, which can only be defined when particular cases arise.

"5th. That a court does not possess the power, in a cap-

ital case, to discharge a jury because it will not or can not agree."

We hold, that what is here said applies equally to cases of felony; that said eleventh section of the bill of rights embraces every case of felony, without regard to the punishment to be inflicted.

The two first special pleas pleaded in this case were clearly insufficient, because they do not state that the jury had been sworn, but only that they had been impanneled. This, without more, was not enough.

The improper discharge of the juror by the court on the first trial of the defendant, for the reason given in the bill of exceptions taken on that trial, after said juror had been accepted by the State and the prisoner, without his consent, and against his objection, was an error, for which the conviction was, at the last January term of this court, reversed and the case remanded for another trial. This did not entitle him to be discharged; if it had, the case would not have been remanded for another trial.

In the case of *Williams v. The State*, (3 Stewart, 454,(a case very much like this, it is held, that where a juror is erroneously discharged, and the prisoner is convicted, a reversal of the judgment does not discharge him from a second trial. The demurrer to these two pleas was, therefore, rightly sustained.

2. Clearly there was no error in the charge given, or in refusing the charges asked, as to the plea of former jeopardy. The said record did not show that defendant had been put upon his trial before a jury that was impanneled, sworn, and charged with his trial, and, without his consent, and in the absence of any pressing necessity, had been discharged without rendering a verdict; consequently, it did not appear that defendant had been put in legal jeopardy. The jury on said issue found a verdict for the State, in conformity with the charge of the court; thereupon the defendant pleaded not guilty, and the trial proceeded on that plea. After the evidence was closed, the court, at the instance of the State, charged the jury in writing. To this charge, the bill of exceptions states, the

defendant excepted, "and to each part thereof." This is a mere general exception, and does not disclose any particular error or errors in the said charge. The said charge appears to be full, and intended to instruct the jury on the entire case.

I have carefully examined this charge, and although not as precise and perspicuous as it might have been, I am not prepared to say it contains any substantial error.

None of the evidence is set out in the bill of exceptions; it is impossible, therefore, to determine that this charge is erroneous. The rule is, that the appellant must make the record affirmatively show error.—*Eskridge v. The State*, 25 Ala. 30, and *Butler v. The State*, 22 Ala. 43.

There was no error in refusing the last charge asked by defendant. As the evidence is not set out, we can not know what was the character of the defendant's intent, but in favor of the ruling of the court we will presume that the charge was abstract, and not authorized by the evidence. When a party excepts to the refusal of a charge asked, he must show, by his bill of exceptions, that it was not abstract.—*Morris v. The State*, 25 Ala. 57.

The judgment of the court below must be affirmed.

[NOTE BY REPORTER.—The opinion in this case was delivered at the June term, 1871. The report of it was omitted from the last volume on account of a want of space.]

STEPHENS *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Bill of exceptions; when will not be stricken from record.*—A bill of exceptions in a criminal case, taken on the trial in the city court of Montgomery, had on the 20th day of July, 1871, which is signed by the presiding judge on the 18th day of December following, in vacation, under agreement of counsel of the parties, is a valid bill of exceptions under the "act relating to bills of exceptions," approved February 14, 1870, and it will not be stricken from the record in this court.
2. *Indictment and list of jurors; what sufficiently shows services of copy upon defendant, in actual confinement.*—In a criminal prosecution upon a charge of murder, when the accused is in actual confinement, the record which recites that the defendant was *served* with a copy of the indictment and a list of the jurors summoned for his trial, sufficiently shows that a copy of the indictment and a list of the jurors summoned for his trial, including the regular jury, had been delivered to him, according to law. PETERS, J., dissenting on this point, held, that in such a case the word "served" is not equivalent to the word "delivered," or the word "leave."
3. *Oath of jury; when attempted to be set forth, what must show.*—The record should show in a criminal case that the jury were sworn as required by law. If the oath is set forth, it must be that required by the Code. It is not enough to swear the jury to "try the issue between the State and the defendant," but it should also appear that they were sworn "true verdict to render according to the evidence," in the language of the statute.—Rev. Code, § 4092; 43 Ala. 24.
4. *Murder in second degree; what charge as to erroneous.*—On a trial for murder, a charge of the court which instructs the jury that if the blow which occasioned the death was given "in malice," and willfully, the accused may be found guilty of murder in the second degree, under our statute is erroneous. There must be "malice aforethought" to constitute murder in the first or second degree under our statute.
5. *Court, remarks of in presence of jury; what erroneous.*—When asked by the accused to give a charge upon the form of the verdict, if there is any doubt as to the guilt or grade of guilt, the court should not say, in the hearing of the jury, "I can't conceive how the jury could find such a verdict upon such a state of facts; but if you request it, I'll instruct them." Such remarks may be fatal to fairness.
6. *State; when costs not taxed against.*—This court will not adjudge costs against the State upon the denial of a motion made by the Attorney-General in a criminal case.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

The appellant, Zack Stephens, was indicted for murder at the February term, 1871, of the city court of Montgomery, tried at the July term following, and found guilty of murder in the second degree.

An appeal having been taken by the defendant to the January term, 1872, of the supreme court, the clerk of the city court of Montgomery, on the 8th day of August, 1871, sent up to the supreme court a full transcript of the record and proceedings in said cause, duly certified under his hand and the seal of the court.

After the record was sent up to the supreme court, and after another term of the said city court had been held, to-wit, on the 18th day of December, 1871, a bill of exceptions was signed by the presiding judge under a written agreement signed by the prosecuting attorney, which agreement is set out in full in the opinion of the court. This bill of exceptions was then certified to the supreme court by the clerk of the said city court under his hand and the seal of the court, and was filed in the office of the clerk of the supreme court on the 28th day of December, 1871, and was by him attached to the record which had been previously sent up.

The testimony, in material respects, was conflicting, so as to leave the grade of the defendant's guilt in doubt.

The following charge was given by the court in writing, and of its own motion, after the conclusion of the general charge:

"If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant, in the county of Montgomery, and before the finding of this indictment, in malice, did willfully strike the deceased, as described, by striking him with a club or stick likely to produce death, or great bodily harm, and that he did so without the specific intent to kill him, but with the intent to inflict upon him great bodily harm, and deceased came to his death by

wounds inflicted under such circumstances, the defendant is guilty of murder in the second degree."

To the giving of this charge the defendant excepted. The bill of exceptions then states:

"At the conclusion of the general charge to the jury, the court instructed them what should be the form of their verdict if they should find the defendant guilty of murder n the first degree, or murder in the second degree, or of manslaughter in the first degree, and then closed; thereupon the defendant, by his counsel, requested the court to instruct the jury what should be the form of their verdict if they should find the defendant guilty of manslaughter in the second degree. To this request the court replied, in the presence and hearing of the jury, 'I can't conceive how the jury could find such a verdict upon such a state of facts, but if you request it, I'll so instruct them,' and did then instruct the jury as requested. To this remark defendant excepted."

The remaining facts appear in the opinion.

ATTORNEY-GENERAL for motion to strike out bill of exceptions.—The motion ought to be granted, because after the appeal was taken and the record placed on the files of this court, the court below had no power over the case. *Montevallo Mining and Manufacturing Co. v. Reynolds*, 44 Ala. 252–4. And no agreement of counsel could confer power on the court, under these circumstances, to add to the record by signing a bill of exceptions.

Again, the agreement of counsel was made after an entire term had intervened between the term at which this case was tried and the time of the agreement of counsel. The vacation in which the agreement was made and the bill of exceptions was signed was not that immediately succeeding the term of the trial. It was the vacation of a subsequent term. This was not the intention of the statute of 1870, "relating to bills of exceptions."

Again, the clerk, under a penalty, is compelled to send up a "full and accurate transcript" of the record of criminal cases appealed to the supreme court within twenty

days, &c.—Acts 1870-71, p. 41. Bills of exceptions properly signed become parts of record. Therefore, to enable him properly to perform his duty, the bill of exceptions should be signed within twenty days. As this provision conflicts with the act of 1870 relating to bills of exceptions in criminal cases, the act is repealed *pro tanto*.

If no appeal had been taken, or if the record had not been filed in this court until after the agreement of the counsel, and signature of the bill of exceptions, the position of the appellant's counsel might be entitled to some consideration. But since the appeal had been taken, the court had finally adjourned; the record was made out and sent to this court; another regular term of the city court had been held before the counsel made any agreement at all concerning the bill of exceptions, or such bill was signed.

The validity of agreement of counsel made under the law is not assailed. It is submitted, that such agreements should be made during the term at which cases are tried, and not several months after its adjournment.

JOSEPH S. WINTER and WM. S. THORINGTON, Esq's, made the following points for the appellant on the motion to strike the bill of exceptions from the record:

1. The agreement made by the solicitor in relation to the signing of the bill of exceptions is binding on the State. *Rosenbaum v. The State*, 33 Ala. 362.

2. This agreement was made under and by virtue of the act of the legislature entitled "An act in relation to bills of exceptions," approved February 14, 1870 This act is remedial in its nature, and should receive a liberal construction.

3. The act above referred to fixes no limit within which bills of exception may be signed by agreement of counsel. The only limitation on the right given to parties by this statute is that which requires appeals to be taken within two years from the rendition of the judgment or decree. Under this statute it is sufficient if the bill of exceptions

is signed, by agreement of counsel, at any time before the right of appeal is barred.

4. The court below, under circumstances like these, has power, even after appeal and *supersedeas*, to amend its records so as to make them speak the truth, whenever there is anything of record to amend by. During the term the record is said to be in the breast of the judge. The act only lengthens the term in which this part of the record is permitted "to remain in the breast of the judge." The act gives him power to reduce this portion of the proceedings to record by signing them at any time during the period allowed by the act. This court has no power to refuse to act upon any matter which the law thus makes part of the record, although such proceedings are not made matter of record until after the cause comes into this court. It is a sufficient answer to the objection of the Attorney-General, to say that the law itself permits the consequences which he urges as a reason in favor of his motion.

NOTE.—The motion to strike the bill of exceptions from the files was denied, and the reasons therefor given in the following opinion:

PETERS, J.—In this case, there is a preliminary motion to strike the bill of exceptions from the record, made by the Attorney-General on behalf of the State. The ground of this motion is, that the bill of exceptions brought up with the transcript was not signed by the presiding judge on the trial in the court below, as required by law; and that what purports to be a bill of exceptions was not filed in this court until after the transcript had been filed, and that it has not been brought to this court by *certiorari*, and is not, therefore, a part of the record in the cause.

It appears from the record, that the appellant, Zack Stephens, was indicted upon a charge of murder, and tried upon this charge in the city court of Montgomery on the 20th day of July, 1871. He was found guilty of murder in the second degree, and sentenced to confinement in the

penitentiary for the term of fifty years. The bill of exceptions found in the transcript does not seem to have been dated at all, though it is properly signed by the learned judge who presided on the trial in the court below. It is entitled as of the July term of the city court of Montgomery, in the year 1871, and it recites that the trial of the appellant, said Zack Stephens, took place on the 20th day of July in said year 1871. On this bill of exceptions is a consent or agreement, in writing, in the following words, to-wit:

"Montgomery, Ala., Dec. 18th, 1871.

"I consent and agree that the foregoing is a correct bill of exceptions, and that the same may be signed by the presiding judge in vacation, at *any time before* the next term of the Supreme Court of Alabama.

"JNO. GINDRAT WINTER,

"Prosecuting Attorney."

Before the passage of the "act relating to bills of exceptions," which was approved February 14, 1870, bills of exceptions were of no validity unless they were signed by the judge during the term of the court at which the trial took place, or by consent of counsel in writing, within ten days after the adjournment of the court.—Revised Code, § 2760; *Bryant v. The State*, 36 Ala. 270; *Union India Rubber Co. v. Mitchell*, 37 Ala. 314. But the act above referred to declares, "That bills of exceptions in the several counties (courts?) of this State, in which such bills are or were by law authorized to be signed, shall be of the same force and have the same effect, if signed in pursuance of an agreement of counsel of the parties, notwithstanding they may have been signed in vacation, as if they had been signed in term time at the term when the judgment was rendered. This bill shall apply to judgments heretofore rendered and to bills of exception heretofore signed." Pamph. Acts 1869–70, p. 99, No. 112. This is the whole act, save the title and the enacting clause. It is a remedial law, and should, for this reason, be so construed as to advance the remedy. Such laws, almost without exception, are to be liberally construed, and everything is to be

done to advance and enlarge the remedy that can be done consistently with any construction that can be put upon them.—*People v. Runkle*, 9 John. 147; *Gillett v. Moody*, 3 New York, 479; *Johns v. Johns*, 3 Dow, 15; Dwarris on Statutes, Potter's ed. pp. 73, 74. The act above quoted puts no limit upon the period within which a bill of exceptions may be signed under its provisions, save "if signed in pursuance of an agreement of counsel of the parties." This is the only limit. Then, if the court should add another, this would approach legislation, which is forbidden to the courts. The legislature, then, giving its act the most extended scope, did not propose to limit this enlargement of the remedy to any time short of the limitation of the right of appeal. It will be seen that the agreement aforementioned is not required to be in writing, though it is possible that no other than an agreement in writing could be heard in this court, because its jurisdiction in such a case is wholly appellant, and it could only revise the action of the court below upon the record from that court. The bill of exceptions sought to be stricken from the record in this cause very clearly comes within the purview and purpose of the above recited act, and it is a most essential part of the remedy. And there is no doubt in my mind that it is the right of the appellant to have its benefit, whatever that may be, and the duty of this court to see that this right shall not be denied. But it is contended, also, that the bill of exceptions attached to the transcript was not filed in this court until the 28th day of December, 1871, some days after the transcript itself had been filed, on the 11th day of the same month. The two together make up the record in the case, and both are verified by the certificate of the clerk and the seal of the court from which it has been sent, and in which the appeal has been taken, and both are filed here as parts of the same record before the term of this court to which the appeal has been taken. This, though a very irregular mode of getting a record into this court, is not such as would justify this court in denying to the clerk's certificate and the seal of the court below their proper validity. And the record be-

ing now perfect, no *certiorari* could be awarded. The genuineness of the bill of exceptions is not impeached, but only that it has come here in an irregular way. It is here under the certificate of the clerk, verified by the seal of the court from whence it comes, and it is filed in proper time in this court.—Rev. Code, §§ 3495, 3498. This, I think, is enough, when the objection is confined solely to the regularity of the filing of the record in this court.

Let the motion be refused, but without costs, as the State in such a suit does not pay costs by judgment of this court.

Wm. S. Thorington, Esq., for the appellant, made the following points in the main case:

1. The record fails to show that a copy of the indictment and a list of the jurors summoned for the trial, including the regular panel, "was delivered" to the "defendant" at least one entire day before the day appointed for his trial, notwithstanding it appears he was in actual confinement on a capital charge.

The recital in the record that a "copy of the bill of indictment, &c., having been served on the defendant," &c., does not meet the requirement of the statute and the constitution upon this subject. The words "served upon the defendant" simply express a conclusion or opinion of the sheriff, and so far as appears to this court may mean that these papers were served by being handed to defendant's counsel, or left at the jail, or read to the defendant. But the words "delivered to the defendant" clearly express a fact. They can only mean an actual, manual delivery of these papers to the defendant in person, and this is what the law requires should be shown affirmatively by the record.—Const. Ala. Art. I, § 8; Rev. Code, § 4171; *Driskill v. The State*, 45 Ala. 21; *Flanagan v. The State*, 46 Ala. 703.

2. The record shows that an oath materially different from that required by the statute was administered to the jury.

Section 4092 of the Revised Code requires that the jury,

among other things, should be sworn a "true verdict to render according to the evidence," while the record in this case shows that the jury were sworn "well and truly to try the issue joined between the State of Alabama and the defendant, Zack Stephens."

In arriving at a verdict under the oath required by the statute, the jury are judges only of the facts, and not of the law, of the case.—Rev. Code, § 4092; 18 Ala. 119, 720; 26 Ala. 90; 12 Ala. 153; *United States v. Battiste*, 2 Sumner, 243.

Under the oath which the record shows was administered, the jury were made judges of both the law and the facts of the case. They were entirely unrestrained and uninstructed thereby as to the bounds of their province, and for aught that this court may know the verdict of some of the members of the jury may have been the result of their ideas of the law of the case, while the verdict of others may have been predicated upon the principles of equity which they considered applicable to the case; and, so far as bound by their oath, none of them were required to render a verdict "according to the evidence."—See on this point brief of appellant's counsel in the case of *Joe Johnson v. The State*, now pending for decision.

In support of the foregoing propositions the case of *Frank v. The State*, (40 Ala. 12,) is cited to the point that the prisoner has the right to have any error which distinctly appears upon the record revised by this court.

Also, the case of *Shapoonwash v. United States*, (Wash. Ter. Rep. 219,) to the effect that "in a capital case no presumption is made in favor of the regularity of the proceedings; the record must show that the prisoner was duly and legally convicted."—Brightly's Dig. Fed. Decis. p. 74.

3. The charge given by the court is erroneous, for the following reasons:

Murder in the second degree, as defined by the Revised Code, § 3653, is "any homicide committed under such circumstances as would have constituted murder at common law." As defined by Coke, murder at common law is "when a person of sound memory and discretion unlaw-

fully killeth any reasonable creature in being and under the king's peace with malice aforethought."—Black. Com. 4th book, p. 194.

All writers on criminal law agree that "malice aforethought" is a necessary element of the crime of murder. The omission of these words, therefore, from the charge of the court was erroneous. The words "in malice," used in the charge, do not supply this omission. The killing might have been in malice, yet without malice aforethought.

4. The remark of the court, set out in the bill of exceptions, not only excluded from the minds of the jury the consideration of a verdict of manslaughter in the second degree, but also of "not guilty." It substituted the opinion of the presiding judge for that of the jury, its natural effect upon them being to prejudice their minds against the defendant, and to cause them to disregard the testimony of his witnesses. It deprived the accused of the fair, impartial trial by jury which was guaranteed to him by the laws and constitution of the State.—*Sims v. The State*, 43 Ala. 33.

ATTORNEY-GENERAL, *contra*.

The opinion of the court in the main case was as follows:

PETERS, J.—The appellant, Zach Stephens, was indicted at the February term, in 1871, of the city court of Montgomery, for murder. He was tried at the July term following of said city court, and found guilty of murder in the second degree, and sentenced to confinement in the penitentiary for fifty years. And he now brings the case here by appeal, and insists that the record shows numerous errors in the proceedings in the court below, which would justify a reversal of the judgment of conviction, and a new trial in the court below.

In such an appeal, this court must render such judgment on the record as the law demands. No assignment of errors is needed.—Rev. Code, § 4314. The charge here is a capital offense.—Rev. Code, §§ 3653, 3654. On this the

accused was arrested and committed to jail, and he was in actual confinement at the time of the trial. This entitled him to have a copy of the indictment and a list of the jurors summoned for his trial, including the regular jury, "*delivered* to him at least one entire day before the day appointed for his trial."—Rev. Code, § 4171. This is a constitutional right, which the record should show has not been denied him.—Const. Ala. Art. I, § 8; *Driskill v. The State*, 45 Ala. 21; *Lacy v. The State*, 45 Ala. 80; *Flanagan v. The State*, 46 Ala. 703. The recital in the record on this point is in these words: "It is ordered by the court, that the trial of this cause be set for Thursday, the 9th day of March, 1871; and that the sheriff summon fifty special jurors, in addition to the regular panel, to appear on said day, to serve as jurors in said cause; and ordered, that a copy of the indictment, together with a list of the special jurors, and also of the regular panel, be *served* upon him one entire day before the day set for trial." The judgment entry also recites that "a copy of the indictment and a list of all the jurors, both regular panel and special jurors, having been *served* upon defendant one entire day before the day set for trial," &c. It is insisted that there is such a radical difference between the word *delivered* and the word *served*, that they can not be used indifferently for each other. The constitution declares that "the accused has a right" "to demand the nature and cause of the accusation," and "to *have* a copy thereof."—Const. Art. I, § 8, *supra*. In criminal prosecutions, certainty to every intent is required. Where the life or liberty of the citizen is in peril, nothing is to be taken by intendment. The words, then, which declare the performance of an act to which the accused is entitled as a right, should be those used in the law that gives the right, or of equivalent import. The words "to have," and "to deliver," are not equivocal. They are certain to every intent. They need no argument to make their meaning clear. Can this be said of the word "serve"? I think not. A service may be made without an actual delivery. The usual mode of summoning witnesses is by serving the

subpœna by notice of its contents. This would not do, if an actual delivery of a copy were required. Then, the language of the record is insufficient to show that a copy of the indictment and a list of the jury were *delivered to* the defendant, as required by law. And without this, the proceeding is erroneous.—45 Ala. 21, 80, *supra*. It is much the best to follow the language of the statute in such a case. Then there can be no doubt. The same may be said of the declarations of the record upon the organization of the juries. The safest rule is to follow the language of the statute as minutely as possible. If departures from this language are permitted, the field of controversy will be enlarged, and the rights of the accused will be imperiled. In criminal proceedings this is forbidden. *Parmer v. The State*, 41 Ala. 416.

On this point I differ with my brethren. They hold that the recitals in the record show a *delivery* to the defendant of a copy of the indictment and list of jurors, &c., as required by law.

It is further objected in behalf of the appellant, that the oath administered to the jury, on the trial below, was not sufficient. The record shows that the jury were sworn to "try the issue joined between the State of Alabama and the defendant, Zach Stephens." This is not the oath required by the statute. This latter oath is not only to "try the issue joined between the State of Alabama and the defendant," but also, "*true verdict render according to the evidence.*"—Rev. Code, § 4092. The difference between these two forms is too palpable to need comment. The statutory form is the only one that can be permitted to be used. If any other is used, the court does not proceed by "due process of law."—Const. Ala. Art. I, § 8; Rev. Code, § 4092; *Perry v. The State*, 43 Ala. 24; *Joe Johnson v. The State*, 47 Ala. 9.

The charge of the court, as shown in the bill of exceptions, is also objected to. It is not free from error. The statute divides felonious homicides into two classes; that is, 1st, murder in the first degree; and 2d, murder in the second degree. This last is any "homicide committed

under such circumstances as would have constituted murder at common law."—Rev. Code, § 3653. There could be no murder at common law without premeditated malice; that is, "malice aforethought."—4 Bla. Com. 195; 1 Hawk. P. C. p. 184, 7th Lond. ed. 1795; 1 Russ. on Crimes, p. 482, *et seq.* The charge here instructs the jury that "malice" alone, coupled with a willful act which produced the death, was sufficient to constitute murder at common law, or, which is the same thing, murder in the second degree under our statute. Malice means evil-mindedness and a disregard of law. All homicides, except in self-defense, or by accident or ignorance, are done with an evil mind and a disregard of law; yet there is a considerable class of homicides, so committed, which are not murders at common law, or under the statute.—Rev. Code, § 3659; 1 Bish. Cr. Law, p. 230, bottom; § 263, and cases in notes. Then, there must not only be malice, but "malice aforethought," to constitute murder in the first or the second degree under our statute. The charge of the court found in the record departs from this definition of murder in the second degree. It is erroneous.

The remarks of the court, when asked by the defendant's counsel in the court below to instruct the jury as to the form of their verdict in case they found the defendant guilty of manslaughter in the second degree, or involuntary manslaughter, were unfortunate. The remarks were, "I can't conceive how the jury could find such a verdict upon such a state of facts; but, if you request it, I'll instruct them." Although this was obviously not intended as a charge to the jury, yet it is hardly consonant with that perfect fairness and impartiality that should be most scrupulously maintained by the presiding judge where the life and liberty of the citizen are imperiled. Often "trifles light as air, are confirmations strong as holy writ" to bias minds, and juries are not always free from such. But I have no doubt that those remarks were an unguarded and hasty expression of opinion, which will not be repeated by the learned and amiable and upright judge who presided

on the trial of this cause in the court below.—*Sims v. The State*, 43 Ala.

The judgment and sentence of the court below are reversed, and the cause is remanded for a new trial. The appellant, said Zach Stephens, will be kept in custody until discharged by due course of law.

MOREN, LIEUT. GOV., *vs.* BLUE.

[APPEAL FROM ORDER GRANTING MANDAMUS.]

1. *Per diem, compensation; when officers and members of the general assembly of Alabama not entitled to.*—When the general assembly, during an annual session of the legislature, adjourns for a month, longer or shorter, and the object of such adjournment is that the members may return to their homes, and the business of the session thereby ceases for that time; in such a case, neither the members nor the officers of the two houses are entitled to their *per diem* compensation for the period of such adjournment.

APPEAL from the Circuit Court of Montgomery.
Tried before Hon. J. Q. SMITH.

SECTION 55 of the Revised Code provides that "the secretary of the senate is allowed eight dollars a day." Section 56 provides that "the compensation due under the preceding section must be certified by the president to the comptroller, [now auditor,] who issues his warrant therefor."

During the entire session of the general assembly in the years 1870–71, Blue was secretary of the senate. The general assembly took a recess from the 16th day of December, 1870, until the 18th day of January, 1871. Blue presented his account for services, at eight dollars per day, during the recess, to Moren, lieutenant-governor and president of the senate, and requested him to certify it; this, Moren refused to do. Blue then petitioned for a *manda-*

mus. Moren demurred to the petition, on the ground that it did not show that any services were rendered, or required to be rendered, and that there was no law authorizing or requiring him to sign said certificate.

The cause being submitted for final decision on the demurrer, the court overruled the demurrer and ordered a peremptory *mandamus* to issue, and hence this appeal.

JOHN W. A. SANFORD, Attorney-General, for appellant.
RICE, CHILTON & JONES, *contra.*

PECK, C. J.—The members of the court are unanimous in the opinion that the order of the circuit court awarding a *mandamus* in this case, is erroneous.

We hold, that where the general assembly adjourns for a few days, for some special reason or purpose, both the members and the officers of the two houses are entitled to their *per diem* compensation; but when the adjournment is, say, for a month, longer or shorter, and the object is, that the members are to return to their homes, and the labors of the session are to cease; in such a case, neither the members nor the officers of the two houses are entitled, during the period of such an adjournment, to their *per diem* compensation.

The general rule is, that where public officers or servants receive a *per diem* compensation, there must be a *per diem* service. We can see no good reason to make the present case an exception to this general rule.

The order and judgment of the circuit court directing a *mandamus* to be issued, &c., are reversed, and the appellee's petition is dismissed at his cost, both of this court and of said circuit court.

[NOTE BY REPORTER.—The opinion in this case was delivered at the June term, 1871, but did not come into the Reporter's hands in time to be reported earlier. The case of *Reynolds v. Blue* was decided at the June term, 1872, but as the two opinions cover the whole of the law upon the subjects therein discussed, it has been thought better to report the two cases in the same volume.]

REYNOLDS, AUDITOR, *vs.* BLUE.

[APPEAL FROM ORDER GRANTING MANDAMUS.]

1. *Appeal; when auditor may take, without giving security for costs.*—Where a peremptory *mandamus* is awarded against the auditor, commanding him to draw his warrant on the treasurer in payment of a claim against the State, he may sue out an appeal to this court without giving security for costs, if it appear that he has no personal interest in the matter, and has only acted therein in his official capacity, with a view to protect the interests of the State.
2. *Payment of money out of the treasury; what does not authorize.*—A certificate issued to the secretary of the senate, under resolution of the Senate of the 26th of February, 1872, (Journals, p. 548,) does not, without other legislation, authorize the auditor to issue his warrant on the treasurer for the payment of the account thus certified.
3. *Constitution, Art. IV, § 31; what not a law within meaning of.*—A resolution of the senate requiring its president and its secretary to certify the accounts of its duly elected and appointed officers for their *per diem* compensation during the recess, is not a law within the meaning of § 31, Art. IV, of the constitution, which declares that no money shall be drawn from the treasury but in pursuance of an appropriation made by law.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

THIS was an appeal by R. M. Reynolds, auditor, from a peremptory *mandamus* issued out of the city court of Montgomery, commanding him to draw his warrant on the State treasurer, in favor of M. P. Blue, for $168, the amount claimed by Blue as his *per diem* compensation as secretary of the senate, for the twenty-one days of the recess of the general assembly of Alabama, between the 19th day of December, 1871, and the 10th day of January, 1872.

Blue's petition shows that he was secretary of the senate at the commencement of the session, during the said recess, and continued to be secretary until the end of the

session in 1872; that on the 26th day of February, 1872, the senate passed the following resolution: "*Resolved*, That the president of the senate and the secretary of the senate are hereby authorized and required to issue the usual certificates to the regularly elected and appointed officers of the senate during the recess, commencing on the 19th of December, 1871, and ending January 10th, 1872;" that petitioner's account, regularly made out and certified as required by said resolution, was presented to the auditor, and a warrant demanded on the State treasurer for the amount so certified, which demand the auditor refused to comply with. There was no allegation in the petition that Blue performed, or was required to perform, any duties during the recess.

The auditor demurred to the petition, the substance of the grounds being that the petition did not show that Blue was lawfully employed by any competent authority to render services during the recess, or that any services had in fact been rendered, or that any appropriation had been made to pay for such services, even if it were admitted that they had been rendered.

The cause being submitted for final decision on the demurrer, the court overruled the demurrer and granted a peremptory *mandamus*, &c., and hence this appeal.

Overruling the demurrer is now assigned as error.

No security was given for the costs of appeal. The clerk certified in his certificate "that no bond is required, the appeal being in behalf of the State." Appellee made a motion to dismiss the appeal on this account.

JOHN W. A. SANFORD, Attorney-General, for appellant.
RICE, CHILTON & JONES, *contra*.

PECK, C. J.—The motion to dismiss the appeal because security for the costs of the appeal was not given, must be overruled. This proceeding is essentially, except as to the name of the party against whom it is instituted, a proceeding against the State. The appellant, as auditor, has no interest in the matter, except in so far as it is his duty, as a public State officer, to protect the interests of

the State, and he ought to be permitted to do this without subjecting himself, individually, for the costs. Since the case of *Riggs, Comptroller, v. Pfister*, 21 Ala. 469, to the present time, the comptroller and auditor have uniformly, so far as we know, prosecuted appeals in such cases without giving security for the costs of the appeal, and we are not disposed to disturb this long continued practice. If not within the letter, such cases are within the spirit of section 3487 of the Revised Code.

2. At the June term of this court, 1871, in the case of Moren, lieutenant-governor, against the present appellee, we held that when the general assembly, during an annual session of the legislature, adjourns for a month, longer or shorter, and the object of such an adjournment is, that the members may return to their homes, and the business of the session thereby ceases for that time, in such cases, neither the members nor the officers of the two houses are entitled to their *per diem* compensation for the period of such an adjournment; that where officers receive a *per diem* compensation, there must be a *per diem* service.

In principle, there is no substantial difference between that case and the present. The resolution of the senate dated the 26th of February, 1872, (Journal, p. 548,) authorizing and requiring the president and the secretary of the senate to issue the usual certificates to the regularly elected and appointed officers of the senate during the recess of the general assembly, commencing on the 19th of December, 1871, and ending on the 10th day of January, 1872, does not, *without other legislation*, make it the duty of the auditor, nor authorize him, to draw his warrant on the treasury for the payment of certificates issued by authority of said resolution. Article IV, § 31 of the constitution, says, "No money shall be drawn from the treasury but in pursuance of an appropriation made by law." Said resolution is not a law within the meaning of that section of the constitution, and we are not informed, nor is it stated in appellee's petition, that any law has been passed providing for the payment of said certificates. Without this,

the auditor correctly refused to draw his warrant on the treasury for the payment of the certificate issued to petitioner under said resolution.

The demurrer of the auditor to appellee's petition should have been sustained. The judgment of the court below is reversed, at appellee's costs.

ARRINGTON *vs.* PORTER.

[ACTION TO RECOVER DAMAGES FOR FAILURE TO DELIVER COTTON.]

1. *Statute of frauds; what contract not within.*—A parol contract for the rescission of a sale of land, the purchase-money not having been paid, accompanied by a return of the possession to the vendor, is without the statute of frauds.
2. *Decree against principal; when not evidence against surety.*—A decree o the chancery court foreclosing a mortgage of land is not evidence against the surety of a debtor, who was not a party, in a suit at law to recover the balance of the purchase-money, to prove that the sale had not been rescinded by the parties.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

On the 10th day of December, 1866, appellant sold Thos. R. Stacey a plantation in Montgomery county. Stacey, with one V. R. Porter, in payment of said plantation, executed three written instruments, of like tenor with the one below, with the exception of the dates, and secured these obligations by a mortgage on the land, which Arrington had conveyed to him in fee simple.

The written instrument upon which this suit was brought was as follows:

"Montgomery, Ala., Dec. 10th, 1866.

"On the 15th day of November, 1868, we or either of us promise to pay and deliver to A. H. Arrington, or order,

in the city of Montgomery, thirty-three and one-third bales of cotton, each bale to weigh five hundred pounds, to be in good order, and of the class known as middlings.

"THOS. R. STACEY,
"V. R. PORTER."

Stacey was duly adjudicated a bankrupt in May, 1868, and received a discharge. On the 8th of January, 1869, no part of said cotton having been delivered, appellant brought this action against the appellee to recover damages. The plaintiff introduced the written instruments in evidence, and proved the price of middling cotton, and then rested.

The defendant then introduced Thos. R. Stacey, who testified that he as principal, and the defendant as surety, executed said written instrument; that the consideration thereof was a tract of land lying in Montgomery county, which was purchased by the said Stacey from plaintiff, and conveyed to Stacey by the plaintiff, by an absolute warranty deed, on the 10th day of December, 1866, the date of said instruments; that he (Stacey) at the same time executed a mortgage to secure the payment of said instrument, and two like instruments, due respectively on the 15th of November, 1867, and the 15th of November, 1869; that he went into possession of the land conveyed, and cultivated it during the year 1867, making about thirty bales of cotton and sixteen hundred bushels of corn; that between the 15th and 18th day of December, 1867, witness met plaintiff; that plaintiff asked witness if he would be able to make the first payment; that witness said he would not; that plaintiff then proposed to rescind the said contract and take the land back; that witness agreed to this proposition, and as the papers, except the deed to Stacey, were in the city of Montgomery, they agreed to exchange papers when they met in the city of Montgomery; that witness agreed to pay the plaintiff a reasonable rent, but that no time was fixed for the payment thereof, nor was the amount fixed or agreed on; that witness told plaintiff that he could pay part of said rent in corn, which plaintiff said would suit him; that witness agreed to surrender to

plaintiff possession of the plantation, but plaintiff agreed that witness might remain in the houses till he could get another place, which occurred a few days afterwards, when witness moved out. In a day or two after this agreement was made, the plaintiff called upon the defendant (who had possession of it) for the deed which plaintiff had executed to witness, which was sent to him and received by him, and in a few days, and before plaintiff left the neighborhood, plaintiff rented out said plantation to other persons for the year 1868, who occupied and cultivated it during that year.

The defendant testified that plaintiff came to his house some time in December, 1867, and asked for the deed he (plaintiff) had executed to T. R. Stacey, saying he had rescinded the trade with Stacey; that he (defendant) looked for the deed, but could not find it at that time, but on the next morning found it and sent it to plaintiff; that he was not present when the agreement to rescind was made, and knew nothing of it till plaintiff called for the deed; that he afterwards met plaintiff in the city of Montgomery, and that plaintiff asked him for a draft on Lehman, Durr & Co. for the rent of the land, but he refused, telling plaintiff he had no funds, and had rented no land from him.

Two other witnesses testified in substance that they saw plaintiff in 1867, on his arrival in Montgomery from North Carolina, before he saw Stacey, and plaintiff was then trying to find some one to rent the land to, as he said he expected to have to take the land back, and that in 1867 plaintiff did rent out said land for the year 1868.

On behalf of the plaintiff there was testimony to show that the rescission of the contract for the sale of the land was to be dependent upon Stacey and Porter paying a certain portion of the crop raised that year on the land, and that this was not done. The plaintiff himself testified that he got the deed to the land, so as to prepare a reconveyance from Stacey and wife to the land, in case Stacey complied with the terms upon which the land was to be taken back; that he applied for the deed only to enable

him to draw up the new deed for Stacey and wife to sign. The bill of exceptions then recites:

"At this stage of the evidence the plaintiff offered in evidence a duly certified transcript of a bill filed on the 22d of June, 1868, by the plaintiff against Thomas R. Stacey, (the principal of defendant, Porter,) to enforce said mortgage, and of the summons issued on said bill against said Stacey, and of the service of said summons on said Stacey in July 1868, as duly returned on said summons, and of the decree *pro confesso* and decrees and reports in said chancery suit; which transcript is marked and referred to as 'Exhibit C,' and is hereby made part of this bill of exceptions."

It was admitted by the defendant, and Stacey testified that the summons issued under said bill in chancery was duly served on him in July, 1868. The defendant objected to the evidence of the said bill in chancery, and the said proceedings thereon, on the ground that the same were irrelevant. The court sustained this objection, and the plaintiff excepted to this ruling and decision of the court.

The decree of foreclosure referred to was rendered upon decree *pro confesso* against Stacey, and the suit in which it was rendered was commenced July 7th, 1868.

This being the substance of the evidence, the court charged the jury as follows:

"If A convey land to B by deed, and at the same time, in order to secure the purchase-money, takes the agreement of B and D to deliver cotton to him, and also a mortgage from B to secure the delivery of the cotton on the same land, and at the same time and after the law day of the mortgage agree with B to rescind the contract of sale, and they do rescind it by agreement, it is not necessary that the agreement to rescind should be in writing in order to discharge the surety, unless that was a portion of the agreement to rescind."

To the whole of this charge and each several part thereof the plaintiff excepted.

The court then, at the request of the defendant, gave the following charge, to which plaintiff excepted:

"If the jury believe, from the evidence, that the instrument in writing described in the complaint was executed by Thomas R. Stacey, and the defendant as surety for said Stacey, in consideration of the purchase of a plantation by said Stacey from the plaintiff, in 1866, at the time of said purchase plaintiff executed to said Stacey a deed to said plantation, and the said Stacey at the same time executed to said plaintiff a mortgage to said plantation to secure the payment of the cotton agreed to be delivered, and that afterwards, in December, 1867, plaintiff and said Stacey agreed to rescind said contract for the purchase of said plantation, and to consider said contract as then rescinded, the papers to be afterwards exchanged, and Stacey to pay rent for the year 1867, the amount of said rent to be afterwards determined, in pursuance thereof said Arrington did procure said deed to said land, and said deed was received and accepted by him, and said Stacey delivered the possession of said plantation to plaintiff, and that plaintiff retained possession of the same by leasing it to other persons for the year 1868, then they must find for the defendant."

The charges excepted to and the action of the court in excluding the record of the chancery suit, are now assigned for error.

SAMUEL F. RICE and THOS. M. ARRINGTON, for appellant. An important question in this case is, whether, in a court of law, a mere verbal rescission of a sale of land previously made honestly and fairly, and perfected by acceptance of a regular conveyance, and of possession on the part of the vendee, in Alabama, can be treated as valid. If this question is decided in the negative, the defense which was successful in the court below, fails entirely, and there must be a reversal of the judgment of that court.

That this question must be decided in the negative, seems to be settled by adjudged cases upon reasoning which admits of no refutation.—*Clark v. Graham*,

6 Wheat. 577; *Keeler v. Tatnall*, 3 Zabriskie's Rep. 62; *White v. White*, 1 Harrison's Law (N. J.) Rep. 202; *Hughes v. Moore*, 7 Cranch, 176; *Quincey v. Tilton*, 5 Greenl. Rep. 277; *Gleason v. Drew*, 9 Greenl. Rep. 81, 82; *Miller v. Smyth*, 1 Mason's Rep. 175; *Tripp v. Tripp*, Rice's Rep. 84; *Chapman v. Searle*, 3 Pick. Rep. 38.

"A court of law can look only to the legal title" where real estate is concerned; "the legal title to lands can not pass by parol in this State"; nor "by a parol estoppel." This is the inevitable result of the policy of our statute of frauds.—*Doe, ex dem. McPherson v. Walters*, 16 Ala. 714; *Causey v. Driver*, 13 Ala. 818; *You v. Flinn*, 34 Ala. 409; *Hughes v. Moore* and *Clark v. Graham*, *supra*.

By our statute of frauds, (Revised Code, § 1862,) every agreement, the legal effect of which, if valid, would be to change or transfer either the legal or equitable title to land from one person to another, is void, unless it, or some note or memorandum thereof, expressing the consideration, "is in writing and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing," "unless the purchase-money or a portion thereof be paid, and the purchaser be put in possession of the land by the seller." And if there be no such writing as is required by this statute, then, although the purchase-money be paid and the purchaser put in possession of the land by the seller, a court of law must treat the contract as so far void, that it can not enforce the contract or any right of the purchaser thereunder. The purchaser in such case can get relief only in a court of equity, where he will get it, but only upon equitable terms and conditions.—*Chapman v. Glassell*, 13 Ala. 50; *Hughes v. Moore*, *supra*.

The legal requisites of a perfect sale or exchange of land are set forth in the statute of frauds.—*Clark v. Graham*, *supra*. And "when the sale or exchange is fairly and honestly made and perfected by delivery, the property is completely changed in the land which is the subject of the sale or exchange; and if, after this, the parties agree to give up the bargain, as it is often expressed, and place

things as they stood before it was made, this object can only be effected by what, in legal contemplation, amounts to a re-sale or re-exchange; and whatever was necessary constitute the original sale or exchange a legal transfer of the property from one of the parties to the other, is equally necessary to constitute a legal re-sale or re-exchange." *Quincey v. Tilton, supra*, and other cases cited above.

Even the cancellation or re-delivery of a deed for land, by the vendee who had accepted it and taken and held possession under it, (such possession being equivalent in law to recording the deed, so far as notice is concerned,) does not divest the title of the vendee or revest the title in the vendor.—*Mallory v. Stodder*, 6 Ala. 808, and the cases from Massachusetts and Connecticut Reports therein cited.

2. An agreement to rescind is very different from a rescission. The mere agreement to rescind is, in its nature, executory; whilst a rescission, in its nature, is executed. No such mere agreement as to land, so long as it retains to any extent its executory nature, can be the basis of a defense to a suit for the price agreed to be paid for the land on its original sale.—*White v. White*, 1 Harrison's (N. J.) Law Rep. 202; *McNair v. Cooper*, 4 Ala. 660, (which illustrates the difference in the effect of an executed and an executory agreement.)

The agreement to rescind, relied on in the present case as a defense, was not executed.

3. A third answer to the defense set up below, is found in the proceedings in the chancery suit read in evidence and shown in the record. Full opportunity was afforded for the interposition of the pretended rescission as a defense in that chancery suit. That was the suit in which that kind of defense should have been made. If that defense was good anywhere, it was good in that suit. It was not made there, and it can not be allowed here.

There is nothing in the fact that Porter was the surety of the original purchaser. There are defenses peculiar to sureties. But the alleged rescission of a sale of lands is not one of those defenses. A surety has no right to ask a court to disregard the statute of frauds, or the law of the

land, in deciding what amounts to a rescission of such sale. Besides, Porter, the surety, had notice of all the facts, and has not been, and can not be, prejudiced, or deprived of any benefit he otherwise would have had, by any act of the plaintiff. And it is clear, the plaintiff has done nothing but what he lawfully might do. Certainly the lawful acts of the plaintiff can not deprive him of his right to recover judgment for what is lawfully due to him from Porter, as well as from Porter's principal.

STONE, CLOPTON & CLANTON, *contra.*

B. F. SAFFOLD, J.—The material question at issue in this case is, whether a verbal contract rescinding a sale of land, the purchase-money not having been paid, executed by the vendor receiving possession of the land and using it as his own, is within the statute of frauds.

The rescission of a sale of land which has been completed, is virtually a sale of the land by the vendee to the vendor. Possession by the purchaser with the consent of the vendor, under a parol contract of sale, takes the case out of the statute of frauds, but the possession must be under the contract.—*Danforth v. Laney*, 28 Ala. 274. A purchaser who has paid the purchase-money, and has obtained possession under a parol contract, is entitled to a specific execution of the contract.—*Brewer v. Brewer & Logan*, 19 Ala. 481. If the proof establishes that Arrington received possession of the land with the consent of Stacey, under a parol contract rescinding the former sale, the purchase-money not having been paid by Stacey, then there was only needed the proper conveyance to complete the sale. This, either party could enforce. The purchase-money was virtually paid, and the debt sued for in this case was extinguished.

It was not stated with what view the plaintiff, Arrington, offered in evidence the record of his chancery suit against Stacey. We presume it was intended to show an adjudication of the question whether there had been a rescission of their contract. Porter was not a party to that suit, and

the decree was *pro confesso*. Stacey had become bankrupt, and was doubtless indifferent to the result of the chancery proceeding. It sought only to appropriate the land to the payment of the debt, and that had already been done. In some instances, a judgment against the principal is made conclusive upon his sureties by statute, as in the cases of *Williamson v. Howell*, 4 Ala. 693, and *McClure v. Colclough*, 5 Ala. 65. The general rule, however, is, that a recovery against the principal can not be used as evidence to charge the surety, unless his contract binds him to the result of legal proceedings against his principal. When the judgment is binding on the surety at all, it is conclusive. He is either a party, or privy, or a stranger.—*Fireman's Ins. Co. v. McMillan*, 29 Ala. 147. There was no error in excluding the record of the chancery suit.

There is no error in the action of the court to which the appellant has a right to object.

The judgment is affirmed.

TANNER, ADM'R, *vs.* HAYES ET AL.

[MOTION TO AMEND RECORD NUNC PRO TUNC.]

1. *Amendments nunc pro tunc; parol evidence inadmissible.*—On application to amend a judgment *nunc pro tunc* at a subsequent term, parol testimony is not admissible to supply the deficiencies of the record evidence.
2. *Same; discretionary power.*—The amendment, or rendition, of a judgment *nunc pro tunc*, is allowed in furtherance of justice, and is obliged to be to some extent discretionary. This court will not reverse the judgment of the lower court refusing such an application, unless it is made to appear that otherwise injustice will be done to the applicant, and that the rights of others will be invaded.

APPEAL from the Probate Court of Limestone.
Tried before Hon. JOSHUA P. COMAN.

APPELLANT, as administrator of the estate of John H. Jones, deceased, moved the probate court, on the 11th day of May, 1871, to amend its record *nunc pro tunc*, so as to show that said estate was declared insolvent on the 23d day of March, 1868, instead of the 25th day of the same month and year, as appeared by the record. No reason is stated why the amendment should be made, the sole grounds upon which the motion was based being, as therein stated, "that said decree was in fact made and rendered on the 23d day of March, 1868, instead of on the 25th day of March, 1868, as now appears of record." The bill of exceptions recites that "said administrator was heard by his attorneys in favor of his motion, and that W. H. Hayes and Spalding, Lucas & Co. were heard by attorneys in opposition thereto, the said Hayes as assignee of E. M. Hussey, and the said Spalding, Lucas & Co. being creditors of said estate, and having filed their claims against said estate in time."

In support of his motion, appellant introduced in evidence a minute entry of the 25th of February, 1868, reciting that on that day appellant, as the administrator of said estate, reported said estate insolvent, and that thereupon the court fixed the fourth Monday in March, 1868, to hear and determine said report, and ordered publication, &c.

Appellant then introduced in evidence the minute entry of the decree declaring said estate insolvent, as found on page 250 of the minute book, which decree was dated as of March *25th*, 1868. He also introduced in evidence certain minute entries relating to other estates, which were dated respectively the 19th, 21st, and 23d days of March, which entries immediately preceded the minute entry of the 25th of March declaring said estate insolvent. He also introduced in evidence the entry in said minute book, found on page 251 of said book, which entry was in relation to another estate, and dated March 23d, 1868, and followed immediately after the decree of insolvency dated March 25th.

He next introduced in evidence the following entries of the judge on the docket, respectively on pages 303 and 316:

234 "Estate J. H. Jones, } This day Wm. P. Tanner, adm'r
Rept. Insolvency. } of said est., makes report of insolvency. Set for 4th Monday in March. Pub. ord.
Feb. 25th, 1868."

250 "Estate of J. H. Jones, } This day said estate declared
Declared Insolvent. } insolvent, ordered that adm'r, W. P. Tanner, make settlement 25th April. Ord. that pub. be made.
March 23, 1868."

He next introduced in evidence two entries of the judge in relation to other estates, on said docket, one of said entries immediately preceding, and the other immediately following, the judge's entry on the docket of the declaration of insolvency of said estate, dated March 23d, 1868. Both of these entries were dated March *23d*, 1868, and corresponded with the minute entries of the court of same date made in relation to said estates.

It was admitted that the 4th Monday in March, 1868, was the 23d day of March, and that there was no record or other evidence showing a continuance of the hearing of the matter of said report of insolvency from the 23d to the 25th day of March.

It was also admitted that Thomas J. Cox, who was clerk of the judge of probate sometime before, and at the date of said entry of the decree of insolvency, would swear, if present, that he made the minute entry, sought to be amended, from the entry of the judge on the docket, on page 316 of said docket, which entry is set out above, and recites, among other things, "This day said estate declared insolvent," and dated March 23d, 1868; that he intended the minute entry sought to be amended to conform in all things to said entry of the judge made on page 316 of his docket, dated March 23d, 1868. On the objection of said W. N. Hayes and others, the court rejected the testimony of Cox, and the appellant excepted.

The above is the substance of the bill of exceptions, except an agreement as to the effect of the decision in this case as to others in which the parties were interested. "All objections as to the parties to the motion were waived."

The court refused to allow the amendment, and hence this appeal.

HOUSTON & PRYOR, for appellant.
WALKER & JONES, *contra.*

B. F. SAFFOLD, J.—The appellant moved the probate court to amend its record *nunc pro tunc*, so as to show that the estate of John H. Jones, which he represented, was declared insolvent on the 23d of March, 1868, instead of the 25th of said month and year, as appears from the record.

In support of this motion, he offered the testimony of Thomas J. Cox, to the effect that he was the clerk who made the entry proposed to be amended, and that he wrote it from and by the authority of a docket entry made by the probate judge to the following effect: "Est. J. Haywood Jones, declared insolvent. This day said estate declared insolvent. Ordered that adm'r, W. P. Tanner, make settlement 25th April. Ord. that pub. be made, March 23, 1868." The court held the testimony inadmissible.

The application of the administrator was not made under the authority of any particular statute, but it invoked the aid of the court under the general law applicable to the amendment of judgments *nunc pro tunc*. It is a well established rule, that judgments can only be amended, or rendered, *nunc pro tunc*, when there is sufficient matter apparent on the record or entries of the court to amend by.—*Hudson v. Hudson*, 20 Ala. 364. Parol evidence can not be admitted to supply the deficiencies of the record evidence. The court did not err in excluding the testimony of Cox.—*Harris v. Martin*, 39 Ala. 556.

Every court must have authority to correct its own entries, so as to make them speak the truth, even after the adjournment of the court, on sufficient evidence.—*Coffey v. Wilson & Gunter*, 2 Ala. 701. The source of this inherent power is justice, and therefore the courts must have some discretion in altering their records after the time when they are said to import absolute verity. They some-

times impose terms on the party asking this indulgence, in order that it may not operate to the prejudice of others, and refuse it altogether, after a considerable lapse of time, where the delay has been owing to the applicant or his attorney. In other cases, the amendment or rendition is made to operate only from the date of the application. Tidd's Prac. 965, 972. It is proper that a party making such an application should assign some reason why he would be injured if the correction is not made.

The record evidence in support of the motion in this case is such, that if the court had decided reversely, we would not disturb its judgment. But inasmuch as no reason is given why the amendment is sought, and the rights of others may be prejudiced, and the presumption is legitimate that the term of the court commencing on the 23d of March was continued or protracted until the 25th, we sustain its action.

The judgment is affirmed.

HAYES ET AL. *vs.* COLLIER ET AL.

[PETITION TO PROBATE COURT AT A SUBSEQUENT TERM TO SET ASIDE DECREE OF INSOLVENCY.]

1. *Insolvent estate; jurisdiction of probate court as to, when attaches.*—The jurisdiction of the probate court to declare an estate insolvent attaches on the reception of the administrator's report of insolvency.
2. *Declaration of insolvency; when not void.*—A declaration of the insolvency of an estate, made by the probate court, after obtaining jurisdiction, can not be impeached as void for irregularities and omissions in the record.
3. § 635 *of Revised Code construed; acts done by disqualified judge voidable merely.*—The judgment of a court, the presiding judge of which is interested in the cause, or related to either party, or h s been of counsel, rendered without having the consent of the parties entered of record, is not void, but merely voidable.
4. *Same; ministerial acts of disqualified judge involving no discretion, valid.*—Mere ministerial acts, involving no discretion whatever, done

by a judge disqualified from sitting in a cause by § 635 of the Revised Code, are not on that account invalid, or reversible for error.

APPEAL from the Probate Court of Limestone.
Tried before Hon. J. P. COMAN.

THE appellees, as creditors of the estate of J. Haywood Jones, applied by petition to the probate court, at a subsequent term, to set aside and annul an order of said court, appointing a day to hear and determine the report of insolvency of the estate made by the administrator, W. P. Tanner, and also the decree of insolvency rendered on said report. The grounds upon which the petition was based were as follows:

1st. The report and accompanying statements do not conform to the law requiring them. 2d. The subsequent proceedings were erroneous in the time set for hearing the report and the notice given the creditors. 3d. The judge before whom the proceedings were had, and who made the order and decree, was related within the fourth degree of affinity to appellant, Hayes, and to Hussey, by assignment from whom he claimed to be a creditor, and consequently could not file and take verification of their claims and determine whether they were creditors or not.

It appears from the record that at the February term, 1868, Tanner, administrator of the estate of Jones, reported the estate insolvent. Thereupon the court appointed the fourth Monday in March, 1868, which was the 23d day of the month, to hear and determine upon the matter of said report of insolvency, and ordered that the creditors be notified of the filing of the petition and the day set for hearing the same, by publication in the Athens *Post*. On the 25th day of March, 1868, the court rendered a decree declaring said estate insolvent. This decree recites that the administrator moved to declare said estate insolvent "in accordance with said report and statement." So far as the record shows, with the exception of the recital in the above minute entry, no statement, as required by § 2179 of the Revised Code, appears to have

been filed with the report. There is nothing in the record showing that notices had been posted, &c., or notices mailed to creditors whose residences were known. The presiding judge was son-in-law of Hussey, and brother-in-law of Hayes; but neither of these facts appeared of record.

The record does not show any continuance of the hearing of the said report of insolvency from the 23d to the 25th day of March.

The court granted the motion, and set aside and annulled said decree of insolvency, and hence this appeal.

W. H. WALKER, and WALKER & BRICKELL, for appellants.
HOUSTON & PRYOR, *contra*.

[No briefs came into Reporter's hands.]

B. F. SAFFOLD, J.—The record shows that there was a report by the administrator of the insolvency of the estate, and that upon this report the decree of insolvency was founded. The jurisdiction of the court having thus attached, the decree is not void, no matter what might have been its fate in a direct proceeding to reverse it.—*Heydenfeldt v. Towns*, 27 Ala. 423; *Hine v. Hussey*, 45 Ala. 496. It is not claimed that the decree was rendered at a time when no court was authorized to be held.

The relationship of the judge to one of the creditors can not affect the filing and verification of his claims. The acts to be done by the judge are purely ministerial, involving no discretion whatever.—*Underhill v. Dennis*, 9 Paige, 202; *Heydenfeldt v. Towns*, 27 Ala. 423.

In addition to this, section 635 of the Revised Code should not be construed to render void the judgment of a court because the presiding judge was related to either party, or interested in the cause, or had been of counsel. It was not so by the common law, and this we regard as high authority. A system of law, the accretion of ages in practical application to human affairs, and so comprehensive as to furnish a remedy for the protection of every

right, and the redress of every wrong, may well indicate the construction of a statute the terms of which do not forbid the interpretation. The statute referred to does not declare void the acts of the judge, but expressly authorizes them, with the consent of the parties entered of record. If the omission of this entry is to annul the judgment, then it may be set aside indefinitely afterwards, notwithstanding the actual consent of the parties, by strangers whom its operation may impede. If parol evidence of such disability is admissible, then the judgment, and the rights accrued under it, become ever liable to defeat.

The judgment is reversed and the cause remanded.

[Note by Reporter.—The opinion in this case was delivered at the January term, 1871. By some means it was filed away in the record in the case of *Tanner, Adm'r, v. Hayes, et al.*, decided at the January term, 1872, and reported on pages 722–6 of this volume, which involved the question of the amendment *nunc pro tunc* of the decree of insolvency sought to be set aside in this case; hence it is that this case was not reported earlier.]

BOX ET AL., ADM'RS, *vs.* DELK.

[PROCEEDING IN PROBATE COURT TO SUBSTITUTE LOST RECORDS, &C., UNDER SECTION 652 OF REVISED CODE.]

1. *Lost records; what not proof sufficient to authorize substitution of.*—An application to substitute lost records, under § 652 of the Revised Code, can not be sustained by proof that the judge failed to make the proper entries and decrees; nor will it sustain a decree to complete the minute entries and decrees in a cause, rendered under § 796 of the Revised Code.
2. *Register in chancery; when authorized to act in place of probate judge.* The register in chancery is authorized to act in the place of the probate judge, disqualified by § 635 of the Revised Code, on an application to substitute lost records, or to complete the minute entries and

decrees, in a cause which he might have heard originally under § 2302 of the Revised Code.

APPEAL from Probate Court of DeKalb.

Heard before SOL. C. CLAYTON, Esq., Register in Chancery, sitting in place of the Probate Judge.

WALKER & MURPHEY, for appellant.—The register's jurisdiction, when the probate judge is disqualified, extends only to an executorship, an administratorship, or a guardianship.—Rev. Code, § 2302. This is not one of the cases in which the register can act as probate judge. If there is a *casus omisus*, it is for the legislature, not the courts, to remedy it.

The want of jurisdiction is available on error.—29 Ala. 141; 27 Ala. 362; 19 Ala. 171; 20 Ala. 387; 23 Ala. 155.

The evidence was utterly insufficient to authorize an amendment *nunc pro tunc*. The testimony shows a case not of lost records, but goes mainly to show that many of the entries sought to be substituted had never been made at all; and that no record entries or *memoranda* existed which would authorize an amendment *nunc pro tunc* as to these. No search was made to find the entries which it was proved had been made.—See Shepherd's Dig. p. 396; 19 Ala. 619.

JAMES AIKEN, *contra*.—(No brief on file.)

B. F. SAFFOLD, J.—The appeal is taken from a decree of the probate court to complete the minute entries and decrees in the matter of the sale of the land belonging to the estate of Jeremiah Holcombe. The probate judge being incompetent under section 635 of the Revised Code, the application was heard before the register in chancery. The application on which the decree was rendered was made by the appellee, who was the purchaser. He alleged only that the papers and records in the cause were lost or destroyed, and he asked that others might be substituted. The proof shows very clearly that none of the records had been lost or destroyed; and while it establishes the exist-

ence of some of the papers described, it stops short of showing their loss or destruction. While they seem to be missing, no witness states that they have been diligently searched for in the places where they would most likely be found.

The evidence tends very strongly to show that the probate judge omitted to make the necessary entries and decrees at the time they should have been made, and the decree appealed from was rendered under that conviction. We do not think an application to substitute lost records, under section 652 of the Revised Code, will sustain a decree rendered under section 796 to complete the minute entries and decrees. There is a fatal variance between the allegations and the proof.

We decide that the register in chancery is authorized by section 2302 of the Revised Code to act in the place of the probate judge in such a case as this. He would have had jurisdiction to hear and determine the original cause, and we think the spirit of the law embraces this as well.

The decree is reversed and the cause remanded.

[Note by Reporter.—The opinion in this case was delivered at the June term, 1871. The record did not come into the hands of the Reporter in time to be included in the 46th volume of Reports.]

JONES *vs.* HOLLAND.

[ATTACHMENT TO RECOVER RENT.]

Attachment; error to render judgment before maturity of debt.—In a suit against a tenant to recover rent, commenced by attachment, it is error to render judgment against the defendant before the rent is due.

APPEAL from the Circuit Court of Henry.
Tried before Hon. J. McCALEB WILEY.

APPELLEE commenced suit by attachment on the 18th day of September, 1869, to recover from his tenant the amount due for rent, which it is shown in the affidavit for attachment was payable on the 1st day of November, 1869. On the 21st day of October, 1869, a proper complaint having been filed before that time, judgment by default was rendered against defendant, the tenant of appellee. This appeal is taken on the record, and it is now assigned as error that the judgment was rendered before the debt was due.

W. C. OATES, for appellant.
M. A. BELL, *contra.*

B. F. SAFFOLD. J.—The suit was commenced by attachment, and was for the recovery of the rent of land due, as stated in the affidavit, on the 1st of November, 1869. The judgment by default was obtained October 21, 1869.

An attachment may issue to enforce the collection of a debt not due, but the complaint is not required to be filed until the maturity of the debt.—Rev. Code, §§ 2927, 2999. There is no authority for rendering judgment against the defendant until the debt is due.

The judgment is reversed and the cause remanded.

[NOTE BY REPORTER.—The opinion in this case was delivered at the June term, 1871, and the report of it was omitted from the previous volume on account of a want of space.]

LEHMAN, DURR & CO. *vs.* FORD ET AL.

[APPEAL FROM DECREE DISMISSING CROSS-BILL BEFORE FINAL DETERMINATION OF ORIGINAL BILL.]

1. *Cross-bill, regularly filed; when appeal lies from decree dismissing.*—A cross-bill, regularly filed, is so far an independent suit as to authorize an appeal from a decree dismissing the same on demurrer for want of equity before the final determination of the original bill.

APPELLEES, on the ground that this appeal was prematurely taken, moved to dismiss it. The appeal was taken from a decree of the chancery court of Montgomery, dismissing a regular cross-bill on demurrer for want of equity before the final determination of the original bill. Appellants contested the motion, and also petitioned for a *mandamus* to compel the restoration and reinstatement of the cross-bill to the docket. The points decided are sufficiently stated in the opinion.

ELMORE & GUNTER, for motion to dismiss appeal.
RICE, CHILTON & JONES, *contra*.

PETERS, J.—This is a motion to dismiss this appeal, because the same has been prematurely taken. And in connection with this motion to dismiss, there is also an application for *mandamus* to compel the reinstatement and restoration of the cause to the docket in the court below.

The bill in this case is a cross-bill, regularly filed as such, and not an answer to an original bill in chancery turned into a cross-bill under our statute. It is, then, not a mere statutory proceeding, to be governed by the rules prescribed by the statute, or growing out of it. Such a bill is an auxiliary suit, in which the complainant may be entitled to independent relief connected with the matters of the original bill. The cross-bill is a suit which terminates in a final judgment.—Story Eq. Pl. §§ 389, 398. And it is

served, and answered, and proceeded in just as if it were an original bill, until it is finally disposed of.—3 Daw. Ch. Pr. pp. 1746–7. In *Brooks v. Woods*, such a bill has been treated as a separate suit so far as to allow an appeal from an order of dismissal on sustaining a demurrer for want of equity.—40 Ala. 538; Story Eq. Pl. §§ 628, 630, 632. This is a convenient practice, and we see no sufficient reason to overrule it. In the practice of the English courts, a cross-bill may be treated as a separate suit, and filed in a different court.—3 Dan. Ch. Pr. p. 1746, note 2. We therefore think that the appeal in this case ought to be retained. If it is, the necessity for a *mandamus* is removed.

The *mandamus* is denied, with costs, and the motion to dismiss is denied, with costs.

[Note by Reporter.—The opinion in this case was delivered at the June term, 1871, but was omitted from the 46th volume of Reports on account of a want of space.]

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11. *Equitable relief on grounds of frad, discovery, and account.*—Where a surety files a bill against his principal, seeking to subject lands which are alleged to have been conveyed by the principal, in secret trust, to hinder and delay the collection of the complainant's demand, and to have been afterwards secretly released or reconveyed by the trustee; and the answer, while admitting the conveyance and re-conveyance of the lands, denies all fraudulent intent, and alleges that the only purpose was to secure the lands as

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a homestead exempt from execution; all the parties being competent witnesses at law, and there being no complicated accounts to be settled,—the bill is properly dismissed on the merits; nor can it be maintained for the purpose of ascertaining the value of the homestead exemption, and subjecting the residue of the lands to the satisfaction of the complainant's demand.—*Kimball v. Greig*.. 239

12. *Injunction; when will lie to restrain opening street by municipal corporation.*—An injunction will lie, at the suit of the proprietor, to restrain a municipal corporation from opening a new street on his land, and collecting a sum of money out of him, assessed as his benefit of the proposed improvement, and his contribution to the cost of opening the street, when the proceedings of the corporation appear to be regular, and their invalidity is to be shown by extrinsic evidence.—*Miller v. Mayor, Aldermen, &c., of Mobile*.... 163

13. *Bill to enforce payment of pecuniary legacy; when should not be dismissed for failure to allege payment of testatrix's debts.*—Where a bill filed by a female minor, to enforce payment to her of a pecuniary legacy, is submitted for final decree on bill and exhibit, and decrees *pro confesso* against all the defendants, the chancellor should not, *ex mero motu*, dismiss the bill, even without prejudice, no defense being interposed by plea, answer, or motion to dismiss, because the bill omits to allege that all the debts of the testatrix have been paid, if it appear that the administration has been pending for ten years, and that sufficient assets have been received by the executor to pay the legacy. In such case, the chancellor should direct the bill to be amended, or proceed to decree any relief appropriate to the facts stated.—*Childress v. Harrison et al* 556

14. *Chancery; when will entertain bill to subject to payment of note the estate of deceased maker in the hands of heirs-at-law.*—An administrator in North Carolina, on his final settlement, was charged with and accounted for a note given him as administrator at a sale of the property of his intestate in Alabama. The maker of the note died intestate in this State, and his children, without administration, took possession of the estate and converted it to their own use,—*Held*, that the estate became a fund in the hands of the children for the payment of the note, and there being no adequate remedy at law, the administrator could file a bill in his own name to subject the estate to the payment of the note.—*Dunlap v. Newman et al*..... 429

15. *Chancery; what bill will entertain for settlement of partnership.*—A bill in equity filed by one partner against his insolvent co-partner in the business of carrying on a farm for one year, asking the settlement of the partnership accounts, and the foreclosure of a mortgage executed by the defendant co-partner on his share of the crop to be raised to secure an individual liability to the complainant, is not obnoxious to the objection that there is an adequate remedy at law; nor is it demurrable for multifariousness, although several purchasers from the defendant partner, of different por-

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tions of the crop at different times, are united with him as defendants.—*Monroe v. Hamilton* 217

16. *Chancery; when will enjoin erection of a toll bridge.*—Where the general assembly, in 1837, chartered a company for the purpose of building and maintaining a toll-bridge, the law at that time forbidding the erection of any toll-bridge within three miles by water of any other toll-bridge, and after this the general assembly makes a second grant to other parties, permitting them to erect a toll-bridge, a court of chancery will enjoin the use of such second bridge and abate it as a toll-bridge.—*Micou et al. v. Tallassee Bridge Co* 652

17. *Decedent's estate; removal of settlement from probate into chancery court.*—The final settlement of a decedent's estate can not be removed from the probate into the chancery court, under a bill filed by a portion of the heirs-at-law and legatees, alleging that the estate was regularly reported and declared insolvent, but, in consequence of the failure of creditors to file their claims, eventually proved solvent; that a large claim, filed against the estate by the widow, and partly paid by the administrator, was not properly a debt or preferred claim against the estate under the decree of insolvency, though, so far as it might be correct, it constituted a charge on the residue; and that the complainants had no notice of the filing of this claim, until after the expiration of twelve months from the declaration of insolvency, and no opportunity to contest its correctness. In such case, there is an adequate remedy in the probate court.—*Prince v. Prince* 284

18. *Real estate; when treated as personal property in equity.*—Real estate purchased by a partnership, for partnership purposes, and paid for with partnership funds, as to the creditors of the firm is, in equity, treated as personal property, and will, if necessary, be subjected to the payment of their debts, whether the title be conveyed to the partners by name, or to one of them, or to a third person.—*Offutt et al. v. Scott* 104

19. *Firm, dissolved by death of partner, judgment creditor of; how and against what may proceed in equity for satisfaction of his debt.* When a partnership is dissolved by the death of one partner, the only remedy at law against the firm, by the creditors of the firm, is by suit against the survivor; and when a creditor has exhausted his remedy at law against the firm, by a suit against the survivor prosecuted to a return of an execution "no property found," he may then file his bill in equity to subject the real estate of the partnership to the payment of his debt, and this whether the possession be in the surviving partner, the personal representative, or the heirs of the deceased partner, or any other person who is not a *bona fide* purchaser for valuable consideration and without notice. *S. C.* 105

20. *Bill to enforce vendor's lien on land; when not without equity.* B. purchased certain lands of S., gave his notes for the purchase-money, and received S.'s bond for titles, when the said notes were

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paid. A few days after said purchase, and before B. was let into possession, with the knowledge and consent of S., B. sold said lands to C. and C. at an advance of a thousand dollars, and by an understanding between all of said parties, C. and C. were to take up and cancel B.'s notes, and give their note to S. for said advance, expressing that it was given in part payment of said lands, and S. then and there delivered said note to B., and B. transferred said bond for titles to C. and C., and they went into possession of said lands, and continued in possession for several years, and then moved away, and H. went into possession, whether under a purchase from C. and C. was not known to B., but claiming some interest in said lands. In the meantime S. died; afterwards B. filed his bill, making the widow and heirs of S., C. and C., and said H. defendants and prayed that said thousand dollar note be declared a lien on said lands, and, if necessary, that said lands be decreed to be sold for its payment. On motion of H. the bill was dismissed for want of equity.—*Held*, 1st, that said note was a lien on said lands; 2d, that the bill was improperly dismissed for want of equity; and, 3d, that if H. purchased said lands, in good faith, for valuable consideration and without notice, after a conveyance by S. to C. and C., it would defeat B.'s lien, and be a good defense to his bill.—*Bulger v. Holly et al*..... 453

II. PRACTICE AND PLEADING.

21. *Parties to bill to subject lands to payment of debt.*—To a bill which is filed by a surety against his principal, and which seeks to subject to the payment of the debt lands alleged to have been conveyed by the principal in secret trust, the holder of the legal title to the lands is a necessary party.—*Kimball v. Grey*..... 230

22. *Dismissal of bill without prejudice.*—When a bill is dismissed without prejudice, but neither the decree nor the opinion shows the reason of such dismissal, although the record shows that it was defective for the want of necessary parties defendant, the appellate court will presume that the complainant was allowed an opportunity to amend by adding the proper parties, and that he declined to do so.—*S. C*..... 230

23. *Proof of purchase for valuable consideration without notice; who may traverse, and on what grounds.*—A vendor, who has conveyed to the purchaser the legal title to the land sold, and who seeks to enforce his lien on the land against a sub-purchaser at a sale under an order of the probate court, made on the application of the personal representative of the deceased purchaser, can not set up against such sub-purchaser, in traverse of his plea of purchase for valuable consideration without notice, the fact that he paid the purchase-money in Confederate currency, unless he impugns the good faith of the transaction.—*Kinsey v. Howard*..... 236

24. *Variance between bill and proof; when should be held immaterial.* A variance between the statements of the bill and the proof, if not of such a character as to operate as a surprise to the defendants,

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and the defendants do not appear to be thereby injured, should generally be held to be immaterial.—*Offutt et al. v. Scott*..... 105

25. *Administration; allegation as to court granting same.*—On a bill filed by an administrator, in his own right, to subject to payment of a note (for which such administrator had been charged and accounted for in his final settlement in North Carolina) the estate of the deceased maker in the hands of his children, who, without administration, had taken charge of and converted the same to their own use, it is sufficient to state that complainant was *duly appointed* administrator in North Carolina, without stating the particular court or authority by which the appointment was made.—*Dunlap v. Newman et al* 429

26. *Final settlement; what allegation as to, what sufficient.*—Where the bill states that the final settlement, &c. was made in the court of pleas and quarter sessions of Moore county, North Carolina, this is sufficient, without stating the said court had jurisdiction to make said settlement. *Prima facie*, it is to be presumed the court had jurisdiction.—*S. C*..... 429

27. *Bill in equity; when multifarious.*—Presly W. Hardin and John Williams, being indebted to Eliz. T. Swoope, a married woman, by two promissory notes, one made by Hardin & Williams, and the other by Williams & Hardin, sold their lands; the said Hardin sold and conveyed his lands to one William C. Phillips, and the said Williams sold and conveyed his lands to his four children; thereupon said Eliz. T. and her husband, as her trustee, filed their bill against said Hardin and Phillips, and said Williams and his children, and charge that said Hardin and Williams were, both of them, insolvent; that said sales were made with the intent to hinder, delay, and defraud creditors, and void as to said Eliz. T.; and prayed that said sales might be set aside and declared fraudulent, and the said lands be decreed to be sold, and the said debts paid out of the proceeds, &c.,—*Held*, that said bill was multifarious; that said sales were distinct and independent transactions, or matters, and that the parties to said sales were separate and different parties, having no connection the one with the other, and, therefore, could not be united as defendants in one and the same bill. *Hardin & Williams v. Swoope et al*..... 273

28. *Same.*—A bill in chancery, which seeks to enforce a vendor's lien for the unpaid purchase-money of land, against the personal repsentative of the purchaser and a sub-purchaser in possession, and also to establish a *deva starit* against the personal representative for misrepresenting the complainant's claim on the land, is multifarious.—*Kinsey v. Howard et al*..... 236

29. *Bill to enforce payment of pecuniary legacy; when should not be dismissed for failure to allege payment of testator's debts.*—Where a bill filed by a female minor, to enforce payment to her of a pecuniary legacy, is submitted for final decree on bill and exhibit, and decrees *pro confesso* against all the defendants, the chancellor should not, *ex mero motu*, dismiss the bill, even without prejudice,

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no defense being interposed by plea, answer, or motion to dismiss, because the bill omits to allege that all the debts of the testatrix have been paid, if it appear that the administration has been pending for ten years, and that sufficient assets have been received by the executor to pay the legacy. In such case, the chancellor should direct the bill to be amended, or proceed to decree any relief appropriate to the facts stated.—*Childress* v. *Harrison et al*..... 556

30. *Publication against non-resident defendants, and decree pro confesso thereon*.—A decree *pro confesso*, based upon an order of the register, published in a newspaper in the city of Columbus, Georgia, which order was made in a suit pending in the county of Barbour, in this State, is not void, if the order of the register directs the publication so to be made. The newspaper in which such an order may be published is discretionary with the chancellor, or the register, and this court will not control such discretion, if the place of publication is not made a matter of objection in the court below—*Mobley and Wife* v. *Leophart et al*..... 257

31. *Exhibits; proof of.*—When promissory notes, which are exhibits to the bill, are to be proved in a foreclosure suit, it is no sufficient objection to interrogatories to witnesses, called to prove such notes by their depositions, that the notes are not attached to the interrogatories. If the opposite party wishes copies of such notes in order to cross-examine, he can get them from the register.—*S. C.*. 257

32. *Lien; decree against guardian and father, in favor of ward and daughter, postponed to lien of mortgage by guardian, in favor of bona fide creditor.*—The husband may receive from his wife's guardian his wife's statutory separate estate, and receipt for the same; and if the receipt is in full of all demands, it is, if unimpeached, a full discharge in law and equity of the guardian. In such a case, when the father is the guardian, a decree rendered in favor of the husband and his wife, who is the ward, for her use, after the giving of such receipt, against the guardian, for a considerable sum of money still remaining in the hands of the guardian, and no *fieri facias* has ever been issued on such decree to enforce collection of such decree, it has no such lien against the property of the guardian as will be preferred to the lien of a mortgage of the defendant in such decree, when it appears that the mortgagee is a *bona fide* creditor of such defendant, and that the mortgage was made and recorded during the suspension of the *fieri facias* on said decree.—*S. C*.... 257

CHARGE OF COURT.

1. *Charge; if asked for in writing, should be given or refused.*—The right to have a written charge given or refused is peremptory, and it leaves no discretion in the court, and the judge should do his *duty* as prescribed.—Rev. Code, § 2756.—*Bush* v. *Glover*..... 168

2. *Charge to jury; what, error to refuse.*—R. went to L. and requested him to purchase a small lot of paper for him, (to make paper bags,) of R. & Co. L. consented, and sent his confidential clerk with R. to R. & Co. and purchased the quantity of paper de-

CHARGE OF COURT—CONTINUED.

sired; the purchase was on credit and charged to L., and when it fell due it was paid by L. R. needed more paper, and he and L.'s clerk went again to R. & Co., and a second lot of paper was gotten on like credit as at first. This was delivered to R. at L.'s saloon, and a carrier's receipt was given for it in L.'s name. In a suit by R. & Co. v. L. for the price of this paper, L. deposed that the second lot of paper was gotten without any authority from him, and he knew nothing of it, and that it was not gotten for him or for his use, and moved the court to charge the jury, "That unless the defendant (L.) authorized by himself or his agent the purchase of the paper in question on the credit of the defendant (L.), then the defendant is not liable for it,"—*Held*, the refusal of this charge is error.—*Laurence v. Randall & Co*..... 240

3. *General charge on evidence.*—When the evidence is clear, and without conflict, and it is only necessary to draw a legal conclusion from it, the court may instruct the jury, that, if they believe the evidence, they must find for the party whose case is thus clearly made out.—*Hall's Heirs v. Hall*..... 290

4. *General charge on evidence when conflicting.*—In an action on a verbal promise to pay a sum of money on a future day, if the evidence is conflicting as to the day fixed for the payment, (*i. e.*, whether it was to be paid on the happening of an event which occurred *before*, or of another event which happened *after* the commencement of the suit,) a charge which authorizes the jury to find a verdict for the plaintiff, without reference to the decision of this question of fact, is erroneous.—*Sharman v Jackson*..... 329

4. *Charge; what does not refer construction of written instrument to jury.*—In an action on an insurance policy, to recover damages for a loss by fire, a charge which instructs the jury, that, if the defendant's agent wrote the application for the insurance after an inspection of all the machinery in the building, and wrote it in such form as to include a planing machine with other machinery insured to which it was attached, and that such was the understanding of the agent and the plaintiff, then the defendant was liable for the insurance of the planing machine as well as the rest of the machinery, does not necessarily leave to the jury the construction of the writing, when there is conflicting oral evidence respecting the inclusion of the planing machine—*James River Ins. Co. v. Merritt & Robinson*..... 387

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37. § 4092. What cath not compliance with.—*Johnson v. State*..... 10
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CONFEDERATE CURRENCY.

1. *Promissory note; what sufficient consideration for.*—M., in March, 1863, having purchased property of R., gave him in payment an order, payable in Confederate currency, on C., who was M.'s debtor. C. took up the order, giving therefor his promissory note to R.,—*Held*, that the note was neither illegal, nor without consideration. *Jordan v. Cobb et al*..... 132

2. *Receipt of Confederate money by administrator, or investment in Confederate bonds.*—An administrator who, during the late war, converted the assets of the estate into Confederate money or bonds, is liable to account for the same, on his final settlement, in sound funds; but the improper allowance of a credit by the court, for such money and bonds, is a mere irregularity, or error of law, and does not render the final settlement absolutely void, nor authorize the court to set it aside at a subsequent term.—*Bruce's Executrix v. Strickland's Adm'r*..... 192

3. *Plea of purchase for valuable consideration; who may traverse and on what grounds.*—A vendor who has conveyed to the purchaser the legal title to the land sold, and who seeks to enforce his lien on the land against a sub-purchaser under an order of the probate court, made on the application of the personal representative of the deceased purchaser, can not set up against such sub-purchaser in traverse of his plea of purchase for valuable consideration without notice the fact that he paid the purchase-money in Confederate currency, unless he impugns the good faith of the transaction.—*Kinsey v. Howard et al*..... 236

4. *Payment of Confederate currency to State treasurer, for money loaned by State in 1853, does not extinguish indebtedness.*—A payment in Confederate currency in 1864, to the acting treasurer of the State at that time, is not a proper credit on a debt due the State by a plank road company, for a portion of the two per cent. fund loaned to such company in 1853.—*Jemison et al. v. Governor, &c*..... 390

CONFLICT OF LAWS.

1. *Conflict of laws, as to property rights of husband and wife, under marriage celebrated in South Carolina, with intention to reside in Alabama, where husband was domiciled.*—A marriage, contracted and celebrated in the State of South Carolina, between a man, a citizen of this State, domiciled in this State, with a woman, a citizen of the former State and residing there, with the intention of coming immediately to this State, to reside at the husband's domicile here, will be treated in our courts as a marriage contracted in this State, for the purpose of regulating the marital rights of both parties; and the marital rights of the wife will be regulated by the

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laws of the husband's domicile, if there is no marriage contract. *Glenn v. Glenn*..... 204

2. *Same, as to property afterwards bequeathed and devised to wife in South Carolina.*—Property, given to a married woman domiciled with her husband in this State, who is a citizen of this State, by the will of her father, in the State of South Carolina, in 1848, since the passage of the act of the general assembly of this State, approved March 1, 1848, entitled "An act securing to married women their separate estates, and for other purposes," for her sole and separate use and benefit, during her natural life, is to be taken, held, and esteemed here, as the separate property of the wife to the extent of her estate therein, under the law of this State regulating the "separate estate of wife," as found in the Code of Alabama.—Pamph. Acts, 1847-48, p. 79; Code, §§ 1993, 1997; Revised Code, §§ 2382, 2388.—*S. C*..... 204

CONSTITUTIONAL LAW.

1. *Act of December* 28, 1868; *constitutionality of.*—The act to suppress murder, lynching, and assaults and batteries, approved December 28,1868, is not unconstitutional.—*DeKalb County v. Smith*..... 407
2. *Constitution, Art. IV*, § 31; *what not a law within meaning of.*—A resolution of the senate requiring its president and its secretary to certify the accounts of its duly elected and appointed officers for their *per diem* compensation during the recess, is not a law within the meaning of § 31, Art. IV, of the constitution, which declares that no money shall be drawn from the treasury but in pursuance of an appropriation made by law.—*Reynolds, Auditor, v. Blue*.... 711
3. *Act of February* 9, 1870, *amending revenue law of* 1868; *constitutionality of.*—The act of the general assembly approved February 9, 1870, entitled "An act to amend an act entitled 'An act to establish revenue laws for the State of Alabama,'" is not violative of any constitutional provision; it does not invade the executive powers in remitting penalties already incurred in the non-payment of taxes for the year 1869; it does not exempt the property of railroads from taxation; it does not impair any vested right; it relates to but one subject, and that is sufficiently set forth in the title.—*Mobile & Girard R. R. Co. v. Peebles*..... ... 317
4. *Constitutional law; Art. IV, section* 2, *of the State constitution not violated, when statute complete within itself.*—An act of the legislature, complete in itself, intelligible without reference to any other, and not purporting to be amendatory of another, does not violate Art. IV, § 2, of the State constitution.—*Ware v. St. Louis Bagging and Rope Co*..... 667
5. *Injunction bond; not void because taken and approved by officers of a government in rebellion against the United States.*—An injunction bond taken by a register in chancery in pursuance of an order of the chancellor granting an injunction in 1863, is not void on the ground that those officers represented a government in rebellion against the United States.—*Estes v. Prince & Garlick*..... 269

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6. *Mobile; section 94 of charter of, unconstitutional.*—Section 94 of the charter of the city of Mobile violates Article XII, section 15, of the State Constitution, which prohibits the appropriation of a right of way to the use of a corporation, without full compensation in money, irrespective of any benefit to be derived, &c.—*Miller v. Mayor, &c., of Mobile* 163

7. *"Act to extend the jurisdiction, powers and duties of the harbor master and port wardens of Mobile," approved March 3d, 1870, and ordinance of city of Mobile thereunder, police regulations merely, and not unconstitutional.*—The act of the general assembly of Alabama "to extend the jurisdiction of the harbor master and port wardens of Mobile," approved March 3d, 1870, and the ordinance of the city of Mobile passed thereunder, on 22d of April, 1870, properly understood and interpreted, are police regulations merely, and are not in conflict with or repugnant to the constitution of the United States.—*Harbor Master, &c., v. Southerland* 511

8. *Judgment by default, rendered since the war on summons issued and served during the war, not a nullity.*—A judgment of a circuit court of this State, rendered on 3d of September, 1866, during the existence of the provisional government, founded upon a summons issued from a rebel court in this State on the 8th day of February, 1861, and served upon the defendant by the rebel authorities, though such judgment be taken by default, is not a nullity.—*Bush v. Glover* 167

9. *Sheriff's sale; validity of under such judgment.*—A sale of lands made by the sheriff under authority of an execution issued on such a judgment, and regularly conducted, is valid, and the sheriff's deed conveys to the purchaser such title as could pass by the sale. *S. C.* 167

10. *Section 3760 of Revised Code; not unconstitutional.*—Section 3760 of the Revised Code is not unconstitutional, either as to fine or costs.—*Morgan v. The State* 34

11. *Constitution, section 22 of Art. I of; what not debt in meaning of.* The costs in a criminal case do not constitute a debt within the meaning of section 22, Article I, of the State Constitution.—*S. C.* 34

12. *Contract; what constitutes.*—An act of the general assembly of this State in 1837, incorporating a company of persons, with authority to erect a toll-bridge across a river, is a contract.—*Micou et al. v. Tallassee Bridge Co.* 652

13. *Same; how construed.*—Such a contract must be construed with reference to the laws in force as they existed at the date of the passage of the act.—*S. C.* 652

14. *Same; how can not be impaired.*—The law in force in 1837 not allowing the erection of one toll-bridge within three miles, by water, of another toll-bridge, the general assembly can not impair such contract by a second grant authorizing other persons to erect a toll-bridge in less than three miles of the first toll-bridge.—*S. C.*. 652

15. *Same; validity of order of sale, and confirmatory decree, rendered in 1863.*—An order of the probate court for the sale of a decedent's

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lands, and a subsequent decree confirming the sale, both rendered in 1863, are not void as being the acts of a court of the State while in insurrection against the United States.—*Inman's Adm'r v. Gibbs*..... 306

CONTRACT.

1. *Vendor's lien; part of every legal contract for sale of land.*—To every contract for the sale of lands legally executed in this State, the right of the vendor to retain a lien on the lands sold for the payment of money, is an incident to such contract unless it is waived or abandoned.—*Napier et al. v. Jones, Adm'r*..... 90
2. *Promissory note; what sufficient consideration for.*—M., in March, 1863, having purchased property of R., gave him in payment an order, payable in Confederate currency, on C., who was M.'s debtor; C. took up the order, giving therefor his promissory note to R.,—*Held*, that the note was neither illegal, nor without consideration. *Jordan v. Cobb et al*..... 132
3. *Contract; ratification.*—When a person adopts, deliberately and with a full knowledge of all the circumstances of the case, an act which another has done for his benefit, such adoption, as a general rule, amounts to a ratification of the unauthorized act, and puts the ratifying principal in the place of the person who assumed to act as his agent, unless the contract itself is absolutely void, and not voidable only.—*Chapman v. Lee's Adm'r*..... 143
4. *Contract creditor; rights of under section 3446 of the Revised Code.* Section 3449 of the Revised Code confers upon simple contract creditors the remedy previously confined to judgment creditors, of a bill in chancery to set aside conveyances with intent to hinder, delay and defraud creditors.—*Reynolds v. Welch et al*..... 200
5. *Written contract; what questions tend to vary, modify, and change.* In a suit on a promissory note for the hire of a slave, which, besides the promise to pay, contains certain stipulations as to clothes to be furnished, the pleas, being in short by consent, "general issue, failure of consideration, want of consideration and frauds," the plaintiff having offered in evidence the note and rested his case, the defendant, having offered at the time of asking the questions no evidence in support of his pleas, offered to ask a witness the following questions: "State the contract in full that was made between you and plaintiff in reference to the hire of this negro, at said time and cotemporaneous with the signing of said instrument. Was there a warranty of soundness given by plaintiff? Did not said warranty form, in part, the consideration of said agreement or contract? Was not said warranty a part of contract?" &c.,—*Held*, that the court properly refused to permit an answer to the questions, as they tended to add to, vary and change the written contract between the parties.—*Gaines et al. v. Shelton*..... 414
6. *Consideration; when inquiry as to precluded.*—Where the parties have fixed the consideration, and stated it in the contract as a part of the agreement, this precludes an inquiry into the question of a

CONTRACT—CONTINUED.

failure of consideration, unless there is fraud, misrepresentation, or deceit.—*S. C.* 414

7. *Merger of antecedent contract in deed; when both instruments will be construed together without merger.*—Where a written contract for the sale and purchase of lands is signed by the vendor, and by one who, without written authority, assumes to act as the agent of the purchaser; and afterwards, on the same day, the vendor executes a deed for the land to the purchaser, which deed expressly refers to the contract, declares that "it is made a part of" the deed, and that the intention of the parties in making the deed "is that it shall conform in all respects to said contract,"—the contract is not merged in the deed, but the two instruments are to be construed together, as parts of the same transaction.—*Chapman v. Lee's Adm'r* 143

8. *Warehouse receipt for cotton.*—A warehouse receipt for cotton, subject to the order of the person in whose name the receipt is given, or the bearer, is an admission that the cotton belongs to such person, and in an action to recover the cotton, or its value, it is no defense that it has been shipped and sold by direction of a party who had obtained possession of the receipt, without indorsement by the person stated to be the storer in the receipt, and without authority from him todispose of the same.—*Lehman, Durr & Co. v. Marshall* 363

9. *Usury; who only can set up defense of.*—The defense of usury can only be set up by a party to the usurious contract, or by some one having an interest in or prejudiced by the same.—*S. C.* 363

10. *Construction of application for policy, as to property included.*—A written application for insurance, in which the property is described as "a frame steam saw-mill, covered with sheet iron, situated," &c., "boiler, engine, machinery, and belting contained therein," includes a planing machine in the building on the same floor with the machinery proper of the mill, about twenty-five feet distant, but attached to it by the belting, and plainly visible.—*James River Ins. Co. v. Merritt & Robertson* 387

11. *Act of incorporation; when creates a contract.*—An act of the general assembly of this State in 1837, incorporating a company of persons, with authority to erect a toll-bridge across a river, is a contract.—*Micou et al. v. Tallassee Bridge Co.* 652

12. *What consideration does not invalidate promissory note.*—It is no defense to a suit upon a promissory note that the consideration was a horse purchased from the plaintiff for use in the military service of the Confederate States, within the knowledge of the plaintiff, and that it was so used.—*Thedford v. McClintock* 647

See, also, FRAUDS, STATUTE OF, 5, 6, 7.

CORPORATION.

1. *Foreign corporation; action by.*—A foreign corporation is entitled to sue in the courts of this State; and if the complaint describes the plaintiff as a "corporate body duly incorporated by the laws

CORPORATION—CONTINUED.

of Massachusetts," the description is sufficient after judgment by default.—*Eslava v. Ames Plow Co.* 384

2. *Nul tiel corportion; plea of, when irrelevant.*—A plea of *nul tiel* corporation to a complaint which describes the plaintiffs as "The St. Louis Bagging and Rope Company," without more, is irrelevant, and may be stricken out.—*Ware v. St. Louis Bagging & Rope Co.*. 667

3. *Act of incorporation; when creates a contract.*—An act of the general assembly of this State in 1837, incorporating a company of persons, with authority to erect a toll-bridge across a river, is a contract.—*Micou et al. v. Tallassee Bridge Co.* 652

4. *Municipal corporation* —The supreme court will not take judicial notice of the ordinances of a municipal corporation.—*Harbor Master, &c., of Mobile v. Southerland*..... 511

COSTS.

1. *Quere.*—A defendant was fined for the violation of a city ordinance, and appealed to the circuit court, where he was acquitted. Is the city subject to a judgment for costs in such a case?—*Mayor, &c., of Mobile v. Burton* 84

2. *Costs; against whom taxed.*—The unsuccessful party or parties to a motion to set aside a sale of lands under execution, should be taxed with the costs.—*Beach v. Dennis* 261

3. *Same; security for.*—The rule of the circuit court of Mobile, forbidding attorneys to become security for costs, does not apply to suits commenced before the adoption of the act of the general assembly authorizing the judge to prescribe rules of practice.—*Eslava v. Ames Plow Co* 384

4. *Same; what necessary to review ruling on.*—The failure of a corporation to give security for costs of an action commenced by it, is not available on error unless exception was reserved in the primary court.—*S. C.* 384

5. *State; when not taxed with costs.*—Costs will not be taxed against the State by the supreme court, on the denial of a motion made by the attorney-general in a criminal case.—*S. C.*..... 384

6. *Appeal; when auditor may take, without giving security for costs.*—Where a peremptory *mandamus* is awarded against the auditor, commanding him to draw his warrant on the treasurer in payment of a claim against the State, he may sue out an appeal to this court without giving security for costs, if it appear that he has no personal interest in the matter, and has only acted therein in his official capacity, with a view to protect the iterests of the State.—*Reynolds, Auditor, v. Blue*..... 711

7. *Section 3760 of Revised Code; not unconstitutional.*—Section 3760 of the Revised Code is not unconstitutional, either as to fine or costs.—*Morgan v. The State*..... 34

8. *Constitution, section 22 of Art. I of; what not debt in meaning of.* The costs in a criminal case do not constitute a debt within the meaning of section 22, Article I, of the State Constitution.—*S. C.* 34

COURTS.

1. *Power of courts over officers, parties, and process.*—Courts of justice have the undoubted power to control their officers, suitors, and process; and this power should be exercised to prevent oppression, correct abuses, and in furtherance of justice.—*Beach et al. v. Dennis* 262
2. *Courts of State; plea of bankruptcy.*—In a State court, the plea of bankruptcy properly pleaded must be allowed. The bankrupt's certificate of discharge, properly authenticated, is conclusive evidence in his favor on issue joined on such plea, except in cases where the discharge has been annulled by a direct proceeding in a proper Federal court.—*Oates, Adm'r, v. Parish et al* 157
3. § 635 *of Revised Code construed; acts done by disqualified judge voidable merely.*—The judgment of a court, the presiding judge of which is interested in the cause, or related to either party, or has been of counsel, rendered without having the consent of the parties entered of record, is not void, but merely voidable.—*Hayes et al. v. Collier et al* 726
4. *Same; ministerial acts of disqualified judge involving no discretion, valid.*—Mere ministerial acts, involving no discretion whatever, done by a judge disqualified from sitting in a cause by § 635 of the Revised Code, are not on that account invalid, or reversible for error.—*S. C.* 726

COURT, CHANCERY.

See CHANCERY.

COURT, COMMISSIONERS.

1. *Damages; what need not be presented to commissioners court for allowance.*—The damages given by the act of December 25th, 1868, "to suppress murder, lynching," &c., against counties, are not such claims as are required to be presented to the commissioners court for allowance before suit brought.—*DeKalb Co. v. Smith* ... 407

COURT, PROBATE.

1. *When appeal lies from probate decree.*—An appeal lies from a decree of the probate court, setting aside and declaring void a former decree rendered on the final settlement of an administrator's accounts.—*Bruce v. Strickland* 192
2. *When probate decree may be set aside at subsequent term.*—A final decree of the probate court which is absolutely void, whether for want of jurisdiction of the subject-matter or of the persons interested, may be set aside and declared void at a subsequent term; *secus*, as to a decree which is voidable merely.—*S. C.* 192
3. *Notice of final settlement of administrator's accounts.*—To sustain a decree of the probate court, rendered on final settlement of an administrator's accounts, the record must affirmatively show that the parties in interest had notice, either by personal service, or by

COURT, PROBATE—CONTINUED.

proper publication, of the intended settlement; and if the record shows that the notice was given by posting at the court-house door and three other public places in the county, (Revised Code, § 2446,) it must also affirmatively show that no newspaper was published in the county.—*S. C.* 192

4. *Settlement of administrator with himself as guardian of infant distributees.*—When an administrator is also the guardian of the infant distributees of the estate, the chancery court only has jurisdiction to settle his accounts; but a settlement made in the probate court, in such case, is not absolutely void.—*S. C.* 192

5. *Amendment of probate decree nunc pro tunc; what not admissible.* A decree of the probate court rendered on the final settlement of an administrator's accounts, which shows on its face that notice only given by posting at the court-house door and three other public places in the county, can not be amended at a subsequent term *nunc pro tunc*, by parol proof of the fact that no newspaper was published in the county; such amendment can only be made on proof of some order or memorandum of record.—*S. C.* 192

6. *Insolvent estate; jurisdiction of probate court as to, when attaches.*—The jurisdiction of the probate court to declare an estate insolvent attaches on the reception of the administrator's report of insolvency.—*Hayes et al. v. Collier et al.* 726

7. *Declaration of insolvency; when not void.*—A declaration of the insolvency of an estate, made by the probate court, after obtaining jurisdiction, can not be impeached as void for irregularities and omissions in the record.—*S. C.* 726

8. *Insolvent estate; jurisdiction as to.*—A claim against a decedent's estate in favor of his widow, founded on a clause in his will in these words: "Out of the proceeds of my property directed to be sold, I desire my funeral and other debts first paid, including expenses for support and maintenance of my family from the time of my death until the division of my estate," is not such a debt against the estate as is required to be filed within twelve months after a decree of insolvency, nor is it entitled to share in the assets when distributed under the decree of insolvency.—*Prince v. Prince.* ... 283

9. *Same.*—If there should be a residue after the payment of the preferred claims and debts against the insolvent estate, such claim may be contested before the probate court by any person interested in the residue, on an annual or the final settlement of the administrator.—*S. C.* 283

10. *Same; nature of such claim.*—Such a claim can only be paid out of the residue of the estate, if any, after the payment of the preferred claims and debts which have been regularly filed against the estate, and it is not in any way affected by the proceedings under the decree of insolvency.—*S. C.* 283

11. *Settlement of estate; when can not be removed to chancery court.*—The final settlement of a decedent's estate can not be removed from the probate into the chancery court, under a bill filed by a portion of the heirs-at-law and legatees, alleging that the es-

COURT, PROBATE—CONTINUED.

tate was regularly reported and declared insolvent, but, in consequence of the failure of creditors to file their claims, eventually proved solvent; that a large claim, filed against the estate by the widow, and partly paid by the administrator, was not properly a debt or preferred claim against the estate under the decree of insolvency, though, so far as it might be correct, it constituted a charge on the residue; and that the complainants had no notice of the filing of this claim, until after the expiration of twelve months from the declaration of insolvency, and no opportunity to contest its correctness. In such case, there is an adequate remedy in the probate court.—*Prince v. Prince*..... 284

12. *Probate of will; jurisdiction of probate court over.*—Courts of probate, in this State, have original, general, and unlimited jurisdiction of the probate of wills.—*Hall's Heirs v. Hall*..... 290

13. *Same; nature of proceeding.*—A proceeding for the probate of a will, is in the nature of a proceeding *in rem*, and is conclusive on all persons; and it can not be collaterally impeached for any irregularity that may have intervened after the jurisdiction of the court attached.—*S. C*..... 290

14. *Same; notice to widow and next of kin.*—The failure to give the widow and next of kin the notice required by the statute, (Rev. Code, § 1251,) is a mere irregularity, which can only be taken advantage of in a direct proceeding to set aside the probate.—*S. C*.. 290

15. *Sale; what interest may be sold.*—A purchaser of lands, sold under an order of the probate court, has such an interest in them, after the confirmation of the sale, as may be sold by the probate court, after his death, although he had not paid the purchase-money, and had not obtained a deed.—*Inman's Adm'r v. Gibbs*... 306

16. *Same; validity of order of sale, and confirmatory decree, rendered in* 1863.—An order of the probate court for the sale of a decedent's lands, and a subsequent decree confirming the sale, both rendered in 1863, are not void as being the acts of a court of the State while in insurrection against the United States.—*S. C*..... 306

17. *Sale of decedent's real estate by order of probate court; jurisdiction of court, and validity of proceedings.*—The case of *Satcher v. Satcher's Adm'r*, (41 Ala 26,) which this court approves and adheres to, decides that, under the act of February 7, 1854, as under the former statutes, the jurisdiction of the probate court, to order a sale of the lands of a deceased person, attaches on the filing of a petition by the administrator, alleging that a sale is necessary, either for the payment of debts, or for equitable division among the heirs; and that when the jurisdiction of the court has thus attached, mere errors and irregularities in the proceedings do not render the order of sale, or the sale, absolutely void.—*Smitha v. Flournoy*..... 345

18. *Same; sufficiency of petition in description of lands.*—Although the statute requires that the application for the sale "must describe the lands accurately," (Revised Code, § 2222,) and although the lands must, in point of fact, be situated in the county; yet an imperfect description of them in the petition, which is true so far as it goes, and which may have been amended in the probate court,

COURT, PROBATE—CONTINUED.

or perfected by the aid of facts judicially known to the courts, is not fatal to the validity of the proceedings.—*S. C.*..... 345

19. *Judicial notice of cities, incorporated towns, post-offices, and public lands.*—The probate court of Barbour county may take judicial notice of the facts, that Eufaula is an incorporated city in said county; that it is a railroad terminus, and the location of a post-office, the only one by the name in the State; also, also, the boundaries of the county, and the numbers of the lands within its limits, as described in the records of the land-office of the United States. *S. C.*..... 346

20. *Appeal from order of probate court confirming sale of land; in what time may be taken.*—An appeal from an order of the probate court confirming a sale of lands made by order of that court, on the *nineteenth* day *after* the day of the rendition of the order of confirmation, is in time to save it from the bar of the statute of limitations of twenty days.—Rev. Code, §§ 14, 2095, 2246, 2247.—*Field et al. v. Gamble.*..... 443

21. *Sale of land under order of probate court; what order as to, court can not make.*—When a sale of lands made by order of the probate court is returned unto said court as required by law, and the same is vacated or set aside on account of the inadequacy of the price bid at the sale, it is error for the court to permit the purchaser to increase his bid from $125 to $150, and then confirm the sale. In such a case, a resale should be ordered.—Revised Code, § 2094. *S. C.*..... 443

22. *Administrator; petition by to sell land for distribution; what should allege.*—A petition by an administratrix for an order to sell the lands of a decedent for distribution among those persons entitled to the same, should not only state that the lands sought to be divided can not be equitably divided amongst the heirs or devisees, but it should also show that some one of the heirs or devisees desired or requested that division should be made.—*Avery's Adm'r v. Avery's Heirs*..... 505

23. *Same; when order of sale should be denied.*—On such a petition, a sale for division should not be made, when there are minor distributees, and no one interested in the distribution desires it to be made, and when the proofs show that it would not be to the interest of the minors that the partition should not be made in that way.—*S. C.*..... 505

24. *Ancillary administration; distribution of proceeds of sale of lands.* Where the testator died in Georgia, the place of his residence, and his will was there duly probated; and an ancillary administration was granted in this State; and the administrator here, having sold certain lands, under an order of the probate court, for divison among the devisees, remitted the proceeds of sale to the principal administrator in Georgia, and, on the final settlement of his accounts, was allowed a credit for the amount so remitted, on the production of the receipt of the principal administrator,—*Held*,

COURT, PROBATE—CONTINUED.

that the decree of the probate court would not be reversed, at the instance of a devisee resident here, unless injury was affirmatively shown.—*Cochran v. Martin*. 525

25. *Sale of decedent's lands; jurisdiction of probate court to order, for division between widow and only heir.*—The probate court has no jurisdiction to order a sale of real estate belonging to a decedent, for the purpose of making an equitable division among the heirs or devisees, (Revised Code, § 2221,) when the facts stated in the petition negative the existence of the ground on which the sale is asked; as where it alleges that the widow and an only child are the heirs; nor can the widow's consent to the sale of her dower-interest, in such case, give the court jurisdiction to order the sale. *Snedicor et al. v. Mobley*. 517

26. *Sale of decedent's lands; sufficiency of petition for.*—A petition for sale of a decedent's lands filed by his administrator, which alleges that a sale is necessary to pay the debts of the estate, and if he should be mistaken in this, that it is more to the interest of the estate to sell land than slaves, sufficiently avers two statutory grounds for a sale, and is not bad because the two grounds are thus disjunctively stated.—*Inman's Adm'r v. Gibbs*..... 305

27. *Same.*—A petition filed by an executor asking an order to sell his testator's land, stating only that "he believes a sale is necessary," and that he "wishes to make it under order of the court," is not sufficient to authorize an order of sale. An order of sale founded on such a petition is a nullity, and a sale made thereunder confers no title on the purchaser.—*Hall's Heirs v. Hall*..... 290

CRIMINAL LAW.

ADMISSIONS AND DECLARATIONS.

See EVIDENCE, 33, 35, 36, 37.

ALIBI.

1. *Alibi; charge as to what erroneous.*—A charge that "the law regards evidence to prove an *alibi* among the weakest and most unsatisfactory of all kinds of evidence," is illegal. An *alibi* is a fact, and its existence in a criminal case is established by like weight of evidence that may be required as to any other fact.—*Williams v. The State*..... 659

BILL OF EXCEPTIONS.

2. *Bill of exceptions; when will not be stricken from record.*—A bill of exceptions in a criminal case, taken on the trial in the city court of Montgomery, had on the 20th day of July, 1871, which is signed by the presiding judge on the 18th day of December following, in vacation, under agreement of counsel of the parties, is a valid bill of exceptions under the "act relating to bills of exceptions," approved February 14th, 1870, and it will not be stricken from the record in this court.—*Stephens v. State*..... 696

CRIMINAL LAW—CONTINUED.

3. *Bill of exceptions; part of record in criminal case.*—In this State, a bill of exceptions taken and signed in a criminal prosecution, as required by law, is part of the record. On appeal to the supreme court from the judgment in such a prosecution, no assignment of error or joinder in error is required; but the court examines the whole record, as the law demands. If the errors apparent on the record are injurious to the accused, the cause will be reversed.—*Williams v. The State* 659

4. *Construction of bill of exceptions.*—When all the evidence is not set out in the bill of exceptions, a charge of the court which is excepted to, will be presumed to have been warranted by the proof. So, also, where a charge is refused, it will be presumed, if necessary to sustain the ruling of the court below, that the charge was abstract, the bill of exceptions not showing to the contrary. Error must affirmatively be made to appear in such a case.—*Lyman v. The State* 686

CARRYING CONCEALED WEAPONS.

5. *Revised Code, section 3555 of; word "traveling" used in, defined.*—The word "traveling" used in section 3555 of the Revised Code means to pass from place to place, whether for pleasure, instruction, business, or health, and the length of the journey does not destroy the character of the occupation. (SAFFOLD, J., *dissenting.*) *Lockett v. The State* 42

6. *Same.*—A person who is a passenger and passing on a railway train from Selma to Marion in this State, a distance of twenty-eight miles, to seek employment, is "traveling" in the sense of the statute, and may carry a pistol concealed about his person. (SAFFOLD, J., *dissenting.*)—*S. C.* 42

CHARACTER.

7. *Deceased, evidence of bad character of, as blood-thirsty, turbulent, &c.; for what purpose admissible.*—On a trial on an indictment for murder, under our statutes, the jury are not only required to pass upon the guilt or innocence of the accused, but also, on conviction, to find by their verdict whether it be murder in the first or second degree, and determine the character, the extent, and severity of the punishment to be inflicted. Evidence, therefore, of the general bad character of the deceased as a turbulent, blood-thirsty, revengeful, dangerous man, is competent, relevant and proper evidence, (although, under the circumstances of the particular case, it may not be sufficient to reduce the offense from murder to manslaughter,) to enable the jury to determine the degree of the offense, and the character and measure of the punishment.—*Fields v. State.* 603

8. *Good character, as man of peace; effect of proof of.*—Where the general good character of the accused as a peaceable man is proved, the following is a correct charge, to-wit: "If the prisoner has proved a good character as a man of peace, the law says that such

CRIMINAL LAW—CONTINUED.

good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed, but for such good character;" and if asked in writing, it is error to refuse it.—*S. C.*..... 603

9. *Particular acts of accused; when can not generally be inquired into.* The general rule is, that the prosecutor can not enter into an examination of particular acts of the accused, even when the latter has called witnesses in support of his general character.—*Smith v. The State*..... 540

CHARGE TO JURY.

10. *General charge of court; requisites of.*—The charge of the court should always be not only a correct exposition of the law governing the issue, but it should also be applicable to the whole evidence, when it is a general charge.—*Martin v. The State*..... 564

11. *Same; when erroneous.*—When a general charge of the court, in a criminal prosecution, may be divided into two propositions not naturally connected, if either proposition, when so separated, is not applicable to the evidence, such charge is erroneous.—*S. C.* 564

12. *Same; what will not cure error in.*—A qualification appended to the second proposition of such a charge will not be applied to the first, in order to remove the objection of too great generality, when it is only true without the limitations suggested by the evidence.—*S. C.*..... 564

13. *Charge to jury in criminal case; what erroneous.*—A charge, that if the jury believe "from the evidence that the defendant killed the deceased by shooting him with a pistol, the law presumes it was done with malice," when the evidence tended to show that the pistol was resorted to in self-defense, is erroneous. It is too broad, and ignores all the evidence of self-defense.—*S. C.*..... 564

14. *Evidence, what is a charge on effect of; when erroneous.*—A charge of the court, in a criminal case, that "if the jury believe the evidence, they are bound to find the defendant guilty," is a charge upon the effect of the evidence. If the court gives such a charge without being required to do so by one of the parties, it is such an error as will cause a reversal of the judgment.—*Foster v. The State.* 643

15 *Charge to jury; what erroneous.*—Where the presiding judge in the court below enumerates a portion of the witnesses for the State, and charges the jury upon this testimony of the witnesses thus enumerated, "if you believe the balance of *this* testimony for the State, (leaving out the testimony of Susan Williams, who had been impeached,) then the defendant is guilty of murder in the first degree." Such a charge is erroneous, if there is any testimony for the accused and the testimony is at all conflicting.—*Williams v. The State*..... 659

16. *Same.*—A charge in writing requesting the court to instruct the jury, that unless they believe from the evidence to a moral certainty that the defendant is guilty, they can not convict him, is an improper charge and should be refused.—*McAlpine v. The State*.. 78

CRIMINAL LAW—CONTINUED.

17. *Same.*—The charge of the court should be confined to the evidence, and if the court in a criminal case states to the jury a purely hypothetical case and asks the jury what is the presumption in such a case, the charge will be held erroneous as tending to mislead the jury.—*S. C.* 78

18. *Charges asked in writing; must be given or refused as asked.*—The accused in a criminal case is entitled to have the charges moved for by him in writing given in the very terms of the written charges, if such charges are not abstract and are proper enunciations of the law applicable to the case. It is error to refuse such charges, though charges similar in principle have already been given. The rule, of error without injury, does not apply in such a case. The right is absolute, and must be enforced.—*Williams v. The State*... 659

19. *Charge of court; when will be presumed to be warranted by the proof* If all the evidence is not set out in the bill of exceptions, a charge of the court which is excepted to, will be presumed to have been warranted by the proof. So, also, where a charge is refused, it will be presumed, if necessary to sustain the ruling of the court below, that the charge was abstract, the bill of exceptions not showing to the contrary. Error must affirmatively be made to appear in such a case.—*Lyman v. The State*..... 686

20. *Charge of court; what invades province of jury.*—A charge which assumes a fact to be proved, without referring to the jury the credibility of the evidence offered to prove it, and whether if credible it proves the fact, invades the province of the jury, and is therefore erroneous.—*Thompson v. The State*.... 37

21. *Murder in second degree; what charge as to erroneous.*—On a trial for murder, a charge of the court which instructs the jury that if the blow which occasioned the death was given "in malice," and willfully, the accused may be found guilty of murder in the second degree under our statute, is erroneous. There must be "malice aforethought" to constitute murder in the first or second degree under our statute.—*Stephens v. The State* 696

22. *Court, remarks of in presence of jury; what erroneous.*—When asked by the accused to give a charge upon the form of the verdict, if there is any doubt as to the guilt or grade of guilt, the court should not say, in the hearing of the jury, "I can't conceive how the jury could find such a verdict upon such a state of facts; but if you request it, I'll instruct them." Such remarks may be fatal to fairness.—*S. C* 696

23. *Flight of accused; charge as to, what erroneous.*—It is not error to refuse a charge as follows, to-wit: "If the facts proved render it doubtful whether the flight of the accused was from a consciousness of guilt, then the jury ought not to regard it as an evidence of guilt."—*Kelsoe v. The State* 573

24. *Good character, as man of peace; effect of proof of.*—Where the general good character of the accused as a peaceable man is proved, the following is a correct charge, to-wit: "If the prisoner has proved a good character as a man of peace, the law says that such

CRIMINAL LAW—CONTINUED.

good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed, but for such good character," and if asked in writing, it is error to refuse it.—*Fields v. State* 603

CONFESSIONS.

25. *Confessions of accused; when should not be excluded.*—When no promises are made or threats used to obtain confessions, they should not be excluded because the circumstances surrounding the defendant were threatening. Such circumstances are proper to be considered by the jury in determining the credibility of the confessions, and what force and effect should be given to them.—*Rice v The State* 38

26. *Same; charge as to, what erroneous.*—A charge asked in the following words may be refused, to-wit: "If the confessions of the defendant are not corroborated, a strong presumption arises that they are not true." There is no general presumption that confessions are to be regarded as untrue unless they are corroborated. *S. C.* 39

COSTS.—*See that Title.*

DISCONTINUANCE.

27. *Criminal prosecution; how may be discontinued.*—A criminal prosecution, as well as a civil suit, may be discontinued by the act of the State, or of the court, or of the attorney who prosecutes in behalf of the State.—*Ex parte Hall* 675

28. *Discontinuance; definition of.*—A discontinuance is defined to be, *a gap or chasm* in the proceeding, occurring while the suit is pending.—*S. C.* 675

29. *Same; what amounts to waiver of.*—If, notwithstanding the discontinuance, the defendant continues to appear, and suffers the suit to progress without objection on his part, the discontinuance is waived, and he loses the benefit of it.—*S. C.* 675

30. The petitioner was indicted for murder in the circuit court of Cherokee county, in 1865. In 1867, on his application, the venue was changed to the county of Baine. Afterwards, in December, 1867, the county of Baine was abolished by an ordinance of the constitutional convention. In 1868 said ordinance was repealed by an act of the general assembly, by which it was provided "that said county shall be known as the county of Etowah." The cause was then entered upon the State docket of Etowah, and the petitioner continued to appear, without objection, and the cause was continued from term to term until the fall term of the circuit court of Etowah county, 1871, at which term petitioner moved the court to strike said cause from the docket, on the ground that the same had been discontinued. His motion was overruled, and he excepted, and now makes an application to this court for a *man-*

CRIMINAL LAW—CONTINUED.

damus to compel the circuit court to strike said cause from the docket. *Held*, 1st, that the said ordinance, abolishing the county of Baine, was a discontinuance of said prosecution; 2d, that the said act of the general assembly, repealing said ordinance, did not create a new county, but re-established the county of Baine, with another name; 3d, that the continued appearance of said petitioner, without objection, and the continuance of said cause from term to term, until the fall term of the circuit court of Etowah county, 1871, was, on his part, a waiver of said discontinuance. (PETERS, J., *dissenting*, held that the abolition of the county of Baine did not work a discontinuance of the prosecution.)—*S. C.*. 675

31. *Discontinuance; what prevents.*—A general order, made before the final adjournment of the court, continuing all causes not otherwise disposed of, is sufficient to prevent a discontinuance, although section 162, page 432, in Clay's Digest, is omitted in the Revised Code.—*McAlpine v. The State*..... 78

EVIDENCE.

32. *Criminal act, slight evidence of motive for doing; should not be excluded.*—In a criminal case, slight evidence to show a motive for doing the act is not to be excluded, but should be left to the consideration of the jury. For example, in a case of murder, it may be shown that a relative and friend of the accused had, on two successive days, difficulties with deceased, which *originated* about the accused; that in the first of said difficulties accused was present, *and sided* with his relative and friend, and in the second his relative and friend was killed by deceased.—*Kelsoe v. The State*..... 573

33. *Conversations and oral declarations; evidence as to; for what reason should not be excluded.*—Conversations and oral declarations are to be received at all times with great caution, but when the witness hears all the conversation, although he may not remember all of it, his evidence for that reason is not to be altogether excluded, but it should be permitted to go to the jury to determine its credibility and effect—*S. C.*..... 573

34. *Witness; judgment alone renders incompetent*—It is the judgment, *and that only*, that renders a party infamous, and incompetent to testify as a witness.—*S. C*..... 573

35. *Admissions of defendant against co-defendant; when are competent evidence.*—Where two parties are tried together, on a joint indictment, the admissions of one of the parties, not made in the presence of the other, are only admissible as evidence against the party making them. If they are of such a character that what tends to prove the guilt of the party, by whom they were made, can not be stated without implicating the other, they may, notwithstanding, be received, but the court must, at the time they are received, instruct the jury that they are evidence only against the party by whom they were made.—*S. C.*..... 573

36. *Declarations of defendant; when can not be proved in his own be-*

CRIMINAL LAW—Continued.

half.—A defendant should not be permitted to prove his acts or declarations, in his own behalf, unless they constitute a part of acts or declarations proved by the State, or properly form a part of the *res gestæ* of the main fact under consideration, and were contemporaneous with it.—*Birdsong v. The State*..... 68

37. *Dying declarations, when admissible; what evidence of, sufficient to authorize admission of.*—As a general rule, dying declarations are only admissible in evidence, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. When this is the case, dying declarations are admissible if the deceased knows or thinks he is in a dying state. Positive evidence of this knowledge is not required, but it may be inferred from the conduct and condition of the deceased. The dying declarations admitted by the court, under the evidence in this case, were properly admitted.—*Johnson v. State.* 9

38. *Murder, trial of; what irrelevant evidence on.*—On a trial for murder, it is improper for the State to prove that defendant, on the day the killing took place, proposed to deceased that they should go and rob a negro man who was supposed to have money. Such evidence is not a part of the *res gestæ*, and might create an improper prejudice against the defendant.—*Birdsong v. The State*.... 68

39. *Witness; what proper question to ask of.*—On the cross-examination of a witness for the State, defendant may ask a question that may enable him to show that an apparent inconsistency between confessions proved and the evidence of said witness could be reconciled, and both be true.—*S. C.*..... 68

40. *Larceny; what competent evidence on trial of.*—On the trial of an indictment for the larceny of a horse, which grazed in the day and regularly returned to his stall at night, proof that the horse failed to return to his stall as usual, though slight evidence, is admissible, in connection with proof tracing the horse into defendant's possession, to show a taking by him. But the testimony of a witness to such facts, whose knowledge of them is derived solely from what his wife and family reported to him, is mere hearsay.—*Johnson v. The State* 62

41. *Threats, evidence of; for what purpose inadmissible.*—The proof showing the commission of a felonious homicide, perpetrated by the accused by lying in wait, he offered evidence that deceased had often threatened his life, and the day before the killing had lain in wait in the road to shoot him, and that this was known to accused before the killing; but also stated, in reply to a question by the court, that he did not expect to show any act done by deceased at the time of the killing indicating an intention to kill accused or do him great bodily harm, but that he did expect to show such act on the part of deceased as late as the evening before, and thereupon the court rejected the evidence,—*Held*, that the evidence was incompetent either to justify or excuse the homicide, and as that was the only purpose for which it was offered, the evidence was rightfully excluded.—*Hughey v. The State*..... 97

CRIMINAL LAW—CONTINUED.

42. *Variance.*—A charge of larceny of the property of M. G. is not the same as a like charge of the property of W. G. M. G. or his son M. G., and a record of the latter case is not competent proof of the former.—*Brown v. The State*..... 47

43. *Motion to exclude evidence, refusal to decide at time when made; when will be cause for reversal of judgment.*—Where the State offers evidence of the dying declarations of the deceased, and the defendant objects to their admissibility and moves to exclude them, if the court refuses to decide on the motion until all the evidence in the case is closed, and compels the defendant to proceed with his defense, and then, after the evidence in the case is closed, decides the defendant's motion and excludes a part only of the dying declarations objected to and the defendant is convicted, the judgment will be reversed.—*Johnson v. State*..... 9

44. *Wife, not competent witness for husband in a criminal case.*—In a criminal case the wife is sometimes a competent witness against the husband, but never for him.—*S. C*..... 10

45. *Deceased, evidence of bad character of, as blood-thirsty, turbulent, &c.; for what purpose admissible.*—On a trial on an indictment for murder, under our statutes, the jury are not only required to pass upon the guilt or innocence of the accused, but also, on conviction, to find by their verdict whether it be murder in the first or second degree, and determine the character, the extent, and severity of the punishment to be inflicted. Evidence, therefore, of the general bad character of the deceased as a turbulent, blood-thirsty, revengeful, dangerous man, is competent, relevant and proper evidence, (although, under the circumstances of the particular case, it may not be sufficient to reduce the offense from murder to manslaughter,) to enable the jury to determine the degree of the offense, and the character and measure of the punishment.—*Fields v. State*. 603

46. *Court and jury; province of as to evidence.*—The court judges what evidence has been delivered to the jury, but the jury are the judges of its weight, and its weight upon their own minds—*Williams v. The State*..... 660

47. *Jury; duty of, as to weighing and rejecting testimony of witness.* The jury can not capriciously reject the testimony of a witness that has been delivered to them on the trial; but they may reject the evidence of a witness who has been successfully impeached. But even in this they must be governed by reason. Reason is the soul of the law.—Coke Litt. 232; 28 Ala. 71.—*S. C*..... 660

48. *Wholesale dealer of spirituous liquor, in the meaning of the revenue law; what acts do not constitute.*—A person, charged by indictment under the revenue law of this State as a wholesale dealer in spirituous liquors, should not be convicted, although he has no license, if the proofs only show that he is a country merchant, keeping a variety store, a miller and a farmer; that the sale of spirits is a minor part of his business; that he only sells whisky by the quart or gallon, which is not drank on or about his premises, and that the sale is to his customers for domestic purposes.—*Espy v. The State*.... 533

CRIMINAL LAW—CONTINUED.

FINE.

49. *Revised Code, section 3760 of; not unconstitutional as to fine.*—Section 3760 of the Revised Code is not unconstitutional, either as to fine and costs, and unless both are paid, a defendant may be lawfully imprisoned in the county jail, or, in the discretion of the court, sentenced to hard labor for the county if he refuses to confess judgment, with good and sufficient securities for both fine and costs, or for the costs only, if the fine be paid.—*Morgan v. The State*..... 34

50. *Constitution of Alabama, section 22 of Art. I of; what not a debt within meaning of.*—The costs in a criminal case do not constitute a debt within the meaning of section 22 of Art. I of the constitution of Alabama.—*S. C.*..... 34

FORMER JEOPARDY.

51. *Former jeopardy, plea of; what must state.*—A plea of former jeopardy, where there has been neither a conviction nor an acquittal, must state that the defendant had been put upon his trial on a good indictment, and also that the jury had been duly impanneled and sworn, and charged with his trial, and without his consent, and without any pressing necessity, discharged without rendering a verdict.—*Lyman v. The State*..... 686

GRAND JURY, OBJECTION TO.

52. *Grand jury, objection to; when comes too late.*—An objection to the grand jury, which found the indictment, comes too late after the defendant has pleaded to the merits.—*Horton v. The State*..... 58

HUSBAND AND WIFE.

See EVIDENCE, 12.

INDICTMENT.

53. *Indictment; when sufficient.*—An indictment for perjury, in the form prescribed in the Revised Code, is sufficient.—Revised Code, p. 812, No. 44.—*Brown v. The State*..... 47

54. *Robbery; description of property, what insufficient.*—In an indictment for robbery, a description of the property taken as "ten dollars in money of the United States currency," is too indefinite.—*Crocker v. The State*..... 53

55. *List of jurors and copy of indictment; when failure to serve on defendant is a reversible error.*—Where the defendant is in actual custody, charged with a capital offense, the record must show that defendant was served with a copy of the indictment and list of jurors at least one entire day before the day set for his trial.—*Bugg v. The State*..... 50

See, also, *Crocker v. The State*..... 53

56. *Indictment and list of jurors; what sufficiently shows services of copy upon defendant, in actual confinement.*—In a criminal prosecu-

tion upon a charge of murder, when the accused is in actual confinement, the record of which recites that the defendant was *served* with a copy of the indictment and a list of the jurors summoned for his trial, sufficiently shows that a copy of the indictment and a list of the jurors summoned for his trial, including the regular jury, had been delivered to him, according to law. (PETERS, J., dissenting on this point, held, that in such a case the word "served" is not equivalent to the word "delivered," or the word "have.")—*Stephens v. The State*..... 696

JURY—JURORS.

Absent Juror.

57. *Absent juror; when court not bound to send for.*—The court is not bound to send for a juror, summoned in a capital case, who fails to answer to his name when called, although it be shown that the juror resides in the city where the court is held, and was in the city at the time his name was drawn.—*Johnson v. The State*..... 10

58. *Same; when court should send for.*—If, however, a juror, in such a case, is in jail under the order or sentence of the court, a refusal to send for him, on the request of the defendant, is a reversible error.—*S. C*..... 10

Challenge.

59. *Challenge for cause; what good ground for.*—It is a good ground for challenge for cause to a juror put upon the defendant, that he was one of the grand jury by whom the indictment was found, and if the challenge is disallowed and the defendant excepts, and then challenges him, peremptorily, the defendant is entitled to the benefit of his exception, although his peremptory challenges be not exhausted before the jury is completed.—*Birdsong v. The State*.... 68

Instructions to, in absence of Counsel.

60. *Counsel, instructions, &c., given in absence of; when error.*—Where, during the trial of a criminal cause, the court, at a recess, gave additional instructions to the jury, received their verdict, and discharged them, in the absence of the prisoner's counsel,—*Held*, error, when it appeared from the record that no attempt to give them notice was made, but that it would be sufficient notice to call them at the courthouse door or other place, as witnesses and other persons are usually called.—*McNeill v. The State*..... 498

Misconduct of.

61. *Arrest of judgment; what not ground for.*—The misconduct of the jury in dispersing and mingling with other persons after the cause has been submitted to them, is ground of new trial, but not of arrest of judgment.—*Crocker v. The State*..... 53

CRIMINAL LAW—CONTINUED.

JURY—JURORS.

Oath administered to.

62. *Capital cases; what must affirmatively appear in.*—In capital cases and other felonies there are some matters which must affirmatively appear in the record, otherwise the judgment will be reversed; among these is the oath to the jury.—*Joe Johnson v. State*..... 9

63. *Oath of jury; what omission will invalidate verdict.*—If it appear from the record that an essential part of the oath, required by section 4092 to be administered to the jury, was omitted, the judgment will be reversed.—*S. C*..... 9

64. *Oath administered to jury; what recital of, and sufficient to uphold verdict.*—The judgment entry in this case recites: "Thereupon came a jury of good and lawful men, to-wit, A. L. Mathews and eleven others good and lawful men, who being duly elected, tried, and sworn to well and truly try the issue joined and true deliverance make between the State of Alabama and the defendant, upon their oaths do say, &c.,—*Held*, upon the authority of *Joe Johnston v. The State*, to be insufficient to uphold the verdict.—*Bugg v. The State*..... 49

65. *Judgment and conviction; what recital as to oath of jury will cause reversal.*—When the record shows that the jury who tried the case was not duly sworn as required by law, and that the verdict of the jury was not delivered on "their oath," this is error for which the cause will be reversed.—*Horton v. The State*..... 58

66. *Oath of jury; what recital shows that jury was not properly sworn.* The recital in the record, as to the oath of the jury, that "thereupon came a jury, to-wit: E. B. R., and eleven others, good and lawful men, who being elected, tried and sworn well and truly to try the issue joined between the State of Alabama and the defendant, on their oaths do say," &c., shows that the proper oath was not administered to the jury.—*Johnson v. The State*..... 62

67. *Oath to jury; recitals as to, what insufficient.*—In a criminal case, the omission of an essential portion of the oath required to be administered to the jury, apparent from the record, is a reversible error. The record shows such omission in this case.—*Smith v. The State*..... 540

68. *Same; what recitals in record sufficient.*—Where the record recites that the jury were "duly sworn according to law," this sufficiently shows that the oath required by law was administered.—*Lockett v. The State*..... 42

69. *Oath of jury; what recital as to, sufficient.*—On appeal from a sentence in a criminal case, where the judgment entry recited that the jury was "sworn to well and truly try the issue joined,"—*Held*, apparent that the oath administered to the jury was not attempted to be set out, and this court will presume the proper oath was administered.—*McNeil v. The State*..... 498

70. *Oath of jury; when attempted to be set forth, what must show.*—The record should show in a criminal case that the jury were sworn as

CRIMINAL LAW—CONTINUED.

required by law. If the oath is set forth, it must be that required by the Code. It is not enough to swear the jury to "try the issue between the State and the defendant," but it should also appear that they were sworn "true verdict to render according to the evidence," in the language of the statute.—Revised Code, § 4092; 43 Ala. 24.—*Stephens v. The State*..... 696

Province of.

71. *Deceased, evidence of bad character of, as blood-thirsty, turbulent, &c.; for what purpose admissible.*—On a trial on an indictment for murder, under our statutes, the jury are not only required to pass upon the guilt or innocence of the accused, but also, on conviction, to find by their verdict whether it be murder in the first or second degree, and determine the character, the extent, and severity of the punishment to be inflicted. Evidence, therefore, of the general bad character of the deceased as a turbulent, blood-thirsty, revengeful, dangerous man, is competent, relevant and proper evidence, (although, under the circumstances of the particular case, it may not be sufficient to reduce the offense from murder to manslaughter,) to enable the jury to determine the degree of the offense, and the character and measure of the punishment.—*Fields v. State.* 603

72. *Court and jury; province of as to evidence.*—The court judges what evidence has been delivered to the jury, but the jury are the judges of its weight, and its weight upon their own minds.—*Williams v. The State*..... 660

73. *Jury; duty of, as to weighing and rejecting testimony of witness.* The jury can not capriciously reject the testimony of a witness that has been delivered to them on the trial; but they may reject the evidence of a witness who has been successfully impeached. But even in this they must be governed by reason. Reason is the soul of the law.—Coke Litt. 232; 28 Ala. 71.—*S. C.*..... 660

74. *Charge to jury; what erroneous.*—Where the presiding judge in the court below enumerates a portion of the witnesses for the State, and charges the jury upon this testimony of the witnesses thus enumerated, "if you believe the balance of *this* testimony for the State, (leaving out the testimony of Susan Williams, who had been impeached,) then the defendant is guilty of murder in the first degree." Such a charge is erroneous, if there is any testimony for the accused and the testimony is at all conflicting.—*Williams v. The State*..... 659

LARCENY.

75. *Larceny; what competent evidence on trial of.*—On the trial of an indictment for the larceny of a horse, which grazed in the day and regularly returned to his stall at night, proof that the horse failed to return to his stall as usual, though slight evidence, is admissible, in connection with proof tracing the horse into defendant's possession, to show a taking by him. But the testimony of a wit-

CRIMINAL LAW—CONTINUED.

ness to such facts, whose knowledge of them is derived solely from what his wife and family reported to him, is mere hearsay.—*Johnson v. The State*..... 62

MOBILE, ORDINANCE 292 OF.

76. *Mobile, ordinance 292 of; to what has no reference.*—Ordinance No. 292 of the city of Mobile, against disorderly conduct, has no reference to simple trespass upon a vacant lot, though committed in an attempt to assert an adverse right to the property.—*Mayor, &c., v. Barton*..... 84

MURDER.

77. *Threats, evidence of; for what purpose inadmissible.*—The proof showing the commission of a felonious homicide, perpetrated by the accused by lying in wait, he offered evidence that deceased had often threatened his life, and the day before the killing had lain in wait in the road to shoot him, and that this was known to accused before the killing; but also stated, in reply to a question by the court, that he did not expect to show any act done by deceased at the time of the killing indicating an intention to kill accused or do him great bodily harm, but that he did expect to show such act on the part of deceased as late as the evening before, and thereupon the court rejected the evidence,—*Held*, that the evidence was incompetent either to justify or excuse the homicide, and as that was the only purpose for which it was offered, the evidence was rightfully excluded.—*Hughey v. The State*..... 97

78. *Same; what necessary to excuse or justify homicide.*—No mere threats to take life, or even past attempts to execute such threats, will justify or excuse a felonious homicide. There must be actual impending danger to the slayer at the time of the fatal blow, or such a state of facts as are justly calculated to impress upon his mind a reasonable belief of the necessity to take life.—*S. C*..... 97

79. *Murder, trial of; what irrelevant evidence on.*—On a trial for murder, it is improper for the State to prove that defendant, on the day the killing took place, proposed to deceased that they should go and rob a negro man who was supposed to have money. Such evidence is not a part of the *res gestæ*, and might create an improper prejudice against the defendant.—*Birdsong v. The State*.... 68

80. *Charge to jury in criminal case; what erroneous.*—A charge, that if the jury believe "from the evidence that the defendant killed the deceased by shooting him with a pistol, the law presumes it was done with malice," when the evidence tended to show that the pistol was resorted to in self-defense, is erroneous. It is too broad, and ignores all the evidence of self-defense.—*Martin v. The State.* 564

See, also, PROVINCE OF JURY, 71.

PRACTICE.

81. *City ordinance; appeal from conviction for violating, fine subject to*

CRIMINAL LAW—CONTINUED.

revision.—Where a city ordinance prescribes a fine for its violation of not exceeding a specified amount, and the trial of an appeal in the circuit court from a conviction before the mayor for its violation is *de novo*, the amount of the fine imposed is subject to revision as any other issue in the case.—*Mayor of Mobile v. Barton*..... 84

82. *Quere.*—Whether, in such a case, the acquittal of the accused in the circuit court subjects the city to a judgment for costs.—*S. C.*.. 84

83. *Discontinuance; what prevents.*—A general order, made before the final adjournment of the court, continuing all causes not otherwise disposed of, is sufficient to prevent a discontinuance, although section 162, page 432, in Clay's Digest, is omitted in the Revised Code.—*McAlpine v. The State*..... 78

REVENUE LAW—WHOLESALE LIQUOR DEALER.

84. *Wholesale dealer of spirituous liquor, in the meaning of the revenue law; what acts do not constitute.*—A person, charged by indictment under the revenue law of this State as a wholesale dealer in spirituous liquors, should not be convicted, although he has no license, if the proofs only show that he is a country merchant, keeping a variety store, a miller, and a farmer; that the sale of spirits is a minor part of his business; that he only sells whisky by the quart or gallon, which is not drunk on or about his premises, and that the sale is to his customers for domestic purposes.—*Espy v. The State*..... 533

RAPE.

85. *Rape, complaint as to; what competent evidence to prove.*—In a prosecution for rape, the request of the female, alleged to have been injured, to the witness to go before a magistrate and report the offense, is competent evidence to prove complaint made.—*Smith v. The State*..... 540

86. *Rape; duress as to; definition of.*—Duress in a case of rape is a reasonable fear of serious personal injury, the age, sex, state of health, temper and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, being taken into consideration.—*S. C.*..... 540

ROBBERY.

87. *Taking; what equivalent to a taking from the person.*—Property taken in the presence of the owner, under circumstances constituting robbery, is taken from his person.—*Crocker v. State*..... 53

VENIRE.

88. *Venire; what no ground to quash.*—The *venire*, or list of jurors summoned in a capital case, will not be set aside or quashed because one of the persons so summoned was a member of the grand jury which found the indictment, and was present when the witnesses were examined by the grand jury, and when the indictment was returned into court a true bill.—*Birdsong v. The State*..... 68

CRIMINAL LAW—CONTINUED.

89. *Same.*—A mistake in the christian name of one of the jurors on the list delivered to a defendant in a capital case, is no cause to quash the venire. The remedy in such a case is provided by section 4175 of the Revised Code.—*Johnson v. The State*..... 10

VENUE.

90. *Venue, Application for change of; not discretionary.*—An application for change of *venue*, in this State, no longer rests in the discretion of the court. If denied in a proper case, it is an error for which, after conviction, the judgment will be reversed on appeal; or, before trial the defendant may obtain the benefit of his application by *mandamus.*—*Birdsong v. The State*..... 68

91. *Same; counter affidavits, what insufficient to defeat.*—A counter affidavit that does not deny the truth of the defendant's affidavit, but only that affiant does not believe there is any such prejudice or excitement in the public mind of the county against defendant as would deny him a fair and impartial trial, is not sufficient to defeat the application.—*S. C.*..... 68

VERDICT, JUDGMENT, AND SENTENCE.

92. *Copy of indictment and list of jurors; failure to serve on defendant, when reversible error.*—The failure to serve a copy of the indictment and list of jurors on the defendant in actual custody, one entire day before the trial, is a reversible error.—*Crocker v. The State* ... 53

93. *Sentence; failure to do what, invalidates.*—So, too, is the failure to ask him, when convicted, if he has anything to say why sentence should not be passed on him.—*S. C.*..... 53

94. *Quere.*—Whether the verdict, "We, the jury, find the defendant guilty of robbery; imprisonment ten years in penitentiary," sufficiently ascertains the subject of the punishment.—*S. C.*..... 53

95. *Arrest of judgment; what not ground for.*—The misconduct of the jury in dispersing and mingling with other persons after the cause has been submitted to them, is ground for new trial, but not of arrest of judgment.—*S. C.*..... 53

96. *Sentence; when illegal.*—A sentence for a longer or shorter time than the law prescribes is error. The court can not sentence one convicted of perjury to confinement in the penitentiary for *two* years.—Revised Code, § 3557; 5 Wis. 529; 20 Gratt. (Va.) 848.—*Brown v. The State*..... 47

97. *Oath of jury; what omission in invalidates judgment.*—If it appears from the record that an essential part of the oath, required by section 4092 of the Revised Code to be administered to the jury, was omitted, the judgment will be reversed.—*Joe Johnson v. The State*..... 10

See, also, *Bugg v. State*..... 51
Horton v. The State..... 58
Johnson v. The State..... 62
Smith v. The State..... 540
Stephens v. The State..... 696

CRIMINAL LAW—CONTINUED.

WITNESS.

98. *Wife not competent witness for husband.*—In a criminal case, the wife is sometimes a competent witness against the husband, but never for him.—*Johnson v. The State*..... 10

99. *Witness; what proper question to ask of.*—On the cross-examination of a witness for the State, defendant may ask a question that may enable him to show that an apparent inconsistency between confessions proved and the evidence of said witness could be reconciled, and both be true.—*Birdsong v. The State*..... 68

100. *Jury; duty of, as to weighing and rejecting testimony of witness.* The jury can not capriciously reject the testimony of a witness that has been delivered to them on the trial; but they may reject the evidence of a witness who has been successfully impeached. But even in this they must be governed by reason. Reason is the soul of the law.—Coke Litt. 232; 28 Ala. 71.—*Williams v. The State*... 660

CUSTOM.

1. *Custom; what not good.*—A custom in the city of Montgomery, among merchants, factors and planters, dealing in, or buying or selling cotton, that warehouse receipts to deliver to a certain person, or his order, or the bearer, the number of bales of cotton specified in said receipts, are transferable by delivery, as money or bank bills, without any indorsement, and that such transfer passes the cotton, without further inquiry or evidence of title than what arises from the possession of such receipts, unless notice is given that the receipts have been lost, or got into the hands of some one who is not the owner, or entitled to hold the same, is not a good custom.—*Lehman, Durr & Co. v. Marshall*..... 362

DAMAGES.

1. *Measure of damages, for breach of penal bond.*—In an action on a penal bond, given to the State by a plank-road company, in consideration of a loan of a portion of the two-per-cent. fund; conditioned for the faithful application of the money, annual reports to the governor, and the completion of the road within a specified time, but containing no condition for the return of the money,—the measure of damages for a breach is the damage proved to have been actually sustained, and not the amount of the money loaned. *Jemison v. Governor, &c*..... 390

2. *Damages, claim for; what not required to be presented to commissioners court.*—The damages given against counties by the act of December 28th, 1868, "to suppress murder, lynching," &c., are not such claims as are required to be presented to the commissioners court for allowance before suit brought.—*DeKalb Co. v. Smith*..... 407

3. *Plea of set-off; what can not be given in evidence under.*—Under a plea of set-off, which alleges that the plaintiff is indebted, &c., by

DAMAGES—CONTINUED.

"liquidated demand," or by "unliquidated demand," evidence of an unliquidated demand sounding in damages merely should not be admitted.—*Lang v. Waters' Adm'r*..... 625

DEEDS.

1. *Sheriff's deed; when not invalid*—A sale of lands made by the sheriff in 1866, under execution issued on a judgment rendered by default in 1866, on process issued from a Confederate court and served on defendant during the war, is not for that reason invalid, and the sheriff's deed conveys to the purchaser such title as could pass by the sale.—*Bush v. Glover*..... 167
2. *When certified copy of recorded deed is admissible evidence.*—Under section 1544, Revised Code, a subsequent purchaser of land may give in evidence a certified copy of the deed to his vendor, on the ground that he has not the custody of the original.—*Jones' Heirs v. Walker*..... 175
3. *Transcript from general land-office; when admissible evidence.*—A transcript from the general land-office of the United States of the deed, to the patentee, made by a purchaser from an Indian reserve under the Indian treaty of 1832, is secondary evidence, and admissible only when the absence of the original is properly accounted for.—*S. C*..... 175
4. *Married woman's statutory separate estate; how only can be conveyed.* The separate estate of a married woman, whether by the common law, or by the Revised Code, can only be sold and conveyed by husband and wife jointly, in the manner prescribed by the Revised Code, unless the will, deed, or other instrument by which the separate estate is created, otherwise provides.—*Ellett v. Wade*..... 456
5. *Deed, certified transcript of under sections* 1548–49 *of Revised Code; when only can be received in evidence.*—The duly certified transcript of a deed, acknowledged or proved, substantially in the form given in the Revised Code, sections 1548–49, can only be received as evidence of the execution and contents of the original deed, after the original is shown to be lost or destroyed, or that the party offering it has not the custody or control of it.—*Hines v. Chancey*..... 637
6. *Deed; what proof does not sufficiently show loss of.*—The loss or destruction of a deed, left in the office of the judge of probate for registration by the grantor, without paying the fees of registration, is not sufficiently proved, by showing it can not be found in said office, where the said judge of probate is shown to have been succeeded by another, who on turning over to his successor the books and records of his office, took away the deeds recorded by him for the purpose of collecting his fees, there being no proof that it can not be found in the hands of the said outgoing judge of probate. *S. C*..... 637
7. *Deed, probate of; what insufficient.*—The probate of a deed does not substantially comply with the form given in the Revised Code, when it omits to certify the subscribing witness was known to the officer before whom the proof was made; or, that fails to show that

DEEDS—CONTINUED.

the grantor voluntarily executed the deed, in the presence of said witness and of the other subscribing witness, on the day the same bears date; or, that fails to state that said witness attested the same, in the presence of the grantor and of the other witness, and that such other witness subscribed his name as a witness in his presence.—*S. C.* 637

8. *Merger of antecedent contract in deed; when both instruments will be construed together without merger.*—Where a written contract for the sale and purchase of lands is signed by the vendor, and by one who, without written authority, assumes to act as the agent of the purchaser; and afterwards, on the same day, the vendor executes a deed for the land to the purchaser, which deed expressly refers to the contract, declares that "it is made a part of" the deed, and that the intention of the parties in making the deed "is that it shall conform in all respects to said contract,"—the contract is not merged in the deed, but the two instruments are to be construed together, as parts of the same transaction.—*Chapman v. Lee's Adm'r* 143

9. *Power, defective execution of; general rule in equity as to.*—As a general rule, equity will not help, aid, or carry into effect the defective execution of a power created by statute; especially, defects which are of the essence or substance of the power, will not be aided.—*Ellett v. Wade* 456

10. *Specific performance of contract for sale of real estate; when will not be decreed.*—Courts of equity will not decree the specific execution of a contract for the sale of real estate, where the contract is founded in fraud, imposition, mistake, undue advantage, or gross misapprehension, or where, from a change of circumstances, or otherwise, it would be unconscientious to enforce it.—*S. C.* 456

11. *Deed, surrender or re-delivery of, by grantee to grantor; effect of.* The mere surrender or re-delivery of a deed by the grantee to the grantor, does not work a divestiture of the title out of the grantee; nor can a trustee, having accepted a conveyance on a secret trust, repudiate the trust and divest himself of the title conveyed to him by surrendering the deed to the grantor and declaring he will not have anything more to do with the matter.—*Kimball v. Greig* 230

DISCONTINUANCE.

See that title under head of CRIMINAL LAW.

EJECTMENT.

1. *Ejectment, complaint in statutory action of; necessary averments of.* A complaint in an action for the recovery of land, whether under the statute or at common law, must allege that the plaintiff was in possession of the premises sued for, (describing them,) and that, after his right accrued, the defendant entered thereupon, and unlawfully withholds and detains the same. If it fails to do this, it is bad on demurrer.—Rev. Code, § 2611; Rev. Code, Forms, p. 677. *Bush v. Glover* 167

EJECTMENT—CONTINUED.

2. *Ejectment plaintiff in; what must prove as to possession and claim of his vendor, before entitled to recovery.*—A plaintiff who makes title under a deed from a third person can not recover, even as against a party in possession without claim of title, unless it be shown that his grantor was in possession, claiming title to the premises at the time the deed was made.—*Hines v. Chancey* 638
3. *Ejectment; when plaintiff may recover.*—In ejectment the plaintiff must recover on the strength of his own title. He is defeated if the defendant, not being estopped, shows a superior outstanding title.—*Jones' Heirs v. Walker* 175
4. *Same; what not good matter for a plea puis darein continuance.*—In an action by a devisee, or his heirs-at-law, to recover devised lands, a subsequent action, brought by the personal representative of the testator, against the defendant, is not good matter for a plea *puis darein continuance;* and on a trial under the general issue, proof of the pendency of such action, and that there are outstanding debts of the testator unpaid, is irrelevant.—*Hall's Heirs v. Hall*... 290
5. *Same; recovery of less than entire interest.*—The plaintiff in ejectment may declare for the entire interest, and recover an undivided moiety.—*Jones' Heirs v. Walker* 175

See, also, ADVERSE POSSESSION.

ERROR AND APPEAL.

WHEN APPEAL LIES.

1. *Venue, application for change of; ruling on subject of appeal.*—An application for change of *venue,* in this State, no longer rests in the discretion of the court. If denied in a proper case, it is an error for which, after conviction, the judgment will be reversed on appeal; or, before trial the defendant may obtain the benefit of his application by *mandamus.*—*Birdsong v. The State* 68
2. *Persons not parties to the suit below can not appeal.*—Persons not made parties to the suit below can not be permitted to bring a cause to this court by appeal. Nor will they be permitted, after the cause is brought here, to assign errors as parties to the record. If such errors are assigned, they will be stricken out on motion of appellee.—*May v. Courtenay, Tenant & Co.* 185
3. *Appeal, when lies from probate decree.*—An appeal lies from a decree of the probate court setting aside and declaring void a former decree rendered on the final settlement of an administrator's accounts.—*Bruce, Ex'rix, v. Strickland* 192
4. *Appeal; when lies; when dismissed.*—Where an issue was made up before the probate court, between the assignee in bankruptcy and the assignee by contract, of a creditor who had duly filed and verified a claim against an insolvent estate, touching their respective rights to the claim, and is decided by the court in favor of the latter, an appeal by the assignee in bankruptcy, against the administrator, without notice to the assignee by contract, will be dismissed.—*Miller v. Parker's Adm'r.* 312

ERROR AND APPEAL—CONTINUED.

5. *Same.*—Section 2759 of the Revised Code does not authorize an appeal from a judgment of non-suit, taken in consequence of the ruling of the court on pleadings. Such an appeal will be dismissed. That section only authorizes appeal from order of non-suit taken in consequence of rulings of the court on matters which can only become part of the record by bill of exceptions.—*Paulling and Wife v. Marshall*..... 270

6. *Appeal; what judgment will support.*—A motion entered on the motion docket in term time is sufficient notice of the motion to all officers of court and their sureties; and when the parties to such a motion appear and demur to the *notice* of motion, and such demurrer is sustained, and the motion is dismissed, the judgment thus rendered is final, and an appeal may be taken therefrom to this court.—Revised Code, § 3027.—*James et al. v. Mosely*..... 299

7. *Appeal; when auditor may take, without giving security for costs.* Where a peremptory *mandamus* is awarded against the auditor, commanding him to draw his warrant on the treasurer in payment of a claim against the State, he may sue out an appeal to this court without giving security for costs, if it appear that he has no personal interest in the matter, and has only acted therein in his official capacity, with a view to protect the interests of the State—*Reynolds, Auditor, v. Blue*..... 711

8. *Cross-bill, regularly filed; when appeal lies from decree dismissing.* A cross-bill, regularly filed, is so far an independent suit as to authorize an appeal from a decree dismissing the same on demurrer for want of equity before the final determination of the original bill.—*Lehman, Durr & Co. v Ford*..... 733

9. *Appeal from order of probate court confirming sale of land; in what time may be taken.*—An appeal from an order of the probate court confirming a sale of lands made by order of that court on the *nineteenth* day *after* the day of the rendition of the order of confirmation, is in time to save it from the bar of the statute of limitations of twenty days.—Revised Code, §§ 14, 2095, 2246, 2247.—*Field et al. v. Gamble*..... 443

PRACTICE.

10. *Assignment of error; practice as to.*—Generally, a specific assignment of error will not be extended by this court beyond the specific objections insisted on in the arguments at the bar and in briefs of counsel.—*Napier et al. v. Jones' Adm'r*..... 91

11. *Same; when held to be waived.*—An assignment of error not made or not insisted on in this court at the hearing, is to be regarded as waived.—*Micou v. Tallassee Bridge Co*..... 653

12. *Same; exception necessary.*—In an action commenced by a corporation, the failure to give security for the costs, as required by the statute, (Rev. Code, § 2804,) is not available on error, unless objection was raised in the court below, and an exception reserved. *Eslava v. Ames Plow Co*..... 384

ERROR AND APPEAL—CONTINUED.

13. *Presumption in favor of correctness of court below.*—The judgment of an inferior court is presumed to be right, and if the record is so defectively made up that it can not be told whether it is right or wrong, the judgment will be affirmed.—*Harbor Master, &c., v. Southerland*..... 511

14. *City corporation, ordinances of; supreme court can not take judicial notice of.*—This court can not judicially know what the laws and ordinances of a city corporation are, and if not set out in, and made a part of the record, they can not properly be considered in disposing of a case on appeal.—*S. C.*..... 511

15. *Ancillary administration; distribution of proceeds of sale of lands.* Where the testator died in Georgia, the p ace of his residence, and his will was there duly probated; and an ancillary administration was granted in this State; and the administrator here, having sold certain lands, under an order of the probate court, for division among the devisees, remitted the proceeds of sale to the principal administrator in Georgia, and, on the final settlement of his accounts, was allowed a credit for the amount so remitted, on the production of the receipt of the principal administrator,—*Held*, that the decree of the probate court would not be reversed, at the instance of a devisee resident here, unless injury was affirmatively shown.—*Cochran v. Martin*..... 525

16. *Presumption in favor of judgment.*—When administration is granted to a person who is indebted to the decedent's estate, the administrator is chargeable with the amount of the debt, as assets collected, although he is only the surety of another person; but, to reverse a decree of the probate court, refusing to charge him with the amount of such debt, enough of the evidence must be set out to show error.—*S. C.*..... 525

17. *Sufficiency of evidence.*—On appeal from a decree of the probate court, authorizing the erection of a dam for a public grist-mill, (Rev. Code, §§ 2481-2593,) the judgment of the court below will not be disturbed, when it appears to be sustained by a preponderence of the evidence.—*Frost v. Barnes*..... 279

18. *Dismissal of bill without prejudice.*—When a bill is dismissed without prejudice, but neither the decree nor the opinion shows the reason of such dismissal, although the record shows that it was defective for the want of necessary parties defendant, the appellate court will presume that the complainant was allowed an opportunity to amend by adding the proper parties, and that he declined to do so.—*Kimball v. Greig*..... 230

19. *Judgment on reversal; when will not be rendered.*—Where a defendant may have relied upon the dismissal of the bill on account of technical defects in its frame, and on this account fails to defend, this court will not render judgment upon reversal, but will remand the cause, to give an opportunity for defense on the merits. *Childress v. Harrison*..... 556

20. *Reversal of judgment, with instructions for rendition in primary court.*—On appeal from a judgment and decree of the probate court,

ERROR AND APPEAL—CONTINUED.

in the matter of the contested probate of a will, the evidence having been submitted to the court without the intervention of a jury, and being all set out in the bill of exceptions, the appellate court, on reversing the judgment of the primary court, (Revised Code, § 2251,) will direct that court what judgment to render in the case. *Leeper v. Taylor*..... 221

21. *Evidence, illegal and irrelevant; admission of, when is error without injury.*—Where evidence irrelevant or illegal is simply redundant or superfluous, the judgment being fully sustained without it, its admission is error without injury.—*Blackwell v. Hamilton*..... 470

22. *Oath of jury; what recital as to, sufficient.*—On appeal from a sentence in a criminal case, where the judgment entry recited that the jury was "sworn to well and truly try the issue joined,"—*Held*, apparent that the oath administered to the jury was not attempted to be set out, and this court will presume the proper oath was administered.—*McNeil v. The State*..... 498

23. *Rehearing, application for; what questions will not be considered on.*—On an application for rehearing, this court will not consider a question that raises a new assignment of error not insisted on in the court below, and not before insisted on in this court.—*Micou et al. v. Tallassee Bridge Co*..... 652

24. *Parties plaintiff, imperfect description of, not available on error or in arrest of judgment, if not previously objected to.*—When the complaint contains a substantial cause of action, and judgment is rendered on the plea of the general issue, the imperfect description of the character in which the plaintiffs sue, not previously objected to, is not available in arrest of judgment, or on error.—*Ware, Adm'r, v. St. Louis Bagging & Rope Co*..... 667

25. *Presumptions on appeal; when demurrer presumed withdrawn.*—A demurrer copied into the transcript, upon which no action of the court appears to have been taken, will be presumed to have been withdrawn.—*S. C*..... 667

26. *Evidence; waiver; admission of evidence without objection below, not available on error.*—Where the minutes of a court and the original papers in a cause are used in evidence in another court without objection, and admitted to be correct, exception to the irregularity of their admission can not be made for the first time in this court.—*S. C*..... 667

27. *Charge of court; when will be presumed to be warranted by the proof.*—If all the evidence is not set out in the bill of exceptions, a charge of the court, which is excepted to, will be presumed to have been warranted by the proof So, also, where a charge is refused, it will be presumed, if necessary to sustain the ruling of the court below, that the charge was abstract, the bill of exceptions not showing to the contrary. Error must affirmatively be made to appear in such a case.—*Lyman v. The State*..... 686

28. *Amendment of judgment; when made by supreme court.*—A judgment against the defendant individually, when sued as administrator on a cause of action against his intestate, will be amended to

ERROR AND APPEAL—CONTINUED.

conform to the complaint.—*Ware, Adm'r, v. St. Louis Bagging & Rope Co*..... 667

29. *Practice as to costs.*—The supreme court will not adjudge costs against the State on the denial of a motion made by the Attorney-General in a criminal case.—*Stephens v. The State*..... 696

30. *Bill of exceptions; part of record in criminal case.*—In this State, a bill of exceptions taken and signed in a criminal prosecution, as required by law, is a part of the record.—*Williams v. The State*... 659

31. *Same; appeal in criminal case, duty of court as to.*—On appeal to the supreme court from the judgment in such a prosecution, no assignment of errors or joinder in error is required; but the court examines the whole record, and gives judgment upon the whole record, as the law demands. If the errors apparent on the record are injurious to the accused, the cause will be reversed.—*S. C.*... 659

ESTATES OF DECEDENTS, AND HEREIN OF INSOLVENT ESTATES.

1. *Who can not move to set aside order of sale.*—An administrator, on whose petition real estate is sold under an order of the probate court, can not afterwards move the court to set aside the sale for want of jurisdiction, although the estate is afterwards declared insolvent, and he is continued in the office of administrator: the estoppel operates against the person, and not against his official capacity—*Snedecor et al. v. Mobley*..... 517

2. *Who can move to set aside order of sale.*—An administrator *de bonis non* may make application to the probate court to set aside an order of sale and sale of lands belonging to his intestate's estate, which were made on the application of the administrator in chief for the purpose of equitable division among the heirs-at-law.—*Smitha et al. v. Flournoy*..... 346

3. *Title to devised lands.*—On the death of a testator, the title to lands devised by him vests at once in the devisee; and he is entitled to the immediate possession thereof, and to hold the same until, when necessary, they are subjected by the personal representative to the payment of debts.—*Hall's Heirs v. Hall*..... 290

4. *Decedent, conversion of estate of by heirs; rights of creditor of.*—N. bought property at an administrator's sale and gave a note payable to the administrator, who charged himself with and accounted for it, on his final settlement in North Carolina. N. died intestate in Alabama, and his heirs, without administration, divided his estate among them,—*Held*, that the estate of N. in the hands of his heirs constituted a fund in their hands for the payment of the note, which the payee might subject by a bill in equity for that purpose. *Dunlap v. Newman et al*..... 429

5. *Administrator; liability of, for debt due estate of decedent.*—When administration is granted to a person who is indebted to the decedent's estate, the administrator is chargeable with the debt as assets collected, although he is only surety of another person.—*Cochran v. Martin*..... 525

ESTATES OF DECEDENTS—CONTINUED.

6. *Decedent's estate, settlement of; when can not be removed to chancery court*—The final settlement of a decedent's estate can not be removed from the probate into the chancery court, under a bill filed by a portion of the heirs-at-law and legatees, alleging that the estate was regularly reported and declared insolvent, but, in consequence of the failure of creditors to file their claims, eventually proved solvent; that a large claim filed against the estate by the widow and partly paid by the administrator, was not properly a debt or preferred claim against the estate under the decree of insolvency, though so far as it might be correct, it constituted a charge on the residue; and that complainants had no notice of the filing of this claim, until after twelve months after the declaration of insolvency, and no opportunity to test its correctness. In such a case, there is an adequate remedy in the probate court.—*Prince v. Prince*..... 284

7. *Insolvent estates; claim for family expenses, incurred under will, not required to be filed, nor entitled to share in distribution of assets with "debts of the estate."*—A claim against a decedent's estate, in favor of his widow, founded on a clause in his will in these words: "Out of the proceeds of my property directed to be sold, I desire my funeral and other debts first paid, including the expenses for the support and maintenance of my family, from the time of my death until the division of my estate," is not such a "debt against the estate" (Revised Code, § 2064,) as is required to be filed within twelve months after a decree of insolvency, nor is it entitled to share in the assets when distributed under the decree of insolvency.—*S. C.*..... 284

8. *Same; nature of such claim.*—Such a claim can only be paid out of the residue of the estate, if any, after the payment of the preferred claims and debts which have been regularly filed against the estate, and it is not in any way affected by the proceedings under the decree of insolvency.—*S. C.*..... 284

9. *Same; jurisdiction of probate court in such case.*—If there should be a residue after the payment of the preferred claims and debts against the insolvent estate, such a claim may be contested before the probate court, by any person interested in that residue, on an annual or the final settlement of the administrator.—*S. C.*..... 284

10. *Insolvent estate; claim filed by creditor afterwards becoming bankrupt; respective rights of transferee and assignee in bankruptcy.*—When a claim against an insolvent estate is duly filed and verified, by a creditor who afterwards becomes a bankrupt, but is transferred by him, by deed of assignment, before the proceedings in bankruptcy are instituted, the decree allowing the claim should be in favor of the assignee in bankruptcy, and not in favor of the transferee or trustee under the deed.—*Miller v. Parker's Adm'r*... 312

As to jurisdiction of probate court to order sale of estate of decedent, and to declare estates insolvent, and therein of what a petition for order of sale or a report of insolvency should state, see title COURT, PROBATE.

EVIDENCE.

I. Admissibility and Relevancy.

1. *Stated account; relevancy of evidence to prove.*—In an action to recover the unpaid balance of the purchase-money for land, the written contract between the parties, and the vendor's subsequent deed to the purchaser for the lands, in which the terms of the contract are stated, are relevant evidence for the plaintiff, under a count for an account stated, to prove the amount of the purchase-money, and the terms on which it was to be paid.—*Chapman v. Lee's Adm'r* 143

2. *Evidence; what irrelevant in suit on promissory note on issue as to date of execution.*—In a suit on a promissory note, the issue being whether it was executed on Sunday or not, evidence that the plaintiff, the payee, was the superintendent of a sabbath-school, which he invariably attended, unless he was sick or absent from home, is not admissible.—*Hamilton v. Blackwell.* 470

3. *Evidence; what admissible on suit on promissory note.*—Where the collection of a promissory note is defended on the ground that its consideration was a horse purchased from the plaintiff for the military service of the Confederate States within the knowledge of plaintiff, and that the horse was so used, any evidence is admissible to show the purpose of the parties in making the contract.—*Thedford v. McClintock* 647

4. *Amendments nunc pro tunc; parol evidence inadmissible.*—On application to amend a judgment *nunc pro tunc* at a subsequent term, parol testimony is not admissible to supply the deficiencies of the record.—*Tanner, Adm'r, v. Hayes* 722

5. *Decree against principal; when not evidence against surety.*—A decree of the chancery court foreclosing a mortgage of land is not evidence against the surety of a debtor, who was not a party, in a suit at law to recover the balance of the purchase-money, to prove that the sale had not been rescinded by the parties.—*Arrington v. Porter* 714

6. *Consideration; when inquiry as to precluded.*—Where the parties have fixed the consideration, and stated it in the contract as a part of the agreement, this precludes an inquiry into the question of a failure of consideration, unless there is fraud, misrepresentation, or deceit.—*Gaines et al. v. Shelton* 413

See, also, Criminal Law, under title Evidence.

II. Burden, Weight, and Sufficiency.

7. *Judgment nil dicit against administrator and execution returned nulla bona, conclusive against surety.*—An execution *de bonis intestatis* upon a judgment rendered against an administrator, returned "no property," is conclusive evidence of assets or a *devastavit* against the sureties of the administrator, in a suit upon the administration bond.—*Grace v. Martin* 135

8. *Legacies; proof held insufficient to charge executor with.*—On an application by legatees to charge an executor with legacies, the ques-

EVIDENCE—CONTINUED.

tion being whether certain money directed by the will to be retained for a contingent liability, the balance of which was the subject of the legacies, was left by the testator at his death, and received by the executor,—*Held*, evidence that the testator had such money at the date of his will, in 1861, and of declarations made by the executor soon after the testator's death, in 1866, that the money was left for the purposes mentioned, or that there was such money to be so distributed, which declarations might be referred to the provisions of the will, with as much propriety as to the executor's receipt of the fund,—is not sufficient to authorize a decree against the executor, when opposed by the direct and positive testimony of the executor and several other witnesses, that they were well acquainted with the testator and his property between the date of the will and his death; that he had no such property within their knowledge, though, possibly, he might have had money; and proof that he had loaned money during the time, and sustained heavy losses, and that he did not return such money in his tax list.—*Jay, Ex'r, v. Mosely*..... 227

9. *Bankruptcy; plea of, when conclusive.*—A bankrupt's certificate of discharge, properly pleaded in a State court, is conclusive evidence in his favor of the fact and regularity of such discharge, if it has not been set aside and annulled in a proper Federal court.—*Oates, Adm'r, v. Parrish et al*..... 157

CHARGE UPON EFFECT OF EVIDENCE.

10. *General charge on evidence.*—When the evidence is clear, and without conflict, and it is only necessary to draw a legal conclusion from it, the court may instruct the jury, that, if they believe the evidence, they must find for the party whose case is thus clearly made out.—*Hall's Heirs v. Hall*..... 290

See, also, CRIMINAL LAW, title CHARGE TO JURY.

MATTERS JUDICIALLY NOTICED.

11. *Judicial notice of cities, incorporated towns, post-office, and public lands.*—The probate court of Barbour county may take judicial notice of the facts, that Eufaula is an incorporated city in said county; that it is a railroad terminus, and the location of a post-office, the only one by that name in the State; also, the boundaries of the county, and the numbers of the lands within its limits, as described in the records of the land-office of the United States. *Smitha v. Flournoy*..... 346

12. *Judicial notice of ordinances of city; courts do not take.*—The supreme court can not judicially know what the laws and ordinances of a city corporation are.—*Harbor Master, &c. v. Southerland*..... 511

PRIMARY AND SECONDARY.

13. *Deed; what proof does not sufficiently show loss of.*—The loss or destruction of a deed, left in the office of the judge of probate for re-

EVIDENCE—CONTINUED.

gistration by the grantor, without paying the fees of registration, is not sufficiently proved, by showing it can not be found in said office, where the said judge of probate is shown to have been succeeded by another, who on turning over to his successor the books and records of his office, took away the deeds recorded by him for the purpose of collecting his fees, there being no proof that it can not be found in the hands of the said outgoing judge of probate. *Hines v. Chancey*..... 637

14. *Deed, certified transcript of under sections* 1548–49 *of Revised Code; when only can be received in evidence.*—The duly certified transcript of a deed, acknowledged or proved, substantially in the form given in the Revised Code, sections 1548–49, can only be received as evidence of the execution and contents of the original deed, after the original is shown to be lost or destroyed, or that the party offering it has not the custody or control of it.—*S. C*..... 637

15. *When certified copy of recorded deed is admissible evidence.*—Under section 1544, Revised Code, a subsequent purchaser of land may give in evidence a certified copy of the deed to his vendor, on the ground that he has not the custody of the original.—*Jones' Heirs v. Walker*..... 175

16. *When transcript from general land-office admissible evidence.*—A transcript from the general land-office of the United States of the deed, to the patentee, made by a purchaser from an Indian reserve under the Indian treaty of 1832, is secondary evidence, and admissible only when the absence of the original is properly accounted for.—*S. C*..... 175

PAROL AND WRITTEN.

16. *Contract reduced to writing; for what purpose parol evidence inadmissible.*—In a suit upon a contract in the shape of a promissory note for the hire of a slave, which besides the promise to pay a sum certain in money, contains various stipulations about the clothing and return of the slave, the pleas being in short by consent, "general issue, failure of consideration, want of consideration, and frauds," the plaintiff having offered in evidence the note and rested his case, the defendant, having offered at the time of asking the questions no evidence in support of his pleas, offered to ask a witness the following questions: "State the contract in full that was made between you and plaintiff in reference to the hire of this negro, at said time and cotemporaneous with the signing of said instrument. Was there a warranty of soundness given by plaintiff? Did not said warranty form, in part, the consideration of said agreement or contract? Was not said warranty a part of contract?" &c.,—*Held*, that the court properly refused to permit an answer to the questions, as they tended to add to, vary and change the written contract between the parties.—*Gaines, et al. v. Shelton*. 413

RECORDS.

17. *Lost records; what not proof sufficient to authorize substitution of.*—An application to substitute lost records, under § 652 of the Re-

EVIDENCE.—CONTINUED.

vised Code, can not be sustained by proof that the judge failed to make the proper entries and decrees; nor will it sustain a decree to complete the minute entries and decrees in a cause, rendered under § 796 of the Revised Code.—*Box v. Delk*..... 729

18. *Judgments of former county courts; how certified since transfer to circuit court.*—A transcript of the proceedings and judgment of the county court of Mobile in 1840, is properly certified by the clerk of the circuit court of Mobile county.—*Jones' Heirs v. Walker*..... 175

VARIANCE.

19. *Variance between bill and proof; when immaterial.*—A variance between the statements of the bill and proof, if not of such a character as to operate as a surprise to the defendants and they do not appear to be thereby injured, should generally be held to be immaterial.—*Offutt et al. v. Scott*..... 105

20. *Variance; what is.*—A charge of larceny of the property of W. G. M. G. is not the same as a charge of larceny of the property of W. G. M. G. or his son M. G., and the record of the latter case is not competent proof of the former.—*Brown v. The State*..... 47

EXECUTION.

1. *Administrator, judgment against, returned nulla bona; effect of.* An execution *de bonis intestatis* upon a judgment rendered against an administrator, returned "no property," is conclusive evidence of assets or a *devastavit* against the sureties of the administrator in a suit upon the administration bond.—*Grace v. Martin*..... 135

2. *Sale under execution issued on a judgment by default, rendered since the war on summons issued and served during the war, not a nullity.* A judgment of a circuit court of this State, rendered on 3d of September, 1866, during the existence of the provisional government, founded upon a summons issued from a rebel court in this State on the 8th day of February, 1861, and served upon the defendant by the rebel authorities, though such judgment be taken by default, is not a nullity. A sale of lands made by the sheriff under authority of an execution issued on such a judgment, and regularly conducted, is valid, and the sheriff's deed conveys to the purchaser such title as could pass by the sale.—*Bush v. Glover*..... 167

3. *Execution issued after defendant's death, and sale of lands under it; invalidity of.*—An execution, issued after the death of the defendant in the judgment, is void; and, consequently, a sale under it is also void, and may be set aside on motion, at the instance of the heir-at-law.—*Beach et al. v. Dennis*..... 262

4. *Parties to motion to set aside sale under execution.*—There is no settled rule, as to who are the necessary parties defendant to a motion to set aside the sale of lands under execution. Generally, those persons only who have an interest in the sale, or who will be prejudiced by setting it aside, need be made defendants to the motion. *S. C*..... 262

EXECUTORS AND ADMINISTRATORS.

1. *Settlement of administrator with himself as guardian of infant distributees.*—When an administrator is also the guardian of the infant distributees of the estate, the chancery court only has jurisdiction to settle his accounts; but a settlement made in the probate court, in such case, is not absolutely void.—*Bruce's Ex'rix v. Strickland.* 192

2. *Receipt of Confederate money by administrator, or investment in Confederate bonds.*—An administrator who, during the late war, converted the assets of the estate into Confederate money or bonds, is liable to account for the same, on his final settlement, in sound funds; but the improper allowance of a credit by the court, for such money and bonds, is a mere irregularity, or error of law, and does not render the final settlement absolutely void, nor authorize the court to set it aside at a subsequent term.—*S. C.* 192

3. *Notice of final settlement of administrator's accounts.*—To sustain a decree of the probate court, rendered on final settlement of an administrator's accounts, the record must affirmatively show that the parties in interest had notice, either by personal service, or by proper publication, of the intended settlement; and if the record shows that the notice was given by posting at the court-house door and three other public places in the county, (Revised Code, § 2446,) it must also affirmatively show that no newspaper was published in the county.—*S. C.* 192

4. *Sale of decedent's estate; who may move to set aside.*—An administrator, on whose petition real estate is sold under an order of the probate court, can not afterwards move the court to set aside the sale for want of jurisdiction, although the estate is afterwards declared insolvent, and he is continued in the office of administrator: the estoppel operates against the person, and not against his official capacity.—*Snedecor et al. v. Mobley* 517

5. *Statute of limitations; when begins to run.*—The statute of limitations of six years in favor of the sureties of executors, administrators and guardians, (Rev. Code, § 2901,) begins to run from the date of the final settlement of the trust.—*Rives v. Flinn* 481

6. *Administrator, promissory note payable to; when may maintain action thereon in his own name.*—If an administrator in North Carolina, on his final settlement there, is charged with, and accounts for a note, given to him as administrator, by a resident of Alabama, for property purchased at a sale of his intestate's estate, the note thereby becomes his property, and he may maintain an action on it, in his own name, whether the sale was or was not made by authority of law.—*Dunlap v. Newman et al.* 429

7. *Bill in equity; administrator may file to subject estate of maker of such note, in hands of heirs.*—On the death of the maker of such a note, in this State, if his children, without administration, take possession of and convert his estate to their own use, it becomes a fund in their hands, which the payee of said note may subject to its payment, by a bill in equity filed for that purpose. In such a case, there is no adequate remedy at law.—*S. C.* 429

EXECUTORS AND ADMINISTRATORS—CONTINUED.

8. *Administration, court granted by; what allegation sufficient as to.* In such a bill, it is sufficient to state that the complainant was *duly appointed* administrator in North Carolina, without stating the particular court or authority by which the appointment was made.—*S. C.* 429

9. *Final settlement; what allegation as to, sufficient.*—Where the bill states that the final settlement, &c., was made in the court of pleas and quarter sessions of Moore county, North Carolina, this is sufficient, without stating that said court had jurisdiction to make said settlement. *Prima facie*, it is to be presumed the court had jurisdiction.—*S. C.* 429

10. *Administrator, judgment against, returned nulla bona; effect of.*—An execution *de bonis intestatis* upon a judgment rendered against an administrator, returned "no property," is conclusive evidence of assets or a *devastavit* against the sureties of the administrator in a suit upon the administration bond.—*Grace v. Martin* 135

11. *Same; liability of, for debt due by him as surety of debtor.*—When administration is granted to a person who is indebted to the decedent's estate, the administrator is chargeable with the debt as assets collected, although he is only surety of another person.—*Cochran v. Martin* 525

12. *Who may file petition to set aside sale.*—An administrator *de bonis non* may make application to the probate court to set aside an order of sale and sale of lands belonging to his testator's estate, which were made on the application of the administrator in chief for the purpose of equitable division among the heirs-at-law.—*Smitha et al. v. Flournoy* 346

13. *Administrator; when liable as for devastavit.*—Where a trustee applied the trust funds to the use of an estate of which he was administrator, and afterwards bought cotton of that estate, a portion of which he designed for the trust, but never set apart, and then sold the cotton for Confederate bonds, which he also sold, and made a partial settlement without any reference to these transactions,—*Held*, that on his final settlement he was properly charged with the amount of the trust funds appropriated, with interest, in lawful money.—*Hall v. Glover* 467

14. *"Option of executor;" when can not be permitted to defeat legacy.* A clause of a will as follows: "I give to my friend P. O. H. ten thousand dollars in notes or in Confederate States bonds, at the option of my executors hereinafter named, creates a general and not a specific legacy, which "the option of the executors" will not be permitted to defeat, by a payment of the Confederate States bonds, which had become worthless, when there were general assets out of which the legacy could be paid, in whole or in part.—*Harper v. Bibb and Falkner, Ex'rs* 547

For necessary averments of petition by administrator for order of sale, &c., see title COURT, PROBATE.

FINE.

See CRIMINAL LAW, under that title.

FRAUDS, STATUTE OF—FRAUD IN GENERAL.

1. *Mortgage to bona-fide creditor; when void as against other creditors.* Where a debtor, in failing circumstances, mortgaged to one of his principal creditors almost the whole of his estate, equal in value to fifty per cent. more than the debt secured; stipulating with him, both in the conveyance and privately, for two or more years' delay in its foreclosure, the mortgagee knowing that there were other creditors, who would thereby be hindered, delayed, and most likely totally defeated,—*Held*, that the mortgage was fraudulent and void, under section 1865 of the Revised Code, as against other creditors. *Reynolds v. Welsh*..... 200

2. *Fraud permits inquiry into consideration even when stated in contract.*—Where parties have fixed the consideration and stated it in the contract as a part of the agreement, inquiry into the question of a failure of consideration is precluded, unless there is fraud, misrepresentation, or deceit.—*Gaines et al. v. Shelton*..... 413

3. *Fraud of vendor at executor's sale of lands; when will permit purchaser to resist collection of notes for purchase-money without surrendering possession.*—Where executors sell the lands of their testator, under an order of sale by the probate court for that purpose, if the vendee gives his notes for the purchase-money, and is let into, and retains the possession of the premises, he can not, at law, defend an action by the executors on said notes, on the ground that the order of sale is erroneous; even its utter invalidity is no defense to such an action. If, however, the vendee has paid a part of the price, or made necessary and permanent improvements, where fraudulent representations have been made, to the injury of the vendee, or the vendor can not make good titles, and in some other like cases, the vendee may, without restoring the possession, within a reasonable time, file his bill in a court of chancery to rescind the sale, and to enjoin the collection of the purchase-money. In such cases, the vendee is permitted to retain the possession as a security for the money paid, and to indemnify him for necessary and permanent improvements made, in good faith, upon the premises.—*Hickson et al. v. Lingold et al*..... 449

4. *Fraud; prevents decree of specific performance of contract for sale of land*—Courts of equity will not decree the specific execution of a contract for the sale of real estate, where the contract is founded in fraud or imposition.—*Ellett v. Wade*..... 457

5. *Statute of frauds; what promise to answer for debt, &c. of another, void.*—Where an administrator has advanced money and necessaries to an infant distributee, and claims an allowance for the same, as against her distributive share, on final settlement of his accounts; a promise by her guardian, present and representing her on the settlement, that if the administrator "would withdraw said claim, and not insist on the allowance of a credit for the same,"

FRAUDS, STATUTE OF—FRAUD IN GENERAL.—CONTINUED.

he would pay it when certain lands belonging to the infant were sold, or when the purchase-money for them was collected, is a promise to answer for the debt, &c. of another, (Rev. Code, § 1862), and is void if not reduced to writing.—*Sharman v. Jackson*..... 329

6. *Frauds, statute of; what promise within.*—J. gave a mortgage to T. on two mules and his crop of cotton, to secure the payment of $500. He was indebted to him about the same amount in addition. He and T. disputing about the debt to which the cotton should be applied, D. proposed to give his note to T. for the unsecured debt, and take a mortgage on the mules for his reimbursement, the existing mortgage to be satisfied with the cotton, and J. to join with him in renting land from T. for the next year. T., in pursuance of the agreement, received the cotton in satisfaction of his mortgage, and J., after promising to execute the agreement on a subsequent day, and obtaining the credit on his mortgage debt, refused to consummate it. He insisted all the time that his payment should be so appropriated,—*Held*, that the agreement was void, because not in writing, and that J. had the right to apply his payment as he preferred.—*Townsend v. Jones et al*..... 479

7. *Frauds, statute of; what contract not within.*—A parol contract for the rescission of a sale of land, the purchase-money not having been paid, accompanied by a return of the possession to the vendor, is without the statute of frauds.—*Arrington v. Porter*..... 714

GENERAL ASSEMBLY.

1. *Per diem, compensation; when officers and members of the general assembly of Alabama not entitled to.*—When the general assembly, during an annual session of the legislature, adjourns for a month, longer or shorter, and the object of such adjournment is that the members may return to their homes, and the business of the session thereby ceases for that time; in such a case, neither the members nor the officers of the two houses are entitled to their *per diem* compensation for the period of such adjournment.—*Moren, Lieut. Gov., v. Blue*..... 709

GUARDIAN AND WARD.

1. *Guardian; receipt of husband of ward, when discharges.*—A *bona-fide* and unimpeached receipt by the husband, in full of all demands, for the separate statutory estate of the wife, delivered to the husband by the guardian, is a full discharge of the guardian both at law and in equity.—*Mobley and Wife v. Leophart et al*..... 257

2. *Guardian; liability of, for compound interest.*—As a general rule, a guardian is not chargeable with compound interest, unless he has collected it.—*Starling v. Balkum*..... 314

3. *Same, liability for specie.*—He is not chargeable in specie, on final settlement, on the ground that he received specie or its equivalent in 1861; United States treasury-notes being a legal tender for debts

GUARDIAN AND WARD—CONTINUED.

contracted before as well as since the passage of the act of congress of February 25, 1862.—*S. C.*..... 314

4. *Same; right to credit for expenditures beyond income and for board.* If a guardian commit the custody and control of a female ward to a person who compels personal services, from her, while her education and culture are wholly neglected, he will not be allowed a credit for her board within the value of her personal services, nor for expenditures beyond the income of her estate, when she is able to maintain herself.—*S. C.*..... 315

5. *Same; competency of, as witness for himself.*—A guardian is a competent witness for himself, on final settlement of his accounts, to prove the correctness of any vouchers claimed by him.—*S. C.*..... 315

6. *General guardian, appearance by for minor; effect of.*—The general guardian of a minor may appear and represent him on the final settlement of the succession by the administrator, and such appearance cures the want of notice.—*Rives v. Flinn et al.*..... 481

7. *Guardian; when statute of limitations begins to run in favor of.* The statute of limitations of six years in favor of the sureties of executors, administrators and guardians, (Rev. Code, § 2901,) begins to run from the date of the final settlement of the trust.—*S. C.* 481

8. *Guardian of infant distributees of estate, when settlement with himself as administrator, not absolutely void.*—When an administrator is also the guardian of the infant distributees of the estate, the chancery court only has jurisdiction to settle his accounts; but a settlement made in the probate court, in such case, is not absolutely void.—*Bruce's Ex'rix v. Strickland*..... 192

HARBOR MASTER.

See MOBILE, CITY OF, 1.

HUSBAND AND WIFE.

1. *Married woman with separate statutory estate; can not purchase land partly on credit, and take title to herself.*—A married woman, in this State, since the passage of the act of the general assembly of March 1, 1848, entitled "An act *securing* to married women their separate estates, and for other purposes," has no legal capacity to purchase lands and take title to herself. And if she attempts to do so, and enters into such a contract, and pays a part of the purchase-money and gives her promissory notes for the balance of the purchase-money, and secures the notes by a mortgage on the lands thus attempted to be sold to her, she may go into chancery and have her money paid back to her.—*Cowles v. Marks*..... 612

2. *Same; what relief chancery will give to.*—In such case, if the lands should be sold under a power in the mortgage, and the purchaser at the mortgage sale comes into chancery against the married woman to foreclose her right of redemption, and to have her deed given up and cancelled as a cloud upon his title, upon a cross-bill filed by such married woman setting up her right as a married

HUSBAND AND WIFE—CONTINUED.

woman under our statute, the court will direct her debt to be held as a charge upon the land, and decree her money to be paid back to her, within a reasonable time, or in the event of failure, that the land be sold, and her debt paid out of the proceeds of such sale.—*S. C.* 612

3. *Same; for what married woman will be held to account.*—But such married woman will be held to account for the value of the rents and profits, if any, which accrued to her out of said land during her use and occupation, which have been used by her "for articles of comfort and support of the household, suitable to the degree and condition in life of the family of said married woman, and for which the husband would be liable at common law."—*S. C.* 612

4. *Conflict of laws, as to property rights of husband and wife, under marriage celebrated in South Carolina, with intention to reside in Alabama, where husband was domiciled.*—A marriage, contracted and celebrated in the State of South Carolina, between a man, a citizen of this State, domiciled in this State, with a woman, a citizen of the former State and residing there, with the intention of coming immediately to this State, to reside at the husband's domicile here, will be treated in our courts as a marriage contracted in this State, for the purpose of regulating the marital rights of both parties; and the marital rights of the wife will be regulated by the laws of the husband's domicile, if there is no marriage contract. *Glenn v. Glenn* 204

5. *Same, as to property afterwards bequeathed and devised to wife in South Carolina.*—Property, given to a married woman domiciled with her husband in this State, who is a citizen of this State, by the will of her father, in the State of South Carolina, in 1848, since the passage of the act of the general assembly of this State, approved March 1, 1848, entitled "An act securing to married women their separate estates, and for other purposes," for her sole and separate use and benefit, during her natural life, is to be taken, held, and esteemed here, as the separate property of the wife to the extent of her estate therein, under the law of this State regulating the "separate estate of wife," as found in the Code of Alabama.—Pamph. Acts, 1847–48, p. 79; Code, §§ 1993, 1997; Revised Code, §§ 2382, 2388.—*S. C.* 204

6. *Resulting trust for wife declared, in lands purchased by husband with money belonging to her statutory separate estate.*—If the husband takes possession of the wife's property given to her in South Carolina, and converts the same into money by a sale there, and afterwards brings the money thus obtained to this State, and invests it in the purchase of lands here, but takes the title in his own name, a trust results to the wife in such lands so purchased by the husband with her money, which will be enforced at the suit of the wife against the husband in a court of chancery, to the extent of the wife's money so invested, and interest thereon, if the husband makes no objection as to the interest.—*S. C.* 204

7. *Statutory separate estate of wife; husband may receive.*—The hus-

HUSBAND AND WIFE—CONTINUED.

band may receive from his wife's guardian her statutory separate estate and receipt for the same. Such receipt, if in full of all demands and unimpeached, is a full discharge of the guardian, both at law and in equity.—*Mobley and Wife v. Leophart*..... 257

8. *Same; what held to be part of.*—Mrs. L. joined her husband in a promissory note for her husband's debt for $2,000, and also in a mortgage on her lands of her separate estate, derived from the will of her father since the passage of the Code, to secure the payment of said note to E. K. & Co.; afterwards Mrs. L. and her husband sold said lands to R. for $6,000, and R. was to pay the $2,000 mortgage debt; R. then sold the same lands to B., and B. also undertook the payment of said mortgage debt to E. K. & Co. But R. and B. failed to pay said mortgage debt, and thereupon the surviving partner of E. K. & Co. filed his bill against Mrs. L. and her husband to foreclose the mortgage and to collect the mortgage debt. In this suit he failed, and the mortgage and note were held to be void as to Mrs. L.,—*Held*, that after the defeat of the mortgage, the $2,000 (the amount of the mortgage debt) left in R.'s hands to pay this debt, was the separate property of Mrs. L., which was secured to her by a vendor's lien in her favor on said land, and she could file her bill in chancery by her next friend against her husband and B., who was in the possession of said land under R.'s deed, to enforce her lien for said $2,000 so left in the hands of R. *Bunkley et al. v. Lynch*..... 210

9. *Same; what property constitutes.*—Real estate purchased by, and conveyed to a married woman in 1861, although paid for by her with money derived from the income and profits of property settled in the hands of a trustee to her separate use, by an antenuptial agreement made in 1839, is her separate estate by force of section 2371 of the Revised Code, and not by the common law.—*Ellett v. Wade*..... 456

10. *Same; how only can be conveyed.*—The separate estate of a married woman, whether by the common law, or by the Revised Code, can only be sold and conveyed by husband and wife jointly, in the manner prescribed by the Revised Code, unless the will, deed, or other instrument by which the separate estate is created, otherwise provides.—*S. C.*..... 456

11. *Wife; when not competent witness for husband.*—The wife is not a competent witness for her husband in a criminal case.—*Johnson v. The State*..... 10

12. *Wife; in what case may be agent and witness for husband.*—The wife may lawfully become the agent or attorney of the husband, and as such she is a competent witness for him, except in "criminal cases," and in certain suits against executors and administrators —Rev. Code, § 2704.—*Lang v. Waters' Adm'r*..... 625

12. *Same; agency of wife for husband, how may be proved.*—The wife, being the agent of the husband, may prove her agency, in a suit against him.—*S. C.*..... 625

INDIAN RESERVE.

See PUBLIC LANDS.

INJUNCTION.

1. *Injunction; when will lie to prevent assertion of claim to land, &c.* Where the property of a railroad company has been sold by the tax-collector, for the non-payment of taxes which have been remitted, by act of the legislature, before the sale; and the purchaser makes no attempt to assert his right to the property, but allows the company to retain possession,—a court of equity will entertain a bill by the railroad company to annul the sale, cancel the deed made to the purchaser, and enjoin him from asserting any claim to the property.—*Mobile & Girard Railroad Co v. Peebles*..... 317

2. *Same; when will lie to restrain opening street by municipal corporation.*—An injunction will lie, at the suit of the proprietor, to restrain a municipal corporation from opening a new street on his land, and collecting a sum of money out of him, assessed as his benefit of the proposed improvement, and his contribution to the cost of opening the street, when the proceedings of the corporation appear to be regular, and their invalidity is to be shown by extrinsic evidence.—*Miller v. Mayor, Aldermen, &c., of Mobile*.... 163

3. *Same; when will lie to restrain use of toll-bridge.*—An act of the general assembly of this State incorporating a company of persons, with authority to erect a toll-bridge across a river in this State, is a contract, which must be construed in reference to the laws as they existed at the date of its passage. Such a contract the general assembly cannot impair by a second grant made some years after, to other parties, conferring upon them authority to erect another toll-bridge within three miles, by water, from the one first erected, over the same stream, when the first act was passed in 1837. If such second toll-bridge is erected within the distance prohibited by law, at the date of the first act, chancery will enjoin its use and abate it as a toll-bridge.—*Micon et al. v. Tallassee Bridge Co*..... 652

4. *Same; when will lie to restrain collection of notes given for purchase-money of decedent's land sold under order of probate court.*—If the vendee of land of a decedent's estate, sold under order of the probate court, gives his notes for the purchase-money and is let into and retains possession of the land, he can not at law defend an action by the executor on the notes, on the ground of the invalidity of the order of sale. If, however, the vendee has paid a part of the price, or made necessary and permanent improvements, where fraudulent representations have been made, to the injury of the vendee, or the vendor can not make good titles, and in some other like cases, the vendee may, without restoring the possession, within a reasonable time, file his bill in a court of chancery to rescind the sale, and to enjoin the collection of the purchase-money. In such cases, the vendee is permitted to retain the possession as a security for the money paid, and to indemnify

INJUNCTION—CONTINUED.

him for necessary and permanent improvements made, in good faith, upon the premises.—*Hickson et al. v. Lingold et al*..... 449

5. *Same; when prohibition will not lie against.*—When an appeal to the circuit court has been taken from the judgment of the probate court in favor of the contestant in a case of contested election for sheriff, and the successful party is proceeding under sections 103–199 of the Revised Code to recover from the incumbent the books, papers, &c., of the office, the supreme court will not issue a prohibition against an injunction from the chancery court restraining the further prosecution of the summary remedy, until decision upon the appeal.—*Ex parte Scott*..... 609

6. *Injunction bond; not void because taken and approved by officers of a government in rebellion against the United States.*—An injunction bond taken by a register in chancery in pursuance of an order of the chancellor granting an injunction in 1863, is not void on the ground that those officers represented a government in rebellion against the United States.—*Estes v. Prince & Garlick*..... 269

INSOLVENT ESTATES.

See ESTATES OF DECEDENTS.

INSURANCE.

1. *Construction of application for policy, as to property included.*—A written application for insurance, in which the property is described as "a frame steam saw-mill, covered with sheet iron, situated," &c., "boiler, engine, machinery, and belting contained therein," includes a planing machine in the building on the same floor with the machinery proper of the mill, about twenty-five feet distant, but attached to it by the belting, and plainly visible.—*James River Ins. Co. v. Merritt & Robertson*..... 387

2. *Same; charge to jury as to.*—In an action on an insurance policy, to recover damages for a loss by fire, a charge which instructs the jury, that, if the defendant's agent wrote the application for the insurance after an inspection of all the machinery in the building, and wrote it in such form as to include a planing machine with other machinery insured to which it was attached, and that such was the understanding of the agent and the plaintiff, then the defendant was liable for the insurance of the planing machine as well as the rest of the machinery, does not necessarily leave to the jury the construction of the writing, when there is conflicting oral evidence respecting the inclusion of the planing machine.—*S. C.*..... 387

INTEREST.

See GUARDIAN AND WARD, 1.
HUSBAND AND WIFE, 6.

JUDGMENTS AND DECREES.

1. *Judgment, &c., against administrator; when conclusive against surety.*—An execution *de bonis intestatis* upon a judgment ren-

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dered against an administrator, returned "no property," is conclusive evidence of assets or a *devastavit* against the sureties of the administrator, in a suit upon the administration bond.—*Grace v. Martin*..... 135

5. *Decree against principal; when not evidence against surety.*—A decree of the chancery court foreclosing a mortgage of land is not evidence against the surety of a debtor, who was not a party, in a suit at law to recover the balance of the purchase-money, to prove that the sale had not been rescinded by the parties.—*Arrington v. Porter*..... 714

3. *Lien of decree against guardian and father, in favor of ward and daughter; when postponed to lien of mortgage by guardian, in favor of bona fide creditor.*—The husband may receive from his wife's guardian his wife's statutory separate estate, and receipt for the same; and if the receipt is in full of all demands, it is, if unimpeached, a full discharge in law and equity of the guardian. In such a case, when the father is the guardian, a decree rendered in favor of the husband and his wife, who is the ward, for her use, after the giving of such receipt, against the guardian, for a considerable sum of money still remaining in the hands of the guardian, and no *fieri facias* has ever been issued on such decree to enforce collection of such decree, it has no such lien against the property of the guardian as will be preferred to the lien of a mortgage of the defendant in such decree, when it appears that the mortgagee is a *bona fide* creditor of such defendant, and that the mortgage was made and recorded during the suspension of the *fieri facias* on said decree.—*Mobley and Wife v. Leophart*..... 257

4. *Probate decree; when may be set aside at subsequent term.*—A final decree of the probate court which is absolutely void, whether for want of jurisdiction of the subject matter or of the persons interested, may be set aside and declared void at a subsequent term; *secus.* as to a decree which is voidable merely.—*Bruce, Ex'r, v. Strickland*..... 192

5. *Same; validity of order of sale, and confirmatory decree, rendered in 1863.*—An order of the probate court for the sale of a decedent's lands, and a subsequent decree confirming the sale, both rendered in 1863, are not void as being the acts of a court of the State while in insurrection against the United States.—*Inman's Adm'r v. Gibbs*. 306

6. *Final decree; what not sufficient reason for disturbing.*—A decree disposing of the equities of the case and ordering a reference to the master, where the bill was filed in 1858, and the cause was brought to a hearing in 1860, will not be set aside as a nullity, because the case was not finally disposed of until after the end of the late war. If otherwise regular, such decree is valid.—*Micou et al. v. Tallassee Bridge Co.*..... 652

7. *Same.*—In such a case, a final decree rendered after the restoration of the legal State government, will not be held void or irregular, because the reference upon which it is founded was commenced before the rebellion, and not concluded until after the restora-

JUDGMENTS AND DECREES—CONTINUED.

tion of the legal State government, when such order of reference was renewed after the restoration, and the report made under the authority of the renewed order.—*S. C.*..... 652

8. *Same; what sufficient to support decree.*—A report on such a reference, after it is confirmed without objection or exception in the court below, will be held sufficient to support the final decree, for the amount of principal and interest ascertained and stated by the master on such renewed reference.—*S. C*..... 652

9. *Judgment by default, rendered since the war on summons issued and served during the war, not a nullity.*—A judgment of a circuit court of this State, rendered on 3d of September, 1866, during the existence of the provisional government, founded upon a summons issued from a rebel court in this State on the 8th day of February, 1861, and served upon the defendant by the rebel authorities, though such judgment be taken by default, is not a nullity.—*Bush v. Glover*..... 167

10. *Sheriff's sale; validity of under such judgment.*—A sale of lands made by the sheriff under authority of an execution issued on such a judgment, and regularly conducted, is valid, and the sheriff's deed conveys to the purchaser such title as could pass by the sale. *S. C*..... 167

11. *Probate decree; amendment of nunc pro tunc; what not admissible.* A decree of the probate court rendered on the final settlement of an administrator's accounts, which shows on its face that notice was only given by posting at the court-house door and three other public places in the county, can not be amended at a subsequent term *nunc pro tunc*, by parol proof of the fact that no newspaper was published in the county; such amendment can only be made on proof of some order or memorandum of record.—*Bruce, Extr'x v. Strickland*..... 192

12. *Same.*—On application to amend a judgment *nunc pro tunc* at a subsequent term, parol evidence is not admissible to supply the deficiencies of the record evidence.—*Tanner, Adm'r, v. Hayes*,... 722

13. *Same; allowance of amendment discretionary.*—The amendment or rendition of a judgment *nunc pro tunc* is allowed in furtherance of justice and is obliged to be to some extent discretionary. The exercise of this discretion will not be interfered with by the supreme court unless it is made to appear that otherwise injustice will be done to the applicant and that the rights of others will be invaded.—*S. C*..... 722

14. *Judgment; what will support appeal.*—A motion entered on the motion docket in term time is sufficient notice of the motion to all officers of court and their sureties; and when the parties to such a motion appear and demur to the *notice* of motion, and such demurrer is sustained, and the motion is dismissed, the judgment thus rendered is final, and an appeal may be taken therefrom to this court.—Revised Code, § 3027.—*James v. Moseley et al*..... 299

See BANKRUPTCY, 3, 4, 5.
COURTS, 3, 4.

LEGACY.

1. *Legacy, what creates a general.*—The clause of a will in the following words: "I give to my friend P. O. H. ten thousand dollars, in notes or in Confederate States bonds, at the option of my executors, hereinafter named," creates a *general*, and not a specific legacy.—*Harper v. Bibb and Falkner, Ex'rs* 547
2. *Same; how paid.*—Such a legacy, after ascertaining its pecuniary value at the time it became due and payable, is entitled to be paid out of the general assets of the estate liable to be applied to the payment of general legacies, either in whole or *pro rata*, in proportion to the sufficiency of such assets. It can not be defeated because of the failure of the notes or Confederate States bonds, in which it was directed to be satisfied.—*S. C.* 547
3. *"Option of executors"; what can not defeat.*—"The option of the executors" in such a case can not be permitted to be exercised to defeat the gift.—*S. C.* 547

See, also, CHANCERY, 29.
COURT, PROBATE, 24.
EVIDENCE, 8.

LIEN.

See VENDOR AND PURCHASER.

LIMITATIONS, STATUTE OF.

See GUARDIAN AND WARD, 7.
MORTGAGE, 7.

MILLS.

1. *Inquest of jury; requisites of.*—In a statutory proceeding for authority to erect a public grist-mill, (Revised Code, §§ 2481-2509,) it is not necessary that the inquest of the jury should be unanimous; if it is signed by a majority of the jurors, and otherwise conforms to the requisitions of the statute, it is sufficient.—*Frost et al. v. Barnes* 279

MOBILE, CITY OF.

1. *Harbor master's fees, as fixed by ordinances of Mobile and act of March 3, 1870; when can be recovered.*—By the ordinance of the city of Mobile passed the 22d of April, 1870, entitled "An ordinance regulating and fixing the harbor master and port wardens' fees, in the port of Mobile, as per act passed by the legislature authorizing the same, approved March 3d, 1870," the harbor master's fees specified in said ordinance, are only to be paid when the services of the harbor master and port wardens become necessary, and are actually rendered or offered to be rendered.—*Harbor Master of Mobile v. Southerland* 51

See CONSTITUTIONAL LAW, 7.
INJUNCTION, 2.
CRIMINAL LAW, 76.

MORTGAGE.

1. *Mortgage, land subject to, sale of part of, and payment of purchase on mortgage debt; when does not release parcel sold from mortgage.* A deed in the nature of a mortgage to secure the payment of certain enumerated debts, creates an incumbrance on the whole property conveyed for the whole of the indebtedness secured. If the mortgagor sell a portion of the land thus incumbered to a purchaser who had constructive, though not actual, notice of the mortgagee, and transfers the notes of the vendee for the purchase-money to one of the mortgage creditors, to be applied to the reduction of the mortgage debts, the payment of such notes by the purchaser to one of the mortgage creditors does not release the land thus sold from the mortgage, unless it was so agreed between the purchaser and the parties to the mortgage.—*Colby v. Cato's Adm'r* 247
2. *Crop; when may be subject to mortgage.*—A growing crop may be mortgaged, and when matured and gathered, if not before, the mortgagee is entitled to the possession, and may maintain an action to recover it, or its value.—*Lehman, Durr & Co. v. Marshall*.. 363
3. *Note secured by mortgage; what contract as to note does not destroy effect of mortgage as security for note.*—A contract between mortgagee and mortgagor, that if the mortgagor will deliver, in the name of the mortgagee, at a warehouse to be named by him, a sufficient quantity of cotton, at a certain number of cents per pound, to pay the note secured by the mortgage, the mortgagee will accept the cotton in payment of the note, does not destroy the legal effect of the mortgage as a security for the note.—*S. C.*.... 363
4. *Right of redemption, as between several mortgagees.*—Where a debtor executes two or more mortgages on the same tract of land, at different times, to different persons, and for the security of different debts, the junior mortgagee has the right to redeem from the senior mortgagee, by paying his debt, with interest and costs.—*Wiley, Banks & Co. v. Ewing*..... 418
5. *Same.*—This is an equitable right, founded on common-law principles, and is entirely independent of the statutory right of redemption given to judgment creditors; and it applies equally to deeds of trust to secure the payment of debts, and to mortgages proper. *S. C*..... 418
6. *Same.*—If the lands have been sold under a decree of foreclosure on the senior mortgage, the junior mortgagee not being a party to the suit, he may redeem from the purchaser at the sale, on paying the amount of his bid, with interest and costs, and the value of all permanent improvements erected by him up to the time of the tender, or offer to redeem; and if the tender is refused, the purchaser is chargeable with the value of the rent from the time of the tender and refusal.—*S. C*..... 418
7. *Same; limitation of.*—The right to redeem, in such case, is not governed by the limitation of two years, which is the prescribed bar to proceedings under the statute, but may be asserted at any time while the mortgage is operative.—*S. C*..... 418

See CHANCERY, 8, 32.

MOTIONS.

1. *Revised Code, section 2957; motion under may be made against sheriff and any one of sureties.*—A motion against the sheriff and his sureties, under section 2958 of the Revised Code, for money received by him for sale of perishable property sold under section 2957 of the Revised Code, may be properly made against the sheriff and his sureties, "or *either* of them." It is not required to be made against the sheriff and *all* his sureties.—*James et al. v. Mosely*.... 299

2. *Judgment; what will support appeal.*—A motion entered on the motion docket in term time is sufficient notice of the motion to all officers of court and their sureties; and when the parties to such a motion appear and demur to the *notice* of motion, and such demurrer is sustained, and the motion is dismissed, the judgment thus rendered is final, and an appeal may be taken therefrom to this court.—Revised Code, § 3027.—*James v. Moseley et al*..... 299

3. *Parties to motion.*—There is no settled rule, as to who are the necessary parties defendant to a motion to set aside the sale of lands under execution. Generally, those persons only who have an interest in the sale, or who will be prejudiced by setting it aside, need be made defendants to the motion.—*Beach et al. v. Dennis*... 262

PARTNERSHIP.

1. *Real estate; when treated as personal property in equity.*—Real estate purchased by a partnership, for partnership purposes, and paid for with partnership funds, as to the creditors of the firm is, in equity, treated as personal property, and will, if necessary, be subjected to the payment of their debts, whether the title be conveyed to the partners by name, or to one of them, or to a third person.—*Offutt et al. v. Scott*..... 104

2. *Surviving partner; powers and duties of.*—In case of the death of one partner, the survivor is a trustee for all persons interested in the partnership, for the creditors of the firm, for the representatives of the deceased partner or his heirs, and for himself; and for the purpose of closing up the business of the firm, he is invested with the exclusive right of possession and management of the whole partnership property and business. His trust being to wind up the concern, his powers are commensurate with the trust; hence he may collect, compromise, or otherwise arrange all the debts of the firm, and his receipts, payments, and doings generally, in that behalf, are valid, if honestly done, and within the fair scope and purposes of the trust; and until the debts of the firm are paid, neither the personal representatives nor the heirs of the deceased partner have any beneficial interest in the partnership property. *S. C*..... 104

3. *Firm, dissolved by death of partner, judgment creditor of; how and against what may proceed in equity for satisfaction of his debt.* When a partnership is dissolved by the death of one partner, the only remedy at law against the firm, by the creditors of the firm, is by suit against the survivor; and when a creditor has exhausted

PARTNERSHIP—CONTINUED.

his remedy at law against the firm, by a suit against the survivor prosecuted to a return of an execution "no property found," he may then file his bill in equity to subject the real estate of the partnership to the payment of his debt, and this whether the possession be in the surviving partner, the personal representative, or the heirs of the deceased partner, or any other person who is not a *bona fide* purchaser for valuable consideration and without notice. *S. C.* 105

4. *Goods received on consignment before death of partner; duty of survivor as to.*—If goods shipped and consigned to a firm doing a commission business, to be sold on account of the shipper, are received, but before they are sold one of the partners dies, the survivor may sell such goods, and, and in such case, the claim of the shipper on account of such sale is properly against the firm, and not against the survivor individually.—*S. C.* 105

5. *Purchaser of land bought with partnership assets; when equity of, superior to that of creditor of partnership to subject for payment of firm debt.*—If a surviving partner sell and convey his interest in the real estate belonging to the partnership to a *bona fide* purchaser for valuable consideration, without notice, before a creditor of the firm has acquired a lien on the same by bill filed to subject it to the payment of his debt, the purchaser will hold it against the general equity of the creditors to have it appropriated to the payment of the partnership debts.—*S. C.* 105

See CHANCERY, 15.

PLEADING AND PRACTICE.

PARTIES.

1. *Parties to motion to set aside sale of lands.*—There is no settled rule, as to who are necessary parties defendant to a motion to set aside the sale of lands under execution. Generally, those persons only who have an interest in the sale, or who will be prejudiced by setting it aside, need be made parties defendant.—*Beach et al. v. Dennis* 262

COMPLAINT.

2. *Complaint; necessary averments of, in action in nature of ejectment.* A complaint in an action for the recovery of land, whether under the statute or at common law, must allege that the plaintiff was in possession of the premises sued for (describing them), and that, after his right accrued, the defendant entered thereupon and unlawfully withholds and detains the same. If it fails to do this, it is bad on demurrer.—*Bush v. Glover* 167

3. *Same; necessary averments in declaring against principal on contract made by agent.*—In declaring against the principal, on a contract made by the agent in his own name, it is sufficient to allege that the defendant made the contract by his duly authorized agent, although the contract, as set out in the complaint, appears on its face to be the personal contract of the agent.—*Chapman v. Lee's Adm'r* 143

PLEADING AND PRACTICE—CONTINUED.

4. *Same; what instrument may be declared on as promissory note.*—A contract in the form of a promissory note for the hire of a slave, may be declared on as a promissory note, notwithstanding, besides the promise to pay a sum certain in dollars, it also contains a promise to furnish certain articles of clothing to the slave, pay his taxes, and return him at a certain time to the owner. It is not necessary that any notice be taken in the complaint of the latter stipulations, where no recovery is sought upon these stipulations. *Gaines et al. v. Shelton* 413

DEMURRER.

5. *Demurrer sustained to special plea; when not error.*—In an action of debt or assumpsit by assignee against assignor of a promissory note, if the general issue is pleaded, "with leave to give in evidence any matter that may be specially pleaded," the allowance of a demurrer to a special plea involving the same matter settled on the plea of the general issue so pleaded with leave as aforesaid, is error without injury, if error at all, and though the demurrer may have been wrongly sustained, a reversal will not be allowed for this reason.—*Hays v. Myrick* 335

6. *Demurrer; when presumed to be withdrawn.*—A demurrer copied into the transcript, upon which no action of the court appears to have been taken, will be presumed to have been withdrawn.—*Ware v. St. Louis Bagging & Rope Co.* 667

PLEAS.

7. *Pleading; nul tiel corporation, when irrelevant.*—A plea of *nul tiel* corporation to a complaint which describes the plaintiffs as "The St. Louis Bagging and Rope Company," without more, is irrelevant, and may be stricken out.—*S. C.* 667

8. *Plea; when sufficient as to form and substance*—Pleas, in this State, have no technical forms as at common law. A succinct statement of the facts relied on in bar or abatement of the suit is sufficient, if the facts are so stated that a material issue can be taken thereon.—Rev. Code, §§ 2629, 2638.—*Lang v. Waters' Adm'r* 625

9. *Set-off, plea of; what sufficient.*—Pleas of set-off which allege that the plaintiff is indebted to the defendant in a certain sum falling due on a day named, "by liquidated demand," or "by unliquidated demand," on which debt or assumpsit may be maintained, and which insist upon such demand as offset against the plaintiff, are sufficient, if the facts are stated as required in the forms prescribed in the Code.—Code, §§ 2642-3.—*S. C.* 625

10. *Same; what evidence improper under.*—Under such pleas, evidence of an unliquidated demand sounding in damages merely, is improper, and should not be admitted.—*S. C.* 625

11. *Pleading; discretion of court as to time allowed for.*—The court trying a cause may enlarge the time of pleading, or permit additional pleas to be filed, when this tends to the administration of right and justice. Such power is discretionary, and not the subject of revision in this court.—*S. C.* 625

PLEADING AND PRACTICE—CONTINUED.

SERVICE.

12. *Return of service of summons and complaint.*—A return of service of a summons and complaint, issued from the office of the clerk of the circuit court of Mobile in January, 1870, signed "A. M. Granger, S. M. C., B. H. Hamilton, D. S.," shows a sufficient service by the sheriff, by his deputy.—*Eslava v. Ames Plow Co.*..... 385

VARIANCE.

13. *Variance between writ and declaration, or complaint; how taken advantage of, and when immaterial.*—A departure in the declaration (or complaint) from the writ (or summons) by which the action is commenced, or a variance between the two, can not be taken advantage of by demurrer; a motion to strike the declaration (or complaint) from the files is the proper remedy in such case; and the motion should never be granted, unless there is a material variance, amounting to a radical departure; a mere variance in the amount of the debt claimed is immaterial.—*Sharman v. Jackson*... 329

WITNESS.

14. *Witness; re-examination of; matter of discretion.*—The court may permit the re-examination of a witness, or the admission of additional testimony, after a party has closed the examination of his witnesses. This is also a matter of discretion, to be exercised in favor of right and justice, and is not revisable in this court.—*Lang v. Waters' Adm'r*..... 625

PAYMENT.

See ACCORD AND SATISFACTION, 1.
CONFEDERATE CURRENCY, 4.
SURETY, 1.

PROHIBITION.

1. *Same; when prohibition will not lie against.*—When an appeal to the circuit court has been taken from the judgment of the probate court in favor of the contestant in a case of contested election for sheriff, and the successful party is proceeding under sections 103–199 of the Revised Code to recover from the incumbent the books, papers, &c., of the office, the supreme court will not issue a prohibition against an injunction from the chancery court restraining the further prosecution of the summary remedy, until decision upon the appeal.—*Ex parte Scott*..... 609

PUBLIC LANDS.

1. *Indian reservation; title of purchaser under approved contract.*—A purchaser of land from an Indian reserve, with the approval of the President of the United States, acquired such an interest as was subject to sale under execution in 1852; and its purchase under such sale conferred a title to the land superior to a patent issued to a purchaser from him subsequent to the sale.—*Jones' Heirs v. Walker*..... 175

RECEIPT.

See Husband and Wife, 1.

RELEASE.

See Surety, 1.

SHERIFF.

See Motions, 1, 2.
Judgments and Decrees, 10.
Pleading and Practice, 12.

SET-OFF.

See Pleading and Practice, 8, 9.

SUMMARY PROCEEDING TO COMPEL DELIVERY OF BOOKS AND PAPERS.

1. *Revised Code, §§ 193-199; to what cases apply.*—Sections 193-199 of the Revised Code, to compel the delivery of the books, papers, &c., of an office, were not intended to provide a mode for trying the right to the office. They apply only to cases where the title of the applicant to the vacated office is free from doubt, and his predecessor, or some other person, without reasonable claim thereto, willfully, contumaciously, or negligently, withholds the property of such office.—*Ex parte Scott*..... 609

SURETY.

1. *Release by creditor of one of several co-sureties on penal bond.*—A release by the creditor, for valuable consideration, of one of several co-sureties on a penal bond, is not a release or discharge of the others, except to the extent of his liability to them for contribution under the statute, (Revised Code, § 3072,) when some of them are insolvent; but, to that extent, it is a release and discharge of the others, although it contains an express stipulation, that it "is not in any manner to affect or operate as a discharge of the liabilities of the other obligors in said bond, or to affect or discharge any action or right of action against them."—*Jemison v. Governor*..... 390

See Judgments and Decrees, 1, 2.
Guardian and Ward, 7.

TENDER.

1. *Note payable in dollars; how only can be discharged.*—A promissory note payable in "dollars" can only be discharged by a tender of "dollars in legal tender currency," unless there is an agreement between the parties that it may be discharged in something else. A tender in "baled cotton" on such a note is not sufficient without such an agreement.—*Lang v. Waters' Adm'r*..... 625

TRUSTEE.

See DEEDS, 11.
CHANCERY, 21.
EXECUTORS AND ADMINISTRATORS, 13.
PARTNERSHIP, 2.

USURY.

1. *Usury; who only can set up defense of.*—The defense of usury can only be set up by a party to the usurious contract, or by some one having an interest in, or prejudiced by the same.—*Lehman, Durr & Co. v. Marshall*..... 363

VENDOR AND PURCHASER.

1. *Vendor's lien; part of every lawful contract for sale of land.*—The right of the vendor to retain a lien on land sold for the payment of the purchase-money, is an incident to every such contract lawfully made in this State, unless it is waived or abandoned.—*Napier et al. v Jones* 90
2. *Same; when not waiver of.*—The mere execution of a bond for the purchase-money with two sufficient sureties and the execution and delivery of a deed by the vendor to the vendee, is not a waiver or abandonment of such lien when it was otherwise understood and agreed by the parties at the time of sale and the delivery of the deed.—*S. C.*..... 90
3. *Same; against whom enforced.*—The vendor's lien may be enforced against the vendee or a sub-purchaser from him with notice of the lien.—*S. C.*..... 90
4. *Same; when enforced, and against whom.*—Where W. sold lands to M. & Y., giving bond for titles; and Y. having become insolvent, and having left the State, without having paid the purchase-money, M. afterwards assigned the title-bond to P., in consideration of his paying the balance of the purchase-money, and the satisfaction of a judgment recovered against M. by him, and afterwards M., as the agent of P., sold the lands to B., who paid the balance of the purchase-money due, and gave his notes to P. for the additional price; and W. then conveyed the legal title to P., from whom B. accepted a bond for titles when his notes should be paid,—*Held*, that the lands were subject to the payment of the notes.—*Davenport et al. v. Presley et al*..... 303
5. *Same; when will lie to restrain collection of notes given for purchase-money of decedent's land sold under order of probate court.*—If the vendee of land of a decedent's estate, sold under order of the probate court, gives his notes for the purchase-money and is let into and retains possession of the land, he can not at law defend an action by the executor on the notes, on the ground of the invalidity of the order of sale. If, however, the vendee has paid a part of the price, or made necessary and permanent improvements, where fraudulent representations have been made, to the injury of the vendee, or the vendor can not make good titles, and

VENDOR AND PURCHASER—CONTINUED.

in some other like cases, the vendee may, without restoring the possession, within a reasonable time, file his bill in a court of chancery to rescind the sale, and to enjoin the collection of the purchase-money. In such cases, the vendee is permitted to retain the possession as a security for the money paid, and to indemnify him for necessary and permanent improvements made, in good faith, upon the premises.—*Hickson et al. v. Lingold et al.*..... 449

6. *Mortgage; when preferred to vendor's lien.*—M. sold a tract of land to F., which was incumbered by a mortgage executed by M. to O prior to that date; but it was agreed between F., M. and O. that M. might sell the land to F. if F. would give his notes to O. for the amount of M.'s mortgage debt, and also give a mortgage to O. on the same land to secure this debt, and that this second mortgage should be preferred to the vendor's lien in favor of M. for his part of the purchase-money to be paid by F. above the debt to O. The sale was concluded by a deed from M. to F. and a mortgage by F. to O., as agreed upon, all of the same date. F. gave his notes to M. for the balance of the purchase-money above the amount of O.'s mortgage. One of these notes was afterwards transferred by M. to B, who filed his bill against F., M. and O. to enforce his vendor's lien arising on the note held by him,—*Held*, that the lien of O.'s mortgage was to be preferred to the vendor's lien in favor of B., and upon a sale of the land under a decree of the court, O.'s mortgage debt must be first paid, and then the residue, if any, applied to the discharge of B.'s debt.—*Balkum v. Owens et al.*..... 266

See CHANCERY, 20, 23.

HUSBAND AND WIFE, 6, 7.

WILLS.

1. *Undue influence; what constitutes.*—The undue influence necessary to overthrow a testamentary disposition of one's estate, must be of such a character as to dominate the will of the testator, and substitute the will of another in its stead. There must be such importunity, or coercion, as could not be resisted, so that the motive impelling the testator is tantamount to force or fear.—*Leeper, Ex'r, v. Taylor and Wife*..... 221

2. *Unsoundness of mind; what constitutes.*—The unsoundness of mind which incapacitates one to make a valid will, is not mere impairment or weakness of intellect, which sometimes attends old age or disease, but the mind must be so prostrated as to lose the government of reason and common sense.—*S. C*..... 221

3. *Probate of will; jurisdiction of probate court over.*—Courts of probate, in this State, have original, general, and unlimited jurisdiction of the probate of wills.—*Hall's Heirs v. Hall*..... 290

4. *Same; nature of proceeding.*—A proceeding for the probate of a will, is in the nature of a proceeding *in rem*, and is conclusive on all persons; and it can not be collaterally impeached for any irregularity that may have intervened after the jurisdiction of the court attached.—*S. C*..... 290

5. *Same; notice to widow and next of kin.*—The failure to give the

WILLS -CONTINUED.

widow and next of kin the notice required by the statute, (Rev. Code, § 1251,) is a mere irregularity, which can only be taken advantage of in a direct proceeding to set aside the probate.—*S. C.*.. 290

6. *Indorsement of certificate of probate.*—Every will, properly admitted to probate, must have indorsed on it the certificate required by the statute (Revised Code, §§ 1947–8); but it is not necessary that a transcript, properly certified, should show that such indorsement was made on the original will.—*S. C.*..... 290

See LEGACY, 1, 2, 3.

WITNESS.

1. *Guardian; competency of, as witness for himself.*—A guardian is a competent witness for himself, on final settlement of his accounts, to prove the correctness of any vouchers claimed by him.—*Starling v. Balkum* 315

2. *Wife; competency of, as witness for her husband.*—The wife may lawfully become the agent or attorney of the husband, and as such she is a competent witness for him, except in "criminal cases," and in certain suits against executors and administrators —Rev. Code, § 2704.—*Lang v. Waters' Adm'r*..... 625

3. *Witness; what may be permitted to state.*—The reason, whether good or bad, for the positive knowledge expressed by a witness of a fact about which he is examined, may be stated by him, as it only affects the credibility of his testimony.—*Blackwell v. Hamilton*... 470

4. *Witness, impeaching or sustaining of; to what examination may extend.*—In impeaching a witness, or sustaining him, the examination is not confined to his general character for truth, but may extend to his general character.—*DeKalb Co. v. Smith*.., ... 407

5. *Same; what question may be asked of impeaching witness.*—In a suit against a county for damages for assault and battery, under the act of December 28, 1868, the plaintiff having given evidence of an assault and battery upon him by unknown and disguised persons, and the defendant having assailed his character for truth, it is not error to allow him, in support of his testimony, to prove by the impeaching witness, on cross-examination, that although he did not know of any enemies the plaintiff had in the neighborhood, he was *of the opinion, from rumor*, that he did have some.—*S. C.*.. 407

6. *Witness; re-examination of; matter of discretion.*—The court may permit the re-examination of a witness, or the admission of additional testimony, after a party has closed the examination of his witnesses. This is also a matter of discretion, to be exercised in favor of right and justice, and is not revisable in this court.—*Lang v. Waters' Adm'r*..... 625

7. *Witness, misstatement of fact by; when jury may discredit whole testimony of.*—It is the province of a jury to determine the credibility of evidence, and, if conflicting, to reconcile it, if it can be reasonably done. If a fact is misstated by a witness, his evidence as to other matters is not to be altogether rejected, unless the jury believe the misstatement was wilfully and deliberately made, knowing it to be untrue.—*Lehman, Durr & Co. v. Marshall*..... 363

See CRIMINAL LAW, title WITNESS.