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REPORTS

OF

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

During part of January Term, 1845, all of June Term, 1845, and part of January Term, 1846.

BY THE JUDGES OF THE COURT.

TUSCALOOSA:

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1846.

OFFICERS

OF

THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HENRY W. COLLIER, Chief Justice.
HENRY GOLDTHWAITE, } Associate Justices.
JOHN J. ORMOND, }

THOMAS D. CLARKE, Attorney-General.
JAMES B. WALLACE, Clerk.

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REPORTS

OF

CASES ARGUED AND DETERMINED,

JANUARY TERM, 1845.

ALEXANDER GRAHAM v. JOHN LOCKHART.

1. A deed of trust operative as a security for the payment of money, is not fraudulent *per se*, on account of the reservation of uses to the grantor.
2. *Quere?* Whether a deed conveying property for the benefit of sureties, and fixing the law day of the deed to a time subsequent to the maturity of the debts, for which the sureties are bound, is operative as a conveyance, without the assent of the sureties.
3. So far as the particular creditor is concerned, the debtor, with his assent may stipulate that the effects conveyed may be continued, in trade or planting, for a definite or indefinite period, but such a stipulation cannot prevent any other creditor from his right to sell the resulting trust of the debtor, in satisfaction of his execution.
4. *Quere?* Whether a debtor, by the mortgage of his perishable personal estate, for the security of one creditor, can prevent others from reducing that estate to money, and thus to determine the risk there always is, of its destruction or deterioration in value.
5. The powers of a Court of Equity are sufficient to prevent injury to the mortgage creditor, as well as injustice to the one who has no security.
6. Assuming that a deed of trust conveying property as a security, for the benefit of sureties, and reserving the use of perishable effects, which may be consumed in the use, has been made operative by the assent of the beneficiaries, yet no other creditor is bound by the contract between those parties. His right is to have all the debtor's estate reduced, at once, to its money value, and if the secured creditors choose to become the purchasers, and thus continue their relation with the debtor, a Court of Equity is competent to let them in to the extent of their debts.
7. In claims interposed under the statute, to property which is levied on as belonging to the defendant in execution, the bond required to be given may

be executed by those claiming the beneficial interest in the property, as well as by him who is invested with the title.

8. To let in a deed as evidence, it is not essential that the subscribing witness should remember its execution. His statement that his superscription as a witness was genuine, and that it would not have been placed there unless he had been called to witness it, is sufficient.
9. Where the intention is declared to attack a deed of trust for fraud, it is competent for the trustee to show that his action, with reference to the trust property, has been in accordance with the deed, for the purpose of rebutting any presumption which might arise from the acts of the grantor.
10. Where debts are described in a deed of trust, as the consideration upon which it is founded, a misdescription, either as to the names of sureties, dates, or sums, will not affect the validity of the deed, and evidence may be given of debts created by notes, &c. variant in some respect from those described in the deed.
11. Where notes and other written securities are described as the consideration of a deed of trust, parol evidence may be given of them, without producing them to the jury, when they are not within the control of the party offering the evidence.
12. The admissions of a trustee having no beneficial interest in the property conveyed to him, cannot be given in evidence to defeat a deed of trust executed solely for the benefit of others.
13. Where one of the trusts of a deed was to pay certain outstanding judgments, and afterwards these were superseded by writs of error bonds, it is competent for the trustee to show their payment by him, after their affirmance.

Writ of Error to the Circuit Court of Perry.

Claim interposed by Lockhart to certain property levied by virtue of a writ of *fi. fa.* at the suit of Graham against A. B. W. Hopkins. The *fi. fa.* was issued the 6th of February, 1843. The claim bond was not executed by Lockhart, though his name is inserted in its caption as one of the obligors. At the trial the plaintiff moved the Court to dismiss the claim for this reason; but the Court refused to do so, deciding, that as the claimant was a mere trustee his name as an obligor was unnecessary, if the bond, in other respects, was sufficient, and executed by those beneficially interested in the trust.

In the further progress of the trial, the claimant offered in evidence a deed executed by Hopkins and Lockhart, dated the 1st November, 1841. It recites that the indentiture is made by and between Hopkins of the first part, Lockhart of the second,

and Samuel G. McLaughlin, Henry C. Lea, and "other persons," of the third part, and purports to be in consideration of the sum of five dollars, paid by Lockhart, and the "debts as security," thereinafter mentioned. It then conveys to Lockhart thirty-five slaves by name, 1080 acres of land, of which the several parcels are described. "And also all his stock of horses, mules, cattle, hogs and stock of any kind; his corn, cotton, at that time gathered or ungathered; his farming utensils, all his household and kitchen furniture, carriage, sulky, and three waggons, and harness of each; all his notes, actions, accounts, suits, judgments or claims, in or out of Court, after paying the expenses on the same; all books, papers, rights of action, so far as the same can be conveyed; all right or interest which he had, either at law or equity, to the same, whether interested as an individual or as one of the firm of Hopkins, McLaughlin & Co., or Hopkins & Tarrant; all interest which he had in a mortgage assigned to him on the tavern establishment in the town of Greensborough, called the Warrior House, formerly or now, with all its lots, appurtenances, &c.; all his real and personal property, after paying off the judgments heretofore rendered against him." It then proceeds to declare a trust in these terms: "All of which is in trust, nevertheless, for the satisfaction of my securities and other creditors, and on the following express conditions, to wit: that in the event that any one or more of the debts herein enumerated, or any part of any or all, should not be paid off, settled, or in some way, by me, or by my agent, or representatives, satisfied by the 1st day of January, 1843, then and in that event, the said Lockhart, or his legal representative, shall, after having given thirty days previous public notice, on the Court House door of Perry county, and in one or more newspapers, if any be published at the time in said county, put up and expose to sale, at public outcry, to the highest bidder, for cash, the whole, or any portion, of the previously described property, and pay off the whole or any portion of the said debts, which remain at the time unpaid. The undersigned, A. B. W. Hopkins to retain possession of the said property for the purpose of aiding all the time in effecting the object of this deed: and the proceeds to be applied as aforesaid, in the same way as the balance of the property—paying the incidental expenses—and the said Lockhart, as trustee as aforesaid, or representative, to have the right to

possession at all times, whenever he deems it necessary for the security of said debts."

It then proceeds to enumerate the debts to be secured and paid. These are thus described:

One note for the sum of $8,041 86, payable to George W. Johnson & Co., made by Hopkins, H. C. Lea, S. G. McLaughlin, A. B. Moore, and others; due 25th Dec. 1841.

One note for between $2,500 or $3,000, being an extended, or part of an extended debt, with A. W. Fletcher and C. J. Philips, payable to the Bank of the State of Alabama.

One note payable at the Bank of Mobile, but discounted at the Branch of the Bank of the State of Alabama at Mobile, made by Hopkins with A. W. Fletcher and R. B. Walthall as his securities, for near $2,000, due about the 1st February, 1841.

One note made by Hopkins, with A. W. Fletcher as security, for about $450, payable to Jesse Crone.

One note, due about the 1st of January, 1841; made by Hopkins, for $275, with A. W. Fletcher as security, payable to P. W. Sink, guardian, &c.

One note made fer the benefit of Hopkins, by W. J. Johnson, with R. B. Walthall as security, for about $450, due about the 1st January, 1842.

To pay to Mildred H. Williams, or her heirs, a note payable to her for $3,000, due the 1st January, 1843, made by Hopkins.

One note made by Hopkins, payable to S. G. McLaughlin, for $1,000, or upwards, due about the 1st January, 1842.

The balance of a note due Nancy Lea; due 1842, for about $1,300.

One note payable to Wiley, Lane & Co. for $1,423 04, dated 15th April, 1840, due eleven months after date, with current rate of exchange when due, made by Tarrant & Hopkins.

One bill of exchange, made by the same, for $1,007 51, dated 8th June, 1840, due sixty days after date, drawn on Wm. Stringfellow, Mobile, Ala.; provided these two last debts should not be paid off by a deed heretofore made by Hopkins to L. G. Tarrant, for that purpose, among other things.

Four notes amounting in all to $1,000, payable to E. D. King. made by the same.

It then proceeds thus: "And in order that the property and

effects above named, may produce the greatest amount for the purpose herein specified, the said Lockhart is hereby authorized to order applied, or apply, the present crop to the payment of the executions or judgments now standing against me; for any of which any portion of said property is liable to be levied on, or sold; to control my books, papers, property aforesaid; to sell and do as herein directed; to sell and do any thing, and every thing, necessary to carry the object of this deed into effect."

It is also required of said trustee, that should there be a deficiency in the payment of the debts of the late firm of Hopkins McLaughlin & Co., out of the effects of the said firm, then also to pay one-third part, which is my portion of said deficiency, or debts.

The said property may be sold on the premises, or at the Court House door of Perry county, as may be deemed best by the said Hopkins. And $1,000 of the demands in the hands of Lea & Towns, may, under the direction of the said Hopkins, be applied by said trustee, to such other debts or demands as may be against said Hopkins."

The claimant called as a witness, one Godden, whose name appears to the deed as a subscribing witness; he stated that his signature was genuine, as was also that of M. A. Lea, another of the subscribing witnesses, since dead, but that he had no distinct recollection of ever having seen the parties sign it, or execute it, or of ever having heard them acknowledge that they they did so; that he had a faint recollection that some such instrument had been signed by him as a witness, one afternoon, some time before, but except from the genuineness of his signature to the deed, he could not say that he knew any thing positive about it. The plaintiff objected to the reading of the deed; whereupon the claimant asked the witness, if he did not know it was not his custom to sign such instruments without having seen them executed, or having heard them acknowledgd by the the parties, and whether he was not confident, that one or the other had been done, before he put his signature thereto. The plaintiff objected to this question, but the Court allowed the witness to answer it. The answer was in the affirmative, and the Court allowed the deed to be read, notwithstanding the plain-

tiff continued his objection. Afterwards the deed was proved by another of the subscribing witnesses.

The claimant offered evidence of a notice and sale under the deed, as well as other proceedings under it, pursuant to its provisions, but subsequent to the levy of the plaintiff's *fi. fa.*; to this the plaintiff objected, but the Court allowed the evidence, on the ground that the notice of sale, if in accordance with the deed, might go to the jury as evidence to rebut the idea of fraud, for which the plaintiff declared it was his intention to assail the deed.

The claimant offered to give in evidence an original execution, in favor of the Bank of the State of Alabama, against A. B. W. Hopkins, N. W. Fletcher and Charles J. Philips, from the office of the Clerk of the County Court of Tuskaloosa county, for $2,489 70, besides costs; for the purpose of sustaining that part of the deed which asserts the existence of a note described in the deed, as due that bank. To this the plaintiff objected, on the ground that the execution was not duly certified; and also, because it contained no sufficient proof of the identity of the debt to be levied, with that described in the deed. It was allowed to go to the jury. The claimant offered in evidence, a note due 1st June, 1841, to P. L. Sink, made by Hopkins and N. W. Fletcher, for $275, without any other proof of its identity with a similar note described in the deed, than such as arose from the genuineness of the signatures. This note was produced from the files of Perry Circuit Court, in a cause in which judgment had been rendered.

He also offered to prove, by William J. Johnson, the existence and contents of a note made for the benefit of Hopkins, by W. J. Johnson, with R. B. Walthall as his security, for about $450, due about the 1st January, 1842, without producing the note, or accounting for its absence, except that the note was delivered to its payee. The witness was allowed to testify, and stated that he himself had executed the note for Hopkins's benefit.

The Claimant offered in evidence, a note made by Hopkins to Mildred H. Williams, or her heirs, for $3,000, due 1st January, 1843, dated —— February, 1841, and proved Hopkins' signature. It was also in evidence that Mildred H. Williams, at the date of the note, and time of trial, was a married woman.

He also offered a note made by Hopkins to L. Y. Tarrant, indorsed by the latter to S. G. McLaughlin, for $1,284, due 1st January, 1843, for the purpose of sustaining that part of the deed which speaks of a note to McLaughlin, for $1,000, or upwards, due about the 1st January, 1842, and proved by Tarrant, that when it was executed, it was designed for McLaughlin's benefit.

The claimant also offered in evidence, the indorsement of a writ taken from the files of the Circuit Court of Perry county, containing the description of a note by Tarrant & Hopkins to Wiley, Lane & Co., for $1,423 04, dated 15th April, 1840, due eleven months after date, with current rate of exchange, without producing, or accounting for the absence of the note, otherwise than the testimony of the clerk, that it was not on file, and that judgment on it had been rendered.

Also, three notes made by Hopkins to E. D. King, all dated 21st August, 1841, one for $200 75, due 1st January, 1842; one for the same sum, due 1st January, 1844, and the third for $700, with interest from date, one half payable 1st January, 1842, and the other half payable 1st January, 1843, and proved the signature, and that they were obtained by him from King's possession.

The claimant likewise offered a note made by S. G. McLaughlin, Hopkins and N. W. Fletcher, for $1,000, due 1st June, 1842. To this the plaintiff objected, because there was no proof that Hopkins and Fletcher were securities, and because that described in the deed, is said to be due 1st January, 1843.

All this evidence was objected to by the plaintiff, but admitted by the Court, and thereupon the plaintiff excepted. The plaintiff, in cross-examining one of the claimant's witnesses, asked what the claimant said and admitted about the deed of assignment, in which he was trustee. The claimant objected to this, and the Court ruled that Lockhart, being only a trustee, and not having executed any bond for the trial of the claim, was a competent witness for the plaintiff, if willing to be sworn, and that no evidence of his sayings could be introduced.

The claimant, in reference to that part of the deed which is supposed to require the trustee to pay off all judgments rendered against the grantor, before the making of the deed, introduced sundry judgments, which had been recovered before its

date, but which had been superseded afterwards by writs of error to the Supreme Court, where they were afterwards affirmed against the principal and securities in the writ of error bonds; and also offered evidence of the subsequent payment of these judgments thus affirmed with damages and costs. The Court overruled the plaintiff's objection to this, as evidence.

The plaintiff moved the Court to charge the jury—

1. That the deed was void on its face.

2. That it contained stipulations, promises and conditions inconsistent with the statute of frauds, and condemned by it, and was therefore null and void.

This was refused, and the jury instructed, that the deed was not in itself fraudulent, and contained no provision inconsistent with the statute of frauds, and unless fraud in fact was established by the proof, they ought to find for the claimant.

3. The plaintiff also requested the charge, that the last clause in the deed was fraudulent, and being so, the whole deed was void. The Court refused the charge as requested, but ruled that clause was void for repugnancy with previous provisions of the deed, but was not fraudulent so as to taint the whole transaction, and render it void.

4. There was proof that the trustee, on the 13th April, 1842, hired an overseer for the plantation, and delivered to him the field hands to manage and control, with instructions to consult Hopkins as to the cultivation and management of the plantation. On this the plaintiff requested the charge, that if the jury should believe that Hopkins remained in possession of the trust property, after the making of the deed, and used the provisions from the same for himself and family, before and during the year 1843, this was a badge of fraud. This the Court refused, and instructed the jury, that the possession of the property, before and during that year, by Hopkins, subject to the control of Lockhart, subsequent to the making of the deed, was not inconsistent therewith.

The plaintiff excepted to all these several charges, refusals to charge, and decisions of the Court, and now assign them as error.

A. Graham and H. Davis, for the plaintiff in error, made the following points:

1. The claim bond should have been executed by Lockhart. [Clay's Dig. 211, §§ 52, 55; 213, §§ 62, 64; Minor's Rep. 406.] If the trustee improperly refused his aid, recourse could be had to a Court of Equity. [2 S. & P. 356.]

2. The evidence admitted by the Court was improper, as parol evidence cannot be admitted of the contents of writings unless their loss is shown, or their absence accounted for.

3. The evidence proving the admissions of Lockhart should have been allowed, for it is certain he was not a competent witness. [Green. on Ev. 347, 393-4.] His liability for costs was sufficient to disqualify him. [Ib. 401, 447, 455.]

4. The charges refused and those given, involve the principal question, which is, whether the deed, on its face, is fraudulent and void. It is supposed to be so for many reasons.

1. Because partnership property is conveyed to pay individual debts. [4 Paige, 35.]

2. The grantor reserves a possessory interest and benefit to himself. [4 John. 464; 5 Ala. Rep. 297.]

3. Because of the stipulation that the property shall not be sold until the 1st of January, 1843, fifteen months after the execution of the deed. [11 Wend. 203; 4 Ala. Rep. 380.]

4. The deed does not name all the creditors and beneficiaries. [11 Wend. 203; 4 Ala. Rep. 380.]

5. The conveyance is conditional, and every thing belonging to the grantor is conveyed. [Ib.]

6. The grantor indirectly, and by a secret trust, stipulates for a pecuniary advantage to himself. [2 Kent's Comm. 535; 11 Wend. 201; 9 Porter, 571; 4 Ala. Rep. 379; 5 Paige, 374.]

7. Of this nature is the power of appointing creditors, [14 John. 463; 11 Wend. 188; 7 Paige, 563; 4 Ala. Rep. 380; 5 Cowan, 566.]

8. The trustee is authorized to sell either all or *a part* of the property, to pay all or *a part* of the creditors, and the grantor retains the power to determine between two places of sale. [9 Porter, 572.]

9. The deed is inoperative, inasmuch as it never has been executed by the parties of the third part, and their assent cannot be presumed, for it is not for their benefit to be delayed until the period stipulated for.

5. If the deed is void in part, as against the statute, it is void *in toto*. [1 S. & P. 156; 14 John. 466; 5 Cowan, 548; 4 Paige, 37.]

Hopkins and T. P. Chilton, contra, argued—

1. It is not material by whom the bond is executed; the object was security to the plaintiff in execution, and this is as well attained by other names. A bond by one, when there were more than one, has been held good. [Minor, 406.]

2. The claimant in the Court below, was properly attempting to show, that the debts mentioned in the deed were *bona fide*, and real. The evidence was offered, and admissible, for this purpose, and was not, as supposed by the plaintiff, giving evidence of writings, &c., without producing them. It was entirely unnecessary to produce the notes, &c., nor would any misdescription of the debts avoid the deed.

3. The question is not, whether Lockhart could have been sworn as a witness, but whether evidence of his admissions would be competent to defeat the deed. What he said or admitted, is not shown.

4. As to the question of fraud *per se*—

1. Many of the objections made to the deed do not affect this question; for, conceding the utmost weight to them, they would be considered only as badges of fraud, and consequently would be left to the jury to determine upon.

2. The deed must receive a reasonable construction; thus it cannot be supposed that a power is given to the trustee, to pay one part of the creditors named, and to omit to pay another. Its meaning is to pay all, or whatever part shall remain unsatisfied. So the provision for the sale, upon the day named, unless the debt was in some way paid by the grantor, is no reservation of an interest: it is what would be the law of the case, if no such clause was inserted, and therefore does not affect the validity of the deed.

3. Conceding that the deed does assign the grantor's interest in partnership property, it is neither fraud *per se*, nor a badge of fraud. It may be a fraud on the partner, for his co-partner to assign the effects of the partnership, to pay or secure his individual debts, but it does not affect the validity of a general deed that it may cover a partnership interest.

4. The judgment creditors existing at the execution of the deed, were properly paid, but if otherwise, that was a question for a specific charge, and did not affect the validity of the deed.

5. Indeed, the only questions which do go to this extent, are the reservation of the property from sale until the first January, 1843, and the appropriation of the $1,000, under the last clause of the deed. Now the first of these points is supposed to be covered by the decision of Ravisies v. Alston, 5 Ala. Rep. 297, 303.

6. The appropriation of the $1,000 out of the demands in the hands of Lea & Townes, to be paid as the grantor might direct, is not within the principle which governs the decision of Gazzam v. Poyntz, 4 Ala. Rep. 378, inasmuch as there can be no interference with either of the creditors named as preferred, nor with the property. It is nothing more than a reservation of $1,000 out of the deed, to be paid by Hopkins to other creditors than those named in the deed. If no appointment is made, the whole remains to the named creditors. It is not a power which could be used so as to benefit the grantor, for the money is gone from him under any circumstances.

GOLDTHWAITE, J.—1. The principal question here, which, somewhat out of its order, we shall consider first, is that arising out of the refusal of the Court to instruct the jury, that the deed of trust, in evidence, is fraudulent and void, on account of the reservations for the grantor's benefit, contained in it.

Since the cause was argued; two others, Elmes v. Sutherland and Pope v. Irvin, have been determined by us, in both of which the same general principles were involved, and in which we held, that deeds of trust, operative only as securities for the payment of money, were not fraudulent *per se*, on account of reservations of uses for the benefit of the grantor. [7 Ala. 262; id. 690.]

2. After a deliberate consideration of this deed, we are satisfied there is nothing on its face to warrant us in pronouncing it as intended to delay, hinder or defraud creditors, and that such cannot be the legal effect of it.

The intention is very apparent, we think, to appropriate the debtor's property to the payment of the specified debts, and for the indemnity of the persons who stand upon many of them as sureties for the grantor. It is questionable whether this deed,

either as to creditors or sureties, according to what is said in Elmes v. Sutherland, has any effect as a conveyance, without the assent of the creditors, or sureties, or some of them. If such an assent was given, then it operated as an agreement by the creditor, to postpone the payment of his debt until the law day of the deed, and its effect on the surety was to prevent him from resorting to a sale of the trust effects, for the same period. The reason why this deed does not at once operate as a conveyance in favor of the sureties, is, that it is not necessarily beneficial to them, inasmuch as there is no reason why they should assent to be responsible to the creditor out of their own estate, if the effects of the debtor is sufficient to pay all his debts. It cannot, at this day, be questioned, that a debtor has the right to appropriate the whole, or any part, of his estate to the indemnity of his sureties, and it is equally clear, that if the same stipulations as are found in this deed, were contained in a mortgage, no other debtor would have just cause of exception to it. Every mortgage, or deed of trust, intended as a security, necessarily contains a resulting trust for the debtor, and the stipulation so customary in conveyances of these kinds, that the debtor shall have the control and benefit of the estate, until the law day, is no more than he is entitled to, without any stipulation.

3. It is a very different matter, however, when it is asserted, that a debtor, under pretence of a mortgage, may continue his effects in trade, or in planting, for a definite or indefinite period. So far as the particular creditor is concerned, this is all a fair subject of stipulation and contract, but it cannot interfere to prevent any other creditor from his right to sell the resulting trust of the debtor in satisfaction of his execution.

4. So, too, it is a subject deserving great consideration, whether a debtor can, by a mortgage of his perishable personal estate, for the security of one creditor, prevent others from reducing that article to money, and thus determining the risk there must always be of its destruction, or depreciation in value; a risk which might fall upon all alike, as the mortgage creditor would have the same right as any other creditor, to look to the residuum of his debtor's estate, or to that afterwards acquired by him, in satisfaction of the debt, in the event of the depreciation or destruction of the mortgaged estate; and thus the unsecured creditors' fund might be lessened.

5. All these difficulties could be avoided by an immediate sale, and the powers of a Court of Equity are amply sufficient to prevent injury to the mortgage creditor, as well as to prevent injustice to the one who has no security.

6. Assuming that all the creditors and sureties indicated by the deed of trust, have assented to the proposed delay, in the payment of the debts named, it by no means follows that another creditor must wait the termination of this contract between these parties, if by a present sale of the property, any thing would remain for his satisfaction; nor is he bound by the stipulations between others, that perishable property may be consumed in the use of it. His right, is, to have all the debtor's estate reduced at once, to its money value, and if the secured creditors choose to become purchasers, and thus continue the relations between them and their debtor, a Court of Equity is competent to let them in to the extent of their debts, but all beyond, in common justice, ought to be fairly appropriated to such other creditors as pursue the common debtor with legal vigilance.

Under the views here expressed, it is obvious there can be no well grounded fear, that debtors will make these sorts of conveyances the means of delaying or defrauding other creditors, and the great evil is avoided of vitiating securities, which, in many, perhaps most cases, are honest and *bona fide.*

These conclusions necessarily dispose of all the charges requested to be given, as the deed, if free from fraud in fact, is valid in law.

7. The other points in the case will now be examined, in the order they are disclosed by the record. And first, of the motion to dismiss the claim, because the bond was not executed by the claimant, The condition of the bond, as now required by law, is for the forthcoming of the property, if found subject to the execution, and for the payment of such costs and damages as shall be recovered. [Clay's Digest, 213, § 62.] In practice, the claim is a distinct suit, in which the plaintiff in execution is the *actor*, and the claimant is the defendant; costs are rendered against either, according as the suit is determined, and damages are sometimes assessed against the claimant, when it appears that the claim is interposed for delay. It is obvious, therefore, so far as the cost and damages are concerned, that

the bond is merely an additional security, inasmuch as the claimant is already liable for them by force of the judgment. But the bond is also intended to secure an indemnity, if the property, after condemnation, is not re-delivered to the sheriff. This indemnity may be equally benefical to the plaintiff without, as with, the claimant's name to the bond; and as cases may occur in which it will be onerous on the claimant thus to bind himself, we consider the proper construction of the act, to be such as will advance the remedy intended by it. The intention of the act, was, to give those whose property is seized under executions against others, the right to contest the party's claim to sell it, instead of a suit against the sheriff, or persons purchasing it. In a great variety of cases, the person having the legal title may be, as he is here, a mere trustee; and there is no reason why he, instead of those actually interested in the property, should give the bond. At a very early day, it was held by this Court, that one of several claimants might give the bond, (Marrs v. Gantt, Minor, 406,) and it is only an extension of the same view, to hold, that it may properly be entered into by any one claiming to be beneficially interested in the property levied on.

8. It is not essential, to let in a deed as evidence, that the subscribing witness should remember, with precision, its execution by the parties. If this was the rule, the imperfections of the witness's memory would avoid the deed. Here, however, he stated that his signature, as a subscribing witness, was genuine, and that it would not have been placed there, unless he had been called to witness the instrument. This, in our opinion, was sufficient to let in the deed to the jury, though it would obviously be of little reliance, if the question at issue had been the execution, or non-execution, of the deed.

9. The plaintiff having avowed his intention to attack the deed for fraud, it was entirely proper for the claimant to offer evidence of every matter which could raise a contrary inference. Although we are not prepared to say, that any act or omission of action, by the trustee, would vitiate the deed, yet an inference of fraud might be drawn, if the *cestuis que trust* had permitted the property to be used by the debtor as his own. In this view, it was entirely proper to show the action of the trustee, with reference to the trust property, and in ac-

cordance with the deed, to rebut any presumption which might arise from the acts of the debtor.

10. The questions arising out of the admissions of the evidence offered to sustain the consideration of the deed, or, in other words, the proof of the indebtedness described by it, are of some importance, and call for a more extended consideration. It is objected, that the description in the deed, is variant from the proof, and also, that the indebtedness could not be shown, without producing the notes, or accounting why they were not produced.

The necessity for proof to sustain the consideration of the deed, is shown by the decisions of Bradford v. Dawson, 2 Ala. Rep. 203, and Ravisies v. Alston, 5 Ala. Rep. 297; but in neither of these cases is it asserted that the proof must correspond precisely with the description in the deed. It is quite evident, that in drawing deeds of this description, the draftsman, and the grantor may be ignorant of the precise terms of the writing, evidencing the indebtedness intended to be secured; and it seems most unreasonable that a conveyance otherwise *bona fide*, should be avoided by a misdescription of the debt. There is a dearth, quite remarkable, of decided cases, bearing directly on this subject, and we have found but two in point. In Johns v. Church, 12 Pick. 557, one of the questions was, whether parol evidence was admissible to show, that a note for $256, produced at the trial, was the instrument described in a mortgage given to secure it, as for the sum of $236; and the evidence was held proper. In Commercial Bank v. Clapier, 3 Rawle, 335, the testimony of the grantor of a deed was allowed, to show, that a note different from that described in the deed, was the one intended to be secured, and that the one described never existed.

There is a marked distinction between letting in parol evidence to show a different consideration from that stated in the deed, when the contest is between the parties to it, and a stranger. The rule is universal, that a stranger may attack a deed by showing, either that it is without consideration, or is for a different one than stated, (2 Starkie's Ev. 556;) and though it is said that one who claims under a deed, will not be permitted to show a consideration, in support of it, different from that expressed, (2 Starkie's Ev. 556,) yet we think this expression must

be understood as referring to a difference in the quality of the consideration, and not that it must be shown to be precisely as stated. Thus, in Garret v. Stuart, 1 McCord, 514, it was held, that a greater or less consideration of the same character might be shown. And in Hinds v. Longworth, 11 Wheat. 199, a deed importing a voluntary conveyance from a father to a son, being assailed by a creditor, the party claiming under the deed, was allowed to shew the indebtedness of the father to the son, in an amount equal to the value of the property conveyed. See also, Jack v. Dougherty, 3 Watts, 151; Rex v. Scammander, 3 Term. 374; Williams v. Beaumont, Dyer, 146, a.: Duval v. Bibb, 4 H. & M. 113; Eppes v. Randolph, 2 Call, 103; Harvey v. Alexander, 1 Rand. 219; Bullard v. Briggs, 7 Pick. 533.

When the matter of consideration is collaterally presented, as it seems to be always, when a deed is to be supported by proof of a consideration, or defeated for the want of it, the question of letting in parol evidence, to explain or alter the written instrument does not arise. Lord Thurlow, in Coote v. Boyd, 2 Bro. C. 527, puts the matter on its proper ground, when he says, "*a question of presumption donec probetur in contrarium will let in all sorts of evidence.* When the presumption arises *from the construction of words, merely as words,* no evidence can be admitted. In this case, the question is not one of construction, but is of intention, and the deed is valid, or void, as there may be a consideration or the want of it shown. In this connection it is of little importance whether there is a mistake in the description of the debt, as the deed would be *bona fide,* if there was one substantially agreeing with the description, and if entirely misdescribed, there is no doubt of the power of Chancery to correct the mistake. In Brooks v. Maltbie, 4 S. & P. 96, and Mead v. Steger, 5 Porter, 498, the conclusions to which we have arrived, are stated as the result of the cases, though the questions then before the Court were not the same as they now are. See Stover v. Herrington, et al, 7 Ala. Rep. 142.

The decisions we have cited, lead directly to the conclusion, that so far as there may be a difference between the debts described as the consideration of the deed, and those shown in evidence, either as to the names of the sureties, debts or sums, this does not affect the validity of the deed, but at most furnishes grounds for presumptions, as the scale of evidence may incline.

We are satisfied this is the proper consideration to be given the subject and it seems the only one which will enable the true merits of a conveyance to be put before a jury, in a contest between a creditor and one claiming under the deed.

11. With regard to the objection, that the notes and other evidences of debt were not produced. or their absence accounted for, there is a different and sufficient answer. It is obvious, that neither the trustee, nor the debtor's sureties, have the control of the notes, &c. described in the deed. We do not know from the bill of exceptions, whether it was the sureties or the creditors, who availed themselves of the provisions of the deed, and if it is the former, as seems most probable, no suspicion arises that the originals were withheld from any improper motive. It is very questionable if the trustee or the sureties could compel the creditors to produce the notes held by them, to be used in this suit, (Bell v. Lorilard, 10 Pick. 9 ; Mills v. Oddy, 6 C. & P. 728; Schelencker v. Maxey, 3 B. & C. 789;) though it is said this is rather the privilege of the witness than of the party. [Mills v. Oddy, supra.] But, however this may be, we think, on other and more general grounds, there was no necessity to produce the notes. The general rule is, that when the writing is the exclusive medium of proof, it must be produced or its absence accounted for. [See cases collected in Cowan & Hill's Notes, 1208.] Here the fact to be proved, is the indebtedness of the grantor, or that the sureties named stood in that relation to him, and both these may as well be proved orally, as by the production of the writing. Indeed, it will admit of question, whether the production of the notes, without further proof, would be sufficient to establish either fact, on account of the facility with which such evidence might be fabricated. In Lamb v. Maberly, 3 Monroe, ; the action was for the price of a note, sold by the plaintiff to the defendant, and it was held, evidence might be given of the sale, without producing the note. In Spears v. Wilson, 4 Cranch, 398, evidence was given of a deed of slaves, without producing it, to show the nature of the possession which accompanied it. These cases seem to recognize the rule just stated, and as there is nothing to authorize the inference, that the notes themselves could be procured, or were within the control of the party offering the evidence, we think the objection cannot be sustained.

12. The next question is that which relates to the exclusion of evidence of the admissions of the trustee, with respect to the deed. What those admissions were, we are not informed, but the inference is, they were offered to defeat the deed, and in this view, we think the evidence inadmissible.

The English Courts seem generally to maintain, that the admission of the plaintiff on the record is always evidence, though he be but the trustee for another. [Craib v. D'Aeth, 7 Term, 670, in note; Bauerman v. Radenius, ib. 663.] In the latter case, Mr. Justice Lawrence said he had looked into the books, and could find no case in which it had been held, that an admission by the plaintiff on record was not evidence. To permit a mere nominal party to defeat a suit by his admission, and yet refuse the same effect to his release of the action, seems to involve a contradiction of principle. However this is, it is certain the English Courts have held the latter doctrine. In Payne v. Rogers, 1 Doug. 407, where the defendant had procured a release from the nominal plaintiff, the Court ordered it to be delivered up, and permitted the real plaintiff to proceed with the action. And a nominal plaintiff in ejectment, has been committed for a contempt, upon releasing an action. [1 Salk. 260.] On the other hand, it is said, in Buller's Nisi Prius, 233, that the answer of a trustee can, in no case be received against the *cestui que trust*, and it has also been held, that the admissions of neither guardian, or *prochein ami*, can be received against an infant. [Cowling v. Ely, 2 Stark. Ca. 366; Webb v. Smith, 1 R. & M. 106; to the same effect is Isaacs v. Boyd, 5 Porter, 388.] In many of the Courts of this country, a rule different from that usually recognized in England, has obtained very generally; and the party having the beneficial interest in a chose in action, is not affected by the admissions, or release, of the nominal plaintiff. [See cases collected in Cowan & Hill's Notes, 163; Chitty on Bills, 9, note 1.] In conformity with the general current of decision, we held, in Chisolm v. Newton, 1 Ala. Rep. N. S. 371, that the admission of the nominal plaintiff, made after the commencement of the suit, could not be given in evidence to defeat the action. And in Duffee v. Pennington, ib. 506, as well as Prewit v. Marsh, 1 S. & P. 17, it was considered the nominal plaintiff might be called as a witness by the defendant and sworn, if he made no objection.

It is true that most of the American cases are upon assigned choses in action, but the principle on which they proceed is, that one having no interest in the suit, ought not to be permitted to defeat or affect it, by his admissions; this seems equally applicable to a trustee, who is invested with the legal title to a specific chattel, solely for the benefit of others. Whether the claimant, under the circumstances of the case, might have been called as a witness, it is not necessary to determine, but we may be permitted to remark, that independent of his relation to the cause, as a party upon the record, there seems no objection on the score of interest. [12 East, 250; Duffee v. Pennington, 1 Alabama Reports, N. S. 506; Mann v. Ward, 2 Atk. 229; Hall v. Tyrrel, Bard. K. B. 12; Goss v. Tracey, 1 P. Wms. 290; Craft v. Pyke, 3 ib. 181; Philips v. D. of Bucks, 1 Vern. 230; 1 P. Wms. 595; Ballew v. Russell, 1 B. & B. 99.]

13. The deed authorizes the trustee to apply the proceeds of the crop of the year, when it was made, to the payment of the then subsisting judgments against the grantor. The circumsance, that these were afterwards superseded by writs of error sued out by him, and subsequently paid by the trustee, was proper evidence to rebut any presumption of fraud arising out of the omission to show what had been done with the property.

From what we have said, it will be seen that we consider the case as free from error, in all the points presented.

Judgment affirmed.

DUFFEE, ADM'R, v. BUCHANAN AND WIFE.

1. A testator declared in his will, that certain property "shall be equally divided between my mother and my two sisters, H. and M." Held, that the meaning of the will was, that each was to have one third part.
2. An administrator is chargeable upon his settlement, with the amount of a note due by him to his intestate, as money in his hands.
3. An administrator may subject himself to be charged with the notes of third persons, as assets, upon proof of neglect or mismanagement; and

when the record recites, that the Court, upon the proof adduced, was satisfied he was chargeable with such notes, it will be considered in this Court, that the proof was sufficient, if no objection was made to it in the Court below.

4. The administrator having appeared in obedience to the citation, is affected with notice of all the subsequent proceedings.

Error to the Orphans' Court of Tuskaloosa.

This was a proceeding, upon the final settlement of the estate of Seaborn P. Gillespie, of which the plaintiff in error was administrator, with the will annexed. The will is as follows:

First—It is my will and desire, that the proceeds of a promissory note, due me from Matthew Duffee, amounting to eight hundred dollars, or thereabouts, and another for about two hundred dollars, shall be equally divided between my mother, Margaret Gillespie, and my two sisters, Harriet Williams and Mary Gillespie.

Second—It is my will and desire, that my mother and sisters, above named, shall receive the amount of a debt, due me from William McGuire, amounting to about thirty dollars, and also the amount of a debt, due me from Mr. Samuel, amounting to about five dollars, to be equally divided between them, as above named.

Third—It is my will and desire, that my mother and sisters, above named, shall receive a certain horse of mine, now in the possession of Wm. Robinson, (after deducting the value of his keeping,) also, a sulkey, to be divided between them as aforesaid.

Fourth—It is my will and desire, that my other little debts and property, which I may have, after the same is arranged and settled, shall be given as aforesaid, to my mother and sisters.

Fifth—It is my will and desire, that Matthew Duffee, should be allowed, as a set off to the amount due me, for the rent of my house, any sum he may have expended in putting additions to said house.

On the 19th April, 1844, the following order was made: It appearing to the satisfaction of the Court, that Matthew Duffee, administrator of the estate of Seaborn P. Gillespie, deceased,

has made no settlement of his accounts, as such administrator: it is therefore ordered, by the Court, that a citation issue, to said Matthew Duffie, to appear before this Court on the second Monday in May next, to file his accounts and vouchers, and make settlement of the said estate.

At the return of the writ, Duffee appeared and presented his account and vouchers, for a settlement, and the Court received, audited and stated said account, and reported the same for allowance, at a term to be held on the second Monday in August next, after, and directed publication to be made.

On the second Monday in August, 1844, a decree was rendered as follows: Be it remembered, &c. that at this term, came up for a final settlement of the estate of Seaborn P. Gillespie, deceased, the accounts and vouchers of Matthew Duffee, administrator of said estate. The account having been audited, &c., heretofore, and due notice thereof given, as required by law, the Court proceeded to consider the same, and the exceptions thereto. It was objected, that as the account took no notice of the two debts stated in the will, to be due from the administrator to the testator, and one also due from Moses McGuire, said account was not correct, and the Court, upon the proof adduced, being satisfied that said amounts should be charged against said administrator, as well as the amount of two hundred and eighty three dollars and fifty cents, in said account stated, and after deducting the amount charged, $293 88, and $100 to the administrator, for his services, and $42 57 Court charges, there is left, calculating interest from the time of testator's death, on the sum of $1,020, which remained after deducting charges, from the credits of the estate, said testator having died 26th February, 1834, the sum of $1,717 43, to be equally divided, according to testator's will, between his mother, Margaret Gillespie, and his two sisters, Harriet Williams and Mary Gillespie. The sum of five hundred and seventy-two dollars thirty-seven cents, is hereby decreed to be the distributive share of Harriet Williams; and it appearing to the Court that Margaret Gillespie departed this life, before this settlement, and that David Johnson is her administrator, it is hereby decreed, that $572 is the distributive share of said Johnson, as administrator. It is hereby further decreed, that $572 is the distributive share of E. Buchanan and Mary his wife, formerly Mary Gil-

lespie, testator's sister, which several sums, said administrator is required to pay to the persons to whom they are respectively due.

From this decree the administrator prosecutes this writ, and assigns for error—

1. That it does not appear at whose instance the citation issued, or the account and other proceedings were had.

2. It does not appear that any of the parties, and particularly Duffee, were present when the decree was made.

3. Duffee is charged, with the notes mentioned in the will, without its appearing that they ever came to his hands, or continue unpaid.

4. The decree in favor of Buchanan, should have been for one fourth, instead of one third.

W. Cochran, for plaintiff in error, upon the first point, cited 1 Ala. Rep. 596. If the administrator failed to bring into the account, items supposed to belong to the estate, an issue should have been made up on notice, or after attachment. [Clay's Dig. 226, § 28.]

An examination of the will, shows that the mother was entitled to one half the estate, and the sisters to the residue.

Peck & Clarke, contra. The notes charged to Duffee, are his own notes, with which he is chargeable as cash. No notice was necessary, because he was already in Court.

The citation may be at the instance of the Judge of the Orphans' Court. [Clay's Dig. 226, § 27.] Having appeared and delivered his vouchers, he is affected with notice of all the subsequent proceedings.

ORMOND, J.—We consider the true construction of the will to be, that the mother and the two sisters, took each one-third part of the estate. The language is, "shall be equally divided between my mother and my two sisters, Harriet and Mary." If the term *equally* had been omitted, there might have been some plausibility in the argument, that it was intended to create two classes of beneficiaries. In a subsequent clause of the will, the same idea is conveyed, in language admitting of no doubt, where it is said, "My mother and sisters above named,

shall receive the amount of a debt due me," &c. The plain import of the will is, that his mother and sisters were to be equally interested in his estate, and it would be doing great injustice, to change this natural interpretation of the whole will, by a criticism upon a particular word, especially in a case where the will being *nuncupative*, was reduced to writing after the testator's death. In such a case, we must give effect to what appears to have been the prevailing idea, in the testator's mind.

In respect to the note due by the administrator, to the deceased, there can be no doubt, he was properly chargeable with it as money. It was assets in his hands for collection and distribution, and as he could not sue himself, it was properly considered as cash in his hands. [Childress v. Childress, 3 Ala. Rep. 754.]

The note due by McGuire, stands upon a different footing. As a general rule, executors and administrators are not chargeable with notes remaining in their hands as money; though certainly they may subject themselves to account for them, as assets, upon proof of neglect or mismanagement. [Douthitt, Administrator, v. Douthitt, 1 Ala. Rep. 597.] In this case, the administrator having had possession of the estate for about ten years, appears in obedience to the citation, and submits an account for final settlement; upon the final settlement, the Court, "upon the proof adduced," being satisfied that he was correctly chargeable with the amount of the note due from McGuire, decrees against him. If there was no evidence authorizing this decree, it should have been shown by an exception. In the absence of any objection, we must presume, either that it was shown that the money had been collected, or that it was lost by the neglect of the administrator, who was entitled to its custody, and upon whom the law devolved the duty of collecting it. The record, it is true, does not show, that the administrator was present when the final settlement was made, nor is it important whether he attended or not. He is one of the parties in the cause, and having appeared in obedience to the citation, is affected with notice of all the ulterior proceedings, of which, indeed, the record states due notice was given.

We are unable to perceive any error in the decree of the Court, and it is therefore affirmed.

FITZPATRICK'S ADM'R v. HARRIS.

1. Where the vendee of land pays to the vendor the purchase money, or a part of it, and receives of the latter a deed of conveyance, the deed, in a controversy between the parties, is admissible to show the amount of the purchase money.
2. Where a party presents an account to his debtor, in which are stated both *debits* and *credits*, he shall not claim the benefit of the former without submitting to the latter also.

Writ of Error to the Orphans' Court of Montgomery.

This was a proceeding before the Orphans' Court, for the settlement of the estate of Joseph Fitzpatrick, deceased, which had been reported insolvent by the plaintiff in error, its administrator. The defendant in error, as a creditor of that estate, preferred a claim against the same, the correctness of which, and the amount thereof, were submitted to a jury for decision. On the trial of the issue, the plaintiff in error excepted to the ruling of the Court. From the bill of exceptions it appears, that the creditor introduced a witness, who stated that he was present at a sale of land made by George Whitman to the intestate and the creditor, that he saw some money paid by the latter, but could not say how much; he saw nothing paid by the intestate, nor could he say what was the amount of the purchase money of the land. Witness was requested to attest the execution of the deed of conveyance from Whitman to the intestate and creditor, and saw it delivered to them, as both were present, and believes the deed exhibited at the trial to be the same. Thereupon the creditor offered to read to the jury, the recital in the deed which acknowledged the receipt, by the grantor, of four hundred dollars, in order to show the amount actually paid by the creditor for the land. To this the defendant objected, but the objection was overruled, and the testimony read to the jury.

The creditor then exhibited an account marked A, and offered evidence tending to prove some of its items, but adduced no proof of its presentment, either to the administrator, or to the

clerk of the Orphans' Court. The creditor then read to the jury, an account marked B, and proved that he presented the same to the administrator, in February, 1842, but offered no evidence of its correctness, and stated that he did not seek to recover thereon; that it was intended, in connection with other evidence, to show that the items charged in the account A, had been presented to the administrator, within eighteen months from the grant of letters of administration. Upon the introduction of the account B, the administrator informed the creditor, that he should claim the credits therein stated. The debits in A, were $6,549 22, and the credits $1,570; the debits in B, were $9,827 74, and the credits $2,810 32. The items of which A was made up were all embraced by B.

The administrator prayed the Court to charge the jury, that as the creditor offered in evidence the accounts A and B, his disavowal of a wish to recover on the latter, and declaration, that in connection with other proof, it was intended to show a presentment of the demands stated in the former, to the administrator, did not prevent the administrator from availing himself of the credits stated in B; and further, the creditor cannot claim the debits shown therein. This charge the Court refused to give, and charged the jury, that if the administrator sought to avail himself of the credits in the latter account, then the same would be evidence both as to charges and credits.

The jury returned a verdict for the creditor, for five thousand two hundred and one 36-100 dollars, and a judgment was rendered that he recover his *pro rata* dividend thereof, when the same shall be ascertained by the Court.

A. Martin, for plaintiff in error, made these points: 1. The deed from Whitman to Fitzpatrick and Harris, was admissible to aid the latter to fix a charge upon the estate of the former. [Saunders v. Hendrix, 5 Ala. Rep. 227.] 2. The administrator might avail himself of the credits in account B, without subjecting the intestate's estate to the charges made therein against it.

I. W. Hayne, for the defendant in error, argued, that the payment of the money by Harris, when the intestate was present, the delivery of the deed to both of them, &c. made the recital

as to the price paid for the land, evidence of that fact. But if it had been improperly received, then he proposed to abate from the recovery in the Orphans' Court, the amount of this item in Harris' account. He insisted that the principle was well settled, that the debtor cannot avail himself of the credits stated in the account of his creditor, without admitting the charges against him as evidence.

COLLIER, C. J.—In Saunders v. Hendrix, 5, Ala. Rep. 224, it was held, that an acknowledgement in a deed, of the amount paid as the consideration of the conveyance of land, was in legal effect a mere receipt, and as much open to explanation as if indorsed on the back of the deed. So in Mead v. Steger, 5 Porter's Rep. 498, we determined, that where a monied consideration is expressed in a deed, it is allowable to show the consideration to have been greater or less than that stated; for the reason that it is not usual to state it with precision. The principle deducible from these cases, does not deny the admissibility of a deed, to show the consideration paid by the grantor to the grantee, it merely affirms its inconclusiveness as evidence. That it would be competent in the present case, as against Whitman, to show the amount which the purchasers paid him, if an action were brought for breach of warranty, we apprehend would not be disputed; although it would be allowable for the vendor to prove that it did not recite the consideration truly. And we think it good evidence against the vendees, not only in favor of the vendor, but as between themselves, upon the ground that they were both present when it was executed, and received it, without any objection to the correctness. This conclusion, we think, results from the familiar rule, that silence on the part of one, when a fact is affirmed, which is calculated to elicit a denial, if untrue, shall be construed into an implied and virtual admission. [Batturs v. Sellers, 5 H. & Johns. Rep. 119; Coe v. Hutton, 1 Sergt. & R. Rep. 398; Hendrickson, Adm'r, v. Miller, 1 Const. Rep. 296; Vincent v. Huff's lessee, 8 Sergt. & R. Rep. 381; Wells v. Drayton, 1 Const. Ct. Rep. 111.] See the cases collected on this point in Cowan & Hill's Notes to Phillips' Evidence, 2 vol., 191 to 199, 213.

We place our conclusion on this point upon the ground, that the vendor and vendees were all present when the money was

paid and the deed delivered, and the fair inference is, that it was read to, or by them all, so that all were informed of its contents, and if untrue in any recital, would most probably have so stated. This doctrine as to implied or virtual admissions, we are aware, has been denied with regard to statements in writing, other than accounts; that is, where those statements are not subjects of conversation between the parties, or not delivered in person, but are sent from one to the other at a distance. [2 C & H.'s Notes, 2 Phil. Ev. 195.]

In respect to the refusal to instruct the jury as prayed, as also in the charge given, we think the Court ruled correctly. It is a rule of unquestionable authority, that where a party presents an account to his debtor, in which are stated both *debits* and *credits*, the latter shall not claim the benefit of the credits, without also submitting to the debits. The Court merely affirmed such to be the law. [2 C. & H.'s Notes to Phil. Ev. 227 to 230.]

The order of the Orphans' Court is therefore affirmed.

CHANDLER AND MOORE v. LYON ET AL.

1. C. borrowed the bills of an unchartered banking company, from one L. assuming to act as its President, and gave his note for the same amount, payable at a future day, with M. as his surety. The bills received, were the bills of the company, and made payable to S. Jones, or bearer, but not assigned. The note given was payable ninety days after date, to L., or order. After the note became due, C. procured other bills of the company, and went to the place where it transacted business, but found no one there to receive payment, or give up the note. The company was composed of L. and S. chiefly, and if of others, they are unknown. L. and S. both absconded from the State soon after, and are entirely insolvent. Afterwards, suit was commenced, in the name of the administrator of L., for the use of one Miller, against C. and M., who being unable to succeed in making any defence at law, a judgment was recovered. Afterwards, an execution upon it was levied on the property of M., in common with other executions, and his property sold. A case was made between the several plaintiffs in execution,

and the sheriff selling the property, to determine the priority of the executions, and such proceedings had, that the administrator of L. recovered a judgment for the use of Miller, against the sheriff and his sureties. C. filed his bill, setting out these facts, insisting that the company was contrived and set on foot to defraud the public—that the death of L. was merely simulated, to enable the other parties to carry their fraudulent plans into effect; that the note yet remained the property of the company, and that in equity he was entitled to set off the notes held by him, and to enjoin the collection of the judgment against the sheriff, as C. would have to reimburse M. if that was paid. The defendants demurred to the bill, for want of equity, and this demurrer being overruled, admitted all the facts stated to be true, if they were well pleaded: *Held*—

1. That suit being in the name of the administrator of L., the notes held by C. against the company, were not legal off sets, and that on this ground there was relief in equity.
2. That the circumstance that the notes were held by C. when the judgment was obtained, or suit brought against C. and M. did not take away the equity, as M. was a surety only.
3. That C. being entitled to his relief against the parties to the judgment at law, it extended also to defeat the recovery against the sheriff, as without this, the relief would be of no avail.
4. If the original transaction between C. and the company was illegal, it does not defeat C.'s right to set off the other bills afterwards procured by him.
5. [*Upon the petition for re-hearing.*] That although C. might have defeated the suit at law, by pleading that L. was yet alive, or by showing that the suit was collusive, and that the interest in the note sued on then belonged to the company, yet his omission to do so, was no bar to relief in equity. The suit being in the name of the administrator of L., C. is entitled so to consider it, and it is no answer to the complainants to say, that by showing another state of facts, he could have had relief at law.

Writ of Error to the Court of Chancery for the fourth district of the Northern Division.

THE case made by the bill, after divesting it of extraneous matter, is this:

Chandler, in November, 1838, was desirous to borrow some money, and was ignorant that unchartered associations were prohibited from issuing notes, to circulate as money. He, in that month, applied to the Wetumpka Trading Company, an unincorporated association, transacting business at Wetumpka, through one Isaac Lyon, as their President and agent, and received from him six hundred dollars in post notes of the said

company, payable at ninety days. These notes were in the form of bank bills, of various denominations, and intended to circulate as money. For these, Chandler, with Moore as his security, gave his note for six hundred dollars, payable at the office of the said company, to the order of Lyon, sixty days after date. The note, although payable to Lyon, was a transaction with the company. Chandler made a payment of one hundred and eighty-two dollars on this note, in October of the same year, and afterwards provided himself with notes of the said company, to discharge the remainder, but when he came to the office of the company, Lyon refused to be seen, and absconded the next day. The notes held by Chandler were payable to S. Jones, or bearer. The company was set on foot for the purpose of defrauding the public, and was solely owned and controlled by Lyon, or by others who are entirely insolvent. Lyon caused a report to be spread of his death, for the purpose of avoiding pursuit and detection. Previous to his flight, he abandoned the papers belonging to the company, and among them the note above described, as valueless. Suit was soon after commenced on the note, in the name of W. J. Campbell, as administrator of said Lyon, for the use of one Jonathan Miller, who is the father-in-law of Lyon, and lends his own name for the purpose of the suit, but has no interest in it, as the money, if collected, is to be divided among the aiders and abettors of the Wetumpka Trading Company; but these persons are unknown to the complainants. Lyon and one Smith, the only two persons known to be liable as members of said company, are entirely insolvent, and reside out of the limits of the State, in parts unknown. Although the suit is instituted on the note in the name of Campbell, for the use of Miller, the interest in it is yet in the Wetumpka Trading Company, or in Lyon, as its owner. That the notes on that company held by Chandler, are due him in the same right. Judgment was rendered in the suit above described, the complainants asserting they were unable to make any defence to it, by way of set off, by reason of the difficulty of identifying and proving the notes, and because *prima facie* they were not due in the same right.

Execution having issued, was levied by Spencer, as sheriff, on the property of Moore, and he having several executions against that person, questions of priority of satisfaction arose

between the several plaintiffs, which resulted in Campbell, for the use of Miller, obtaining a judgment against Spencer, for not paying over the money collected, or which should have been collected, from the property of Moore. Chandler insists, that if Spencer pays this judgment, Moore will have a claim against him, (Chandler,) for so much money paid on account of the note. The bill prays that Campbell and Miller may be enjoined from proceeding against Spencer or the complainants; that the notes held by Chandler may be set off against the judgment obtained by Campbell, as administrator of Lyon, for the use of Miller, and for such other relief as may be necessary. The defendants demurred to the bill, and set out the following grounds of demurrer:

1. Because no equity is shown, to entitle the complainant to the discovery and relief sought.

2. There is no sufficient excuse shown why the defence was not made at law; and because it could have been so made.

3. Chandler has no right to control the judgment against Spencer; neither has Chandler and Moore.

4. On the face of the bill, it is shown that the judgment against Chandler and Moore is satisfied.

5. The bill is multifarious.

The Chancellor overruled the demurrer, and then it was agreed between the parties, that all the facts well pleaded should be taken as true. A final decree was therefore rendered for the complainants, the form of which is not called in question here.

The defendants assign as error that the Court should not have overruled their demurrer, but should have dismissed the bill.

J. W. Pryor and W. W. Morris, for the plaintiff in error, argued—

1. The bill sets out an illegal contract, in which the complainant, Chandler, participated, In such a condition of parties the defendants have the best of it. [Monk v. Abell, 3 B. & P. 35; United States v. Owens, 2 Peters, 527.]

2. The complainants cannot come into equity for a new trial upon any of the matters of fraud alledged in the bill; and if this fraud extended to the manner of executing the notes of the

company, so as to give Chandler no right of action in his own name on them, that point must be concluded also.

3. Whatever may be the apparent equities of the parties, it is clear Chandler has sustained no injury; the judgment against him is satisfied, and it may be that Moore will never call on him to refund.

4. If this is a proceeding by Chandler, to secure a debt due him from the Wetumpka Trading Co., it will not be permitted in equity, until he has exhausted his remedies at law. [Wiggins v. Armstrong, 2 John. Ch. 144; 1 Vern. 399.]

5. The judgment of the Court determining the priority of the liens of the several plaintiffs in execution, and declaring Spencer liable to Campbell, for the use of Miller, is a judgment *in rem*, and binding on every one, whether before the Court or not. [Gelston v. Hoyt, 13 John. 139.]

6. The very circumstance that this money, under the decree, may never be refunded to Moore, and that it may be appropriated to other executions, is almost conclusive to show that there is no equity as against Miller.

7. There is no connection between the demand on which judgment was obtained, and those sought to be set off, and it is apprehended that no case can be found where a demand, collectable at law, unconnected with a trust or other exclusive matter of equitable cognizance, can be enforced until a judgment at law is obtained.

8. The case of Schiefelin v Noxubee Co. recently decided by this Court, shows that Chandler had a complete remedy at law, and might have used the notes held by him as a set off.

W. P. Chilton and Bowden, contra, contended—

1. That the bills held by Chandler could not have been used by him, in the trial at law, as a set off, however much they might have conduced to prove a fraud. [French v. Garner, 7 Porter, 549.]

2. If they could have been so used, the insolvency and non-residence of Lyon, is a sufficient reason to let in the equitable jurisdiction. [Pharr v. Reynolds, 3 Ala. Rep. 523.]

3. Chandler, as a creditor, might pursue the demand in progress of collection, because he has no legal remedy in such a case; but the bill is not framed for that purpose. Chandler and

Moore seek to have the debt paid, by setting off one due in equity, and not at law, to Chandler. Chandler could not sue in his own name on the bills held by him, and therefore could not set them off. It makes no difference whatever, how near the defendant, Lyon, has accomplished his intention, a Court of equity can stop him at every point. [Treble v. Lane, 7 Monroe, 455; Montague, 61; 19 Vin. Ab. 469; Ex parte Blagden, 3 Bibb, 255; Hughes v. McConnell, 1 Bibb, 256; Dale v. Sallet, 4 Burr. 2133; Green v. Farmer, 4 Burr. 2221; James v. Kynnier, 5 Vesey, 110; Payne v. Loden, 1 Bibb, 518; Barclay v. Hart, 4 Burr. 1996; Talbot v. Warfield, 2 J. J. Marsh. 86; Talbot v. Banks, 2 J. J. Marsh. 548; Stewart v. Chamberlin, 6 Dana, 32; Merrel v. Fowler, 6 Dana, 305; Watkins v. Chamberlin, 8 Dana, 164; 6 Ib. 224; 14 John. 53; Chance v. Isaacs, 5 Paige, 592; Robbins v. Holly, 1 Monroe. 194.]

GOLDTHWAITE, J.—1. The matters of fraud with respect to the transactions of the Wetumpka Trading Company, and the simulated death of Lyon, are so prominently set forth in the bill, that our first impression was, that these were the sole grounds on which relief was sought; but a more caerful examination has satisfied us, as it did the Chancellor, that the complainants are entitled to relief on the ground of set off. It sufficiently appears, from the bill and exhibits, that at the time Campbell, as the administrator of Lyon, commenced his suit against Moore and Chandler, the latter was the holder and owner of notes of the Wetumpka Trading Company, of which Lyon was a partner, if not the only individual composing it. The bills held by Chandler are payable to S. Jones, or bearer, and do not appear to have been assigned or indorsed by him. Now, whether Lyon was a partner, or the only member of this concern, it is evident he could not have been sued by Chandler in his own name. Consequently he could not have set off the bills to the suit against him and Moore, even if Lyon was the only person liable; but if he was a partner only, the liability of his personal representative was yet more remote. The same observations will apply to a defence of set off, made upon showing that the suit, though in the name of Lyon, was in fact for the benefit of the Wetumpka Trading Company. Chandler could not have sued them in his own name, and therefore under

repeated decisions of this Court, could not have given the bills in evidence as a set off. [French v. Garner, 7 Porter, 549.]

2. It is a matter of no importance to the investigation of this suit, whether Lyon is dead or living, or whether the one or the other of the complainants are entitled to the relief. It is true, there is no mutuality in the debt reduced to judgment, under the statute of set off, but the decision recently made of Winston v. Metcalf, 6 Ala. Rep. 756, shows that a debt due to the principal debtor may be discounted when the surety is sued; and of course the same rule applies, where both are joined in the action.

3. The circumstance that such proceedings have been had, that a judgment has been obtained against the sheriff, by the administrator of Lyon, although it involves the case, and renders it more complex, does not stand in the way of relief, as that judgment is not in the nature of a penalty. It is only one mode which the law allows to a party to get at money which he is entitled to, but it gives him no right whatever to enforce that to which he has no claim in good conscience.

4. With respect to the objection, that Chandler is a *particeps criminis* in the illegal transaction of circulating the bills of the company, it is sufficient to say, that however that may be as to the bills received for the original loan, it does not appear to be so with respect to those which he afterwards obtained for the purpose of making payment. The question, therefore, is a fact not raised, to which our attention is called by the defendants' counsel.

The form of the decree is not called in question by the errors assigned, and therefore the judgment here must be one of affirmance generally, and with costs.

At a subsequent day of the term, Mr. Pryor, for the plaintiff in error, submitted a motion to re-hear this cause; and called the attention of the Court to the decree made in the Kemper and Noxubee Co. v. Scheffelin, 5 Ala. Rep. 492.

GOLDTHWAITE, J.—It is certain the case referred to by the plaintiffs, was overlooked by me when the opinion was written, nor did I at that time know of its existence. I may now be permitted to say, that I very fully accord with the principles there settled; but though this decision shows that the

complainant, Chandler, might have either sued the company in his own name, or have asserted his set off against the suit by the administrator of Lyon, upon showing that the suit, though in this right, was in truth the suit of the company, yet he was not bound to do so.

It is true, he asserts in his bill, that the suit against him in the name of Lyon's administrator was collusive, and that the interest in it remained in the Trading Company, but this is only one of the aspects of the case in which he is entitled to relief. The defence which he could have thus interposed to the suit at law, by going behind it, and showing that the bringing it in that name, was a fraud upon him, is a privilege which the law accords to him, but which involves no consequences, if he omits to make it in that manner.

The argument amounts to this: the complainant kne wthe suit was a fraudulent and collusive one, and could have defeated it in that aspect; and because he omitted to do so, he ought to be deprived of his right to defend the suit, in the aspect in which it was fraudulently presented. We cannot yield our assent to this proposition. The administrator of Lyon brings the suit, and in that particular aspect the notes for which Lyon, in his lifetime, was jointly responsible, cannot be interposed as a set off, because the right of set off, does not exist at law, under such circumstances. The debt is gone against his representatives at law, except under peculiar circumstances, and in no condition of which could the liability *sub modo*, be asserted as a set off. It is stated in the bill, that Lyon and one Smith were the only partners of the company, known to the complainants, and that both were insolvent, as well as having absconded. Under this State of facts, a clear and well recognized equity existed, for Chandler to set off the notes held by him, against the judgment recovered by Lyon's administrator. This is one of the grounds for relief asserted by the bill, and meets the suit at law, as those interested in it have chosen to present it, and, in our judgment, it is no answer to the complainants to say, that if another State of facts asserted by them, is true; they could have had relief at law. It may be that they could, but as before stated, that privilege is accorded to those showing that the plaintiff is a simulated person, but they are not bound to do so. Motion denied.

MARTIN, ADM'R, v. HILL.

1. Where a joint obligation would survive upon the death of one of the obligors, against his heirs and personal representatives, a judgment founded it, will also survive against them, upon the death of one of the parties to the judgment.
2. When a party to a suit in this Court dies, pending the suit, and it is abated as to him, it becomes several as to him, and is not merged in the judgment of this Court, against the other parties to the judgment, and their sureties.

Error to the Circuit Court of Montgomery.

This was a proceeding upon the settlement of the estate of Joseph Fitzpatrick.

The defendant in error presented a claim against the estate, consisting of a judgment obtained by him in the Circuit Court of Macon, against the plaintiff's intestate, and others. For answer to this demand, the defendant pleaded, that the judgment aforesaid, was by the defendant thereto, taken to the Supreme Court, and bond given to supersede the execution. That whilst the suit was pending in the Supreme Court, the death of his intestate was suggested, and by the judgment of the Court, the suit was abated as to him, and judgment rendered against the other defendants to the judgment. To this plea, the claimant demurred, and the Court sustained the demurrer, and rendered judgment, from which this writ is prosecuted. The error assigned, is the sustaining the demurrer to the plea.

A. Martin, for plaintiff in error, cited 4 Ala. Rep. 9; 6 id. 422.

Harris, contra, cited 2 Saunders, 101.

ORMOND, J.—We think this case is within the equity of the statute, providing that joint obligations shall survive against the representatives of the deceased obligors. [Clay's Dig. 323.] Judgments are not, it is true, specifically mentioned in the statute, but as the obligation itself would have survived, the judgment founded upon it must have the same attribute.

The principal reliance of the plaintiff in error, is upon the supposed merger of the judgment of the inferior Court, by the affirmance of that judgment in this Court, against the other defendants and their surety, as was held in Wiswall v. Munroe, 4 Alabama Reports, 9. By the death of Joseph Fitzpatrick, the original judgment, by the operation of the statute above referred to, became several, and might be revived against his representatives; and if not revived, became a debt due from them to the plaintiff, upon which a suit might be brought. The prosecution of this claim in the Orphans' Court, is, in effect, the institution of a suit upon the judgment, which, we have seen, is maintainable. The merger of the judgment against the surviving defendants, has no influence whatever upon this question, as, by the death of Joseph Fitzpatrick, the judgment, as to him became several.

Let the judgment be affirmed.

KENT v. LONG.

1. The plaintiff, defendant and B. were joint sureties for Brown, in a bond executed pursuant to the statute, by the defendant, in an action of detinue; previous to the termination of the suit, the plaintiff endeavored to obtain possession of the property in controversy; this was resisted by the defendant, who was in possession of the same—saying he would keep it until the trial, and be responsible for its forthcoming. But instead of so doing, he delivered the property to the defendant in the action of detinue, who removed it without the State; by reason of which the plaintiff was put to great trouble and expense, and sustained damages, &c.: Held, that a declaration framed upon these facts, in case, was good on general demurrer.
2. A demurrer to a declaration containing several counts, will not be sustained, if either of them is good, unless there is a misjoinder of counts; in that case, it will be sustained, without reference to the sufficiency of the counts when detached from each other.
3. If "the declaration contains a substantial cause of action, and a material issue be tried thereon," the act of 1824 declares, that the cause will not be reversed, arrested, or otherwise set aside, after verdict, or judgment," for a defect in "the pleadings not previously objected to;" consequently, an ap-

pellate Court will not regard the defects of a declaration, if a demurrer has not been directly interposed, or the attention of the primary Court called to it, upon a demurrer to some other part of the pleadings; and in the latter case, the record should show such to have been the fact.

Writ of Error to the Circuit Court of Butler.

This was an action at the suit of the defendant in error, against the plaintiff in error. The declaration contains several counts, the first of which is in case, and alledges that the plaintiff, defendant, and one Brown, were the sureties of William Burke, in a bond for the forthcoming of a slave, named John; which bond was such as the statute requires to be executed by a defendant in the action of detinue. The action in which the bond was given was brought by Daniel S. E. Starr, against Burke, for the recovery of the slave, and previous to its termination, the plaintiff below became uneasy on account of his suretyship, and tried to take possession of John, and deliver him to the sheriff of Butler, in discharge of his bond. This the defendant refused to permit the plaintiff to do, as he had the slave in possession, saying he would keep him until the trial, and be responsible for his forthcoming. But instead of so doing, he delivered him to Burke, who removed the slave without the State, by reason of which, &c., the plaintiff was put to a great expense, &c., and hath sustained damage, &c. The common counts in assumpsit are also added.

The defendant pleaded in short *non assumpsit*, and a former recovery; on the first of which the plaintiff took issue, and to the second replied. The judgment entry recites that the defendant demurred to the replication to the plea of former recovery, that his demurrer was overruled, and the issues were submitted to a jury, who returned a verdict in favor of the plaintiff for two hundred and fifteen 50-100 dollars, and judgment rendered accordingly. Subsequent to the rendition of the judgment, the following entry was made, viz: "This day came the defendant, by his attorney, and moved in arrest of judgment, on the ground of a misjoinder of actions, which motion being heard and overruled by the Court—the Court having charged the jury in this case before they retired, no recovery could be had under the testimony, by the plaintiff, under the two last counts in the declaration."

G. W. Gayle, with whom was Watts, for the plaintiff in error, made the following points: 1. There is a misjoinder of actions

in the declaration; the first count is in case, and in the second are embraced the common counts in assumpsit; and the objection is available, either on demurrer, in arrest of judgment, or on error. [1 Chitty's Plead. 208; White v. Kornegay, at the last term.] 2. The verdict is general on a misjoinder of counts, and the first count is bad.

T. J. JUDGE, for the defendant in error. Case is clearly an appropriate remedy for the cause stated in the first count; the defendant shared in the proceeds of the slave when he was sold, and by his neglect he was run off, and should therefore contribute to the compensation of the plaintiff for loss of time, trouble and expense, in hunting up and bringing back the slave. As to the misjoinder of counts, that was cured by the instruction of the Judge to the jury, which was equivalent to a *nolle prosequi* of the common counts. Although *non assumpsit* is not the general issue in case, yet it will be considered good after verdict.

COLLIER, C. J.—The defendant, by his refusal to permit the plaintiff to take possession of the slave, and deliver him up in discharge of the suretyship, previous to the determination of the suit of Starr against Burke, and instead thereof allowing the latter to take him into possession, furnished an opportunity for his removal. These facts are alledged in the declaration, and in addition, it is stated that the plaintiff, at the expense of much time, trouble and money, recovered the slave; that he had been sold, and the proceeds, *pro tanto*, applied to the discharge of the judgment against Burke, for which the defendant, plaintiff and their co-security, Brown, were liable; that, that judgment was not thereby extinguished; besides this, the defendant had not contributed any thing to defray the expense and charges consequent upon the recovery of the slave. Assuming the facts stated to be true, as we are bound to do, and we think they show that the plaintiff has been injured by the improper conduct of the defendant, and that the latter has actually received a benefit by the plaintiff's industry, and expenditure of money. These grounds certainly furnish a good cause of action, which may be made available in the form adopted by the plaintiff. This we intimated when this case was here at a previous term, but in a different form, Long v. Kent, 6 Ala. Rep. 100.

We have repeatedly held that a general demurrer to an entire declaration cannot be sustained if there be one good count, but if there be a misjoinder of actions, without reference to the sufficiency of the counts in themselves, the defendant is entitled to judgment. [Chandler v. Holloway, 4 Porter's Rep. 17.] This is the rule, where the objection for misjoinder is made on demurrer, and at common law, perhaps, a motion in arrest of judgment, or a writ of error would lie, where the plaintiff had thus united distinct actions. But the act of 1824, "to regulate pleadings at common law," (Clay's Dig. 322, § 53,) cures many defects in pleadings. The first section enacts, "that no cause shall be reversed, arrested, or otherwise set aside, after verdict or judgment, for any matter on the face of the pleadings not previously objected to; *Provided*, the declaration contains a substantial cause of action, and a material issue be tried thereon." We have always given to this statute a liberal interpretation in advancement of the object contemplated by the legislature. It is clear that the declaration contains a substantial cause of action, whether we consider either count, although they are improperly united. And the record shows that a material issue was tried thereon. The plea of *non assumpsit* may, after verdict, be regarded a denial of the entire declaration, though inappropriate to an action on the case; for it has been frequently held, that "not guilty," will sustain a verdict for the plaintiff, in an action of debt.

As, then, the defendant did not object to the declaration previous to the trial, its defects were cured by the act of 1824. Although there was a demurrer to the replication to the plea of former recovery, which it would, perhaps, have been competent for the Circuit Court to have visited upon the declaration, yet we think the act cited, requires that the objection should have been distinctly made by a demurrer to the declaration, or that it should have been pointed out orally, by the defendant, in urging his demurrer to the replication. The intention and spirit of the enactment cannot be carried out by any other construction; and where it is proposed to take advantage of any defect in the preceding pleadings of the parties, the record should show that it was insisted on in the primary Court.

The judgment must therefore be affirmed.

WALL v. WILLIAMSON.

1. A marriage between two Indians, belonging to the Choctaw tribe, entered into according to the laws and customs of that tribe, at a place where such laws and customs were in force, is recognized as a valid marriage, by the laws of Alabama, the laws of Alabama having been extended over the territory where the parties so married resided. An exception to the general rule, that a valid marriage is so every where, is said to obtain with respect to incestuous or polygamous marriages, when asserted in the Courts of a Christian State; but however this may be, it cannot obtain with respect to the wife of a Choctaw Indian, unless it is shown there was a previous marriage.
2. The laws and customs of the Choctaws were not abrogated, so far as members of the tribe were affected, by the extension of the jurisdiction of the State over the country occupied by them. It is only by positive enactments, even in the case of conquered or subduced nations, that their laws are changed by the conqueror, but there is no merger, until one tribe or nation is swallowed up, or lost in another, by the efflux of time.
3. When, by the laws of an Indian tribe, the husband takes no part of his wife's property, it is a necessary consequence, that the wife retains the capacity to contract, and it is likely, means were provided by their laws for the enforcement. But if such was the case, it is not perceived how the wife could, in our Courts of law, be sued alone, so long as the marriage continued, as the case presented would be that of a wife with a separate estate.
4. When, by the law of an Indian tribe, the husband has the capacity to dissolve the marriage at pleasure, and his abandonment of his wife, he remaining within the jurisdiction of his tribe, is evidence that he has done so, the effect of this dissolution of the marriage is the same as if directed by a lawful decree.

Writ of error to the Circuit Court of Sumter.

Assumpsit, by Williamson, against the defendant, as the maker of a promissory note. At the trial, upon the general issue, the defendant produced evidence tending to prove, that she and one David Wall lived together, as man and wife, from the year 1831 until the year 1839, in the territory belonging to the Choctaw Indians, until that was annexed to, and made the county of

Sumter; after which they lived in the same relation, in that county, near the same place where they previously had resided, and until the said David left the State of Alabama, in 1839, and went to the Choctaw country, west of the Mississippi. Both were of Indian extraction, and of the Choctaw tribe; that they were regarded as man and wife by the tribe, and as having been properly married, according to the laws and customs of the Choctaws. The defendant had said, that she had been advised that she had not been legally married; that she had been married in the Choctaw territory, by one Pistole, a justice of the peace from Marengo county. It was also in proof, that by the laws and customs of the Choctaws, the husband, by his marriage, takes no part of his wife's property; that among them, a man takes a wife at pleasure, and dissolves the marriage whenever he pleases, and that the men are allowed a plurality of wives.

Upon this state of proof, the defendant requested the Court to instruct the jury, that a marriage under the laws and customs of the Choctaws, entered into in a place where such laws and customs are in force, is recognized as a valid marriage by the laws of Alabama, when the same are extended over the territory where the parties so married reside.

This was refused, and the Court charged the jury—1. That the living together of an Indian man and woman would not be regarded by the laws of this State, as such a marriage as would affect a contract entered into by the female. 2. That if the defendant was abandoned by Wall, and she executed the note after he had left her, that she would be bound by her contract, although she might have been married. 3. That if, according to the customs among the Choctaws, the parties to a marriage can dissolve it at pleasure, by mere separation, and that the defendant and Wall did so separate, then the defendant was liable on her contract, as a *feme sole*.

The defendant excepted to the refusal of the Court to give the charge requested, as well as to those given, and error is assigned upon the bill of exceptions.

Hair, for the plaintiff in error.
Smith, contra.

GOLDTHWAITE, J.—Previous to entering upon the consideration of the questions raised, by the refusal to give the

charge requested by the defendant, it is not improper to ascertain what facts had to be ascertained by the jury, from the evidence. The existence of a marriage between David Wall and the defendant, at the time when the note sued on was given by Mrs. Wall, was one of the principal matters to be passed upon. Once established, to the satisfaction of the jury, as having been entered into, in conformity with the usages of the Choctaw tribe of Indians, its effect, in connection with the laws of this State, became a very material subject of inquiry. The defendant insisted then, and now, that if this marriage was valid, by the laws and usages of the Choctaw tribe of Indians, it is recognized as valid by the laws of Alabama. The *validity* of the marriage, and not the consequences of it, as to the defendant, was, at that time, the subject for instruction. If the marriage is not to be recognized as valid by our law, it was of no consequence to the defendant, what further charge was given, for or against her, because her entire defence rested on sustaining that proposition. All the testimony in relation to rights of husband and wife, under the Choctaw law, may have been of a disputable or doubtful nature. These observations are called for, because it has been assumed that this charge was immaterial, and that all the case is covered, by the charge actually given by the Court.

1. With respect to the refusal of this charge, it is not unlikely that the Circuit Court intended to be understood, by the counsel, that the charge was refused, not as an incorrect proposition, but for the reason that the case was clear for the plaintiff, even if it was conceded. If such was the impression of the Court, the charge should have been given, with the necessary explanation to direct the jury to the consideration of those points deemed to be more material. The general rule upon this subject is, that a marriage, valid at the place where contracted, is deemed to be valid every where else. [Story Confl. of Laws, 77, §§ 79, 103, 113, a.] It is said by the same author, that the most prominent, if not the only exceptions to this rule, are those marriages, involving polygamy and incest. [Ib. §113, a, 114.]

These, the learned author says, Christianity is understood to prohibit, and therefore no Christian country would recognize polygamous, or incestuous marriages. Lord Brougham, in Warrender v. Warrender, (cited in a note to § 114, 9 Bligh. 112,) says, "it is important to observe, that we regard it, (mar-

riage,) as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations; because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages, the laws of those countries authorize and validate." If this doctrine is to be understood as leading to the conclusion, that a Court can collaterally inquire into the existence of such a relationship, as would, in a direct proceeding, annul the marriage, it is very questionable whether it is sustainable. [1 Black. Com, 434.] A parallel case, to a Turkish, or other marriage in an infidel country, will probably be found among all our savage tribes, but can it be possible, that the children must be illegitimate, if born of the second or other succeeding wife? However the true rule may be, it is immaterial to this case, unless it can be shown, that when the law tolerates polygamy, there can be neither lawful wife or legitimate children, for here, the evidence does not disclose any previous marriage.

The validity of the marriage may possibly have been denied upon the impression, that having been contracted within the territorial limits of the State, it cannot be affected by Choctaw usages or customs, though both parties were of that tribe, and resident within its bounds.

2. The refusal cannot be sustained on this ground. Waiving the consideration of the peculiar relation which these Indian tribes bear to the States, within the limits of which they were resident, and assuming that the individuals composing the tribes could, by the States, have been made subject to their general laws, the question yet remains, whether, at the time of this supposed marriage, the laws and usages of the Choctaw tribe had been abolished or superseded; or, whether they composed a distinct community, governed by their own chiefs and laws. It is not pretended, that any statute producing this effect was then passed, and therefore, if lost at all, their local laws must have been lost, in consequence of their living within the territorial limits of the States. It may be difficult to ascertain the precise period of time when one nation, or tribe, is swallowed up by another, or ceases to exist; but until then, there can not be said to be a merger. It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror. The mere acquisition, whether by treaty or

war, produces no such effect. It may therefore be considered, that the usages and customs of the Choctaw tribe continued as their law, and governed their people, at the time when this marriage was had. The consequence is, that if valid by those customs, it is so recognized by our law.

For that error, in refusing thus to charge, the judgment must be reversed, and the cause remanded.

3. But although this result is arrived at, it yet remains necessary to ascertain what further instructions ought to have been, or should be given. The evidence tended to show, that by the Choctaw law, the husband takes no part of the wife's property. A necessary consequence of this peculiarity is, that the wife must have the capacity to contract, for otherwise she would be incapable, in many instances, to preserve or protect her property. The bill of exceptions is silent as to any positive law among them, as to this point, but the inference is direct and immediate, from what was proved. Having, by their law, the capacity to contract, it is also likely that means were provided by it, for its enforcement; but if that was the case, we do not see how she could be sued, in a Court of law, so long as the marriage continued. It would present nothing, but the case of a wife with a separate estate to her own use. It may be possible, that the objection to the form of action could not be urged at the trial, but it is unnecessary to consider this point further, because we are clear, that the marriage was dissolved according to Choctaw usages, by the abandonment of the husband.

4. Whatever may have been the capacity of the husband to abandon his wife, and thereby to dissolve the marriage, if both had become residents of Alabama, after the tribe had departed from its limits, it is very clear that the same effect must be given to a dissolution of the marriage, by the Choctaw law, as given to the marriage by the same law. By that law, it appears the husband may at pleasure dissolve the relation. His abandonment is evidence that he has done so. We conceive the same effect must be given to this act, as would be given to a lawful decree in a civilized community, dissolving the marriage. However strange it may appear, at this day, that a marriage may thus easily be dissolved, the Choctaws are scarcely worse than the Romans, who permitted a husband to dismiss his wife for the most frivolous causes. [Story Confl. of Laws, 169.]

The jury then, should have been instructed, that notwithstanding the marriage, if contracted according to Choctaw usage, between members of the tribe, in their own territory, before their laws were abrogated, was valid, yet the wife had the capacity to contract, and in case of a valid contract, was liable to be sued as a *feme sole*, if the marriage could, by the Choctaw law, be dissolved by the husband, at his pleasure, and was so dissolved, which might be inferred, if the husband abandoned his wife, and went with his tribe beyond the Mississippi, or elsewhere.

Judgment reversed and remanded.

[Note.—This cause was decided at June Term, 1844, and should have been published in the 6th or 7th volume of Reports.]

PALMER, use, &c. v. SEVERANCE AND STEWART.

1. When a defendant is offered as a witness, to prove usury, he cannot be confined in his testimony to the instrument upon which the suit is brought, but may prove other transactions connected with it; as that other notes existed, which have been cancelled, the consideration of which entered into, and formed a part, of the note sued.
2. A promise by the maker, to an innocent holder of usurious paper, to pay it, if indulgence is given, is binding on him, and may be enforced, if the delay is given.

Error to the Circuit Court of Russell.

Assumpsit by the plaintiff, against the defendant in error, on several promissory notes. The defence was, that the notes were usurious.

The defendants being examined as witnesses, the plaintiff objected to their proving any thing but the rate of interest, but the Court permitted them to prove the entire consideration, embracing payments made by them, before their notes were given, which

were but the renewal of other notes, given for borrowed money, to all which the plaintiff excepted.

There being proof conducing to show, that the first note of defendants, bought by plaintiff, was made for the purpose of obtaining a usurious loan, the plaintiff's counsel moved the Court, to charge, that if this note was purchased by plaintiff, without any knowledge of the purpose for which it was made, and without intent to violate the law against usury, plaintiff was entitled to recover the amount of said note, which charge the Court refused to give, and plaintiff excepted.

There was also proof conducing to shew, that one from whom the beneficial plaintiff bought the notes, after obtaining them, called on the defendants for payment—that defendants had previously objected to paying, on account of the usury, but on this occasion, told the holder of said notes, that if he would wait with him until the end of year, he would pay the note, and legal interest—that the holder did wait accordingly. Upon this proof, the plaintiff asked the Court to charge, that if the defendant had agreed with the nominal, or beneficial plaintiff, or the holder, from whom the notes were bought, upon consideration of time given, to pay the principal and legal interest, and time had accordingly been given, the plaintiff was entitled to recover the principal and legal interest; which charge the Court refused to give, and the plaintiff excepted. The jury found for the plaintiff one dollar, for which the Court rendered judgment.

The errors assigned are, the matters of law arising out of the bill of exceptions.

Heydenfeldt, for plaintiff in error, submitted the cause, and cited Clay's Dig. 590; 3 Ala. Rep. 158; 2 Taunton, 184.

ORMOND, J.—When the defendant is offered as a witness, under the statute to prove usury, he is competent to prove any fact which tends to establish the usury. He cannot be confined in his testimony, to the instrument upon which the suit is brought, but may prove other transactions connected with it; as that other notes existed, which have been cancelled, and the consideration of which entered into, and formed a part of the note sued upon.

From the ambiguous manner in which the facts are stated in the bill of exceptions, we are at some loss to know, what the

point was, intended to be raised by the first charge. Presuming the fact to be, that the plaintiff acquired the note without knowledge of the usury, and that the defendants executed another note in *lieu* of it, the case of Cameron and Johnson v. Nall, 3 Ala. Rep. 158, is an authority in point, to show, that the substituted note, would not be affected by the original usurious consideration, but that the principal, and legal interest, might be recovered.

So in regard to the facts upon which the last charge of the Court is prayed. Understanding the bill of exceptions to state, that the promise of the defendant to pay principal and interest, if the holder would wait until the end of the year, was made to one who had acquired the note, by purchase, or otherwise, and not to the original payee, the delay would be a sufficient consideration to entitle the holder to recover; as he might thereby lose his recourse upon the person from whom he obtained the note.

Such a promise, made to the person with whom the usurious contract was made, would not be binding on the promissor, as it would be without consideration.

From the interpretation we put upon the bill of exceptions, the Court erred in both the charges given to the jury, and its judgment is therefore reversed and the cause remanded.

HODGES v. THE STATE.

1. It is competent for the clerk of a Circuit Court to issue a writ of error to remove to this Court, a cause in which a final judgment has been rendered upon a forfeited recognizance, or for a fine or penalty, without a previous order for that purpose.
2. Wherever a person charged with a criminal offence, is put upon his trial, he is, by operation of law, committed to the custody of the sheriff, without either a general or special order for that purpose.
3. The act of 1812, merely furnishes a remedy, by which a fine assessed against a party committed to custody, may be recovered of the sheriff, &c., or their sureties, in case of escape; but in addition to this proceeding, the party guilty of a breach of official duty, might be indicted, if the facts of

the case were such as constituted an offence at common law: consequently, the provisions of the Penal Code, which provide for the punishment of escapes, are merely substitutes for the common law, and do not abrogate the act of 1812.

4. The act of 1815, requires the county treaserer to proceed against delinquent sheriffs, &c., for the recovery of fines, &c.; consequently it is not competent for the Court in which the judgment was rendered, to institute the proceeding against the sheriff, *mero motu.*

Writ of Error to the Circuit Court of Barbour.

Pulaski Mann and Leroy Gunter, were charged in three several indictments, with assaults and batteries; on all of which they were found guilty, by the verdicts of juries. In the first case, the parties were fined eighty-five dollars each; in the second, eighteen dollars each; and in the third, twenty dollars each. Judgments were accordingly rendered against each of the defendants for the fines and cost.

It is shown by the record, by a recital of the fact, that Mann and Gunter were committed to the custody of the plaintiff in error, who was the sheriff of Barbour, and that he has omitted to retain them in custody, but suffered them to escape. Thereupon it is ordered, that rules be issued returnable to the next term, requiring the sheriff to show cause why he should not be attached for contempt in the premises. A citation was accordingly issued, executed and returned. The case thus made coming on for trial, an entry was made, reciting, that the defendant showed for cause, that said escapes were involuntary, and moreover, that there was no order of record, committing said Mann and Gunter, nor either of them, to his (defendant, Hodge's,) custody; and so it appears from an inspection of the record of the said convictions of the said Mann and Gunter, at the last term; nor is there any general order of that term, that prisoners convicted at that term, be in custody till fine and costs are paid, shown to the Court, as being upon the record of proceedings of said term. *And further*, the said Hodges showed for cause, that after the adjournment of said last term, he took the said Gunter, but finding no order of record for his detention, he released him. And now it is considered by the Court, that said showing is insufficient, and that the State of Alabama recover from the said Hodges, the sum of $259 13, for the balance of fines and costs upon said convic-

tions, of said Mann and Gunter, for which execution may issue."

Buford, for the plaintiff in error, insisted that the rights of Courts to punish for contempt, was restricted to cases of misbehavior in the presence of the Court, or for disobedience of any party, juror, witness, or officer, to some process, rule or order of such Court. [Clay's Dig. 151, § 5.]

The record shows, that there was no order for the convicts' detention; and if there had been, the remedy is by indictment, and on conviction a fine, from two hundred to one thousand dollars. [Clay's Dig. 429, § 13.]

Attorney General, for the State, moved to dismiss the writ of error because it was issued by the clerk of the Circuit Court, when the statute requires an order from this Court, or one of its Judges in vacation. [Bourne v. The State, 8 Porter's Rep. 458.]

If his motion was overruled, he insisted that the proceeding against the sheriff was authorized by the statute. [Clay's Dig. 247, §§ 4, 10.] The provision on which the plaintiff in error relies, does not repeal the previous act, but is merely cumulative. [Clay's Dig. 429, §§ 12, 13.]

The record need not have shown, that Mann, and Gunter, were committed to the sheriff by express order. It is no objection to the proceeding, that the sheriff was required to answer for a contempt; such a requisition was proper.

COLLIER, C. J.—It has been always considered, that the general law, which authorizes a clerk of the Circuit Court to issue a writ of error, to remove to this Court, a cause in which a final judgment, &c., has been rendered, embraces a case like the present. Judgments on forfeited recognizances, or fines or penalties, imposed without a previous indictment, or the verdict of a jury, have been thus revised. The provision of the Penal Code applies to judgments rendered on indictments, and does not require an application to this Court for a writ of error, where the proceeding is by motion. [Clay's Dig. 470, § 2.]

It is provided by the act of 1812, among other things, that if any person shall be committed to the custody of any sheriff, or other officer, by any of the Courts of this State, until the fine, for-

feiture or amercement, for which he was committed, shall be paid, who shall suffer him to escape, &c.; then "it shall be lawful for the Comptroller of Public Accounts, upon motion in the Circuit Court, to demand judgment against such sheriff or other officer, or their securities, for the fines, forfeitures, or amercements, mentioned in such writ, or for so much as shall be returned levied, or for the amount for which the defendant, or defendants, shall have been committed;" and such Court is authorized to give judgment accordingly, and award execution thereon. *Provided*, ten days previous notice of the motion be given. [Clay's Dig. 247, § 4.]

By the act of 1815, it is enacted that all fines and forfeitures shall thereafter be paid into the county treasury, and not into the State treasury, &c.; and the county treasurer is hereby required to proceed immediately, against any officer who shall fail to comply with the provisions of this section. [Clay's Dig. 249, § 10.]

The twelfth and thirteenth sections of the fifth chapter of the Penal Code provide, that if any sheriff, &c., having the legal custody of any person, charged with, or convicted of a criminal offence, shall voluntarily suffer, or permit, the person so charged or convicted, to escape, he shall, on conviction, be punished by imprisonment in the penitentiary, &c. And if, through negligence, he shall suffer any prisoner in his custody, upon a conviction, or upon any criminal charge, to escape, he shall, on conviction, be fined, not less than two hundred and not exceeding one thousand dollars. [Clay's Dig. 429.]

Whenever a person charged with a criminal offence is put upon his trial, he is by operation of law, committed to the custody of the sheriff, and there is no necessity for either a general or special order, mandatory to that officer. From that moment the accused is in legal custody, and the sheriff, as the executive officer, is charged with his safekeeping.

The act of 1812, merely furnishes a remedy by which the fine, &c., with which the party committed was charged, may be recovered of the sheriff, or other officer, or their sureties, in case of his escape. Its effect is to impose on them a liability *in numero*, where an escape has been suffered. But the party guilty of a breach of official duty, was still subject to an indictment, if the facts were such as to constitute an offence. So the officer

might have been twice charged, once on motion under the statute, to recover the fine, and again on indictment. This being the law, the provisions of the Penal Code prescribing the punishment for a voluntary and a negligent escape, are merely substitutes for the common law, and do not repeal or abrogate the act of 1812.

The act of 1815, directs, that "all fines and forfeitures shall thereafter be paid into the county treasury," and requires the county treasurer to proceed against delinquent officers, as it was previously the duty of the Comptroller of Public Accounts to do. The proceeding in the present case indicates that the Court *mero motu*, or, perhaps, at the instance of the solicitor, was the *actor*. This is an irregularity which we think fatal to the judgment; the motion should have been made on behalf of the county treasurer, and he should appear as the party seeking the judgment of the Court. For this defect, the judgment of the Circuit Court is reversed, and the cause remanded.

HOGAN & CO. v. REYNOLDS.

1. It is irregular to permit a witness to give evidence of the general law merchant.
2. It is not improper to permit the parties to ask a witness, whether he intended to convey to the jury a specified impression, by what he had previously stated.
3. A witness having stated, that one of the firm sued had borrowed a sum of money from a third person, of which a part had been paid from the firm effects since its dissolution, also stated, that he thought the note of the firm was given for the money so borrowed, but was not certain whether it was the note of the firm sued on, or the note of another firm, of which the same partner was a member; under these circumstances the evidence is admissible, although the note is not produced, or its absence accounted for.
4. A receipt in these terms, to wit: "Received of W. R. one of the executors of W. W. two notes of hand on W. G. & J. McN. amounting to $1750, due 1st January, 1838, which we are to collect, or return the same to said R.

with interest from the time it was due," is open to explanation by parol evidence, so as to show whether the words *with interest*, &c. was intended to refer to the return of the money, by the signers, or to the amount which was to be collected from the notes.

5. The receipt being signed by a firm, and the question being, whether all the members were bound, or only the one signing it, in the absence of all explanatory evidence, the Court should give it the construction which will operate most strongly against those purporting to be bound by it.
6. It is not within the ordinary scope of a partnership created for the mere purpose of buying and selling merchandize, to receive and undertake to collect notes.
7. If there is a distinction, as to the capacity of one partner to bind the firm, between the borrowing of money and notes, it does not apply when the borrowed note is taken for the purpose of receiving money upon it, and the money is actually received.
8. If a partner has converted the money of another to his own use, and afterwards appropriates the same sum to the purposes of the firm, the firm does not thereby become a debtor to the person whose money has been converted; but if one partner, in the firm name, but without the authority of his partners, obtains money and applies it to the use of the firm, the firm is liable the instant the appropriation is so made, although it would not be in the absence of such appropriation, because of the defect of authority.

Error to the County Court of Talladega.

Assumpsit by Reynolds, against Hogan, Hardin & Tompkins, as partners of a mercantile firm, doing business under the name of James A. Hogan & Co. The declaration, besides the general counts, contains several in which the liability of the defendants is charged to arise from a written instrument, in these terms:

"March 12th, 1838. Received of Walker Reynolds, one of the executors of the estate of William Wilson, dec'd, two notes of hand, on William Graham and John McNeil, amounting to seventeen hundred and fifty dollars, due the 1st day of January, 1838, which we are to collect, or return the same to said Reynolds, with interest from the time it was due.

Jas. A. Hogan & Co."

Harden and Tompkins pleaded the general issue, and denied, by affidavit, the execution of the instrument described in the special counts, and therein alledged to be made by them, as well as by their co-defendant.

At the trial, the plaintiff gave in evidence, articles of co-partner-

ship between all the defendants, executed in May, 1837. These articles recite, that the partnership was to be considered as formed the 1st April, 1836, and continue five years. Hogan put in $2,010 25, in goods on hand, besides certain real estate. Tompkins was to put in $5,000, $2,010 25 of which had been previously put in by one R. H. Carr, into the firm, and the remainder in money. Harden was to put in $5,000, in money. The business was to be carried on by Hogan, under the name of James A. Hogan & Co., and the profits of the business of Hogan, Simms & Kerr, was to go to the benefit of the business of Hogan & Co.

The firm could be dissolved and its business controlled by a majority of the partners. He also gave in evidence, the instrument in writing before set out, and proved that the makers of the notes therein mentioned were perfectly good, and that they were paid as soon as presented. It was also in evidence, that the firm of Hogan & Co. was a mercantile firm, of an ordinary character, in which Hogan was the active partner, and the other defendants were silent members. The firm was shown to have been dissolved in February, 1839, and its affairs committed to a trustee, named by them, for settlement.

The plaintiff offered evidence, showing that Hogan had obtained a note from one Sawyer, which called for $1,000, due from one Jenkins. Hogan had collected the money on it, and the witness who spoke of this transaction, thought the note was obtained on the firm account, but was not certain whether it was Hogan & Co. or Hogan, Carr & Co. Hogan stated at the time he procured this note, that the firm owed Jenkins, and it would answer the purpose of money. Hogan afterwards paid the witness the amount of the note then borrowed, partly in a claim the firm held against the witness, but there was no proof that this arrangement was known to the other defendants, or to the plaintiff.

The plaintiff then asked a witness, who was a merchant, whether it was within the custom of merchants, under the law merchant, for any member of a firm to borrow money in the firm name. The same question was asked of another merchant, and permitted in both witnesses to be answered in the affirmative, notwithstanding an objection by the defendants; who thereupon excepted.

The plaintiff called a witness, who stated that he had a con-

versation with defendant, Harden, whom he asked why he let Reynolds sue him. Harden replied, Reynolds had a right to sue him, he supposed, that the firm owed him money. Witness then said to Harden—but Reynolds says you promised to pay him the money. Harden replied—Reynolds told me he held the note of the firm for money, but when I came to see it, it was a receipt for the collection of notes—not a mercantile transaction, and without the scope of the partnership. The defendants then asked a witness, if Hogan could have borrowed this amount of money on his own responsibility. The witness replied, he could, from some persons. The plaintiff then asked the witness, if he desired to be understood as saying, that Hogan could have borrowed the money from Reynolds. To this question the defendant objected, but the Court permitted the witness to answer; and he then said he thought not. The defendants excepted to this.

The defendants proved that the firm had a cash capital, at its formation, of $12,000, which, with prudent management, was sufficient to sustain the business without borrowing. The same witness proved that collections were deferred in the fall and winter of 1838-9. The plaintiff then proved that Hogan had borrowed $2,000 in cash of one Ball; that a part of the money, since the dissolution of the firm, had been paid out of the firm effects, by the consent of the partners. To all this about borrowing money, the defendants objected and excepted.

The witness then stated that he thought Hogan gave Ball the note of the firm of James A. Hogan & Co., but was not certain whether it was that or the note of Hogan, Carr & Co. The defendant objected to the witness speaking of the note, until its absence was first accounted for, but the Court admitted the evidence; to which the defendant excepted. The defendants then proved, that in August or September, 1838, a dissolution of the firm was proposed, and preparatory thereto, Hogan made out a statement of what he said were the firm liabilities and assets. The witness then before the Court, produced a paper, which he said was that statement, and the defendants asked if the debt now sued for, was included in that statement. The plaintiff objected to this question, and to all evidence in relation to that paper. The Court sustained the objection, and the defendants excepted.

The witness then stated, that he was the clerk of Hogan & Co.

and familiar with their books, and that no writing within his knowledge had ever been made concerning the notes mentioned in the receipt, or their proceeds.

It was further proved, that the notes named in the receipt were collected, and their proceeds applied under Hogan's direction. Some seven or eight hundred dollars were shown to have been appropriated to the firm liabilities, and as to the remainder there was no proof as to its application; nor was there any proof that either of the other defendants knew of its appropriation to firm purposes, or of their consent that it should be so applied, save such inferences as may be drawn from the facts previously stated; nor was there any proof of objection by them, to the appropriation, further than the facts previously set out. The defendants then offered to prove, by a witness, that in a conversation had with Hogan, in reference to the subject matter of the suit, Hogan told the witness, that if the firm would not take the money he would, and buy negroes, whose increase would be worth more than the interest of the money. The plaintiff objected, and the Court excluded the evidence; to which the defendants also excepted.

This being substantially all the evidence before the jury, the defendants requested the Court to charge the jury—

1. That the plaintiff having produced the special contract, to wit, the receipt, he must recover on that receipt, or not at all.

2. That if they should believe that the receipt sued on was given without the scope of the ordinary dealings of the firm of Hogan & Co., Harden and Tompkins were not bound by it.

3. That should they believe, the firm of Hogan & Co. was a mercantile firm, engaged in the ordinary business of buying and selling merchandize, and not in the habit of giving receipts for notes for collection, then Harden and Tompkins were not bound by the receipt, unless they gave their assent to it, or in some way ratified the act.

4. That to entitle the plaintiff to recover for money collected on the notes mentioned in the receipt, (if any was collected,) and if the jury should find that the receipt was given without the scope of the ordinary patnership dealings, and that the giving it was not assented to, or sanctioned by Harden and Tompkins, the plaintiff must show that the meney was used by, or came into the firm, by the consent, or with the knowledge of Harden and Tompkins.

5. That if any money was collected from the notes, the plaintiff in no event could recover, without proving a demand of the money before suit; and if the plaintiff had failed to prove a demand, the jury should find for Harden and Tompkins on the common counts.

6. That a partner of an ordinary mercantile firm has no authority to borrow notes on other individuals, and bind the firm for their collection, or return, without the acquiesence or consent of his partners; nor does it alter the case, that the partner thus borrowing the notes, intended to use the funds arising from their collection for partnership purposes.

7. That if they should be satisfied the receipt exhibited was given without the scope of the partnership dealings, and that Harden and Tompkins never ratified the act, either directly or indirectly, then the plaintiff is not entitled to recover against them, for any money brought into the concern as the proceeds of the notes, or applied to the payment of firm debts, without their knowledge or consent.

8. If they should find that Hogan was the active partner of the concern, that did not autherize him to bind the firm, upon contracts unconnected with the business of the firm.

9. If they should believe that Harden, under the representation of the plaintiff, that he held the note of the firm of Hogan & Co., promised to pay it, this would not render the firm liable upon the receipt exhibited.

Each of these charges as asked was refused, and the jury was charged in these terms:

"A receipt by a partner of a mercantile firm, the legal import of which is to collect money on notes, is without the scope of the partnership dealings; and if the jury, after taking all the evidence should find, that this is a receipt solely, and only for collecting money on notes, then they should find for defendants. But, should the jury, from the force of evidence, as they can and may, believe, that the receipt contains such language and such terms as will imply a borrowing on the part of Hogan, from Reynolds, of money, and that the proceeds were realized from the notes, and applied to purposes of the partnership, then the receipt does come within that provision of law which says, that one partner may bind the firm, in all matters growing out of, or having reference to the business thereof. The receipt, embracing a promise to pay

interest, may be regarded by the jury, not so much a receipt for the collection of notes, as an arrangement to borrow money, as it is not usual for officers of the law, or collecting agents to pay interest, and the law will not compel them to do so, until after a demand and refusal.

"If the jury believe the arrangement was made by Hogan, to borrow money, and was not made by him in his individual capacity, and applied to his individual use, then they should find for the plaintiff.

If Hogan gave the instrument sued on, and a part of the money was applied to the debts due by the partnership, the firm is bound for the whole.

The receipt is not like the iron bed of Procrustes—it is the foundation of the action, and must be taken in connection with the other evidence in the cause; and the jury ought to consider any evidence going to show, that money was received on the notes, by Hogan, and applied to the business of the firm. That parol evidence is not admissible to vary a written instrument, but the jury will give weight to any thing which tends to substantiate it."

The refusal to give the several charges requested, and that given, were excepted to, by the defendants, and are now assigned as error, as is also the several rulings of the Court, upon the matters of evidence excepted to at the trial.

W. P. Chilton, White, and S. F; Rice, for the plaintiffs in error, contended—

1. That it was error to allow witnesses to give evidence of the law merchant.

2. It was irregular to permit the witness to give his *opinion* with reference to the fact, that Reynolds would not have lent money to Hogan individually.

3. The allowing a witness to speak of a transaction in which a note was given for borrowed money, without the production of the note, is in direct opposition to a well known rule of evidence; and in the particular instance referred to, if the paper had been produced, it might have shown the entire statement to have no connection with the suit.

4. The principal question is, whether the firm is bound by Hogan's undertaking to collect or return notes. Such acts are

not within the ordinary business of commercial partnership, and therefore the firm is not bound. [Story on Part. 165, 169, 173, 175, 221, 225; Catlin, Peoples & Co. v. Gilder's Ex. 3 Ala. Rep. 536.]

5. Nor does the fact that money thus raised without authority, is carried into the firm, make the other parties responsible. [Whitaker v. Brown, 16 Wend. 505; 8 N. Hamp. 363; 21 Wend. 365.]

6. The borrowing of notes cannot be regarded in the same light as the borrowing of money, for the reason, that there is necessarily some limit to the power to borrow. Such an act is not usual, and therefore the power to do it ought not to be inferred. [Cook v. Branch Bank at Mobile, 3 Ala. Rep. 178; Mauldin v. same, ib. 502; Fisher v. Campbell, 9 Porter, 216.] It would not be contended, that land, slaves, &c., could be borrowed, so as to bind the partnership, and it is difficult to define the distinction between such acts and this.

Peck, contra, insisted there was no error in the several points ruled at the trial.

1. It was irrelevant, perhaps, to ask any witness what the law merchant was, but certainly a correct exposition of it ought not to reverse a judgment.

2. It is a mistake to suppose that witness gave his opinion upon the probability of Reynolds trusting Hogan alone. He was merely asked if he wished to convey a particular impression to the jury, and very properly was permitted to answer, that he did not.

3. It was impossible for the witness, or for the plaintiff to produce the note given by Hogan, for borrowed money to another person. The inference clearly is, that it had been paid and cancelled; however it may be, it is not within the reason of the rule, or indeed of its letter.

4. The receipt is capable of no other construction, than that the money was to be loaned if collected. It is therefore within the general scope of the business of a mercantile firm. Collyer on Part. 103, 212, 219, Gow. 52, 53; Collyer, 215, note, 68; 1 Esp. 406.]

5. But one partner may not only bind the firm, in the ordinary acts connected with its business, but also by acts out of that

course, if done with reference to matters transacted by the firm. [Collyer, 237, 271; Gow, 76, 74; 1 Salk: 291.]

6. The appropriation of the money to firm purposes, makes the partnership responsible. [Gow, 57; 6 Conn. 497.]

7. The plaintiff was entitled to a charge, giving a construction to the receipt, and although some of the charges asked and refused, may be correct enough, as mere abstract propositions, they were properly refused, because not involved in the evidence before the jury. It is possible too, the charge given may contain propositions which are debateable, yet they could not, nor did, affect the merits, which are clearly with the plaintiff.

GOLDTHWAITE, J.—The investigation, severally, of each of the questions raised in this case, would swell our opinion to an undue length. We shall therefore limit ourselves to the decision of those points of evidence which were made at the trial, and the ascertainment of the rules by which, in our judgment, the cause ought to have been governed in the Court below.

1. It was doubtless irregular to permit any witness to give evidence of the general law merchant, and it is very possible, if the objection was made to the relevancy of such evidence, the exception would be of sufficient weight to reverse the judgment; but this point being one of no importance, as we consider the case, we decline any further expression upon it.

2. The next exception calls in question the propriety of permitting a witness to say, that his testimony was not intended to convey the impression to the jury, that he supposed the plaintiff would have lent the money to Hogan individually. We see no reason why such explanation should not have been given; the question asked of the witness was, whether Hogan, on his own responsibility, could have borrowed such a sum of money. The answer of the witness was, that he could, from some persons; and, as this was nothing more than the expression of his opinion, there was no impropriety in ascertaining if the plaintiff was intended to be included in his answer.

3. The only other exception to the evidence which is now insisted on, is, that which questions the right of the plaintiff to examine his witness, as to some money borrowed by Hogan, from one Ball, for which either the note of Hogan & Co. or of Hogan, Carr & Co. was given, because the note was not pro-

duced or accounted for. The true rule with respect to this matter, is well stated in Cowan & Hill's notes, 1209, where it is said, "but even where the law calls for the writing as the best evidence of the transaction to which it pertains, certain things relating to the writing, or the matters evinced by it, may be proved, without producing it, though they involve the fact of its existence." Thus in an action for the purchase money of a note, sold by the plaintiff to the defendant, parol evidence of the sale may be given without producing the note, or accounting for its absence. [Lamb v. Maberly, 3 Monroe, 179.] So the existence of a deed for slaves, will not prevent parol evidence from being given, without its production, for the purpose of characterising the possession which accompanied it. [Spears v. Wilson, 4 Cranch, 398; see also, Rex v. Ford, 1 Nev. & Mann. 776.]

It might also be said, in answer to this exception, that it was not affirmatively shown that the note existed, and that the ordinary presumptions were, that it was paid, and consequently cancelled, or destroyed, though we prefer our decision to rest on the general rule.

4. Having thus disposed of the preliminary questions of evidence, we shall consider the rules which must govern the cause on its merits. And, first, with respect to the effect of the receipt offered in evidence. We think undue weight is given to this, by both parties, for each seems to consider it conclusive of the case. In our judgment, it belongs to that class of writings which is open to explanation. We do not now speak of that explanation which all writings receive, from the circumstances surrounding, and attending their execution, or which arises out of the description of the parties to them; for we consider those matters as proper in all cases; and as such they are held, by elementary writers on the subject of evidence. [Philips on Ev. 543; Wigram on Ex. Ev. 59; Gresley's Eq. Ev. 201.] But we refer to that explanation, which may be given to terms of a doubtful, ambiguous, or double nature. That the notes described in the receipt, were to be collected, and that they might be returned, is very clear; but it is doubtful whether the last expression used—with interest from the time it was due—refers to the return of the money, by Hogan & Co., or to the amount which was to be collected from the notes of Graham and Mc-

Neil. It is upon the connection of this expression with the one or the other of these matters, that the *prima facie* force of the writing depends; for if those words refer to the payment of interest by Hogan & Co., it is difficult to resist the conclusion, that the parties contemplated a loan of the money, in the event of its collection; but if they refer merely to the amount to be, collected, then it is quite obvious they do not extend the meaning of what precedes them, and the receipt is one for collection only.

It would be strange indeed, if a writing of this description, which every one will admit to be so ambiguous, that it is difficult to determine what was really intended by it, should be incapable of explanation by extrinsic or parol evidence; but the principle is well settled, that such evidence is admissible. Thus, if one promises to pay another a sum of money for counsel, it shall be intended to be for counsel in law, physic or otherwise, as the promisee may be of either of those, or other professions. [Powell on Con. 384.] So it has been held, where a bequest was made of a female slave and her *increase*, that extrinsic evidence was admissible, to explain and apply the term increase, to those already born, or those to be so in future. [Reno's Ex. v. Davis, 4 H. & M. 283.] The case of Cole v. Wendall, 8 John. 116, is very similar, in principle, to the one under consideration. There, one of the parties agreed to receive from the other, sixty shares of the stock of a certain bank, on which ten dollars per share had been paid, by the seller, and he was to receive his note for $667, from the purchaser, who was to pay the remainder in cash, and an advance of five per cent. It was held, that parol evidence of the agreement between the parties wa sadmissible, to show, whether the term five per cent. advance, was applicable to the nominal amount of the shares, or the sum paid for them by the seller. These cases are entirely satisfactory, to show, that wherever language is used in a written instrument, which is capable of receiving two meanings, it is open to explanation, by parol or extrinsic evidence.

The terms made use of in this receipt, are not so clear as to authorize a Court to determine positively, and absolutely upon their meaning. We arrive thus at the conclusion, that this receipt may be explained, by extrinsic or parol evidence, so as to show what the parties intended by the doubtful terms.

5. But, however this instrument may be subject to explanation and control, by evidence *aliunde*, the question may arise as to its construction, in the event that no such evidence is given. It is a most salutary rule, and of as much force here as in any other case, that a written instrument is to be construed most strongly against the promissor; and when he has made use of language of doubtful or double import, he will not be heard to complain, that it is taken in its strongest sense. So too, as the instrument is capable of two constructions, it should receive that which will bind all the firm, as it purports to do, instead of one which will bind a single partner only. Again, the rule is, that every part of an instrument shall receive such a construction, that none of it shall be rejected as insensible, if it is capable of meaning; and this cannot be applied to the last phrase of the receipt, without construing it to mean an engagement by the firm, to pay interest upon the sum of $1,750, (if collected from Graham and McNeil,) from the time it was due from them.

6. If, however, the evidence before the jury, satisfied them, that the doubtful phrase in the receipt, referred merely to the collection of interest from Graham and McNeil, then the question would have arisen, how far the firm was bound by the act of Hogan. It certainly is not within the ordinary scope of a partnership, created for the mere purpose of buying and selling merchandize, to receive, and undertake to collect, notes on other persons; though we are not unaware that it is extensively the practice for commercial firms, in one place, to send their demands to other firms, or houses, doing business near the residences of the debtors. How far the assent, or concurrence of all the members of the firm might be presumed, from the act or correspondence of one, in the name of the firm, is not here the question, and therefore calls for no consideration. Whatever the presumptions in such a case might be, it is evident they would not be the same where the party seeking the collection, resided in the same vicinage with the house to which these demands were committed, and when he possessed the same facilities for collecting them in person, or for transmitting them to others.

7. It is conceded that one partner may bind the firm, for money borrowed in the firm name; but the power is denied to borrow notes on other individuals. We will not discuss this

point further than to say, that if there is a distinction between the borrowing of money, and notes, it does not apply, when the borrowed note is taken for the purpose of receiving money upon it; and such is actually received. No one can suppose the giving a check upon a bank, or an order, or a draft upon a third person, is not a loan of money, when that is afterwards received; and we can perceive no reasonable distinction between these cases, and the transfer of a note, followed by a similar payment.

8. It is doubtless true, that if one partner has converted money to his own use, and he afterwards appropriates the same sum to the purposes of the firm, the latter does not thereby become a debtor to him whose money has been converted; but such a state of facts is widely different from the case, where one partner, in the firm name, but without the actual authority of his partners, obtains money, and applies it to the use of the firm. The firm, in consequence of the defect of authority, might not be liable without the application of the money to firm purposes; but certainly becomes so, the instant the appropriation is made.

This summary of rules, will enable us to determine all the questions presented by the refusal to give the charges requested by the defendants, as well as the charge actually given. It is possible, that all the evidence before the jury was not sufficient to destroy the *prima facie* intendments arising out of the receipt; but we cannot say there was no evidence to be considered in that connection. We cannot, therefore, coincide in the plaintiff's view, that the charges asked are wholly abstract. Without intending to be understood as having given a critical examination to all the instructions refused, we may remark, that the second, fourth, eighth, and ninth, seem to contain propositions entirely clear; and therefore should have been given; but it would also have been proper to have accompanied them with such explanations, as would have prevented their generality from misleading the jury.

The first and fifth charges were properly refused, because the propositions therein contained are not correct, when applied to the facts of this case; and the third, because it assumes the receipt to be one for collection only. The sixth, and seventh, were also properly refused, because not in accordance with the rules deduced.

One error of the charge given to the jury is, that it leaves the *prima facie* construction of the receipt to the jury, when the Court should have declared it; but this, in all probability, did not prejudice the defendants. Another is, that the appropriation by Hogan, of a part of the money collected to the use of the firm, made it liable for the whole amount; without drawing the distinction between the receipt as one for collection only, without ratification by the other partners, and as evidence of a loan of money. The last, and possibly the most important, is, that parol evidence is not admissible to explain the doubtful terms of the receipt; for such we understood to be the effect of the charge.

Let the judgment be reversed, and the cause remanded, that further proceedings may be had, in accordance with this opinion.

[Note.—This cause was decided at June Term, 1844, and should have been published in the 6th or 7th volume of Reports.]

GILMER v. WIER.

1. One who, as administrator, improperly sues out an attachment, is liable to respond in damages personally. He cannot, by his tortious conduct, subject the estate he represents, to an action for damages.

Error to the Circuit Court of Cherokee.

The action was brought to recover damages for improperly suing out three attachments, against the defendant in error. The defendant demurred to the declaration, which was overruled by the Court, and judgment rendered for the plaintiff. The error assigned is, the overruling the demurrer to the declaration.

Moore, for plaintiff in error.

ORMOND, J.—The objection taken to the declaration is, that there is a misjoinder of counts. This objection rests upon the fact, that in one count of the declaration, the attachment is alledged to have been sued out by Gilmer, in his own name, and in two other counts, that in suing out the attachment, he described himself as the administrator of J. Waters, deceased. This is certainly not a misjoinder of counts. In all, he is proceeded against individually, and could not have been sued in any other mode. He could not be sued as the administrator of J. Waters, because describing himself as such, and to recover a debt due the estate, he improperly sued out an attachment; nor could he subject the estate to an action for damages by his tortious conduct. He was therefore liable to respond personally for the injury, and was properly sued in his individual character.

The statement in the declaration, is mere matter of description, which was not necessary, but which does not vitiate. The judgment must therefore be affirmed.

HORTON v. SMITH.

1. The mere right to personal property in the possession of a third person, which possession originated, and is continued, in good faith, is not subject to seizure under an attachment or execution; and where there is no evidence tending to prove *mala fides*, a charge to the jury, laying down the law as above stated, is not erroneous, because it omits to refer to them the *bona fides* of the adverse possession.
2. The admissions or declarations of a vendor, or assignor, of personal property, made before the sale or assignment, are evidence against his vendee, or assignee, claiming under him, immediately or remotely, either by act or operation of law, or by the act of the parties. So they are in like manner evidence against any one, coming after such admissions, or declarations made, into his place, or representing him in respect to such rights and liabilities. But the exclusion of such evidence, where it could not have worked a prejudice, will not be available on error.

3. *Semble:* A derivative purchaser, without notice, cannot be affected by a notice to his immediate vendor; and if he purchases with notice, he may protect himself by the want of notice in such vendor.

Writ of Error to the Circuit Court of Lowndes.

THE plaintiff in error sued out an attachment on the 14th October, 1842, against the estate of Lewis B. Talliaferro, who it was alledged, resided without the limits of this State; which being levied by the sheriff of Lowndes, on certain slaves, the defendant in error interposed a claim, and gave bond with surety, for the trial of the right, as provided by statute. An issue was made up, and tried by a jury, who returned a verdict for the claimant, and a judgment was rendered accordingly. At the trial, a bill of exceptions was sealed, at the instance of the plaintiff, from which it appears that the slaves in question *descended* to the wife of the defendant in attachment as *heir at law* of the estate of Nicholas Johnson, deceased, (her father;) that the defendant took possession of the slaves, and held them as such heir, during the year 1832. In 1833, he put them in possession of C. E. Talliaferro, for his son N. J. and his daughter Harriett, who removed them from Lawrence to Marengo county, where they remained up to 1836; the defendant in the meantime residing in the county of Madison. The claimant deduced a title from N. J., the son of the defendant, and introduced evidence tending to show a parol gift of the latter, to his son, previous to his (claimant's) purchase, and before the debt due the plaintiff was contracted.

The plaintiff then offered a deed, executed by the defendant, which conveyed the slaves in question to C. E. Talliaferro, as trustee for the use of N. J. Talliaferro. This deed was duly acknowledged and certified, according to law, on the 23d September, 1840. It provides that the trustee shall hold the slaves embraced by it, in special trust and confidence, to the following uses and intents, viz: that he shall annually pay over to the *cestui que trust*, the hire and profits of the slaves, until he shall attain the age of twenty one years; or the trustee may, in his discretion, permit him to possess, employ, and work them, until he attains the age of twenty-one years. Whenever the *cestui que trust* shall attain to that age, it shall be the duty of the trustee, and he is directed, to convey and deliver the slaves to him in fee: to have

and to hold them, and the increase of the females, to the *cestui que trust*, and his heirs.

Proof was also adduced, tending to show, that there never had been a parol gift, from the defendant in attachment to his son, but there existed a mere intention to give, which was not consummated until the execution of the deed above recited. It was also shown, that N. J. Talliaferro had sold the slaves to the claimant, after that deed was made, before he was twenty-one years of age; and that he died previous to attaining his majority.

The plaintiff prayed the Court to charge the jury, that if they believed, from the testimony, that the deed constituted the only gift of the slaves, from the defendant in attachment, to the vendor of the claimant, and that the latter had derived title to them in no other way than under that deed; that he sold the slaves to claimant, and died before he was twenty-one years of age, then the slaves were the property of the defendant in attachment, subject to his debts, and they must so find by their verdict; which charge the Court refused to give.

The Court charged the jury, that if they found the facts as stated in the instruction above prayed, then the defendant in attachment would have a reversionary interest in the slaves, which his creditors could not reach in this proceeding, and which no one could recover, but by suit in the name of the defendant himself.

In the course of the trial, the plaintiff offered to prove that N. J. Talliaferro, while he had possession of the slaves, and before he had sold them to the claimant, but not in his presence, or to his knowledge, said that the slaves had been given to him by his father, after the plaintiff's and other debts then in execution, in the sheriff's hands, had been contracted, and subsequent to the date of the parol gift attempted to be established. But this testimony was rejected by the Court, &c.

T. J. Judge for the plaintiff in error, insisted that the death of N. J. Talliaferro, before he became twenty-one years old, caused the slaves embraced by the deed, to revert to to the defendant in attachment; and having a legal interest which would support an action at law, it might be levied on at the suit of his creditor. True, the declarations of a vendor, are not admissible to defeat a title which he has conveyed; but what he has said about his title

while in possession of the property, is always received as evidence.

N. Cook, for the defendant in error, contended, that the absolute estate in the slaves vested in N. J. Talliaferro, without reference to his age, at the time of his death, and the distributees provided by the statute, in cases of intestacy, became entitled; and the father could not take, if there were children of the intestate, or brothers and sisters surviving. *Further*, if the father took a reversionary interest, or, as a distributee, he had no such right as could be sold under attachment or execution.

He insisted that the declarations of a vendor of real property were, under some circumstances, competent evidence, but the rule had not been extended so far as to admit such evidence, where personal property was the subject of the sale. He cited, 5 Jacob's Law Dic. 446-7, 526; Sugden on Powers, 81; 1 Mad. Chan. 252-3; 1 Ala. Rep. N. S. 582; 11 Pick. Rep. 50; 7 Cow. Rep. 752; 8 Wend. Rep. 490; 1 Mass. Rep. 165; 1 Esp. Rep. 357; 2 Ala. Rep. 526; 1 Starkie's Ev. 306-7, note, (1); 2 Ala. Rep. 648, 684.

COLLIER, C. J.—In Wier v. Davis and Humphries, 4 Ala. Rep, 442, it appears, that an administratrix sold, at private sale, a slave belonging to the estate of her intestate; that afterwards, a creditor obtained a judgment against her, in her representative character, and caused an execution issued thereon, to be levied on the slave, in the possession of a person who had purchased from the vendee of the administratrix. It was held, that an administrator is not authorized to sell the personal estate of his intestate at private sale, and the purchaser, under such circumstances, does not acquire a valid title. But the Court said, although the title of the estate is not divested by the unauthorized sale, yet it does not follow that a creditor can subject the property to sale, under execution. "We have never understood, that an execution against the goods and chattels of any person, could be so used as to transfer a mere title, unaccompanied by the possession. It is obvious, that such a rule would be liable to abuse, from collusive arrangements, by which a person out of possession, and with a doubtful title, would substitute another in his place, clothed with the more imposing title of purchase under a sheriff's sale.

Added to this advantage, the possession itself would be changed by the seizure, and transferred to the purchaser." *Further*— "The relative condition of the parties would be entirely reversed, and the unquestioned possession which before was held under a defective title, would be turned into a mere right of action. We apprehend it is well settled that the mere right of action of a defendant in execution to personal property is not the subject of a levy. [Commonwealth v. Abel, 6 J. J. Marsh. 476; Thomas v. Thomas, 2 Marsh. Rep. 430, and cases there cited."]

In the case from which we have so largely quoted, the Court also cite Goodwin v. Lloyd, 8 Porter, 237; Brown v. Lipscomb, 9 id. 462; in which it was determined that a person who has a mere right of action to personal property cannot transfer it, so as to authorize a suit in the name of the purchaser; and say that it is always a question for the jury, whether the adverse possession is *bona fide;* if this is wanting, the transfer, whether by sale or execution will be inoperative.

We have cited thus, at length the case reported in 4 Ala. Reports, because it seems to us to be conclusive of the present, both upon the charge given and refused. The facts show that the claimant holds the slaves in question, under a title adverse to the defendant in attachment; whether it be superior, or not, is immaterial in the present inquiry; for the conflict of title depends, not upon the fact, that one is better than the other, but upon the opposite pretensions which the parties set up to the same object.

It is not necessary, in the posture in which this case comes before us, to consider whether the slaves conveyed by the deed, in trust for N. J. Talliaferro, reverted to the donor by the death of his son, during his minority. If this be so, the interest of the defendant in attachment, we have seen, is a mere right of property, not acquiesed in by the party in possession, and consequently not liable to seizure, by mesne or final process.

The charge given, it is true, does not refer the *bona fides* of the possession of the claimant to the jury, but assuming that it originated, and is continued in good faith, the Court say, that the reversionary interest of the defendant can't be reached, by an attachment sued out at the suit of his creditor. This charge, if there was evidence tending to prove *mala fides*, would be objectionable, but as there was no such proof, it was not necessary to embarrass the inquiries of the jury, by laying down the law upon a point which did not arise out of the evidence.

The admissions or declarations of the assignor, vendor, or holder of personal property, made before the sale, assignment, or other departure with his interest, are evidence against his vendee, assignee, or other person claiming under him, immediately or remotely, either by act and operation of law, or by the acts of the parties. And his declarations, with regard to his rights and liabilities, are in like manner evidence against any one coming after such declarations made, into his place, or representing him in respect to such rights and liabilities. In case of a sale, it is said, that such declarations of the vendor made previous thereto, as would be evidence against himself, are also admissible against his vendee. And this without regard to the question, whether the vendor be a competent witness, alive, capable of attending Court, and within reach of its process. The cases on this point, are collected by Cowen & Hill, in their notes to Phillips on Evidence, (2 vol. 596 to 603, and 656 to 669.) This statement of the rule will show, that the evidence of the declarations of the claimant's vendor were admissible upon principle; and the only remaining question is, was the plaintiff prejudiced by their exclusion.

In Fenno, et al. v. Sayre & Converse, 3 Ala. Rep. 458, we held, that a derivative purchaser, without notice, cannot be affected by a notice to his immediate vendor; and if he purchases with notice, he may protect himself by the want of notice in such vendor. Sugden says, that although a deed be merely voluntary, or fraudulent in its creation, and avoidable by a purchaser, viz: would become void by a person purchasing the estate, yet it may become good by matter *ex post facto;* as, if a man make a feoffment by covin, or without any valuable consideration, and then the first feoffor enter and make a feoffment, for a valuable consideration; the feofee of the first feofee, shall hold the lands, not the feofee of the first feoffor; for although the estate of the first feoffee was, in its creation covinous, or voluntary, and therefore voidable, yet when he enfeoffed a person for a valuable consideration, such person shall be preferred before the last." [Sugden on Vendors, 471; Bumpass v. Platner, 1 Johns. Ch. Rep. 212; Rochelle v. Harrison, 8 Porter's Rep. 351; Eddins v. Wilson, 1 Ala, Rep. N. S. 237.] Now if the claimant was a *bona fide* purchaser, without notice of a fraud, or of facts, which the law considers sufficient to establish it, or from which it is inferrable, then he could not be affected by a notice to his vendor. There is nothing

in the record, as we before remarked, on which the imputation of unfairness in the claimant's purchase can rest. This being assumed, the liability of the slaves to the attachment of the plaintiff, cannot be maintained; for then the claimant's possession would be *bona fide*, under a claim of right, honestly acquired, which, we have seen, cannot be divested, by the levy of an attachment, or execution. The rejection of the evidence then, did not injuriously affect the plaintiff. The judgment of the Circuit Court is consequently affirmed.

CRAWFORD v. THE BRANCH BANK AT MOBILE.

1. The Bank of the State and its Branches, being public property, its books are public writings, and when the books themselves would be evidence, if produced, sworn copies are admissible in evidence.
2. A clerk of the Bank cannot testify to facts of which he has no knowledge, from notes, or *memoranda*, taken from the books of the Bank.

Error to the Circuit Court of Mobile.

Motion by the Bank, against the plaintiff in error, as maker of a promissory note. The defendant appeared and issue was joined, on the plea of payment. The defendant, as appears from a bill of exceptions, introduced the Cashier of the Bank, and asked him, if he had produced the books, agreements, &c., connected with a shipment of cotton by the Bank, and produced the *subpoena* executed on him, and the President, requiring them to produce them. The books not being produced, the Court allowed the defendant to examine the witness as to their contents, who testified that he had made but a partial examination of their contents, and could not well answer. That he inferred from the words, "on cotton," written on the back of the book, in red ink, that the note was received in bank, in connection with a shipment of cotton by the defendant, through the bank; that the writing was made by a clerk of the Bank, and that the transactions,

termed cotton transactions, were kept separate, from the ordinary accounts of the Bank. That he was of the impression, that the Bank had received 190 bags of cotton of the defendant, for shipment, but did not know to whom shipped, when sold, nor the price of cotton in the market. The defendant then proved the value of cotton in the market, and the average receipts by another witness.

The plaintiff, in reply, introduced a clerk of the Bank, who testified, that he was not a clerk in the Bank at the date of the transaction referred to; that he had made some of the entries in these books, and was not the keeper of them, but had access to them. He produced memorandums which he had just taken, shewing both the description of a draft, and the note in dispute, which note he stated had been discounted by the Bank, on the day of its date, and his memorandum stated the amount that had been paid for them; these he stated, were based on a shipment of cotton. He further testified, to a note having been discounted in December, 1840, to settle the balance on the cotton shipment. He was asked whether the last note was taken to settle the whole transaction, or the balance due on the draft, but could not answer with precision, and could not tell what the cotton sold for.

When this examination commenced, the defendant's counsel objected to any question being asked apparent on the books or papers of the Bank, and insisted that the books and papers, or sworn copies at least, should be produced, and the testimony of the clerk was not competent; but the Court overruled the objection, and permitted the witness to speak from the memorandums taken from the books; to all which the defendant excepted. The plaintiff had judgment, from which this writ is prosecuted.

The plaintiff in error filed a written argument, in which he relied upon the following authorities: 4 Ala. Rep. 159; Washington C. C. R. 51; 2 Sumner, 453; 1 Peters, 596; 9 Wheaton, 558; 3 Robinson's Law. R. 33; 3 Watts & Ser. 291; 5 Ala. Rep. 784; 1 Phillips Ev. 290; 4 Ala. Rep. 46.

Dargan, contra.

ORMOND, J.—An exception to the general rule, that the best evidence must be produced, obtains in the case of public

writings, as it would be improper to permit them to be transported from place to place. [1 Phillips Ev. 428.] In England, it has been held, that the books of the East India Company, and the Bank of England are, for some purposes considered as public writings, from the interest the public have in them, and so far as the books themselves would be evidence, if produced, sworn copies may be admitted in evidence. See the authorities referred to by Phillips at page 428, and see also, 1 Starkie, 157; Mann v. Cary, 3 Salkeld, 155; Philadelphia Bank v. Officer, 12; S. & R. 49; Ridgeway v. F. Bank of B. County, ib. 256.

The Bank of the State of Alabama, and its Branches, are the property of the public, and there can be no doubt, that its books are public writings, within the meaning of the rule, and that where the books themselves would be evidence, if produced, sworn copies may be received. How far the entries on the books of the Bank would be evidence, either for or against it, is a question not now before us.

In the present case, a clerk of the Bank was permitted, from *memoranda* which he had taken from the books, to give parol evidence of the facts there stated, on the part of the Bank. We understand the bill of exceptions to be, not that the clerk produced in Court, a copy from the books of the Bank, of the fact to be proved, but that he had taken *memoranda*, or notes, from the books, from which he was permitted to give parol evidence of the facts, of which he had no knowledge, further than as he found them recorded on the books of the Bank. For this error, the judgment must be reversed and the cause remanded.

HOUSTON v. FRAZIER.

1. L. was indebted to F., and in payment, sold him a promissory note, but without indorsement, on A. This note was collected of M. as an attorney, but the suit thereon was in the name of L. and did not show that any one else was interested therein. F. demanded the money of M. after he received it, and while H., who was about to become L.'s administrator, was present, informing the latter that he should claim the money of him, if he

received it; to which M. replied that he could not recognize the right of any one to the money but L.'s administrator. H. administered, received the money of M., and returned it in the inventory as a part of L.'s estate: *Held*, that *assumpsit* for money had and received, would lie against H., in his individual capacity; that the notice, and subsequent receipt and appropriation of the money, being a conversion of it, rendered a further demand unnecessary.

Writ of Error to the Circuit Court of Sumter.

The defendant in error declared against the plaintiff in assumpsit, for money had and received. On the trial before the jury, the defendant below excepted to the ruling of the Court. It is shown by the bill of exceptions, that the plaintiff proved, in September or October, 1840, he paid a debt of Bryan Lavender, for $215, and Lavender, in order to refund the same, in part, agreed to sell to the plaintiff a promissory note on David M. Abbott, and the note was accordingly passed to him, but without indorsement. This note was collected by suit, by John W. Mann, an attorney at law, but the record does not show, that any other person was interested in its recovery, than Lavender, who was the plaintiff. While the money was in the sheriff's hands, and after he had paid it over to Mann, the plaintiff in this action demanded it of Mann, but he refused to pay, assigning as a reason that he knew nothing of his right to it, and could not recognize the title of any one but Lavender's administrator. The plaintiff once demanded the money of Mann in the presence of the defendant, and notified the latter, who it was understood was about to administer, that he should claim the money of him, when he received it.

The money was not demanded, except as stated, before the institution of this suit; nor did it appear that the defendant ever refused to pay, or deny the plaintiff's right to the money, though he returned the same in his inventory as the property of Lavender's estate.

The defendant's counsel prayed the Court to charge the jury as follows: 1. If the money in question was collected by Mann, as the property of Lavender, and the defendant received it as assets of the intestate's estate, and so returned it, in his inventory, the plaintiff cannot recover in this action. 2. To make the defendant liable to an action, it was necessary for the plaintiff to show, that he demanded the money of him, or that he had disclaimed a

liability to pay the same. Both these charges were refused, and the Court instructed the jury, that if the plaintiff agreed with Lavender for the purchase of the note, and the money thereon due, and the note was delivered to the plaintiff, and the defendant was informed before he received the money, that the plaintiff claimed it, then a special demand was not necessary, to entitle the latter to maintain the action, and to recover the money, and interest. The jury returned a verdict for the plaintiff, and judgment was rendered accordingly.

W. H. Green, for the plaintiff in error, made the following points: 1. The defendant below received the money as an agent, or trustee, and a demand must have preceded the action. [Sally's adm'rs v. Capps, 1 Ala. Rep. N. S. 131; Stewart & Pratt v. Frazier, 5 id, 114.] 2. The money being received by the defendant, as administrator, and so returned in his inventory, the action cannot be supported. [Yarborough, use, &c. v. Wise, administrator, 5 Ala. Rep. 292.] 3. There was no privity of contract between the plaintiff and defendant, and the action if maintainable at all, should have been brought against him in his representative character. 4. As the money was collected for the defendant's intestate, he did right in receiving it; the plaintiff produced no evidence of his title to it, and by not demanding it after the receipt of it by the defendant, the latter might infer that he had abandoned all claim to it. 5. The plaintiff should have presented his demand to Lavender's administrator, as a creditor of the estate, and the defendant did not, by the receipt of money, become personally chargeable with the debt and interest. [Porter v. Nash, 1 Ala. Rep. 452.] 6. Even admitting that the note was delivered by Lavender to the plaintiff, the fair inference from the delivery by him to Mann, is, that he again became its proprietor.

R. H. Smith, for the defendant in error, insisted—1. In the absence of direct proof, it is inferrable, that the note was transferred by Lavender to the plaintiff before suit brought. 2. Mann peremptorily refused to pay the money to the plaintiff, without reference to his right to it, saying he would pay none but Lavender's administrator. This rendered a further demand of Mann unnecessary. 3. The defendant retained the money, not as a bailee, but under a claim adverse to plaintiff's, and with a full

knowledge of it, and to maintain the action a demand was not necessary. 4. If the money was received as assets, and had been so disposed of, and the estate of Lawrence was insolvent, or finally settled, perhaps the plaintiff would be remediless; but the facts do not show such to be the predicament of this case. 5. The objection of a want of privity between plaintiff and defendant, cannot be supported; Mann might have been sued by the plaintiff, and the defendant is in the same situation, and liable to the same remedies. If the defendant has been guilty of a tort, that may be waived and assumpsit maintained. 6. There was no necessity for suing the defendant as administrator; if he did not receive the money wrongfully, his conversion was tortious. [2 Lomax Ex'rs, 273.] 7. If the action can be surported, the right to recover interest necessarily follows. [Porter v. Nash, 1 Ala. Rep. 452.] The counsel also cited, Black v. Briggs, 6 Ala. Rep. 687; Stewart & Pratt v. Frazier, 5 Ala. Rep. 114.

COLLIER, C. J.—The action for money had and received, has been assimilated to a bill in equity; and it is said, that whenever the defendant has received money, to which the plaintiff is in justice and equity entitled, the law implies a debt, and gives this action *quasi ex contractu.* Hence it has been held, that the plaintiff is entitled to recover, where he can show, that the defendant has received money belonging to him under any fraud, or pretence, [Cowp. Rep. 795; 2 Burr. Rep. 1008; 4 M. & S. Rep. 478; Bogart v. Nevins, 6 Sergt. & R. Rep. 369; Mowatt, et al. v. Wright, 1 Wend. Rep. 360; The Union Bank v. The U. S. Bank, 3 Mass. Rep. 74; Murphy v. Barron, 1 H. & Gill's 258; Tevis v. Brown, 3 J. J. Marsh. Rep. 175; Guthrie v. Hyatt, 1 Harr. Rep. 447.] And there need be no privity of contract between the parties, in order to support the action, except that which results from one man having another's money, he has not a right, conscientiously, to retain. [Eagle Bank v. Smith, 5 Conn. Rep. 71; Hall v. Marston, 17 Mass. Rep. 579; Mason v. Waite, id. 563.]

Where one receives money, to which a third person, whose agent he professes to be, has no right, and he have notice not to pay it over to him, an action for money had and received lies against such agent. [Garland v. Salem Bank, 9 Mass. Rep. 408.] But if it is paid over, with intent to pass it to the credit of the

principal, before notice is given to the agent, in general, no action will lie against the latter for its recovery. [Frye v. Lockwood, 4 Cow. Rep. 454; Fowler v. Shearer, 7 Mass. Rep. 14; Pool v. Adkisson, 1 Dana's Rep. 117; Dickens v. Jones, 6 Yerger's Rep. 483; Elliott v. Swartwout, 10 Pet. Rep. 137; Edwards v. Hadding, 5 Taunt. 815; see also, 8 Taunt. Rep. 136; Cowp. Rep. 565; 3 M. & S. Rep. 344.]

So it is laid down generally, that the plaintiff may recover in any case where the defendant has, by fraud or deceit, received money belonging to him; for he may waive the tort, and rely upon the contract, which the law implies for him. [2 Starkie's Ev. 109, 110, and cases there cited.]

We will now consider the case in reference to the principles we have stated. It may be assumed that the note on Abbott became the property of the plaintiff, by the agreement between Lavender and himself; assumed, we say, because, whether such was the fact, was an inquiry which was submitted to the jury, and their verdict is an affirmation of its truth. This question being disposed of, it is clear that the plaintiff became entitled to the money collected on the note; and this although the action brought for its recovery, was in the name of Lavender, without indicating upon the record the plaintiff's interest. The money in the hands of Mann, was the property of the plaintiff, and his right to it was not divested by the payment of the defendant. If the latter had received it in his representative character, and it had been appropriated in the regular course of administration, before he received notice of the plaintiff's claim, then he would not have been liable, upon the principle, that an agent, who receives money in that character, is not answerable for it to a third person, if he has paid it over to his principal before he has notice of the adverse claim.

Here, the plaintiff not only demanded the money of Mann, but informed the defendant that it was his property, and he should claim it from him, if he received it. True, the defendant had not then administered, but he was about administering, and the remark was made to him in view of such a state of things. This was quite sufficient to protect the interest of the plaintiff, and should have induced the defendant not to treat the money as assets of his intestate's estate. Such an appropriation of it was a conversion, clearly manifesting a disregard of the plaintiff's claim, and amounted to a refusal to account with him.

It is a principle of law recognized by us, whenever the point has been made, that an agent who collects money, in the course of some lawful employment, is not liable to an action, until a demand has been made, or something equivalent has been done. But the notice in the present case, and the appropriation of the money was equivalent to a demand, or, rather, showed a conversion of it, and a determination not to pay it to the plaintiff; and in such case the law holds a demand to be unnecessary.

In respect to the objection that the defendant should have been charged in his representative character, we think it is not well taken. If an administrator becomes possessed of personal property, as a part of his intestate's estate, and after demand made, converts it, either to his own purposes, or in the course of administration, an action of trover will lie against him, *personally*. This rule is too well established to require the citation of authority to support it. If the law were otherwise, and an administrator could only be charged in his fiduciary character, the rightful owner of a chattel might lose it, without remuneration, if the estate were insolvent. The principle, in respect to a wrongful appropriation of money by an administrator, is precisely the same.

From this view, it results that the County Court did not misapprehend the law to the prejudice of the defendant below, and its judgment is therefore affirmed.

McGEHEE v. McGEHEE.

1. The Court will not permit the sheriff to amend his return, after judgment by default, so as to show that the writ was not executed, unless it were shown that irreparable injury would follow from permitting the judgment to stand, and then only upon terms which would not work a discontinuance. It does not vary the case, that the motion is made by the defendant.
2. Whether the remedy in such a case must not be sought by mandamus, if the Court below improperly refuses to permit the amendment—*Quere?*

Error to the Circuit Court of Lowndes.

HAYNE, for the plaintiff in error.

ORMOND, J.—After judgment rendered in the Court below, by default, the defendant moved the Court, to permit the sheriff to amend his return upon the writ, upon his suggestion, that it was returned, executed, by mistake, and that the writ had never been served on the defendant. The Court refused to permit the return to be amended, and the defendant excepted.

In Watkins v. Gayle, 4 Ala. Rep. 153, we determined that the sheriff had not the right to amend his return after a judgment, when the effect would be to make the judgment erroneous. Here, the motion was made by the defendant; but we do not perceive that the case is materially varied, by the substitution of the defendant, for the sheriff, as his consent could doubtless always be obtained. If it were shown that irreparable injury would be sustained, by permitting the judgment to stand, as for example, if it were made to appear, that the sheriff could not respond in damages, it would be the duty of the Court to set aside the return of the sheriff, upon such terms as would prevent a discontinuance of the action.

We have not thought it necessary to consider, whether error would lie in such a case as the present, or whether redress in a proper case must not be sought by *mandamus*, because we are satisfied, that the decision of the Court was correct.

Let the judgment be affirmed.

HUFFAKER v. BORING.

1. In the complaint before a justice of the peace, it was alledged, that the plaintiff "has the peaceable possession of the north east quarter of section five, township eight, range eleven, east, in the Coosa land district, in the west part of said quarter, being and lying in the State and county aforesaid, dwelling house and other buildings, and fifty acres of land cleared, more or less;" and after alledging the forcible entry and detainer of the premises, the complaint proceeds thus, viz: "detaining and holding the same by

such words, circumstances, or acting, as had a material tendency to excite fear or apprehension of danger." *Held*—1. That the description of the premises was sufficiently specific. 2. That the allegation of force was as direct and full as the statute requires.

2. A witness, on the trial of a forcible entry and detainer, produced certain articles of agreement, entered into between himself and the plaintiff, by which the latter stipulated to keep him in the peaceable possession of the premises in question, until the first day of the succeeding year, (1844;) at which time witness undertook to deliver peaceable possession of the land to the plaintiff. Witness further stated, that he received an equivalent for the undertaking on his part, and accordingly gave up the possession for the plaintiff's benefit, even before the day agreed on. One of the subscribing witnesses also proved the execution of the agreement. *Held*, that the writing was admissible to show the plaintiff's possession, and how acquired; and that its execution might be proved, either by a party to it, or a subscribing witness.
3. The testimony of a witness, in a proceeding for a forcible entry and detainer, that he "had fodder on the premises by plaintiff's leave, and plaintiff told witness, that he could have the land, or part of it, during the year," &c., is admissible as to the first branch, viz: that witness had fodder on the premises by plaintiff's permission; because this tends to show an actual possession; but inadmissible as to the second, because it amounts to nothing more than a mere assertion of a right by the plaintiff. COLLIER, C. J. thought the testimony inadmissible *in toto*.
4. A verdict and judgment in the following words, to wit: "We, the jury, find for the plaintiff. Upon which judgment passed for the plaintiff, for the premises, and that defendant, George L. Huffaker, pay all costs," though not formal, does not authorise a reversal of the judgment on *certiorari*.

Error to the Circuit Court of Cherokee.

THIS was a proceeding under the statute, at the suit of the defendant below, for a forcible entry and detainer. The complaint states, that the plaintiff below "was in peaceable possession of the north east quarter of section five, township eight, range eleven, east, in the Coosa land district, in the west part of said quarter, being and lying in the State and county aforesaid, dwelling house and other buildings, and fifty acres of land cleared, more or less." *Further*, after alledging the forcible entry and detainer of the premises, the complaint then alledges the "detaining and holding the same, by such words, circumstances, or actings, as had a material tendency to excite fear, or apprehension of danger."

The defendant, previous to pleading before the justice, moved to quash the complaint for defects apparent thereon; but this motion was overruled, and the case submitted to a jury, who returned a verdict subscribed by their foreman, in these words; "We, the jury, find for the plaintiff. Upon which," (as the justices entry recites,) "judgment passed for the plaintiff for the premises, and that the defendant, George L. Huffaker pay all costs." On the trial, objections were made to certain evidence adduced by the plaintiff. It appears that a witness introduced by him stated, that he had been in possession of the premises for the last four or five years, that he became bound to give the possession to plaintiff, and that he did give it up for his benefit, with the expectation that a third person, (whose name he mentioned,) would occupy it as a tenant. The witness was permitted to introduce, and read articles of agreement between the plaintiff and another of the first part, and himself of the second part, by which the parties of the first part, undertook to keep the party of the second part in the peaceable possession of all the premises, on the north-west side of a creek, running through the north-east quarter of section five, township eight, and range eleven, east, in the Coosa land district, until the 1st day of January, A. D. 1844; at which time the party of the second part, obliged himself to deliver peaceable possession of the same land, to the parties of the first part. This agreement is dated the 8th April, 1843, and is signed and sealed by the respective parties. The defendant objected to the admissibility of this writing generally, and particularly, because it was irrelevant, and not proved: the justice was also requested to cause the same to be withdrawn from the jury; but the objections and request were denied, and the witness was permitted to state that he gave up the possession for the benefit of the plaintiff previous to the first day of January, 1844, and that the plaintiff had paid him forty dollars, and the rent of the land one year, for the possession.

Plaintiff then offered another witness, who testified, that plaintiff was never known, by him, to be in possession of the premises. Plaintiff was then permitted to show, notwithstanding an objection by the defendant, that the witness had fodder on the premises, by his permission, and that the plaintiff told the witness, that he could have the land, or part of it, during the year 1844.

Plaintiff was also permitted to introduce one of the subscribing witnesses to the written agreement above recited, to prove the

same; he also proved that the defendant told the plaintiff, that he could do nothing with the person from whom the latter acquired possession, and that the plaintiff might make the best trade he could with him.

The case was removed by *certiorari* to the Circuit Court, where the judgment of the justice of the peace was affirmed, and to revise the latter judgment, a writ of error is prosecuted to this Court.

S. F. Rice, for plaintiff in error, made the following points: 1. The complaint is insufficient; it does not describe the lands in controversy, with such certainty as to identify them, nor does it alledge force in the entry and detention. 2. The articles of agreement, and the evidence explanatory thereof, together with all the oral testimony objected to, was improperly allowed to go to the jury. 3. The verdict does not support the judgment, and the judgment itself is too defective to authorize an execution. He cited McRae v. Tilman, et al. 6 Ala. Rep. 487; Clay's Dig. 252, § 13.

No Counsel appeared for the defendant in error.

COLLIER, C. J.—In Wright v. Lyle, 4 Ala. Rep. 112, the complaint stated, that the plaintiff "was in possession of a certain messuage and parcel of land, with the appurtenances, containing thirty acres, be the same more or less, adjoining Thomas B. Watts and others, in the county of De Kalb, until James C. Wright, on &c., unlawfully entered thereupon, and forcibly and unlawfully detains and keeps possession of said land, and appurtenances, &c." This Court determined that the description of the land was not sufficiently definite, but held, that the allegation of force showed an unlawful detainer. In McRae v. Tilman & others, 6 Ala. Rep. 486, the lands were described in the complaint, as "a certain messuage with the appurtenances and lands, situate, lying and being in, and a part of, township 14, range 1, west, and section 9 S. W. qr. 80, lying in the county aforesaid, having had lawful and peaceable possession of the said messuage and lands for the space of five years," &c. Here, too, it was determined that the description of the land was too general; and not being aided by the verdict and judgment, the proceedings before the justice were set aside.

The boundaries of the land alledged to be forcibly entered upon, it is said, need not be specially set out, and a warrant was adjudged to be sufficiently certain, which charged the entry "by Moore on one dwelling house, one kitchen, one smoke house, one tobacco house, one stable, one corn house, and sixty acres of arable land, twenty acres of pasture land, and forty acres of woodland, lying in the county of Madison, on the waters of Muddy creek; all of which was in the peaceable possession of Massie." [Moore v. Massie, 3 Litt. Rep. 296.]

In respect to the quantum of force necessary to sustain the proceedings for a forcible entry and detainer, it has been held, that the bare entry on the possession of another, (with or without title,) without his consent, is, in contemplation of law, a forcible entry. [Brumfield v. Reynolds, 4 Bibb's Rep. 388; Henry v. Clark, id. 420; Chiles & Co. v. Stephens, 3 Marsh. Rep. 347.] So, a mere refusal to restore the premises, is in itself force, within the statute. [Ewing v, Bowling, 2 Marsh. Rep. 35; see, also, Swartzwelder v. U. S. Bank, 1 J. J. Marsh. Rep. 44.]

Our previous decisions which have been cited, we think, are clearly distinguishable from the case now before us. In the first, the premises were described as adjoining Watts and others; whether on the north, south or where else was not stated, nor was the locality of Watts shown; and for any thing appearing to the contrary, he may have had a dozen tracts of land in De Kalb county. In the second case, a messuage being in and a part of a quarter section, was alledged to be forcibly detained, without stating how much, or where situate within the same. But in the case at bar, the premises are described as fifty acres, situate within the west part of a quarter section. This description, we think, is sufficiently specific—perhaps as much so as was practicable, unless its precise location could have been ascertained by a survey; and if the party in possession was perverse, it would not be easy to make a survey against his consent.

The allegation as to the forcible entry and detention, alledges force, quite as directly and fully as the law requires. This is so clear, from a comparison of the complaint with the statute, as to relieve us from the necessity of endeavoring to make it plainer. The second section prescribes the cases, in which forcible entry and detainer is the appropriate remedy, and the seventh section points out the essential constituents of the complaint. [Clay's Dig. 250, 251.]

The written agreement, and all the evidence relating thereto, and to the possession which it was intended to confer on the plaintiff, were clearly admissible. The object of this evidence, was merely to show the peaceable possession of the plaintiff, at the time the entry was made by the defendant, and its effect was to prove, that the person who relinquished the possession, had himself occupied the premises for several years, and parted with them to the plaintiff under a contract. In this point of view, the defendant cannot be heard to object, that he was not a party to the writing, any more than the defendant in an action to try the title, could oppose the introduction of the documentary evidence of the plaintiff, because it did not emanate from himself, or he was not a party to it. As to the execution of the writing, this has been proved by the party who executed it, and thereby parted with his interest in the premises to the plaintiff; in addition to this, one of the subscribing witnesses afterwards proved it. Its genuineness, then, was twice established. [Falls & Caldwell v. Gaither, 9 Porter's Rep. 605.]

But the evidence that a witness "had fodder on the premises by plaintiff's leave, and plaintiff told witness that he could have the land," &c., was inadmissible to prove the plaintiff's possession, or the defendant's entry. It was not offered as the declaration of a party constituting part of the *res gesta*, but as proof of an independent fact. To admit its competency, would, in my opinion, be to hold, that a party's mere claim of right, and attempt to exercise ownership, are allowable to prove his peaceable possession. Such evidence, even if it tended to establish the fact, would be obnoxious to the objection, that it was a mere narration of what the plaintiff himself said.

It is true, that the verdict and judgment are not very formal, yet we think they are entirely sufficient. In finding for the plaintiff, the jury affirm that his case was made out by proof, and that the defendant's plea is false; and the legal effect of the judgment is, that the plaintiff recover the premises. There was no necessity for an express award of execution for the costs, or to restore the possession. These were but consequences of the judgment, as provided by the statute. [Clay's Dig. 252-3, §§ 13, 14; see, also, Wheatly v. Price, 3 J. J. Marsh. Rep. 168.]

For the admission of improper evidence, the judgment of the Circuit Court is reversed, and the cause remanded, that such further proceedings may be had as are agreeable to law.

GOLDTHWAITE, J.—As to the point upon which this judgment is reversed, my opinion is, that the plaintiff could properly prove, that the witness, or, indeed, any other person, had fodder upon the premises in controversy, by his leave, because this was proof of an actual possession of the land. Whether the forcible entry of the defendant was an intrusion on this possession, or on that of some other person, or by virtue of a previous occupancy by himself, was matter for him to show; but the proof by the plantiff was regular, though very weak. The evidence of his willingness to permit the witness to occupy the land for the year, in which the trial was had, was incompetent, as showing nothing more than the assertion of a right to rent the land. This assertion neither proved, nor tended to prove, an actual possession, unless accompanied by some act connected with the assertion. In this opinion I am authorized to state the concurrence of Judge ORMOND.

MORRISON v. SPEARS.

1. Reference may be made in the declaration to a previous count, for dates, &c., which will be sufficient, although such previous count be held bad on demurrer.
2. A count which does not show, either by an express allegation, or by reference to some other count, that the note sued on was due, when the suit was brought, is bad on general demurrer.

Error to the Circuit Court of Bibb.

ASSUMPSIT by the defendant, against the plaintiff in error, upon an indorsed note, of which he was the maker. The declaration contained four counts, all of which were demurred to, and the demurrer sustained to all, except the third count.

That count charged, that the defendant at, &c., to wit, on the day and year aforesaid, made his certain other promissory note, &c. &c., charging the indorsement of the note to the plaintiff, on

the 16th January, 1843, without alledging when the note was payable, but stating, "that the period had now elapsed."

Upon the trial of the issue, it appeared in evidence, that the indorsement to the plaintiff was made on the 10th January, 1843, and the defendant thereupon objected to the indorsement going to the jury, because of the variance, which the Court overruled; to which the defendant excepted. He now assigns for error, the overruling the demurrer to the third count, and the admission of the indorsement as evidence.

T. B. Clarke, for plaintiff in error.

ORMOND, J.—The reference in the third count of the declaration, to the previous counts, for the date of the promissory note, is sufficient, although the previous counts were held insufficient on demurrer, as the allusion was, to the fact distinctly stated in the first count, of the day on which the note was made, and which, therefore, need not be repeated in the succeeding counts, further, than by reference to the allegation previously made. [Mardis' Adm'r v. Shackelford, 6 Ala. Rep.]

The count is still, however, defective, in not alledging, either positively in the count itself, or by reference to a preceding one, when the note became due. The allegation, "which period has long since elapsed," does not tend to show, that the note was due when the suit was brought, as the only point of time to which the allegation can refer, is the date of the note. If, therefore, it were admitted, that an allegation that the note was due at the time the suit was brought, was sufficient, no such allegation is made here. This count was, therefore, bad on general demurrer.

The objection in regard to the variance between the time of the indorsement alledged, and that proved, need not be noticed, as the case must be remanded, and it is not probable it will again occur.

Let the judgment be reversed and the cause remanded.

ALFORD v. SAMUEL.

1. Where the plaintiff, in a summary proceeding for the failure to pay over money collected by a sheriff, on a *fieri facias*, recovers a *verdict* and *judgment* for the amount of the damages given by statute, as a consequence of the sheriff's default, and no more, the defendant cannot object on error, that the verdict should have been for the amount of the *fi. fa.* also.

Writ of Error to the County Court of Benton.

W. B. Martin, for the plaintiff in error.
S. F. Rice, for the defendant.

COLLIER, C. J.—This was a proceeding by motion against the sheriff of St. Clair, for the failure to pay over money collected by him on a *fieri facias*, at the suit of the defendant in error, against Boyt, Houston and Gilbert. The notice, and the judgment which recites and adopts it, are very special in their recitals, &c. But it is objected that the verdict and judgment thereon, cannot be supported, because, although all the allegations of the notice are affirmed to be true, the verdict is only for the amount of the damages given by statute as a consequence of the sheriff's default.

This objection questions the correctness of the judgment, because it shows, that the plaintiff below was entitled to recover not only damages, but the amount of the execution also. This error is beneficial to the sheriff, and consequently not available for him. See, also, Moore v. Coolidge, 1 Porter's Rep. 280.

The judgment is consequently affirmed.

GARNER v. GREEN & ELLIOTT.

1. When an act which is continuous in its nature, is proved to exist, its continuance may be presnmed until the contrary is shown.
2. G. was the owner of a ferry over the Coosa river, which was managed by E. for a share of the profits. During high water, when the ferry was impassable, E. was in the habit of taking the boat, and the hand who assisted him at the ferry, and conveying passengers over a creek, which emptied into the river above the ferry, to enable them to cross the river at another point. Upon one of these occasions, a waggon with its lading, was lost, by the negligence of the ferryman. Held, that to show that the ferry over the creek, was an appendage of the ferry over the river, it was admissible to prove the transportation of travellers, by E. across the creek, as well after, as before, the act which occasioned the loss.

Error to the Circuit Court of Benton.

Trespass on the case, by the plaintiff in error, against the defendants in error, as common carriers.

Upon the trial, it appeared that the defendant, Green, was the owner of a ferry across the Coosa river, near the mouth of Beaver creek, and that Elliott was his ferryman. That when the water was too high to use the ferry across the river, the ferry flat used in conveying persons, and property, across the Coosa, was employed, under the management of the ferryman, from time to time, for a period of five years, in transporting persons, and property, over Beaver creek, near where the same empties into the Coosa. That the plaintiff came to the ferry over the Coosa, and the water being too high to cross, Elliott, the ferryman of Green, proposed to take him, his wagon, &c., across the creek, by which means he could, at another ferry, cross the river; that in atttempting to do so, by his neglicence, the waggon, team, and load were lost. Elliott managed the ferry for Green, across the Coosa, for a share of the profits. Green was not present when the accident happened, but lived within a quarter of a mile of the ferry.

The plaintiff then offered to prove by a witness, that about twelve months after the commencement of this suit, the ferry-

man of defendant, had conveyed him during high water, across the mouth of Beaver creek, and charged ferriage, and the counsel for the plaintiff, admitting that he could not connect this testimony, further, than by the testimony already given in, the Court, on motion of the defendant, excluded it from the jury; which is the matter now assigned for error.

Rice, for plaintiff in error, argued, that the evidence rejected, was relevant; the object being to connect Green with the ferryman, in transporting passengers, and property, across Beaver creek; and to authorize the jury to infer, that Green knew and approved of it. For this purpose, proof of his acquiesence, after the loss here sued for, should have been given in evidence, for the purpose of strengthening the evidence previously offered. He cited 8 Porter, 70, 511; 1 Ala. Rep. 83; 3 id. 16, 371; Lester v. The Bank of Mobile, at the present term.

W. B. Martin, for defendant in error.

ORMOND, J.—The question to be determined, is, whether the evidence excluded by the Court, was relevant. It appears that Green was the owner of a ferry over the Coosa river, which was managed by Elliott, for a share of the profits. It also appears, that during high water, when the ferry was impassable, Elliott was in the habit of taking the boat, and the hand who assisted him at the ferry, and carrying passengers over a creek, which emptied into the river above the ferry, to enable them to cross the river at a different point. In an attempt to carry the plaintiff's waggon across the creek, it was lost, with its lading, and the effort at the trial, was, to fix the liability on Green. This was attempted to be done by proving facts, from which the participation of Green, in the profits, might be inferred. Thus, it was proved, that Green lived within a quarter of a mile of the ferry—that Elliott had frequently before transported travellers across the creek, during high water, and had done so about a year afterwards. The evidence of the act subsequently to the loss, was objected to, and excluded by the Court, and this is the only question presented upon the record for revision.

Presumptive evidence, is founded upon the connection, which is found by experience, to exist, between the facts, which are prov-

ed, and those which are intended to be proved. The presumption intended to be drawn from the facts in proof, in this case, is, that from the contiguity of the residence of Green, to the ferry, he knew of the acts of Elliott, in transporting passengers and property over the creek, during high water, and from this knowledge, the further presumption is attempted to be derived, that he would not suffer the use of his property in such a hazardous employment, without a participation in its benefits.

We are not prepared to say, that the evidence was admissible upon this theory. Presumptions which may properly be made, are only justifiable, where they are the natural, or necessary consequence of the acts proved, and exclude every other reasonable hypothesis. Yet it is by no means unreasonable to suppose, that Green, may have allowed his ferryman the use of his boat, and hand, as a gratuity, or perquisite, upon these extraordinary occasions. The conclusion is not therefore sufficiently certain, to be the basis of human conduct, either in the jury box, or in the ordinary transactions of common life. And in this view of the case, the evidence of the acts of Green, both before and after the act, which occasioned the loss, would be alike inadmissible.

There is, however, one aspect of the case, upon which the testimony should have been received. It appears that Green, and Elliott, were jointly interested in the profits of the ferry, upon the Coosa, and to prove that this custom of transporting passengers and property over the creek, was a mere appendage of the principal ferry, the evidence was clearly admissible. When a fact, which in its nature is continuous, is proved to exist, its existence subsequently, may be presumed. Thus when a partnership is once proved to exist, its continuance will be presumed, until the contrary is shown, and *a fortiori*, where a partnership is proved to exist at two different periods of time, it will be presumed to have existed during the intervening period. [3 Starkie's Ev. 1077.]

The fact that the ferry over the creek, during high water, was but a temporary removal of the ferry over the Coosa, could, like any other fact,be proved by circumstantial evidence, and any act, tending to establish that fact, whether it happened before, or after, the act which occasioned the loss, would be legitimate testimony; the fact to be proved being continuous in its nature, and having no necessary, or immediate connection with the point of

time when the act happened, which occasioned the loss. In McLeod v. Walkley, 3 Car. & P. 311, it was held, that an admission by one, that he was an editor of a paper upon one day, was no evidence that he was editor on a subsequent day. This decision must be based upon the fact, that the business is not necessarily continuous; but we apprehend, that if it had been proved that he was editor at two different periods of time, a presumption would have arisen, that he was so, during the intervening space.

What influence the testimony excluded would have had upon the jury, it is not our province to determine; it may be in itself very weak, and not entitled to much consideration, as it might seem, that if the previous acts proved, did not establish the unity of the two ferries, the single subsequent act, would not exert any influence. This, however, is a speculation we cannot indulge in; if the testimony was relevant, it was improperly excluded. Such we have seen is the fact, and the judgment must be therefore reversed, and the cause remanded.

EVANS, ADM'R, v. MATHEWS.

1. Where the Orphans' Court orders the sale of the real estate of an intestate, upon the petition of the administrator, alledging that the personal estate was insufficient to pay debts, the administrator, although one of the heirs, cannot object on error, that the evidence on which the decree of the Orphans' Court was founded, was *ex parte;* or that the record does not show that the heirs residing in the county had personal notice that the petition was filed; or that the Orphans' Court, instead of appointing a guardian for one of the heirs, should have required that heir to select one for herself. These are irregularities that do not show a want of jurisdiction in the primary Court, and cannot affect the administrator, and if important, he should have prevented them by conducting the proceeding according to law.
2. The Orphans' Court ordered that an administrator, who made, what was supposed an imperfect report upon the sale of real estate under its decree, should be committed, until he made one more perfect; a report was accordinly made: *Held,* that the order of commitment, whether erroneous or not, furnished no ground for the decree which directed the sale.

3. An equitable title may be sold under a decree of the Orphans' Court, and the purchaser will stand in the same predicament, as to title, as the heirs did.

Writ of Error to the Orphans' Court of Wilcox.

THE plaintiff in error filed his petition in the Orphans' Court, as the administrator of Thomas Evans, dec'd, late of Wilcox county, in which he represented that the personal estate of his intestate, was insufficient to pay the intestate's debts; and alledging that he died siezed and possessed of a tract of land, (particularly described,) situate in that county, which should be sold and made assets for the payment of debts. Petitioner further stated, that the intestate left three sons, to wit: himself, John Evans and Charles Evans, and two daughters, to wit: Eliza, the wife of James Battle, and Carolina Evans; the three former reside in Wilcox, and the two latter in Mobile; all of whom, with the exception of Carolina, are of full age. The petition concludes with a prayer, that such proceedings may be had, as the statute prescribes, in order that the real estate of the decedent may be sold, &c.

The Court made an order, describing the land, reciting the object for which a sale was asked, and directing that publication be made forty days in a newspaper, requiring all persons interested to appear, &c., and show cause why the prayer of the petition should not be granted.

On the day designated, a decree was rendered, reciting the substance of the petition, the order thereon, stating that Wm. C. Gilmore had been previously appointed a guardian for Carolina Evans, and had filed his answer, denying all the allegations of the petition, and the other heirs had been served with personal notice of the pendency of the proceeding. The decree also affirms, that the necessity of a sale appeared by proofs, regularly taken and filed, as in Chancery cases. Thereupon, the petitioner was ordered to sell the land in question, on a credit of six months, the purchaser giving bond with good and sufficient surety, &c.; and that he make report, &c.

There is no deposition or other evidence found in the record, but the affidavit of J. P. Fairly, verified before the clerk of the Court; at the foot of which it is stated that it is taken by consent

of all parties interested, subscribed by two or three of the heirs or their representatives.

The land was sold, as required by the decree, and the defendant in error became the purchaser, and executed his bond, payable six months after date, with surety. These facts being reported to the Orphans' Court, they were directed to be recorded, and the petitioner was ordered to make title to the purchaser, when his bond should be paid, &c.

After the decree of sale, the administrator objected to the sale to Mathews, on the ground that the land was a part of a 16th section, of which his intestate became the purchaser, at a sale by the commissioners, that full payment had not been made therefor, or if it had, a patent had not been obtained by the intestate, in his lifetime, or his heirs, since that event. But these objections were overruled by the Court.

Bethea, for the plaintiff in error, cited Simpson's adm'r v. Simpson, Minor's Rep. 33; 5 Stewt. & P. Rep. 17,

Sellers, for the defendant, cited Clay's Dig. 525, § 21

COLLIER, C. J.—The supposed irregularities which have been insisted on by the plaintiff in error, may be thus stated: 1. The evidence on which the decree of the Orphans' Court was founded, is *ex parte*, not being assented to by all the heirs. 2. The record does not show that the heirs residing in the county had personal notice that the petition was filed. 3. The first report of a sale, which was made by the administrator, should have been received by the Court, and he should not have been committed until he made a second, on which the final order was made. 4. The intestate, or his heirs, had no title to the land that could be sold, under a decree of the Orphans' Court; and, 5. Instead of appointing a guardian for Carolina Evans, she should have been called on to select one herself.

It must be observed, that the administrator who was the actor in the proceedings in the Orphans' Court, is here complaining, and it is incumbent upon him to show, not only that errors have there been committed, but that they are such as prejudice him, or at least affect the title, which the defendant acquired by his purchase. Assuming this as a postulate, and neither the first, second

or fifth points, conceding them to be well founded in fact, and as abstract legal propositions, indisputable, can avail the plaintiff. We have often held, that if in an application for the sale of the real estate of a decedent, the jurisdiction of the Orphans' Court is established, a decree rendered, and the proceedings consequent thereupon, regular, the purchaser's title will not be divested, although the decree should be reversed. And the same result will follow, although the heirs may not have been served with a notice of the petition, and the petitioner has failed to comply with the directions of the law, as to matters to be observed subsequent to the sale. *Further*, the reversal of the decree for error in the record, only entitles the successful party to the purchase money, but the purchaser shall hold the property. [Wyman, et al. v. Campbell, et al. 6 Porter's Rep. 219; Perkins Ex'rs. et al. v. Winter's adm'rx, et al. 7 Ala. Rep. 855.] This being the case, the defendant has no interest in litigating these points; no matter what may be the judgment of the law upon them, the plaintiff can recover nothing of him, or defeat his title, unless the jurisdiction of the Orphans' Court, could be successfully assailed. This has not been attempted, and our impression, from an inspection of the record, is, that such an effort would be vain.

It might also be answered, to the objections we are considering, that if they are errors, they are attributable to the plaintiff—it was his duty to have prevented them, by conducting the proceedings with regularity, and he cannot be permitted to urge them, to annul a decree rendered at his own instance.

If it were granted that the report first made by the plaintiff, correctly stated the facts, and authorized the final order, and that his commitment until he made a second, was oppressive, and irregular, and still it would furnish no ground for a reversal of the *decree*. It was a matter occurring *post factum*, and if the plaintiff objected to it, he should have interposed an objection while it was *in fieri*. As the result was legal, if the process by which it was obtained were set aside, the purchaser would still be secure in his title.

In respect to the fourth point made by the plaintiff in error, without stopping to inquire, whether, if available under any circumstances, he could urge it, we need only remark that in Perkins' Ex. et al. v. Winter's Adm'rx, et al., (supra,) we held, an equitable title could be sold under a decree of the Orphans' Court, and the

purchaser would stand in the same predicament as to the title, as the heirs did. We are, however, by no means certain, that the title of the intestate was not legal.

This view is decisive of the case, and the decree of the Orphans' Court, is affirmed, so far as the writ of error in the present case could present it for revision.

In the transcript, there is a copy of a bond executed by all the heirs of the intestate, including the administrator, reciting that the writ of error was sued out by them, and conditioned for its prosecution, &c. If the writ of error was such as the bond recites, the result would be such as announced, and it is therefore unnecessary to inquire whether the writ might not be amended so as to make it conform to the bond.

BLACKMAN v. BRANCH BANK AT MOBILE.

1. A notice for judgment, by motion, made by one assuming to be President of the Bank, is sufficient, whether he be President of the Bank, *de jure*, or not, if the act is adopted by his successor, who is legally President of the Bank.

Error to the Circuit Court of Dallas.

Motion, by the Bank, for judgment on a note, made by Josiah Blackman, payable to Billups Gayle, Cashier, or bearer, negotiable and payable at the Bank.

The defendant appeared and pleaded, that Edmund Harrison, whose name is signed to the notice, was not, at the date of said notice, President of said Branch Bank, but that one Theophilus L. Toulmin, was at that time President of the Bank. To this plea the plaintiff demurred, and the Court sustained the demurrer.

The defendant also pleaded a set off, and issue being joined thereon, the jury found a verdict for the plaintiff, upon which judgment was rendered. The defendant now assigns for error—

1. The judgment of the Court, in sustaining the demurrer to the plea.

2. The plaintiff had not such an interest in the note, as to sustain a motion on it.

Geo. Gayle, for plaintiff in error, cited 3 Ala. Rep. N. S. 186.

ORMOND, J.—In Curry v. The Bank of Mobile, 8 Porter, 373, we held, that the notice of an intended motion for judgment, might be given by an attorney of the corporation. The plea, in this case, is founded upon the supposition, that as Mr. Harrison was out of office at the time notice was issued, it was invalid. The charter requiring the President of the Bank to give notice, does not contemplate that he should do it in person, but that notice shall be given under his direction. The notice, in this case, was issued under the direction of Mr. Harrison, acting as the President of the Bank, and whether he was President, *de jure*, of the Bank or not, is wholly unimportant, as the act was affirmed by his successor.

The objection that it does not appear from the record, that the Bank had the legal title to the note, is cured by statute. See the case of Crawford v. The Branch Bank of Mobile, at the present term.

Let the judgment be affirmed.

BORLAND v. MAYO.

1. As the plaintiff in execution, if succesful upon the trial of the right of property, is entitled to a return of the specific thing, which was delivered to the claimant, or its assessed value, it is allowable for him to offer evidence to the jury, to show what was its value at the time of the trial.
2. The defendant in execution made a sale and conveyance of his entire estate to the claimant, and the former made certain statements to his creditor to induce him to accept the claimant for his debtor: *Held*, that as these statements were no part of the *res gesta*, viz: the sale and conveyance, the

creditor to whom they were made could not be allowed to narrate them as evidence.

3. On the trial of the right of property, the consideration of the cause of action on which the judgment was recovered, is not a matter in issue, yet if evidence to this point has been admitted, at the instance of the plaintiff in execution, a judgment in his favor will not, for that reason, be reversed; unless it appear that the claimant was prejudiced by its admission.

4. With the view of showing that a sale of property on long credits was fraudulent, by reason of the inadequacy of the price agreed to be paid, it is permissible to prove, that the price stipulated is less than the property in question would have commanded, on the time given.

5. The declarations made by a vendor, previous to the sale, are admissible to contradict his testimony given on the trial of a cause in which the *bona fides* of the sale is drawn in question.

6. The declarations of a vendor are admissible against his vendee, where the purpose of both was to consummate a fraud by the sale.

7. Where the vendor of a plantation and slaves, in giving testimony, with a view to support the sale, stated that he acted as the vendee's overseer, it was allowable for the adverse party to inquire of another witness, whether he ever knew the vendor to act as an overseer of the vendee.

8. Evidence of declarations made by a defendant in execution, which are not part of the *res gestæ*, are not admissible upon the trial of the right of property against the claimant, who deduces a title from the defendant—the defendant in execution is himself a competent witness.

9. With the view of showing the transaction to be fraudulent, it is competent to show that the vendee, who purchases from his son-in-law all his estate (which is a large one,) even on time, was himself greatly indebted at the time of the purchase.

10. After the plaintiff has introduced his evidence, the defendant his, and the plaintiff rejoined, it is then a matter of discretion whether the Court will allow the defendant to adduce further testimony.

11. Where the vendor of property remains in possession, his declarations in respect to the same, are evidence against the vendee.

12. If a debtor in failing circumstances makes a transfer of his property, which is intended, both by the vendor and vendee to prevent what they consider a sacrifice by sale under execution, and thus enable the vendor, afterwards to give a preference to his own proper creditors over those to whom he was liable as a surety; such a transaction is a fraud upon the creditors who are hindered or delayed in the collection of their demands.

13. Where an absolute sale of personal property is made, there must be an actual *bona fide* delivery of the same to the vendee, in order to give a title as against the creditors of the vendor, or some *special reason or excuse shown*

for the retention of the possession by the latter; and the fact, that the vendor was the son-in-law of the vendee, is not a legal excuse.

14. Where there is a fraudulent sale, the parties may rescind it, and make another contract in good faith, before liens attach upon the property as the vendor's; but where a sale is void *ab initio* for fraud inferrable from inadequacy of consideration, or other cause, it cannot acquire validity against the creditors of the vendor, although the vendee may pay a sum beyond the amount of the purchase money stipulated.
15. It cannot be intended that the vendor was aware of the vendee's insolvency, merely because he purchased all his estate on long credits.
16. If a father-in-law purchase from his son-in-law, who is in failing circumstances, all his estate, consisting of lands, slaves, furniture, &c., the transaction will be looked on with suspicion, and if there are other circumstances making its fairness questionable, then, altogether, they should be considered, by the jury, as adverse to the vendee, upon an issue of fraud, *vel non.*
17. Inadequacy of price, upon the sale of property, is a badge of fraud, where the vendor was greatly indebted; though in itself it may not be sufficient to avoid the sale, unless the disparity between the true value and the price paid, or agreed to be paid, was so great as to strike the understanding with the conviction that the transaction was not *bona fide.*
18. If *mala fides* is not attributable to the vendee, but he has acted with fairness, his purchase cannot be pronounced void, at the instance of the vendor's creditors, merely because its *tendency* was to defeat or delay them.

Writ of Error to the Circuit Court of Lowndes.

The defendant in error having obtained a judgment against John H. Walker, caused a *fieri facias* to be issued thereon, which was levied by the sheriff of Lowndes on a negro man named Joshua, as the property of the defendant in execution, and the plaintiff interposed a claim, and gave bond with security, as required by the statute, to try the right. As issue was thereupon made up, and submitted to a jury, who found the slave in question subject to the execution, and assessed his value at seven hundred and fifty dollars, and judgment was rendered accordingly.

On the trial, the claimant excepted to the ruling of the Court. It is shown by the bill of exceptions, that the suit in which the plaintiff's judgment was recovered, was commenced in March, 1840; the execution was issued and levied in November, 1841. In the examination of the evidence, the following questions were

raised—all of which were duly reserved, viz. 1. The plaintiff was admitted, notwithstanding an objection by the claimant, to prove the value of the slave in controversy, at the time of the trial. 2. A creditor of Walker testified, that after the sale to Borland, Walker so arranged it as to induce the creditor to accept Borland as his debtor; whereupon the claimant asked the witness to state what Walker said to him, while he was endeavoring to induce him, (witness,) to accept the claimant's note for his debt; but the plaintiff objecting, the witness was not permitted to answer. 3. The plaintiff was allowed to prove the consideration of the note on which his judgment was recovered, although the claimant objected that such evidence was irrelevant. 4. So the plaintiff was permitted to inquire of a witness what difference was usually made between sales, for cash, and on time, for the purpose of showing that the purchase made by the claimant of the defendant, was for a stipulated sum, below the value of the property, considering the credit allowed. 5. The plaintiff was permitted to prove, by a witness, what the defendant in execution said of his intention to sell, for what purpose, &c., before he made the sale, on which the claimant relies, notwithstanding the claimant objected to the evidence, except so far as it went to contradict the defendant; but the objection was overruled, the Court remarking, that such evidence was only admissible to show the intention of Walker in selling, and to contradict him, but not to affect Borland, unless he was connected with his vendor in consummating an unlawful purpose. 6. The plaintiff was also allowed to show, by a witness, that the latter never knew the defendant in execution to act as the overseer of the claimant; this evidence was adduced to contradict Walker, who stated that he was Borland's overseer in 1841, and to prove that the property which the latter claimed under a purchase from the former, had never been delivered to the purchaser. 7. A witness adduced by the plaintiff, was permitted to testify, that he was employed by Walker, professedly as the agent of Borland, in the latter part of 1840, and the beginning of 1841, to act as the overseer of the plantation and slaves, to which the latter asserts a title, under a contract with Walker; that Walker let him have some groceries, and one of the farm horses when he left the plantation, with the price of all which he credited Borland's account. Claimant offered to show what Walker subsequently said about the horse, but

this, on objection, by the plaintiff, was rejected as inadmissible. 8. The plaintiff was allowed to prove, that Borland was greatly indebted, in September, 1840, notwithstanding it was shown, that he was a man of wealth, and had property of much greater value than all his debts. 9. After the plaintiff had closed his testimony, in rejoinder to the claimant, the latter offered to prove what Walker said about the groceries and horse, he had furnished to Graham, after the latter had received them, but this evidence was rejected. 10, It was shown by the plaintiff, that Walker remained in possession of the homestead, &c., which was embraced in the sale to Borland, and that the plantation on which the slaves labored was adjoining the land on which Walker continued to reside; the plaintiff was then permitted to give evidence of Walker's declarations, notwithstanding the claimant objected.

It was proved that the defendant in execution was the son-in-law of the claimant, that they both lived in the same neighborhood; that the former was greatly embarrassed with debt, in September, 1840, (when he sold *all his property* to the claimant,) perhaps a hundred per cent. beyond the value of his estate; that the sale was made on a long credit, the last payment not falling due, until the expiration of twelve years thereafter; that the claimant made different statements, as to the price he was to pay for the property; that according to the largest sum stated by him, the slaves might be so employed on the plantation as to yield a profit large enough to pay the purchase money in eight or ten years; that there was no ostensible change of the possession of the property sold from Walker to the claimant, &c.

The plaintiff prayed the Court to charge the jury as follows; 1. That if the vendor was a debtor in failing circumstances, in September, 1840, and had creditors including the plaintiff in execution, not provided for by the sale to the claimant, who were hindered in the collection of their demands, and that the tranfer to the claimant was intended by the vendor and vendee to prevent what they considered a *sacrifice* of the property, by sale under execution, and thereby enable the vendor, afterwards, to give a preference to his own *proper* creditors, over those to whom he was liable as a surety, then the plaintiff was entitled to a verdict.

2. If there was no actual and *bona fide* change of possession, consequent upon the sale from the defendant to the claimant, and

no special reason or excuse was shown, for the retention of possession by the vendor, other than the relationship between himself and the vendee, and the use the family of the latter had for the property, then the plaintiff was entitled to a verdict.

3. If the sale by the defendant in execution, to the claimant, was fraudulent and void, as against creditors of the former, for inadequacy of the consideration, on account of the long credit given, or other cause, then it could not be made valid as against the creditors, by the payment of the purchase money before it was due, or by increasing the amount stipulated.

4. If it was the understanding and intention of the parties, that so much of the purchase money as was not appropriated by the deed, should be paid by Borland to such creditors *only*, of his vendor, as the latter should subsequently direct, and who were not provided for; and it was intended by such means to hinder and delay any of the creditors of the vendor, then the plaintiff was entitled to a verdict.

5. If the deed embraced *all the property* of the defendant in execution, then the jury were authorized to infer from that fact, in connection with the disclosures made upon the face of the deed, that the claimant was cognizant of the insolvency of the former, at the time of the sale.

6. If the defendant in execution was in failing circumstances at the time of the sale, and the claimant was his father-in-law, then, this relationship was a just ground of suspicion, and if other suspicious circumstances were shown, it was to be regarded as a circumstance tending to establish fraud.

7. If, considering the long credit given for the purchase money, by the defendant in execution, to the claimant, or other cause, the jury should believe the price agreed to be paid for the property to be inadequate, and the vendor was embarrassed at the time, then, such inadequacy was a mark of fraud.

8. If the object of the defendant in execution and the claimant was to put the property out of the reach of the creditors of the former, in order to obtain time to pay them, or to compromise their demands, the sale was fraudulent and void; and this although the creditors may have been the gainers by the sale.

9. Although the claimant may not have intended any fraud, or contemplated a dishonest or fraudulent purpose, yet if the object or tendency of his purchase, was to place the property beyond

the reach of Walker's creditors, and thus hinder and delay them, then the transaction between claimant and defendant in execution was void by construction of law.

10. Although the claimant may have paid more than the property was worth, yet if the object and effect of the sale, was to hinder and delay the creditors of the defendant in execution, then it was fraudulent, and the jury should find for the plaintiff in execution. Which several instructions were given accordingly.

T. Williams, for plaintiff in error.

R. Saffold for the defendant in error, insisted, that the record discovered no error for which the judgment was reversible. The declarations of a *particeps fraudis* before or after the act committed, are evidence against those associated with him, and the proof of a combination by one witness of a vendor, who fraudulently co-operates with his vendee, being in possession, is evidence against the latter. [2 Phil. Ev. 177-8, C. & H.'s notes; id. 452-3, 601-2, 772-3-4-5; 3 Car. & P. Rep. 94-9; 6 Rand. 285; 7 Cow. Rep. 301.]

What was said by Walker about the groceries and horse, at a time subsequent to that when they were delivered to Graham, was properly excluded. [2 Phil. Ev. 225; 13 Sergt. & R. Rep. 85.]

To sustain the several charges prayed of, and given by the Court, he cited, 2 J. J. Marsh. Rep. 233; 8 Dana's Rep. 263; 2 Con. Ct. S. Caro. Rep. 125-6; 4 Day's Rep. 146, 150-2-6; 9 Johns. Rep. 243; 2 Peter's Rep. 107; 2 Ala. Rep. 313-8; 3 Stewt. Rep. 243-5; 2 Stewt. Rep. 50; id. 336; 5 Ala. Rep. 531; id. 770; 13 Peters' Rep. 101; 12 Sergt. & R. 198, 201-2; 16 Wend. Rep. 523; 17 Wend. Rep. 53; 7 Paige's Rep. 163-5-6; 20 Wend. Rep. 25, 507, 524, 542; 5 Ala. Rep. 324; 9 Johns. Rep. 337; 3 Johns. Ch. Rep. 481; 7 Cow. Rep. 732; 5 Sergt. & R. Rep. 275; 2 Kent's Com. 412; 14 Johns. Rep. 458; 4 Johns. Rep. 536, 592-3-7; 20 Johns. Rep. 442; 1 Hopk. Rep. 373; 2 Mason's Rep. 252; 11 Wend. Rep. 189, 200-1-2; 4 Paige's Rep. 23; 9 Porter's Rep. 39, 566, 573; 3 Ala. Rep. 444; 4 Ala. Rep. 374-6-9, 380-1-2; 2 Phil. Ev. 452; 3 C. & P. Rep. 9.

COLLIER, C. J.—1. It was clearly competent to permit the plaintiff below to prove the value of the slave, at the time of the trial. The claimant, by the regular interposition of his claim, became the custodian of the property, until the question of the slave's liability to the satisfaction of the *fieri facias*, should be determined. If the decision was favorable to the claimant, then his bond would become inoperative; but if otherwise, the bond remains in full force, as the statute declares "it shall be conditioned for the forthcoming of the property, if the same be found liable to the execution, and for the payment of such costs and damages as shall be recovered," &c. "And if the claimant shall fail to deliver the same, or any part thereof, when required by the sheriff," it shall be the duty of the sheriff to indorse the failure on the bond, and return it to the clerk, &c.; whereupon the bond shall have the force and effect of a judgment, and execution shall issue against the claimant and his surety, for the value of the property not delivered, as assessed by the jury. [Clay's Dig. 211, § 52; 213, §§ 62, 64.] The latter section directs, that when the jury shall find the property subject to the execution, they shall find the value of each article separately, but does not, in so many words, provide, that they shall be governed in their estimate, by the value at the time the trial takes place, yet, we cannot doubt that the plaintiff may offer proof to show, what the property was then worth. This conclusion necessarily results from his right to have the property to satisfy his execution, and if it cannot be had, or the claimant will not return it, then he is entitled to the value assessed. Whether the plaintiff may not elect to prove the value at the time of the levy, if the property has afterwards depreciated, or been entirely destroyed, we need not consider.

2. It was not allowable for the claimant, to prove by a creditor of the defendant in execution, what the latter said to the creditor as an inducement to him to accept the claimant as his debtor, instead of the defendant. Such declarations were no part of the *res gestae*, which the plaintiff was impugning, but related to a transaction subsequent in point of time to the sale to the claimant, and which the plaintiff did not controvert.

3. The consideration of the note on which the plaintiff's judgment was recovered, was not a question in issue, and could not be controverted in a proceeding of this character; the evidence then adduced to this point was unnecessary, and should not have

been admitted by the Court. But we are unable to discover how the claimant could have been prejudiced by its admission, unless it be conceded that the consideration, viz: services as an overseer, were so meritorious as to overreach and invalidate the sale. This has not been pretended. No injury, therefore, resulting from the evidence, its admission furnishes no sufficient ground for the reversal of the judgment.

4. Where the question is, whether a sale of property on long credits, is fraudulent, it is allowable to show the inadequacy of the price, by showing the difference usually made between cash and credit sales, with the view of proving that the amount agreed to be paid, was less than the property would have sold for on the time given. It cannot be objected that the law fixes the rate of interest, and therefore, the true difference in price is, the addition of the interest to the cash value for the term of credit. There certainly should not be a greater difference, yet, if according to the usual mode of dealing, parties are not thus restricted, the vendor may enforce the contract, if he makes a fair sale, where the difference is more than interest, unless it is obnoxious to the law against usury. The evidence upon this point was, then, properly received.

5. The Court did not admit the declarations of Walker, made previous to the sale to the claimant, without qualification, but the jury were informed that they were to consider them so far as they went to contradict the testimony which Walker had given, in his examination; but the claimant could not be affected by them, unless he was connected with his vendor in the consummation of a fraud. As to the first purpose for which they were admitted, their competency cannot be disputed; and as it respects the second, viz: to show that the sale was fraudulent, under the qualification laid down by the Court, we think their admissibility is equally defensible. The declarations of a conspirator are admissible against his fellow. [Phil. Ev. C. & H. 177, and cases cited.] So, where there is proof tending to show fraud, on the part of the purchaser of property, and a community of design with his vendor, it has been held, that in a contest between the former and the creditors of the latter, the declarations of the vendor are admissible against his vendee. [Clayton v. Anthony, 6 Rand. Rep. 285; Reitenbach v. Reitenbach, 1 Rawle's Rep. 362.] And it has been decided, where the vendor is left in possession of property,

and exercises acts of ownership over it after sale, this proves a combination to defraud creditors, and the declarations of the vendor are evidence against his vendee. [Wilbur v. Strickland, 1 Rawle's Rep. 458; Willies v. Farley, 3 Car. & P. Rep. 395; 2 Phil. Ev. C. & H.'s notes. 178, 601-2.] The testimony recited in the bill of exceptions shows, that the integrity of the transaction between the defendant in execution, and the claimant, was at least questionable, and that there was no ostensible change of possession. This being the case, the proof of Walker's declarations, comes within the principle upon which the authorities cited rest, and are admissible against his vendee, if competent evidence under the circumstances. The form of the claimant's objection to the evidence we are considering, indicates, that he did not object to it because it tended to impeach the credit of the defendant in execution, by showing that he had made other statements of the facts to which he testified, without first inquiring of him, whether he had made such statements. [Lewis v. Post & Main, 1 Ala. Rep. N. S. 69; 2 Phil. Ev. C. & H.'s notes, 771 to 775.] But it was expressly admitted, that it was allowable to give evidence of Walker's declarations, so far as they contradicted his testimony; and as to the further object proposed by such proof, what we have said will make it sufficiently clear, that its admission was placed, by the Court, on the true ground.

6. It was competent for the plaintiff to inquire of a witness, whether he ever knew Walker to act as the claimant's overseer, for the purpose of countervailing the testimony of Walker, who had affirmed such to be the fact, and also to show that there had been no delivery of the property in question to the claimant. True, such evidence may not be entitled to great weight, yet it was pertinent, and entitled to more or less consideration, according to the opportunities which the witness possessed for acquiring knowledge upon the subject.

7. Evidence of what Walker said about the horse he previously allowed an overseer, employed by Borland, to have, at an agreed price, was properly excluded. If those declarations were admissible, Walker was *prima facie* a competent witness, and could himself have been called on to relate them. They constituted no part of the *res gestae*, viz: the witness' employment and service as overseer, or purchase of the horse from Walker

on the claimant's account, but they were *post factum* statements, and according to all principle were properly excluded.

8. We can discover no objection to the admission of the evidence, to show that the claimant was greatly indebted in September, 1840, when the sale was made to him, of the entire estate of the defendant in execution. Such testimony, it is true, might not establish a fraud, yet, in connection with other facts, the indebtedness of the claimant might exert a controlling influence. No matter what may be the extent of one's property, prudent men, who are indebted, are less disposed to make heavy purchases, even on time; especially if they do not expect, or intend to realize by a re-sale.

9. What we have said about the seventh objection to the testimony, is conclusive upon this point. But it may be said in addition, that if the Court had misapprehended the law, in rejecting the evidence, its decision would furnish no ground for the reversal of the judgment. The plaintiff in execution opened the case, and laid his testimony before the jury. The claimant then introduced his evidence, and the plaintiff rejoined; after the trial had proceeded thus far, it was a matter of discretion with the Court, whether any other evidence should be adduced. It was at this latter stage of the cause, when the testimony we are considering was offered.

10. The view taken of the fifth objection will show, that the evidence of Walker's continued possession of the property which he conveyed to the claimant, was such as to make the declarations of the former evidence against the latter. We do not say that it was sufficient to negative the conculsion, that the possession was changed, but that there was proof on the point, which the jury should have considered, cannot be questioned. The declarations of the vendor were only admissible upon the hypothesis, that he retained the possession, or himself and vendee were co-workers in the purpose to defraud; and the Court perhaps so instructed the jury, if not, it was proper to call the attention of the Court to it, and pray such a charge.

We will now briefly consider the several charges to which the claimant excepted:—

1. This charge affirms, that if a debtor in failing circumstances makes a transfer of his property to a third person, which is intended, both by the vendor and vendee, to prevent what they con-

sidered a sacrifice, by sale under execution, and thus enable the vendor afterwards to give a preference to his own proper creditors, over those to whom he was liable as a surety, that such transaction is a fraud upon the creditors, who are hindered or delayed in the collection of their demands. There can be no question but an assignment made under such circumstances is inoperative, by the second section of the statute of frauds, which expressly declares, that every gift, grant or conveyance of goods or chattels, by writing or otherwise, made and contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their actions, suits, debts, &c. shall be utterly void. [Clay's Dig. 254.] If the vendor had reserved to himself, by a stipulation on the face of the deed, the right to direct the appropriation of the money, such stipulation would have been void against judgment creditors, and the legal conclusion must be the same, although the deed is silent upon the subject, if the sale is the result of a fraudulent combination between a failing debtor and a third person, to defeat the creditors of the former.

2. The terms of the contract between Walker and the claimant, contemplated an immediate change of possession, and if there was not *an actual and bona fide delivery of the property to the claimant*, in order to maintain a title against the creditors of the vendor, it devolved upon the claimant to show some *special reason, or excuse, for the retention of the possession by the vendor*. The fact that the vendor married the vendee's daughter, and the family of the latter required the services of the slaves, &c. furnished no sufficient excuse, so as to repel the legal inference of fraud. This point is explicitly adjudged in the Planters' and Merchants' Bank v. Borland, 5 Ala. Rep. 531, and cases there cited.

3. If the sale to the claimant was void *ab initio*, for fraud, inferrable from the inadequacy of the consideration, by the length of credit given, or for other cause, it could not acquire validity agianst the vendor's creditors, although the vendee might pay a sum beyond the purchase money stipulated, and even before the expiration of the term of credit agreed. The fraud of the transaction did not prevent the parties from rescinding it, and making another contract, *bona fide*, before liens attached; and the charge does not deny such to be the law, it merely asserts, that if the sale

was fraudulent against creditors, in its inception, it still continued so, although the vendee shall have made the full payment.

4. What we have said upon the first charge, is equally applicable to this, and shows that the Court, in giving it, did not misstate the law.

5. The mere fact, that the conveyance from Walker to the claimant, transferred all Walker's property, does not of itself warrant the inference that the latter was aware of the insolvency of his vendor. A man may sometimes be induced to sell all his visible estate, preparatory to a removal from the country; and the fact that he provides for the payment of a large amount of debts, by substituting the credit of his vendee for his own, may not proceed from his inabili;y to pay otherwise. He may find it for his interest to sell on time, because a purchaser cannot be obtained, who is prepared to pay the cash, or by giving credit, a better price may be had. Besides, he may know that it is possible for him to relieve himself from debt, by using the paper of his vendee. And the vendor may thus act, though he has a large amount of cash, which he supposes it will be more beneficial for him to use in some other way.

No such inference can be drawn from the fact, that in this case, a large amount of the purchase money, was payable from seven, to twelve years after the sale. The vendor is usually compensated for giving long time, and hence, if he thus sells, it neither proves his solvency, or insolvency. The written transfer only evidences such a contract as we have described, and does not, when taken alone, or in connection with the fact supposed, show that the claimant knew his vendor was insolvent, when he purchased from him.

The fact of the relationship of the vendor and vendee, the contiguity of their residence, and the actual insolvency of the former, perhaps, would have authorised a jury to presume, that the claimant was aware of Walker's situation; the charge does not rest the presumption on these grounds, but alone upon the purchase of all the vendor's property.

In Yates and another v. Carnsew, 3 Car. & P. Rep. 99, the question arose under the statute of 46 George III, ch. 135, whether a party dealing with a trader, knew him to be insolvent. The defendant there had for nearly two years been buying goods of the bankrupt at prices vastly below prime cost, and *Lord Ten-*

terden said to the jury, "it is for you, as men of business, to say, whether the defendant could go on dealing with a man in this way, for so long a time, without knowing that he was insolvent. There is no doubt, that for the sake of getting ready money, great sacrifices are often made, in one or two transactions, by solvent men, but the strength of this case, on the part of the plaintiff, is, there were, not merely one or two dealings between these parties, but a continued series of them," in two several years. Here, the vendee's knowledge of the vendor's insolvency was presumed from extensive purchases of goods, repeatedly made, during a long period of time, at prices far below cost; while, in the case at bar, the Court was required to instruct the jury, that if the claimant purchased all the property of the defendant in execution *at one time*, it might be legitimately inferred that he was aware of his vendor's insolvency. Such a conclusion, we have seen, cannot be predicated of the premises.

6. This charge assumes, that if a father-in-law purchases from his son-in-law, who is in failing circumstances, all his property, including lands, slaves, horses, cattle, hogs, household furniture, &c., the relationship of the parties will cause the transaction to be viewed with suspicion, and if other suspicious circumstances were shown, its tendency would be to establish a fraud. The law is not laid down too stringently against the claimant. The connection between the vendor and vendee, the embarrassment of the former, and sale of all his property, certainly should cause the transfer to be looked on with suspicion, and if there were other circumstances making its fairness questionable, then all taken together, should be considered by the jury, as adverse to the vendee, upon an issue of fraud *vel non*.

7. Inadequacy of consideration, where the vendor is greatly indebted, is recognized as a mark of fraud. In this charge the Court says nothing more than so to declare the law. True, it might not be sufficient *per se*, to authorize a sale to be annulled, unless the disparity between the true value of the property, and the price paid, or agreed to be paid, was so great as to strike the understanding at once, with the conviction, that such a sale never could have been made *bona fide*. But it may be a mark of fraud where the difference is not so great, and when other circumstances are associated with it, they may be conclusive.

8. What has been said in respect to the first and fourth charg-

es, is applicable to this. It merely affirms, that if the facts be such as are supposed, then the conveyance would be fraudulent because intended by both parties, to delay and hinder creditors in the collection of their debts. That such a conclusion is a necessary sequence, if the facts are affirmatively shown, we think will not be seriously questioned.

9. This charge, we think, cannot be supported. It assumes, that although the claimant may have been influenced by honesty of purpose, in purchasing the estate of the defendant in execution, yet if the object, *or* tendency of the purchase was to place the property beyond the reach of the vendor's creditors, and thus hinder and delay them, the transaction was void, by construction of law. Now, every man may sell his property in good faith, if neither creditor nor other person has a lien which is opposed to such a right; and this, although the consequence may be to defeat creditors in the collection of their demands. If the vendee has meditated no dishonest purpose, but has acted with fairness, his purchase can't be pronounced void, at the instance of the vendor's creditors, merely because its "tendency" was to defeat or delay them. The claimant cannot be injuriously affected by the fraud of the defendant, unless he participated in it, or can, by legal construction, be connected with it in some offensive manner. If, in speaking of the effect of the sale, the word *object* alone had been used, or object *and* tendency, instead of connecting the two latter by the disjunctive "or," then the instruction would have been proper; but these terms could not have been employed because it was hypothetically admitted, that no fraud or dishonesty of purpose was attributable to the claimant, In declaring, that if either the object *or* tendency of the purchase was to defeat the vendor's creditors, then the same was void, it is sufficiently shown, that the Court did not correctly state the law.

10. For the reasons stated in considering the first, fourth and eighth charges, this is unobjectionable.

We have thus considered the numerous points made upon the record in this cause, with as much brevity as we could, in order to make ourselves intelligible. The great and unnecessary length to which the bill of exceptions is drawn, admonishes us of the propriety of again declaring our disapprobation of a practice, which causes bills of exception to be surcharged by the statement *in extenso* of all the evidence adduced, as well oral as documen-

tary. Such a practice is productive of benefit to no one—it imposes increased labor upon the counsel; the case, instead of being divested of every thing extraneous is mystified, and a heavy draft is made upon the time of the appellate Court in denuding it, that it may be seen what are the questions intended to be revised.

The points made being severally considered, recapitulation is unnecessary, and we need only add, that the judgment of the Circuit Court is reversed, and the cause remanded.

BRANCH BANK OF MOBILE v. MURPHY.

1. The statutes of the State, unless otherwise expressed, take effect from their passage, and an act done in the county of Clarke, on the day after the passage of the law, will be governed by the statute, although it was impossible it should have been known there.

Error to the Orphans' Court of Clarke.

Blount, for plaintiff in error.
Peck, contra.

ORMOND, J.—It is unnecessary to consider any of the assignments of error, but those which question the regularity of the decree of the Court, declaring the estate of the deceased insolvent. The decree was made on the 10th February, 1843; on the 9th February, preceding, an act was passed "to amend the laws now in force in relation to insolvent estates," which materially changed the mode of proceeding in such cases, but the proceedings were had in conformity with the former law. The counsel for the defendant in error, maintains, that as it was impossible that the law should have been known in Clarke county, one day after its passage, it ought not to affect this proceeding.

The rule of the common law, that statutes are in force from the date of their passage, when no time is fixed for the commencement of their operation, has been repeatedly recognized by this Court. [Weatherford v. Weatherford, 8 Porter, 174; The State v. Click, 2 Ala. Rep. 26.] The last case was an indictment for carrying concealed weapons, and it was insisted that the act did not operate, becausa it had not been published at the time of the commission of the offence; yet it was held, that although the rule might sometimes operate harshly, it was now too firmly settled to be changed, in any other mode than by legislation. The same decision was made in Thompson v. Stickney, 6 Ala. Rep. 579.

Nor are we able to comprehend what other rule could be adopted. The law must certainly be obligatory over the entire State, if valid any where. Yet, according to this argument, its obligation would depend on the distance of the place, where the law was violated, from the seat of government. In the case of a penal law, the executive clemency would doubtless be extended where it was impossible, that the law should have been known at the time of its supposed violation. But in this case, there is really no hardship. The decree of insolvency was but the initiatory step, in the whole proceeding, and although when that decree was made, the change of the law was unknown, yet when the change was known, it was the duty of the parties to retrace their steps, and commence anew. Instead of doing so, they have proceeded to a final settlement, in utter disregard of the existing law.

We have not considered it necessary to look into the other assignments of error, as the same questions will not necessarily arise again.

Let the judgment be reversed and the cause remanded.

HOPPER, GARNISHEE, v. TODD.

1. A garnishment to obtain satisfaction of a judgment, must issue out of the Court in which the judgment was rendered; therefore, a garnishment cannot issue out of the County Court, when the judgment was rendered in the Orphans' Court.

Error to the County Court of Montgomery.

This was a proceeding in the County Court of Montgomery, by the plaintiff in error, who, by the oath of a credible person, made affidavit before the Clerk of the County Court, that she had recovered a judgment in the Orphans' Court of Montgomery county, of one Anderson Thomas, that he had no property within affiant's knowledge to satisfy the judgment, &c., and that the plaintiff in error was indebted to him. Thereupon a writ of garnishment issued, returnable to the next term of the County Court.

The garnishee appeared, and pleaded to the jurisdiction of the Court, to which the plaintiff demurred, and the Court sustained the demurrer. The garnishee then moved to quash the garnishment, which motion the Court overruled, and the garnishee answering, and admitting an indebtedness to the defendant, of five hundred dollars, the Court rendered a judgment against him, for that amount from which this writ is prosecuted.

Elmore, for the plaintiff in error.

Hayne, contra, contended, that the act of 1823, Clay's Dig, 260, § 3, intended to confer this jurisdiction, on any Court of record, without regard to the Court in which the judgment was rendered.

ORMOND, J.—The act of 1818, Clay's Dig. 259, § 2, and that of 1823, ib. 260, § 3, to enable a judgment creditor to garnishee a debtor of the defendant to the judgment, have precisely the same object in view. The precise object of the last act, was to enable the party to make the affidavit before the clerk, either

in term time or vacation, whilst by the former act, it could only be made in Court. No other change of the law was intended, or accomplished by it.

That the garnishment must be returnable into the Court which rendered the judgment, is clear, from the terms of the act, and such has been the uniform construction put upon it in this Court. The garnishment, is merely auxilliary to the judgment, to obtain satisfaction. In Blair v. Rhodes, 5 Ala. Rep. 648, it was considered "a consequential suit, in which the plaintiff seeks to render some third person liable to the payment of his judgment," and in that case it was held, that the record of the judgment in the original suit, might be sent up, to sustain the judgment upon the garnishment.

The County Court proper, having no jurisdiction, its judgment must be reversed.

CLAPP, ET AL. v. MOCK, ET AL.

1. M. became the indorser for L. of certain bills of exchange, upon an agreement that they should be used in the purchase of the stock of a particular bank, in which both were equally interested, and both to be equally bound for the payment of the bills. L., pursuant to an arrangement with H., transferred the bills to C., in payment of a debt due by H. to C., the latter being ignorant of the agreement between M. and L., relating to the indorsement of the bills: Held, first, that C. could recover of M., the indorser, though L., in the transfer to C., had violated the contract by which the indorsements were made. Second, that if L. was the dupe of H. in the contract by which the bills were transferred to C., the fraud could not be visited on C., who was ignorant of it, and did not participate in it.

Error to the Chancery Court at Montgomery.

The bill was filed by Benjamin Lathrop, and Benjamin Mock, jr., and charges, that the defendant, Clapp, had a real or pretended claim on one Haynes, for $12,800. That Clapp represented

to Lathrop, that Haynes was the owner of ten thousand shares of stock in the Bank of Rome, in Georgia, on which thirty-five dollars per share had been paid, and proposed to Lathrop, to assume the debt due by Haynes to him, and that Haynes should assign one half of his interest in the stock to him. That Clapp proposed to take in payment of the debt of Haynes, drafts of Haynes on Lathrop, indorsed by Mock, upon the house of Cummings & Spyker, in Montgomery. That Haynes confirmed the statements of Clapp, and represented himself to be wealthy, and produced papers tending to prove that he was the owner of a large number of shares in the Bank. That confiding in these representations, the bills were drawn, and handed to Clapp, bearing date the 10th May, 1840. That in consideration of these bills, an agreement was entered into between Lathrop and Haynes, as follows:

"*Rome, Georgia, April* 12, 1840.

Articles of agreement between B. G. Lathrop, of the one part, and C. Haynes of the other part. The said Lathrop & Haynes have this day agreed to combine their interest, which they now have in the Western Bank of Georgia, also to share equally in the stock which either party may hereafter purchase, provided that the said Lathrop, pays to the said J. W. Clapp, twelve thousand eight hundred dollars, half of which is to be paid back to the said Lathrop, in one hundred and twenty days from this date, and the said Lathrop & Haynes do further agree, to join their interests in said bank with R. A. Greene, and Wm. Smith, provided the said Greene and Smith agree to the same.

B. G. Lathrop,
C. Haynes."

Indorsed—

"Ninety-nine shares has been transferred to B. G. Lathrop, in pursuance of the above, upon which thirty-five per cent. has been paid, less five per cent. off, making $3,291 75. The memorandum below, of the within, is not intended to affect the within agreement. C. Haynes."

That judgments have been obtained upon the said bills of exchange, against Mock, the indorser. That since the judgments, Lathrop has travelled into Georgia, and ascertained from one Green, the President of the Bank, that Haynes was a swindler, that he never owned any stock in the Bank, having never paid

any thing upon it; that no defence was made to the actions at law, because it was believed the stock was a sufficient security for the debt, &c.

An injunction was granted.

An amended bill was filed, in which it is alledged, that the complainants had agreed to purchase stock in the Bank at Rome, for which purpose, and no other, the bills of exchange were drawn, and indorsed. That at the time an engagement in writing was entered into between complainants, as follows:

"*Alabama, Montgomery county.*

Know all men by these presents, that I, Benjamin Mock, have this day indorsed three bills of exchange, (describing them.) The above described bills, are to be used in purchaing Rome Bank stock, and for no other purpose. The said stock, purchased with said bills, to be equally divided between the said Mock, and B. G. Lathrop, and all benefits arising from the same, either directly or indirectly, is to be shared equally, by the above mentioned parties; and each one is to pay an equal share of the above named bills. Given under our hands and seals, this 12th day of May, 1840.

B. Mock, Jr.

B. G. Lathrop."

That both Haynes and Clapp knew of this agreement, previous to the transfer of the bills of exchange, and that the bills of exchange had been executed for the purpose stated in the agreement. That Clapp knew, that Haynes had no stock in the bank. That Mock was a stranger, and had never been at Rome until since the judgment; when he ascertained that Haynes never owned any stock in the Bank, &c.

The defendant, Clapp, by his answer, positively denies all the material allegations of the bill, and states the facts of the case to be, that Haynes was the partner of one Bronough, in some slaves; that Bronough died, and Clapp was sent from Virginia, to settle the affairs of the firm with Haynes. That Haynes was indebted in the sum for which the bills were drawn, including some individual accounts against Haynes, in his hands for collection. That Haynes promised to pay him at Rome, in Georgia, where he professed to have funds. That Haynes failed to do so, and he threatened to sue him, and attach the stock which he understood he owned in the Bank at that place. That Haynes endeavored to prevail on him, to take Lathrop for the debt. That La-

throp promised to pay the debt in Montgomery, from what inducement Clapp did not know. That Lathrop failed to pay in Montgomery, alledging that he could not raise the money, but promised to pay in Mobile. That he went to Mobile, where Lathrop again failed to pay the money, and proposed to give bills of exchange, which Clapp refused to take. That upon his arrival again in Montgomery, he agreed to take bills of exchange for the debt, if Lathrop would procure a responsible indorser. That he proposed the complainant Mock, and Clapp having made inquiries, agreed to take him; and Lathrop set out, as he said, to obtain his indorsement. About a week afterwards he met with Lathrop, near Jacksonville, who informed him that he had the bills, indorsed by Mock, and a transfer of the stock of the Bank from Haynes, which he exhibited, and proposed to return to Rome, to make an examination of the Bank, to see if Haynes had not deceived him. That he accordingly went to the Bank, and assisted by one of the clerks, examined the books of the Bank, as to Haynes' interest, expressed himself satisfied with the result, and filled up, and handed the bills to him, Clapp. He denies any knowledge, that the instrument executed between Mock and Lathrop, was made, but supposed, that he was an accommodation indorser. Denies that he made any representations to Lathrop as to Haynes' being the owner of stock in the Bank, or that he induced, or persuaded him, to become bound for the debts. That understanding that Haynes had some interest in the Bank, he was about to commence a suit to subject it to the payment of the debt, when he was prevented by Lathrop in the mode above described. He denies all fraud, &c.

Haynes also answered the bill, but his answer need not be inserted, as it has no influence on the case.

To prevent a continuance of the cause, the defendant admitted that Lathrop would prove, that the bills of exchange were delivered to him, to be used in the purchase of bank stock, for the benefit of Mock and himself; and that Clapp knew these facts, when he received the bills in payment of the debt of Haynes, &c. All exceptions were reserved to the competency of Lathrop as a witness. It was also admitted that Lathrop had been declared a bankrupt, since this suit was commenced.

Much other testimony was taken, for which see the opinion of the Court.

The Chancellor considering, that it appeared sufficiently, that the bills of exchange were created for a specific purpose, the purchase of stock, and that Clapp knew the fact, he was chargeable as being accessory to a breach of trust, and could not recover on the bills; and accordingly he decreed a perpetual injunction to the judgments recovered at law upon them.

This decree is now assigned as error.

Hopkins and Elmore, for plaintiff in error. The answer contains a full denial of all the equity of the bill, and there is no proof but that of Lathrop, who is incompetent because of interest, and because he is a complainant on the record. [2 Ala. Rep. 100; 4 id. 285; 6 id. 97, 488, 442; Gressly Ev. 242; 1 Smith Ch. P. 343; 2 Mad. 415; 1 Vernon, 230; Greenleaf Ev. 405.]

They further contended, that the case made by the complainant, in his bill, and amended bill, was incongruous, and inconsistent. That the answer was fully supported by the proof, where it was not responsive to the bill. Lastly, that Chancery had no jurisdiction, as the defence was purely legal, and no sufficient reason shown for not making defence at law. [5 Porter, 547; 6 id. 24; 7 id. 549; 2 Ala. Rep. 21.]

Thos. Williams and Peck, contra, contended, that there was testimony sufficient to fasten on Clapp, a knowledge of the purpose for which the bills were made, and he was therefore accessory to a breach of trust. That it was impossible not to see, that Lathrop, and Mock, had been the prey of the artifices of Clapp and Haynes, as it was perfectly clear, that Haynes never owned any stock in the Bank, and Clapp knew the fact, or at least knew enough to put him on inquiry. [5 Wend. 566.]

As to the jurisdiction of the Court, they contended, that the Court of Chancery had concurrent jurisdiction with the Court of law, in cases of fraud, such as the present.

ORMOND, J.—We shall abstain from the consideration of the question, whether Chancery had jurisdiction of this case, from the omission of complainants to make defence at law, or to account satisfactorily for the omission, because, in our opinion, upon the merits, the case is with the plaintiff in error.

The supposed equity of the bill is, that the bills of exchange,

upon which the plaintiff in error recovered a judgment at law, were indorsed by Mock, upon an agreement with Lathrop, that they should only be employed in the purchase of stock, in the Bank of Rome, Georgia, in which Mock and Lathrop were to be equally interested, and to be paid by them in equal proportions. That with a knowledge of this agreement, between Mock and Lathrop, Clapp received the bills of exchange from the latter, in payment of a debt due by one Haynes, to him, Clapp; Haynes having induced Lathrop to believe, that he was the owner of a large amount of stock in the Bank, when, in truth, he did not own any.

It appears very clear, from the proof, that Haynes had an interest in, or control over, a large amount of the stock of the Bank, and that Lathrop had been at Rome, the place where the Bank was located, endeavoring to obtain some of the stock of the Bank before Clapp had visited Rome, or had any connection, or interview with Lathrop.

Clapp was the agent of an estate, having a large claim against Haynes, and went to Rome with the design of getting payment of the debt, and was there informed by Haynes, that he had made a contract with Lathrop, for a sale of his interest in the stock of the Bank, for the purpose of paying the debt, which Lathrop was to pay in Mobile. This appears from the answer of Clapp, corroborated by the deposition of Haynes. It is also corroborated by the bill itself. In the first bill which was filed, an exhibit is made, by which it appears, that on the 12th of April, 1840, which was about a month before the execution of the bills of exchange, Lathrop made a contract with Haynes, for an equal share of his interest in the stock of the Bank at Rome, for $12,800, half of which Haynes was to pay back to Lathrop, in one hundred and twenty days. This contract, Haynes, in his deposition, says, was made for the express purpose of obtaining money to pay the debt to Clapp. He also states, as does Clapp in his answer, that Lathrop failed to obtain the money in Mobile, according to his expectation, and proposed to give Clapp bills of exchange. It also appears, by the evidence of Pullum, that Lathrop was in Mobile about this time, endeavoring to raise the credit of the Bank. It is therefore very clear, we think, that the allegation of the bill, that Clapp induced Lathrop to become the pur-

chaser of the stock from Haynes, with a knowledge that the latter did not own any stock in the Bank, is without foundation.

It has already been stated, that Lathrop was at Rome, endeavoring to obtain stock in the Bank, and anxious, as the witness, Pullum says, to have an interest in it, before Clapp, who was a stranger in the country, had been at Rome, to obtain payment from Haynes. It also appears that Haynes, whether the owner or not, had the control of a large amount of the stock of the Bank, which, though standing in the name of other persons, he had powers of attorney to sell and transfer. He swears to the fact, positively, himself, and it appears from his testimony, and that of others, that he subsequently caused to be transferred, on the books of the Bank, to Lathrop, five hundred and eighty-seven shares, on which thirty-three dollars had been paid on each share.

There is not a particle of proof in the cause, that Clapp induced Lathrop to make his purchase of the stock of Haynes. He positively denies it in his answer, and is corroborated by Haynes, who says he proposed it to Lathrop himself; and from the testimony of Pullum, a clerk in the Bank, it appears, that the bills were not delivered to Clapp, until Lathrop, by an examination of the books of the Bank, and by obtaining information from the officers of the Bank, had become satisfied of the extent, and value, of the interest of Haynes in the Bank.

The equity set up in the amended bill, is, that Clapp knew of the agreement, between Mock and Lathrop, and of the condition upon which the latter indorsed the bills; that they were only to be used in the purchase of the stock of the Bank. This is positively denied by Clapp, who states, that after Lathrop had failed to obtain the money in Mobile, to pay him, as he had agreed with Haynes, on the 12th April, 1840, to do, he, Lathrop, proposed to pay in bills of exchange, which Clapp agreed to take, if a responsible indorser was procured. That upon Mock being proposed, he made inquiry, and agreed to take him; whereupon Lathrop went to obtain it. That he never saw Mock, and always supposed he was a mere accommodation indorser. This denial of knowledge of the true character of the indorsement of Mock, is supposed to be contradicted by the testimony of Haynes, but it does not appear to us, that there is any contradiction between the answer of Clapp, and the testimony of Haynes. Haynes was re-

quired to answer, whether Clapp knew, before he obtained the bills, the purposes for which they were made. In answer to this, he says, that Clapp, "did know that the bills were executed for, and in consideration of purchasing stock, in the Western Bank of Georgia." Now, this, by no fair interpretation, means, that Clapp knew, that Mock was to have any interest in the stock. Clapp himself, distinctly admits in his answer, that he knew, that Lathrop was purchasing stock from Haynes with the bills, at the same time that he expressly denies, knowing any thing of Mock's interest in the transaction, or the character of his indorsement. It appears from a previous deposition of Haynes, that *he* did not know, that Mock had any interest in the stock. He says, he became the drawer of the bills, at the request of Lathrop, and that Lathrop did not inform him, that Mock had any interest. He is therefore, in the answer above quoted, speaking of the bills, and not of the indorsement on the bills. Nor indeed, was the question calculated to elicit any other answer. If it had been intended to inquire of the witness, as to Clapp's knowledge of the contract between Mock and Lathrop, by which the former became indorser on the bills, it should not have been framed in this ambiguous manner, but the attention of the witness should have been directly pointed to it. We cannot understand by his answer, that he intended to affirm Clapp's knowledge of a fact, of which he, a party to the bill, was ignorant. The plain, and evident meaning of the witness is, that Clapp must have known, that the bills were for the purchase of stock, because, as he says in his answer, Clapp had by letter informed him, that Lathrop had failed to pay the money in Mobile, as he had agreed to do, and had promised to pay in bills of exchange. This is a corroboration of the answer, rather than proof to the contrary.

The answer, expressly denying all the material allegations of the bill, and there being no proof in contradiction of the answer, but the evidence which it was admitted Lathrop would give, if competent to testify, it is unnecessary to consider, whether he, a complainant in the bill, could be examined as a witness for his co-complainant, with, or without an order from the Chancellor; the rule being clearly established, that the answer of a defendant responsive to the bill, of facts within his own knowledge, cannot be overthrown by the testimony of one witness, unless it be aided by other corroborating circumstances. None such exist in the

case. The answer is clear, explicit, and probable. On the other hand, the case made by the bill originally, and that set up in the amended bill, are essentially dissimilar, if not incongruous. The equity set up in the first bill, is, that Clapp and Haynes fraudulently induced Lathrop to believe, that Haynes was the owner of stock in the Bank, and thus induced the latter to become the purchaser of stock, which had no existence—whilst in the second, it is the knowledge of Clapp, of the agreement between Mock and Lathrop, by which the former agreed to indorse the bills of exchange, in the purchase of stock. There is nothing then, to relieve the case from the operation of the rule.

It appears to have been supposed, that if Haynes was not the owner of stock in the Bank, the bills of exchange would be invalid, in the hands of Clapp. This is certainly incorrect, unless Clapp could be implicated in the fraud of Haynes, which has been shown not to be the case. Clapp, as it appears, was a stranger in the country, endeavoring to collect a debt from Haynes, who, whether the owner of Bank stock, or not, was certainly in possession of large means, and wielding a large amount of money—Lathrop, by his own act, in procuring the bills to be drawn, induced Clapp to relinquish the pursuit of Haynes, to take the bills in payment of the debt, and to discharge him from the debt; and it would be extreme injustice, to visit upon Clapp, the consequence of the imprudence of Lathrop, or the fraud of Haynes, if fraud there was. Nor can Mock be in any better condition, than Lathrop. He entrusted the latter with his name, and if an improper use has been made of it, the consequence cannot be visited upon one ignorant of the facts.

It is, however, by no means certain, that Haynes was not able to comply with his contract with Lathrop. Whether he had stock in his own name or not, it is very clear he had the control of a large amount, He swears that he had the control of more than two thousand shares, more than half of which belonged to himself, and upon which thirty-three per cent. had been paid: and it is certain, that subsequent to his contract with Lathrop, he did cause to be transferred to him, five hundred and eighty-seven shares. Upon this stock, a certificate issued to Lathrop, to be delivered to him, on his paying $10,000 in cash, and executing his note for $9,000 more, and upon his failure to comply, the stock became forfeited to the company.

We are not informed, why this forfeiture was permitted to take place, nor what the value of the stock was in its then condition. If one-third part had been paid on it, as appears to be the inference from Haynes' testimony, it was still of value sufficient, supposing the stock to be at par, to satisfy the bills of exchange.

If, however, Lathrop was the dupe of Haynes, as perhaps may be inferred from Pullum's testimony, where he says, that "Haynes had control of a sufficient interest in said Bank at that time, (the time of the transfer of the stock,) to have secured Lathrop, if he had not wished to put him off upon the Bank, and thereby secure to himself, the interest held by him, which interest he afterwards forfeited, by becoming indebted to the Bank," it would only shew the ability of Haynes to comply with his engagements to Lathrop, when it was made, and that by a subsequent fraudulent contrivance, he overreached him. On what principle of equity, could this be visited upon Clapp, who was neither a party to the contract, or a participant in the fraud.

From every view, which we have been able to take of this case, the Chancellor erred in the decree made by him, enjoining the collection of the judgments, upon the bills of exchange; his decree must therefore be reversed, and a decree be here rendered, dismissing the bill

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KIRKSEY v. KIRKSEY.

1. A brother-in-law, wrote to the widow of his brother, living sixty miles distant, that *if she would come and see him, he would let her have a place to raise her family.* Shortly after, she broke up and removed to the residence of her brother-in-law, who for two years furnished her with a comfortable residence, and then required her to give it up: Held, that the promise was a mere grauity, and that an action would not lie for a violation of it.

Error to the Circuit Court of Talladega.

Assumpsit by the defendant, against the plaintiff in error. The question is presented in this Court, upon a case agreed, which shows the following facts:

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega county, some sixty, or seventy miles off. On the 10th October, 1840, he wrote to her the following letter:

"Dear sister Antillico—Much to my mortification, I heard, that brother Henry was dead, and one of his children. I know that your situation is one of grief, and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. * * * I do not know whether you have a preference on the place you live on, or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well."

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for two hundred dollars, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

Rice, for plaintiff in error, cited 4 Johns. 235; 10 id. 246; 6 Litt. 101; 2 Cowen, 139; 1 Caine's, 47.

W. P. Chilton and Porter, for defendant in error, cited 1 Kinne's Law Com. 216, 218; Story on Con. 115; Chitty on Con.

29; 18 Johns. 337; 2 Peters, 182; 1 Mar. 535; 5 Cranch, 142; 8 Mass. 200; 6 id. 58; 4 Maun. 63; 1 Conn. 519.

ORMOND, J.—The inclination of my mind, is, that the loss and inconvenience, which the plaintiff sustained in breaking up, and moving to the defendant's, a distance of sixty miles, is a sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family. My brothers, however think, that the promise on the part of the defendant, was a mere gratuity, and that an action will not lie for its breach. The judgment of the Court below must therefore be reversed, pursuant to the agreement of the parties.

REPORTS

OF

CASES ARGUED AND DETERMINED,

JUNE TERM, 1845.

WIER v. BUFORD.

1. When, by the terms of a written contract, money is to be paid to one, as the agent of a *feme covert*, the husband is not a competent witness to sustain the contract in a suit by the agent to enforce payment.
2. When a *feme covert* appoints one as her agent, to hire slaves, which, in point of fact, belong to her children, and a hiring is actually made, the person hiring is authorized to treat with the *feme covert* as the principal in the contract, until he has notice that the contract enures to the benefit of others; and her acts and declarations with reference to the slaves hired, will affect the contract in the same manner as if she had a separate estate in the slaves, or was acting in the premises by her husband's consent.
3. When a hired slave has left the service of the person to whom it is hired, and has gone to the house of the one hiring it, a second demand is unnecessary, when one is made, and the person hiring consents to take the slave if returned the next day.

Writ of Error to the Circuit Court of Marengo.

[Debt on a sealed note, by Buford against Weir and others. The declaration describes the note as payable to Buford generally, but when produced in evidence, it appeared to be payable

to him, as the agent of Eleanor Williams, and the sum promissd to be paid, was for the hire of two negroes, to wit: Fanny, Daley and child, from the date of the note to the 25th December, 1842. It also provided that the slaves should be delivered to Thomas Buford, as agent, at Demopolis, at the end of the time.

At the trial, the defendant produced a witness, who testified that he was present the latter part of December, 1841, when Thos. Buford, as the agent of Eleanor Williams, hired out, at public auction, the two slaves named in the note, and that they were bid off by Wier; Fanny at $120 50. Also, that in the month of April, or May, 1841, the woman, Fanny, ranaway from the house of Wier, and that, at the request of Wier, the witness accompanied him to the residence Mrs. Eleanor Williams; that on their arrival there, Wier inquired of Mrs. Williams, if the woman, Fanny, was at her house; Mrs. Williams replied in the affirmative; then Wier inquired, if she intended to give her up. Mrs. Williams replied, that according to the terms of the contract of hiring by Wier, he was bound to pay for the hire of the slaves, and that he had no right to retain them if he treated them cruelly; or if they were dissatisfied. Wier replied, that he did not wish to have any difficulty with Mrs. Williams, and informed her, that unless she returned the slave, Fanny, by the next day, he would consider his contract of hiring, as to her, at an end. Also, that the slave did not afterwards to return to Wier. It was further shown, by the evidence, that the slave was frequently seen at the house of Mrs. Williams, during the remainder of the year, and was not again in the possession of Wier. The plaintiff thereupon introduced Samuel J. Williams, the husband of Eleanor Williams, who testified that the slaves mentioned in the note, did not belong to his wife, but belonged to the minor children of himself and her; that the children have no legal guardian, but his wife had requested Buford to hire out the negroes. The defendant objected to this evidence upon the grounds—1st. That Williams was not a competent witness. 2d. That it is incompetent for the plaintiff to show by parol evidence, that he acted in a different character from that disclosed by the note. This objection was overruled.

The Court charged the jury, that if they should believe that Mrs. Williams had a husband, at the time of the demand of the slaves, by Wier, that Wier was bound to make the demand of the

husband, instead of the wife, so as to rescind the contract of hiring; and that if Mrs. Williams had no title to the slave in question, she could not consent to a rescission of the contract. Also, that if Wier gave her all the next day, after his application for the slave, to decide whether she would determine to return the slave, then he was bound again to apply for her.

A deed of gift was also in evidence, showing that Fanny belonged to the children of Mr. and Mrs. Williams. No proof of any demand, or effort to recover Fanny, by Wier, was offered, other than as before stated. The slave was also frequently seen going about the streets of Demopolis, apparently under the control of no one.

The defendant excepted to the several matters before stated, and are now assigned as error.

Hopkins, for the plaintiff in error, made the following points;

1. The husband was not a competent witness. [4 Ala. Rep. 696; 4 Term. 671, 679.]

2. It was not competent for the plaintiff to contradict, by parol, the written admission on the note, that he was the agent of Mrs. Williams. [Mead v. Steger, 5 Porter, 498; 2 Ala. Rep. 571.]

3. As the contract was made with Mrs. Williams, through her agent, it was competent for her, by her acts or declarations, to rescind the contract. [5 Porter, 320, 325; Story on Bail, 255, 256, 262; 1 Salk. 65; 1 Ala. Rep. N. S. 423.]

Peck, contra, insisted that Williams was competent, because the money for the hiring was due, properly speaking, to the children, and not to Mrs. Williams. The recital in the note, that Buford was her agent, estopped no one, and the defendant, Wier, was not authorized to treat with her, as having a separate, or any other estate in the slaves.

GOLDTHWAITE, J.—1. We think there was error, both in the admission of the husband as a witness, and in the several charges given to the jury.

It may be, that the plaintiff was not estopped from showing that the slave in question did not belong to Mrs. Williams, but was the property of her children; but however that is, the evi-

dence, when this was made to appear, had no effect, whatever, on the rights of the parties. Concede that the slave did belong to the children, it then proves only, that the hiring by Buford, was an act authorized by the wife, the benefit of which would probably enure to her husband, if the hiring is to be considered a conversion of the hire. Even if there was evidence, from which his assent to the hiring could be inferred, it would amount to the same thing, whether the hiring was to be paid either to her use, or to his.

The test of the husband's interest, is the fact, that if Buford shall receive the money upon this contract, he cannot dispute, that Williams or his wife, is, one of them, entitled to receive it. He cannot dispute their claim to it, unless some other persons interpose and compel a payment. In this view, we think it clear, that Williams was an incompetent witness.

2. The more material inquiry, however, is, as to Wier's right to treat with Mrs. Williams as the principal in the contract, and to claim a discharge through her acts. And this seems to rest on grounds very similar to the other point. At the hiring, Buford announces that he acts as the agent of Mrs. Williams; the note expresses the same thing. Now, it is not very material, whether Wier knew that she had a husband, or whether he was ignorant of the fact. If he knew it, it was fair for him to presume, either that the wife had a sole and separate estate in the slave, as Buford acted as *her* agent, and not as her trustee; or that her husband permitted her to act for herself. Whatever was the fact, the contract was made substantially with her, and until Wier had notice, that in legal effect, it enured to the benefit of others, he was entitled to treat with her as a principal. So too, if in point of fact, as seems to have been shown, she, or her husband, had no title to the slave, this is a matter, that neither will be allowed to dispute, so as to cast a liability upon Wier, different from that assumed by him. By the hiring, she held herself out as entitled to act in the premises; her agent cannot refuse credit to her acts, and receive the benefit of the contract at the same time.

3. The remaining question, that it was necessary for Wier to make a demand of the slave, after the day during which he permitted her to be so returned, scarcely requires an examination. If his interview with Mrs. Williams, is to be considered as a de-

mand on his part, and a refusal on hers, there he might have rested the matter; but if, instead of doing so, he consented to receive the slave, if she would return the next day, this did not bind him to demand her again.

Judgment reversed and cause remanded.

MANNING v. MANNNING, ET AL.

1. A note, or other security, given in consideration of money won at gaming, is void in the hands of an innocent holder, for a valuable consideration, unless he was induced to take it, by the representations of the maker.
2. The payee of a gaming note, who has transferred it to another, is a competent witness for the maker, and may be compelled to testify as to the consideration of the note, upon a bill in Chancery, filed by the maker against the indorsee.
3. Whether his testimony could be used against him, as an admission, upon a criminal prosecution for gaming—*Quere?*
4. Where the allegations of the bill were, that the indorsee of a note, knew when he obtained it, that it was made upon a gaming consideration, and he is called on by an interrogatory, to state under what circumstances the same was assigned to him, his answer, that before the note was indorsed to him, the maker informed him, *it was good, and he had no off sets against it*, is not responsive to the bill.

Error to the Chancery Court of Madison.

The bill was filed by James Manning, who alledges, that he left his signatures on blank sheets of paper, with Robert J. Manning, with the distinct understanding, that they should be used only in business transactions; that on the 11th October, 1839, by writing his own name, and the form of a note, over one of these signatures, R. J. Manning made the joint note of himself and complainant, negotiable and payable at the Branch Bank at Decatur, for $1,900, payable twenty-four months after date, to defendant, Blevins, who indorsed it to Kavanaugh, by whom it was indors-

ed to Turner, who obtained a judgment on the note, against R. J. and James Manning, in the Circuit Court of Madison, by default. That R. J. Manning has left the State, and gone to Texas. That the note was executed to Blevins upon a gaming consideration, to which the complainant gave no consent, and of which he had no knowledge. That he is informed, and believes it to be true, that Kavanaugh and Turner, at the time they respectively became the assignees of the note, knew that it was founded solely on a gaming consideration. That from an inspection of the note, it appears, there was once a credit of one thousand dollars upon it, which has since been partially erased, but is still legible. The prayer of the bill is, that all these parties be made defendants, and answers thereto be required to make, &c., &c. "Your orator calls on each of the parties to state the consideration of said note, according to his knowledge, information, and belief. Let said Kavanaugh and Turner each state, for what consideration, and under what circumstances the same was assigned to him, and let them all state how the credit came to be erased."

Blevins denies knowing any of the matters in relation to the note, between complainant and R. J. Manning; admits he received the note from the latter, in consideration of money won from him at cards. That he assigned the note to Turner, (having procured Kavanaugh to indorse it for his accommodation,) in the purchase of a race horse and two hundred dollars; does not know that Turner, or Kavanaugh, knew of the consideration of the note.

Kavanaugh admits he indorsed the note for the accommodation of Blevins; did not know any thing about the consideration.

Turner admits the purchase of the note from Blevins, in the fall of 1839, for his interest in the race horse Bustamente, and two hundred dollars in addition, which he has paid. "That before he received said note, he asked the complainant if he had any off sets, and told him he was about trading for the note. That complainant informed him he had no off sets, and the note was a good one," and thereupon he took the note; and that after he received the note, he again informed complainant of it. That he knows of no gaming between Blevins and R. J. Manning, so far as this note is concerned; nor did he suspect that such was the case, when he purchased said note, nor did he ever hear that the note was given for money won at cards, until the filing of the bill. The credit up-

on the note was indorsed in consideration of a bet, won by R. J. Manning of him, and one J. R. Acklin, on the Presidential election, which he entered witout consulting the parties, and that R. J. Manning, being indebted to Acklin in a larger amount the latter agreed to receive payment from Acklin, of the bet which he had won.

In an amended answer, he states that he purchased without any knowledge of the illegal consideration of the note; "that he had neither knowledge, information, or belief of it, at any time, at and before the time, when he purchased and paid for it. He never knew, or heard, or suspected any thing of the kind, until long after all this, and does not now know, or admit it."

An order was made to take the deposition of Blevins, subject to any exception to his competency, and also whether he was compelled to testify. In his deposition, he states, that the note was executed to him by R. J. Manning, for money won at cards. Other testimony was taken not necessary to be recited.

The Chancellor, considering the answer of Turner, stating that he applied to the complainant for information about the note, before he traded for it, responsive to the bill, and also considering, that Blevins was not a competent witness, dismissed the bill.

From this decree an appeal was taken to this Court.

McClung and A. R. Manning, for plaintiff in error. The ground upon which the Chancellor suppressed the deposition of Blevins, is clearly untenable. The decision in Walton v. Shelly, 1 Term. 296, upon which he relied, has been long since overruled in England, 7 Term, 601, and also in this Court, 9 Porter, 225; id. 406; 3 Ala. Rep. 93; 5 id. 385.

Nor can he withhold his testimony, from fear of criminating himself, as the statute compels him to make a discovery. [Clay's Dig. 350; 3 Ala. Rep. 477.] But in this case, the statute of limitations had operated a bar before the testimony was taken.

Turner, in effect, admits that the note was founded on a gaming consideration, Blevins proves it, and the statute declares it void; it is so, therefore in the hands of an innocent holder, for value. [Chitty on Bills, 111; 2 Dana, 414; 7 Porter, 256; 5 Ala. Rep. 353; id. 708.]

The answer of Turner, stating that the complainant informed him that there was no objection to the note, and that he took it up-

on the faith of such representation, is incredible, and wholly inconsistent, with the admitted facts of the case, but if entitled to credit, it is not responsive to the bill, or to any allegation, or interrogatory contained in it, and was therefore not testimony for him. The interrogatory under which it is supposed this part of the answer is responsive, merely calls on him to state the attending circumstances, which is nothing more than he would have been required to do if there had been no such interrogatory. The effect and meaning of the interrogatory, must be ascertained by the stating part of the bill, which is wholly silent as to any such conversation. [Cooper's Eq. 11, 12; Story's Eq. P. §§ 35, 36, 38.]

If this were not so, there could be no recovery on the note, as that is utterly void, but in an action upon the misrepresentation. [1 Porter, 57.]

The counsel also cited, Douglass, 736; 2 B. & A. 590; 8 Price, 288; 2 Str. 1153; Bayley on Bills, 237; 5 Ala. Rep. 334.

S. Parsons, contra. Conceding that this note would be void, in the hands of an innocent holder, for value, without notice, the holder must recover in this case, because he took the note on the representation of the complainant, that there was no defence to it; and although the note in its inception might have been void, the new consideration upon which it was taken, would be sufficient to sustain an action upon it, against such party, whether the maker, or a third person. [Chitty on Bills, App. 816; 2 Starkie's Rep. 232; 1 Camp. 165; 4 B. & A. 212; 6 Bingham, 109; 2 Starkie Ev. 28-9; 16 Mass. 397; 12 id. 281; 5 id. 201; 2 Starkie Rep. 90.]

An examination of the bill, will fully satisfy the Court, that the answer of Turner was responsive to the bill.

The statute giving Chancery jurisdiction, was not intended to uproot all the rules of a Court of Equity, and where it would be inequitable to grant relief, the statute does not apply. Upon a statute similar to ours, in England, against gaming, the Courts refused to set aside a judgment, upon a power of attorney made to secure a gaming debt, when the party making it had declared to the purchaser that it was valid. [1 B. & Adol. 142; see also, 3 Ala. Rep. 458.] He who seeks equity, must do equity, that is,

must act justly; and certainly nothing can be more unjust, than such a defence.

Blevins was not a competent witness. The admissions of a vendor, after a sale, are not evidence against the purchaser. [1 Smith C. P. 340.] He was also incompetent from interest, and because he was a party upon the record, interested in the event, as the decree would be evidence, as between him and Turner, his indorsee, for a valuable consideration. [1 Gressly's Eq. 243; 2 Starkie Ev., 1 ed., 392; 3 Johns. C. 371, 612; 3 Atkins, 401; 1 Johns. Rep. 518.]

ORMOND, J.—The object of this bill is, to obtain relief against the payment of a note, upon the ground, that it was executed upon the consideration of money won at cards. The decree is sought upon two statutes of this State. One, passed in 1807, declares, that "all promises, agreements, notes, bills, bonds, or other contract, judgment, &c., made, &c., upon any gaming consideration, shall be utterly void and of no effect, to all intents and purposes whatsoever." [Clay's Dig. 257, § 1.] And in 1812, it was enacted, that "the Courts of Equity shall have jurisdiction in all cases of gambling consideration, so far as to sustain a bill for a discovery, or to enjoin judgments at law." [Ib. 350, § 28.]

Upon the construction of this last act, it has been held by this Court, that to give Chancery jurisdiction, it was not necessary to assign any reason for not making defence at law, the design of the legislature being to extirpate the evil practice of gaming, and to afford every possible facility for putting it down. [Cheatham v. Young, 5 Ala. R. 353.] In confirmation of this view, it may be stated, that the legislature have since declared, that money actually paid, may be recovered back by the loser. So in Fenno v. Sayre & Converse, 3 Ala. Rep. 458, it was held, that one object of the statute, was to compel the winner to answer, which, but for this statute, he might have refused, from his liability to a public prosecution.

As it respects the act first cited, it has never been necessary, hitherto, for this Court to determine its effect, in regard to the rights of an innocent holder, for a valuable consideration, of a security given for money won at play; but we entertain no doubt whatever, that it is utterly void. The statute, in effect declares,

that it never had a legal existence, and makes it "utterly void, and of no effect, to all intents and purposes whatsoever." And, indeed, if such were not the true construction of the statute, it would, in effect, be a dead letter, as such securities, would always be found in the hands of *innocent holders*, for value.

Such is the uniform tenor of the English decisions upon the statute of 9 Anne, c. 14; see the cases cited on the brief, and the authorities cited in the notes to Chitty on Bills, 9 Am. ed. 111, which in its terms is precisely equivalent to ours.

The same conclusion has been attained, in regard to a note tainted with usury. [Metcalf v. Watkins, 1 Porter, 57.] Although, therefore, the bill alledges, that Turner, the holder, knew that the note was executed for a gaming consideration, when he received it, it is wholly immaterial and need not be proved; the only question upon this part of the case, is, whether the note is, in fact, a security given upon a gaming consideration.

We decline entering upon the consideration of the effect of the answer of Turner, as to this point of the case, because the consideration of the note is proven by Blevins, to have been money won at cards. This testimony was rejected by the Chancellor, because it was against public policy, to permit a party to a negotiable security to impeach its consideration. This doctrine, first asserted in Walton v. Shelly, 1 Term Rep. 296, has been long exploded in England, and never was recognised in this Court, but the opposite opinion asserted, in numerous cases, to be found in our books, and cited by the plaintiff's counsel.

It is now further argued, that he was interested in the event of the suit, as a decree founded upon the illegal consideration of the note, would render him liable over to his indorsee. Conceding such to be the fact, he was clearly competent to testify against his interest, which was the attitude in which he was placed, by being called by the plaintiff in error.

The witness objected to testifying, and his testimony was taken subject to all exceptions; it is now insisted, that he could not be compelled to testify. The State, as already observed, requires a party in the predicament of the witness, to answer, and thus to give evidence against himself, and no reason is perceived why he should be excused from testifying, when he has transferred his interest to another. If that should be the construction of the statute, nothing would be easier than to evade it. No question as

to his liability to a criminal prosecution arises in this case, from this admission, not only because he had admitted the same fact previously, in his answer to the bill, but also, because the statute of limitations had created a bar to a criminal prosecution, before he was called on to give evidence. Whether in any case, the testimony thus compulsorily drawn from a witness, could be used against him upon a criminal proceeding, we need not inquire at this time.

We now approach the only point of difficulty in the case—the fact disclosed in the answer of Turner, that he took the assignment of the note, upon the assurance of the plaintiff in error, that it was valid; and if so, whether the answer is, as to this fact, responsive to the bill, and to be considered evidence in the cause.

Whatever may be the rule at law, we are satisfied, that in equity, the maker of a gaming security cannot have relief against an innocent holder, whom he has induced by his promise of payment, or by an assurance, that the note was valid, to invest his money in its purchase. To this effect are the cases of Beverly v. Smith, 1 Wash. 297, and Hoomes v. Smock, id. 390, upon the principle, that it would be a fraud upon the purchaser, to permit such a defence to be made. It is therefore necessary to inquire, whether the answer is, in this respect, responsive to any allegation of the bill. The defendants are called on to state the consideration of the note, and each is required to state, "*under what circumstances the same was assigned to him.*"

The interrogating part of the bill, is not absolutely necessary; its whole design seems to be, to point more specially to the charges, and thus to sift the conscience of the defendant. Special interrogatories, when introduced into a bill, must be founded on, and authorized by, the stating part of it, or they may be disregarded by the defendant; although, if answered, and replied to, the matter is put in issue. [Fenno v. Sayre & Converse, 3 Ala. Rep. 477; Coop. Eq. P. 11.] It is obvious, however, that where the import of an interrogatory is doubtful, its true interpretation must be sought in the stating part of the bill.

In the stating part of the bill, no fact is alleged from which it can be inferred, that the complainant had any knowledge whatever, of the facts relating to the assignment of the note. On the contrary, he professes utter ignorance of them. The leading idea

which pervades the bill, is, that both Turner and Kavanaugh successive assignees of the note, knew when they obtained it, or at least had reason to believe, that the consideration was illegal. This is expressly charged in the bill, and the interrogatory framed upon it, is to state the circumstances attending the assignment, which indeed, is no more than would have been their duty, if no such interrogatory had been inserted in the bill. The design doubtless was, to get at some fact, or circumstance, showing a knowledge of the consideration of the note, which appears to have been supposed necessary.

The alledged conversation between the complainant, and Turner, is not a circumstance attending the assignment of the note, or connected with it. It is evidently matter in avoidance, not in the slightest degree hinted at in the bill. It is the defence of the defendant, wholly distinct and separate from the case made by the bill, and interrogatory, and which, to be available to him, must be proved by him. This could not naturally have found its way into the bill, and cannot be derived from the general interrogatory above cited, which is founded on, and has reference to, a distinct matter. See the case of Marshall v. the Huntsville Bank, 4 Ala. Rep. 60, and Cummings & Cooper v. McCullough, 5 Ala. Rep. 333, where this subject is quite fully considered.

The allegations of the bill, as to the manner in which the complainant became a party to the note, are not denied, and although not proved, must be considered as true, as they cannot be explained upon any other hypothesis. It is not pretended by Blevins, or any of the defendants, that the complainant was present when the note was executed. Yet we find that it was made payable directly to Blevins, thus showing very conclusively, that it must have existed in a blank form previous to that time. It could not be evidence of a debt from complainant to R. J. Manning, because both parties appear as makers; nor could it be a debt due jointly by them, to some third person, because, in that event, Blevins could not appear as the payee. The allegations of the bill on this point, are entirely consistent with the admitted facts, and must therefore be considered as true. It is, however, unimportant, whether the complainant did, or did not know of the illegal consideration, as the statute vitiates the note, in the hands of an innocent holder, for value. The defence set up in the answer, that the defendant, Turner, was induced to take the note, by the

representations of the complainant, that it was good, not being proved, it follows, that the complainant is entitled to the relief he seeks by his bill. The decree of the Chancellor must therefore be reversed, and a decree be here rendered, perpetuating the injunction.

BUTLER AND WIFE vs. THE MERCHANTS' INSURANCE COMPANY OF THE CITY OF MOBILE.

1. By the third section of the bankrupt act of 1841, not only the property in possession, but actions pending, and mere rights of action, of every one who is regularly declared a bankrupt, vest *eo instanti*, in the assignee appointed for that purpose.
2. Where the husband conveys, by way of release, to the wife, for her sole use and benefit, all the right, title and interest, he had acquired, by virtue of their marriage, to certain stock in an incorporated company, as also the right to sue the company for permitting the unlawful transfer thereof, such a conveyance will be inoperative *at law;* and the rights of the husband attempted to be released, will, upon his being declared to be a bankrupt, vest in the assignee in bankruptcy.

Writ of Error to the County Court of Mobile.

The plaintiffs in error declared against defendants in an action on the case; stating that Helen N., at and before her intermarriage with her co-plaintiff, Thomas J., was entitled to, and possessed in her own right, and as her own property, of fifty shares of the capital stock of the defendant, (a corporation,) of the value of ten thousand dollars; which stock was then, and previously, standing in her name in the books of the Company. That Helen N., before her marriage, and herself and husband since, were entitled to the dividends, &c. accruing on that stock, and to have and demand the same of and from the defendant. It is averred that the defendant, in violation of the rights and property of Helen N., before her intermarriage with her co-plaintiff, suffered the fifty shares of stock to be transferred on the books of the corpo-

ration, without her authority, (or that of any person duly authorized,) to Samuel St. John, jr., and the certificate that had been previously issued by the Company to her was cancelled and revoked, so that the stock, with the dividends thereon, were wholly lost, &c.

The defendant pleaded, that the plaintiff, Thomas J., after his marriage with Helen N., and after the accrual of the several causes of action in their declaration mentioned, became a bankrupt, under and according to the act of Congress, passed August 19, 1841; and the District Court of the United States for the Southern District of Alabama, in pursuance of that act, previous to the commencement of this suit, declared Thomas J. a bankrupt, and such further proceedings were had in that Court, that he received his final certificate and discharge, &c. It is then averred, that all the property, and rights of property, of Thomas J., with the exception specified in the act, vested in Ptolemy T. Harris, the assignee appointed by the District Court, &c.; and the shares of stock supposed to be held by Helen N., and claims for dividends thereon, vested in the assignee.

The plaintiffs replied, that before their intermarriage, the defendant had permitted the transfer of the stock as stated in the declaration, and that after their intermarriage, but before the application of the said Thomas J. for the benefit of the bankrupt act, and before any decree was rendered against him, he did convey, by way of release, to the said Helen N., for her sole use and benefit, all the right, title and interest he had acquired by virtue of their marriage, to the stock, as also the right to sue the defendant for permitting the unlawful transfer thereof.

The defendant craved oyer of the release set it out, and demured. The release bears date six days before the plaintiff, Thomas J. was declared a bankrupt, and recites that Helen N., previous ty the intermarriage of herself and co-defendant, was entitled to certain property and estate, rights and credits in her own right, and also to all the benefits secured to her by law as the heiress of her father Joshua B. Leavens, then deceased; as well as the benefits accruing to her under the will of her father, recorded in the County Court of Mobile. All which estate of Helen N., then unsettled, remained in the hands of the executor of Joshua B., undisturbed and undivided, not recovered, nor in any manner reduced into possession by Thomas J. And Thomas J. having

determined not to take any steps to reduce the choses in action, &c. of his wife into possession, but has elected to abandon the same, and renounce all his marital rights therein, and release to Helen N. his contingent marital right unto her said separate estate and choses in action, and to vest in her full and exclusive power to recover and reduce the same into her own possession, should she think proper so to do, for her sole and separate use and benefit, and the benefit of her heirs, &c. free from all claims of her husbend, and all others claiming through or under him.—The instrument then proceeds to release, &c., to Helen N., her heirs, &c., forever, all his claim, right, interest, property, &c. in and to every thing to which she was entitled, either in law or equity, in consequence of his marriage with her, and which he had not reduced into possession; so that the same may be recovered by Helen N., and held and enjoyed by her in her sole and separate right, &c. The demurrer was sustained, and the plaintiff declining to plead further, judgment was rendered for the defendant.

Dargan, for the plaintiffs in error, made the following points:

1. If an incorporated company improperly transfer stock standing in the name of a subscriber, so that the stockholder's right is reduced to a mere chose in action, he may maintain an action against the company. [9 Eng. Com. Law, 444; 2 Eden's Rep. 299.]

2. The right, of the wife, being a chose in action at the time of the marriage, did not vest absolutely in the husband, and his deed in favor of the wife, vested the entire and exclusive interest in her. [2 Brock. Rep. 285; 3 Paige's Rep. 440; 4 Id. 64; 10 Peters' Rep. 594; 1 Atk. Rep. 259, 270–1; 5 Ves. Rep. 78; 2 Swanston's Rep. 109.] And the subsequent bankruptcy of the husband did not impart to the assignee the right to sue for the improper transfer of the stock. [Owen on Bankr. 125; Eden on Bankr. 192; 1 Term Rep. 356, 619; 3 Bos. & P. Rep. 40; 1 M. & S. Rep. 326; 1 P. Wms. Rep. 316.]

3. It is supposed by the defendant's counsel, that the plaintiff, Thomas J., must have filed his petition in bankruptcy before the deed of release was executed, because it bears date but six days before the decree adjudging the petitioner a bankrupt was rendered, and the act of Congress requires that twenty days shall

intervene between the filing of the petition and decree. The date is an immaterial part of a deed, and may be shown to be untrue—it cannot outweigh upon demurrer, the allegation that the deed was executed before the petitioner sought the benefit of the bankrupt law; otherwise the plaintiff would be prevented from showing that the deed was made and delivered long before it bears date. It must be intended from the replication that the release was executed before the petition was filed.

The application of Thomas J. was voluntary, and could be dismissed by him at any time until the final decree was rendered; neither his wife nor creditors could control him in the prosecution of his suit. The interlocutory decree did not vest in the assignee, the wife's choses in action, or take from the husband the right to relinquish to her his claim to them. The release does not operate as an original conveyance, but as a mere renunciation of title to one who has a paramount equity. The husband might refuse to reduce the wife's choses in action into possession, and he may have avowed such to have been his determination before he filed his petition in bankruptcy; if so, the institution of that proceeding voluntarily, would not render the release inoperative,

J. A. Campbell, for the defendant.—The replication admits the fact that a decree was rendered in pursuance of the act of Congress, but contradicts the release as to the time when the petition was filed. This contradiction could only be taken advantage of by craving oyer of the release, setting it out and demurring. [1 Chit. Plead. 415, 660; 1 Saund. Rep. 468, and notes.] Taking the date of the release to be true, and it is obvious that the petition was filed before it was executed; and there must have been twenty day's notice of the petitioner's application, in order to make the decree regular—this it must be supposed was given. [3 § of Bankr. Act of 1841; Eden's Bankr. Law, 205.]

The facts set forth in the replication does not avoid the bar of the plea. [2 § Bankr, Act. of 1841.] A court of law recognizes no dealing between the husband and wife; though a Court of Chancery will sometimes sustain a settlement or other equivalent act by the husband, yet a court of law will treat it as invalid. In a case like the present, the wife could assert her rights against the assignee, under all the equities of the case. [2 Vern.

Rep. 565; 1 P. Wms. Rep. 458; 2 Atk. Rep. 562; 1 N & McC. Rep. 33; 1 Green's Rep. 398.] The choses in action of the wife vest in the assignees of the husband, at least so far as to prevent the latter from making any disposition of them. [Roper on H. and Wife, 140; 1 P. Wms. Rep. 248; 3 Vesey's Rep. 617; Clancy on Rights, &c. 476; 2 Kent's Com. 138.]

As to the plea, it is believed to be free from objection. [1 Chit. Plead. 17; 15 East's Rep. 622; 11 Eng. Com. Law Rep. 348.]

COLLIER, C. J.—The third section of the bankrupt act of 1841, enacts "That all the property and rights of property, of every name and nature, whether real, personal or mixed; of every bankrupt, except as is hereinafter provided, who shall by a decree of the proper court be declared to be a bankrupt within this act, shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested by force of the same decree, in such assignee as from time to time shall be appointed by the proper Court for this purpose," &c. "And the assignee so appointed, shall be vested with all the rights, titles, powers and authority to sell manage and dispose of the same, and to sue for and defend the same, subject to the orders and direction of such court, as fully to all intents and purposes as if the same were vested in, or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits at law or in equity then pending, in which such bankrupt is a party, may be prosecuted or defended by such assignee to their final conclusion, in the same way and with the same effect as they might have been by such bankrupt," &c. There is a proviso, which excepts from the provisions of this section, household and kitchen furniture, &c. not exceeding in value, in any case, the sum of three hundred dollars; also the wearing apparel of the bankrupt, &c.

The terms of this enactment are exceedingly comprehensive, and operate not alone upon the property of the bankrupt, of which he is in possession, but upon actions pending, and mere rights of action; so that it is important to inquire, whether the husband at the time of the application to be discharged as a bankrupt, had any right growing out of the cause of action stated in the declaration.

Marriage, it is said, operates as an absolute gift to the husband

of all the personal chattels of the wife which were in her possession at the time of the marriage. Choses in action are mere rights, arising from contracts expressed or implied, which must be asserted at law for the purpose of being reduced into possession, as money due on simple contract or by specialty, damages for the breach of promises expressed or implied, &c. When such rights of action belong to a woman at the time of her marriage, they become vested in her husband and he acquires a qualified property in them; that is he may reduce them into possession during his wife's life-time, and then they become his property absolutely; but if he die without having reduced them into possession, they become his wife's by survivorship, and if she die in the life-time of the husband, he shall have them only as her administrator. [Clancy on H. and Wife, 2–4; 2 Kent's Com. Lecture 28, on H. and Wife; Legg vs. Legg, 8 Mass. Rep. 99–101; Howes v. Bigelow, 13 Id. 384; Stanwoood v. Stanwood, 17 Mass. Rep. 57.]

The right of the husband to the wife's choses in action, is recognized by law as something valuable, and may be disposed of by him, so as to cut off her right of survivorship, though they be not reduced into possession. Thus it may be barred by a settlement, either before or after marriage; by a release of the demand; by an award of payment to the husband; by a judgment and execution at the suit of husband and wife; by husband's assignment for valuable consideration, &c. [Clancy on H. and Wife, 110–136.]

It is a rule of the English Common Law, that a married woman cannot possess personal property, and that every thing of this nature to which she is entitled at the time of her marriage, and which accrues in her right during its continuance, is vested solely in her husband; they are but one person, and all the rights and duties which are her's at the period of the marriage, become his during its continuance. Hence, it is said that a man cannot by any conveyance at the common law, limit an estate to his wife, and if a joint estate be conveyed to husband and wife, and a third person, the husband and wife would take a moiety. The unity of their persons, disables her to possess personal property, and the husband being the head of the wife, all that she hath belongs to him. [Clancy on H. and Wife, 1, 2; 2 Steph. Com. 296; 2 Kent's Com. 136.]

These are the rights and disabilities of the wife, at law, so far as it is necessary now to consider them. But the husband may grant to, or contract with a third person, as trustee for the wife; and if he conveys land to a third person, to her use, that will be an effectual conveyance under the statute of uses. [2 Steph. Com. 297.] If the husband makes a gift to his wife to her separate use, equity will regard him as a trustee; and if a conveyance be thus made by a third person without the interposition of a trustee, the husband will be considered such. [2 Kent's Com. 136; Clancy on H. and Wife, 256–261.]

The release (as it is called) to Mrs. Butler by her husband, is not the mere abandonment or discharge of a right of action; whatever the terms employed may be. If operative at all, it must be as a conveyance among other things of the husband's interest in, or right to the choses in action of the wife, which have not been realized by him. Releases, it is said, frequently operate as conveyances. [2 Bouvier's Dic. tit. Release.] Assuming such to be the character of the writing under which the title of the wife is attempted to be sustained, and the conclusion necessarily follows, that it is inoperative at law for all purposes. The effect of a conveyanee (we have seen) from the husband directly to the wife, is not to invest the latter with any rights which a court of law will recognize; but as it respects that *forum*, the thing granted remains in the same predicament in which it was before the deed was executed. If the husband convey directly to the wife, property of which he is in possession, if the conveyance could operate to invest the wife with the legal title, as her head, and in virtue of the unity of their persons, her title would immediately vest in him: and a conveyance by the husband to the wife of his interest in her choses in action, would be alike inoperative, to take from him the right to sue for or assign them. A Court of Equity, in such case, is alone competent to give effect to such deeds, if they can be upheld. [2 Brock. Rep. 285; 3 Paige's R. 440; 4 id. 64; 10 Pet. Rep. 594.]

This brings us to the conclusion, that the wife, in the present case, can claim nothing from the release; and our inquiries might now close, but we will add a few words upon the effect of the husband's bankruptcy. It is said to be now settled, that neither the assignment produced by the bankruptcy, or the insolvency of the husband, will defeat the wife's title by survivorship to her

choses in action. [Clancy on H. and Wife, 124.] Owen, in his Treatise on Bankr. 118–122, says, that property, which the husband is entitled to in right of his wife, either upon or after his marriage, passes to the assignee, subject to the equity of the wife, and if the same be in the hands of trustees, or executors, or in other words not reduced into the husband's possession at the time of the issuing of the decree, the wife may claim her equity for a settlement; and if the assignee, in such case, file a bill in equity to recover the wife's property, equity will not interfere to relieve him, except upon the terms of making a suitable settlement upon the wife and children. But if the assignee can recover without the intervention of a Court of Equity, it is said by the same author, that he will not be bound to make a settlement on the wife. Whether, if the deed in question, before the husband applied for the benefit of the bankrupt law, a Court of Equity would not give to the wife the entire benefit of it, is an enquiry aside from the present case.

The view we have taken, is conclusive of the cause as presented by the record; the consequence is, that the judgment of the Circuit Court must be affirmed.

LAMKIN v. CRAWFORD.

1. A purchaser at sheriff's sale, who refuses to comply with the contract of purchase, is liable to an action by the sheriff, and the right to recover the full price cannot be controverted, if the sheriff, at the time of the trial, has the ability to deliver the thing purchased, or if that has been placed at the disposal of the purchaser, by a tender. The loss actually sustained by the seller, is, in general, the true measure of damages when the purchaser refuses to go on with the sale.
2. When the sheriff has re-sold the thing which the first purchaser has refused to pay for, there is an implied contract by the first purchaser to pay the difference, which is thus ascertained between his bid and the subsequent sale; and a count upon a contract to pay the same is good.

3. Where a sale is made by private individuals, the same rule does not apply, and in such a sale, to let in a recovery of the difference between the sales, it must appear that the one last made, was under such circumstances as will indicate that a fair price has been obtained.
4. There is, however, an exception to the rule, that the sheriff may recover the difference between the sales, and that is, when the first purchaser is himself the owner of the property sold, as the defendant in execution, or from having purchased it from the defendant in execution, after its lien has attached. In such a condition of things, the surplus, after satisfying the execution, belongs to the party purchasing.
5. It is no defence to an action by the sheriff, against a purchaser refusing to go on with the sheriff's sale, that the thing purchased was not the property of the defendant in execution. That is a matter to be ascertained by the purchaser previous to bidding, and cannot be urged against an action for the price. *Quere*—If relief could not be afforded by the Court upon a proper application.

Writ of Error to the Circuit Court of Lowndes.

Assumpsit by Crawford, for the use of William T. Streety, against Lamkin. The declaration has three counts, which were severally demurred to. The first count sets forth, that Crawford, as the Marshal of the United States for the Southern District of Alabama, had levied an execution, issued from the Circuit Court of the United States for that district, in favor of one Hall against Harden, Marcus, and Levi Pruitt, on a certain slave, and on the 7th January, 1839, exposed the same to sale, at public outcry, upon the terms, that the highest bidder should be the purchaser, and should pay cash upon the delivery of the slave; that Lamkin became the purchaser on these terms, at the price of $1,000. And avers an offer of the slave to the defendant, who refused to receive and pay for him according to his promise and undertaking.

The second sets out the execution as for $828, damages, with interest from the 16th of April, 1838, besides $46 costs; avers its levy on a slave, as the property of Levi Pruitt; that the sale was advertised to take place on the 7th day of January, 1839, and that it was then offered for sale at public outcry, upon the following terms, with others, to wit: the sale to be to the highest bidder, to be paid in cash, on the delivery of the said slave. It then avers, that the defendant became the highest bidder, at the sum

of $1,000; that the plaintiff tendered the slave to the defendant, and demanded that sum, which he did not, nor would pay; whereupon the plaintiff again exposed the slave to the highest bidder, and it sold for $750. It then alledges a liability in the defendant, to pay the difference between his bid and what the sale of the slave produced on the resale, and a consequent promise to pay that sum. The third count is similar to the second, but states the right of re-selling at the risk of the first bidder, as one of the terms of the first sale.

The demurrers to the several counts were overruled, and the defendant then pleaded—1. Non-assumpsit. 2. That the slave sold was not the property of the defendant in execution. The plaintiff demurred to the last plea, and his demurrer was sustained.

At the trial upon the general issue, it was shown in evidence, that Crawford, Marshal of the United States for the Southern District of Alabama, by one Love, his deputy, having a *fi. fa.* in his hands in favor of Hall v. Pruett and others, levied on a slave, as the property of one of the defendants in execution, and after having advertised the slave, exposed him to sale, when, the defendant being the highest bidder, became the purchaser at one thousand dollars.

Previous to the levy and sale, the deputy marshal had demanded of the plaintiff's agent a bond of indemnity, against any damage in making the levy and sale; this fact was proclaimed by the deputy marshal before the sale. After the sale, the defendant offered to pay the purchase money if the deputy marshal would either assign to him the indemnifying bond, or make him a warranty title to the slave. The deputy marshal refused to do either, but offered to execute the ordinary marshal's deed, and deliver the slave, and the defendant then refused to pay the purchase money. The deputy marshal then put up the slave and sold him on the spot, when the brother-in-law of one Streety, who was the real plaintiff, and had the control of the execution, purchased him at $750. Streety, the real plaintiff, was present, and gave a receipt to his brother in law for the bid, and paid the marshal his costs.

On this state of proof, the Court charged the jury, that the measure of the damages was the difference in money between the first and second sale.

The defendant offered to prove the real value of the slave, which, upon an objection by the plaintiff, the Court refused to allow.

The defendant excepted to these several matters, and they are now assigned as error, as is also the overruling of his demurrers to the several counts of the declaration, and the sustaining the plaintiff's demurrer to the second plea.

THOMAS WILLIAMS, for the plaintiff in error, made the following points:

1. The first count of the declaration is bad, because no injury can arise out of the facts therein alledged, to the plaintiff, as marshal. If the slave remains unsold, it is the property of the defendant in execution, and he may not complain of any injury.

2. The second and third counts are bad, because they assume the liability of the defendant to pay the difference between the sale, and the resale. If the last had produced sufficient to discharge the plaintiff's execution debt, the marshal is not injured at all, and if there is a surplus upon the recovery of the $250 from the defendant, this, instead of belonging either to to the marshal, or the plaintiff in execution, would properly belong to the Pruitts. Independent of this, the difference between the sales is not the only measure of damages, and therefore cannot be declared for *eo nomine*. [Adams v. McMullen, 7 Porter, 74.] So, also, the defendant, under certain circumstances, might be entitled to the surplus, after satisfying the execution, as he would be if he had purchased the slave from Pruitt, after the lien of the execution had attached, but before the sale. [Wheeler v. Kennedy, 1 Ala. Rep. N. S. 292,]

3. If the defendant in execution had no title to the slave, or if it did not belong to him, the defendant ought not to be forced to complete a purchase made in ignorance of the fact.

4. The questions upon the instructions are substantially the same as those arising out of the pleadings, but the proof might have shown that the slave was worth less than the price bid at first, and the plaintiff ought not to recover more than would satisfy the plaintiff in execution.

ELMORE, contra, insisted, that all the questions raised have

been settled by previous decisions. [Aikin v. School Comm'rs, 5 Porter, 169; Robinson v. Garth, 6 Ala. Rep, 204.]

GOLDTHWAITE, J.—1. The general question as to the right of a sheriff to maintain an action against a purchaser refusing to comply with the contract of sale, arising out of his bid, at sheriff's sale, was settled in Robinson v. Garth, 6 Ala. Rep. 204; but in that case there was no objection taken to the mode of declaring. The objection to the first count of this declaration, as insisted here, is, that if the slave remains unsold, in the marshal's hands, no injury has been sustained by any one, as it cannot be known but more money will be produced by a resale. This may be answered by a reference to the peculiar liabilities which the law imposes on this officer, if, omitting to re-sell, and confiding in the expectation that the purchaser will pay, he returns, that by the sale of the slave, he has made the money which was bid. By this, he would become personally responsible to the extent of the sale returned, and his right to recover the full price, we think, cannot be controverted, if the ability to deliver the slave continues at the time of the trial; or if it has been placed at the disposal of the bidder, by a proper tender. The seller of goods which are not in themselves perishable, has the right, either to re-sell, and look to the former purchaser for damages, upon his contract, or he may make a tender and keep it good, and recover the whole original price. Such was the decision in Bement v. Smith, 15 Wend. 493. It is obvious however, that no recovery to that extent could be had, when the seller had, subsequently to the tender, appropriated the goods to his own use, or again sold them. In general, the true rule by which to ascertain the damages resulting to the seller, from the refusal of the purchaser to go on with the sale, will be the loss actually sustained. [Gerard v. Taggart, 5 S. & R. 19; Mussen v. Price, 4 East, 147.] We think these reasons are conclusive to show, that there is no valid objection to the mode pursued in the first count.

2. The second and third counts assume, that the defendant is liable for the precise difference between the sum bid at the first sale, and that produced at the last; and the only difference between them is, that in the one the legal liability is supposed to grow out of the fact of purchasing at such a sale, and in the other, that it was one of the conditions of the sale. In the School Com-

missioners v. Aikin, 5 Porter, 169, the declaration was the same as the second count here, and would have been sustained, but for the fact, that the plaintiff had no authority to dispose of the school lands under a minimum price; and consequently no implication could arise of a right to re-sell, unless that price could be obtained. We put the decision upon the demurrer there, expressly on these grounds, and say, if upon the second sale, the lands had brought the minimum price, the declaration would have been good. That, it will be seen, was an official sale, and we think the same consequences grow out of every sale of this kind, and that there is always an implied contract to pay the difference, which is ascertained between the bid, and the subsequent sale. This is peculiarly the case with sheriffs' sales, because the officer is bound to make the money at his peril, and the only means which the law gives him, is by a re-sale.

3. In the case of sales which are not made by official persons, this rule has no application, because the sale is not a forced one, and to let in the recovery of the difference of price, it must appear that the subsequent sale was made under such circumstances, as will indicate that a fair price has been obtained. This is the effect of our decision in Adams v. McMillan, 7 Porter, 74. We there say, where the right to re-sell lands, for a failure to comply with the contract is one of the conditions, the difference between the two sales is the measure of damages agreed on by the parties, and is in the nature of stipulated damages; but if no such condition is entered into, as one of the terms of sale, the vendor, upon a breach of the contract, would certainly be entitled to recover such damages as he had sustained by its violation; and the difference between the first and second sale would be a good criterion of the damages sustained by the vendor; not, however, as binding on the jury, but as fit testimony to be received by them, as a means of coming to a correct conclusion. As a general rule, therefore, we think it is implied as a condition in all sheriffs' sales, that the officer may re-sell, if the contract of sale is not complied with by the purchaser, and that the difference is generally recoverable, as in the nature of liquidated damages.

4. We say generally recoverable, because there is one condition of the property, which may exist, in which the purchaser would clearly only be liable to the extent of the money to be collected by the sheriff, and perhaps also such damages as he might

be amenable for, from a failure to return the money. This condition is, where the purchaser is in reality the owner of the property sold, as the defendant in execution, or from having purchased it from the defendant in execution, after the lien of the judgment or execution had attached. In such a condition of things, the surplus arising from the sale, would clearly belong to the purchaser. [Wheeler v. Kennedy, 1 Ala. Rep. N. S. 292.] But this is considered by us, merely an exception to the general rule, which does not require a change in the form of pleading.

5. The demurrer to the second plea, we think, was properly sustained, as the plea presents no ground of defence to the action. The rule certainly is, that the sheriff is not understood as guaranteeing the property of the defendant in the thing sold. That is a matter to be ascertained by the purchaser previous to bidding, and cannot be urged against an action for the price. Whether, upon a proper application, the Court from which the execution issued, might not have the power to relieve a purchaser, under peculiar circumstances, is not the question here, and calls for no expression of opinion.

Having now examined all the points raised in argument, we have only to announce the conclusion, that the judgment must be affirmed.

THE STATE v. HALLETT.

1. An intention to change the domicil, without an actual removal, with the intention of remaining, does not cause a loss of the domicil.
2. Where one resident in Georgia, came to this State, for the purpose of settling here, and leased land and purchased materials for the erection of a foundry, and returned to Georgia for his family, and after some detention returned with his family, and has ever since resided in this State—Held, that he did not lose his domicil in Georgia, or acquire one in this State, until his actual removal to this State, with the intention of remaining.

Novel and difficult questions from the Circuit Court of Talladega.

The defendant was indicted, found guilty, and fined, for voting in the last Presidential election, without being legally qualified to vote.

From a bill of exceptions, it appears, that the defendant was a citizen of Georgia, up to September, 1843—that about that time, being in this State, he declared his intention to settle in Talladega county, if he could procure a site for an iron foundry, from one Robert Jemison. That between the 1st and 15th of September, he leased from Jemison a place in Talladega county, for this purpose, for five years, which took effect from its date. That soon after the lease was made, he employed Jemison to get lumber, for the foundry, and left for the purpose of bringing his family to Talladega. That he was delayed from some cause, in getting back with his family, and did not reach Talladega until the 26th November, 1843; and on his return explained to Jemison the cause of his delay. He established his foundry, and has ever since resided in Talladega county, and on the 11th November, 1844, voted at the Presidential election. It further appeared, that on the day of the election, and before he voted, he took the advice of a lawyer, as to his right te vote, who told him that he had a right to vote.

Upon this evidence, the Court was of opinion, that he was legally guilty, as charged in the indictment, which is now certified as novel and difficult.

S. F. Rice and Bowden, for defendant. The *quo animo* is the real subject of inquiry. An implied residence is sufficient, if the intention is clearly made out. [1 Kent's Com. 77; 8 Cranch, 253.] When the defendant leased the foundry, if his intention was to become a resident of this State, he became so in fact, although his family were in Georgia: nor did he lose his citizenship by going to Georgia for them, because he had the *animus revertendi*. The residence of the husband, or father, is not lost by the failure or omission of the rest of the family to join him. The jury were judges, both of the law and fact.

Attorney General, contra. Two things must concur, to constitute domicil, to wit: actual residence and the intention of making it the home of the party. The *animo et facto* must concur. [Story's Con. of L. 42, § 44; 3 Ves. 198; 5 id. 750; 10

Pick. 77; 5 id. 370; 2 B. & P. 228; 11 Mass. 423; 4 Cow. note, 516.]

A mere intention to acqnire a new domicil, without the fact of removal, avails nothing; nor is an original domicil lost, until the new one is acquired, *animo et facto*. The residence of the famly, is the domicil, although the head of it may have another place of business. But in this case, it does not appear, that Hallett expected, or intended to be in Alabama, by the 11th November, 1843.

ORMOND, J.—The question presented upon the record, has always been considered one of great moment, and has given rise to much discussion, and ingenious, subtle, reasoning, both in the civil and common law. It appears, however, to be well settled, that when a domicil has been acquired, it is not lost, until a new one is actually gained, *facto et animo*. The mere intention to change the domicil, without an actual removal, with the intention of remaining, does not cause a loss of the domicil.

Here the facts were, that the defendant, being domiciled in Georgia, came to this State, with the design of settling here, and manifested his intention of making this State his permanent residence, by leasing a piece of land, procuring materials for the erection of a foundry, and going to Georgia to bring his family. These acts all mark, unequivocally, his intention to change his residence, from Georgia to this State. These facts, however, are not sufficient to cause a loss of the domicil he previously had. If, on his return to Georgia, he had died before being able to carry his purpose into effect, it can admit of no doubt, the Courts of Georgia, and not of this State, would have been entitled to distribute his estate. The same rule must have prevailed, if he had died upon the journey here, because until he had actually reached here, there would have been no change in fact, of the domicil. In one case indeed, the *intention* to remove, has the effect to change the domicil—where one, by residence, has acquired a domicil, different from that of his birth, and with intention to resume his former domicil, sets out on his return. In that case, it has been held, that the domicil, is re-acquired, from the time he manifests such intention. [The Venus, 8 Cranch, 253.] This proceeds from the fact, that the acquired domicil, was adventitious, and may therefore be thrown off at pleasure. See also, the ca-

ses of Jennison v. Hopgood, 10 Pick. 77; Bruce v. Bruce, 2 B. and P. 228; and Williams v. Whiting, 11 Mass. 423. This last case is expressly in point, and does not vary in any essential particular from this. There, as here, an intention was manifested to change the residence of the party, but until it was consummated by an actual removal, the Court held, the former domicil was not lost.

The charge of the Court, therefore, upon the facts was strictly correct, and its judgment must be affirmed.

GOLDTHWAITE, J., *dissenting*.—I am not disposed to question the correctness of the principles upon which the decision of the Court is founded; but I think they are mistakenly applied to the case before us. The peculiar condition of all new countries is such, that the *factum* of domicil, or residence, is essentially different from what it is in an older country, or a city. The *domus*, in the first instance, is either a tree top or a mere hovel, and the hammer of the artizan and the axe of the woodman must, in most cases, precede the removal of the family of the settler. His duties as a citizen commence with his first preparatory act of settlement, and after ten days actual residence, he may be compelled to defend the home which he is preparing. If the duties of citizenship are thus imposed on him, I can see no reason why his privileges should not date from the same period, if they became perfect by a continuation of residence for the required time.

I think it should have been put to the jury to determine from the evidence before them, whether the acts done by Mr. Hallett, with relation to his foundry, were performed with the intention to make a permanent residence amongst us, and if they so found them, that his residence commenced with the first act, independent of the then domicil of his family.

LOWRIE vs. STEWART.

1. Where the plaintiff declares in the common counts in *assumpsit*, a plea of the statute of limitations of three years is bad, unless it aver that the cause of action is an open account.
2. B. was indebted to S., (his father-in-law,) or S. was bound to advance money for him, B. sold to L. a house and lot, and took his note payable to S. for the purchase money; B. had been a partner of F. in a mercantile establishment. Upon the dissolution of their partnership, the firm were indebted to B. more than $1,000, which he was to retain, and appropriate the residue of the effects to the payment of the joint debts; some of the demands due B. and F. were placed by the former in the hands of S. as a justice of the peace to collect, who acknowledged their receipt from, or his accountability to S: *Held*, that the inducement for taking the note and receipt in S.'s name was sufficient to free the transaction from the imputation of fraud; that a debtor may prefer one creditor to another, and the relationship between B. & S. could not prevent the latter from securing himself; *further*, that by making the note payable to S., L. admitted that he was entitled to the money, and cannot be heard to alledge the reverse.
3. Where a justice of the peace receives money in his official capacity, he cannot detain it in satisfaction of a debt due him, in his private capacity, or when sued for its recovery, plead a set off against it.

Writ of error to the Circuit Court of Talladega.

The defendant in error declared against the plaintiff in assumpsit. 1. On a promissory note, dated the third of November, 1838, for the payment of two hundred and eighty-seven dollars, twelve months after date. 2. For money had and received. 3. For goods, wares and merchandize, sold and delivered. 4. For money lent and advanced. To each of these counts there was a demurrer, which being overruled, the defendant below pleaded—1. *Non assumpsit.* 2. A set off. 3. Want of consideration. 4. Failure of consideration. 5. Statute of frauds, alledging that the cause of action in each count, except the first, is an open account; and, 6. To all of the declaration, except the first count, defendant pleads the statute of limitations of three years. On motion of the plaintiff, the fifth plea was stricken out, issue was joined on the others, and the cause was submitted to a jury, who returned a

verdict for the plaintiff, for the sum of $547 87 damages: and judgment was rendered accordingly.

From a bill of exceptions it appears that the plaintiff had been a partner in a mercantile firm with one Brasher, his son-in-law; upon a dissolution of their partnership, Brasher received the effects of the concern and undertook to pay the debts. Afterwards Brasher formed a similar partnership with one Favour. This latter firm being also dissolved, Brasher received its effects and stipulated with his partner that he (Brasher,) would retain one thousand and seventy-six dollars, the amount of his individual account against the concern, and appropriate the residue, amounting to some thousand dollars, to the payment of the partnership creditors. The defendant received for collection as a justice of the peace some of the claims due Favour & Brasher; for so much as he had collected and failed to account for, this action was intended, among other things, to recover.

There was evidence tending to show, that Brasher's object, in taking the receipt of the defendant, in the plaintiff's name, was to indemnify the latter from loss, in consequence of the failure of the former to pay off the debts of Stewart & Brasher.

During the partnership of Favour & Brasher, they owned a house, of which, upon the dissolution, Brasher became the sole proprietor, by the purchase of Favour's interest. This house and lot was afterwards sold by Brasher to the defendant, who, in part payment, took the note described in the first count of the declaration, payable to the plaintiff.

On the 25th of January, 1838, Favour & Brasher, made a note for the payment of four hundred dollars, to one Holloway, on which there was an indorsement to the defendant, dated the 21st August, 1838. The signature of the indorser was proved, the date was not otherwise shown, but it was proved that the defendant had the note in his possession previous to the 22d day of November, 1843, more than one year before this suit was commenced.

The bill of exceptions, after reciting with great particularity, the facts above condensed, proceeds thus: "The questions were, 1. Whether the note of Favour & Brasher to Holloway, indorsed to Lowrie as above, could be set off against the note declared on; and, 2. Whether it could be set off against the claim for collected monies. The Court charged the jury that the giving of the

note by Lowrie to Stewart, estopped him, under the circumstances, from asserting that it belonged to Favour & Brasher, so as to justify a set off against them; and that the giving of the receipt to Stewart, although for effects of Favour & Brasher, or which had belonged to them, had the same effect, and thereupon excluded the note from the jury." Thereupon the defendant excepted, &c. It appears from the judgment entry, that the sixth plea was stricken out by the Court.

S. F. Rice, for the plaintiff in error, contended—1. That the sixth plea was good, and consequently should not have been stricken out. [1 Ala. Rep. 124; 6 id. 509.] 2. If the transfer of the claims due Favour & Brasher was merely colorable, or fraudulent, as is shown by the evidence recited in the bill of exceptions, then the defendant below should have been allowed to set off the note acquired from Holloway. 3. Neither the undertaking to pay the plaintiff the sum expressed in the note declared on, or giving him a receipt for the claims placed in the defendant's hands by Brasher, estopped the defendant from insisting that the transaction was fraudulent as between the plaintiff and Brasher; or prevent him from relying on the set off. 4. The three last counts in the declaration are imperfect, and to them at least the demurrers should have been sustained.

E. W. Peck & Clark, for the defendants in error, insisted, that the declaration was good. The sixth plea was not an answer to the declaration; for the common counts are not necessarily founded upon open accounts, and not alledged to be so. The striking out of the plea is only shown by the judgment entry, and not by the bill of exceptions—will it be considered by this Court? 2. The note of Holloway was not good as a set off. It does not appear that the defendant acquired it, until after he made the note to the plaintiff; but if he had it previously, he was estopped from setting it up, by consenting to become the plaintiff's debtor, instead of becoming liable to Brasher. In respect to the sum of $1,076 dollars, which Favour and Brasher owed Brasher, certainly the latter had the right to use that sum as he pleased. He transferred effects of the firm to that extent to Stewart, and that it might be realized, he placed some of the claims in the defendant's hands for collection. Thus far there is no right of set off. Again;

the defendant could not retain money collected by him, as a justice of the peace, in satisfaction of his own private demand.

COLLIER, C. J.—In Winston v. The Trustees of the University, 1 Ala. Rep. 124, it was determined that in an action of assumpsit on the common counts, a plea of the statute of limitations of three years, which does not aver that the plaintiff's cause of action is an open account, is bad on demurrer. If the plea was no answer to the declaration, the defendant has not been prejudiced by the striking it out, and cannot complain that the plaintiff did not demur.

The three counts which were demurred to, are certainly not so verbose as those furnished by most of the writers upon pleading, yet it is believed that each of them states with clearness the facts which constitute a good cause of action; and that the liability deduced from them is a proper deduction.

It was clearly competent for Brasher to transfer his individual property to Stewart, who had perhaps made advances for him, or if he had not, was bound to pay money for him. The arrangement between Brasher, the plaintiff and defendant, was, in effect, a transfer of a portion of the purchase money, to be paid for the house which the former sold to the latter. The validity of this transaction, we think, cannot be impngned by showing that Brasher also transferred the effects of Favour & Brasher to the plaintiff, and that he preferred him to other creditors, because he was his father-in-law. A debtor may prefer one creditor to another, if liens already attaching are not thereby defeated or impaired. A relationship by consanguinity, or affinity, cannot prevent the creditor from securing himself.

It is not necessary to an estoppel that there should be a deed, but it may be by matter *in pais*. By making the note payable to the plaintiff instead of Brasher, the defendant admitted his liability to the payee, and that he was entitled to the money, and cannot now be permitted to alledge otherwise. Such a defence might be prejudicial to the plaintiff, who, in consequence of the defendant's promise, must have pretermitted other means to secure himself *pro tanto*.

In Prewitt v. Marsh, 1 Stewart & P. Rep. 17, the defendant being sued for the recovery of money received by him as a justice of the peace, attempted to set off money due him from the

beneficial plaintiff in the action. This Court said, "that a justice of the peace who receives money in his official capacity, cannot lawfully detain it in satisfaction of a debt due him in his private capacity; and that it cannot be the subject of payment or set off," &c. Here is a case directly in point, and fully sustains the decision of the Circuit Judge. See also Crockford v. Winter, 1 Camp. Rep. 124.

It results from the view taken, that the judgment of the Circuit Court is affirmed.

MASSEY v. WALKER.

1. The refusal to quash an attachment, is a matter which cannot be re-examined on error.
2. A plea seeking to abate an ancillary attachment, on the ground that the defendant had been previously arrested and held to bail, is bad on demurrer.
3. A replication to a plea in abatement, asserting that the arrest of the defend ant and pendency of the suit spoken of in the plea, are part of the proceedings in the same suit, as pleaded to, should conclude to the Court, as it is triable by the record.
4. In practice, no formal judgment of *respondeas ouster* is entered upon the sustaining a demurrer to a plea in abatement. The sustaining of the demurrer is entered on the record, and if the defendant wishes to plead over, he is permitted to do it.
5. An ancillary attachment may be sued out, although the party has been previously arrested on bail process issued in the same cause.

Writ of Error to the Circuit Court of St. Clair.

Walker on the 30th June 1842, sued out a writ in assumpsit against Massey, returnable to the then next September term. Bail having been required, the defendant was arrested, and entered into the usual bail bond, with surety. Afterwards, on the 17th

July of the same year, the plaintiff sued out an ancillary attachment, which is returned levied.

At the return term, the defendant moved to quash the attachment, which motion was refused.

He then pleaded in abatement of the attachment—1. Because the bail writ before sued out had been executed on the defendant. In this plea the attachment is said to be the leading process in the suit. 2. A similar plea, showing the arrest of the defendant under the bail writ, and leaving out the assertion that the attachment is the leading process in the suit. Both pleas pray judgment of the attachment that it may be quashed.

The plaintiff replied to the first plea, that there was no record of any such attachment, forming the leading process in the suit, and avers that the attachment sued out is ancillary to the suit commenced by the bailable process, and that both writs formed one suit. To the second plea he demurred. The defendant took issue "in short," to the plaintiff's replication to the first plea.

The judgment only recites that the demurrer to the second plea was sustained; the issue formed on the first plea in the count was found for the plaintiff, and the defendant saying nothing further in bar, or preclusion of the plaintiff's demand, it was considered, &c., rendering a final judgment.

The defendant now assigns, that the Circuit Court erred—

1. In overruling the motion to quash the attachment.
2. In sustaining the demurrer to the second plea.
3. In deciding the issue formed on the first plea in favor of the plaintiff.
4. In not awarding a judgment of *respondeas ouster* after sustaining the demurrer.
5. In rendering judgment final upon the state of facts shown by the record.
6. In rendering final judgment, without having first awarded a judgment of *respondeas ouster*.
7. In trying the issue joined, and in not submitting it to a jury.

Rice, for the plaintiff in error, made the following points:

1. The estate of a debtor cannot be attached, on *mesne process* after his body has been arrested in the same suit. [Daniels v. Wilcox, 2 Root, 346; Brinly v. Allen, 3 Mass. 561.

2. The issue growing out of the second plea should have been submitted to a jury.

3. A judgment of *respondeas ouster* is the only proper one which can be given on the plaintiff's demurrer to a plea in abatement. [1 Lord Raymond, 338, 550; 16 John. 307; Com. Dig. 142; Burntham v. Webster, 5 Mass. 266.]

F. W. Bowdon, contra, argued—

1. The refusal to quash is not reviseable on error, (Reynolds v. Bell, 3 Ala. Rep. 57,) but the attachment is regular. [Hounshell v. Pharcs, 1 Ala. Rep. N. S. 580.]

2. The issue was properly *nul tiel record*, and therefore to be tried by the Court. [Gaston v. Parsons, 8 Porter, 469.] And the record shows that the defendant declined to plead over. [McCutchen v. McCutchen, 8 Porter, 151; Chilton and Bowdon v. Harbin, 6 Ala. Rep. 171.]

4. The bail writ does not preclude the suing out of the ancillary attachment. A parallel case exists under the statute, which gives a *ca. sa.* and *fi. fa.* at the same time. [Cary v. Gregg, 3 Stewart, 433.]

GOLDTHWAITE, J.—All the questions made in this case, may be briefly disposed of.

1. As to the refusal to quash the attachment, that is not a matter which is proper to be examined on error. At best, this is a motion which the Court may entertain, but cannot be controlled to do so. [Reynolds v. Bell, 3 Ala. Rep. 57.]

2. Our statutes which authorize attachments as ancillary to causes already depending, make no distinction between suits commenced by bailable process, and suits commenced in the ordinary mode. In either class, we consider the attachment proper, if the statutory course for suing it out is shown. This conclusion is decisive of any supposed merit in the second plea in abatement, to which the demurrer was properly sustained.

3. In relation to the issue growing out of the other plea, it is entirely immaterial what it was, or whether formed, to the Court or jury, as in either case it would have availed the defendant nothing. But in point of form the proper issue was *nul tiel record*, and although we do not know what was shown to the Court, as

evidence, we would presume error in a case where the matter was material, that the evidence supported the plea.

4. The proper judgment upon a demurrer to a plea in abatement, when the demurrer is sustained, is one of *respondeas ouster*, but in point of practice with us, no formal judgment is, in general entered; the mode generally is, to notice the sustaining of the demurrer, upon the judgment entry, as in this case. If the defendant wishes to plead over, he does so; if otherwise, there is no injury done. Here no formal judgment is rendered on the demurrer; the final judgment in this cause is only rendered upon the failure to plead further.

We can see no error in the record. Judgment affirmed.

Afterwards, at another day in Court, a mandamus was moved for, on behalf of Massey, to direct the Circuit Court to set aside the ancillary attachment in this case, on the ground that at the time of its issuance and levy, the defendant was in custody under the bail writ. An affidavit was submitted, showing that Massey had never been discharged legally from the arrest, and the record of the case showed, that the motion to quash the attachment had been made and refused in the Circuit Court.

Rice, for the motion, cited, Daniels v. Wilcox, 2 Root, 346; Bradley v. Allen, 3 Mass. 561; 3 Ala. Rep. 57, 250, 363; 4 ib. 393, 687.

GOLDTHWAITE, J.—The statute under which the attachment in this case was sued out, provides, that whenever a suit shall be commenced in any Circuit or County Court of this State, and the defendants, or any one or more of them, shall abscond, or secrete him, her, or themselves, or shall remove out of this State, or be about to remove out of this State, or shall be about to remove his, her or their property out of this State, or be about to dispose of his, her or their property fraudulently with intent to avoid the payment of the debt or demand sued for; and oath being made, &c., an attachment may issue, and when returned, the same shall constitute a part of the papers in the original suit, which may proceed to judgment as in other cases. [Clay's Dig. 62, § 35.]

The object of this enactment was to give the process of attachment, when any one of the enumerated causes for its issu-

ance might exist; and we can see nothing in it which limits its provisions to cases where the defendant has not been held to bail. We have held, it is true, that an ancillary attachment can not be sued out in an action of detinue, because no original attachment can be issued for such a cause of action. [Le Baron v. James, 4 Ala. Rep. 687.] But here the cause of action is such as would support an original attachment, being a liquidated debt; and therefore the ancillary one is proper, unless the previous arrest on the bailable process prevents it. In our opinion, this does not, The arrest on bailable process, has only a very remote analogy to the final process by *ca. sa.*, where the reason for the discharge from arrest, if a sufficient levy is made, is, that there is a *quasi* satisfaction by the levy; but, even in that case, we presume, a Court would require very satisfactory proof, that the levy would be productive, before it would allow the defendant to be discharged. When the process, however, is under this statute, we think there is no pretence to discharge the levy of the attachment, whatever the proceedings might be affecting the person of the debtor.

Motion refused.

GRAHAM v. RUFF.

1. An allegation in an affidavit, made to obtain an attachment, that the person against whom the process is sought, "is a non-resident," is sufficiently certain.

Error to the Circuit Court of Montgomery.

This was an action commenced by the plaintiff in error, by attachment. The cause assigned for the suing out the attachment, in the affidavit, is, that the defendant is a "non-resident." For this cause the attachment was quashed by the Circuit Court. From this judgment this writ is prosecuted.

WILLIAMS, for plaintiff in error, argued, that the Court should not have quashed the attachment, but should have put the party to his plea in abatement. [6 Ala. Rep. 154.]

PRYOR, contra.—Where the want of jurisdiction appears upon the proceedings, the Court may quash. He cited, 1 Sumner, 578; 6 Wheat. 450; 1 id. 92; 3 Dall. 382; 4 id. 12, 22; 8 Pet. 148

ORMOND, J.—The case of Wafer v. Pope, 6 Ala. Rep. 154, merely determines, that the want of an affidavit, or bond, cannot be assigned for error, in this Court, if the objection has not been taken in the Court below. The mode pointed out by the statute, of taking the objection, is by plea in abatement, and therefore a writ of error would not lie, for a refusal to quash. But if the Court thinks proper to act in this summary way, and repudiates the cause for want of jurisdiction, it cannot be assigned as error in this Court, if the cause was sufficient, as in that event the defendant has sustained no injury. We proceed therefore to consider, whether the cause assigned authorized the action of the Court.

One of the causes for which an attachment may issue, is, that "he or she resides out of this State." The cause assigned in the affidavit, is, that the defendant "is a non-resident." As the Legislature has declared, that "the attachment law of this State, shall not be rigidly and strictly construed," it becomes necessary to inquire, whether the language employed in the affidavit is of equivalent import, with the statutory requisition.

It is urged, that the term "non-resident," is equivocal, and may mean, that the person of whom it is affirmed, does not reside in a particular county, in the State of Alabama, or in the United States, and is therefore insufficient from its uncertainty. To ascertain the meaning, we must look at the context, and the purpose for which the allegation was made. The terms used, are found in an affidavit made to obtain an attachment, according to the law of the State, and as a non-residence in any particular county in the State, is not sufficient for that purpose, it is reasonably certain, that the plaintiff intended to swear, that the defendant did not reside within the State; and if, by fair and just interpretation, this must be understood to be its meaning, it is sufficient. To hold otherwise, would be to say, that it must be so certain as to

exclude every other conclusion, which would be a manifest violation of the statute.

If the defendant resides within this State, the plaintiff could not escape the force of this reasoning, but would be clearly guilty of perjury. It results from this, that the Court erred in quashing the attachment for this cause, and its judgment is therefore reversed, and the cause remanded.

HARGROVES v. CLOUD.

1. The possession of property by a bankrupt, at the time of his discharge, or immediately after, which by industry he might reasonably have acquired, does not warrant the presumption that he did not make a full surrender of his estate; but if the value of the property is so great as to make it improbable that it was earned since the filing of the petition in bankruptcy, it devolves upon the bankrupt to show how he became the proprietor of such property, when his discharge is impugned for fraudulent or wilful concealment.
2. Where it appears that the defendant and alaintiff pleaded and replied "in short by consent," it will be intended that the plea and replication contain every material allegation that the law requires, to make them complete; but if the pleading could not be supported, if drawn out in form, a demurrer should be sustained, if so interposed as to reach the defect.

Writ of Error to the Circuit Court of Russell.

THE defendant in error suggested to the County Court of Russell, that on the 12th December, 1840, he became the surety of the plaintiff in a promissory note for the payment of $250, to David Golightly; that at the August term of that Court, holden in 1842, Wm. S. Chipley, as the administrator of the payee, recovered a judgment on the note against the plaintiff below, for the sum of $263 87. On the 5th of December, 1843, the plaintiff paid off and satisfied the judgment thus recovered; and thereupon

he moved the Court for judgment against the defendant below, for the amount thus paid by him, with interest, &c.

The defendant appeared and pleaded—1st. That he was a certificated bankrupt. 2d. Payment. To the first plea, the plaintiff replied, that he had obtained his certificate fraudulently; to which defendant demurred, and his demurrer being overruled, issue was joined on both pleas. Thereupon the cause was submitted to a jury, who returned a verdict for the plaintiff, and judgment was rendered accordingly.

From a bill of exceptions, sealed at the instance of the defendant, it appears that the plaintiff offered to prove, that the defendant had some negroes in his possession after filing his petition, and after the decree of bankruptcy; to the admission of this evidence the defendant objected, but his objection was overruled, and the evidence was permitted to go to the jury. The defendant then prayed the Court to charge the jury, that they should not regard any evidence tending to show that the defendant did not render a complete schedule of the property in his possession at the time of filing his petition. *Further*, that the possession of property by the defendant, after obtaining a decree in bankruptcy, is not admissible evidence to prove fraud in obtaining his certificate. Which charges the Court refused, and charged the jury, that property in defendant's possession, immediately after obtaining the decree, unless explained, was a circumstance which they ought to take into the consideration as evidence of fraud. The cause was removed to the Circuit Court, and the judgment of the County Court there affirmed.

G. W. Brown, for the plaintiff in error, insisted, that the Court below erred in the several points presented by the bill of exceptions. That although it appears from the record to have been agreed that the plaintiff might reply "*in short*" to the first plea, yet this consent did not relieve the pleader from setting out specially, in what the fraud consisted; and for its generality the replication was defective. [3 Ala. Rep. 316; 5 Id. 451-]

S. Heydenfeldt, for the defendent in error. The replication is entirely sufficient. The bankrupt act of 1841, provides that the plea of bankruptcy may be met by proof, that the certificate was obtained by fraud—the plaintiff first giving a written notice

to the defendant of the grounds relied upon. If the notice is special, as the law requires, where is the necessity of disclosing the facts in the plea, which tend to establish the fraud? The record does not set out the notice, or even alledge that it was given, and it could not with propriety be sent up, unless it was incorporated by bill of exceptions; but it must be presumed that it conformed to the law.

COLLIER, C. J.—A discharge and certificate duly granted to a bankrupt, under the act of Congress of 1841, for the establishment of a uniform system of bankruptcy, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which are proveable under the act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment, by him, of his property, or rights of property, contrary to the provisions of this act, on reasonable notice specifying in writing such fraud or concealment." (See § 4.) The fraud and concealment of property by a bankrupt, it is held, must be deliberate and intentional to affect him; but it is said, where property is discovered belonging to the bankrupt's estate, subsequent to the issuing of the decree, which had not been accounted for; the intention of the bankrupt being apparent, his discharge and certificate will be disallowed. [Owen on Bank. 222-3.] What facts will establish fraud or wilful concealment, so as to annul a certificate already allowed must depend more or less upon the circumstances of every particular case. The possession of property by a bankrupt at the time of his discharge, or immediately after, which by industry he might reasonably have aequired, would not warrant the presumption that he did not make a full surrender of his estate. But where the value of it is so great as to make it improbable that it was earned by him since the filing of his petition, it devolves upon him to show how he became the proprietor of such property: whether by inheritance, bequest or purchase. This much the bankrupt owes to his creditors as well as himself; and the *onus* of relieving himself from the imputation of fraud, is, in such case,

cast upon him, who is best acquainted with the origin and nature of his title, and if fair may easily sustain it.

In the present case, the property in the possession of the bankrupt, was slaves. These, we know, are of too great value to be acquired in a very short time as the earnings of industry, and if they were purchased on credit, obtained by gift, &c., the fact should be proved. It is not shown by the bill of exceptions how long the case of the bankrupt was pending; if for a long time, the presumption of fraud would be weakened. But as all intendments are favorable to the decision of a primary Court, it would be presumed, if necessary, that the suit progressed regularly to a hearing, without a continuance; especially as the party excepting has not shown by the record, that the reverse is true.

Without stopping to inquire whether the act, in requiring a notice in writing, to the bankrupt, specifying the fraud or concealment, has any influence upon the form of the pleadings, we are satisfied that the replication in this case is good. It is explicitly stated in the record, that both the defendant and plaintiff pleaded and replied "in short by consent." This being the case, we have repeatedly held, that it must be intended that the plea and replication contain every material allegation which the law requires, to make them complete; and that an objection which supposes the reverse, cannot be entertained. If the pleadings could, under no circumstances, be supported, of course a demurrer would be sustained, if so interposed as to reach the defect. But the objection which is made to the replication, applies with all force to the plea, and that being prior in order, would be adjudged bad, if the demurrer could be entertained.

This view disposes of the case; the judgment is affirmed.

WATSON AND WIFE v. MAY.

1. The statute which gives a writ of error or appeal from all judgments, or final orders of the Orphans' Court, does not take in cases in which neither writ of error or appeal could be taken, by the course of practice in the Courts of the civil or common law.
2. It is not necessary to the validity of proceedings by administrators before the Orphans' Court, that parties should there be made except in cases provided by the statute. Even where the estate is ready for distribution, a general citation to parties having an adverse interest was necessary, prior to the last act.
3. Persons having an adverse interest, are not concluded by an erroneous decree, but they cannot, without further proceedings, forthwith sue out a writ of error.
4. The personal representative is entitled to examine and litigate the title of any one who claims an interest in the final distribution of the estate.
5. When the proceedings by an executor or administrator have been in conformity to the rules prescribed for his action, there can be no review of the facts upon which the judgment of the Court is founded, although persons having an adverse interest were not apprised of the final settlement intended by the administrator. On the other hand, the administrator cannot prevent a re-examination, when the proceedings are erroneous, because those actually interested have not appeared.
6. When any one claims to have the right to examine the correctness of a final decree, the proper practice is for him to propound his interest to the Court in which the decree is rendered. Upon this, after citation to the administrator, and his appearance or default, the person is made a party or his petition is dismissed.
7. When a writ of error is sued out by persons who are not parties to the proceedings below, the writ of error will be dismissed.

Writ of Error to the County Court of Sumter.

The writ of error in this case is sued out by Watson and his wife, who is the Emily Easley hereafter named, and a motion is submitted to amend the writ of error in the parties plaintiff, so as to conform to the transcript sent to this Court. The motion is resisted, and a cross one made to dismiss.

The record discloses these facts:

At a special term of the County Court of Sumter, held on the 3d June, 1839, probate of the will of Wareham Easly was granted, and letters testamentary issued to David Blackshear and Thomas Ballzell, who are named by it as executors. By this will, specific bequests are made to Creed T. Easley and Martha Ann Foreman, two of the testator's children. Another bequest of a right of action is made to Martha Ann Foreman, before mentioned, and Samuel W. and Christopher Easley, two children of his sons, and the remainder of his estate, real and personal, is given to his wife, Emily Easley, and to her children, until his daughters, Catharine Maria, Elizabeth Jane and Virginia Noble, should become of age, when the whole estate was to be equally divided between them, his said children. His executors are also invested with power to sell certain lands described in the will. Both the executors resigned the trust, on the 17th June, 1839, and on the 8th July, Patrick May, the defendant in error, was appointed administrator *de bonis non cum testamento*, &c. In August of that year, the administrator filed a petition praying an order for the sale of certain lands therein described, and other than those named in the will. In this petition he sets out, that Emily Easly, the widow, Catharine M., Elizabeth J. and Maria N., the children of the testator, are the only persons interested, they being the devisees, &c. A guardian *ad litem* was appointed, who denied the allegation, and a decree was made the same day that the petition was filed for the sale of the lands. Commissioners were appointed to conduct the sale, and their report of sale was confirmed at the October term of the same year. After a return of inventory, account sales and several accounts showing the hiring of slaves, the administrator, on the 27th October, 1842, applied for leave to make a final settlement, and thereupon the 3d of January, 1843, was set for that purpose. On that day, as appears from the recitals of the record, the administrator appeared and presented his accounts for settlement; a settlement was made, in which he appeared as having expended more than he had received, $1,650. This sum, by the decree, was to be retained by him out of uncollected assets; or out of assets which should afterwards come to his hands; or for which an execution might issue, at his option, to be levied of the goods and chattels of the estate, as soon as administered by some other person, It

does not appear that any one appeared at the settlement of the estate to contest the proceedings, and the administrator immediately afterwards resigned his trust.

R. W. Smith, for the motion.
F. S. Lyon, contra.

GOLDTHWAITE, J.—1. In testamentary matters, the Orphans', or, more properly to speak, the County Court, is invested with jurisdiction of a peculiar nature, entirely different in many essential particulars from that of a court of common law; and in the exercise of this jurisdiction from its inception, upon the application of any one for the grant of administration, to its close, by rendering judgment upon the final settlement of the accounts of the executor or administrator, questions may arise which require the intervention of parties who would not be parties under other circumstances. Thus when a will is presented for probate the heirs at law are proper parties to contest the will, and yet, after its probate, it might be that they could have no interest whatever in the subsequent proceedings, or in the final settlement. So also where two wills exist, the legatees or devisees under one of them, have the right to contest the other, as well as the heirs at law to contest both. Again, the real estate being charged by statute, generally, with the payment of debts on the deficiency of personal assets, and the personal representative having the capacity to ask for an order of sale of lands, the heirs generally, or the particular devisee, may be entitled to contest the facts, upon the existence of which this power may be called forth. In all these cases, and our statutes present many similar, it is evident, unless the parties interested can re-examine proceedings alledged to be erroneous, their rights may be greatly prejudiced. It was with reference to such matters as these, our statute was enacted, which provides, that from any judgment, or *order final*, whether in vacation or term time, an appeal or writ of error will lie to the Circuit or Supreme Court, in the same manner as upon judgments in the Circuit Courts. [Clay's Dig. 297, § 4.] When, however, an appeal or writ of error is spoken of, the statute must be understood as using these terms in their known and received signification, and ought not to be extended to take in cases in

which neither could be taken, according to any course of practice known either to the civil or common law.

2. Among the duties imposed by law, upon the Judges of the County Courts, are some which may be exercised although the proceedings may not necessarily assume the form of a suit, by the appearance of contesting or litigant parties. Thus administration upon the estates of decedents, when there is no application for the grant, may be imposed on the sheriff, and it is not essential to the validity of any proceedings by an administrator, save only in cases specially provided by the statute, that parties should actually be made. Even when the estate is ready for a final settlement, and consequently for distribution, only a general citation to all persons concerned in adverse interest, to appear was necessary prior to the last act; and this may be given by advertisement, or by other mode of publication. [Clay's Dig. 229, § 41.]

3. But it does not follow, either that persons having an adverse interest, are concluded by an erroneous decree, or that they can, without other proceedings, forthwith sue out a writ of error to review the decree or judgment.

We say it does not follow that persons having an adverse interest to the personal representative are bound by an erroneous decree. This will be apparent, when it is considered, that such may exist and be in entire ignorance of their rights. To hold such to be concluded, without express legislation to that effect, would scarcely comport with sound views of justice.

4. On the other hand it is alike apparent, if any one, by asserting an interest in the final distribution, can attack the decree by suing out a writ of error, without further proceedings in the primary Court, the personal representative would have no opportunity to litigate or examine the title by which they pretented to interfere in the suit. That the personal representative is so entitled, was settled in this Court by the decree of McRae v. Pegues, 4 Ala. Rep. 158. See also, Public Adm'r v. Watts & Leroy, 1 Paige, 347; Kellet v. Rathbun, 4 ib. 162.

5. In Courts, proceeding according to the course of the civil law, no difficulty ever arises upon the questions of making new parties to causes in progress. The Courts being always open, the person claiming an interest in the cause, or the subject matter of the suit may always intervene, which is done by a petition

or libel, in which he sets out his interest, or the title by which he claims to come before the Court. If this title is denied or disputed, an exceptive allegation is filed by the other parties, and, if necessary, the interest is ascertained. [Public Adm'r v. Watts & Leroy, 1 Paige, 347; 2 Brown's Civ. & Adm. Law, 402; Reid v. Owen, 9 Porter, 181.] A similar rule obtains after a final judgment has been rendered in admiralty suits, and the cause may not only be examined as to the law, but the facts also, if the proceedings have been by default. [2 Bro. Civ. & Adm. Law, 402.]

Under our statutes, however, it is evident enough, that the Legislature never contemplated, or intended, a review of the facts, when the proceedings by an executor or administrator have been in conformity with the rules prescribed for his action, although it might happen that persons adverse to him in interest were, in point of fact, never apprised of it, or of his intention to proceed to a final settlement. On the other hand, it seems to be alike evident, that he cannot prevent a re-examination when the proceedings are erroneous, because those interested in contesting the matter have not appeared.

6. The course of practice, which seems the only one by which the rights of all can be properly guarded, when there has been no contested suit, is to permit all, or any of those who claim to have the right to examine the correctness of the final decree, to propound their interest to the Court in which the decree was rendered, upon which a citation to the personal representative would be proper, requiring him to appear at a stated term, or in vacation, and contest their claim. If, after service, he remained in default, the order would be, that parties should be made for the purposes of the writ of error, or appeal, and the same order would be proper, if the claim was supported against an exceptive allegation of the other party. If, however, the exceptive allegation was found to be true, the petition would be dismissed. This is, in effect, the course of practice in the Eclesiastical and Admiralty Courts, somewhat modified to meet the exigencies called for by our statutes.

7. To apply what we have now ascertained to the case before us, it is necessary to recur to the facts contained in the record. Do the plaintiffs in error wish to question the correctness of the proceedings for the sale of the real estate? or, is it the final

settlement made by the administrator *de bonis non* with the Court? And if the latter, how are we at this time to know, that the administrator may not have fully paid and discharged to them all that they claim? If the order of sale is the subject to be examined, that is already barred by lapse of time. [Boyett v. Kerr, June Term, 1844.] And if it is matter pertaining to the final settlement, the administrator is entitled to question the plaintiff's right to call him to account, or to examine errors, which, after all, may not affect them. If they have an interest to correct any errors in the final settlement, they can place themselves in a condition to examine them on error by pursuing the course we have indicated.

There is nothing in the transcript either to warrant the writ of error as it now is, nor can it be made available by amendment. It must therefore be dismissed.

CONGREGATIONAL CHURCH AT MOBILE v. ELIZABETH MORRIS.

1. The true construction of the two acts of the Legislature for the relief of Elizabeth Morris, is, that she was made capable of inheriting the lands of her uncle, James D. Wilson, in the same manner as if herself, her mother and her uncle, had been native born citizens. The declaration in the act, that the land shall not escheat to the State, is a waiver of the right of the State in her favor only, and will not enable her brother, who is an alien, or was so at his uncle's death, to inherit as his heir.
2. When a certified copy of a registered deed is admissible in evidence, it is *prima facie* a correct copy of the original, but may be shown to be incorrect, by comparing it, either with the original deed, or the record of it on the Register's book. But where the difference between the record of the deed, and the copy taken from it, consisted in a scroll, or written seal, which was found in the copy, and did not appear upon the Record book, when produced in Court, it was not error for the Court to leave it to the jury, to say, whether the copy was not correct when it was taken, as the

original deed was in Court, in the possession of the other party, which he declined to produce.

3. The wife of an *alien*, though an American citizen, is not dowable of his lands.
4. Whether the saving in favor of creditors in the statute of escheats, applies to the land held by an alien at his death—*Quere?* But if it does apply in such a case, the fact of such indebtedness would not prevent the escheat. Nor could the land be sold by an administrator of the alien, for the payment of creditors, without authority from the Orphans' Court, as in other cases.

Error to the Circuit Court of Mobile.

EJECTMENT by the defendant in error, for a lot in Mobile. Upon the trial, as shown by a bill of exceptions, it appears, that the plaintiff, to prove title to the premises, read in evidence a statute passed 9th January, 1836, entitled "an act for the relief of Elizabeth Morris," and proved that James D. Wilson was her uncle; that her mother was the sister of said James; that herself, her mother, her father, and said James, were all natives of Scotland, and not naturalized. That Wilson purchased a piece of land, of which the lot sued for was a part, of William E. Kennedy, and received from him a conveyance, dated in 1818, under which he held the possession, and that he continued in possession until he died, in the year ——, intestate, and without children.

That the plaintiff came to this country with her mother, between the years 1820 and 1821, and has since resided here; that her mother died in 1822; that her father never came here, and died in Scotland; that her three brothers, David, Charles and George, also came to this country, but that George alone is living. It also appeared, that Wilson had a brother in Scotland, but it was not known whether he was living or not.

The plaintiff further gave in evidence, a duly certified copy of the conveyance of Kennedy to Wilson, purporting to be a copy of the registration of the instrument, in the clerk's office, (having laid the grounds for the introduction of secondary evidence,) and by the copy so offered and certified, there appeared a seal, or scroll, affixed to the name of William E. Kennedy, so as to make it a deed, or sealed instrument. It was further shown, that Kennedy was in possession before the sale to Wilson, and that he

claimed under a concession by the Spanish Government, made to Thomas Price.

The defendant proved, that on the 9th August, 1836, it purchased the lot from one Johnson, for $———, and received from him a deed of conveyance of that date; that he was in possession of the property at, and before that time; that they gave a full value for the lot, and expended on it $13,000.

The defendant further proved, that Wilson married in this country, a native American wife; that when he died she remained in possession of the property, and continued in possession until she sold it. That she was appointed administratrix of the estate of Wilson, and paid a portion of his debts. That among other debts, was one to James H. Garrow, who transferred it to Bartlett & Waring. That the widow married one Lord, by whom she had a son, who is still living. That Lord died, and she married one Morgan Brown, who is still living, but that she is dead. That Wilson left no personal estate of any value, and that on the 12th March, 1835, Brown and wife, for $6,050, conveyed the premises to Bartlett & Waring, and put them in possession.

The defendants, to show, that the conveyance from Kennedy to Wilson, was not a sealed instrument, but a simple contract, introduced the original book of records, kept in the County Court, from which the copy shewn by the plaintiff purported to have been taken, and in which original record, there appeared no seal or scroll to the name of Kennedy, and in this respect the record book differed from the copy; but it was in proof that the original deed was in Court, in the possession of the defendant's counsel, who refused to introduce the same.

They further read to the jury, a Spanish concession made to Thomas Price, in 1806, and a conveyance thereof from Price to William E. Kennedy, previous to the deed from him to Wilson; also, a deed from William E. to Joshua Kennedy, in 1824, and also a patent from the United States to Joshua Kennedy, upon the confirmation of the grant, dated April, 1836, which embraced the land sued for. Joshua Kennedy died, and left children as his heirs, in 1838.

Upon the above state of facts, the defendant moved the Court to charge, that the plaintiff could not recover, by reason of any descent cast from her uncle; also, that she could not recover the whole title, as she had brothers. That she could not take as a

grantee of the State, as for lands escheated to the State. That the wife of Wilson would be entitled to dower in the land, and that the title made by her to Bartlett & Waring was superior to that of the plaintiffs.

These charges the Court refused, and charged, that the effect of the two acts of the Legislature, was to vest in the plaintiff a good title by descent, as sole heiress of James Wilson, if she was his niece, and he died intestate and without children, notwithstanding she had brothers and another uncle, all being aliens. That the act enabled her to take alone, the whole estate. That the wife of Wilson being a native American, made no difference, her husband being an alien, she was not entitled to dower; and that the plaintiff could take without office found of the escheat of the lands.

The defendant further asked the Court to charge, that unless Wilson had the legal estate, or fee simple to the property, there could be no escheat, and if the conveyance of W. E. Kennedy was not a sealed instrument, or deed, the legal title did not pass to Wilson by it. That if the fee was in the United States, till after Wilson died, there could be no escheat. That the original record of the deed of William E. Kennedy, no seal thereto appearing, was conclusive against the evidence of the copy that there was no seal. These charges the Court refused to give, except the first, and charged the jury, that there could be no escheat unless Wilson had the legal title, but that the patent was only a confirmation by the United States of the Spanish title, and did not operate as a new grant of the land, to prevent an escheat. That it was for the jury to determine, whether the deed of Kennedy was sealed or not, from the copy and the original record; that both were before them; that the record was not conclusive, and they might infer, if they thought proper, that the clerk had done his duty in making the copy, and that when it was made, there was a seal, although none now appears. To all which the defendants excepted.

The assignments of error embrace all the matters presented by the bill of exceptions.

Campbell and Stewart, for plaintiff in error made the following points:

The title of the plaintiff derived from the two acts of Assem-

bly, must either operate as a grant, or in removing a disability. The latter only was intended; the statute does not grant the title, but confers on her the privilege of taking by descent, notwithstanding her alienage.

It is one of the first principles of the law of descent, that it must vest at the time of the descent, or it cannot vest at all; but Wilson died in 1824, and her capacity to take by descent did not exist until long afterwards. [2 Hill, 67.] Nor can this capacity be conferred by the Legislature, as it cannot create a fact. See also, 2 Howard, 589; 8 Wheaton, 1.

The estate derived through the widow, having vested, could not be thus divested. It might grant the land to her, if it had the power. Has it done so? That point was decided when the case was here before, under the first statute, 9 Porter, 270; the last act has merely removed another disability.

The State had not the power to grant. The act itself declares that the land shall not escheat—and the plaintiff, by the act, is to take as if Wilson, herself, and her mother, were citizens.

The land, in point of fact, did not escheat. At the time of the death of Wilson, the title was incomplete, and the warranty of Kennedy did not pass to the State, with the land. [Shep. Touch. 200; Lincoln College case, 3 Rep. last page of the case.] When, therefore, Kennedy received the title from the United States, he took it discharged from the obligation of his warranty. Whether the property would revert to Kennedy, or belong to the first occupant, it is clear it could not escheat to the State. [3 P. Will. 32, note; 16 Vin. title Occupant; 3 Vesey, 423; 1 Coke's Ist. 228; Cruise Dig. Escheat; 3 Vol. 286, 296; 1 Hilliard's Ab. 23.]

At all events, the Court erred in saying that Miss Morris was entitled to recover the entire lot. The statute gives the widow one half, when there are no children. [Clay's Dig.] The wife being a citizen, may take dower from an alien husband. [Cruise Dig. 3 vol., 303; 9 Mass. 363.] An alien may sell, and convey, or devise, [7 Cranch, 621,] and, as marriage is a purchase, he may endow.

The Court erred in leaving it to the jury, to say, whether the original record, or the false copy, should be believed by them. They also cited, 5 Rawle, 112; 1 Lomax Dig. 604; 3 Pick. 221; 1 N. & McC. 292; 7 Com. Dig. 79; 1 id. 553; 4 Cranch, 321;

1 Hay. 373; 11 Wheaton, 332; 1 Bro. 201; 1 Blk. R. 123; 1 Eden. 177; 3 B. Monroe, 252; 2 How. 589; 2 Peters, 434.

PHILLIPS, contra.

The title of the defendant in error is under the acts of 1836 and 1841, which show, that in her favor the State releases its escheat—it declares, that she shall "take and hold," &c.

As the property of Wilson vested in the State, immediately on his death, as declared by the statute, these acts must be construed as a donation to her; for it cannot be considered that the State yet holds this interest, in opposition to its own acts. At common law, as well as by our statute, the property vested immediately in the State, without office found. [Clay's Dig. 189; 15 Pick. 345; 16 id. 177.]

There is no incumbrance upon the property—for the widow is not dowable, of the lands of an alien husband. [1 Coke Litt. 30 b, 31 a.]

A grant by the State to individuals, to hold lands in a corporate capacity, itself confers the corporate character. [2 Wend. 109; 3 Pick. 224.]

If a mere equitable right of escheat existed, the State would take as the successor of Wilson, and take a complete title, as Wilson would have taken, had he not labored under the disability of alienage.

The certified copy of the deed, under the circumstances of this case, is conclusive. He also cited, 3 Hill, 79; 2 Leigh, 109; 1 Johns. Cas. 400; 2 Term, 696; 7 id. 2; 3 Phil. Ev. 369; 1 Ala. Rep. 273; 4 id. 86.

ORMOND, J.—The principal question in the cause, depends upon the proper construction of the two acts of the Legislature, passed for the relief of the defendant in error. The act of 1836, is to the following effect: "Be it enacted, &c. That Elizabeth Morris, an alien, of Mobile county, be, and she is hereby, authorized to inherit, and have and hold, such of the estate of her late uncle, James D. Wilson, as she might have inherited by law, if she had not been an alien, and that the same shall not escheat to the State."

The construction put upon this act, in the case of Bartlett & Waring v. Morris, 9 Porter, 269, was, that it merely removed the

disability of *alienage* existing in Elizabeth Morris, but did not qualify either her mother or Wilson, her uncle, if *aliens*, to transmit to her an inheritable estate. In effect, that it merely gave to her the benefit of citizenship. To remedy the omissions of this act, the act of 1841 was passed:

"An act to amend and explain an act entitled an act for the relief of Elizabeth Morris.

"Be it enacted, &c. That Elizabeth Morris, an alien of Mobile county, be and she is hereby authorized, and enabled, to have and to hold, such of the estates of her late uncle, James D. Wilson, who died in Mobile county, as she might have inherited by law, had she not been an *alien*—had her mother, who was the sister of said Wilson, not been an *alien*—and had the said James D. Wilson not been an *alien*, but a citizen, capable of transmitting inheritable estates. And that the true intent and meaning of the act, of which this is amendatory, is, that said Elizabeth Morris should have been made capable of inheriting from her said uncle, in the same manner as if the said Elizabeth, her mother, and her said uncle had been natural born citizens of the United States."

Nothing can well be conceived more explicit than this last act, to remove the obstacles which opposed the assertion, by the defendant in error, of title to the land, as the heir at law of her uncle. The defect, as we have seen, of the former law, was, that whilst she was made capable of taking, her mother, and her uncle, being *aliens*, were incapable of transmitting the estate. The effect of the act, is, to give to all these persons the attributes of citizens, and the only question upon this part of the case, is, whether she has shown herself to be the sole heir of her uncle.

The uncle, it appears, died without children, and it does not appear that he has any brother or sister alive; his nephews and nieces are therefore his heirs at law. Of these, it seems, there are but two living, the defendant in error and her brother George. It does not appear that the latter was a citizen at the time of his uncle's death; but if he were, his mother and uncle being aliens, could not transmit to him inheritable blood, and it is therefore the same as if he were not in existence. [Orr v. Hodgson, 4 Wheat. 401; Smith v. Zaner, 4 Ala. Rep. 106.] The act of 1841 removes the disability arising from the alienage of the mother, and uncle, *sub modo*. It would be a most unreasonable interpretation

of the act, so to construe it, as to remove the disability as to all the relations of Wilson. The act is for the relief of Elizabeth Morris, and authorizes *her* "to have and to hold" the estates of her uncle, and to have her right to inherit through her mother, in the same manner as if all the parties had been native born citizens. The act, in a word, makes *her* capable of inheriting her uncle's estates, and to accomplish this object, it removes out of the way the impediments arising from the *alienage* of her mother and uncle; as to all the rest of the world they continue to be, what they died, *aliens*. This is the plain and obvious intent of the statute; any other construction, would defeat the object the Legislature have, by two several acts, endeavored to accomplish. We think therefore, that she is shown upon the record to be the sole heir of her uncle, capable of inheriting his estate.

It is further urged, that the power to inherit must exist at the time of the descent cast, and that as no such capacity existed in the plaintiff, at the death of her uncle, it cannot be conferred by the Legislature, which it is said cannot create a fact.

It was certainly competent for the Legislature, to waive the forfeiture arising from the alienage of the plaintiff's uncle, and it is wholly unimportant, in the present case, that this is done by an act having a retrospective operation. The power of the Legislature to pass acts of that description, affecting civil rights, cannot be questioned, and has been repeatedly recognized by this Court. The prohibition of the constitution of the United States against the passage, by the States, of *ex post facto* laws, relates to penal and criminal proceedings. [Watson and others v. Mercer, 8 Peters, 88.] Whether the States can pass retrospective laws, affecting vested rights, is a question not presented on the record, as no right is shown to have existed, but the right of the the State by escheat.

The case of the People v. Conklin, 2 Hill, 67, is unlike this case, in the important particular, that there the State was enforcing its right of escheat, against the descendant of an alien; and the Court held, that the naturalization of the alien, many years after the descent cast, would not retroact, so as to divest a right which had previously vested in the State. It is obvious that has no application to a case, where the State is not only not enforcing its rights, but has, in the most explicit terms, declared that the land shall not escheat.

It is further urged, that at the time of the death of Wilson, the title was incomplete, being then either in Kennedy, from whom he purchased, or in the United States, and that the warranty of Kennedy to Wilson, did not pass with the land. It is stated in Sheppherd's Touchstone, 200, that "he that comes into the land, merely by the act of law, in the post, as the Lord by escheat, and the like, shall never take advantage of a warranty." It is not necessary that we should enter upon the inquiry, whether the statute of this State, in relation to escheats, has not swept away entirely, the ancient common law doctrine of escheats, with its feudal appendages, by making the State, the successor to all persons who are intestate, without heirs, whether the property be real or personal; because, from the record, it appears that the fact is not as the argument supposes.

To establish a legal title in Wilson, at the time of his death, the plaintiff offered in evidence a duly certified copy, from the records of Mobile County Court, of the conveyance of the land from Kennedy to Wilson, by which it appeared, that it was a sealed instrument. The defendant, to prove that it was not a deed, produced the original record book, from which the copy offered in evidence was taken, and from that it appeared, that there was no seal or scroll attached to the name of William E. Kennedy, the grantor. The original deed was also in Court, in the possession of the defendant's counsel, but which he declined to produce in evidence. The Court left it to the jury to determine, as a question of fact, whether the instrument was sealed or not, and refused to instruct them, that the appearance of the instrument in the record book was conclusive, that the original was not a deed.

The object of our registration acts is two fold; to give notice of the existence of the instrument recorded, and as far as practicable, to perpetuate its contents; and if the deed be lost or destroyed, or not in the power of the party to produce, the statute makes a certified copy from the record, evidence. [Clay's Dig, 155, § 25.] We apprehend, however, that the certified copy, thus produced, is only *prima facie* evidence of the contents of the original, and may be shown to be incorrect, as the record itself is but a copy from the original.

The transcript offered in evidence in this case, might doubtless be confronted with the record, of which it purports to be the

transcript, and if it differed from it, must yield to it, as the record is the original of the transcript. If the difference consisted in the omission of part of the written contents of the recorded deed, or in an alteration of its terms, and the record bore no marks of violence or change, there would be no room for doubt; but the want of a scroll, or flourish of the pen, against the name of the grantor, does not appear to be of the same conclusive character

It must be recollected, that it is not shown by proof that there was a mistake in the copy, at the time it was taken; but such mistake is sought to be inferred, because, at the time of the trial of the cause, it did not appear by inspection of the record, that there was a scroll appended to the name of Kennedy, the grantor. Now, it may be that the scroll had once been there, and effaced by mechanical, or obliterated by chemical means; or it may have been made so faintly, originally, as to have disappeared by efflux of time. It must, however, be conceded that in the absence of any proof throwing suspicion over the purity of the record, it would be the duty of the jury to give effect to the record, against the transcript, where there was a variance between them. But, there is another fact in the cause which presses most strongly upon us, as it doubtless did upon the jury in attaining their conclusion; it is, that the original deed was in Court, in the possession of the defendant, who therefore had it in its power to remove all doubt from the question, by the production of the original, and declined doing so. From this conduct, a strong presumption arises that the production of the paper would have established the fact, that it was a deed, as otherwise it would clearly have been its interest to produce it, and not to rely upon the weaker, and contested evidence, afforded by the record, which, though legal testimony, was inferior to the original deed.

Mr. Starkie lays down this rule in these words: "Although a party may not be compellable to produce evidence against himself, yet if it be proved that he is in possession of a deed or other evidence, which, if produced, would decide a disputed point, his omission to produce it, would warrant a strong presumption to his disadvantage." [1 vol. 489.]

So in Haldane v. Harvey, 4 Burr. 2484, the law is thus laid down, and was the basis of the judgment of the Court in that case. It is indeed, but a modification of the rule, that the party must produce the best evidence in his power.

As, therefore, the Court instructed the jury that the plaintiff could not recover, unless Wilson had a fee simple title, the finding of the jury in favor of the plaintiff, is an affirmance of the existence of such a title, at the time of his death, and there can be no doubt that this was such an interest as would pass to the State, Wilson having died intestate, and being an alien, incapable of having heirs. The language of the act is—"The estate both, real and personal, of persons within this State, who have died intestate, or who may hereafter die intestate, leaving no lawful heir or heirs, shall be considered as escheated to the State of Alabama." [Clay's Dig. 189, § 1.] This interest, or right of succession, by the act in favor of Miss Morris, the State waived, and removed all the disabilities which prevented her from asserting title to the land as the heir of the deceased.

It is further insisted, that the plaintiff is not entitled to recover the entire lot, as Wilson left an American born wife, who entered upon the land in virtue of her right of dower, and afterwards sold and conveyed it to another. A widow has no estate in the lands of her late husband, until her dower is assigned, but a mere right to occupy the dwelling house, &c. until her dower is allotted. [Weaver & Gaines v. Crenshaw, 6 Ala. Rep. 873.] And it does not appear that any assignment of dower was made in this instance. Again, an estate in dower, is an estate for the life of the dowress only, and if it had been assigned to her, would have terminated at her death, which occurred before the suit was brought. It is equally clear, that she could convey no greater interest than she had herself.

Independent of these considerations, the widow was not entitled to dower. An alien may, it is true, purchase land, but he holds for the State; in contemplation of law, he has no interest in it, and therefore cannot transmit any. Nor can any one, by operation of law, derive an interest by, or through him. It follows, that the wife of an *alien*, though she be a citizen, is not dowable of his lands, and such is the settled rule of law. [1 Thomas' Coke, 662, 31, a; Park on Dower, 229.] The sale and conveyance by her passed nothing, and interposes no obstacle to a recovery.

The question as to the right of creditors to have their debts discharged out of the escheated lands, is not distinctly presented upon the record. In the case of escheats at common law, there

can be but little doubt that the crown would take the land, free from the payment of the debts of the deceased; to the payment of which it was not in any case directly subject. In practice, however, it appears the right of the crown is not asserted even against the natural relations of the deceased. See Hubbach on Succession, 74; and several acts of Parliament have been passed on the subject.

The statute of escheats of this State, contains a provision, "that nothing herein contained shall prejudice the right of creditors, or other individuals having claims or legal titles, or who shall be under the disabilities of infancy, coverture, duress, lunacy, or beyond the limits of the United States, untill three years after the disability shall be removed." [Clay's Dig. 191, § 9.] Whether this clause applies to lands of aliens which have escheated, or not, it is not proper we should now discuss. It is true, it appears that a portion of the debts of Wilson are still unpaid—that one of those debts belonged to Bartlett & Waring, who became the purchasers of the lot from the widow of Wilson, and her husband, after her second intermarriage for $6,050. But what the amount of the debt is, is not shown, nor indeed is it shown that the defendant derives title through Bartlett & Waring.

If it were conceded, that the creditors of an *alien*, were entitled under the statute, after his personal estate was exhausted, to the payment of their debts out of his lands escheated to the State, it is apprehended the fact of such indebtedness would not prevent the escheat, but would be a charge upon the land to which the State had succeeded; and that the land could not be sold by an administrator of the *alien* for the payment of the debt, without authority from the Orphans' Court, as in other cases.

If, then, it be true, that these debts are a charge upon the land, and are not barred by the limitation of the statute, it would not prevent a recovery by the plaintiff, who, whether she is considered as succeeding to the rights of the State, or by the removal of the disabilities of alienage, is enabled to deduce her title as heir at law of her uncle, would, in either event, be entitled to recover the land, though there might be outstanding debts which were a charge upon the land.

From these views, it results that there is no error in the judgment of the Court below, and it is therefore affirmed.

DOREMUS, SUYDAM & Co. v. WALKER.

1. The plaintiff recovered a judgment against the defendant, on which a *fieri facias* was issued, and levied on personal property, to which a third person interposed a claim, and executed a bond with security to try the right as provided by statute; afterwards the defendant filed his petition in bankruptcy, and in the regular course of proceeding was declared a bankrupt and discharged, pursuant to the act of Congress of 1841; on motion of the defendant the levy of the *fi. fa.* was discharged and set aside: *Held*, that the proceeding to try the right of property did not destroy the lien of the *fi. fa.*; at most, it was only in abeyance during their pendency, would be revived and might be coerced as soon as the claim was determined to be indefensible: *Further*, that the lien of a judgment, or *fi. fa.* is preserved according to the right of the creditor at the time the bankruptcy is established; if the lien is then absolute, it completely overrides the decree, and the creditor will be let into the enjoyment of its fruits.

Writ of error to the Circuit Court of Lowndes.

This was a motion to quash the levy made and indorsed by the sheriff on a writ of *fieri facias*. The facts, so far as material, may be thus condensed: A judgment was rendered on the 4th April, 1842, on which the *fi. fa.* in question was received the 7th May, 1842, and returned by the sheriff that he had levied the same on the 15th June next thereafter, on certain slaves (naming them,) that a claim had been interposed by a third person, and bond executed, with surety, to try the right.

On the 15th August, 1842, the defendant filed his petition in the District Court of the United States sitting at Mobile, and on the second of May, 1843, he was declared a bankrupt, and fully discharged from all the debts which he owed at the time of the exhibition of his petition, pursuant to the provisions of the Bankrupt act of 1841. All which were vouched by the record of the proceedings in the District Court, accompanied with the defendant's certificate &c. Thereupon it was ordered that the levy in question be discharged, set aside, and for nothing held, &c.

R. Saffold, with whom was Boling, for the plaintiff in error,

made the following points: 1. The discharge of the defendant under the bankrupt law, did not impair the lien which the plaintiffs acquired by their judgment, execution and levy. [2 Caine's Rep. 300; Ex parte Foster, 5 Law Rep. 55; In the matter of Cook, id. 443-4-5-6; Kittredge v. Warren, 7 id. 77; Kittredge v. Emerson, id. 312-3; Dutton & Richardson v. Freeman, 5 id. 447, 452; Ex parte The City Bank of New Orleans, 7 Law Rep. 553; Mosby v. Steele & Metcalf, 7 Ala. Rep. 249; Owen on Bankr. 181; Stead v. Gaiscoigne, 8 Taunt. Rep. 527. See also, 1 Wash. C. C. Rep. 29; Clay's Dig. 208.]

A. F. Hopkins and T. Williams, for the defendant. The levy of a *fieri facias* on personal property, merely invests the sheriff with a special, while the general property remains with the defendant in execution. [8 Johns. Rep. 486; Law Rep. for June, '42, p. 65-6-7.] And where a claim is interposed by a third person, and bond executed, with surety, as prescribed by the statute, the special property of the sheriff is thereby divested, and the possession revested in the defendant, from whom it was taken. Pending the claim, the sheriff may levy on other property, which could not be done, if the lien on the property claimed still continued. [2 Porter's Rep. 51-2.]

The lien, after the claim, may be assimilated to the lien of an attachment, after property attached has been replevied; in the one case it depends upon the judgment of condemnation, in the other upon the fact whether a judgment is recovered by the plaintiff. And the lien being in this imperfect state, the property, so far as the bankrupt is interested in it, is transferred to the assignee in bankruptcy, who may litigate the right to it, and insist upon devoting it to the bankrupt's debts. [Law Rep. June, 1842, p. 55, 64-5-6-7, 70, 72-3.] If the plaintiffs had a lien, the decree in bankruptcy would prevent them from prosecuting it in a State court; but under the bankrupt act, the District Court should be resorted to for its protection. [Law Rep. June, 1842, p. 72-3; id. February, 1845, 120.] The decree placing the property in the custody and under the supervision of that Court.

The object of an execution is to collect the debt, and if the defendant is discharged from all his debts before it is satisfied, the execution may be quashed.

If the defendant had sued out a writ of error and executed the

usual bond, the levy would have been discharged and the claim consequent thereon, could not have been tried; but the bond of the claimant would become inoperative.

By the 3d section of the bankrupt act all the estate of the bankrupt, vests in the assignee, from the time his petition is filed. It is not denied, that the assignee takes subject to all the rights, equities, &c. of third persons. [9 Ves. Rep. 100; Law Rep. Nov. 1842, p. 308.] But it is insisted, that liens by operation of law, as judgment, execution, &c., are entirely divested by the decree which authorizes the certificate of discharge to issue. [See 5 Ala. Rep. 676, 810; Law Rep. May, 1842, p. 19.]

COLLIER, C. J.—The eighth section of the act of 1807, "concerning executions," &c. enacts that "No writ of *fieri facias*, or other writ of execution, shall bind the property of the goods against which such writ is sued forth, but from the time that such writ shall be delivered to the sheriff," &c. "to be executed," &c. [Clay's Dig. 208, § 41.]

By the act of 1812, it is provided, that where a sheriff shall levy an execution on property claimed by a third person, the claimant shall make oath to the same, and give bond to the plaintiff, with surety in a sum equal to the amount of the execution; conditioned to pay the plaintiff all damages which the jury, on the trial of the right of property, may assess against him, in case it should appear that the claim was made for delay, &c. *It is provided further*, that the sheriff shall return the property levied on, to the person out of whose possession the same was taken, upon such person entering into bond with surety, to the plaintiff in execution, in double the amount of the debt and costs, conditioned for the delivery of the property to the sheriff, whenever the claim of the property so taken shall be determined by the Court; and if the obligors in the last mentioned bond shall neglect or refuse to deliver the property to the sheriff, the sheriff shall forthwith return the bond to the clerk's office of the Circuit Court; and the same "shall have the force and effect of a judgment, and execution may be awarded by the Court against all or any of the obligors having ten days notice thereof." The execution, or a copy thereof, (where it is issued from another county,) together with the papers pertaining to the claim, are returnable to the Circuit Court of the county where the *fieri facias* was levied.

[Clay's Dig. 210-11, 213, § 63.] A subsequent statute, passed in 1828, repeals so much of the pre-existing law as required two bonds to be taken for the trial of the right of property, and enacts that the claimant shall execute a bond with surety, "payable to the plaintiff in execution, and conditioned for the forthcoming of the property, if the same be found liable to the execution, and for the payment of such costs and damages as shall be recovered for putting in the claim for delay." *Further*, it is made the duty of the jury, in all cases when they find the property subject to execution, "to find the value of each article separately; and if the claimant shall fail to deliver the same, or any part thereof, when required by the sheriff, it shall be the duty of the sheriff to go to the clerk, and indorse such failure on the bond by him returned, with a copy of the execution." It is then declared that the bond shall have the force of a judgment, and the clerk shall issue execution against the claimant and his sureties, for the value of the property not delivered, &c. And by this latter enactment it is also provided, that proceedings for the trial of the right of property shall in no case prevent the plaintiff from going on to make his money out of other property than that that levied on and claimed, if to be found. Act of 1828, Clay's Dig. 213-4, §§ 62, 64, 67, 68.

The construction of the act of 1807 has been uniform, that the delivery of a *fieri facias* to a sheriff, or other proper executive officer, *eo instanti* operates a lien upon the goods of the defendant, and takes from him the right to dispose of them free from the legal incumbrance. And the creditor who has outstripped all other competitors in the race of diligence, cannot be defeated, or overreached, by a junior *fieri facias* unless he has allowed his execution to become dormant, or has omitted to sue it regularly from term to term.

It may be conceded that the seizure of goods, under legal process, merely invests the officer with a special property, and having disposed of them as the law provides, his estate is at an end. Such a concession cannot benefit or prejudice either party. It proves nothing in respect to the lien, which the plaintiff in execution acquires. The sheriff may part with the possession, without in any manner affecting the plaintiff's right; and we apprehend, such has been the effect of delivering the slaves levied on, in this case, into other hands, upon reciving a bond stipulating for

their return, in the event that they should be adjudged to be the property of the defendant. The trial of the right of property as provided by statute, is *quasi* a proceeding *in rem*—the specific thing is to be restored if the claimant shall be unsuccessful. This, we think, cannot entirely destroy the lien; it may keep it in abeyance, but its active energy will revive, and may be coerced, so soon as the claim interposed shall be determined to be indefensible.

It might, if necessary, be worthy of inquiry, whether the act of 1828, in modifying the law so as to require a single bond to be executed, embracing substantially, the conditions of both the bonds previously necessary, does not by implication require the sheriff to deliver the property levied on, to the claimant instead of the defendant in execution. Is this not clearly inferrible, from Rives & Owen v. Willborne, 6 Ala. Rep. 45, and Langdon & Co. v. Brumby's Adm'r, 7 id. 53? Be this as it may, it was directly decided in Mills v. Williams, et al. (2 Stewt. & P. Rep. 390,) that an execution does not lose any lien acquired by it, if it is subsequently suspended in its operation on particular property, by proceedings to try the right, even under the act of 1812.

So in Campbell v. Spence, et al. 4 Ala. Rep. 543, we say—"where the right to issue execution is merely suspended, as in the case of forthcoming bonds, and bonds to try the right of property," the lien of the judgment will continue. See also McRae and Augustin v. McLean, 3 Porter's Rep. 138; Hopkins v. Land, 4 Ala. Rep. 427; Bartlett & Waring v. Doe ex dem. Gayle & Phillips, 6 Ala. Rep. 305, and cases there cited.

It is argued for the defendant in error, that although the lien may not be impaired by the claim of property, that the third section of the bankrupt law of 1841, vests all the property and rights of property, &c. of the bankrupt in the assignee, and that the eleventh section, and the last *proviso* to the second section, do not exempt from its operation liens created by act of law; and if they do, such lien must be made available through the instrumentality of the District Court. The third section certainly employs terms of very extensive meaning, and the eleventh, and proviso to the second, uses language sufficiently broad to embrace liens, created either by the law, or act of the parties.

In Ex parte Foster, 5 Law Reporter, 55, *Mr. Justice Story*, says, that an attachment for the recovery of a debt under the laws of Massachusetts, when levied, does not create such an absolute lien, as is entitled to protection, and priority, under the bankrupt act of Congress, but gives a contingent lien, dependent upon the creditor's obtaining a judgment. That if the debtor should be decreed a bankrupt, and receive a discharge under the act, that discharge could be pleaded as a good bar to the suit, in the nature of a plea *puis darrein continuance;* and therefore under such circumstances ought to prevent the plaintiff from obtaining a priority of lien over the general creditors of the defendant, on the property attached in his suit. "Consequently," says the learned judge, "the creditor ought to be enjoined against farther proceedings in his suit, except so far as the District Court should allow, until it should be ascertained whether the debtor obtained his discharge or not."

But after judgment obtained, it was conceded, that no injunction should be awarded. "The proceedings in bankruptcy after the judgment, can have no effect whatsoever upon the judgment, or upon the property attached in the suit." The creditor's right is then made perfect, being no longer conditional, or contingent, but has attached absolutely to the property; and the Court has no authority to deprive him, or by an injunction to obstruct the proceedings on his execution. If the bankrupt obtains his discharge it would be no defence to the due execution and discharge of that judgment, in the regular course of proceeding thereon; for the debtor, after judgment, has no day in Court to plead any bar or defence. In the matter of Cook, 5 Law Reporter 443. See also Martin v. Martin, 1 Ves. Rep. 211-3; Lea v. Parke, 1 Kean's Rep. 724.]

In Kittredge v. Warren, 5 Law Reporter, 77, the Superior Court of judicature of New Hampshire, in a well considered opinion, determine that an attachment of property upon mesne process *bona fide* made, before any act of bankruptcy, or petition by the debtor, is a lien upon property, valid by the laws of the State; and within the proviso of the second section of the bankrupt act of 1841. That the means of the attachment being saved by the *proviso*, the means of making it effectual are also saved: and the certificate of discharge of the bankrupt cannot, when pleaded, operate as an absolute bar to the further maintenance of the ac-

tion. If pleaded, the plaintiff may reply the existence of the attachment, in which case a special judgment will be entered, and execution issued against the property attached.

The District Court of Maine, in Smith, assignee, v. Gordon and others, 6 Law Reporter, 313, recognize the law as laid down in Foster and in Cook's cases, holding, that after a lien upon the realty of the debtor, by a judgment, or upon his personal estate by a *fieri facias*, a decree in bankruptcy subsequently rendered cannot defeat it. In the same case, it was decided, that although all the property, &c. of the bankrupt passed to the assignee, yet the assignee is not bound in all cases to take possession of every part of it. If it would be rather a burden than a benefit to the estate, he may allow it to remain with the bankrupt, and if the assignee elects to take it, he must do so in a reasonable time; for if he lies by for an unreasonable time, and allows third persons in the prosecution of their rights to acquire a lien on the property, he will be held by such delay to have made his election not to take.

In Ex parte The City Bank of New Orleans, 3 How. U. S. Rep. the following question arose: What is the true nature and extent of the jurisdiction of the District Court, sitting in bankruptcy? It was admitted, "that independent of the Bankrupt act of 1841, the District Courts of the United States possess no equity jurisdiction whatsoever; for the previous legislation of Congress conferred no such authority upon them. Whatever jurisdiction, therefore, they now possess, is wholly derived from that act." The Court say, there is no doubt that liens, mortgages and other securities are within the purview of the last *proviso* of the second section, so far as they are valid by the State laws, and are not to be annulled, destroyed or impaired, under the proceedings in bankruptcy; but they are to be held of equal obligation and validity in the Courts of the United States, as they would be in the State Courts. *Further*, "We entertain no doubt, that under the provisions of the sixth section of the act, the District Court does possess full jurisdiction to suspend or control such proceedings in the State Courts, not by acting on the Courts, over which it possesses no authority, but by acting upon the parties through the instrumentality of an injunction, or other remedial proceedings in equity, upon due application made by the assignee, a proper case being laid before the Court requiring such interference." But it

was said, that although the District Court does not possess such a jurisdiction, there is nothing in the act which requires that it shall in all cases be absolutely exercised. "On the contrary, where suits are pending in the State Courts, and there is nothing in them which requires the equitable interference of the District Court, to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits, and consummate them by proper decrees, and judgments; especially where there is no suggestion of any fraud, or injustice, on the part of the plaintiffs in those suits. The act itself contemplates, that such suits may be prosecuted, and further proceedings had in the State courts; for the assignee is, by the third section, authorized to sue for and defend the property vested in him under the bankruptcy, "subject to the orders and directions of the District Court;" "and all suits at law and in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and manner, and with the same effect as they might have been by the bankrupt."

We have cited these decisions thus at length, because the provisions of the bankrupt law have not, to any great extent, been drawn in question before us, and every case that arises, being most probably decisive of others, we deem it peculiarly proper to proceed with great caution. The case before us is certainly one of no difficulty. Here, upon motion of the defendant in execution, the levy of a *fieri facias*, which operated as a lien before he was declared a bankrupt, after a decree and certificate of discharge, is quashed. The property, rights of property, &c. of a bankrupt, we have seen, all passed to the assignee, on whom it devolved to prosecute and defend all suits pending against him. The application for the benefit of the bankrupt act, did not invest the debtor with other rights as it respects the property, &c. yielded up by him, than he previously possessed, and it would not be allowable, at his instance, to vacate the levy of process, after his bankruptcy was established, for a cause that would not have been previously available.

While it has been held, that the assignee may, by an injunction, or some other remedial proceeding in equity, arrest litigation, to

which the bankrupt is a party in the State Courts, it is conceded that there is nothing so potent in a petition in bankruptcy, and the judicial action in such suit, as to inhibit the State tribunals from entertaining a suit, to which the bankrupt or his assignee is a party. But until the extraordinary power, which it is said the act of Congress has conferred upon the assignee and the District Court, is put in requisition, there is nothing to impede the regular course of procedure in the State Courts.

We have seen that the lien of a judgment is recognized as operative against the assignee, as it respects the real property of the bankrupt, and that the personalty will be bound by the execution. In either case the lien is preserved according to the rights of the creditor at the time the bankruptcy is established. If the lien is then absolute, it completely overrides the decree, and the creditor will be let in, to the enjoyment of its fruits. This being the case, neither the bankrupt or his assignee could vacate the proceedings under the *fieri facias* by moving to quash the levy, unless such a motion was founded upon something more than is shown by the record.

It does not even appear that the bankrupt's schedule embraced the property levied on, or that the assignee, as such, asserted any claim to it, and (if necessary) we should perhaps infer from the record, that the schedule did not include it, as the claim had been regularly interposed, before the petition in bankruptcy, of the defendant, was filed. But be this as it may, it is sufficiently shown, that the mere fact of the defendant being a certificated bankrupt, furnished no warrant for quashing the levy. The judgment of the Circuit Court, rendered on the defendant's motion, is consequently reversed, and the cause remanded.

BLACKMAN v. SMITH.

1. One who is summoned as transferee of the debt admitted to be due by the garnishee answering in the suit, will not be permitted to take advantage of errors in the proceedings, either against the original defendant or against the garnishee.
2. It is of no importance, that two or more persons are summoned by the same notice to appear and contest the plaintiff's right to condemn a demand which the garnishee suggests has been transferred to another, or to others; but if the objection was valid, it should be raised before submitting to go to trial.
3. After a judgment against a transferee, an issue will be presumed, if one was necessary.
4. When the transferee contests the plaintiff's right to condemn the debt, he is subject to costs, if the plaintiff prevails.

Writ of Error to the County Court of Russell.

JUDGMENT was obtained at the spring term, 1842, by Smith, in a suit in Russell Circuit Court, against one Hunt, for $202. On this judgment, Smith sued out garnishee process against one Shearman, as a debtor of Hunt. Shearman appeared and answered, that at the time of the service of the garnishment, he was indebted to Hunt by two promissory notes, one for $250, due the 1st January, 1843, and a credit upon it of $22 75, which note is dated 31st May, 1842, but as to which note he had, the day of making his answer, been notified by Burwell Blackman, that the same had been transferred to him previous to the time of serving said garnishment. The other, for $210 payable to ——, on the 1st January, 1844, as to which, one Samuel Jones, previous to the service of the garnishment, notified him that the last mentioned note had been transferred to the said Jones. Also, that at the time of service, Hunt was indebted to him, the said garnishee, $120.

On this answer, the Court made an order, in which the answer of the garnishee is said to have been, that he was indebted to Hunt, without setting out the amount or manner of indebtedness, but stating, that since the service of the garnishment, he had

been notified of the transfer of said notes, (none being previously named in the entry, and there being no reference to the answer made by the garnishee,) by Burwell Blackman and Samuel Jones, of the transfer of said notes, and that they held the same, which are payable to said Hunt: Whereupon the said plaintiff, wishing to contest the validity of said transfers, it was considered, that the clerk issue process to the said Burwell Blackman, and Samuel Jones, requiring them to come forward and contest the validity of the said transfers, as the statute directs.

On this order, a writ was issued to the sheriff, reciting the previous proceedings, and requiring him to make known to Burwell Blackman, and Samuel Jones, that they be and appear at the next term of the Circuit Court, to contest the validity of the said transfers, with the said plaintiff.

This was returned executed, on both the parties, and an issue was tried at the spring term, 1844, as between Smith and Blackman, in which the jury returned a verdict, that the note in controversy was the property of the defendant, Hunt, on which a judgment was given against Blackman for costs. Jones, the other garnishee, not contesting the validity of the transfer of the note for $210, payable as stated in this entry, to M. C. Goldsmith, it was considered, that Smith should recover against Shearman, the garnishee, the sum of $251 33, together with the costs in this behalf expended, it appearing to the Court that there is an excess in his hands, after satisfying the plaintiff's demand.

The writ of error is sued out by Blackman, but it names the garnishee, as well as the other transferree, as defendants in the suit of Smith.

It is here assigned as error—

1. That the notice to the transferees is joint, when the answer of the garnishee shows no joint interest.

2. The notice contains no description of the notes to be contested, in order to put the transferrees on their defence.

3. No issue was tendered to the transferees.

4. The finding of the jury is vague and uncertain.

5. The judgment condemns a note not placed in controversy, by the answer of the garnishee, or by the notice to the transferees.

6. The costs are rendered, first as against the transferee, and second against the garnishee.

7. The amount of the judgment is for $64 50 more than the plaintiff's demand, as shown by the record.

8. In rendering judgment.

S. Heydenfeldt, for the plaintiff in error.

No counsel for the defendant.

GOLDTHWAITE, J.—1. The plaintiff here, in the Court below was not a party to the cause in the first instance, but he is called in at the instance of the garnishee, to assert or relinquish his claim to the debt, which otherwise is admitted by the garnishee to be subject to satisfy the demand of the creditor, at whose motion the garnishee was summoned. In this relation to the suit, he can only be heard to complain of errors which affect himself. The original debtor does not complain of the proceedings against him, and the garnishee is also silent, and therefore, so far as the transferee is concerned, must be presumed to have waived any errors or irregularities which may be in the record. [Stebbins v. Fitch, 1 Stewart, 180; Thompson v. Allen, 4 S. & P. 184.]

2. One of the supposed irregularities which affect this party, is, that the notice by which he is called into Court, is a joint one, that is, that another transferee is named in it, and was summoned at the same time. We do not consider this objection as of any importance; the object of the notice, in this mode of proceeding, is, to advise the supposed transferee, that the plaintiff intends to dispute his right to the debt, supposed by the garnishee to be transferred. If he disclaims all interest in the debt sought to be subjected, he is discharged, as a matter of course, and without costs; but if he, as supposed by the garnishee, asserts any right, that is determined upon the necessary allegations, if any are interposed, and in the event of an issue, that is determined by a jury. It is obvious, that if the party objects to the sufficiency of the notice, it must be done previous to the trial of an issue; therefore, if the notice in the present case was defective, it would not now avail.

3. The objection, that no issue was tendered to the transferee, comes within the often repeated decisions of this Court, that one will be presumed in all cases, after verdict, as will all the pleadings necessary to support it, when there is no exception on the record. [Wheeler v. Bullard, 6 Porter, 352.]

4. All the other assignments of error except the one respecting the judgment for costs, falls within the principles we have already ascertained, and in this particular, there is no error. As soon as the party asserted a claim to the debt, as against the supposed right of the plaintiff to condemn it, the cause assumed the form of a contested suit, as between these parties, and costs followed as of course, upon the judgment of the Court, ascertaining that the right to the debt was in the judgment debtor. [Stebbins v. Fitch, 1 Stewart, 180.]

There is no error in the record available to the present plaintiff. Judgment affirmed.

TUSCUMBIA, COURTLAND AND DECATUR RAIL ROAD COMPANY, ET AL. v. RHODES.

1. R. being indebted, by an open account, to an incorporated Rail Road Company, the latter assigned the debt to one S., to whom the Company was largely indebted, and by whom suit was brought against R., in the name of the Company, and a judgment obtained thereon. Pending the suit against him, R. paid for the Company a large debt, as its surety, which debt existed previous to the assignment, by the Company, to S. Held—that as the Company was insolvent, at the time of the assignment to S., of the debt of R., the latter could set off in equity, the money he had paid for the Company, against the judgment obtained by S.

Error to the Chancery Court at Tuscaloosa.

The bill was filed by the defendant in error. The material allegations, are, that the Rail Road Company was incorporated by an act of the Legislature, in 1832, and subsequently amended. That in the year 1836, the Board of Directors represented, that the Company could not sustain its credit, and meet its engagements from the proceeds of the subscriptions to the then capital stock, and that at an informal meeting of the Board, on the 27th June, 1836, the following preamble and resolutions were adopted:

"Whereas, it has been ascertained, from the report of the treasurer of this Company, that the amount of stock heretofore subscribed, and which has been paid by the subscribers, is insufficient for the purpose of paying for the cost of the road, and other improvements appertaining thereto. Be it therefore resolved, that the books of the Company be opened, for the purpose of disposing of stock, to the amount of one hundred and fifty thousand dollars, including the stock heretofore forfeited to the Company, and that subscribers for such stock be required to pay the same in three equal instalments, by giving accepted bills of exchange, with at least one good indorser; said bills to include interest, at the rate of six per cent., to be drawn payable at five, eleven, and seventeen months after the first day of August next, and that upon the delivery of said bills, to the treasurer of the said Company, certificates of stock, as for full payment, shall be issued in favor of said subscribers; and further, that the subscribers, or holders of said stock, shall be entitled to draw dividends on the same, for the year commencing on the first day of August next.

"Be it further Resolved, That the books shall be opened, under the direction and superintendance of the treasurer, and secretary of the Company, who shall attest the said subscription."

At the time this resolution was adopted, complainant was absent from the State, and that his name was subscribed without his authority, for seventy-five shares, and upon his return, and after the books were closed, he signed his name to the list of subscribers for seventy-five shares. But complainant charges, that the resolutions, and subscriptions, under them, were in contravention of the charter.

That Benjamin Sherrod was the President, and one David Deshler the treasurer; that they possessed the confidence of the stockholders, and managed the affairs of the Company. That in the year 1836, the treasurer of the Company represented to the Directors, and some of the stockholders, that the Company required the sum of fifty thousand dollars, to relieve it from debt, and that if that sum could be procured, the Company could continue its operations with advantage, and that the said Benjamin Sherrod had offered to lend that sum, upon bond, executed by respectable persons, and urged complainant to become one of the obligors in such bond, and make in this way the loan aforesaid. That complainant consented thereto, and together with eleven others,

executed a joint and several bond, in the sum of fifty thousand dollars to the said Sherrod; he having advanced to the Company that sum of money.

At the time of the execution of the bond, to show for whose use and benefit it was made, and for the purpose of guaranteeing the payment of the bond, and indemnifying the makers thereof, the Company passed the following resolution:

"At a meeting of the Board of Directors of the Tuscumbia, Courtland and Decatur Rail Road Co., on the 27th June, 1836, the following preamble and resolutions were adopted:

"Whereas, Benjamin Sherrod, has this day proposed a loan of fifty thousand dollars to this Company, for the term of five years, from the first day of January next, at eight per cent. per annum, interest to be paid annually; and whereas, the Directory have accepted the proposition, and have this day executed their joint and several bond, to the said Benjamin Sherrod, to secure the payment of said loan: now it is hereby declared, that said bond, though executed by the following persons in their individual capacity, yet the money borrowed, is for the benefit of said Company, and that said Company in its corporate capacity, is hereby made liable for the same, and a pledge is hereby given by the Company, that it will protect the individual makers of said bond, against the payment of the same." The bond is signed by twelve persons, including the complainant.

That in the early part of the year 1838, the Company became insolvent, and so continue to this time. That after the insolvency of the said Company, it transferred to Benjamin Sherrod, to indemnify him for certain claims, which he pretends to have against the Company, all the property, choses in action, and assets of the Company, and among other things, the said subscription list for additional stock, subscribed by complainant, and also other claims against him, amounting to $14,918 29.

That on the 4th September, 1840, the said Sherrod, in the name of the Company, brought suit against complainant, to recover said amount. That on the trial of the cause, complainant proved that all the obligors to the bond for $50,000, except three, had become insolvent, and that about the 1st January, 1841, complainant had been compelled to pay the said Sherrod, as his proportionable share, the sum of twenty-six thousand dollars, and upwards. But the Court held, that it was no defence to that ac-

tion, and that the complainant could only have relief in equity, and a verdict was found, and judgment rendered against him, for $14,918 29. And in addition to the sum he has paid on the bond for the Company to Sherrod, he charges that the Company are largely indebted to him, and is wholly insolvent, and prays that the money paid by him for the Company, be set off against the judgment obtained for the use of Sherrod.

Sherrod, in his answer, admits the assignment to him by the Company of claims due it, amounting in the whole to $29,118 29, including the claim against complainant, which was done to indemnify him in part, for the sum of $196,196 14 paid by him, for the Company, to the Decatur Bank, besides the sum of $33,714 90, also paid by him for the Company, and is liable besides, for other large amounts. He insists, that he did not look to the Company for the loan of $50,000, but lent it on the faith of the parties to the bond, and that the entry on the minutes of the board, was an attempt on their part, to indemnify themselves. He admits the insolvency of the Company, and denies all fraud.

The corporation also answered the bill, setting forth the assignment to Sherrod, made by order of the Board of Directors, and together with the answer of Sherrod, containing many statements, admissions, and allegations not necessary to be stated.

Much testimony was taken, but as no material fact stated in the bill is now controverted, it is not necessary to state it.

The Chancellor, at the hearing, considering that there was a mutual credit, between the corporation and the complainant, as well as upon the grounds of the insolvency of the corporation, decreed that the money paid by him, to Sherrod, on the bond, as the surety of the corporation, should be *set off* in equity, against the judgment obtained by it at law, for the use of Sherrod.

From this decree, a writ of error is prosecuted by the defendants, and assign for error the decree made by the Chancellor.

Peck & Clark, for plaintiff in error. The principles upon which Courts of Equity proceed, in cases like the present, may be thus stated: 1. Before the statute of set off at law, and that of mutual debts and credits in bankruptcy, Courts of Equity were in possession of the doctrine of set off, upon principles of natural

equity. [2 Story's Com. 656, § 1432; 4 Burr. 2220; 2 Paige, 581.]

2. When debts are mutual, though independent, yet, if there be a mutual credit between the parties, *founded at the time* upon the existence of some debt, due by the crediting party, equity will grant relief. By mutual credit, we are to understand a knowledge on both sides, of an existing debt, due to one party, and a credit given by the other, founded on, and trusting to such debt, as a means of payment. [Story's Com. § 1435; 7 Porter, 554.]

3. Courts of Equity follow the same general rules, as Courts of law, as to sets off. [3 Johnson Chan. 359.] Courts of Equity will set off distinct debts, where there has been a mutual credit, to avoid circuity of suits. [5 Mason, 212; 1 Edwards, 404.] So also where there has been an express, or implied agreement of stoppage. [2 Edwards, 76.]

To apply these principles; The debt transferred by the corporation to Sherrod, was one which from its very nature, and the object of its creation precluded the idea of a mutual credit, between the corporation and Rhodes. Nor did the corporation owe him any thing, when the debt was created. Nor was the corporation indebted to him, when the assignment was made; the transfer therefore to Sherrod, was not clogged by any existing equity.

Huntington, Cochran and Hopkins, contra, contended, that the contract upon which the suit at law was brought, was void, because not authorized by the charter, and also because it was the exercise of banking powers. [Angel & Ames on Cor. 66; 2 Cowen, 664; ib. 678; 3 B. & A. 1; 5 Taunton, 792; 4 Ala. Rep. 558.]

That as the right of the complainant to the off set, did not arise until after the suit brought against him, it was not a good set off at law, and it was therefore necessary to resort to Chancery. [3 Ala. Rep. 256.]

They also maintained, that to constitute a mutual credit, it was not necessary that one should be a consequence of the other, or that the credit should be given at the same time; like mutual debts, they might arise at different times. [1 P. Wms. 326; 1 Atk. 228; Hop. 583; 2 Paige, 581; 5 Vesey, 108; 3 ib. 248; Bab. on Set Off, 57, 72; 5 Paige, 592; 4 Term. 123.]

The pledge of the assetts of the Company, made it one of mutual credit.

The insolvency of one of the parties is a well established ground of equitable jurisdiction, to allow a set off. [6 Dana, 38, 305; 4 Bibb, 356; 1 Monroe, 194; 4 Conn. 302; 2 Hammond Ohio, 432.]

That the assignment being, of an open account, was a mere revocable power to collect the debts, or, in other words, a mere equitable right to the debts, which is countervailed by the opposing equity of Rhodes. [1 Brock. 456; 1 W. C. C. R. 178; 7 Johns. 377; 10 Wend. 85.]

They also cited, 2 Eq. C. Ab. 10; 2 Vernon, 117; 1 Litt. 153; Litt. S. C. 325; Poth. on Ob. 590; 10 I. B. Moore, 198; 3 Vesey, 248; 4 Term, 123, 212; 2 Murphy, 30.

ORMOND, J.—The Tuscumbia, Courtland and Decatur Rail Road Company, having brought a suit at law for the use of Benjamin Sherrod, against H. W. Rhodes, the defendant in error, and recovered a judgment against him, he has filed this bill to obtain the benefit of a set off, for money paid for the Company, after the suit was commenced.

Whatever may be the merits of the demand here attempted to be set off, it is very clear it cannot be set off at law, as it was not a subsisting demand when the action was brought, [Cox v. Cooper, 3 Ala. Rep. 256;] the question therefore is, whether this is a good set off in equity.

The true nature and extent of the doctrine of set off, in a Court of Equity, is one of some difficulty, complicated as it is, in the decisions made upon the subject, with the statutes of set off at law, where there are mutual debts, and of the statutes of bankruptcy, authorizing a set off where there are *mutual credits*. Mr. Justice Story has discussed this question in his Commentaries on Equity, 2d vol. 656, and more at large in the cases of Greene v. Darling, 5 Mason, 201, and How v. Shephard, 2 Sumner, 409. According to his opinion, equity follows the law in regard to set off, unless there is some intervening natural equity, going beyond the statutes of set off. That such a natural equity arises, where there are mutual credits between the parties, or where there is an existing debt, on one side, which constitutes the ground of a credit on the other, or, where there is an express or implied agrement,

that the mutual debts shall be a satisfaction *pro tanto* between the parties.

To the same effect, is the opinion of Chancellor Kent, in Duncan v. Lyon, 3 Johns. C. 358, and of this Court in French v. Garner, 7 Porter, 549. In *ex parte* Stephens, 11 Vesey, 27, Lord Eldon says, Courts of Equity were in possession of the doctrine of *set off*, long before the law interfered; though where the Court does not find a natural equity, going beyond the statute, the rule is the same in equity as at law. See also, Mead v. Merritt, 2 Paige, 402; Burkley v. Munday, 5 Madd. R. 297; Robbins v. Holly, 1 Munroe, 194; Green v. Farmer, 2 Burr. 1214, and *Ex parte* Harrison, 12 Vesey, 346, and to these might be added a multitude of authorities, English and American, establishing the same general principle.

What then is the *natural equity*, or to speak with more precision, what are the peculiar circumstances, attending this case, which would authorize this Court, to set off the one demand against the other.

The facts are, that Rhodes, the complainant, became a subscriber with others, to the Rail Road Company, for seventy-five shares of its stock, at one hundred dollars a share, which was to be paid for, in accepted and indorsed bills of exchange, payable in five, eleven, and seventeen months, interest included. The object of the subscription, was to enable the Company to raise funds for the payment of its debts. About the same time, Sherrod made a loan to the Company of fifty thousand dollars, for five years, to secure the payment of which, Rhodes, and eleven others, executed a bond to Sherrod for that amount, payable also in five years; the Company, by an order on its minutes, pledging itself in its corporate capacity, for the payment of the debt. Subsequently, the Company became insolvent, and being indebted to Sherrod, in the sum of nearly two hundred thousand dollars, money paid by him for it, assigned to him some of its effects, and among other claims, the one against Rhodes for his sub scription, which he had not complied with, by executing bills of exchange; together with other claims against him. Upon this demand against Rhodes, Sherrod brought suit in the name of the Company, for his use, and subsequently Rhodes paid to Sherrod. upon the bond for fifty thousand dollars, twenty-six thousand dollars. A judgment was obtained by the Compa-

ny, for the use of Sherrod, against Rhodes, and he now seeks to set off in equity, the money thus paid against the judgment.

It is not pretended, that there was in this case any express agreement to set off, or extinguish the claim of the Company against Rhodes, for his subscription, by the obligation entered into by the latter, to guaranty to Sherrod, the payment of the loan of fifty thousand dollars. Nor is there the slightest foundation for supposing, that there was an implied agreement, having the same object in view. Before such an implication could be made, there must have been a debt due, or to fall due, which might be presumed to be looked to by the parties, as the fund out of which the debt attempted to be enforced, was intended to be satisfied. So far is that from being the case here, that the Company debt was not to fall due until several years after the bills would have been paid. Besides, such a supposition would have been destructive to the avowed object of the parties, which was to raise money for the pressing exigencies of the Company, whilst this theory of the intentions of the parties, supposes, that the bills were not to be drawn, until the fact was ascertained, whether Rhodes would become liable on his suretyship for the Company. As it is certain there was no express agreement to that effect, it is equally as clear that none can be implied from the circumstances.

It is however argued, that although these transactions are not strictly mutual debts, they are *mutual credits*, to create which, it is supposed, it is not necessary that the debts should fall due at the same time. Waiving for the present, the inquiry, whether there was any debt due from the Company to Rhodes, before the actual payment of the money by him, we proceed to inquire, whether the term *mutual credit* has this meaning.

The statute of 2d Geo. 2d, which first allowed sets off at law, as well as our statute on the same subject, only authorizes "mutual debts" to be set off against each other. The term *mutual credits*, was first introduced in the bankrupt laws of England, as authorizing a set off in bankruptcy, which, in the English books, is said to be a term of larger import than *mutual debts*. Thus in *Ex parte* Prescott, 1 Atk. 230, it was held that a debt due the bankrupt, payable at a future day, might be set off against a debt then due to him, from the bankrupt; his Lordship holding, that although not a mutual debt, it was a mutual credit, within the meaning of the bankrupt law. So where a bill of exchange, ac-

cepted by A, got into the hands of B, it was held in accordance with the same principle, that there was a mutual credit between A and B, although the former did not know the bill was in the hands of the latter. [Hankey v. Smith, 3 Term, 507, in note.]

So also, an accommodation acceptor to a bill, which did not fall due until after the bankruptcy, and was then outstanding in the hands of third persons, and paid by him after the commission issued, was held entitled to a set off, under the words *mutual credit*. [Smith v. Hodson, 4 Term, 211.] To the same effect are *Ex parte* Wagstaff, 13 Ves. 65, and Arbouin v. Trottoire, 1 Holt N. P. C. 408.

Now, in all these cases, it is to be observed, there was a *debt* due before the bankruptcy, though not payable until afterwards, and the whole effect of the bankrupt law, in respect to the question we are now discussing, seems to be, to dispense with those circumstances, which would be necessary to give the Court of Chancery jurisdiction in other cases. It must, however, to be the subject of a set off, be a *debt* actually, and unconditionally due, although it be not payable, until after the debt is due, against which it is proposed to set it off. In *Ex parte* Hale, 3 Vesey, 304, the acceptor of a bill exchange, having become a bankrupt, the indorser was compelled to take it up, and being indebted to the bankrupt ninety pounds, prayed that he might be at liberty to set off that sum, against the amount of the bill which he had been compelled to pay. The Lord Chancellor said, "There was no *mutual credit*. There was a debt created upon the estate, and due at the time of the bankruptcy, but that debt was not due to you, therefore in that respect the set off fails." To the same effect are Chance v. Isaacs and Smith, 5 Paige, 592.

According then, to this extended meaning of the term *mutual credit*, under the bankrupt law, the set off cannot be made in this case, as with no propriety can it be said, that there was any debt due from the Company to Rhodes, at the time this assignment was made to Sherrod. It was at most a contingent liability, to pay a debt for the Company, which might never be enforced against him, and certainly not stronger, than that of the case of the indorser of a bill in the cases cited from 3 Vesey, 304, and 5 Paige, 592. In the language of the Chancellor, in the latter case, at the time of the assignment, there were neither mutual debts,

nor mutual credits, which by the efflux of time, would necessarily ripen into mutual debts, between Rhodes and the Company.

It is however urged, that the insolvency of the Company, would give to Rhodes the right to set off in Chancery, the debt due from the Company to him, and that Sherrod can be in no better condition. Conceding, as such appears to be the weight of authority, that he would have this right against the Company, has he the same right against the assignee of the Company?

By the assignment of the Company for a valuable and full consideration, Sherrod became invested with all the rights the Company then had in the thing transferred, and the judgment has ascertained, that this was a just claim, at that time, to recover the debt. Can this claim be divested, by any subsequent equity, arising between the assignor and the debtor, not coneected with the debt so assigned? In our opinion it cannot.

In Smith v. Pettus, 1 S. & P. 107, the Court declared that an equity inherent in the contract, travelled with the debt, into the hands of the assignee, and would be enforced against him. In Green v. Darling, 5 Mason, 214, this precise point arose, and the Court say, "Where a *chose in action* is assigned, it may be admitted, that the assignee take it subject to all the equities existing between the original parties, as to that very *chose in action*, so assigned. But that is very different, from admitting that he takes subject to to all equities subsisting between the parties, as to other debts, or transactions. There is a wide distinction between the cases. An assignment of a chose in action, conveys merely the rights which the assignor then possesses to that thing. But such an assignment, does not necessarily draw after it all other equities of an independent nature."

The equity in this case, between Rhodes and the Rail Road Company, has no connection whatever, with the debt transferred by the latter to Sherrod. They are totally distinct and unconnected. By the payment of the surety debt, Rhodes merely became the creditor of the Company in general, and although, in equity, the Company, being insolvent, would not have been permitted to enforce their claim against him, Sherrod is not affected by it, because his rights are to be admeasured, by the condition of the debt at the time of the transfer. If Rhodes could not have defended himself against the payment of it then, he cannot now, unless he could show an equity inherent in the thing assigned, in

which event he might enforce it against the assignee, although it arose subsequent to the transfer.

The objection that the subscription for the stock was void, because contrary to the charter, cannot be raised in this Court; all such inquiries are foreclosed by the judgment and release of errors at law.

It is further urged, that the debt so assigned by the Company, was pledged by the Company for the payment of the loan of fifty thousand dollars. It is as follows; "To secure the payment of said loan, it is hereby declared, that the said bond, though executed by the following persons in their individual capacity, yet the money is borrowed for the benefit of said Company, and that said Company in its corporate capacity, is hereby made liable for the same, and a pledge is hereby given by the Company, that it will protect the individual makers of said bond, against the payment of the same." If it were conceded, that this was a pledge of the assetts of the Company, and not a mere guaranty, it would avail nothing, as it is utterly inconceivable that the Company should pledge the bills of exchange, for the term of five years, when the whole design of the subscription, and the loan, was to raise money, to meet the demands, then pressing on the Company. It is true, the bills of exchange were never executed, but in ascertaining the meaning of this *pledge*, we must look to the state of things then existing, and it was certainly expected by the Company, that the bills of exchange would be executed by the first of August, ensuing the arrangement, otherwise the whole proceeding was solemn trifling. Whatever then be the meaning of this pledge, whether a mere guaranty, or a pledge of its existing and future resources, it could not have been the intention to pledge the bills of exchange, or if they were not executed, the amount of the subscription for the stock, as that would have defeated the very purpose of the arrangement. We cannot under these circumstances, infer such an intention from the employment of, to say the most of it, an ambiguous phrase.

It results from the conclusions here attained, that the Chancellor erred in his decree perpetuating the injunction to the judgment at law, and it is therefore reversed. And this Court, proceeding to render such a decree as the Chancellor should have rendered, hereby order, adjudge and decree, that the bill be dismissed, at the cost of the complainant.

On the petition of the plaintiffs in error, the cause was re-argued by Hopkins and Huntington, for the plaintiff in error.

Peck & Clark, contra.

GOLDTHWAITE, J.—The matters of doubt in this cause, which principally induced us to allow a re-argument, are those which arise out of the insolvency of the Rail Road Company, when it made the assignment to Sherrod, of the debt due from Rhodes, and from the fact that the debt which he now seeks to stop, was not then due. To these we shall chiefly address our examination.

The doctrine of set off, or the compensation of one debt by another, seems to have been entirely unknown to the common law, unless the setting off judgments of the same Court, against each other, may be construed as asserting some original jurisdiction over this subject. Its defect in this particular, must have been perceived, when commercial transactions became in anywise general; especially when insolvency or intestacy happened and there were cross demands existing. We may therefore expect to find the development of the equitable doctrine, and its application, ameng the earliest reported Chancery cases. We find the English Chancery Judges frequently asserting the doctrine of stoppage, which was known to the Equity Courts, anterior to the statutes of set off and bankruptcy; but what this stoppage was, or what equitable set off now is, does not seem to be any where very clearly explained, and it will best appear by a collection of some of the cases.

The first is Peters v. Soame, 2 Vern. 428, decided in 1701. There the bill was by the assignees of a bond, against the obligor, and the assignees in bankruptcy of the assignor, to compel payment to the assignees. The *obligor* insisted, that the assignor of the bond owed him a sum of money, for goods sold, and claimed to retain it. The *assignees in bankruptcy*, that they, as representatives of creditors, had an equal equity with the assignees of the bond, (that having been assigned as an indemnity merely,) and having the legal title also, their claim was superior. It was held, that the assignees of the bond had the better equity, as against the assignees in bankruptcy, but the stoppage under such circumstances, by the obligor, was considered a good equity.

Hawkins v. Freeman, 2 Eq. Ca. 10 c. 10, was decided some years afterwards; at least such is the inference, as later Judges say it was by Lord Macclesfield. There the complainant and the defendant's intestate, were both tradesmen, and mutually sold each other goods. The complainants were indebted £30, to the intestate, and he to them in £100, but dying intestate and insolvent, the defendants, as his principal creditors, took out administration, sued the complainants at law, and obtained a judgment. The bill was filed to have the debt of £30 set off, and it was so decreed, as well as that the defendants should pay the balance, in due course of administration.

It will be seen that the first of these two cases may have been decided on the broad ground, that when the complainant sought relief, upon an equitable title, it let in a cross debt as a defence. The second rests alone on the fact of insolvency, unless it is also to be considered as sustaining the jurisdiction, in any case of cross demands. Both were made previous to any statute of set off, and before the general statutes of bankruptcy, though the temporary bankrupt act of 4 Ann, c. 17, was then in force, and in neither is it pretended, that the ground of jurisdiction rested on any other principle than natural equity.

Dowman v. Matthews, Prec. in Chan. 580, was decided in 1721, the same year with the passage of the general bankrupt act of 7 Geo. 1; and its facts are very similar to those of Hawkins v. Freeman. Lord Macclesfield held the stoppage to be a good equity, though *generally*, he said, it was no payment, and there were cases in which it could not be done; as a man might not stop his rent for money due himself, nor that due upon a bond toward satisfaction of a simple contract debt. Insolvency was not spoken of in terms, but, he said, in cases of *this nature*, the Court would seize on the smallest circumstances to imply a mutual credit; as the carrying, or dealings for years, or if no interest had been paid. It was said at the bar, that before the passage of the then recent act 7 Geo. 1, the debtors of bankrupts were without remedy; but the Lord Chancellor observed, the statute was passed because it was reasonable to have been so before. The remark and the answer evidently referred to suits at law, for Peters v. Soame had, twenty years before, decided that an ordinary debtor could have stoppage in equity, and the same was held in 1716, by Lord Cowper, in Lanesborough v. Jones, 1 P. Wms. 325. In that

case, the assignees of the insolvent were seeking to foreclose a mortgage, and the mortgagor was allowed to stop a legal debt due from the insolvent. The assignees asserted, they took the entire estate, and that the debtor was compelled to prove his debt, under the commission, and take a *pro rata* dividend, but it was determined, on principles of natural equity, that the debtor was entitled to stop his debt against the bankrupt, and that his assignees only stand in his condition.

In Jeff. v. Wood, 2 P. Wms. 128, decided ten years after the first general bankrupt act, the Master of the Rolls said, "it may be a doubt, whether an insolvent person may recover against his debtor, to whom at the same time he owes a greater sum; though I own it is against conscience, A should be demanding a debt of B, to whom he is indebted a larger sum, and would avoid paying it." He then referred to the cases noticed by us as establishing that the least evidence of an agreement for stoppage, would let in the set off.

In Whitaker v. Rush, Amb. 407, the Master of the Rolls, for the first time, asserted, that the doctrine of set off, for a long period did not prevail in England, and was first introduced with the statute 5 Geo. 2, and Lord Hardwicke, in *Ex parte* Prescott, 1 Atk. 230, says, that before its passage, a debtor of the bankrupt being also a creditor, was obliged to prove his debt under the commission, and receive a dividend only, and that statute was passed to remedy this great inconvenience. These remarks must be referred to legal suits and proceedings, by the commissioners, for neither of these Judges could have been ignorant of the decisions made *on bills in equity*, by their predecessors, which certainly held a different language. It will be borne in mind, that the question before him arose on a petition in bankruptcy, and was, whether the debtor of a bankrupt also a creditor, could *retain* his debt, which was *not then due*. No cases being cited on either side, Lord Hardwick said, he must make a precedent, and held, the equity of the statute extended to that case, as it gave the creditor whose debt was not due, the right to prove it, and secure a dividend under the commission.

The equitable right of retaining was carried further, by the same Judge, for in *Ex parte* Deeze, 1 Atk. 228, held, that goods in the hands of a debtor of the bankrupt, could be retained until a general debt was paid, though if there had been *no bankruptcy*,

the debt could not have been set off against an action at law, for the goods, the holder having no lien on them, or having a lien on them for a portion only of his debt. At the time of these decisions, and for many years afterwards, it was the settled law, in the Courts of common law, that an *accommodation acceptor*, not having paid the bill when the bankruptcy occurred, though he afterwards did so, could not prove its amount under the commission. [Chilton v. Whiffer, 3 Wils. 13; Young v. Hackley, ib. 346.] Yet both the Courts of Law and Chancery, allowed him to retain the same liability, after its payment, against the claim of the assignees for a debt due to the bankrupt at the commission of the act of bankruptcy. [Smith v. Hodgson, 4 Term, 212; *Ex parte* Wagstaff, 13 Vesey, 65.] These decisions, so fully carrying out the equitable doctrine of stoppage, left no room to complain of hardships, and except the jurisdiction exercised by the Chancellors in bankrupt cases, there was little space for its exercise on the general principles. The English Chancellors then began to doubt as to the nature and origin of the doctrine, though in general they conceded that equity had jurisdiction to some extent. [James v. Kyneer, 5 Vesey 108; *Ex parte* Stephens, 11 ib. 24; Taylor v. Okey, 13 ib. 180; *Ex parte* Blagden, 19 ib. 465.]

In the comparatively recent case of Piggot v. Williams, 6 Wadd. 95, Sir John Leach refused, where a bill was filed by a solicitor to foreclose a security, by way of mortgage, to sustain a demurrer to a cross bill, insisting upon a breach of duty, whereby costs were occasioned, and said, the proper course would be to retain it, until an issue of *quantum damnificatus* was tried. And in Whyle v. O'Brien, 1 Sim. & Stu. 531, the jurisdiction to set off one legal demand against another, was expressly denied. In Rawson v. Samuel, 1 Craig. & Ph. 161, Lord Cottenham says, we speak familiarly of equitable set off, as distinguished from set off at law, but it will be found that this equitable set off exists in cases where the party seeking the benefit of it can show *some equitable ground for being protected* against his adversary's demand.

Perhaps it will hereafter be found, if it is necessary to deduce general principles from all the existing English cases, upon the subject of set off, that they may be thus stated: 1. That although Courts of Equity at first assumed jurisdiction on the natural equi-

ty, that one demand should compensate another, and that it was iniquitous to attempt at law to enforce more than the balance, yet now they only exercise it when a legal demand is interposed to an equitable suit. 2. When an equitable demand cannot be enforced at law, and the other party is suing there. 3. Or where the demands are both purely legal, and the party seeking the benefit of the set off, can show some equitable ground for being protected.

We think it clearly deducible, from the general scope of these decisions, that insolvency was recognized as a distinct equitable ground, entitling the party to relief, even in cases where both demands were purely legal.

In the American Courts, the cases are more numerous, and quite as decisive to show, that the same principle obtains in them generally. In Sampson v. Hart, 14 John. 63, Judge Spencer asserts, that insolvency furnishes a strong and substantial ground of equity, as a meditated fraud. Other decisions rest the jurisdiction on the ground, that without its exercise, the party having a clear natural equity, would be without relief. [Lindsay v. Jackson, 2 Paige, 281; Pond v. Smith, 4 Conn. 302; Ford v. Thornton, 3 Leigh. 695; Feazle v. Dillard, 5 ib. 30; Collins v. Farquer, 1 Litt. 153; Payne v. Landon, 1 Bibb. 519; Robbins v. Holley, 1 Mon. 191; Rowzel v. Gray, Litt. S. C. 487; Dickinson v. Chinn, 4 Mon. 1; Dye v. Claunch, 5 J. J. M. 659; Chamberlain v. Stewart, 6 Dana, 32; Merrill v. Louther, ib. 305; Walker v. Chamberlain, 8 ib. 184; Sarchett v. Sarchett, 2 Ohio, 432; Cullum v. Branch Bank, 4 Ala. Rep. 21; Pharr v. Reynolds, 3 ib. 521; Abbey v. Van Camper, Freeman Chan. 273.]

The only case which seems to indicate a different conclusion, is Green v. Darling, 5 Mason, 201, but in that, there was no consideration of, or decision upon, this question, though it seems to have been in some degree involved by the facts stated. Judge Story also seems to infer, from Lord Hardwick's expression with reference to the time when the doctrine of set off was introduced, that insolvency alone will not give jurisdiction. [2 Story's Eq. § 1436, note 1.]

Notwithstanding the doubt of this eminent jurist, we think it may be considered as well settled, that insolvency furnishes a ground for the interposition of equity, in cases over which, otherwise, there would be no jurisdiction, as in the case of a debtor

who claims to set off a legal demand against his judgment creditor, which he cannot enforce, or have an adequate remedy for at law, by reason of the insolvency.

This conclusion, though it will aid us materially, does not dispose of the case under consideration, as it yet remains to be considered, whether Rhodes' demand, arising from the fact, that he was the obligor in the bond to Sherrod, for the accommodation of the Company, is a debt which can be set off in equity. The circumstances attending the case require, that this case shall be considered in two aspects. 1. Whether this demand, at the time of the assignment, was a debt, as distinguished from a contingent liability. 2. Whether its not being due at that time, though afterwards paid by Rhodes, invests the assignee of the Rail Road Company with the superior equity.

In the opinion formerly delievered, we considered Rhodes' engagement as a contingent liability merely, and from that deduced the conclusion, that he was invested with no rights or equities until its payment. We then deemed it similar to the engagement of an indorser, which in *Ex parte* Hale, 3 Vesey, 304, and Chance v. Isaacs, 5 Paige, 592, was considered as giving no right to retain, against a debt assigned before the maturity of the debt, and payment of it. Our conclusion was based on these adjudications, and we are now satisfied, that the ground of our former decision is untenable. If it was important to draw a distinction between an engagement to pay a sum of money absolutely, for another, as by accepting his bill, or, as here, by giving a bond for his debt, and the indorsement of his note, there can be no question, that Rhodes' engagement is precisely the same as that of an accommodation acceptor, and the cases before cited, of *Ex parte* Wagstaff, 13 Vesey, 65, and Smith v. Hodson, 4 Term, 212, show that such an acceptor, after paying his bill, may retain. But the distinction supposed to be established by *Ex parte* Hale, is not deemed to be a sound one in Collins v. Jones, 10 B. & C. 777, and is at variance with that, as well as Ballard v. Nash, 8 B. & C. 105, where indorsers subsequently paying the bill, were permitted to retain, even at law, against the assignees. Independent of these adjudications, it is very difficult to conceive what difference there is between the equities of an acceptor and indorser. If there was, the strange anomaly would be seen, of allowing the retainer, if the party holding the bill was unable to negotiate it,

in consequence of the doubtful credit of him who afterwards becomes bankrupt, and refusing the same right when the goodness of the paper has been avouched for by the indorsement. It is impossible that natural equity can be governed by distinctions so subtle. We are constrained therefore, to concede, that if the demand now asserted for Sherrod's benefit, was the property of the Rail Road Company, Rhodes' right to set off his demand, in equity, would be clear, by reason of the admitted insolvency of the Company.

And this brings us, lastly, to consider, whether the right which Rhodes, under such circumstances, would be entitled to, is overcome by any superior equity remaining in Sherrod, and arising from the fact, that the debt which Rhodes had bound himself to pay, was not due when his own liability was assigned by the Rail Road Company, though subsequently paid, upon the rendition of the judgment for Sherrod's use.

Many of the cases cited upon the first point examined by us, show very distinctly, that the assignee of a chose in action takes it subject to all the equities existing at the time of the assignment, and that the right to set off a debt is one of these equities. [Peters v. Soame, 2 Vern. 428; Feazle v. Dillard, 5 Leigh. 30; Chamberlain v. Stewart, 6 Dana, 32; Merrill v. Louther, ib. 305; Walker v. Chamberlain, 8 ib. 164.] Judge Story evidently doubted the existence of such a rule, when he decided Green v. Darling, for he there says, "it may be admitted that the assignee takes the chose in action, subject to all the equities existing between the original parties, as to that very chose in action; but that is very different from admitting that he takes it subject to all equities subsisting between the parties, as to other debts or transactions. The assignment of a chose in action conveys merely the rights which the assignor then possesses, to that thing, but it does not necessarily draw after it all other equities of an independent nature."

The rule recognized by the other cited cases, grows out of, and depends upon, the fact that set off is a natural equity, and being so, it at once attaches itself to all demands, the *legal title* to which is incapable of transfer. The observations made in Green v. Darling, apply with full force to that class of choses in action which are capable of being transferred, so as to invest the legal title in another. Such as notes and bills transferred by in-

dorsement, or other mode which passes the legal title, *after they are due.* As to these, there is no inherent equity to set off a cross demand, because the law itself permits the legal title to be transferred. The cases are numerous and consistent, that the party charged on such a bill, or note, can only examine the particular equities growing out of that transaction. [Burroughs v. Moss, 10 B. & C. 558; Breedlove v. Robinson, 7 Porter, 541, and cases there cited.]

Our statute, which makes bonds and notes assignable, extends the right of set off to all demands had before notice of the assignment; but if the law is, as seems to be supposed in Green v. Darling, there would, in this State, be no equities which would warrant a set off against an open account, after its assignment, as it is with us prohibited by no statute, other than the general one, and if the assignee is not charged with the natural equity, he would recover in all cases. We apprehend, the legal rule is, that so long as a debt must be sued in the name of the original creditor, it is *prima facie* subject to be set off by the debtor, but that Courts of Law, at the present day, as well as Courts of Equity, now protect the interest of the equitable owner, so as not to affect him with any set off obtained, or payment made, after notice of the assignment.

The Kentucky decisions, before cited, seem to place the subject on its proper foundation, when they held, that to let in a set off on the mere ground of insolvency, it must be shown to have existed when the assignment of the demand was made. [Robbins v. Holley, 1 Monroe, 191; Walker v. Chamberlain, 8 Dana, 164.] The equitable rights growing out of the insolvency attach immediately, and as soon as it exists; whatever these may be, they can never be affected by a subsequent assignment, however meritorious the consideration, for the equity of the assignee being posterior in point of time, must yield to that of the debtor creditor, which is older. [Merrill v. Louther, 6 Dana, 305.]

What then was Rhodes' equity against the Rail Road Company, when the assignment was made, by reason of its insolvency? The difficulty in finding the appropriate answer to this question, grows out of the apparent injustice, on the one hand, of permitting the debtor corporation to receive the benefit of their debt when it is morally certain they never will discharge that for which Rhodes was the sponsor, and which he has since paid; while,

on the other hand, there seems to be no English precedents, independent of those referred to on the construction of the bankrupt acts, of retaining a debt presently due, to answer one that will only become so at a future time. The cases decided upon the construction of the bankrupt statutes, are nothing more than the recognition of a principle well known to the civil law, which permitted a creditor having goods or effects, in possession of one afterwards becoming insolvent, to retain them until the debt was paid. The doctrine is treated of by Pardassus, under, and in connection with, bills of exchange, paragraph 183, vol. 1; 389 vol. 2; and afterwards, in treating of *des failletes*. See also, Ersk. Inst. b. 3, c. 35; Pothier *Traite des able*, n. 441; Wood's Inst. 227; Brown's Lectures, 362. We do not intend, however, to draw upon the civil law for reasons to sustain a proposition which, if it exist at all, is capable of elucidation from cases decided either at law or in equity, by those Courts from which we are authorized to look for binding precedents.

We have already referred to *Ex parte* Deeze, 1 Atk. 228, where a packer, having goods of a bankrupt to be packed, was permitted to retain, not only for the price of the packing, but also for a general debt. In French v. Denn, Cook's Bank. 536, cited at large in 8 Taunt. 499, the bankrupt had intrusted his creditor with his interest in a string of pearls, to be sold, *and the money to be paid to the bankrupt*. The creditor sold the pearls, after the act of bankruptcy, and the assignees brought trover: but it was held, that the creditor was protected, and might hold the money. The decision in Prescott's case, before cited, though placed to the credit of the bankrupt acts, would be equally sustainable upon natural equity, in a case of insolvency; and such was evidently the opinion of Lord Eldon, when, in a controversy between the assignees of two bankrupts, one owed the other a cash balance, but was liable at the same time on bills for his creditor's accommodation, asks the question, if this creditor, while the paper with his debtor's name upon it was afloat, could have recovered the cash balance? He answers, that he could not; the debtor would say, that the creditor had his name engaged, and it must be disentangled before the creditor could call for the cash balance. [*Ex parte* Metcalf, 11 Vesey, 404.] The same principle governs the cases of Willis v. Freeman, 12 East, 656, and Wilkins v. Casey, 7 Term, 711, though in neither is it so distinctly set

forth as by Mr. Chitty, who cites them as sustaining the position, that a person who is an accommodation acceptor, may retain a debt or fund in his hands, *as indemnity to secure himself*, if his principal becomes either bankrupt or insolvent. [Chitty on Bills, 348.]

Lord Ellenborough, in Madden v. Kempster, 1 Camp. 12, expressly concedes this to be true, in relation to a bill, and it would be difficult to state a doctrine more obviously equitable, than that a debtor becoming his creditor's surety, when solvent, should be entitled to retain a debt in his hands, to secure himself, when his principal afterwards fails.

A coutract is always implied for indemnity, between the principal and his surety, [Chitty on Bills, 347,] and it is on this ground, that the surety is permitted to file a bill against his principal, to compel him to pay, It has even been decided, that a Court of Equity will decree the specific performance of a contract for indemnity. [Ranelagh v. Hayes, 1 Vern. 180; 2 Story's Eq. § 50.]

We think the cases cited, and principles adverted to, evince very satisfactorily, that one who stands to another in the relation of a surety, may, if his principal becomes insolvent, not only retain money in his hands, as indemnity to secure himself against loss, but also that personal chattels in the hands of the surety, upon bailment may be retained for the same purpose. The cases of *Ex parte* Deeze, and French v. Denn, indeed go greatly beyond this, and recognize the same right of retainer as to goods, as applying to a general creditor: and in Rose v. Hart, 8 Taunt, 185, it is said, that French v. Denn has been followed by a string of cases, for more than thirty years, all professing to be founded on it, and some of them containing the fullest approbation of *Ex parte* Deeze.

In our country, the cases are less numerous, but equally conclusive. In Feazle v. Dillard, 5 Leigh, 30, although the decision of the Court did not turn on the question, it was fully considered, and the Court of Appeals held, that a surety for a debt not due, when the assignment was made, was entitled to retain against the assignee, upon the insolvency of his principal, who was also his creditor by different transaction. It is there said, the insolvency constitutes a new ingredient in the case, and upon the principle of the bill *quia timet*, a Court of Equity will permit the retainer for the indemnity of the surety, unless the insolvent will

make some satisfactory indemnity. To the same effect is Abbey v. Van Campen, Freeman, 273; Williams v. Helm, 1 Dev. Eq. 151; Battle v. Hart, 2 ib. 31.

To conclude then, it seems clear, that the entire equity of Rhodes rests upon the insolvency of the Company, and that the existence of this fact, introduced new relations between them, whereby the former was entitled to retain the debt due to the latter, independent of the manner in which it was created, until the Company either relieved him from, or indemnified him against, his obligation; as this equity existed when the assignment was made, that of Sherrod is controlled by it, and the debt having subsequently been paid by Rhodes, he is entitled to the relief which he seeks.

The result of our protracted examination of this case is, the affirmance of the Chancellor's decree, contrary to our first impressions.

ORMOND, J.—In dissenting from the opinion of the majority of the Court, I do not propose to enter upon an elaborate examination of the question. I have done so in the opinion previously delivered, and after an anxious reconsideration of it, I feel myself constrained to adhere to it.

I am thoroughly satisfied, that the principle which is made to govern this case, cannot be derived from the equity of our statute of set off, and has no foundation whatever in the "natural equity" to which the doctrine of stoppage, or compensation, owes its existence. On the contrary, I think it is demonstrable, that the rule which is made to govern this case, has its origin in the bankrupt law of England, by a liberal and equitable interpretation of the term "mutual credit," to be found in that act, though wanting in the statutes of set off, which speak only of "mutual debts." By an equitable interpretation of the bankrupt law, when debts exist between two persons, they are each supposed to give the other a credit, on the faith of the debt each owes the other, and this has been carried so far, as to be held applicable, when one of the parties was ignorant, that the other held a security upon him. [Hankey v. Smith, 3 Term, 507, in note.]

Lord Hardwicke, who can't very well be presumed to be ignorant upon this subject, says, that before the passage of the act of the 5 Geo. 2, no such right existed. He commences his judg-

ment, by saying, "No case has been cited to me, either on one side, or the other, and therefore I must make a precedent," and after stating the case, to be, that of a debt not due, which was offered against the assignee of a bankrupt, as a set off, and after reciting the act of 5 Geo. 2, proceeds to say: "Before the making of this act, if a person was a creditor, he was obliged to prove his debt under the commission, and to receive perhaps only a dividend of 2*s.* 6*d.* in the pound, from the bankrupt's estate, and at the same time pay the whole to the assignee, of what he owed to the bankrupt; to remedy this very great inconvenience, and hardship, the act was made." He concludes, that it is a case of "mutual credit," within the equity of the statute.

Since that time, the construction of the statute has been generally in accordance with the rule thus established. But it appears to me, it can admit of no controversy, that without the aid of the statute, no such decision could have been made. Such a consummate master of equity, as Lord Hardwick, certainly knew what had previously been the rule of decision, and if he was ignorant, the able counsel practising before him were equally so, as they could cite no case in point. Some few, straggling, badly reported cases, there were to be sure, not referrable to any established head of equity. These remarks do not apply to Lanesborough v. Jones, 1 P. Will. 326, which is put by Lord Chancellor Cowper, expressly upon the term "mutual credit," in the 4th Anne, c. 17, and in that case the debts appear to have been due on both sides.

So in Jeff v. Wood, 2 P. Will. 1291, the stoppage was allowed, because there were "mutual debts," and the balance was decreed; the Master of the Rolls agreeing, that in the absence of any agreement to that effect, there could be no stoppage, unless the debts were due, when the balance only would be the true debt. The later English authorities confirm this doctrine, and I will merely refer to the cases cited by Judge Story, 2d Com. on Eq. 658, 664.

The case *Ex parte* Deeze, 1 Atk. 228, was evidently determined upon the usage of trade, by which the "packer" of the goods, retained a *lien* upon them, for the payment of the price of the packing. Such being the case, Lord Hardwicke asks, "what right has a Court of Equity to say, that if he has another debt due to him from the same person, that the goods shall be ta-

ken from him, without having the whole paid?" He concludes by admitting, that if there had been no bankruptcy, in an action for these goods, the debt could not have been set off, yet that it might come within the extended meaning of the term *mutual credit.*

The case *Ex parte* Hale, cited from 3 Vesey, 304, was only cited by me to show, that even under the bankrupt law of England, a set off in bankruptcy, must be an absolute, and not a contingent liability. The argument then made, did not rest on that case for support. We have no bankrupt law here, under which such an off set can be made, whether contingent or absolute. That case was adduced, as fortifying the point, not as essential to the proposition maintained.

Insolvency, is doubtless a sufficient reason in many cases for the interposition of a Court of Chancery, and as such, has been frequently recognized in this Court—as, where an insolvent man, is seeking to coerce a debt from one, to whom he is indebted, but which, from some cause, cannot be set off at law. As between the debtor, and creditor, there can be no doubt of the power, and the duty of Chancery, in such a case to interpose. But where third persons have acquired rights, different considerations arise, and according to my notions of equity, it would be unjust in a Court of Chancery to interpose, and deprive an assignee of his legal rights, unless there is a natural equity growing out of the transaction itself, of which it is just that the debtor should be permitted to avail himself.

I can see none such in this case. The debts are not mutual in any sense of the term, nor can there be any pretence of an agreement for stoppage; nor is there any equity inherent in, or growing out af the debt, due from Rhodes to the Rail Road, which a Court of Equity can give effect to. It is the naked case of a set off, allowed against the assignee, which had no existence until long after the debt matured, which the debtor owed the Company, and which had been before assigned.

I do not deny that the Virginia, and Kentucky cases, do support the opinion pronounced. With all respect for those enlightened tribunals, I would insist, that they are not based upon the rules of equity, as administered in England, independent of the statute of bankruptcy; but are founded, as is shown by the cases

themselves, upon decisions growing out of the bankrupt acts. That these acts introduced a principle, unknown before to the English Chancery, can, I think, neither admit of doubt or controversy.

BAGBY, Governor, &c. v. CHANDLER AND CHANDLER.

1. The Court in which a suit is pending, may, in its discretion, set aside an interlocutory judgment, and allow the defendant to make defence, at least, if he interposes a general demurrer, or plea to the merits.
2. An action may be maintained, upon the official bond of a constable against the principal and his sureties, without first establishing the default and liability of the former, in a separate suit.
3. The bond of a constable, though payable to the Governor *eo nomine* and his successors in office, is, in legal effect, an obligation to the Governor, as the chief executive officer; and may be sued and declared on, without noticing the obligee's name. Or, if the suit be brought in the name of the nominal obligee, (describing him officially,) who was superseded in office before its commencement, it will be regarded as an action by the Governor, and the name of the individual will be treated as surplusage.

Writ of error to the Circuit Court of Perry.

This was an action of debt, commenced in May, 1843, at the suit of the plaintiff in error against the defendants, as the sureties of James L. Chandler, for the performance of his duties as a constable of Perry county. The breaches alledged are, the receipt of two executions, (particularly described in the declaration,) on which the money has been made, but not paid over on demand; and further, that the same have not been returned. A demurrer was interposed by the defendants, which being sustained, a judgment was rendered accordingly.

H. Davis, for the plaintiff in error, made the following points.
1. The suit was well brought, in the name of A. P. Bagby, al-

though he ceased to be Governor before its commencement. See Clay's Dig. 364, § 9; 1 Stewart's Rep. 266; 3 Stew. & P. Rep. 18; 4 Porter's Rep. 90; 6 Porter's Rep. 32. If the objection was available, it should have been pleaded. [6 Ala. Rep. 143.]

2. It was not necessary to ascertain the liability of the principal, in order to make the defendants, his sureties, liable on their bond. [4 Stew. & P. Rep. 441.]

3. It is not necessary for a constable to renew his bond annually, to render his sureties liable for defaults, occurring more than one year after its date. See pamphlet acts 1833-4, p. 7. The statute there found, was not considered in the case in 5 Porter's Rep. 27, and was perhaps inapplicable, as the bond was executed before its passage.

4. All the breaches assigned, might, with propriety, have been embraced in the same declaration. [4 Stewt. & Por. Rep. 441, 445.]

5. The demurrer was interposed after a judgment by default had been taken, and set aside. This it is insisted, could not have been done.

T. Chilton, for the defendants. The statute requires the bond to be payable to the Governor for the time being, and his successors in office, and the suit must be brought in the name of the person who is Governor at the time of its commencement. The other objections which the plaintiff has attempted to answer, it is believed, are sufficient to have authorized the Circuit Court to sustain the demurrer.

COLLIER, C. J.—No formal judgment, by default, seems to have been rendered previous to the filing of the demurrer, but it was merely noted on the minutes of the Court, that the plaintiff claimed such a judgment, which was "to be opened on merits shewn." It appears from the final entry, that the parties came by their attornies, and the plaintiff's demurrer was argued by counsel, &c. Here, instead of indicating an objection to the consideration of the demurrer, it is clearly inferrable that it was assented to by both parties. But suppose such an objection had been interposed, is it competent to object on error that it was overruled? We think not. It is within the acknowledged power of a Court of primary jurisdiction, to set aside an interlocutory

judgment, and to allow the defendant to come in, and make defence to the action. Whether a special demurrer, (where allowable,) or a plea which does not litigate the merits, can be received, we need not inquire. A general demurrer is an admission of the facts which are well pleaded, and refers the law arising thereon to the judgment of the Court. [Cox v. Gulick, 5 Hal. Rep. 329; Neale v. Clantice, 7 H. & Johns. Rep. 372; Tucker v. Randall, 2 Mass. Rep. 284.] It is, according to the English practice, an issuable plea. [Marsh v. Barney, 10 Wend. Rep. 540; Roane's Adm'r v. Drummond's Adm'r, 6 Rand. Rep. 182.] The demurrer, then, so far as the record discloses the facts, was properly received, and the question is, whether it should have been sustained.

In the Governor, use, &c. v. White et al. 4 Stew. & P. Rep. 441, it was explicitly determined, that an action of debt may be sustained jointly against a sheriff, and his sureties, upon his official bond for a failure to pay over money collected by him, without first establishing the default and liability of the sheriff, by a separate suit. [See Governor v. Perkins, 2 Bibb's Rep. 395.] This case is conclusive to shew that the sureties and their principal were jointly suable.

It does not appear from the declaration, that the plaintiff is seeking to recover for a breach which occurred more than one year after the bond in suit was executed, so that it is unnecessary to consider whether the sureties undertook that their principal should faithfully perform his official duty for a longer period than twelve months. In Richardson v. Bean and Washington, 5 Ala. Rep. 27, we held, upon full consideration, that the sureties of a constable could not be made liable for his defaults, occurring after the expiration of a year, from the time of executing his official bond. If no statute has been enacted, modifying the law, since this case was decided, we should be disinclined to depart from it. See Hewitt v. State, 6 Har. & Johns. Rep. 95.

Constables elected in the several counties of this State are required to enter into bond, with sufficient security, to be approved by the Judges of the County Courts respectively, payable to the Governor for the time being, and his successors in office, &c. [Clay's Dig. 364, § 9, 366, § 18.] In the present case, no objection is made to the form of the bond, but it is insisted, that as the person to whom it is made payable *eo nomine*, had ceased to be Governor

before the institution of the suit, the action should have been brought in the name of the individual who was the executive of the State, when it was commenced. Certainly the bond enured to the successor of the obligee, as the representative of the State, yet it by means follows, that his name should be stated as plaintiff of record.

The duty, for the performance of which the obligors bound themselves, attached, not the person, but to the office of the obligee, and an action for a breach, we think, might be maintained, at the suit of the Governor, without designating him by name. The Governor is an officer created by the constitution, and regulated by the constitution and laws, and is of continued existence, no matter who fills the executive chair. As an individual, he is not liable to costs, if unsuccessful in the suit, and can derive no personal benefit, from a recovery in his name. The bond in question, is then, in legal effect, an obligation to the Governor, for the benefit of the State, and may be thus declared on, without noticing the obligee's name.

In Findley v. Tipton, 4 Hayw. Rep. 216, it appeared, that a constable's bond was given to J. S., Governor, &c. though W. B. was in fact the Governor; the Court held, that the name of J. S. might be rejected, as surplusage, and that the bond was good, without inserting the name of the obligee. And in Smith v. Cooper, 6 Munf. Rep. 401, it was said, that in declaring on such a bond, it was not necessary to allege non-payment to the obligee or his successors.

So a bond to the treasurer of a town, may be sued in the name of the town—being in law a bond to the town. [Hopkins v. Plainfield, 7 Conn. Rep. 286.]

The action in the case before us, we have seen, might have been brought by the Governor, as an officer, without disclosing his name upon the record; but if, instead of thus suing, he states the name of the obligee, the executive when the bond was consummated, who has been since superseded by a successor, it must be regarded as a suit by the Governor, and the name of the individual will be regarded as surplusage. If the name be stricken out, the officer is sufficiently indicated, both by the writ and declaration, as the plaintiff. The authorities cited, and the reason of the thing, all lead to this conclusion, so that it is unnecessary to add more on the point.

As to the frame of the declaration, no objection has been made to it, and we have not discovered that it is defective in substance. From what has been said, it results that the demurrer to the declaration should not have been sustained. The judgment of the Circuit Court is therefore reversed, and the cause remanded.

GEORGE v. CAHAWBA AND MARION RAIL ROAD CO.

1. A set off cannot be pleaded to an action for unliquidated damages, arising out of the breach of a contract, in refusing to permit the plaintiff to perform services which he had contracted to perform.
2. When the plaintiff declares in assumpsit on one count for unliquidated damages, also on the common counts, to which the defendant pleads a general plea of set off, upon which issue is taken, and offers evidence to sustain this plea, it is error in the Court to instruct the jury, that the action was subject to, and could be set off, as the effect of such a charge is to preclude the jury from finding a separate verdict upon the different counts, which would enable the plaintiff to remedy the mispleading.
3. When one contracts to perform work for another, at a stipulated price, and is prevented by him from entering upon the performance, the measure of damages is the difference between the cost of performing the work by the party agreeing to do it, and the price agreed to be paid for it; in other words, the profits the party would have made.

Writ of Error to the Circuit Court of Dallas.

Assumpsit by George against the Rail Road Company. The declaration, besides the common counts, has one, in which the plaintiff counts on a special contract between himself and the Company, by which he was to perform certain work, and labor, on the road, for certain compensation to be paid him. The work to be done was, the excavation and grading of the 11th and 12th sections of the road, for which the plaintiff was to receive twenty-five cents per yard, for excavating, and twenty cents per yard for grading. The count avers, that plaintiff entered upon the

performance of the work, but that the defendant would not permit, or suffer him to complete the same. It concludes with alledging, that thereby the plaintiff has lost, and been deprived of, the profits and advantages, which otherwise he would have deserved and acquired.

The defendant pleaded—1. *Nul tiel corporation.* 2. Non-assumpsit. 3. Payment and set off. These pleas are pleaded by their names only, in short, by consent of parties, and there is a joinder of issue in the same manner.

At the trial, the plaintiff, with the leave of the Court *nol pros'd* the common counts of his declaration. The defendant, under the plea of set off, pending the trial, introduced as a set off, four instalments of plaintiff upon his stock, as a corporator of the Company, amounting to $400; the evidence in relation to which, before the argument of the case commenced, the plaintiff moved to exclude from the jury, upon the ground, that the action was for unliquidated damages, and was not subject to set off. This motion the Court refused to grant, and allowed the jury to act upon the evidence, and charged them, that said action was subject to, and could be set off.

The plaintiff asked the Court, to instruct the jury, that the measure of damages, in this case, was the amount which the defendant, by the contract, would have had to pay the plaintiff, on the completion of his part. This charge was refused, and instead, the jury was instructed, that the measure of damages was, the profit which the plaintiff reasonably would have made, on the said contract.

These several matters were excepted to by the plaintiff, and are now assigned for error.

G. W. Gayle, for the plaintiff in error, insisted—

1. That it was error not to exclude the set off, the action being for unliquidated damages. [McCord v. Williams, 2 Ala. Rep. 71.]

2. The contract declared on was special, or entire, and the plaintiff should have been permitted to recover the whole amount of the contract, subject to set off. [Cavender v. Funderburg, 9 Porter, 460; Pettigrew v. Bishop, 3 Ala. Rep. 440; Story on Con. 10, § 17.]

EVANS, contra, argued—

1. The record does not disclose the particular circumstances of the proof, made by the plaintiff, and therefore the question, whether the defendant's set off could be allowed against unliquidated damages, does not arise. The right to set off, against a special count, exists whenever a recovery on the contract could be had, under the common counts. [Chitty on Con. 332.] It is not necessary the debts offered to be set off, should be of the same nature, so that they are *mutual* debts. [Chitty on Con. 228.]

2. As to the measure of damages, he cited Shannon v. Comstock, 21 Wend. 457; 3 Greenl. 51; Mahan v. Cooper, 4 Ala. Rep. 660.

GOLDTHWAITE, J.—1. The question in this case, of the right to set off the instalments, due to the Rail Road Company, by the plaintiff, against his action, is not one of difficulty. The general rule in relation to set off is, if the moneys sought to be recovered under a special contract, for damages, may be recovered under the common counts, then the defendant may set off. [Chitty on Con. 332; see also, McCord v. Williams, 2 Ala. Rep. 71.] Let us test the plaintiff's special count by this rule. He does not pretend that any thing is due him for the services actually rendered, though the assertion is made, that he entered on the performance of his contract. The sole ground of his action is, that the defendants would not permit, or suffer, him to proceed, by reason of which, he lost the profit he otherwise would have made. It is impossible to say, that evidence of the violation of the contract in this particular, could be given in evidence on the common counts. Whe think it clear therefore, that a plea of set off, to the special count, would be considered bad if demurred to.

2. But such is not the condition of the record; issue was joined on the plea, and however irregular or insufficient, the defendant had the right to insist on evidence applicable to it. If then, the Court had gone no farther, than to refuse the plaintiffs motion to exclude the evidence of set off, it would be the same as Watson v. Brazeal, at this term, where we held, that the truth of the issue, and not its effect, was the matter to be ascertained by the trial. [See also, Purdom v. Hazard, 3 Porter, 43; Cullum v. Bank, 4 Ala. Rep. 21,] Independent, however, of the refusal to exclude

the evidence of set off, the Court charged the jury, that the action was subject to, and could be, set off. The effect of this, was to preclude the jury from rendering a separate verdict upon the issues submitted to them, which they had the right to do, and which, if they had done, the injury arising to the plaintiff from the mispleading, might have been obviated, by rendering a judgment *non obstante veredicto*. We come to the conclusion then, that the charge of the Court, in this respect, is erroneous, and as injury has resulted to the plaintiff, the judgment, for this, must be reversed.

3. It yet remains to consider the question made, with respect to the measure by which damages are to be ascertained upon this contract. It is perhaps impossible to ascertain any one rule which will cover all classes of contracts, in regard to the damages which may be awarded to the injured party; but we think it clear, the one proposed by the plaintiff, was not proper to the circumstances of the case, as disclosed by the pleadings, and we are entirely ignorant of the proof. If the work had been performed, a certain price was to have been paid, but this price is not the measure of damages, because it is evident, the cost of the work to the plaintiff, would necessarily have been something. The difference, then, between this cost, and the price agreed to be paid—in other words, the profits which he would have made, is the general measure by which to ascertain the damages. [Shannon v. Comstock, 21 Wend. 457.] This indeed, is the measure which the plaintiff himself has indicated, when he says, that by the defendant's breach of the contract, he has been deprived of the profits and advantages which otherwise he would have acquired. There is no error in this particular.

For the error however already noticed, the judgment must be reversed, and the cause remanded.

CASEY, ET ALS. v. PRATT.

1. D. C. & Co. being bound on certain bills of exchange, for another firm, obtained from them, as an indemnity, a bill of exchange for $4,000, to be held as collateral security. The debt, to secure which it was given, was discharged by the acceptor, by payment, some time in April, 1837; notwithstanding which, D. C. & Co. caused the bill for $4,000 to be protested for non-payment, on the 14th April, 1837. On the 12th May, 1837, D. C. & Co. made a deed of assignment, of all their effects, to P. as trustee, for the payment of debts, in which this bill was not included. On the 30th May, 1837, D. C. fraudulently put the bill for $4,000 in suit, against C. C., who had indorsed it for the accommodation of the drawers, and by his neglecting to make defence, a judgment was obtained, in the name of D. C. & Co. against him, which he ineffectually attempted afterwards to enjoin in Chancery. Subsequently, B. & W., creditors of D. C. & Co., obtained an assignment of the judgment from D. C. & Co. P. the trustee, exhibited his bill, to get the benefit of the judgment, alledging, that it passed to him under the assignment. Held, that as D. C. & Co. had no title to the bill, upon which the judgment was founded, at the date of the deed, none passed to the trustee by the assignment; and, that he could not deduce a title under the general clause of the assignment, by a fraudulent act of the assignor. That, although the grantor was estopped from setting up a title in himself, by alledging his own fraud, yet, that a Court of Chancery would not interfere, and divest the title of another, who did not deduce his claim through the fraudulent act of the grantor.

Error to the Chancery Court at Mobile.

The bill was filed by the defendant in error, and alledges, that the firm of D. Casey & Co. recovered a judgment against Chas. Cullum, for the sum of $4,702 43, besides cost of suit, at the February term, 1838, which was affirmed by the Supreme Court, at the January term, 1839, against Cullum, and Joseph Wiswall as his surety. That the judgment was founded on a bill of exchange, drawn by Brown & Cawly, of Mobile, on Smith & Conklin of New York, in favor of Cullum, for the sum of $4,000, dated 4th January, 1837, and was protested on the 14th April, of the same year, for non-payment. That the draft was in the hands of D. Casey & Co, at the maturity of the bill, and contin-

ued to be held as their property. That in May, 1837, D. Casey & Co. made a general assignment of all the effects of the firm, to complainant, as trustee. That Casey did not deliver to him the bill, or inform him that it was in his hands.

The bill further charges, that the firm of Bartlett & Waring, claim an interest in the judgment, by an assignment subsequent to his, and that one Joseph Wiswall also claims an interest, but it is also charged, that they had knowledge of the prior right of the complainant.

It is further charged, that a bill was filed in Chancery, by Bartlett & Waring, against D. Casey & Co., to attach the judgment aforesaid, to which bill he was a party, but of which he had no notice, and that no subpœna was served on him. That a bill was also filed in Chancery, by Cullum against D. Casey & Co., to avoid the judgment, in which all the facts are stated, and that the same solicitors filed both bills, and therefore had notice of all the facts. The prayer of the bill is, that Bartlett & Waring, and Wiswall, be enjoined from collecting the judgment from Cullum, and that it be assigned to him. Appended to the bill as an exhibit, is the schedule of the assigned effects, but this bill of exexchange is not enumerated among them.

John Bartlett, of the firm of Bartlett & Waring, answers, and admits, that to obtain payment of a debt he had against D. Casey. he filed a bill to subject the judgment against Cullum, in favor of D. Casey & Co., to which complainant was a party, but that before proceeding in it, his partner, Waring, called on complainant, and informed him of the circumstances, when he disclaimed all interest in the judgment, and that it was unnecessary to carry on the suit on his account. In consequence of this disclaimer, the matter was adjusted by the rendition of a decree by consent, in favor of B. & Waring, and a release executed to D. Casey & Co. for the debt due from them. He further insists, that D. Casey & Co. had no interest in the bill of exchange, at the time of the assignment to complainant, but that it belonged to Ransom & Spellman of New York, who, although partners of D. Casey, were also doing business in New York in their own names. He also states, that the judgment against Cullum has been assigned to him, by Waring, who has no interest in it.

D. Casey, by his answer, denies that the bill was the property of D. Casey & Co., at the time of the assignment to complainant.

He states, that the house of D. Casey & Co. had indorsed several bills of exchange, for the house of Brown & Cawly, drawn on Smith & Conklin of N. York; that before the bills matured, he became uneasy, and applied to Brown & Cawly for security, and that for his security, they furnished the bill of exchange described in complainant's bill, as an indemnity. That the drafts of Brown & Cawly, for which the last bill was an indemnity, were not paid at maturity, but were, to the amount of $3,726 95, paid by Ransom & Spellman, with their own funds, and not with the funds of D. Casey & Co. He admits the bill filed by Bartlett & Waring, to subject the judgment against Cullum, to the payment of their debt; and that Ransom & Spellman being informed of it, interposed no objection, and a decree was entered, in favor of Bartlett & Waring, they releasing their debt against D. Casey & Co.

The bill was also answered by Waring, in substance the same as that of his partner, and denying that he had any interest in the matter.

Much testimony was taken, but it is not necessary to to be here set out. The Chancellor decreed in favor of the complainant, from which this writ is prosecuted.

Stewart and Dargan, for plaintiff in error. They contended, that there was no equity in the bill. That the complainant traced his title to D. Casey, and that Casey obtained it by fraud.

That if the debt was valid, it did not pass by the deed—that all the debts intended to be transferred, were included in the schedule, and this was not one of them.

That at the time the deed was made, the bill on which this judgment was founded, was not a debt due Casey & Co., and therefore did not pass by the assignment. That the equity of Bartlett & Waring, was at least equal to that of the complainant, and this Court would not interpose between them, and for this they cited 2 Stewart, 378.

Campbell, contra. This is treated by all the parties, as a valid, subsisting judgment, and if it were not, it must be so considered, as the controversy is between parties, and privies. Nor is there any evidence impeaching the bill of exchange. D. Casey & Co., are estopped from saying it did not belong to them, as they had it in possession previous to, and after the deed of assignment;

instituted suit thereon, and recovered judgment. To prove the conclusiveness of the judgment, he referred to the cases collected by Cowan & Hill, in their Notes on Philips' Ev. 2 vol. 810.

ORMOND, J.—The object of the bill is to give the complainant the benefit of a judgment obtained by D. Casey & Co. against Charles Cullum, upon the ground, that the bill of exchange on which the judgment is founded, passed to the complainant, by a general assignment to him, by D. Casey & Co., in May, 1837, of all the effects of the firm, in trust for the creditors of the firm. That the bill of exchange was not included in the schedule of the assets accompanying the deed, but was fraudulently withheld, by Casey, and subsequently sued upon in his own name.

The right to the judgment is also asserted, by the defendant, Bartlett & Waring, who derive title thereto by an assignment of the judgment, by D. Casey & Co., obtained subsequent to the deed, under which the complainant claims, but in ignorance as they assert, of his title, and after he had disclaimed title to it.

The facts as they now appear, are, that Dennis Casey & Co. were accommodation indorsers for the firm of Brown & Cawly, on certain bills, payable in New York, on the 22d January, 1837, for about $3,700. To indemnify them against responsibility on these Bills, Brown & Cawly, handed to D. Casey & Co., for the purpose of raising money thereon, or as collateral security, a bill for $4,000, on which Charles Cullum, was an accommodation indorser. The bills drawn by Brown & Cawly, were not paid promptly, at maturity, but were paid by Ransom & Spellman, partners of D. Casey & Co. in New York, for the honor of the firm of D. Casey & Co. Soon afterwards, but when does not distinctly appear, certainly however, before the 22d of April, 1837, Smith & Conklin, the drawers of the bills of Brown & Cawly, repaid to Ransom & Spellman, the amount of the bills of Brown & Cawly, which they had taken up for the honor of D. Casey & Co. On the 14th April, 1837, D. Casey & Co. caused the bill of $4,000, which they had received as collateral security for their indorsement of the first mentioned bills, to be protested.

From this statement it is perfectly clear, that the title of D. Casey & Co. in the bill for $4,000, was extinguished by the payment of the bills, for which it was merely a collateral security. Nevertheless, it appears that D. Casey, about the 30th May, 1837,

put the bill in suit against C. Cullum, the indorser, and by the neglect of Cullum to make defence, obtained a judgment against him at law, which he afterwards ineffectually attempted to enjoin, in Chancery, and the judgment is now in full force against him.

As between the parties to this judgment, and those in privity with them, the record is doubtless evidence, that such a judgment was pronounced, and it is also conclusive evidence, of the facts on which the judgment is founded. [Duchess of Kingston's case, 1 Starkie's Ev. 190.] Cullum, by permitting this judgment to be rendered against him, has precluded himself from denying, that he owed the debt on which it is founded, to D. Casey & Co.; and it may be conceded, that he is placed under the same interdict, as it relates to each of the parties, who claim by assignment from D. Casey & Co., and are therefore invested with all their rights. The case has been strenuously argued, as if the solution of this question settled the difficulty, but that, in truth, is not the question presented on the bill. It is not whether this judgment is valid, or invalid; but it is, whether, conceding the judgment to be valid, the complainant has shown a title to it.

It is not pretended, that the title passed by actual transfer of the bill, or by an equitable assignment, by virtue of the schedule attached to the deed; but, it is insisted, that it passed in equity, because it was the property of D. Casey & Co. at the time the deed was made, and by the deed, all the effects of the firm of D. Casey & Co. were conveyed to the complainant, whether mentioned in the schedule or not. The question then, is resolved into the simple proposition, had D. Casey & Co. any property, legal or equitable, in the bill of exchange, at the time the deed was made. Now, at the time the deed, on which the complainant relies, was made, on the 12th May, 1837, the bill was not the property of D. Casey & Co.; it had, by the payment of the debt, to secure which it was made, become mere waste paper in the hands of D. Casey & Co., and if they had actually transferred it to the complainant, he could have acquired no title to it, because they had none to confer. Can it be contended, that the deed of assignment, gives to the complainant a title, which he can enforce against any one, to all the fraudulent acquisitions of the grantor, merely because the inception of the fraud, dated back to a time anterior to the assignment? Even that pretension cannot be set

up in this case, because, before the deed was made, the bill had been discharged, and D. Casey & Co. had not the right even to the possession of the paper, on which the bill was written.

It may be conceded, that if this controversy was between Casey & Co., and the complainant, the fact, that the bill was dated anterior to the deed, would be conclusive against them, and they would not be permitted to aver the contrary, and rely upon their own fraudulent acquisition, subsequent to the date of the deed of assignment; but that is not the predicament of the case. Casey & Co. have no interest whatever in this controversy, which is between the complainant and an assignee of the judgment, who is not compelled to deduce his title, through the fraudulent act of Casey & Co.; but who, it appears, paid a full consideration for it, after the claim had been reduced into a judgment.

We do not, however, determine this case upon the comparative merits of the two claims. If the aid of this Court was required to enforce either, it might perhaps be well doubted, whether the Court would lend its aid, to enforce a claim, which, though matured into a judgment, it is now evident was not founded upon an actual existing debt. But Bartlett & Waring, are not asking the aid of this Court. Our interposition is sought by the complainant, who in effect, asks us to deprive Bartlett & Waring of a right, by giving him the benefit of a fraudulent act of D. Casey & Co. In such a scramble, for that which really belongs to another, this Court cannot lend its aid. So far as the parties are protected, and supported by legal presumptions, which cannot be contradicted, this Court may not have the right to interpose, and deprive them of them; but when they seek our aid, to assist them in enforcing them, the matter assumes a different aspect, and we may then inquire, whether in equity and conscience, they are entitled to the aid of the Court.

This view is decisive of the present case, and renders it unnecessary to consider the other questions argued at the bar. The decree of the Chancellor must be reversed, and a decree be here rendered, dismissing the bill, at the joint costs of the complainant and Bartlett; Waring, as it appears, having no interest in the controversy.

ORMOND, J.—During the last term, a petition for a re-hearing was made in this case, and continued until the present term,

and upon further reflection, we are satisfied that a modification of the decree formerly rendered is proper.

It is very clear, that Casey & Co. cannot assert a title to the proceeds of the judgment against Cullum, as against Pratt his assignee, by alledging his own fraud. Yet that will virtually be the effect of dismissing the bill, no other person than Bartlett asserting any title to it; Wiswall, who it appears was made a party to the bill, not having answered it, and asserting no title to the fund. It is therefore ordered, that the decree heretofore made, be set aside—that the Chancellor's decree be in all things affirmed, except so far as it denies the right of Bartlett & Waring to compensation out of the judgment against Cullum; and a decree will be here rendered, giving to Bartlett, who has succeeded to the rights of Bartlett & Waring, a priority in the payment of his claim, and the residue to Pratt, as assignee of Casey & Co. Let the costs of this Court, and the Court below, be paid out of the fund.

SHRADER v. WALKER, ADM'R, ET AL.

1. A bill to enjoin a judgment, should be filed in a Court of Chancery of the county in which the judgment was obtained, and cannot be exhibited elsewhere, unless the party interested in the recovery at law, will allow the litigation to be had in another county. If such bill be filed in an improper county, it may be dismissed on defendant's motion.
2. *Semble:* A sheriff is not a necessary, or proper party, to a bill for an injunction, merely because he has in his hands the execution sought to be enjoined.

Writ of Error to the Court of Chancery sitting in Shelby.

The defendant in error, as the administrator of Agnus Black, recovered a judgment against James Clark, in the Circuit Court of Benton; Clark filed his bill in the Chancery Court, which was then holden at Talladega, for the county of Benton among others,

obtained an injunction, and gave a bond for the prosecution of the same, which was deposited with the Register of that Court, to which the name of the plaintiff in error was subscribed, as one of the sureties. It is alledged that the bill of Clark, upon a reorganization of the Chancery districts, was, together with all the papers in that cause, transferred to the Chancery Court of Benton, and there finally disposed of, by dissolving the injunction, and dismissing the bill with six per cent. damages, and costs, and execution ordered to issue against the complainant therein, and all whose names appear to the injunction bond, as his sureties.

An execution was accordingly issued, against the plaintiff in error, with the other obligors in the bond, and delivered to the sheriff of Shelby, (in which county the plaintiff resides,) to enjoin which he obtained an order, gave bond with surety, for the successful prosecution of the injunction, and filed his bill in the Chancery Court of Shelby. The ground of equity set up, is, that the complainant's name was forged to the bond as Clark's surety, and that he was ignorant of the forgery, until the sheriff of Shelby demanded the money of him upon the execution. The defendants to the bill are, T. A. Walker, John Griffin, and Jas. W. Poe, of Benton, the two latter of whom were sureties in the injunction bond, James Clark, who has removed from this State, the Register of the Chancery Court of Talladega, and the sheriff of Shelby.

The bill was dismissed by the Chancellor, upon defendant's motion, on the ground that it should have been filed in Benton.

W. P. Chilton, for the plaintiff in error. The bill has equity. [5 Ala. Rep. 65; 6 id. 492; 12 Wheat. Rep. 64.]

T. A. Walker, for the defendants, insisted that the bill was properly dismissed; that if it contains equity, it should have been filed in Benton. [Story's Eq. Plead. 487-8-9; 1 J. J. Marsh. Rep. 474-5-6; 4 id. 407-8-9; 2 Litt Rep. 86; 1 Dana's Rep. 109.]

COLLIER, C. J.—The act of December, 1841, divides the State into forty Chancery districts, and provides that all causes pending in the Chancery Courts, at the time of its passage, shall, on the application of either complainant or defendant, be trans-

ferred to the district in which the defendant resides, &c. *Provided*, That it shall be lawful for all causes now pending in any Chancery Court, to be and continue in such Court, and be there disposed of, in the same manner as they would have been, if this act had not been passed; unless an order be made for their transfer to some other Court, as is herein above provided for." [Clay's Dig. 344, § 2, 348, § 11.] This enactment very clearly indicates that it is not allowable to bring suits in Chancery, in any county where it may suit the inclination, or interest, of the complainant to file his bill, without reference to its subject matter, or the residence of the defendant. The chief object to be effected by dividing the State into so many districts, was to make the administration of justice as little oppressive as possible, by bringing the Court near to the residence of the suitor. So strongly was this object impressed upon the legislature, that the law was not left to operate prospectively, but it was provided, as we have seen, that suits then pending, might, upon the application of either party, be transferred to the county of the defendant's residence.

It clearly results, from the act cited, that the suit could not be prosecuted in Shelby, without the assent of Walker, the principal defendant. The sheriff of that county is improperly made a party—it is not pretended that he has an interest in the controversy, or is in any manner connected with it, except as an executive officer, he was required to make the money on the execution.

The question then, is, should this case have been transferred to Benton, instead of being dismissed. If it was instituted in a county in which the Court could not take jurisdiction of it against the consent of the parties, we cannot see how it could have transferred it without the same consent. The bill was filed a year or two after the act of 1841 was passed; and independent of its provisions, was not, perhaps, exhibited in the proper court; but the spirit and intention of the act, if not its terms, put this question beyond serious controversy.

The case of Lemaster v. Lain, 1 Dana's Rep. 109, is a direct authority in point, and shows that a bill to enjoin a judgment at law, must be filed in the Chancery Court of the county in which the judgment was rendered. This has been the practice in this State, ever since the organization of our courts, and we think rests upon sound principle. If the law were otherwise, suitors

might be put to great inconvenience, by being compelled to defend bills for injunction in one extreme of the State, when the judgment enjoined was rendered in the other.

Let the decree of the Chancellor be affirmed.

TANKERSLEY v. J. & A. GRAHAM.

1. The contract evidenced by a blank indorsement, is ascertained by the law, and cannot be modified or changed by parol evidence.
2. When evidence is given to show, that the condition of the indorsement of a note, was the sale of lands, and proof is also given, that the lands had been patented to another, whose heirs were suing the defendants for a recovery, the evidence of the patent and suit may properly be excluded from the jury, unless an eviction is also shewn.
3. When an agent was employed to sell land, and took from the purchaser the note of another individual, indorsed by the purchaser, it is no defence in a suit on the indorsement, in the name of the agent, to show, that the principal has received the amount of the purchase money, unless it is also shown, that it came from the maker or indorser of the note. The agent paying the money to his principal, acquired such an interest in the note as to entitle him to sue upon it.

Writ of error to the Circuit Court of Sumter.

Assumpsit by the Grahams against Tankersley, as their regular indorsee of a note made by James A. Terry, Stephen Register, and John W. Hawthorn, payable to one Philip Jones, and by the latter delivered to the defendant, who indorsed it to the plaintiff.

At the trial, after the plaintiffs had made out a case, to charge the defendant *prima facie*, he offered parol evidence, conducing to show, that the consideration of the indorsement was to provide the payment of purchase money for a fraction of land, bought by the defendant of one Susannah McNiel, and that the indorsement was made to Alexander Graham, as her agent. Also, that the

defendant refused to indorse the note, or to pay for the land, unless it should be agreed, that he was not to be held liable on his indorsement, in the event that he did not get a good title for the land, or if a better title took it; and that the indorsement was made on these terms. Defendent also proposed to show a patent from the General Land Office to one Green, long issued, before this action was brought, and that his heirs were then suing to recover the land.

The Court ruled, that the undertaking of the defendant by his indorsement, was, to pay the note, if the makers were duly prosecuted to insolvency, and that so much of the testimony as went to vary this undertaking, was inadmissible, and ruled it out; and refused to permit evidence of the pendency of the action by the heirs of Green.

There was also evidence, by means of the deposition of Susannah McNiel, brought out by the plaintiff's cross examination, that she had been fully paid the purchase money, for said land, before the institution of this suit. The judgment against the makers of the note, was shown by the plaintiffs, to be unsatisfied upon the record, and they also offered evidence conducing to show, that the note was indorsed in consideration of purchase money due for different lands, bought of Zachariah Graham. There also was proof that the defendant took, and has since had possession, under the purchase from Mrs. McNiel, and also from B. Graham.

The Court charged the jury, that their first inquiry was, as to Tankersley's undertaking, and that was, that if suit was brought to the first Court, and the makers prosecuted to insolvency, he would pay. This had been done. Second—that if the indorsement was made in consideration of a land purchase from Mrs. McNiel, and the defendant took, and has had the possession under her, he cannot defend at law; that although Mrs. McNiel has received payment, for the land, that did not discharge Tankersley, unless he produced evidence that he had paid the note; or that the makers had done so.

The defendant requested the Court to charge, that if the jury believed the consideration for the indorsement, was purchase money due for lands, bought by the defendant of Mrs. McNiel, and that the transfer was to Alexander Graham as her agent; and they also believed that the whole of the purchase money had been

paid to Mrs. McNiel, the presumption was, that the defendant had paid it, and if so, he could not be held liable on the note.

This was refused, and the jury instructed, that the defendant must prove, that he had paid the note, before he could be discharged from it.

The defendant requested the Court also to charge the jury, that if they believed that plaintiffs had paid the purchase money to Mrs. McNiel, without the defendant's request, the note could not be recovered on, nor could they recover for money had and received, unless they paid by the defendant's request. This was refused, and the jury instructed that no payment by Graham could satisfy the defendant's liability, although without his knowledge.

The defendant also requested the Court to charge, that if the jury believed that Mrs. McNiel had in any manner settled the judgment, obtained against Register, Hawthorn, and Terry, and thus obtained payment for the land, then the defendant was discharged from his liability. This the Court refused, and charged the jury, the proof was the other way, as the judgment against Register, &c. was unsatisfied.

The defendant requested the further charge, that the judgment might be settled, although not satisfied on the record, and this was given; and the Court further charged that the defendant's undertaking, by the indorsement, was to the plaintiffs, and payment for land to Mrs. McNiel, would not satisfy the demand, unless made by Tankersley, or some one for him.

The defendant excepted to the several rulings of the Court, as also to the refusals to charge as requested, and to those given, and now opens all the questions arising upon the bill of exceptions, by his assignments of error.

R. H. Smith, for the plaintiff in error, made these points—

1. That the evidence ruled out should have been left to the jury. [6 Conn. 315, and cases there cited; 3 Ala. Rep. 610.]

2. The charge that the indorsement was made to the plaintiffs, was a charge upon a fact, which question ought to have been left to the jury to decide. It was not sustained by the evidence, but directly against it, as that showed the indorsement was made to Graham, as the agent of Mrs. McNiel. The indorsement was in blank, and the defendant might properly show to whom, and for what, it was made, otherwise no defence could be set up to the

indorsement, for the want of ascertaining the surrounding circumstances. In this connection, the modification of the charge as requested in the third instance, was an invasion of the proper functions of the jury.

3. Upon the supposition that the indorsement was made to Mrs. McNiel for the land, and that she had been paid the purchase money, the Court erred in the charges given, as the payment left no consideration for the indorsement, and re-invested the defendant with the title to the note. [Chitty on Bills, 248, 250; 2 Kent's Com. 616; 8 Term, 310.]

HAIR, contra, argued—

1. That the attempt of the defendant to defeat this action, by showing that Mrs. McNiel had been paid for the land sold, without connecting the makers of the note, or the defendant, with the payment, was to vary the effect of the written contract. [Paysant v. Ware, 1 Ala. Rep. N. S. 160.]

2. If the defendant remains in possession of the land, it is unimportant whether the plaintiff had title or otherwise. [Clements v. Loggins, 1 Ala. Rep. N. S. 622; Wilson v. Jordon, 3 S. & P. 92; Dunn v. White, ib. 645.]

GOLDTHWAITE, J.—1. The defendant in the Court below, seems to have placed his defence, in the first instance, upon the ground, that he was entitled to show that his blank indorsement, upon which the suit against him is founded, was intended, and agreed upon, as a special contract, not to be enforced against him, if he did not get a good title for the land sold him; or if a better title took it from him. In this view of his liability, he offered to show that one Green had the government title, and that his heirs were seeking to recover the land from him. So far as this evidence had the effect to vary or change the contract, ascertained by the law, from the blank indorsement, we think it was properly excluded from the jury. In several cases we have endeavored to show, that the contracts imported by these irregular blank indorsements, are of a fixed, ascertained character, governed chiefly by the nature of the instruments indorsed. [Jordon v. Garnett, 3 Ala. Rep. 610; Milton v. De Yampert, ib. 648.] After the legal effect of these irregular blank indorsements is ascertained, they fall within precisely the same rules, which ob-

tain as to such as are perfect in their nature, and are alike incapable of explanation, or modification by parol evidence. In Somerville v. Stephenson, 3 Stewart, 271, it was held by this Court, that the contract evidenced by the general assignment of a specialty, could not be varied by parol evidence, as it had a specific legal import. The same doctrine was held in Hightower v. Ivy, 2 Porter, 308, in relation to the indorsement of a note. To the same effect is Dupey v. Gray, Minor, 357; Free v. Hawkins, 8 Taunt. 92. These cases, it is true, seem to be indorsements which were filled up; but it is difficult, in principle, to perceive how any distinction can be drawn, when the indorsement is blank, for in either case, the contract has the same definite legal meaning, and the same evils will flow from permitting the legal effect to be varied. The case of House v. Graham, 3 Camp, 57, was the case of a blank indorsement, and the same rule was considered applicable. We are not unaware, that there are many decisions to the contrary of this, in the American Courts. [See Cowen & Hill's Notes, 1473, and Dean v. Hale, 17 Wend. 214.] But the decisions of our own Courts have too firmly established a contrary principle, for us to depart from them, even if we did not entirely concur in their correctness.

2. So far as the evidence went to show the consideration of the indorsement, it was proper enough, and seems to have been considered by the Court below; but the attempt to show a failure of the consideration having failed, in consequence of there being no proof that the defendant had been evicted, the proof with respect to Green's patent, and the suit by his heirs, was properly rejected, as without eviction, these facts constituted no defence. [Cullum v. State Bank, 4 Ala. Rep. 21.]

3. The othe points in the case seem to offer no defence to the action. If, as one of the instructions asked for seems to suppose, Graham acted as the agent of Mrs. McNiel, in making the sale, and the plaintiffs have since paid her the price agreed to be paid for it, they have thereby acquired an interest in this note, which cannot be defeated, except by showing a failure of the consideration, for the indorsement, or a payment of the note by the maker, or indorsers. Such is the effect of all the instructions given, and we are unable to see any error in the refusals of those requested.

The result of what we have said is, the affirmance of the judgment.

DOBSON, ET AL. v. DICKSON, USE, &c.

1. Where the clerk of the Court, in entering judgment, commits an error by confounding two suits, it may be amended *nunc pro tunc.*
2. Upon *certiorari*, judgment may be entered against a party to the original judgment, who did not join in the bond to obtain the writ of *certiorari.*

Error to the Circuit Court of Randolph.

THIS proceeding was commenced before a justice of the peace, by the defendant in error, and was carried by *certiorari* to the Circuit Court of Randolph, on the petition of the plaintiffs in error.

From the record of the judgment, certified by the justice, it appears that a judgment was rendered by him, for the defendant, against the plaintiff in error, for $49 62 1-2, besides costs.

A statement of the cause of action being filed, at the spring term, 1842, the following entry was made:

Charles A. Dickson, for the use of Ransom Kitchens, vs. John Dobson, Matthew Dunklin, } Spring Term, 1842.

This day came the plaintiff, by his attorney, and the death of Ransom Kitchens, the usee, being suggested, and Louisa Kitchens and Benjamin Kitchens, adm'r of Ransom Kitchens, being made parties, by motion to the Court, and the defendants being solemnly called, came not, but made default. It is therefore considered by the Court, that the plaintiff recover of the defendant, the sum of one hundred and eighteen dollars damages, &c. &c.

At the fall term, 1843, the following entry appears:

Charles A. Dickson, for the use of Joseph Edge, vs. John Dobson, Matthew Dunkin, Croft Clark. } This day came the parties by their attorneys, and it appearing to the satisfaction of the Court, by legal and proper evidence, that the judgment entry in this case, made at the spring term, 1842, of this Court, is incorrect, being

in favor of the wrong usee, and for an incorrect amount, on plaintiff's application, leave is given to make a correct entry of the judgment, *nunc pro tunc*. Here follows the entry of judgment for $54 91.

The assignments of error are, the amendment of the judgment and the rendition of judgment against Dobson, who did not join in the *certiorari*.

S. F. Rice and T. D. Clarke, for plaintiff.

ORMOND, J.—We cannot perceive, from any thing in the record, that the amendment was not fully authorized. It is evident from the record, that the clerk, in entering up the judgment, had connected this with another case, and thus produced the confusion that ensued. The parties appeared when the amendment was made, and if there was no sufficient evidence by which to amend the record, it should haye been shown by bill of exceptions.

The judgment was properly entered against all the parties to the original judgment, before the justice of the peace, although one of them did not unite in the bond for the *certiorari*.

Let the judgment be affirmed.

DOE EX DEM. CALDWELL AND WIFE, ET AL. v. THORP, ET AL.

1. The *proviso* to the 7th section of the act of 1802, limiting the "right or title of entry upon any lands," &c. which declares, "that the time during which the person who hath, or shall have such right or title of entry, shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the same limited period of twenty years," does not except from the operation of the statute, a disability occurring after the statute has begun to run. It applies to a disability existing at the time the right accrued, and if that disability be once remov-

ed, the time must continue to run, notwithstanding any subsequent disability, either voluntary or involuntary.

Writ of Error to the Circuit Court of Mobile.

This was an action of ejectment, at the suit of the plaintiffs, for the "recovery of one lot, or parcel of land, being number nine, of square number one, of lots and lands sold by James Innerarity, to William H. Robertson, lying, &c. The defendants were let in to defend, upon entering into the usual consent rule; a verdict was returned for the defendant, and judgment was rendered accordingly.

On the trial, the plaintiff excepted to the ruling of the Court. The bill of exceptions recites, that the plaintiff proved title in Sebastian Shade, their ancestor, in the year 1818; that Shade died in 1820, leaving as his only heirs, Caroline and Matilda, who were then minors, and since intermarried, with two of their co-plaintiffs.

The defendant proved an adverse possession, under color of title, commencing in 1818, and continuing to the beginning of the year 1843.

The Court charged the jury, that if the statute of limitations commenced running in the life-time of the ancestor, the period of the minority of his daughters, Caroline and Matilda, " was not to be taken and computed as part of the time limited by the statute for commencing the action."

The plaintiff prayed the Court to charge the jury, that the statute allowed thirty years after the accrual of the right, or title, or cause of action, to bring the action of ejectment; which charge the Court refused to give, and charged the jury, that the time limited by the statute for bringing the action of ejectment is twenty years, when defendant holds under color of title.

J. A. Campbell, for the plaintiff in error. The statute of limitations was suspended during the minority of the daughters of Sebastian Shade. The proviso of the statute applicable to the case, is unlike any thing found in the 4th Henry the 7th upon fines, which was discussed in Stowell v. Zouch, Plow. Rep. 353, and bears no resemblance to any clause in the statute of *James*, which has been introduced into the legislatisn of most of the States.

[Sugd. on Ven. 460.] The only decisions which are in point, are those of Kentucky, 4 Bibb's Rep. 43, 446; 6 Monr. Rep. 59. See also, 3 Monr. Rep. 42; 3 Johns. Ch. Rep. 131.

Our statute expressly declares, that the time "during which" "the person who hath, or shall have, such right or title of entry," shall have been a minor, shall not be taken as part of the twenty years. These terms cannot be satisfied without allowing each party who comes in by descent, to deduct the period of his infancy from the operation of the act. Arguments drawn from policy, cannot be allowed to exert any influence, when the language employed in the statute is plain, and unambiguous. The question of policy is referable to the legislative, and it must be intended, has been passed on by that department of the government, and the public inconvenience was not supposed sufficient to outweigh the injustice of concluding infants, by an act of limitations. The *provisos* to the different sections of the statute, sanction this argument. Why should the Legislature have employed a variety of language to express the same idea? Why should the statutes of other States have been so closely copied in all particulars, save in this, if the Legislature had not intended to depart from the policy of these statutes, in respect to the preservation of the rights of those who labored, or might labor under disabilities. He also cited the opinion of the minority of the judges in Stowell v. Zouch, *supra.*

E. S. Dargan, for the defendant. When the statute of limitations once begins to run, it does not stop, nor is it suspended in its course by any subsequent intervening disability. [Adams on Eject. 59; 15 Johns. Rep. 169; 18 Johns. Rep, 45.] It is what it has been frequently called, a statute of repose. [5 Pet. Rep. 470.]

All statutes of limitations makes provision in favor of persons laboring under disabilities; but if the statute begins to run, it is not impeded by any disability occurring subsequently. Our statute contains a proviso in favor of infants, &c. but differs from the English statute in this, instead of allowing ten years after the removal of the disability, it deducts the time of its continuance, making the statute to begin to run, after the disability is removed, and requiring twenty years to elapse before the bar is complete. If the exceptions in the English statute will not suspend

its operation after it has once commenced, such an effect cannot be accorded to the *proviso* in our statute.

There are two statutes of limitation in Kentucky, the one contains a provision by which it is suspended in certain cases by express words; the other employs different terms. This being the case, it is fairly inferable that the Legislature intended the latter act should be subject to the known rule of construction; and that to avoid this rule in respect to the former, language of unambiguous import was used.

COLLIER, C. J.—The statute of Fines, 4 Hen. 7 ch. 24, as well as the statute of limitations, 21 Jac. 1, ch. 16, contain a saving clause with respect to those who labor under disabilities. See Blanshard on the Sta. of Lim. 8, 114. By the former, it is provided, that an ejectment may be brought within five years after fine levied, with proclamation, if the right of entry had then accrued; unless the party entitled, labor under some one of the disabilities stated in the act; in that case, five years are allowed after the disabilities cease. The latter enactment provides, that the person having a right of entry upon lands, must pursue his remedy within twenty years after the right accrues, unless he comes within the saving clause in respect to infants, &c. See Id. 8, 18; 15 Viner's Ab. 101 to 105.

It is said to be a settled rule, and applies, without exception, to all the statutes of limitation, that when the statute has once begun to run, it will continue to run, notwithstanding any subsequent disability. As if a fine be levied with proclamation, and A has a present, or future right of entry, and becomes free from disabilities, after a lawful title has once vested in him, to enter or claim the possession, the fine will continue to run against him, his heirs, &c., notwithstanding he may afterwards become disabled, and notwithstanding he die, leaving heirs, &c., who are infants, or laboring under some disability. But if the right first accrue to a person who is at that time under a disability, the fine shall not begin to run against him, until he is free from disability; and successive disabilities, it is said, are a protection against being barred by the statute; but any cessation of disability, it is held, will call the statute into operation, and no cause subsequently accruing will arrest its action. [Blanshard on the Sta. of Lim. 19.]

Wilkinson in his treatise upon the statute, remarks, that the 21 Jac. 1, was passed to fix a shorter definite period than the common law presumption, from length of time allowed as a bar to a recovery; and though since the statute, judges seem always to have favored the right of the plaintiff, where the debt appeared to have been justly due, yet in an early case on the statute of *fines*, followed by others on the other statutes of limitations, it has been uniformly held, that where any of the statutes of limitation had once began to run, no subsequent disability would prevent its running. There is no calculation, says he, how far the time might be extended, if several disabilities had been allowed. This rule has been applied to different statutes of limitation, though they are in very different terms, yet as observed by Lord *Tenterden*, the several statutes of limitation being *in pari materia*, ought to receive a uniform construction, notwithstanding any slight variation of phrase, for their object and intention is the same. See Wilk. on Sta. of Lim. 51; Stowell v. Lord Zouch, Plowd. Rep. 374; Doe ex dem. Duroure v. Jones, 4 D. & East's Rep. 311; Doe ex dem. Griggs and another v. Shane, 4 D. & East's Rep. 306-7; Doe v. Jesson, 6 East's Rep. 80; Cotterell v. Dutton, 4 Taunt. Rep. 826; Murray v. E. I. Company, 5 Barnw. & A. Rep. 215; 1 Lomax's Dig. 627 to 630.

In Thompson, et al. v. Smith, 7 Sergt. & R. Rep. 209, it appears that the Pennsylvania statute in respect to lands, was twenty-one years, with a *proviso*, that persons within the age of twenty-one years, &c. may, notwithstanding the expiration of the time prescribed, bring their actions within ten years after the removal of the disability. Chief Justice Tilghman said, "that the limitation of actions for the recovery of real property, is essential to the peace of society, and therefore the construction of statutes on that subject, ought not to be extended by equity, so as to contravene the main object of the Legislature, by keeping up the uncertainty of title, for a great and indefinite length of time." Again, "The ten years are to be counted from the time of the ceasing or removing of the disability, *which existed when the title first accrued*. If other disabilities, *accruing afterwards*, were to be regarded; the right of action might be saved for centuries. The descent of the title upon infant females, and the marriage of those females, under the age of twenty-one, might succeed each other *ad infinitum*." Such a construction would militate "with the

main object of the law, and is not agreeable to its words. It is contrary also to the current, as well as the spirit of the authorities." See also, Eaton v. Sandford, 2 Day's Rep. 523; Peck v. Randall, 1 Johns, Rep. 165; Read v. Markle, 3 Id. 523; Sugden on Vend. 461 to 464, ed of 1836; Den v. Mulford, 1 Hayw. Rep. 311; Dow v. Warren, 6 Mass. Rep. 328; Eager v. Munroe, 4 id. 182; Griswold v. Butler, 3 Conn. Rep. 227; Demarest v. Wyncoop, 3 Johns. Ch. Rep. 129; Walden v. Gratz's heirs, 1 Wheat. Rep. 292-6; Hudson v. Hudson, 6 Munf. Rep. 352; Faysoux v. Praither, 1 Nott & McC. Rep. 296; Jackson v. Wheat. 18 Johns. Rep. 40.

It is insisted by the plaintiff in error, that although the construction placed upon the statutes of limitation in England, and some of the States, to be such as has been shown, yet the phraseology employed in our enactments will not admit of a similar interpretation. The seventh section of the act of 1802, enacts, that "no person who hath, or hereafter may have, any right or title of entry, upon any lands, tenements, or hereditaments, shall make an entry therein, but within twenty years, next after such right or title shall have accrued, and such person shall be barred from any entry afterwards: *Provided, always*, That the time during which the person who hath, or shall have, such right or title of entry, shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the same limited period of twenty years." [Clay's Digest, 327, § 83.]

By the 1st section of the act of 1843, it is enacted, that where lands are sold under the decree of a Court of Chancery, to satisfy a mortgage, or other incumbrance, all rights of a person not a party to the decree, who shall claim under the mortgagor, &c. shall be forever barred, unless the suit for redemption be commenced within five years from the execution of the decree. The second section is as follows: "All actions for recovery of lands, tenements, and hereditaments, in this State, shall be brought within ten years after the accrual of the cause of action, and not after: *Provided*, That five years be allowed, under both sections of this act, for infants, *femes covert*, insane persons and lunatics, after the termination of their disabilities." [Clay's Dig. 329, § 93.]

The *proviso* to the limitation of act of 21 Jac. 1, so far as it relates to actions for the recovery of real estate, provides, "that if

any person," "that hath, or shall have such right or title of entry," "be at the time of the said right or title, first descended, accrued, come, or fallen, within the age of twenty-one years," &c. "that then such person," &c. shall, notwithstanding the expiration of twenty years, bring action, &c.: so as such person, &c. shall, within ten years next after his full age, &c. sue for the same, and at no time after the said ten years. There is also a saving clause to the sections of the statute, in respect to personal actions; it provides, that if the person entitled, "be at the time of any such cause of action given, or accrued, fallen, or come within the age of twenty-one years," &c. that then, such person may bring the same action, within such time "as other persons having no such impediment, should have done."

In Kentucky, there is a statute, limiting the time of entry into lands, which provides, that if any person entitled, shall be "under the age of twenty-one years," &c. "at the time such right or title accrued, or coming to them; every such person, and his or her heirs, shall and may, notwithstanding the said twenty years are, or shall be expired, bring or maintain his action, or make his entries within ten years next after such disabilities removed, or death of the person so disabled, and not afterwards." In respect to this statute it has been decided, that if it begins to run against the ancestor, but by his death the land descends to his heirs, who are infants, the statute does not run on, but the infants shall have the time allowed by the statute, after arriving at full age, to bring their action. There is a difference, say the Court of Appeals of Kentucky, in the language of the English statute and our own on this subject. The English statute saves the right of infants, &c. who were such "at the time when the said right, or title, *first* descended, accrued, or fallen." From the expressions used in the saving clause, it obviously relates to the time when the right *first* accrued, and the Courts of England have, therefore, properly extended it only to the persons to whom the right then accrued, and not to those to whom it should afterwards come: so that on the death of a person in whose life the statute first began to run, his heir must enter within the residue of the period allowed for making the entry, although he labored under a disability at the death of his ancestor. But the saving in the Kentucky statute evidently relates to the time when the right accrues, or comes to those laboring under the disabilities therein mentioned; not to

the time when the right *first* accrued to those under whom they derive their right. [Machin v. May, et al. 4 Bibb's Rep. 44; Sentney, et al. v. Overton, 4 Bibb's Rep. 446; McIntire's Heirs v. Funk's Heirs, 5 Litt. Rep. 33; South's Heirs v. Thomas' Heirs, 7 Monroe's Rep. 61.]

In Beauchamp v. Mudd, 2 Bibb's Rep. 538, the Court adopted the English construction of the 21 Jac. 1, in regard to personal actions, because, as it was said, "the saving, or proviso" in such cases, was expressed in language different from that used where suits for the realty are limited as to time.

The only case that has come under our notice, which seems to maintain, that a succession of disabilities can be united, so as to prevent the bar of the statute, is, Eaton v. Sandford, 2 Day's Rep. 523. That case was greatly weakened as an authority, by what was said in Bush and wife, et al. v. Bradley, 4 Day's Rep. 298, and was overruled in Bunce v. Wolcott, 2 Conn. Rep. 27. True, the saving in the Connecticut statute confines the disability to the person entitled "at the time of the said right or title, first descended, accrued," &c. in the very terms of the 21 Jac. 1, but no particular stress seems to have been laid upon the word "first." In the last case cited, the proviso of the statute, it was said, "regards solely and exclusively the disabilities existing at the time of the right, or title, first accrued;" and thus to construe it, was in accordance with its terms, with private justice and public convenience. It allows sufficient scope for the operation of the act, while "it avoids the intolerable inconvenience of accumulated successive disabilities, which, for an interminable period, might subvert titles apparently well established, and produce the most ruinous instability. And what is of no small importance, is in harmony with the decisions of other States."

In Walden v. The Heirs of Gratz, 1 Wheat. Rep. 292, 297, it was contended that the statute of limitations of Kentucky, to which we have referred, will stop, although it had begun to run, if the title passes to a person under any legal disability, and recommences after such disability shall be removed. This construction, say the Court, "is not justified by the words of the statute. Its language does not vary essentially from the language of the statute of James, the construction of which has been well settled; and it is to be construed as that statute, and all other acts of limitation founded on it have been construed."

We have been thus particular in noticing the act of limitations of Kentucky, and the decisions in respect to it, as it was insisted, at the argument, that it was materially variant from the statute of 21 James, 1. With all deference, we must say, that in contrasting these enactments, the Court of Appeals of Kentucky have given to unessential variation in language, a potency which it cannot claim, upon any just rules of interpretation; and that what was said in the case cited from the first of *Wheaton*, is entirely consonant to our view of the statutes, if it were necessary to express an opinion.

The case at bar does not come within the act of 1843; for if it be competent for the Legislature to prescribe a limitation, to bar pending suits, they have expressly disavowed any such intention by providing, "that no suit shall be barred by the operation of this act within five years from its passage." Here the action was commenced previous to 1843, and the case must be considered in reference to the statute of 1802. The saving within which it is attempted to bring the plaintiff, is expressed in terms somewhat different from that contained in the English statute—it is not so verbose; yet it is apprehended, that in respect to the question before us, it must receive the same construction. True it does not *in totidem verbis*, limit the disability to the person who hath the "right or title of entry, or shall be, at the time of the said right or title first descended, accrued, come or fallen, within the age of twenty-one years," &c.; but it declares, "that the time during which the person, who hath, or shall have, such right or title of entry, shall have been under the age of twenty-one," &c. "shall not be taken or computed," &c. It is clear that the person here referred to, is him against whom the statute begins to run; as to persons coming in subsequently, there is no exception in their favor. The saving expends itself upon the person first entitled to an action, if he is in the predicament to require the benefit of it; and if the "disability be once removed, the time must continue to run, notwithstanding any subsequent disability, either voluntary or involuntary." Ashurst, J. in Doe ex dem. Count Duroure v. Jones, 4 T. Rep. 300. This conclusion is in perfect harmony with the decisions in England, and the several States, with the solitary exception that has been noted; besides it is promotive of the policy of the statute, and makes it what all statutes of limitation are intended to be, "statutes of repose." Its tendency is

to quiet titles, by prescribing a limit to litigation, instead of deferring it to an uncertain, or unreasonable time in the future.

No objection was taken at the argument, or in the assignment of errors, to the refusal of the Circuit Judge, to charge the jury as prayed by the plaintiff's counsel; we will not therefore consider the question of law arising upon it. From what has been said upon the first point, it follows that the judgment must be affirmed.

JONES v. JONES.

1. Proof of a contract by which the plaintiff was to erect a dwelling house, &c., on lands of the defendant's intestate, and occupy the same free of charge, during pleasure, or remove from it, the defendant's intestate to pay for the carpenter's work and materials furnished by the plaintiff, upon his removal, will warrant a recovery on the common counts, although the promise and liability is therein stated as arising in the lifetime of the intestate.

Writ of error to the County Court of Butler.

ASSUMPSIT, on the common counts, by Joseph Jones against Frances Jones, as the administratrix of James Jones, for a debt due from the intestate. The promise to pay is alledged to have been made by the intestate in his life time, and by the administratrix since his death.

At the trial, the plaintiff showed, that in the year 1839 or '40, an agreement was made between him and the intestate, by which the plaintiff was to put up a dwelling house, and out houses, on lands of the intestate, with hands furnished by both; that the plaintiff was to furnish such lumber and other materials, (that is, sawed lumber, nails, locks, &c.) as could not be procured from the forest, by laborers. The plaintiff was to pay for such work done on the house, and other buildings, as was required to be done by a carpenter. He was to live in the house, free from charge,

during his pleasure, or remove from it. The intestate was to pay back to the plaintiff, the amount he should expend for carpenter's work, and the amount paid for materials furnished by him. The amount so paid was shown in evidence. It was also proved, that the intestate died in the year 1842 or '3, and that the plaintiff, after the intestate died, removed from the house, before the commencement of the suit.

On this state of proof, the Court charged the jury, that the demand sued for in this case, did not become due until after the intestate's death, and that the plaintiff could recover nothing in this action, because the declaration is, that the demand was due before the death of the intestate.

The plaintiff excepted to this charge, and it is now assigned as error.

WATTS, for the plaintiff in error.
T. J. JUDGE, contra.

GOLDTHWAITE, J.—The charge given the jury is clearly erroneous. The declaration is in the usual form, on the common counts, showing a liability arising out of a contract in the lifetime of the intestate, and a consequent promise to pay. The evidence, it is true, disclosed, that the money paid out by the plaintiff was not to be repaid him by the defendant's intestate, until a certain event happened; and before this event transpired, the intestate died. This state of facts does not differ, in legal effect, from a promise to pay at a future day; and it might as well be insisted, that the death of the promissor before the maturity of his promise, would impose the necessity of declaring in a special manner. The promise is deduced from the liability to pay, and in this case, that existed before the death of the intestate.

Let the judgment be reversed, and the cause remanded.

DOE EX DEM HALLETT AND WALKER, EX'RS. v. FOREST, ET ALS.

1. The action of ejectment is barred by an adverse possession of twenty years, unless the plaintiff can bring himself within some of the savings of the proviso, of the act forbidding an entry into lands after twenty years.
2. A possession acquired under color of title, and acquiesced in for twenty years, will bar a recovery in ejectment, although during a portion of the time, the plaintiff in ejectment was prosecuting an application to Congress for the confirmation of an imperfect title, derived from the crown of Spain, to a tract of land, within which the land sued for was situate, and to which his title was finally confirmed—he having been in possession anterior to the alledged intrusion.

Error to the Circuit Court of Mobile.

EJECTMENT, by the plaintiffs in error, executors of Joshua Kennedy, against the defendants in error, for a tract of land in the city of Mobile.

The plaintiffs, to sustain their cause, introduced a translation of the application of Thomas Price, to the Spanish authorities, for a parcel of land in Mobile, with the orders and grants of the Spanish authorities thereon. Also, a deed from Price to Wm. E. Kennedy, and a deed from him to Joshua Kennedy; also, the proceedings before the Register and Receiver at St. Stephens, 5th vol. Am. State Papers, 126-8-9, 130, and in the 3d vol. same work; also, the patent certificate, and the patent from the United States.

The plaintiff further proved, that Wm. E. Kennedy was in possession of a portion of the Price grant in 1824, and at the time of his death. That Joshua Kennedy died in 1838, in possession of parcels of the land in the patent claiming under it, and that Joshua Kennedy devised his lands to his executors, the lessors of the plaintiffs.

The defendant, to prove his case, produced a deed from Robert Carr Love, to Charles Jimelat, dated in February, 1822, for the lot in dispute; a deed from Jimelat to another person, and a deed from him to the defendant. It was also proved that the

land was vacant, and unenclosed, until after the purchase by Jimelat, and that after his purchase he cleared and enclosed it in the spring of 1822, and proved a continued possession to the time of the trial.

The plaintiff moved the Court to charge the jury, that the evidences of title, exhibited by the defendant, are not sufficient to bar the plaintiff's claim. That the entry by Jimelat, under the deed from Love to him, was the entry of a tresspasser, unless Love was in possession, claiming title, and that the statute of limitations afforded no protection to the defendant, claiming under him.

Instead of which, the Court instructed the jury, that if Jimelat took possession under Love's deed, he was in under color of title, and if he, and those claiming under him, had been in possession twenty years before the commencement of this suit, the plaintiffs were barred.

The plaintiffs further moved the Court to charge—1. That the title exhibited by the plaintiff, is superior to that of the defendant.

2. That the statute of limitations did not commence running, till the confirmation of the Price title, by the United States.

3. That the statute of limitations, of twenty years, did not bar the plaintiffs' claim, if they find that Joshua, and William Kennedy, were in possession of any of the lands in the Price claim, asserting title during the twenty years, which the defendants held the lot in dispute. All of which the Court refused, and to which the plaintiff excepted, and which he now assigns for error.

Stewart and Campbell, for the plaintiffs in error, made the following points:

The clause of the statute forbidding an entry into lands, after twenty years, must be construed in connection with the succeeding clause of the same act, which secures the right to bring a "possessory" action for the recovery of the lands, within thirty years after the right or title accrued. So considered, it is evident, that if an entry be made within twenty years, the party has two years longer within which to bring his action.

The title of the plaintiff arises under the "Price claim," which was a concession by Gayoso, in 1798, after his power to make conveyances of land had been suppressed. [2 White's Recap. 245, No. 27; Preamble to Morale's Reg. 2 White, 234; and a

ratification by St. Maxent, Military Commandant at Mobile, in 1806.] The confirmation of the claim did not take place until 2d March, 1829, and the patent did not issue until 1837. The defendant rests alone upon his possession. At the commencement of this possession, (1822,) Kennedy was a suitor to the government, for a perfect title; his proceedings were then pending. No laches is imputable to the government, or any one claiming under it, and Kennedy is entitled to be protected, during the time the government required to examine the title.

It is said, on the other side, that Kennedy might have brought suit upon the title obtained from Gayoso. This is denied. He might, it is true, have sued upon his possession, acquired under it, but not by force of the title. [13 Peters, 436, 498; 8 Cranch, 229.] The evidence, as well as the rights which Price acquired under the inchoate title, became merged, and their effect declared by the patent. [7 Wheaton, 1, 212; 4 id. 488; 6 Peters, 328; 7 Cranch, 359; Peters C. C. 291; 3 Peters, 337.]

That the suit could not have been maintained by Kennedy, is evident from De la Croix v. Chamberlayne, 12 Wheaton 599, and the cases of Hallett v. Eslava, in this Court.

Dargan, contra.

ORMOND, J.—The action of ejectment is brought to recover the possession of lands—the superior, ultimate right or title, is not, therefore, necessarily involved. To maintain this action, the plaintiff must be entitled to the possession, and must consequently have a right to enter upon the land; when, therefore, he has, by the lapse of time, lost this right, he cannot maintain the action. The counsel for the plaintiff in error, not controverting this general proposition, maintain, that although the statute forbids an entry after twenty years, yet, that if an entry be made within that time, the act secures the right to bring the action, at any time within thirty years, from the time the title accrued. This argument being founded upon the statute, it becomes necessary to construe it.

The 7th section of the act of 1802, (Clay's Dig. 327, § 83,) is as follows: "No person, who now hath, or hereafter may have, any right, or title of entry, unto any lands, tenements, or hereditaments, shall make an entry therein, but within twenty years

next after such title shall have accrued; and such person shall be barred from any entry afterwards, *Provided*," &c.

The 9th section of the same act, (§ 85 of the Dig.) reads thus: "Every real, possessory, ancestral, mixed or other action, for any lands, tenements, or hereditaments, shall be brought and instituted within thirty years next after the right or title thereto, or cause of such action accrued, and not after: *Provided*," &c.

We believe it has been the general understanding, both of the bench and bar, from the existence of the Territorial, and State government, that an adverse possession of twenty years, would bar an ejectment; and if the maxim, that *communis error facit jus*, is ever entitled to exert an influence, it is in the present instance. The law has been thus stated, incidentally by this Court, though we are not aware that the point has ever been expressly raised before.

The supposed difficulty in reconciling the two clauses of the statute, arises from the use of the terms, "possessory" and "mixed," in the 9th section. The common division of real actions, is into actions "*droitural*," and actions "*possessory;*" and these again are subdivided, into other classes, not necessary to be noticed. To the first head belongs the writ of *Right*—to the last writs of assize, writs of entry, and writs ancestral possessory. [3 Black. Com. 175 to 197, and 1 Roscoe on Real Actions, 3.] All these last mentioned writs, were to recover the possession, and were in fact, as they were called, *real possessory* actions.

The action of *ejectioae firmae*, was not originally a real action, but was the appropriate writ, when the lessee of a term was ejected by a stranger, to recover, not the term, but damages. [3 Black, Com. 199; 2 Roscoe on R. Ac. 481.] But which, in process of time, became the common method of trying the title, where the right of entry was lost.

The action of *waste* is a mixed *real* action, as the land was recovered, and damages for the injury. [3 B. Com. chap. 14.] From this brief statement of the ancient common law actions for the recovery of real property, it appears, that, properly so called, all actions to recover the possession of land, are *real actions;* and that the modern action of ejectment, was not, at common law, a real action. That the Legislature, in the classification of the actions which should not be barred until after thirty years, had reference to the ancient common law classification, is evident from

the use of the terms, "ancestral" and "waste." The former is without meaning, but by reference to the old common law writs, where a different writ was necessary, when the demandant claims in virtue of his own seizin, or possession, from that which was proper, when he claimed through the *seizin*, or possession of his ancestor. All these distinctions, have disappeared under the adaptation of the modern writ in ejectment, to the trial of titles, as it is wholly unimportant in ejectment, whether the title is derived from the ancestor, or not.

The 7th section is not, in terms, a statute of limitations, and only becomes so, in ejectment, from an inability to make an entry after the lapse of twenty years from the time the title has accrued; whilst the object of the 9th section was to provide a statute of limitation for *real actions*, adopting a portion of the statute of the 32 Henry 8, c. 2, as in the 7th section, a portion of the act of 21 James 1, c. 16, had been copied.

By the statute 4 Anne, c. 16, after an actual entry was made, the action of ejectment must be brought within one year after, and it has been argued that the design of our statute, taken altogether, was, that after an actual entry, the party had ten years further in which to bring his action. This construction is, we think, untenable. The limitation of thirty years is, "after the right and title hath accrued," and if it were conceded that a common law possessory writ, suited to the case, could be sued out within thirty years after the title accrued, provided an actual entry had been made within twenty, still it is clear an action of ejectment could not be maintained, unless the suit was commenced within twenty years; because, after that period, no entry could be made, and therefore none could be presumed.

Our conclusion upon the whole matter is, that the action of ejectment is barred by an adverse possession of twenty years, unless it can be brought within some of the savings of the proviso.

It is further urged, that this statute did not commence running against the plaintiffs, until after the confirmation of their claim by the United States, and the issual of the patent authorized by the act of confirmation. The title of the plaintiffs is derived from a Spanish concession by Governor Gayoso, to Thomas Price, in November, 1798, and a ratification of this act by St. Maxent, the Military Commandant at Mobile, in 1806. This claim was transferred by Price to William E. Kennedy, by whom it was laid

before the board of commissioners, who, at first, reported unfavorably upon it. Finally, a favorable report was obtained, and by the act of Congress, of 2d March, 1829, 1 Land Laws, 455, the claim was confirmed, and in 1837, a patent issued for the lands so confirmed.

The land lies within the lines of the patent. The defendant derives his title by a possession of twenty years, under a deed from one, asserting a title to the land in dispute. This question appears to us to be settled by the decision of the last term, in the case of Eslava v. The Heirs of Narmer, 7 Ala. Rep. 543. It was there held, that it was not intended by the act of confirmation, to legislate upon the title, further than to disavow any title in the United States—the act is, by its terms, a mere relinquishment of any title in the United States.

This argument is fully answered by the case of Eslava, at the last Term. [7 Ala. 543.] It is supposed, that as time will not run against the government, it will not run against the confirmee of the government. But the government never intended by the act of confirmation, to do more, than to relinquish any title which might be in the United States; and whether the confirmation be considered a new grant, or the admission merely, that a good title existed, derived from the Crown of Spain, in either aspect, it was not intended that the act should have any retrospective effect, except as it regarded the government. This is shown by the language in which the confirmation is couched.

The inception of the title, called the "Price claim," was an order from Gov. Gayoso, in 1798, directing the petitioner, Thomas Price, to be put in possession of the land, he solicited. On the 20th November, 1806, Price again petitioned St. Maxent, the Commandant, to be confirmed in the possession of the land he had obtained from Governor Gayoso, and for a further grant of five hundred arpents, in consideration of arrears due him for his salary, and also because of certain grants which had been made and surveyed to other persons, within the limits of his first grant. It also appears from the bill of exceptions, that William E. Kennedy, who succeeded to the title of Price, was in possession of a portion of the land covered by the "Price grant," as far back as 1824.

Whether the imperfect title derived from Gayoso, anterior to

the treaty of St. Ildefonso, was of itself sufficient, before confirmation by the United States, to support an action of ejectment, we need not inquire, because it is evident that the whole merit of the "Price claim," consists, in the supposition that the concession of Gayoso, in 1798, and its ratification in 1806, by St. Maxent, were genuine; and that possession accompanied it, with assertion of title by the grantee. This, Price expressly asserts in his petition to St. Maxent, stating that he had built a house upon the land so conceded, and had resided there for several years; and St. Maxent, responding to the petition, says, that the facts are within his knowledge.

The commissioners, in their reports on this claim, No. 103, of William Crawford, and No. 3, of the Register and Receiver, all state, especially the latter, that possession accompanied the grant, and that it was inhabited and cultivated from 1798, the date of the grant, "according to the Spanish regulations." This is also explicitly asserted by Joshua Kennedy, in his petition to the Register and Receiver of the land office at Augusta, dated 26th December, 1826, who says, "that inhabitation and cultivation were made, according to the Spanish usages and customs."

Now, assuming all this to be true, it is most apparent, that Kennedy had such a title to the land, as would have enabled him to have maintained a suit against a mere trespasser, and such it is insisted we must consider the inception of the defendant's title. The claim was confirmed, because it appeared to be genuine, and had been possessed and cultivated, according to the Spanish usages and customs, although something had been omitted to make the title perfect; but certainly the government did not intend, by this concession, to cover the confirmee with its mantle, and invest him with one of its sovereign attributes—that no laches should be attributed to him, in any succeeding contest about the land, not only during the long interval he was pressing this claim before the government, but also long before the United States had possession of the country. In a contest with an individual citizen, about a portion of the land, the plaintiff cannot stand upon higher ground, than if their claim had been perfect in 1798, in which event, it cannot be doubted, that the possession of the defendants would have ripened into a title; and if the fact were, (which however is not shown upon the record,) that from the neglect to

cause a survey to be made, and, the boundary thus not ascertained, the plaintiffs were unable to eject the defendants, they can derive no benefit from their own laches.

Other points may arise upon the record; we have confined ourselves to those made in the argument. Let the judgment be affirmed.

TRAMMEL v. SIMMONS.

1. One who is ejected from land of which he was in possession, under process issued from a Court of Chancery, in a cause to which he was not a party or privy, cannot, on error, avail himself of irregularities occurring in the decree, or other part of the proceedings.
2. *Semble*, although Chancery may have power to put a party into possession, of land, who purchases at a sale made under its decree, where the possession is withheld by the defendant, or any one who comes in *pendente lite*, it is not allowable to eject a mere stranger, having no connection with the defendant, either immediately, or mediately.
3. The decree for the foreclosure and sale of mortgaged premises, directed, that the purchaser be let into possession; the purchaser found a stranger in possession, of whom he demanded it, informing him, unless it was yielded up, the Register would be moved for a writ of *assistance*, to eject him, &c. The demand was disregarded, the writ issued, the individual in possession ejected, and the purchaser let in to its enjoyment: *Held*, that the party dispossessed cannot have the irregularity corrected on error, but his remedy is by an application to the Chancellor.

Writ of Error to the Court of Chancery sitting in Henry.

THE facts of this case, so far as it is necessary to notice them, may be thus condensed. Moses Mathews obtained a decree for the foreclosure of a mortgage, and a sale of the mortgaged premises, against John M. Kimmey. Among other things, the decree directs that the Register "execute a deed, or deeds, of con-

veyance to the purchaser or purchasers, and that they respectively be let into possession of the premises, which may be by them purchased." The defendant in error became the purchaser of a part of the land, and gave notice of the fact to Trammel, demanded the possession, and informed him, that unless he yielded it up, the Register would be moved for a writ of assistance to eject him, and substitute the purchaser in his stead.

The demand was disregared, the writ was issued, Trammel ejected, and the purchaser let into possession.

Trammel sued a writ of error, returnable to this Court, to revise the proceedings consequent upon the decree of foreclosure and sale, so far as they affect him.

E. W. Peck, and L. Clark, for the plaintiff in error.
No counsel for the defendant.

COLLIER, C. J.—The plaintiff's counsel have called our attention to what are supposed to be errors in the record of the cause between Mathews and Kimmey. It is enough to say, in answer to these, that even if they were available in a direct proceeding between the parties to the decree, they cannot be noticed at the instance of a stranger.

True, the decree directs, that the purchasers at the sale by the Register, should be let into possession, but, if this order can operate, so as to warrant the adoption of coercive measures, it cannot affect any one but the mortgagor himself, or, possibly, his tenant. In Creighton, et al. v. Paine and Paine, 2 Ala. Rep. 158, it was held, that the Court of Chancery has power to put a person in possession, who purchases at a sale made under its decree, when it is withheld by the defendant, or any one who comes in *pendente lite*. In that case we pointed out the course of procedure proper to be pursued, upon an application being regularly made by the purchaser. It was there said, that if, on examination, the Chancellor is satisfied the possession is withheld by one who is concluded by the decree, he will make a decretal order, (unless the decree of foreclosure directed it,) to deliver the possession to the purchaser.

If this order is disobeyed, an injunction will issue, commanding the party in possession forthwith to deliver it up, then upon a re-

fusal being duly made known, a writ of assistance to the sheriff, to put the purchaser in possession, issues of course, on motion.

The recital of the facts in the present case, very clearly shows that the proceedings complained of were not regular. But there is no order operating directly upon the party ejected, and consequently no action of the Chancellor, which can at his instance be revised on error. In Creighton, et al. v. The P. & M. Bank, 3 Ala. Rep. 156, the person in possession made himself a party, by appearing and resisting the order, and it was held that it might be reviewed at his instance. Here, there is nothing but the notice to Trammel, the affidavit of that fact, and his refusal; the application to the Register for the writ of assistance, the writ and its execution, against which he can ask relief. It is clear that the remedy of the plaintiff in error is not in this Court, he should have applied to the Chancellor, whose powers are ample, for the correction of any irregularity in the issuing or executing process by its ministerial officers.

The writ of error is consequently dismissed.

ELLISON v. THE STATE.

1. A recognizance, conditioned that the party charged will appear and answer to the indictment to be preferred against him at a named term of the Court, and not depart therefrom without leave, may be extended at any subsequent term, if an indictment is preferred and found at that term.
2. When the parties acknowledge themselves bound in the sum of $500, to be levied severally and individually of their goods, &c., respectively, this is a joint and several recognizance, and not the several recognizance of each of the parties for that sum.
3. Under our statutes, which allow a *sci. fa.* without setting out the recognizance, the defendant is entitled to crave oyer of the recognizance upon which the proceedings are based, and to demur if there is a variance.
4. When a writ of error is sued out in the names of D. A. and others, it may be amended by the transcript of the record, and the names of the proper party or parties substituted.

5. When a judgment is erroneously entered severally against the parties bound by a joint recognizance, the entire proceedings as to all the parties will be reversed upon the writ of error sued out by one only, and the cause remanded, that its unity may be preserved.

Writ of Error to the Circuit Court of Dallas.

Sci. fa. upon a forfeited recognizance. The *sci. fa.* sets out the judgment on the recognizance, which recites, that at the March term, 1844, it appeared to the Court, that the defendant, (David A. Armstrong,) together with John Murphy, R. W. Armstrong, and Robert Ellison, had, before Zachary Whandby and Samuel Gilmer, justices, &c. acknowledged themselves to owe, and be indebted to Benjamin Fitzpatrick, Governor of the State of Alabama, and his successors, &c. in the sum of five hundred dollars *each*, to be levied, &c. to be void if the said David A. Armstrong, should make his personal appearance at the then present term of the Circuit Court, and answer a charge of the State against him, for an assault and battery, and thence continue from day to day, and from term to term, until discharged by due course of law. It also recites, that the defendant having been called to answer said charge, and failing to appear, a judgment *ni si* was rendered against David A. Armstrong, John Murphy, R. W. Armstrong, and Robert Ellison, for five hundred dollars each, the amount of their recognizance, so forfeited as aforesaid. The *sci. fa.* was made known to Murphy, R. Armstrong and Ellison, and as to D. A. Armstrong was returned not found.

The defendants served with process appeared, craved oyer of the recognizance, and judgment, and then demurred for a variance. This demurrer was overruled, and they then pleaded—1. *Nul tiel record* as to the recognizance set out in the *sci. fa.* 2. The same as to that set out in the judgment *ni si.* 3. The same plea as to the judgment. Judgment final was rendered for the State, that it recover the sum of five hundred dollars each.

The recognizance was produced, under the pleadings, and sets out, that the recognizors acknowledged themselves, held themselves firmly bound, &c. in the sum of five hundred dollars, to be levied severally and individually, of their goods and chattels, lands and tenements, respectively, if the said David A. Armstrong should make default in the condition of the recognizance. That con-

dition is, that the said David A. Armstrong should make his appearance at the fall term, 1843, of the Circuit Court, to answer, &c., and do what shall be enjoined by said Court, and not depart therefrom without leave.

All the parties against whom judgment was rendered, join in the writ of error, or rather it is sued out in the name of D. A. Armstrong, *et al.*

It is now assigned as error—

1. That the judgments should have been for the defendants, on the demurrer, and on the pleas of *nul tiel record.*

2. That the judgment, if one could be rendered upon the *sci. fa.* ought to be joint, for five hundred dollars and not several.

When the cause was called for argument, the Attorney General moved to dismiss the writ of error—1st. Because D. A. Armstrong is the plaintiff in the writ, and no judgment is given against him. 2. Because those against whom judgment is given, cannot sue out a joint writ. The counsel for the defendant moved to amend the writ, so as to make it correspond with the record, and if necessary to make Ellison the plaintiff.

Edwards, for the plaintiff in error, argued, that the recognizance was only for the sum of $500, and that sum only could be recovered by the State. The judgment therefore should be joint, though it may be levied of the several goods, &c.

Attorney General, contra, cited Goodwin v. The Governor, 1 S. & P. 465; Howie and Morrison v. The State, 1 Ala. Rep. N. S. 113.

GOLDTHWAITE, J.—1. If we are to understand from the record, that *oyer* was given of the recognizance, then all the questions presented here, arose upon the demurrer; but if it is to be understood otherwise, they must be considered in the examination of the evidence offered to sustain the issue of *nul tiel recognizance.* When the recognizance is inspected, we find, that the recognizors bound themselves, that David A. Armstrong should make his personal appearance at the fall term of the Circuit Court of Dallas, for the year 1843, to answer to a charge of the State, for an assault and battery, upon one David Armstrong; and further, to do what should be required by that Court, and

that he should not depart therefrom without its leave. At that term of the Court, an indictment for that offence was returned by the grand jury, but no proceedings on the recognizance, or against the recognizors, was had until the spring term, 1844, when, the principal being called, and not appearing, a judgment *ni si* was rendered against each of the parties to the recognizance for the sum of $500.

It is now insisted, that the recognizors not having been called to produce their principal, at the fall term, 1843, were virtually discharged from all liability to do so at a subsequent term. It is said by Hawkins, that if persons be bound by recognizance for the appearance of one in the King's Bench, on the first day of the term, and that he shall not depart till he shall be discharged by the Court; and afterwards a *nolle prosequi*, as to the particular charge, upon motion, is entered, and another is exhibited, on which the defendant is convicted, and refuses to appear in Court, after personal notice, the recognizance is forfeited; for being express, that the party shall not depart till he be discharged by the Court, it cannot be satisfied unless he is forthcoming, and ready to answer to any other information exhibited, while he continues not discharged, as much so, as to that which he was particularly bound to answer to. [2 Hawk. 173.]

Our practice, in misdemeanor cases, is supposed to differ from that pursued in England, inasmuch as the trial is always had when the defendant is present, and he is considered in strict custody as soon as placed on trial; but even with this difference in practice, the quotation from Hawkins is conclucive to show, that the recognizors are bound to produce their principal, to answer the charge, and that they are not released by the omission to call out the recognizance at the term at which the indictment is found. No injury can ever arise to the recognizors, as they are entitled at any time to surrender their principal, in discharge of the recognizance. [Clay's Dig. 450, § 35.] Whether the recognizance would continue in force, without some special order, when no indictment was returned, at the proper term, is a question not involved in this case; nor is it supposed the decision made in Goodwin v. The Governor, 1 S. & P. 465, where a point somewhat similar to that just adverted to was ruled, has any important bearing on the matter just examined; on this, our conviction is, that

that the recognizance could have been properly estreated at the spring term, 1844, and possibly also, at a period more distant.

2. With respect to the variance which is supposed to exist between the recognizance produced in evidence, and that described in the judgment *ni si*, we think the objection well taken. By the recognizance, the parties signing it admitted themselves bound in the sum of $500, and this cannot be extended so as to make it the several engagement of each of the recognizors to pay that sum four several times. The words which follow the statement of the sum for which they admit themselves to be bound, merely show, that it was to be levied of their several, and respective, goods, &c.

3. It is not very material to this case, whether the judgment below is reversed, on the ground that the demurrer should have been sustained, or that the issue of *nul tiel recognizance* should have been decided for the defendants; but as the question of practice is one which must frequently arise, it is proper to give it a brief consideration. We have a statute which dispenses with the recital of the recognizance in the *sci. fa.* when a judgment *ni si* has been entered; in which case it is "sufficient to recite the judgment *ni si*, and the term of the Court at which it was rendered;" and to conclude by stating, that unless the defendant appears and show cause to the contrary, judgment final will be entered up. It also provides, that no other averment, or statement, shall be necessary to the validity of the notice. Another section of the same act, provides, that a variance in setting out a copy of the bond, or recognizance, or judgment *ni si*, shall not vitiate the proceedings, unless it be a substantial variance. [Clay's Dig. 481, § 29, 30.]

This statute was evidently intended to simplify the proceedings by *sci. fa.* and render them less subject to exception, than they had been previous to its enactment. It is certainly entitled to be liberally construed, but not in such a manner as to take away from the defendants, who are called on to show cause, the right to make a substantial variance apparent to the Court. Under the law, as it was before the statute, the recognizance was always set out, according to its legal effect, and the defendants were entitled to plead *nul tiel recognizance*, either when there was no record of the judgment, or of the recognizance, or it was untruly stated in the *sci. fa.* [Green v. Ovington, 16 John. 55. The

statute does not affect to take away this right, yet it is difficult to perceive how a defendant can plead *nul tiel record*, or *nul tiel recognizance*, when the plaintiff has not averred the existence of any such proceedings. As there must be some mode, by which the plaintiff can be forced to produce the proceeding upon which he grounds the process and judgment *ni si*, it seems in accordance with correct principles, that the defendant may crave *oyer* of the recognizance, and when it is given may demur. Both means were resorted to here, by the defendants, and without asserting that the plea of *nul tiel recognizance* is improper, we consider the craving *oyer*, and then demurring for the variance, is entirely proper. The judgment on the demurrer should have been rendered for the defendants.

4. Since the decision of Howie and Morrison v. The State, 1 Ala. Rep. 113, the statute authorising amendments of writs of error, has been passed; and though the writ here is sued out in the name of D. A. Armstrong and others, without naming them, we think that even such a case is within the statute, as the record furnishes the names of those who might sue out the writ. [Clay's Dig. 312, § 39.] As the counsel indicates, the defendant Ellison is the party suing out the writ in this case, it will be amended, so as to make his name appear as the sole plaintiff.

5. There is yet another difficulty in the case, which grows out of the peculiar nature of those proceedings, in which a number of parties are before the Court jointly, until the moment of final judgment, and when, by that judgment, the proceedings assume a several character. In ordinary cases, when the judgment should be, and is several, the suing out the writ of error, by one, and the reversal or affirmance of the judgment does not affect the judgment against any other. Such was the case of Howie and Morrison v. The State, 1 Ala. Rep. 113. But the reversal of the judgment as to Ellison in this case, without reversing as to other recognizors, would leave them severally liable, each for the sum for which a joint judgment should have been rendered. Under the decision made in Robinson v. The State, 5 Ala. Rep. 706, it is probable the reversal of the judgment alone, as to Ellison, would not create a discontinuance of the proceedings against the other defendants; but it would place the entire cause in a condition not contemplated, either by the prosecutor or the defendants. The harmony and unity of the proceedings will be best secured,

by reversing the judgment as to all the parties, R. W. Armstrong and Murphy, as well as Ellison, and remanding it to the Circuit Court, with instructions to amend the judgment *ni si*, and award a new *sci. fa.* that further proceedings may be had upon it, not inconsistent with this opinion.

Reversed and remanded.

DOE EX DEM. FARMER'S HEIRS v. THE MAYOR AND ALDERMEN OF MOBILE.

1. A permission by one in possession of a lot, to another claiming a part of it, to move the fence, so as to take in a part of the lot, may be given in evidence, upon a question of boundary, as an admission of the person then in possession, against his interest, though a stranger to the title. It would not be conclusive, even if made by one claiming title, or by his authorized agent.
2. The boundaries of a public lot, may be proved by general reputation, therefore a deed for an adjoining lot, calling for the "King's bake house lot," as its northern boundary, is admissible to prove as general reputation, that at the date of the deed, the Bake-house lot had an ascertained boundary; and the conduct of the party claiming under such deed, is also evidence of the general reputation at the time; of the true boundary of the Bake-house lot. Whether such evidence would be admissible in the case of a private lot—*Quere?*

Writ of Error to the Circuit Court of Mobile.

EJECTMENT, by the plaintiff in error, against the defendant in error.

The plaintiff produced a patent from the United States, for the premises in question, which calls for "the south boundary of the Bake-house lot" as one of the lines of the tract, which patent issued on the 14th November, 1837, in virtue of the act of Congress, of May, 1822, confirming the claim of the heirs of Robert Farmer, 3 vol. Am. State Papers, Public Lands, page 18.

The defendant relied upon the act of 26th May, 1824, and claimed the premises in dispute, as part of the "Bake-house lot," granted to the city by that act. The defendants produced no official survey, or patent from the land office, for the lot, but relied alone upon the act. To establish the boundaries, they read certain depositions, which were objected to, because the evidence was irrelevant, incompetent, and improper under the issue, and went to contradict and change the legal import, and terms of the patent, introduced by the plaintiff. The Court overruled the objection, and the plaintiff excepted.

The defendant called a number of witnesses, and examined them as to the marks, and memorials that existed of the Bake-house lot, as it was used and occupied in Spanish times, and as to those which remained after the departure of the Spanish government, none of which appeared in the patent of the plaintiff, either as land marks, or otherwise, nor were they now visible, nor did any of the witnesses swear that they were the lines of the lot aforesaid, nor was it proved who put them there.

The defendants also proved the facts of the possession of the adjoining proprietors, Osorno, and Eslava, in Spanish times, and that in 1824, when the lot was taken by the defendants, they leased a portion to third persons, without objection from the lessors of the plaintiff, or the heirs of Eslava, that the witnesses knew of, (and four of them were at the time members of the corporation,) and both of whom claimed the lot south, and bounding the King's bake-house lot, and no suit that they know of, had been brought for the same. That improvements had been put by the defendants, on the part now claimed by them. The object of this testimony was to prove, that the defendants were not in possession of any land, which did not form a portion of the lot, and that the courses, and distances, laid down in the patent, conflict with their right; which evidence was objected to by the defendants, as irrelevant, and improper, but admitted by the Court.

The defendants, further to establish thier southern boundary line, proved, that the lot next, was claimed by Joaquin D'Osorno, in Spanish times, and was used and improved by him. That he parted with his possession to Mr. Eslava, who was at the time commissary, and store-keeper for the Spanish troops, and who was in possession when De Vobiscey, the son-in-law of Farmer, came to the State, and has been ever since controvert-

ing Eslava's right, and that his heirs are now in possession of the lot, and have been for more than twelve years, and that their claim to the possession, was not disputed by Eslava, or his heirs.

The defendants produced the book of translated Spanish records, from the County Court of Mobile, and read a deed there recorded, from one Fontanella, to Osorno, for the lot south, calling for the Bake-house lot as the northern boundary, bearing date in 1801, against the objection of the plaintiff for irrelevancy, and because there was no proof that the deed had ever been offered to the commissioners appointed by Congress. There was no evidence that the claim to possession was ever disputed by Eslava, or his heirs, but there was testimony, that the defendants, shortly after they took possession of the lot, procured the fence, that bounded the Bake-house lot on the south, to be moved in the night time, some thirty feet south, upon the premises claimed by the plaintiff, while De Vobiscey, one of the heirs of Farmer, was in possession thereof.

The Court charged the jury, that the act of Congress of 26th May, 1824, conferred upon the defendant as perfect, and conclusive a title, and their title to the Bake-house lot, was equal in every respect, under the act, with the title of the plaintiff under the patent. That the question for them to settle, was, what was the south boundary of the Bake-house lot in the Spanish times—that such as it then was, it passed to the defendants.

The plaintiff's counsel moved the Court, to charge, that the grant to the corporation was a mere donation, and that the Register, and Receiver, at St. Stephens, were authorized under the act of Congress, of May, 1822, and other acts of Congress, to direct the manner, and mode of surveying, and making the location, and division, between these parties, and having done so, that parol evidence was not competent to change the location so made, and set forth in the patent. Further, that no survey, plot, or other description of the premises in question, can outweigh, or supersede, the survey set forth in the patent, under which the plaintiff claims, unless it be shown by the defendants, in a patent, or instrument of equal dignity. These instructions the Court refused to give, and to the instructions given and refused, the plaintiff excepted.

The assignments of error cover all the matters set forth in the bill of exceptions.

TEST and PHILLIPS, for plaintiff in error.

CAMPBELL, for defendant in error, submitted the cause without argument.

ORMOND, J.—When this case was before this Court, at a previous term, we held, that the action of the officers of the Land Office, in relation to the boundary line, between the "Bake-house lot," and those of the adjoining proprietors, was not conclusive. That if a difficulty should arise as to the boundary, "the precise location must be ascertained by testimony, showing where the *south line* was, when in the occupancy of the crown of Spain. Such as its limits then were, it passed by the treaty to the United States, and with these limits, it was granted to the corporation." The only question therefore open for adjudication is, whether the evidence admitted was competent.

The question to be decided by the jury, was, the precise location of the south boundary of the King's bake-house lot, when in the occupancy of Spain; proof of facts therefore, by witnesses, where this line was, by reference to former, or existing monuments, as a well, and the remains of a picket fence, which once enclosed it, was certainly proper.

It also appears, that when the grant was made to the corporation, in 1824, and they were about taking the necessary steps to obtain the possession, they understood that the heirs of Farmer, had by permission, enlarged their boundaries, and taken in a part of the Bake-house lot, for the purpose of cultivation as a garden —that the corporation determined to resume the possession— that it was yielded to them by the person in possession, who represented himself to be, and was recognized generally, as the agent of the owners of the lot, who assented to the claim of the corporation, and permitted the fence to be removed to its original position.

We can perceive no objection to this testimony. The permission to remove the fence, to what was supposed to be its original site, was in the nature of an admission, against the interest of the person then in its occupancy. This admission would

increase in strength, if made by the plaintiffs or their authorized agent. It would not then, be conclusive, as it might have been made inadvertently, or in ignorance of the facts; but it was competent testimony, to go to the jury, who were the proper judges of the weight it was entitled to.

It appears from the bill of exceptions, that the lot south of the King's bake-house lot, being the one in dispute, was claimed, both by the heirs of M. Eslava, and the plaintiff. That after possession was taken by the corporation, a portion of it was leased by the corporation to third persons, without objection, or suit, until the institution of this, from the heirs of Eslava, or the plaintiffs. This evidence, though not very conclusive, was certainly competent, upon a question of boundary, being the acquiesence of those interested, in opposing it, in the truth of the line, claimed by the corporation. Its effect was a question for the jury.

The defendants were also permitted to read a deed, from one Fontanella, to Joaquim De Orsono, made 1801, by which the lot south of the Bake-house lot, was conveyed by the former, to the latter, which calls for the Bake-house lot as the northern boundary—that Osorno, used and improved the lot, and parted with his possession to Eslava, whose heirs have been in possession for the last twelve years, contravening the right of Farmer's heirs to the lot, and that their claim to the land in dispute, was never disputed by Eslava, or his heirs. The plaintiff objected to this testimony, and to the deed, in addition, that there was no proof, that it had ever been offered to any commissioner appointed under the acts of Congress for the adjustment of private land claims.

From this testimony we understand, that the lot south of the "King's Bake-house lot," is claimed both by the heirs of Eslava, and the heirs of Farmer. That the former deduce their title, from a deed in 1801, calling for the Bake-house lot, as their northern boundary, and that Eslava and his heirs have always admitted, the line between the two lots as claimed by the corporation, whilst the heirs of Farmer, are now insisting, that the line is situate, some thirty feet or more further north.

This is certainly an admission which would be competent testimony against the heirs of Eslava, but is certainly not admissible against the heirs of Farmer as an admission, of the true site of the disputed line. They might, from prudential or other considerations, decline to assert title to the disputed piece of land; but this

certainly could not prejudice any other person, who did assert a title to it. We incline however, to the opinion, that it was competent testimony, though as it regarded the plaintiffs, mere hearsay, upon a question of boundary.

In England, reputation, or the declarations of deceased persons, are not evidence, in questions of boundary, between individuals, though admissible in questions of public right; but in the United States a different rule has generally prevailed. See the cases collected in 2 Cow. & Hill, 628. It is considered as a settled question in this country, by the Supreme Court of the United States, in Boardman v. Reid & Ford, 6 Peters, 341. The Court say, "that boundaries may be proved by hearsay testimony, is a rule well settled, and the necessity, or propriety of which is not now questioned. Some difference of opinion, may exist as to the application of this rule, but there can be none as to its legal force." See also, Ralston v. Miller, 3 Rand. 49.

The deed made in 1801, establishes the fact, as general reputation, that the Bake-house lot, at the date of the deed, had an ascertained boundary, and the conduct of those claiming under it, is, as it respects third persons, proof of the same grade, where that boundary was reputed to be. In the case cited from 3 Rand. the Court say, "ancient reputation, and possession, in respect to the boundaries of streets, are entitled to infinitely more respect in deciding upon the boundaries of the lots, than any experimental survey, that can now be made."

In the present case, the disputed fact, related to the boundary of a public lot, which it appears from the evidence, was enclosed in the Spanish times, with a picket fence. The boundary of such a lot, would be more apt to be known, than that of the lot of a private individual; and we think the conduct of the adjoining proprietors, at a time when the boundary must have been known, conceding where that boundary was, against their own interest, is evidence of the general reputation at the time, of the boundary of the lot.

The fact, that the deed had not been laid before any of the boards of commissioners, is of no importance. It is not offered as a muniment of title, but as evidence of a fact, disclosed by the deed itself. The due execution of the deed is not controverted, and it appears to have been recorded in the book of translated Spanish records in Mobile.

The objection, that all the evidence offered by the defendant, tended to contradict the line, as set out in the patent of the plaintiffs, was considered when this case was previously here.

Let the judgment be affirmed.

WINDHAM, ET AL. v. COATS, USE, &c.

1. Upon an appeal from a justice of the peace, the defendant and his sureties acknowledged that they were bound unto the plaintiff in a definite sum "for the payment of the principal, costs, charges, and all expenses attending the suit," between the plaintiff and the defendant, and that the latter had "appealed from the justice's court of Beat No. 3, for the county," &c. to the Circuit Court, to be holden, &c. *Held*, that although the bond does not conform literally to the act, yet it was substantially sufficient, and was equivalent to a condition "to prosecute the appeal to effect, and in case the appellant be cast therein, to pay and satisfy the condemnation of the Court."
2. The sureties in an appeal bond, are not liable beyond its penalty, and if a judgment is rendered for a greater amount, though objected to, in the primary Court, it will be reversed on error.
3. The clerk of a Court is not authorized, without the consent of the plaintiff, to receive *before judgment*, the amount for which the sureties of the defendant are liable, and thus discharge them.

Writ of error to the Circuit Court of Coosa.

THIS was a suit instituted before a justice of the peace, at the instance of the defendant in error, against the plaintiff, Windham, for the recovery of $5 6 1-4. A judgment was rendered against Windham, for the amount claimed, with interest and costs. Thereupon he entered into a bond with his co-plaintiffs, Rose and Beard, as his sureties, of which the following is a copy, viz: "Coosa county, State of Alabama, know all men by these presents, that we, Stephen Windham, Howell Rose, our heirs, executors and administrators, are firmly held and bound in the

full sum of twenty dollars, for the payment of the principal, costs, charges, and all expenses attending the suit between Nathan Coats, the plaintiff, and myself, Stephen Windham, the defendant, in which I have appealed from the justice's court, of Beat No. three, for the county aforesaid, to the Circuit Court, to be held for the County aforesaid, at the town of Rockford, on the third Monday in April, in the year of our Lord one thousand eight hundred and forty-four, this, the third day of February, 1844." Signed and sealed by Windham, Rose and Beard, and attested by the justice of the peace who rendered the verdict.

The plaintiffs in error objected to the rendition of a judgment against them on the bond, because it did not conform to the statute, and because, previous to the disposition of the case against Windham, he fully paid to the clerk of the Court, the amount of the penalty of the bond. But their objections were overruled, and the judgment rendered against all the obligors in the bond, for the sum of $5 39, debt and interest, eighty cents damages, and all costs, amounting to $193 35.

S. Heydenfeddt, for the plaintiff in error, insisted that the bond was not such as the statute requires, and no summary judgment could be rendered upon it. [4 Ala. Rep. 315.] That even if it was good, no judgment could be rendered upon it beyond the amount of the penalty. [6 Ala. Rep. 476.]

No counsel appeared for the defendant.

COLLIER, C. J.—It is provided by statute, that any person aggrieved by the judgment of a justice of the peace, may, within five days thereafter, appeal to the next superior Court, sitting for his county, first giving to such justice, bond, with good security, in double the amount of such judgment, conditioned to prosecute such appeal to effect; and in case he be cast therein, to pay and satisfy the condemnation of the Court. The bond in the present case, does not conform literally to the act, but we think it substantially sufficient. It recites the names of the parties to the judgment before the justice, states that the defendant had appealed, contains a specific penalty, which is no doubt for the proper sum, and if not, the obligors upon the state of the record, cannot object to it. The bond is an acknowledgment that the obli-

gors are bound in the penalty designated, for the payment of the principal, costs, charges, and all expenses attending the suit. This we think equivalent to a condition *in totidem verbis, to prosecute the appeal to effect, and in case the appellant be cast therein, to pay and satisfy the condemnation of the Court.*

In McBarnett and Kerr v. Breed, 6 Ala. R. 476, the penalty of the appeal bond was $5 25, this Court said, that we would judicially know, that the costs exceeded the penalty, and beyond that sum the obligors in the bond were not liable. Here the amount of the costs are not left to conjecture, but they are explicitly stated in the bill of exceptions. If no objection had been made and overruled, to the rendition of a judgment by the Circuit Court, for an amount exceeding the bond, we should have regarded the irregularity as a mere clerical misprision, amendable at the cost of the plaintiff in error. But the sureties there appeared by counsel, and resisted a recovery against them, for any thing more than the penalty; and the act of 1824, authorises the revision of the judgment on error. [Clay's Dig. 322, § 55.] The payment of the amount of the bond, to the clerk of the Court, *before judgment*, did not, in itself, absolve the obligors from liability; inasmuch as the clerk had not authority, under the circumstances, to receive the money. [Murray v. Charles, 6 Ala. Rep. 678.] To have made the payment effectual, it should have been shown, that it was assented to by the plaintiff, or that the money was paid over.

The judgment of the Circuit Court must be reversed, and here rendered, that the plaintiff below recover of Windham and his sureties in the appeal bond, the debt, damages and costs, amounting to $20, and for the residue of the costs, the judgment will be against Windham alone.

MORROW AND NELSON v. WEAVER AND FROW.

1. When a debtor has been arrested, and has given a bond to keep the prison bounds, the creditor is not discharged by his making affidavit that the particular ground upon which he was arrested is untrue. Under the act to abolish imprisonment for debt, he can be discharged by reason of this affidavit only, only when in custody of the arresting officer.
2. The act to abolish imprisonment for debt, is to be construed in connection with the previous legislation on the same subject, and under it, when the prisoner seeks a discharge by a surrender of his property, &c. or by swearing that he has none, the application must be made to a judge, or two justices of the peace, as required by the previous acts: but if the schedule, &c. be contradicted by the creditor, one justice will constitute a court competent for that purpose, under the act of 1839.
3. A plea in avoidance of a bond for the prison bounds, on the ground of a discharge under the statutes relating to the discharge of debtors, is bad if it does not aver that notice was given to the creditor, and which does not show a discharge by a judge, or two justices of the peace, as provided by the act of 1821.
4. If one in the limits under a prison bounds bond voluntarily surrenders himself in the common jail of the county, and to the custody of the sheriff, in discharge of his sureties, it is a discharge of the bond, although done before the expiration of sixty days.
5. But if such surrender is colorable merely, and not intended to be for the purpose of discharging the bond, it does not have that effect. The intention of the going within the jail, and the surrender to the sheriff, is a matter for the determination of the jury.

Writ of Error to the Circuit Court of Dallas.

Action of debt, by Morrow and Nelson, against Weaver and Frow, as the sureties of one Parkman, on a prison bounds bond, conditioned that the said Parkman, should continue a true prisoner, in the custody, guard, and safe keeping of the keeper of the prison, or of his steward, bailiff, deputy, or other officer, or of some of them, within the limits of the prison bounds of said prison, as by law established, until he should be thence discharged, by due course of law, without committing any escape in the mean time. Breach assigned, that the said Parkman, on the 25th

May, 1842, did escape, and out of, and beyond the limits of said prison bounds, without having been discharged therefrom by due course of law.

The defendants pleaded as follows, among other pleas, to wit:

That before the supposed breach of the said bond, as alledged in the declaration, the said Parkman was discharged from such arrest and imprisonment, by due course of law, by virtue of his complying with the provisions of the act of the General Assembly, entitled an act to abolish imprisonment for debt, by making oath before W. F. an acting justice of the peace, in and for said county, a person authorized to administer the same, that the particular ground on which he was arrested was untrue, and that he had neither estate, effects, or monies, whereby to satisfy the debt, or liable for the same, and was thereupon released by the arresting officer, to wit: the sheriff of Dallas county. Also, that before the supposed breach of said bond, alledged. that the said Parkman was discharged from such arrest, and imprisonment, by due course of law, by virtue of his complying with the requisitions of the act, &c. entitled an act to abolish imprisonment for debt, by rendering a schedule of all the estate he had in possession, or was entitled to, and taking an oath before W. F. a justice of the peace, &c. that he, the said Parkman, did solemnly swear, that he had not any estate, real or personal, to the amount of twenty dollars, except what was therein rendered, and such goods and chattels, which, by law, were excepted from execution, and that he had not any other estate then conveyed or concealed, or in any way disposed, with a design to secure the same to his use, or to defraud his creditors; and was thereupon immediately released by the arresting officer, to wit: the sheriff of Dallas.

These pleas were demurred to, but the demurrer being overruled, issue was taken on them to the country, as it also was to a plea of performance of the condition of the bond.

On the trial of these issues, it was in evidence before the jury, that Parkman, the debtor, voluntarily placed himself in the custody of the sheriff, while on the prison bounds, and went into close confinement in the county jail; that while in said close confinement, he sent for W. F., a justice of the peace, who went to the jail with the sheriff, when Parkman asked the justice to qualify him to an affidavit, appended to a schedule of his effects, made

under, and agreeably to, the act for abolishing imprisonment for debt, which the said justice accordingly did. When Parkman was qualified, the sheriff took possession of the schedule and affidavit, and immediately discharged Parkman, who afterwards left the county, before the expiration of sixty days from the date of the bond sued on; the sheriff retained the affidavit and schedule for some time, and then gave it to the justice, who received and kept it, not as a court, or judicial officer, as he stated, but as a private individual, until a short time before this trial, when it was given to the counsel for the defendants. It was also in evidence that neither Parkman, nor the sheriff, or the justice, or any one for him, or them, had given the plaintiffs any notice of the making of the supposed surrender and affidavit, until after Parkman had been discharged by the sheriff.

On this evidence, the Court charged the jury, the plaintiffs could not recover. Also, that notice was unnecessary to be given to the plaintiffs, by any one, of the making of the surrender, schedule, and affidavit, to entitle Parkman to be discharged under the act.

The overruling the demurrer to the pleas and the charges given to the jury, are now assigned as error.

G. W. Gayle and R. Saffold, for the plaintiffs in error, made the following points:

1. The first plea to which the demurrer is overruled is bad—1. Because it assumes that Parkman was under *arrest*. One under bond, is not under arrest. [Clay's Dig. 275, § 9.] 2. The discharge in the mode asserted by this plea, could not be had upon the facts set out, for the only discharge by due course of law, when out upon a prison bounds bond is under the general insolvent law. [Clay's Dig. 272, § 2; 5 Ala. Rep. 130.] 3. If the discharge from the bond could be had, under the act of 1839, then it was necessary for the plea to have set out what the plaintiff had sworn, in order that it might be seen in what manner the defendant had sworn that the plaintiffs' cause assigned for suing out the *ca. sa.* was untrue.

2. In addition to the reasons before stated, the other plea is bad, because it omits to state that *notice* was given to the plaintiffs, in order that they might controvert the truth of the schedule, as they are allowed to do by the act of 1839. Notice is not re-

quired in terms by the statute, but its necessity is apparent, to enable the party to do that which the act allows him to do. It is also vicious, in not showing that Parkman delivered up all evidences of debt, or effects, named in the schedule.

3. The facts in evidence do not show a discharge by due course of law, because the surrender was not made to a judicial officer. [5 Ala. Rep. 130.] Nothing surrendered was given up; nor any notice given as it is provided by the statute. [Clay's Dig. 272, § 2.]

4. The principal, by going into jail, did not discharge the bond, nor was he thereby under arrest, or in custody. [1 Paine's C. C. Rep. 368; 19 John. 233; 9 ib. 146.]

5. The act abolishing imprisonment for debt, contemplates the debtor's discharge from the original custody only, when the statutory oath was taken; if this is omitted, and the debtor goes either to prison, or upon the bounds, he cannot afterwards be discharged without notice to the creditor, and then only, upon complying with the requisition of the previous enactments.

Edwards, contra, insisted that the questions upon the demurrers were not material, if the evidence showed a discharge of the bond, either by a discharge under the act of 1839, or by the return of the debtor to close confinement. The act of 1839, so far as it provides for a trial before a jury, of the question of fraud, is in violation of the constitution, for no such jurisdiction to punish can be given to a justice of the peace. Hence, if the act contemplates notice to be given, it is only to enable the party to enter upon a trial which would be illegal, and in this view the notice is unnecessary.

The surrendor by the debtor, was an entire discharge of the bond. He is required, at the expiration of sixty days, to return to close custody, and unless he does so, this is a breach of the condition of the bond. [McMichael v. Rapelye, 4 Ala. Rep 383.] The effect of a surrender, whether by the principal or by the sureties, is a discharge of the bond.

GOLDTHWAITE, J.—1. All the questions in this case, involve the construction, more or less, of the act abolishing imprisonment for debt, and cannot well be determined without ascertaining its true meaning and extent.

The first section of this act provides, "that if a plaintiff, or his agent, shall make oath of the amount of the indebtedness of any one to such plaintiff, and that the debtor is about to abscond, or such debtor has fraudulently conveyed, or is about fraudulently to convey, his estate or effects, or such person hath moneys liable to satisfy his debts, which he fraudulently withholds; then, and in that case, it shall be lawful to arrest the body of such debtor, either by bail process, *capias ad satifaciendum*, or other process to arrest the body, known to the law; but in case the debtor thus arrested, shall make oath that the particular ground upon which he is arrested, is untrue, and that he hath neither estate, effects or means, whereby to satisfy the same, then he shall be released by the arresting officer, immediately."

So far in the act, no very serious difficulty as to its meaning is supposed to arise. The creditor is only entitled to cause the arrest to be made, by making oath of the amount of his debt, and swearing to one of the four facts named by the act. When the debtor is arrested, he is dealt with in precisely the same manner as he would have been, if this act never had been passed. If it is mesne process, he either procures bail, or is at the risk of the sheriff; if it is final, he either goes into close confinement, or is allowed the benefit of the prison limits, upon giving the statutory bond and security. But in either case, if he chooses to do so, and his conscience will justify that course, he may make oath that the particular ground on which he is arrested, is untrue. When arrested on final process, in addition to the oath, he must also swear, that he has neither estate, effects or monies, whereby to satisfy the debt, or liable for the same. Whether this latter oath is likewise required when the arrest is on mesne process, we need not now inquire. Upon taking this oath, he is to be released immediately.

It results from this brief analysis of this section, that the discharge from the arrest can only take place, by reason of the debtor's denial of the truth of the ground assigned for his arrest, when the party is in actual custody of the officer. But it does not, we think, follow, that he can never be discharged, if he omits to take the oath, until after he is enlarged on bail, or on prison bounds. This will be evident, when we consider, that on mesne process he may at any time, be surrendered by his bail, and that he is then held by the sheriff, under the original authority. Be-

ing thus held, there is the same reason to discharge him, upon his taking the requisite oath, as there would be if the sheriff, during the entire interval between his arrest and the surrender, had continued him in actual custody. The statute does not speak of his being discharged by his bail, or by his securities for the prison bounds, when the oath is taken, but directs that he shall be released by the *arresting officer*, immediately—that is, as soon as the proper affidavit is made—for doubtless the oath must be in writing, and delivered to the arresting officer, as his justification for permitting him to go at large.

Under this section, it is entirely evident, we think, that the intention of the Legislature was, to put oath against oath, without requiring any notice whatever to be given, or interposing any restriction, except upon the conscience of the debtor. This construction of the first section of the act, is sufficient to enable us to determine that the first plea demurred to is bad, as it asserts a discharge by due course of law, in consequence of a denial of the ground upon which the debtor was arrested. The discharge under this oath, as we have shown, can only take place when the debtor is in custody of the arresting officer. It is not necessary therefore, to examine the other supposed defects of this plea.

2. The other plea asserts a similar discharge, as the consequence of rendering in a schedule of his estate, under the second section of the act. So much of that section as it is necessary to construe is in these words: "When a plaintiff, or his agent, shall take either of the alternative oaths required by the last section, and the same shall not be controverted by the oath of the debtor, then such debtor may discharge himself from said arrest, by rendering a schedule of all his estate, effects, choses in action, and moneys, which he has in his possession, or is entitled to, and taking" a particular oath, which it is not necessary to repeat here. "And if the plaintiff shall desire to controvert the truth of such oath, or schedule, then, on making oath that he believes the same to be untrue, any justice of the peace shall be legally authorized to summon a jury of twelve men, *instanter*, to try the question, whether such oath or schedule is untrue, and fraudulent, or not; and said jurors shall be liable to the challenge of either party, as in civil cases." The remaining section directs what shall be the consequences of a verdict against the debtor; one of which is imprisonment, not exceeding one year; and another is, that he

shall forever be debarred from the beneficial provisions of the act.

It is this portion of the statute, of which it is difficult to ascertain what the intention of the Legislature was; but if it stood alone, and unaided by other enactments in relation to the same subject matter, it cannot, we think, be questioned, that a proper construction would require the creditor, or his agent, to be *notified*, that the debtor intended to discharge himself, by rendering in the schedule, and taking the oath prescribed by the statute; for otherwise, it would be impossible to give effect to that part which provides, that in case of a verdict against him, the debtor shall be debarred from the beneficial provisions of the act. This part of the enactment, therefore, seems to indicate the intention, that the debtor should not be discharged until after the controversy between himself and the creditor. The difficulty of construction however, is lessened, when the other statutes in relation to the same subject matter are examined. We have heretofore held, in the case of Wade v. Judge, 5 Ala. Rep. 130, that the act of 1839 was to be construed in connection with the other legislation upon the same subject matter, to ascertain how, and in what manner, the property surrendered should be disposed of; and in whom the title became invested by the surrender. The same rule of construction will refer the matter of notice, left doubtful by the act of 1839, to that of 1821, which provides, very fully, how it shall be given, and when. By that act it is made the duty of the judge, or two justices of the peace, to whom the application is made for the discharge, to appoint a time and place, and to cause at least ten days notice to be given to the creditors, their agents. &c., if within the State, and twenty days notice, by advertisement, if without the State; it also provides what the notice when served on the creditor, shall advise him of. [Clay's Dig. 275, § 9.] This act also provides the mode and manner in which the hearing shall be had, and the discharge made.

The only difficulty there is, of engrafting the second section of the act of 1839 upon that of 1821, is, that the former permits the oath of the debtor, and his schedule, to be controverted before *one* justice of the peace, while the former act requires the action of *two* to receive the schedule and grant the discharge. This difficulty is nothing more, however, than an incongruity, which is sometimes found to exist in other cases, when several statutes to-

gether make one general system; but it offers no serious impediment to the operation of the law. The application for a discharge must be made to a judge, or to two justices of the peace, and they proceed to hear and determine the application for a discharge, and make the requisite orders respecting the property, &c. surrendered. If the creditor, beyond this, wishes to controvert either the oath or the schedule, any one of the justices would form a court, competent for that purpose, and we cannot doubt, that the verdict of a jury, under the act of 1839, would have the effect, as it is declared it shall, to debar the debtor from the beneficial provisions of the act.

3. We need not perhaps have said so much, if our only object was to show the badness of the other plea demurred to, for that is evidently vicious, under the conclusions to which we have come, in not averring notice to the creditor, and also, because, if that was given, there has been no discharge by a judge, or two justices, as prescribed by the act of 1821.

4. It only remains to consider the charge upon the evidence, which is, that under the proof before the jury, the plaintiffs could not recover. The proof showed, that the defendant voluntarily went within the common jail, and placed himself in the custody of the sheriff, while in the prison bounds. If this was done with the intention of surrendering himself as a prisoner, and in discharge of his sureties, we cannot doubt that it was a discharge of the bond for the prison bounds. Whatever may be the local law of New York, with respect to the inability of a prisoner, or his sureties, to avoid such a bond there, by his surrender, it is certain that it may be done under our laws. Indeed, if the prisoner omits, at the expiration of sixty days, to surrender himself, within the prison walls, that is a breach of the condition of the prison bounds bond, as, after that time, the limits allowed by law are the walls of the jail. McMichael, et al. v. Rappelye, et al. 4 Ala. Rep, 353.] To require a debtor to surrender himself at an exact day, and not allow him to do it in advance of that day, is a matter which, we think, is not a fair construction of the statute.

5. But the intention with which the surrender was made by the debtor, was a main subject of inquiry before the jury; if made with the intention to discharge his sureties, and to impose on the sheriff, the duty of holding him by virtue of the *ca. sa.* it was a discharge of the bond; but if the surrender was colorable merely,

and not intended for this purpose it cannot have that effect. This is a matter which should have been left to the jury, and having been withdrawn from their consideration, by the generality of the charge, the judgment must be reversed and remanded.

BROOKS & LUCAS v. GODWIN.

1. Where an attachment is issued by a justice in one county, returnable to a Court in another county, the objection may be taken on error, although it was not made in the Court below, if it has not been waived, by appearing and pleading to the merits.

Error to the Circuit Court of Macon.

ATTACHMENT, by the defendant against the plaintiff in error.

DOUGHERTY, for plaintiff in error.
PECK, contra.

ORMOND, J.—The attachment in this case was issued by a justice of the peace, for Russell county, returnable to the Circuit Court of Macon. This, in Caldwell v. Meador, 4 Ala. Rep. 755, was held to be a fatal defect. It is now attempted to distinguish this case, from that, because there the objection was taken in the Court below, but we are unable to see that this varies the case. The want of jurisdiction appears on the face of the attachment, which is the leading process in the action, and as there has been no waiver by appearing, and pleading to the merits, it is available on error. Let the judgment be reversed.

THE GOVERNOR, USE, &c. v. KNIGHT.

1. A judgment *nisi* rendered upon a recognizance, when it does not conform to the recognizance, may be amended *nunc pro tunc;* and if a motion for that purpose be overruled, the refusal may be revised on error.

Writ of error to the Circuit Court of Randolph.

A judgment was rendered in this case, reciting that the defendant, Knight, being solemnly called to come into Court, as he was bound by his recognizance to do, came not, but made default; therefore, it was considered by the Court, that the Governor of Alabama, for the use, &c., recover of the defendant and his sureties, &c. the sum of two hundred and fifty dollars, &c., unless they appear at the then next term, and show cause, &c. Accordingly, a *scire facias* was issued, and served on Knight and his sureties, who appeared and moved to quash the same, because the judgment *nisi* did not specify the offence which the defendant was called to answer. This motion was granted; and thereupon, while the parties were still in Court, the solicitor moved the Court, to amend the judgment *nisi*, that it might appear for what offence Knight was called to answer, so that another writ of *scire facias* might issue, requiring the appearance of the parties at a future term. This motion was founded on the indictment, and recognizance, which were sufficiently special. But it was overruled, and Knight and his sureties discharged.

Attorney General, for the plaintiff in error.
S. F. Rice, for the defendants.

COLLIER, C. J.—We have always considered cases of this character, as mere civil proceedings, in which either party supposing himself aggrieved by the judgment of a primary Court, may appeal to an appellate tribunal. If the present was *res integra*, we should be inclined to think that the mere refusal to permit the judgment *nisi* to be perfected *nunc pro tunc* was not revisable on error, inasmuch as it would not be definitive. It would per-

haps be allowable to submit the motion a second time, or oftener, to the same Court, and even if this could not be done, an action might be maintained against the defendants, upon their recognizance. There can be no question that the *data* furnished by the record, was such as authorized the proper judgment to be rendered.

We say if this were a new question, we should not be disposed to entertain a writ of error. A *mandamus* certainly appears to us, to be the more appropriate remedy, but our predecessors held, that where a motion to complete a judgment *nunc pro tunc* was overruled, a writ of error would lie to revise the decision. This is nothing more than a mere question of practice, and as no inconvenience can result from adhering to that adjudication, we are contented to allow the maxim *stare decisis* to control us. [Wilkerson v. Goldthwaite, 1 Stew. & P. Rep. 159.]

It results that the judgment of the Circuit Court must be reversed and the case remanded.

McLENDON v. JONES.

1. The Circuit Court, independent of express legislation, has the power to substitute a judgment, roll, or entry, when the original record is lost, and the substituted matter becomes a record of equal validity with the original.
2. The manner of correcting the loss, is to show, by affidavits, what the record contained, the loss of which is sought to be supplied. The substitution can only be made after a personal notice of the intention to move the Court, and the notice must be sufficiently explicit to advise the opposite party of what is intended, as well as to enable him to controvert the affidavits submitted.

Writ of Error to the Circuit Court of Henry.

THE proceeding commenced with a notice, directed to McLendon, or his attorney, by which he is informed, that Jones, as

the executor of Abner Hill, on the 3d Monday of April, 1844, at the Circuit Court, to be holden for Henry county, would proceed to establish a judgment against the defendant, in the above stated case. (i. e. John Jones, executor of Abner Hill, deceased, v. Joel T. McLendon,) obtained at the fall term of said Court, in the year 1839, or thereabouts, for the sum of one hundred and fifty dollars, or thereabouts. This notice is dated 23d March, 1844, and is signed on Jones' behalf by an attorney, in his name. It is returned by the sheriff on the 30th March, "executed," but on whom, is not stated.

At the April term of the Circuit Court, this entry was made: "It appearing to the satisfaction of the Court, that the original papers in this cause have been destroyed by fire, it is therefore ordered by the Court, that a copy writ, declarations and pleadings be established, in lieu of the papers destroyed, and also, that the plaintiff recover of the defendant one hundred dollars, as also costs of this suit, for which execution may issue."

There is now assigned as error, that the Court erred—

1. In rendering judgment for the substitution of the original papers, without proof of what those papers were.

2. Because the notice is uncertain in being addressed to McLendon, or his attorney, and because it does not appear that it was served upon the former.

3. In rendering judgment on such proceedings.

J. Cochran, for plaintiff in error, cited the act of 1843, entitled "an act to establish lost records in Henry county," p. 88, and insisted, that none of the directions of that act had been pursued. The notice itself, the foundation of the proceedings, is directed to the defendant or his attorney, when it seems clear that personal notice is requisite.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. The transcript in this cause shows nothing which is sufficient to support the judgment rendered by the Court; whether the proceeding is an original one, in the manner of an ordinary suit, or whether it is looked upon as a proceeding to substitute lost papees, or to supply a new record in the place of one destroyed by fire, or other accident. The con-

sequence is, that there must be a reversal of the judgment rendered. But, as we are, perhaps, authorized to infer, from a notice found in the transcript, this may be an attempt to supply the record, and proceedings of a cause, in consequence of the destruction of a former record, it will not be irregular to examine into the power of a Court to do this, either as conferred by the common law, or by statute.

The particular act of Assembly, approved 14th February, 1843, entited an act to establish lost records in Henry county, does not seem to confer any new authority on the Circuit Court, in this particular, or in any way affect that which it had, unless the approval of the action of the commissioners then appointed, and making its judgment thereon subject to revision in this Court, by writ of error, is to be so considered. [See Acts of 1842-3, p. 88.]

The general statute, conferring jurisdiction on the Circuit Courts, and their judges, gives them power to examine, correct, and punish the omissions, neglects, corruptions and defaults of clerks, &c. Clay's Dig. 294, § 29; but independent of this express grant of power, which perhaps does not extend to the case of supplying a new record, where one has been lost, the authority exists in virtue of the full and plenary powers with which these Courts are invested, to "minister ample justice to all persons, according to law."

Cases must frequently have occurred in which, by accident, the records of Courts of justice have been destroyed or lost, and it would seem strange, if the common law had provided no adequate means, by which the injuries growing out of such accidents could be averted, or remedied. Although, in the elementary works upon the science, we can find no express reference to such a power, yet this may arise from the fact, that its existence was never questioned. In the first, and indeed only case, we have found in the English reports, upon the subject, the substitution of the entire record seems to have been considered quite a matter of course. All that is said, is a neglect of entering judgment, and a loss of the roll having been sufficiently shown to the Court, a rule was made, that the clerk should *sign a new roll*, whereon is entered the judgment signed in the cause in *Michaelmas* term, 1729. This was thirty years previous to the motion to supply the loss. [Douglass v. Yallop, 2 Burr. 722.] Soo too, in Jack-

son v. Smith, 1 Caine's 496, the Supreme Court of New York allowed the party to make up and file a new *nisi prius* record, with a *postea* to be indorsed thereon, conformably to the minutes of the trial, and also, to enter up judgment and issue execution. This was done after a lapse of six years, upon an affidavit that the record roll had been lost or burned. In White v. Lovejoy, 3 John. 448, a *fi. fa.* upon a levy having been accidentally burnt, the Court ordered a new *fi. fa.* to be made out, and delivered to the sheriff. In our own Courts, it has long been the practice to permit the substitution of copies, when the original papers have disappeared from the files, either by accident or design. [Dozier v. Joyce, 8 Porter, 303; Williams v. Powell, 9 Porter, 493; Wilkinson v. Branham, 5 Ala. Rep. 608.]

From the authorities cited, it seems clear, that judgment rolls and entries, may be substituted, when the original records are lost, and that the matters thus substituted, by order of the proper Courts, become records of equal validity to those which are destroyed.

2. The manner of correcting the loss appears, from the cases cited, to be, to show by affidavits, what the records contained, the loss of which is to be supplied. Of course the substitution can only be made after a personal notice of the intention to move the Court, and this notice should be sufficiently explicit to advise the opposite party of what is intended; and such also as will enable him to controvert the affidavits submitted in support of the motion. If the affidavits are met with denials, by counter affidavits, it will obviously be necessary to proceed with the utmost caution; and when the evidence leaves the matter doubtful, or uncertain, the motion ought to be denied.

In the present case, the notice is defective, as not containing a sufficient description of the record proposed to be made anew, or its conformity with that which is said to have been destroyed, therefore it is useless to remand the case, as the motion ought not to be entertained upon the notice given.

Judgment reversed.

THE STATE v. MARSHALL, A SLAVE.

1. Notwithstanding the enumerated causes of challenge in the Penal Code, the Court may, in its discretion, reject such as are unfit or improper persons, to sit upon the jury, and may excuse those from serving who, for reasons personal to themselves, ought to be exempt from serving on the jury. So, also, the Court may reject any juror who admits himself open to any of the enumerated challenges for cause, without putting him upon the prisoner.
2. An application to an attorney at law, by a colored person, to draw a petition to the Legislature for his freedom, is not a priviledged communication between attorney and client. Quere, if the disclosure had been of the *facts* upon which he rested his claim to freedom.
3. The owner of a slave is a competent witness for the State, upon a trial of the slave for a capital offence.
4. It is competent to prove, on the trial of a colored person for a capital offence, charged in the indictment as a slave, that he admitted himself to be a slave. But where the proof was, that the prisoner had brought to the witness a bill of sale of himself to one E, transferred to the witness by E, which was objected to, because the bill of sale was not produced—Held, that although this might be considered as an admission by the prisoner, of his *status*, and that it was not therefore necessary to produce the instrument by which it was evidenced, yet, as the jury may have been misled, and probably acted on the belief that the bill of sale was proof, that the prisoner was, or had been the slave of E, in *favorem vitæ*, it was proper there should be a new trial.

Novel and difficult questions from Mobile.

The prisoner was indicted in the Circuit Court of Mobile, for burglary. The indictment contained two counts, in one of which the prisoner is charged to be the property of Joseph Bryan, and in the other, the property of some one unknown. The jury found a general verdict of guilty, upon which the Court passed sentence.

Pending the trial, a bill of exceptions was taken, by which it appears, that upon the empannelling of the jury, one George W. Gaines was sworn to answer questions, touching his qualifications, and to the question asked by the Court, "have you any fixed

opinion against capital or penitentiary punishments?" answered, that he had as to capital punishments." Upon which the Court set him aside as a juror, without calling upon either the prisoner or the State to challenge him.

William B. Sayre, being also called as a juror, and answering that he "was not a house holder, or free holder," was in like manner directed to stand aside.

Another juror being called and empannelled, the counsel for the prisoner, for the first time signified their dissent to the Court setting aside jurors who were challengeable for cause, when the Court recalled Sayre, and called upon the State to challenge or accept him—the State accepted him, and he being put upon the prisoner, and the prisoner neither accepting or challenging, but standing mute, the Court directed the juror to stand aside.

Two other persons were also called as jurors, who, on being questioned as to their qualifications, said upon oath, that they did not understand the English language sufficiently well to serve as jurors, and thereupon the Court set them aside, without putting them upon either the State or the prisoner.

Upon the trial, the prisoner proved that he was a bright mulatto, and that for a number of years he had acted as a free person—that he owned property, or claimed it, and had made contracts as a free person, To prove that he was a slave, the State offered as a witness Joseph Bryan, charged in the first count of the indictment, to be the owner of the prisoner, who stated that he did not consider himself to be the owner of the prisoner. That some six or seven years before, a bill of sale of the prisoner had been transferred to him, by Isaac H. Erwin; that in his opinion he had acquired no right of ownership under the bill of sale, that it was brought to him by the prisoner—that he had not given Erwin any consideration for it, nor had he ever conversed with Erwin in relation to it. The prisoner objected to the testimony, because of the interest of the witness, and because he could not speak of an instrument of writing not in Court. The Court overruled the objection, and permitted the witness to testify.

The State then offered B. B. Breeden, Esq. who testified that several years before, the prisoner had applied to him to draw up a petition to the Legislature for his freedom. Witness said, that he prepared the petition, but that the prisoner never called for it,

nor had he paid witness for it. The witness was an attorney at law, and the application was made to him at his office. The prisoner objected to this testimony going to the jury, because the facts were confidentially disclosed to the witness as an attorney at law, and because the prisoner could not admit that he was a slave. The Court overruled the objection.

The prisoner being convicted, moved in arrest of judgment, because the verdict of the jury was general, and did not state upon which count of the indictment they found the prisoner guilty, and did not ascertain whether he was the slave of Joseph Bryan, or of some person unknown. The Court refused to arrest the judgment, and certified the several matters above as novel and difficult.

HOPKINS and DARGAN, for the prisoner, made the following points:

The jurors were improperly set aside by the Court, although challengeable for cause. There was no authority whatever for discharging the jurors who professed not to know the English language. If that were so, of which there was no proof, they were still competent jurors.

The confession to Breeden, as an attorney at law, was a priviledged communication. [2 Russ. 554; 2 Starkie, 400; 2 Brod. & Bing. 1; 6 Madd. Rep. 47.]

The testimony of Bryan as to the bill of sale, was incompetent proof, [Archbold's P. 106.]

ATTORNEY GENERAL and PHILLIPS, contra, cited 1 Porter, 309; 2 Mason, 91; 4 State Trials, 1, 750; 14 Pick. 422; 2 Starkie, 396; 6 Madd. Rep. 47; 1 Blackford, 317; 6 Rand. 667; 9 Porter, 126.

ORMOND, J.—The Penal Code provides, that the existence of certain facts, when ascertained in reference to one, summoned as a juror, in a criminal case, shall be a good challenge for cause. The plain design of the statute was, to secure a fair and impartial trial, by the selection of an impartial, intelligent jury, and to accomplish that object, it secures to the accused the right to object to jurors summoned to try him, who are liable to certain specified objections. The argument, in effect is, that the provision

is for his benefit, and that therefore, he has the right to waive the objection, and accept the juror. It is only necessary to state some of these causes of challenge, to see that this argument is untenable. Can it be possible, that it must be left to the prisoner to say, whether he will be tried by one connected with him, by consanguinity, or affinity—or who has a fixed opinion, as to his guilt or innocence—or who has an interest in his conviction or acquittal? It is true, the proposition does not seem so clear, when applied to the want of a house hold residence, as an objection to a juror, but as the Legislature have thought proper to make this a challenge for cause, in legal estimation it stands upon the same footing. The right to challenge, is a legislative declaration of the unfitness of the person for that particular cause, to serve as a juror, and therefore the prisoner, in contemplation of law, cannot be prejudiced by his rejection by the Court; the design of the Legislature being, not to enable him to select such a jury as he might desire, but to secure to him the right of rejecting unfit persons summoned as jurors. In a word, it was not the intention of the act, to furnish the prisoner with the means of packing a jury for his trial, but to secure him a fair trial, by an impartial, intelligent jury.

It was not the intention of the framers of the act, that these enumerated causes of challenge, should be exclusive of all others; as it does not include persons, who by law are rendered infamous from a conviction for crimes—infants, idiots, insane, or diseased persons; yet, it is perfectly obvious such persons are not qualified to serve as jurors. Further, jurors free from any objection at the time they were selected, and summoned, might become so afterwards. It is equally clear, that it was not the design of the Legislature, to impair the discretionary power of the Court, to set aside any one, summoned as a juror, who, from any cause, was unfit to serve as a juror, or who, from reasons personal to himself, ought to be excused from this service. This power, so necessary to the proper exercise of the functions of the Court, is expressly recognized in the 13th section of the 10th chapter, as it respects grand jurors; and in the 50th section, power is given to the Court to discharge a juror, for sufficient cause, after the trial has commenced—to supply his place, and commence the trial anew. We are not aware that this discretiona-

ry power has ever been doubted, nor are we able to perceive how justice could be properly administered without it.

Of all the discretionary powers of the Court, this would seem to be least liable to abuse, as it is altogether conservative. Its exercise is confined to the exclusion of improper or unfit persons as jurors, and how this could prejudice the accused, it is difficult to conceive. If, in its exercise, the Court should reject a person qualified to sit as a juror, how does that prejudice the accused? If a juror disqualified by law, is put upon the prisoner, the case would be different; but if he is tried by an impartial jury, he has sustained no injury. This is the decision of this Court, in the case of Tatum v. Young, 1 Porter, 298, and it has not since been questioned. To the same effect is the decision of Judge Story, 2 Mason, 91.

These views dispose of all the questions relating to the rejection of jurors, and we now proceed to the consideration of the other questions raised upon the record.

Confidential communications between attorney and client, are priviledged, and cannot be divulged. The rule is not confined to communications in reference to suits in existence, or expected to be brought; it is sufficient if the attorney is consulted professionally. [Walker v. Wildman, 6 Madd. 47.] As, if he be employed to draw a deed, [Parker v. Carter, 4 Munford, 285,] or to procure a sale under a mortgage, where there is a statutory foreclosure. [Wilson v. Troup, 2 Cow. 197.] No inference can arise from the statement upon the bill of exceptions, that the communication was confidential, but the inference must be that it was not, as the only fact disclosed, was one which it was proper to make public. If the disclosure had been of the facts, upon which the prisoner rested his application to the Legislature, it might be different. It is not sufficient to exclude the testimony, that the witness was an attorney at law. The privilege of withholding the facts disclosed, does not depend upon that circumstance, but that the disclosure was made to him *professionally*. That does not appear from the facts disclosed, or from the nature of the employment, which was such as did not require legal skill, in its execution. We think, therefore, that this case is not brought within the rule.

The propriety of the admission of the witness Bryan, depends upon the question of interest. An interest to disqualify a wit-

ness, must be a pecuniary interest in the event of the suit, inclining him to the side of the party calling him. He was called to prove, that the prisoner was a slave, being charged in one count of the indictment to be the owner of the prisoner. Upon the assumption that he was the owner of the prisoner, he was clearly competent to testify for the State, as it was his interest to prevent a conviction, the consequence of which would be, the certain loss of one half his value, and the possible loss of his entire value.

It is however urged, that he has an interest in the record, which disqualifies him from being a witness. This argument is founded on the statute making compensation to owners of slaves executed for crimes, and is as follows: "Whenever, on the trial of any slave for a capital offence, the jury shall return a verdict of guilty, the presiding judge shall have the same jury sworn to assess the value of said slave, and the verdict of said jury, shall be entered on the record of the Court, and the master or owner of such slave, producing to the Comptroller of Public Accounts, a transcript from the record of the Court, regularly certified by the clerk, and the certificate of the sheriff, that any slave has been executed in pursuance of the sentence of the Court, shall be entitled to receive a warrant on the Treasurer for one half of the amount assessed by the jury, to be paid out of the funds hereinafter provided for that purpose." [Clay's Dig. 474, § 19.] The succeeding section authorizes the jury to refuse compensation to the master, when he has been to blame for the offence committed by the slave.

From this, it appears, that the verdict, and judgment against the slave, does not entitle the owner, or master, to the compensation provided by the statute; that right, is to be ascertained by a subsequent proceeding, and may be refused upon that proceeding. The previous verdict and judgment establishes nothing, but the condemnation of the slave; the right of the master to compensation, and its amount, depends upon the evidence to be adduced upon the subsequent proceeding.

Objection was also made to the testimony itself; what the objection was, does not very distinctly appear; but giving to the bill of exceptions a liberal interpretation, it may be considered, as a motion to exclude that portion of the testimony of the witness, which related to the bill of sale from Erwin, upon the ground that it was secondary

evidence. It is very clear, that the bill of sale, was not evidence before the jury, it not being produced, and its execution proved, or its absence accounted for, so as to let in secondary evidence of its contents; and if the object of the testimony, was to prove that the prisoner had once been the slave of Erwin, it should have been excluded.

It does not however, distinctly appear. that this was the purpose for which the testimony was offered, as there is an aspect of the case, in which it was certainly competent.

It appears, that the prisoner brought to the witness, a bill of sale of himself, which had been transferred by Erwin to the witness, who had never conversed with Erwin in relation to it, or had ever paid any consideration for it. This transaction occurred some six or seven years before the trial, since which time it appears, the prisoner has been acting as a free man, as the witness stated, that he did not consider himself as the owner of the prisoner.

Upon the assumption, that the prisoner knew that the paper he gave to the witness, was a bill of sale of himself, transferred to the witness, which we think from the circumstances may be fairly presumed, it was an *act* distinctly admitting his *status*, and can be understood in no other light, than that of a request to the witness to stand as his nominal owner. Considered in this aspect, the mention by the witness, of the fact that the prisoner brought him a bill of sale, was wholly unimportant, as it proved nothing but the admission of the prisoner, that he was a slave, which would have been quite as potent, without the bill of sale, as with it.

It is probable however, that the jury considered the bill of sale in evidence before them, and establishing the fact, that the prisoner either was then, or had been the slave of Erwin, and in *favorem vitae*, as the jury may have been, and probably were misled, by the permission to the witness to speak of the bill of sale, without limiting the evidence to the fact of the admission of the prisoner, to be inferred from the *act*, we think there should be a new trial. This renders it unnecessary to consider the matters urged in arrest of judgment.

Let the judgment be reversed, and the cause remanded, for another trial, or until the prisoner is discharged by due course of law.

COLLIER, C. J.—I am inclined to think, that the fact of the prisoner's carrying a bill of sale from Erwin to the witness, cannot be construed as an admission by the former that he was a slave. There is no proof that the prisoner was aware of the contents of the bill of sale, or that previous, or subsequent to that time, he had spoken to the witness on the subject, requested the witness to purchase him, or admitted that he was in servitude to Erwin or any one else. In other respects I concur in the opinion pronounced by my brother ORMOND.

GOLDTHWAITE, J.—My judgment, uninfluenced by the opinions of my colleagues, would lead to an affirmance of the judgment of the Circuit Court, on all the questions reserved; but in a capital conviction, I cannot consent that it shall stand when any member of the Court entertains a serious doubt of its correctness.

DUCKWORTH v. JOHNSON.

1. The plaintiff sold to the defendant a mare, which the latter was to pay for by the labor of his two sons, for four months, at sixteen dollars per month; agreeing that if one of the boys, (whose health was delicate,) lost any time by sickness, it should be made up. Thereupon the boys entered the plaintiff's service, and six or seven days afterwards, the healthiest of the two was slightly sick at night, and the next morning he directed them to go home—saying they need not return at the price above mentioned, but one might return and work eight months—neither of them ever labored again for the plaintiff; nor did he require them to do so: *Held*, that the defendant was not in default, and that the plaintiff could not recover the price of the mare in an action of assumpsit.

Writ of Error to the Circuit Court of Bibb.

THIS was an action of assumpsit, at the suit of the defendant in error. The questions of law presented, arise upon a bill of ex-

ceptions taken at the trial, by the defendant below. It appears that the plaintiff proved that he sold a mare to the defendant, at sixty-five dollars, to be delivered to Chesly Payne, and to be paid for by the defendant, *in the labor of his two sons, for four months, at sixteen dollars per month.* It was agreed, that as one of the boys was "puny," he was to make up the lost time, if any occurred, through sickness.

The defendant proved, that he sent his two sons to perform the labor as agreed; that they worked six or seven days, when the healthiest of the two had a slight attack of sickness, at night, and the morning after, the plaintiff told them to go home; and that they need not return again at that price. As they left, the plaintiff told one of them, that he might return and work eight months; but neither of them ever returned.

The defendant's counsel prayed the Court to charge the jury, "that if the defendant sent his boys under the contract, to perform the labor, and the plaintiff sent them home, telling them they need not return again at that price, then the defendant was not bound to send them back again till it was intimated to him by plaintiff, that he would receive them." Which charge the Court refused to give. Defendant's counsel then asked the Court to charge the jury, that if the defendant sent his two boys to plaintiff, to work out the price of the mare, agreeably to the contract, and after working six or seven days, Johnson sent them home, telling them they need not return again at that price, which was the price agreed upon by contract, that then Duckworth was not bound to send them back again, unless demanded by Johnson. This charge the Court also refused to give, but charged the jury, that defendant was bound to send them back, without any demand from Johnson, until Johnson refused to receive them, or have them, positively and peremptorily. The jury returned a verdict for the plaintiff, and judgment was rendered accordingly.

E. W. Peck and L. Clark, for the plaintiff in error.
P. Martin and B. W. Huntington, for the defendant in error.

COLLIER, C. J.—The contract of the parties, obliged the defendant to permit his sons to work four months for the plaintiff, at sixteen dollars for each month, to be applied in payment of the mare, which the latter had sold to him. Like all other agree-

ments, it should be executed according to its legal construction, and it is incumbent upon the defendant to show a performance on his part, or a sufficient excuse for his failure.

It appeared that the defendant sent his sons to the plaintiff's house, to labor according to his undertaking; that one of them having a slight attack of sickness, at night, the plaintiff told them to go home, and that they need not return again at the price he agreed to allow for them; but that one of them could return and work eight months. This conduct was a direct refusal to receive the services of the defendant's sons on the terms stipulated and a dismissal of them from the plaintiff's employment. To do this, it was not necessary that *actual force* should have been employed; a command to cease laboring for the plaintiff, and that they need not return again, at the price fixed by the terms of the contract, furnished an ample apology for the defendant's failure to perform his undertaking. The latter need not have made another offer of his sons' services; but the plaintiff, if willing to recive them, should have given notice to the defendant. Whether, in the first instance, in order to put the defendant in default, a demand of performance should have been made of him, we need not inquire, as the sending of his sons to the plaintiff, presupposes such demand, or dispensed with it.

The offer of the plaintiff, to permit one of the boys to work for him, double the length of time both were to labor, at the price stipulated for each, was not within the contract of the parties, and without the defendant's assent, was not obligatory upon him.

It results from what has been said, that the Circuit Court should have charged the jury as prayed; its judgment is consequently reversed and the cause remanded.

BELL v. OWEN.

1. An action for refusing to comply with a contract of sale, made with a sheriff upon a sale of property under execution, is properly brought in the name of the sheriff.
2. Although a contract for the purchase of land, at a sheriff's sale, cannot be enforced, if not in writing, signed by the party, yet it is unnecessary to aver this fact in the declaration.

Writ of Error to the Circuit Court of Montgomery county.

ASSUMPSIT by Bell against Owen, for refusing to comply with a contract for the sale of land. The declaration contains two counts; the first of which recites that Poe had obtained judgment, and sued out a *fi. fa.* upon it, against one Reed, which was levied by the plaintiff, as sheriff of said county, on certain lots of land, described in the declaration; that these, after being duly advertised, were exposed for sale, according to law, on, &c., when the defendant became the highest bidder for the same, at $710; it then alledges, that the defendant, in consideration that the said plaintiff, as sheriff, would make him a deed for the lots so purchased, promised, and undertook, to pay him the said sum, when he should make titles to the land; it then avers a readiness to make titles, and an offer to do so, upon payment of the money, and the defendant's refusal. The second count differs from the first, only in stating that the land was put up on condition that the highest bidder should be the purchaser, and should pay the cash upon receiving the plaintiff's deed for the lots sold, and avers that the defendant became the purchaser, and refused to comply with these conditions, although the plaintiff was willing to make a deed, and offered to do so, if the defendant would pay him the price bid.

The defendant demurred to each count of the declaration, and the Court sustained the demurrer. This is now assigned as error.

HAYNE, for the plaintiff in error, cited Robinson v. Garth, 6 Ala. Rep. 204, to show that the action was properly brought in

the name of the sheriff, and Wade v. Killough, 5 S. & P. 450, to show, that the averments of an offer to make titles, when the money was paid, was sufficient, without tendering a deed.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. The decisions recently made by us, in the cases of Robinson v. Garth, 6 Ala. Rep. 204, and Lamkin v. Crawford, at this term, show that the action is properly brought in the name of the sheriff.

2. We are not aware that there is any material distinction between the mode of declaring for the breach of a contract of sale, whether the subject matter of the contract is real or personal property. Although with respect to the former, the contract cannot be enforced unless it is in writing, signed by the party to be charged therewith, yet it is not necessary to aver, that it was so, in the pleadings. With respect to the form of the counts, in this case, they seem to be substantially the same as the more general one in Lamkin v. Crawford, and under the authority of that case, we consider them as good.

The consequence is, that the judgment of the Circuit Court is reversed and remanded.

THE STATE v. BURNS.

1. When a white person is indicted for an assault, with intent to kill and murder, and the jury by their verdict, find him guilty of an "*assault with intent to kill*," the legal effect of the verdict, is, that the party is guilty of an assault, or assault and battery, as the case may be.

Error to the Circuit Court of Mobile.

The prisoner was indicted, and tried for for an assault with intent to kill and murder, one David Walker. The jury found him guilty of "an assault, with intent to kill." Upon this ver-

dict, the Court rendered judgment, and sentenced the prisoner to be confined in the penitentiary for two years.

STEWART, for plaintiff in Error.
ATTORNEY GENERAL, for the State.

ORMOND, J.—The case of Nancy, a slave, v. The State, 6 Ala. Rep. 483, is decisive of this. In that case, as in this, the indictment was for an assault to kill and murder, and the verdict for an assault to kill only, and we held, that the necessary intendment of the finding was, that the prisoner was not guilty of an assault with intent to murder, but of an assault to kill only. This is not, in the case of a white person, an offence punishable by confinement in the penitentiary, but is a mere assault, or assault and battery as the case may be. The verdict was therefore no authority for the sentence of condemnation passed by the Court, which must be reversed, and the cause remanded, that the appropriate judgment may be rendered upon the verdict. The prisoner will remain in custody, until discharged by due course of law.

ROUNDTREE v. WEAVER.

1. If a sheriff has become liable for a failure to collect the money upon an execution, and pays the same to the plaintiff, another execution cannot be issued on the judgment for the purpose of reimbursing the sheriff.
2. Where an execution is superseded upon the petition of the defendant, it is competent to submit a motion to quash it, not only upon the grounds disclosed in the petition, but upon any other that will avail.
3. *Semble*, if the defendant approves the payment of an execution against him, made by the sheriff, in whose hands it was placed for collection, by moving to quash an *alias fi. fa.* upon the ground of such payment, the sheriff may maintain an action of assumpsit to reimburse himself.

Writ of Error to the County Court of Dallas.

THE facts of this case are briefly these; the defendant in error obtained a judgment against the plaintiff, an execution was duly issued thereon, and placed in the hands of Thomas O. Holloway, then sheriff of Dallas, which he failed to collect; thus he rendered himself liable, and was threatened with a rule, unless he advanced the money, or made some arrangement satisfactory to the plaintiff in execution, or his attorneys. Holloway accordingly confessed a judgment in favor of the plaintiff's attorneys for the amount of the execution, which he has since paid over to them. One of the plaintiffs in this latter judgment, advanced to defendant in error the amount of his judgment, and was refunded by Holloway.

It was the habit of the plaintiffs' attorneys, to allow to sheriffs the benefit of judgments and executions on which they advanced the money that they had failed to collect; and it was the understanding in this case, that the execution was to be kept open for Holloway's benefit.

Holloway had ceased to be sheriff before the confession of judgment in favor of the plaintiff's attorney, and the execution in this case subsequently issued for his benefit, according to the understanding between him and the plaintiff's attorney.

Upon these facts being shown, the County Court refused to quash the execution, which issued for Holloway's benefit, and dismissed a petition upon which a *supersedeas* had been granted.

G. W. GAYLE, for the plaintiff in error, insisted that a sheriff could not pay off an execution, and use it for his own benefit. [6 Porter's Rep. 432; 4 Ala. Rep. 321.]

C. G. EDWARDS, for the defendant, contended, that the petition for the *supersedeas* was properly dismissed, as it was not supported by the proof. *Further*, the plaintiff had no agency in the arrangement with his counsel and Holloway; there was nothing unfair or oppressive in it, and it should be upheld.

COLLIER, C. J.—In Rutland's adm'r v. Pippin and another, 7 Ala. Rep. 419, it appeared that the sheriff of Greene, on the 19th May, 1842, paid to the agent of the plaintiff in execution, the amount due thereon, saving sixty dollars, the attorney's commissions, (which they afterwards received.) This payment was an

advance by the sheriff, in discharge of an official liability consequent upon his neglect. In respect to the question, whether the defendants could avail themselves of the payment of the amount of the execution, so as to destroy the vitality of the judgment, we said, "this cannot be regarded as a disputable point in this State." The cases of Boren, et al. v. McGehee, 6 Porter's Rep. 432. Fournier v. Curry, 4 Ala. Rep. 323; Johnson v. Cunningham, 1 Ala. Rep. N. S. 257, are cited and considered conclusive against the right to sue an execution on the judgment.

The facts of the case before us are quite as strong as those stated in any previous adjudication upon the subject, and bring it fully within the principle above stated.

We have not looked into the petition to ascertain if it harmonizes with the proof adduced. The petition should certainly have stated the facts truly, but its object was to supersede the execution, and that being attained, it was competent for the defendant to submit a motion to quash the execution, not only upon the grounds stated in the petition, but upon any other that would avail him. This conclusion is so obviously correct, and consonant to the practice in such cases, that it is difficult to illustrate it more clearly.

In Rutland's adm'r v. Pippin and another, *supra*, it was supposed to be unnecessary to consider, whether, if the sheriff paid the money at the request of the defendant, he could not maintain an action against them for money paid, laid out &c., or whether the motion to quash, and thus obtaining the benefit of it, would not warrant the presumption of a previous request, or subsequent adoption of it. We may now add, that if the defendant approves the payment, by moving to quash, we cannot very well perceive how he can avoid a recovery, in an action at the suit of the sheriff for his reimbursement.

Without adding more, we have but to declare, that the judgment is reversed, and the cause remanded.

WOODWARD ET AL. v. CLEGGE.

1. When lands are sold, and a bond for titles given by the vendor, to the purchaser, and notes with sureties given for the purchase money, the sureties are not discharged, in consequence of the title being conveyed by the vendor, without payment of the notes.
2. A party whose acceptance of service is not spread on the record, in the first instance, may cure the defect, by admitting the fact, at a subsequent term, although there are other parties to the suit.

Writ of error to the Circuit Court of Talladega.

ASSUMPSIT by Clegge, against Woodward, P. E. Pearson and E. A. Pearson, on a promissory note. The defendants were not served with process, but on the writ is indorsed an agreement, purporting to be signed and sealed by them, waiving the necessity for service by the sheriff. The Pearsons pleaded to the declaration—

1. Non-assumpsit.

2. That the note declared on was signed by them as sureties of John S. Woodward, to secure the balance due on two other notes, which had been executed to the plaintiff, by Woodward, and the said P. E, Pearson as his surety, which notes were given to secure the purchase money for a certain tract of land, to wit: &c., and described in the bond for titles executed by the plaintiff to said Woodward. And that afterwards, the said plaintiff took up the bond for titles, which all the time had been in the custody of Woodward, and executed to him a fee simple conveyance of said land, thereby parting with the lien which the said plaintiff had upon the land, for the payment of the said note.

3. A plea setting out the same facts as the second, with the additional one, that Woodward afterwards conveyed the land to one Rimpson, which the plaintiff had before conveyed to him.

The plaintiff demurred to the special pleas, and his demurrer was sustained.

Afterwards a judgment was rendered by default against Woodward, without setting out the proof of his acceptance of service, and against the other defendants upon verdict.

At the next term after the rendition of this judgment, Woodward came before the Court, and on the plaintiff's motion, it then appeared to the Court, that due proof of service was made at the previous term; and the said Woodward consented to a rendition of the judgment *nunc pro tunc*, which was entered then as of the former term. Both judgments are against all the defendants, and for the same sums.

All the defendants join in assigning errors, which are, that the Circuit Court erred—

1. In sustaining the demmurrers to the special pleas.

2. In rendering the judgment given, under the circumstances disclosed by the record.

S. F. Rice, for the plaintiff in error, insisted that the sureties were entitled, in the event of payment, to be subrogated to all the securities held by the plaintiff; and that the lien upon the title to the land is one of them; and that if this has been relinquished, the sureties can never be placed in the same condition, and are therefore discharged. [Brown v. Long, 4 Ala. Rep. 50; Lucas v. The Governor, 6 ib. 826; 1 Lord Ray. 174; 1 Chitty, 218; McKay v. Dodge, 5 Ala. Rep. 388.]

F. W. Bowdon, contra, insisted—

1. That these pleas are bad, because they state the conclusion of the pleader, that the lien is lost, without setting out the facts from which that conclusion can arise. It does not necessarily result, that the lien is gone for the purchaser may have known the facts. [Frazier v. Thomas, 6 Ala. Rep. 169.]

2. The pleas do not disclose the condition of the land, so that it cannot be known whether the title was made to Woodward on a day certain, or upon the payment of the notes. The covenants of the bond are independent, and therefore no defence can be made to the notes. [Boone v. Eyre, 1 H. B. 273; Campbell v. Jones, 6 Term. 670; Carpenter v. Cresswell, 4 Bing. 409.]

3. The contract for the sale of the land being still in force, the fact that the vendor has no title, or has deprived himself of it, is no defence at law. [Clay v. Dennis, 3 Ala. Rep. 375; Young v. Triplett, 5 Litt. 247.]

GOLDTHWAITE, J.—Although the special pleas relied on

as presenting a defence to the action, may be objectionable on account of the omission of necessary allegations, yet we choose rather to consider them on more general grounds. The argument in support of their soundness is, that a creditor having a security which he can enforce against a principal debtor, cannot discharge it, without its having the effect to release the sureties. If this is even true, when a collateral security is taken from the principal debtor, we have seen no authority to extend the principle so far as to compel the creditor to hold an equitable lien for the benefit of the surety. In McKay v. Grenn, 3 John. C 56, the object of the bill was to obtain for the indorser of a note, used by its maker in payment for lands purchased by him, the benefit of a lien upon the purchased lands. Chancellor Kent there said, that the notion that the indorser had an equitable lien upon the land, because the note he indorsed was applied in part payment of the purchase money, is entirely without foundation. So with us, in the case of Cullum v. Emanuel, 1 Ala. Rep. N. S. 23, a surety insisted, when a mortgage had also been given, that the lands should be exhausted for his indemnity, instead of being applied to the security of other notes without surety, but we considered his claim as having no valid foundation.

It is said by an eminent jurist, that the principle of subrogation seems in former times, to have been considered as authorizing the surety to insist on the assignment, not merely of collateral securities, properly speaking, but also of collateral incidents, and dependant rights growing out of the original debt. [Story's Eq. § 599, a.] But the extension of the principle is denied by the more modern cases, and must be considered as firmly established. [Ib. § 499, c. d. and cases there cited; see also, Foster v. The Athenæum, 3 Ala. Rep. 302.]

In the present case, the lien arising out of the circumstance, that a bond only was executed to convey title at a future day, is a mere incident to the contract, and is not in any sense a collateral, or independent security, and therefore the sureties to the note, which the creditor also required to be added, cannot be said to have any rights which are affected by a conveyance of the title. There was then no error in sustaining the demurrer to these pleas.

2. The rendition of the judgment against Woodward, without proving his acceptance of service of the writ, was irregular, but

this objection being personal to him, was cured, when, at a subsequent term, he came in person, and admitted upon the record that the proof had been made. Independent of this admission, it was entirely competent for the Court to cure the error, by entering the evidence upon the record *nunc pro tunc.* [Moore v. Horn, 5 Ala. Rep. 231.]

Judgment affirmed.

MAGEE v. FISHER, ET AL.

1. The terms "indenture," "covenant," "demise," "and to farm let," though usually found in deeds, are not technical. The use of these terms, therefore, in the declaration, does not necessarily imply that the instrument in which they were alleged to be, was sealed. That is only effected by the use of the terms "deed," or "writing obligatory."
2. A *profert in curia*, of a parol contract, is surplusage, and does not vitiate.
3. Where several persons become bound for the payment of rent, in contemplation of law, the lease is to all, where there is nothing in the body of the instrument to negative that conclusion.

Error to the County Court of Mobile.

DEBT, by the plaintiff in error.

The declaration describes "a certain indenture of lease," executed by the plaintiff of one part, and the defendants of the other part, of which profert is made, by which, "the plaintiff did lease and to farm let, to the defendants, a certain messuage, &c., to have and to hold for the term of one year, &c., yielding," &c. "And the said defendant, did then, and there, covenant, promise, and agree, to and with, the plaintiff, to pay him the said sum of $550, at the said several times aforesaid." It then avers an entry upon the land, in virtue of the lease, and assigns as a breach the nonpayment of the stipulated rent.

The defendants craved oyer of the instrument sued on, which is set out and demurred to. The instrument as set out on oyer,

is an "indenture," between William Magee of the first part, and Samuel C. Fisher of the second part, for the lease of certain premises for one year, at a stipulated rent, and concludes thus: "In witness whereof, the parties to these presents, have hereunto set their hands, the day and date above written.

S. C. Fisher,
John Hurtel,
Chas. A. Hoppin."

The Court sustained the demurrer to the declaration, and rendered judgment for the defendants, which is now assigned as error.

J. Hall, for the plaintiff in error, contended, that the instrument was set out according to its legal effect, and being for a sum certain, debt was the proper action. That if not a "deed," the fact that profert was made, cannot prejudice. He cited 1 Chitty P. 107; 1 Stewart, 479.

Stewart, contra. The terms, "indenture, lease, covenant," have legal and technical definitions, and must be understood in their appropriate sense. The pleader cannot declare in such a manner that he can consider the instrument as sealed, or not, as may best suit his purposes.

There is also a variance between the instrument, and the declaration. The latter declares the lease was made to all the defendants, whilst the former shows, it was made to but one.

ORMOND, J.—The objection in this case, is purely technical; nevertheless if well founded, we have no authority to disregard it. It having been found in practice, frequently difficult to determine, whether an instrument was to be considered as sealed, or not, the Legislature passed the following declaratory act: "All covenants, conveyances, and all contracts, which import on their face to be under seal, shall be taken and held to be sealed instruments, and shall have the same effect as if the seal of the party or parties were affixed thereto, whether there be a scroll to the name of such parties, or not." [Clay's Dig. 158, § 41.] The evident meaning of this is, that where the parties declare their intention that the instrument shall be sealed, it shall so operate, whether it be in fact sealed, or not. Upon an inspection of the

instrument in this case, it appears, that although in the body of the paper they have used terms of doubtful import, they have not expressed their intention to make it a sealed instrument, and therefore it cannot operate as such. The terms "indenture" and "covenant," though usually found in deeds, have not a technical meaning. An instrument may be *indented*, whether under seal or not, and the practice has in fact become obsolete. A covenant is a contract, and is a writing obligatory, or parol promise, according as it is sealed, or not. The same remarks apply to the terms "demise," and "to farm let." They are generally found in leases, but may be expressed by other terms, and are therefore not technical. Nor does it add any thing to the obligation of a contract of lease, that it is under seal. The use of these terms, therefore, in the declaration, does not necessarily imply, that the instrument in which they were alledged to be, was sealed; that is only effected by the use of the terms "deed," or "writing obligatory;" and even when these technical terms are used, it is customary to add, in conformity with the precedents, "sealed with his seal." No such allegation being found in this declaration, the legal effect ascribed to the instrument, by the pleader, is, that it was a parol contract, and such in fact it was.

Making *profert in curia* of the instrument, was merely surplusage, which does not vitiate.

The legal effect of the instrument is not changed by the fact, that it commences in the singular number, and is signed by other parties, whose names are not found in the body of the instrument. In contemplation of law, the lease is to all, who by their contract have become bound for the payment of the rent, there being nothing in the body of the instrument to negative that conclusion. Let the judgment be reversed and the cause remanded.

HAYDEN v. BOYD.

1. The act of 1839, which provides that in suits upon accounts, for a sum not exceeding one hundred dollars, the oath of the plaintiff shall be received as evidence of the demand, unless the same be controverted by the oath of the defendant, does not make the defendant a competent witness to be sworn generally and give evidence to the jury.
2. The plaintiff repaired the defendant's gin, under an agreement that he should have all that he could obtain for it above fifty dollars, to compensate him for repairs; he kept it in his possession several years, endeavored to sell it, but was unable to find a purchaser; the defendant addressed a note to the plaintiff, demanding the gin or fifty dollars, which concluded thus: "if you do not give one or the other, we will have to settle the matter some other way." The plaintiff, upon the receipt of this note, permitted the defendant to take the gin into his possession. *Held*, that the inference from the evidence was, that the plaintiff voluntarily assented to the defendant's demand, and could not recover for the repairs; unless, perhaps, it could be shown that the defendant had sold the gin for more than fifty dollars, or that the repairs made it worth more than that sum, and instead of selling he had used it.

Writ of Error to the County Court of Benton.

THIS was a suit instituted before a justice of the peace, to recover thirty dollars, for work and labor performed by the plaintiff in error, for the defendant. A judgment being obtained for that sum, the defendant appealed to the County Court, where a judgment was rendered, upon a verdict in his favor.

On the trial, a bill of exceptions was sealed, at the instance of the plaintiff, from which it appears, that the plaintiff was introduced as a witness to prove his account of thirty dollars. After the plaintiff had given his evidence, the defendant was offered by his counsel as a witness, and declared on oath, that the testimony he would give the Court and jury, should be the truth, the whole truth, and nothing but the truth. To the introduction of the defendant as a witness, in the manner proposed, the plaintiff objected, but not to the form of the oath, and his objection was overruled.

It was shown, that the defendant's gin, about four years previous to the trial, was placed by him in the plaintiff's possession, to be repaired by the latter, and sold, upon the agreement that he should have all he could obtain for it above fifty dollars, to compensate him for the repairs. Plaintiff repaired the gin, tried to sell it, but had been unable to find a purchaser. Some four or five months previous to the trial in the County Court, the defendant addressed the plaintiff a note, substantially as follows: "I want you to send fifty dollars by the bearer, or my gin, as it has been on hand long enough to have something done with it. If you send me fifty dollars, the gin is yours, if you fail to do so, the gin is mine, and if you do not give one or the other, we will have to settle the matter some other way." Immediately after the receipt of this note, and in a day or two after its date, the plaintiff informed the defendant that he could take his gin whenever he called for it, that he (plaintiff) would not pay him the fifty dollars demanded. From that time the plaintiff held the gin subject to the defendant's order, and ready to be delivered, and some three or four weeks thereafter permitted defendant to take possession of it, and he now has it. The testimony given by the defendant is also set out, but the view taken of the case, makes it unnecessary to notice it.

The plaintiff's counsel, recapitulating the facts above recited, prayed the Court to instruct the jury, that if they believed them to be true, they should return a verdict for the plaintiff; this charge was refused.

S. F. Rice, for the plaintiff in error, insisted that the act of 1839, did not permit the plaintiff to be examined as a witness; it only allowed him, by a denial of what the plaintiff testified, to cause the rejection of his testimony. [Clay's Dig. 342, § 161; 3 Ala. Rep. 507; 5 Id. 196, 374; 6 Ala. Rep. 783.] The plaintiff was entitled to recover for the repairs upon the gin. [4 Stewart & P. Rep. 262; 4 Porter's Rep. 435; 6 Id. 344; 1 Stew. & P. Rep. 178.]

T. A. Walker, for the defendant, insisted that the defendant's examination was in conformity to the statute, and authorized by it. That the return of the gin, instead of the fifty dollars demand-

ed, was a relinquishment of the right to compensation, and the plaintiff could not recover.

COLLIER, C. J.—It is enacted by the act of 1839, that "in all suits to be commenced upon accounts for a sum not exceeding one hundred dollars, the oath of the plaintiff shall be received as evidence of the demand, unless the same be controverted by the oath of the defendant; but this section shall not apply to the case of executors and administrators, trustees and guardians, when sued." (Clay's Dig. 342, § 161.]

Under the act of 1819, which permits the borrower of money to prove that a usurious rate of interest was reserved, unless the lender will deny on oath the truth of his testimony, it has been held, that he could not be sworn and examined as a witness generally. And where the record affirms that he was offered as a witness, without stating the object, if there was a defence other than usury set up, it cannot be intended that his testimony was restricted to the latter. [Richards, et al. v. Griffin, 5 Ala. Rep. 195.]

In Bennett v. Armistead, use, &c. 3 Ala. Rep. 507, it was decided that the defendant could not be examined as a witness under the act of 1839, (cited above,) that his only privilege was to deny on oath the truth of the plaintiff's testimony, and thus exclude it from the jury. See also, Ivy v. Pierce, use, &c. 5 Ala. Rep. 374; Anderson v. Collins, 6 Id. 783.

In the case at bar, it appears that the defendant was sworn generally, and gave evidence to the jury, notwithstanding the plaintiff objected; this was an irregularity which affects the judgment in question.

The note addressed by the defendant to the plaintiff, is a demand of the gin, or fifty dollars, and informing the plaintiff, that if neither of the alternatives are complied with, then they would "have to settle the matter in some other way." Assuming that the contract of the plaintiff entitled him to retain the gin, until he could find a purchaser for it, and still we think the defendant did not obtain possession of it under such circumstances as make him liable to pay the price of the repairs. The defendant was not bound by the terms of his contract to pay it, but the plaintiff was to compensate himself by retaining all that the gin would sell for above fifty dollars. No undue coercion seems to have been employed to induce the plaintiff to part with it. The concluding re-

mark in the note cannot be construed into a threat, that other than legal measures would be resorted to, in order to adjust the rights of the parties. There is then, nothing to show that there was a rescission of the contract, without the assent of both parties, or that the defendant employed or threatened violent measures to obtain the gin. We must understand that the plaintiff voluntarily gave it up. Under these circumstances, we cannot think, that the mere reception and retaining of it, imposed upon the defendant the legal duty to pay for the repairs. The rescission must be taken to be a rescission by mutual consent.

Whether, if the defendant were to sell the gin at a price beyond fifty dollars, or if the repairs should make it of greater value, and instead of selling it, he should use it, he would be bound to pay the excess to the plaintiff, are questions which do not arise upon this record. For the error in the point first considered, the judgment of the County Court is reversed, and the cause remanded.

LEIPER v. GEWIN.

1. In detinue against a sheriff, for a slave seized under execution, as belonging to the defendant in execution, the latter is not a competent witness for the sheriff to prove property in himself.

Writ of Error to the Circuit Court of Lawrence county.

Detinue, by Leiper against Gewin, for a slave. At the trial, the plaintiff made title under a purchase from the sheriff, who sold the slave as the property of one Niel, by virtue of an execution against him in favor of one Owen. The defendant then proved a *fi. fa.* at the suit of the Branch Bank of the State of Alabama against said Niel, by virtue of which, as sheriff of Lawrence county, he levied again on the same slave, as the property of Niel, and offered Niel as a witness to prove that he furnished the plaintiff, Leiper, with the money paid for the slave, at the first sale, as well as fraud in that purchase. The plaintiff objected to

Niel as an incompetent witness, but the Court overruled the objection, and permitted the witness to give evidence to the jury. The plaintiff excepted, and now assigns the admission of this witness as error.

L. P. WALKER, for plaintiff in error.

A. F. HOPKINS, for the defendant, cited Martin v. Kelly, 1 Stewart, 198; Jones v. Park, Ib. 419; Pruitt v. Lowry, 1 Porter, 101; Prewitt v. Marsh, 1 S. & P. 17, Standifer v. Chisholm, Ib. 449; McGehee v. Eustis, 5 S. & P. 426; Stevens v. Lynch, 2 Camp. 332; Holman v. Arnett, 4 Porter, 63; Reimsdyk v. Kane, 1 Gall. 630; Chitty on Bills, 417; 12 East, 38.

GOLDTHWAITE, J.—None of the cases cited go to the extent of the decision of the Court below. It is true, the defendant in execution, with us, is admitted as a witness for his vendee, when the contest is between him and the creditor, or officer making the levy. [Standifer v. Chisholm, 1 S. & P. 449; McKenzie v. Hunt, 1 Porter, 37.] But there is a marked distinction between his capacity to testify under such circumstances, and when he is called to support his own title against one who does not admit that his is derived from the same source. We are not informed by the bill of exceptions, whether the defendant has sold the slave levied on, and applied the proceeds to the satisfaction of the execution; therefore it is unnecessary to consider how far that circumstance would affect the interest of the witness; but the position assumed by the Court below, seems to be nothing more or less, than calling one to subject property to his own debt. If this witness is competent, there is nothing to prevent a debtor from pointing out the property of another, to satisfy an execution against himself, and sustaining the levy by his own evidence. It seems too clear to admit of doubt, that the effect of such evidence would be to benefit himself, by discharging his own debt. This is the precise case of Bland v. Ansley, 5 B. & P. 331, the principle of which seems generally to have been recognized in England, and in this country. Thus, in Upton v. Curtis, 1 Bing. 210, it was held, in an action of replevin, by an undertenant against the landlord, who had seized chattels for rent due to the tenant in chief, that the tenant was not a competent wit-

ness to prove the amount of the rent due from the undertenant; and in Pratt v. Stephenson, 16 Pick. 325, the debtor was rejected as a witness for the attaching officer. See also, Waller v. Mills, 3 Dev. 515. So in foreign attachment, the debtor is a competent witness for, but not against the garnishee. [Enos v. Tuttle, 3 Conn. 247.] Most of the decisions bearing upon this question are collected in Cowen and Hill's Notes, 84, 91, 120, 1522, and the result seems to be, that the defendant in execution is not a competent witness for the creditor, or attaching officer, except in cases where his interest is balanced, in consequence of his liability as a warrantor, or unless he cannot be a loser by setting aside the act of the officer. In the case before us, if the plaintiff does not recover, the debt of the witness is discharged, to the value of the slave; he is therefore directly interested to defeat him, and no equipoise of interest is shown.

Judgment reversed and cause remanded.

MOONEY v. THE STATE.

1. The words inveigle, entice, steal and carry away, in the Penal Code, (Clay's Dig. 419, § 18,) denote offences of precisely the same grade, and may be included in the same count of the indictment; and upon proving either, the State is entitled to a conviction.
2. The offence of inveigling, or enticing away a slave, is consummated, when the slave, by promises, or persuasion, is induced to quit his master's service, with the intent to escape from bondage as a slave, whether the person so operating on the mind and will of the slave, is, or is not present when the determination to escape is manifested, by the act of leaving the master's service, or whether he is, or is not sufficiently near to aid in the escape if necessary.

Error to the Circuit Court of Montgomery.

THE indictment charged, that the prisoner, and two others, "did unlawfully, and feloniously, inveigle, steal, carry and entice

away, two negro slaves, the property of Francis M. Barnett, with a view, then and there, feloniously and unlawfully, to convert the said slaves to the use of them, the said Henderson Brewer, James McKowen, and John, alias Jack Mooney." The prisoner demurred to the indictment, and his demurrer being overruled, pleaded not guilty.

Upon the trial, as appears from a bill of exceptions, the State offered evidence, tending to prove, that the defendants with others, had entered into a combination to steal negroes in the neighborhood, and that on the night of the 29th March, 1844, the prisoner admitted that he was furnished with a horse, and ten dollars, and told by Brewer, to go to the residence of Barnett, and see the said slaves, at a place designated, near Barnett's House, and inform the negroes, that they, Brewer, and McKowen, would be at that place on the next night, and be then and there ready to take them off. That he communicated the message to the slaves, finding them at the place, and left them, telling Brewer what he had done. That Barnett, being advised of the effort to steal his slaves, with some of his neighbors repaired to the place appointed, on the night of the 30th March, 1844. That the slaves were at the place agreed on, between them and Mooney; that Brewer and McKowen, came riding up, on horseback, to the place where the slaves were, and after inducing them to go with them a few steps, were hailed, and fired upon by the party who were watching, upon which they abandoned the possession of the slaves, and galloped off. On the next morning, the prisoner, Brewer, and McKowen, were seen about ten miles from the place, the former aiding the latter in getting a horse, to make their escape.

Upon this state of facts, the Court charged the jury, that if they found that the prisoner was, on the night of the 29th March, 1844, to meet the slaves named in the indictment, at the place where they were subsequently seen by him, and that he had in accordance with, and in furtherance of, a common design to obtain and carry off the slaves, visited them, and delivered the message, and that this was done with the view of inveigling, or enticing, or aiding, in the inveigling and enticing said slaves to leave their master's service, and go away, and further found, as aforesaid, that this was done with a view to convert said slaves to the use of said Brewer, McKowen, and Mooney, or any of them;

and should further find, that in pursuance of such advice, and persuasion, the said slaves were on the next night induced to start, for the purposes aforesaid, and did, for any period of time, no matter how short, leave their master's service, for the purpose aforesaid, then they should find the prisoner guilty, under the indictment; and, whether he was actually or constructively present, on the night when the negroes were taken, would make no difference.

The prisoner asked the Court to charge, that unless the State proved all the allegations of the indictment, they must find for the prisoner; which the Court refused, and charged that if the prisoner was guilty of inveigling the slaves, from the possession of their master, with a felonious intent, it would be sufficient.

To the charge given, and to that refused, the prisoner excepted, and a writ of error being allowed, he now assigns for error— 1. The judgment on the demurrer; and, 2. The charge given and refused.

Belser, for plaintiff in error, The 18th section of the 4th chapter of the Penal Code, on which this indictment is founded, must be construed in connection with the two preceding sections, and, so considered, is defective in not alledging that the slaves were taken from the possession of the master, or owner. [4 Porter, 410; 1 Gallison, 497; 2 Hawkins, 249.]

The indictment is double, charging distinct offences. [2 Mass. 163; 2 Lord Raymond, 1572; 9 Wendell, 203; Archbold's Crim. Pl. 25.]

The Court erred in its charge, as the prisoner was not actually, or constructively present, when the slaves were taken, and was therefore not guilty of either stealing or inveigling the slaves. [1 Russell and Ryan C. C. 25, 99, 113, 142, 249, 332, 421.]

The charge in the indictment must be proved as laid. [3 Day, 283; 2 Nott & McCord, 3; 2 Dev. & Batt. 390.]

Attorney General, contra. The statute does not require the slave to be stolen out of the possession of the master, as was the fact in Brown's case, cited from 4 Porter, 410.

The indictment does not charge distinct offences, and if it did, as they are divisible, and of the same grade, it would be no valid

objection. [4 B. & C. 330; 2 Camp. 583; 2 Lord Ray. 860; Ros. C. Ev. 90.]

To constitute the offence of inveigling, or enticing away a slave, it is not necessary that the slave should come to the actual possession of the offender; it is sufficient, if the slave is induced by such persuasion, to leave his master's service.

ORMOND, J.—The objection urged against the indictment, is, that it charges several distinct, substantive offences. The language of the act is, "Every person who shall inveigle, steal, carry or entice away, any such slave, with a view to convert such slave to his own use, or the use of any other person, or to enable such slave to reach some other State, or country, where such slave may enjoy freedom, such person shall, on conviction, be punished by confinement in the Penitentiary, not less than ten years." [Clay's Dig. 419, § 18.] There does not appear to be any tangible, or substantial distinction, between the terms "inveigle" or "entice," as employed in this act. Both signify to allure, to incite, to instigate, to seduce, to the doing some improper act. It is true, "entice" may be used in a good sense, but that is not its natural meaning, and when so used, it is figurative, and shown to be so by the context; here it is evidently used in its natural, proper sense. The word "*steal*," being technical, ordinarily imports a larceny; but here it is evidently employed, as a synonime of "*carry away;*" for the act declares that the offence shall be complete, though there is no intention to convert the slave to the use of the taker, or of any other person, which is an essential ingredient in larceny. These are, then, all offences of precisely the same grade, although there may be a slight distinction between the two classes of "stealing and carrying away," and "inveigling and enticing." Whether, then, they are considered as distinct offences, or not, as the same penalty is provided for each, they may be included in the same count of the indictment.

Thus, in The State v. Murphy, 6 Ala. Rep 846, it was held, that one might be charged in the same count, with "receiving and concealing" stolen goods, though the language of the statute was in the disjunctive, "buy, receive, conceal, or aid in the concealment of stolen goods."

In The Commonwealth v. Eaton, 15 Pick. 173, an indictment,

upon a statute forbidding any person from selling, or offering to sell a lottery ticket, which charged, an *offering and selling*, was held to be good. In Rex v. Hunt, 2 Camp. 583, upon an information for a libel, charging the defendant with *composing*, printing and publishing a libel, it was held to be sufficient, to prove the publishing and printing. Lord Ellenborough said, "The distinction runs through the whole criminal law, and it is invariably enough to prove, so much of the indictment as shows that the defendant has committed a substantive crime therein specified."

In indictments for forgery, the established form is, to alledge that the prisoner "feloniously, did falsely make, forge and counterfeit, and feloniously did cause, and procure, to be falsely made, forged and counterfeited, and feloniously did willingly act, and assist, in the false making, forging, and counterfeiting, a certain bond," &c. [3 Chitty's Crim. Law, 1066.] Here, as in this case, distinct and substantive offences are not charged, but different grades of the same offence, punished by the same penalty, and upon proving either, the State is entitled to a conviction.

The question made upon the charges given, and refused, are, whether, to constitute the offence of inveigling, or enticing away a slave, it is necessary that the slave should come to the possession, or be under the actual control of the accused.

To a correct understanding of this statute, it is neccssary to look at the condition of our statute law, as to this offence, previous to the adoption of the Penal Code. The statute then in existence, made the offence of stealing a slave, simple larceny, punishable capitally—and in Hawkins' case, 8 Porter, 461, it was held, that the offence was not complete, as the slave was not to be converted to the use of the taker, but to be conveyed to a free State, and enjoy freedom, and therefore the act was not done *lucri causa.*

So in Wisdomes' case, 511 of the same book, it was held, that the offence was not consummated, until the prisoner was sufficiently near the slave to aid him, if pursuit was attempted, or so near as to be capable of taking actual control over him. Such being the state of the law, at the time of the passage of this act, no other construction can be put upon it, than, that it was intended to make a radical change in the law in this particular, and to make the offence consist, not in the actual manucaption, but in the seduction of the slave from his master's allegiance, and thus

to strike at the root of the evil. If an actual *asportavit* was necessary to the commission of the offence, it could scarcely ever be established, as the slave, an intelligent being, could by his co-operation, produce the same result as an actual taking, in the case of the theft of any other chattel.

It is, we think, therefore, perfectly clear, both from the phraseology of the statute, and the mischief intended to be prevented, that it was the intention of the Legislature, to create an offence essentially distinct from larceny at common law. It is not the fraudulent taking the goods of another, with intent to convert them to the use of the thief, which is denounced by the statute, but it is the influence exerted over the mind of the slave, as an intelligent being, to quit his master's service. This is consummated, when the slave, by promises or persuasions, is induced to abandon his master's service, with the intent to escape from bondage as a slave; whether the prisoner so having operated on the mind, and will of the slave, is, or is not present, when the determination to escape is manifested, by the act of leaving the master's service, or whether he is, or is not, sufficiently near to aid in the escape, if necessary. This is to "inveigle or entice away," under the statute, according to its strict letter, as well as its obvious intent and meaning; and the construction of the statute, by the Court, in its charge to the jury, being strictly correct, its judgment is affirmed.

SPYKER v. SPENCE.

1. The President of a banking corporation, the charter of which does not confer the power, either expressly or incidentally, is not authorized, without the permission of the directors, to whom are intrusted *the management of the concerns of the institution*, to stay the collection of an execution against the estate of one of its debtors; and if a sheriff omits to levy an execution, in consequence of such an order from the President, it will not become dormant, so as to lose its lien.

Writ of error to the Circuit Court of Talladega.

This was an action of trespass, at the suit of the plaintiff in error, to recover damages of the defendant, for taking possession of the storehouse and goods of the former. The defendant pleaded "not guilty," and several special pleas, justifying the trespasses charged, as sheriff, in virtue of a writ of *fieri facias*, &c. The cause was tried by a jury, who returned a verdict in favor of the defendant, and judgment was rendered accordingly. On the trial, the plaintiff excepted to the ruling of the Court. It is shown by the bill of exceptions, that the plaintiff proved the taking of the goods by the defendant, out of his possession, and their value. The defendant offered evidence tending to show that he was sheriff, at the time of the seizure; and that he levied on the goods under an *alias fi. fa.*, issued from the County Court of Montgomery, on the 23d day of February, 1842, and founded on a judgment rendered by that Court, at its May term, in 1841, against Cummings & Spyker. That an original *fi. fa.* issued on that judgment, on the 9th June, 1841, and was placed in the hands of the sheriff of Montgomery; at that time, the goods levied on were in the possession of Cummings & Spyker, in Montgomery, the execution was returned without any money being made thereon. The defendant also offered to prove, that on the 1st April, 1842, a proposition was submitted by Cummings & Spyker to the plaintiff in execution, to take the goods in the defendant's possession, as shown by the letters of C. & S., the letter of the plaintiff, and the deposition of the Cashier of the Branch Bank—all of which make part of the bill of exceptions.

The questions presented for the decision of this Court may be thus stated: 1. The plaintiff objected to each of the interrogatories proposed by the defendant to the witness, Whiting, (the Cashier of the Bank,) as leading and inadmissible, and the answers made by the witness to the same, because the commissioners authorized to take the deposition had not regularly certified the same. 2. Plaintiff also objected to the reading of a certified copy from the minutes of the proceedings of the board of directors, of the proposition submitted to the Bank by Cummings & Spyker, although the same was vouched by the deposition of the Cashier of the Bank, (of which it made a part,) to be a true copy of a genuine paper in possession of the directory. Both these

objections were overruled, and the evidence allowed to be read to the jury. 3. Evidence was adduced to show, that the execution which issued upon the judgment in favor of the Bank against Cummings & Spyker, on the 9th June, 1841, was returned by the sheriff of Montgomery, indorsed thus, "stayed by order of John Martin." There was no evidence of the authority of Martin to control the execution, unless the fact of his being the President of the Bank conferred such a power. Upon this point the jury were charged, "that to make the stay of the execution operative against the Bank, the sanction of the directors of the institution was requisite; that the President of the Bank, merely as such, had not the authority to control the execution, and without further proof of authority, express or implied, it could not be legally inferred; and if the President had no authority, it would be the same as if not ordered at all: and the lien which may have attached would continue operative." 4. It was proved that the proposition of Cummings & Spyker, and to which the plaintiff assented by his letter, was rejected by the Bank, and some days afterwards, when it was ascertained that the Bank could find a suitable purchaser for the goods proposed to be given up to it, the directory took up the proposition and accepted it, with some modifications, without a renewal of the plaintiff's assent. Upon this point the jury were charged, that if they believed "the proposition was made to the Bank by Cummings & Spyker, and accompanied by the proposition of plaintiff, was, when first acted on by the board, rejected, and afterwards was taken up, acted upon and accepted by the board, the same would not be binding on the plaintiff, unless he had subsequently assented to the same, though he may not have communicated such assent to the Bank. 5. There was evidence tending to show that the defendant sold a portion of the goods levied upon, before the plaintiff's letter to the Bank was written; and the plaintiff, by way of rebutting testimony, offered to prove the value of such goods, but the defendant objected, and his objection was sustained.

L. E. Parsons and E. W. Peck, for the plaintiff in error, made the following points: 1. If the defendant was a trespasser in levying on the goods, their subsequent sale by the Bank, though made with the assent of the plaintiff, will not bar a recovery, but will mitigate the damages merely. [7 Porter's Rep. 466; 8 Id.

191; 7 Johns. Rep. 254; 10 Id. 172.] This being the law, the evidence to show the value of the goods sold by the defendant, by way of rebutting testimony was clearly admissible. 2. The objections to the deposition of the Cashier of the Bank, were well taken, and should have been sustained. 3. The copy of C. & S.'s proposition, was at most a copy, of no higher grade of evidence than hearsay; the original, which it is to be inferred was in writing, if it could avail anything should have been adduced. 4. Conceding that the direction of the sheriff of Montgomery to return the execution, was made without a sufficient authority, and still it is insisted that there was no operative lien as against the plaintiff, who purchased *bona fide*, before the levy of the *alias fi. fa.* of the vendee of C. & S. [8 Johns. Rep. 348; 9 Id. 132; 2 Johns. C. R. 284; Horton v. Smith, *ante;* 6 Ala. Rep. 891.] 5. The President might, in virtue of his office, have given the order to the sheriff, to stay proceedings upon the execution, and return the same unsatisfied. [1 Ala. Rep. 388; Id. 398.] The charter requires him to take an oath to perform his duties faithfully, and he is required to give a bond to that effect; in the absence of all proof upon the point, the reasonable inference is, that if his powers as President, did not authorize him to control the execution, the directory had regularly conferred such authority. In proceedings against clerks, sheriffs, &c. for official neglect, the law presumes that they have done their duty, until the contrary is shown; and will not the same reasonable presumption be indulged in respect to the President of a Bank. 6. The execution then became dormant by the order to the sheriff of Montgomery to stay proceedings upon it. [5 Ala. Rep. 44; 2 Johns. Rep. 422; 8 Johns. Rep. 18, 41, 348; 9 Id 132; 11 Id. 110; 15 Id. 429; 17 Id. 274; 2 T. Rep. 596; 4 East's Rep. 523; Salk. Rep. 720; 1 Ld. Raym. 251; 5 Mod. Rep. 377; 7 Id. 37; 1 Esp. Rep. 205; 1 Camp. Rep. 333.] 7. The lien of the first *fi. fa.* was lost by the failure to levy it in Montgomery; consequently the *alias fi. fa.* to Talladega, could not relate back so as to defeat the sale of the goods made in the *interim* by Cummings & Spyker. [5 Dana's Rep. 273.] 8. The proposition of C. & S. with the assent of the plaintiff was virtually withdrawn by its rejection; to make it a binding contract afterwards upon the plaintiff, he should have had notice, that he might ratify it, if necessary; this was more especially necessary as the proposi-

tion was accepted with modifications. [9 Porter's Rep. 191; 5 Ala. Rep. 623.] The plaintiff had the right to stand on the precise terms of his offer to the Bank, and nothing more could be required of him. [5 Ala. Rep. 388.] 9. Corporations are chargeable with the acts of their agents or servants. [7 Mass. Rep. 169; 7 Cranch's Rep. 299; 12 Johns. Rep. 227; 14 Id. 118; 14 East's Rep. 6.]

A. F. Hopkins and W. P. Chilton, for the defendant. Conceding that the President of the Branch Bank was authorized to direct a stay of execution, and it is contended that the lien was not discharged thereby; to give to the delay that effect, it must have been fraudulent. [5 Ala. Rep. 43; Id. 623.] The vendee of the firm of Cummings & Spyker was one of the firm, and of course informed of the unsatisfied judgment in their favor; and the plaintiff who purchased from him, is merely substituted to the situation he occupied.

It must be intended that the original *fi. fa.* was returned at the proper return day, "delayed by John Martin," [4 Ala. Rep. 534; 6 Id. 248;] and the return is inoperative for all purposes. To give it effect, it should at least have been shown that the execution was stayed by John Martin, *the President of the Bank*, in his official character, and that he was authorized to give such direction to the sheriff. Being President did not invest him with such authority. [Clay's Dig. —, §§ 4, 5; 11 Mass. Rep. 94; Id. 288; 14 Id. 180; 17 id. 29; Id. 97; Id. 505; 12 Serg. & R. Rep. 256; Ang. & A. on Corp. 243; 6 Peters' Rep. 51; 8 Id. 16.]

In procuring a sale of the goods to be made to the plaintiff in execution, and ratifying it, (as the jury have found,) the plaintiff surrendered whatever right he had to them, or damages consequent upon the levy. The pleas merely put in issue the fact of the *fi. fa.'s* having been in the sheriff's hands as alledged; the replications do not set up the delay as a matter that avoided the liens. [3 Porter's Rep. 43; 7 Id. 167; 3 Ala. Rep. 382,]

As to the goods sold by the plaintiff, they are specifically set out in the pleadings, and proof of their value, if material, should have been part of his evidence in chief.

The copy of the proposition of C. & S. to the Bank, was not used as evidence in the manner supposed. The proposition con-

tained in the certified copy of the minutes of the directory was verbally made by C. & S.; the original, or first of the several propositions was in writing, and produced in the Circuit Court. Upon this point, there is no error. 1. Because the evidence was upon a collateral inquiry. 2. Because the second proposition was merely verbal, and the copy merely a transcript of the minutes of the board, upon which it was entered; and, 3. Because the agreement to which all the parties assented, and which has been executed, was before the Court.

They denied the application of the case cited from 5 Dana, and insisted that later adjudications have explained it, so as to show that it was not an authority favorable to the plaintiff.

COLLIER, C. J.—The act of 1807 declares, that no *fieri facias*, or other writ of execution shall bind the property of the goods against which the same is sued forth, but from the time such writ shall be delivered to the sheriff, &c. to be executed. [Clay's Dig. 208, § 41.] Under this statute it has been held, that the lien attaches as soon as the execution is received, upon the personal property of the debtor within the county, and it will bind goods that may be brought within its influence, while it continues operative. [Hester, et al. v. Keith & Kelly, 1 Ala. Rep. N. S. 316; Wood v. Gary, et al. 5 Id. 43.]

When the lien once attaches, it cannot be lost without some act with which the plaintiff is chargeable, or neglect which the law makes prejudicial to his rights. [Wood v. Gary, et al. *supra*.] Certainly the removal of the property to another county, without the consent or connivance of the plaintiff, will not impair it. The lien, it is true, does not divest the property of the debtor; he may (certainly until a levy has been made,) pass the legal title to a third person, by a sale, subject however to be defeated by a subsequent levy, and sale, under the same, or another execution issued upon an operative judgment, regularly continued and connected therewith. [Addison, et al. v. Crow, et al. 5 Dana's Rep. 273; Claggett v. Foree, 1 Id. 428; Collingsworth v. Horn, 4 Stew. & P. Rep. 237; Lucas v. Doe ex dem. Price, 4 Ala. Rep. 679; Hill v. Slaughter, 7 Ala. Rep. 632.]

These citations abundantly show, that the mere neglect of the sheriff to levy a *fi. fa.* will not have the effect to deprive the plaintiff of the rights which accrued in consequence of its delivery to

be executed. In the case cited from 5 Ala. Rep. it was said, that "to render an execution *dormant* there must be some act of the plaintiff inconsistent with the pursuit of the defendant, by execution to obtain satisfaction of the judgment." In the present case, the goods on which the defendant is charged to have wrongfully levied in Talladega, were in Montgomery, and in the hands of the defendant in execution when the original *fi. fa.* was delivered to the sheriff. This being the case, it is material to inquire whether the sheriff was authorised to return the execution without levying it, or attempting to make the money thereon.

The charter of the Branch of the Bank of the State of Alabama at Montgomery, provides for an election by the General Assembly, annually, of a President, and twelve directors *to manage the concerns of the institution.* To carry out this general purpose, the President and Directors are *jointly* invested with certain enumerated powers; the former is required to preside at all meetings of the directory; is authorized to move for judgment against a defaulting debtor, after the service of notice, and certify that the debt in question is *bona fide* the property of the bank; he is required to co-operate with the Governor, &c. in issuing State stock, to create an additional capital, and to sign notes directed to be issued by the President and Directors. [See Clay's Dig. 90 to 94.] These are the only, or principal powers and duties conferred upon the President, disconnected with the directory; all his expressly delegated powers are as a member of the directorial board.

The rights, authorities, and mode of transacting the business of a corporation, depend, not upon the common law, but upon the legislative act by which it was created, and where that is silent, upon the principles of interpretation, and doctrines of the common law. But this latter source of power cannot control by implication, an express provision of the charter, or create an authority to do that which is not necessary to give effect to the intention of the Legislature; or confer upon a particular member or officer, the right to do that which the Legislature have made several persons, or a board of directors, competent to perform. [Fleckner v. U. S. Bank, 357-8-9.]

The President and Directors of our State Banks are but the agents of the State for the purpose of managing the affairs of the corporation; the charters of incorporation are in some sense let-

ters of attorney under which they act, and are not only enabling, but are also restraining acts. [Collins v. The Br. B'k at Mobile, 7 Ala. Rep. —; Salem Bank v. Gloucester Bank, 17 Mass. Rep. 29, 30; Lincoln and K. Bank v. Richardson, 1 Greenl. Rep. 81.]

A board of directors, authorized to conduct the affairs of the company, may empower the President and Cashier to borrow money, but the President, under an authority thus conferred upon *the Cashier and himself* cannot borrow money. [Ridgway v. Farmers' Bank of B. Co. 12 Serg. & R. Rep. 256.] It has been held that the President has not, *ex officio*, authority to transfer the property or securities of a Bank; but must have express authority to that effect, from the corporation at large, or the directors, as the case may be. [Hallowell & A. Bank v. Hamlin, et al. 14 Mass. Rep. 180; Hartford Bank v. Barry, 17 Id. 97.] Nor can the President or Cashier charge a bank with any special liability, for a deposite contrary to its usage, without the previous authority or subsequent assent of the corporation. [Foster, et al. v. Essex Bank, 17 Mass. Rep. 505.] In Fleckner v. The United States Bank, *supra*, it was said that *the Cashier is the executive officer*, through whom, and by whom, the whole monied operations of the Bank, in paying or receiving debts, or discharging or transferring securities, are to be conducted. The inducements to a transfer by the Cashier, need not appear; but the Courts will presume the transfer to have been properly made by the Cashier, in the absence of proof to the contrary. This presumption however is not conclusive, but may be impeached. [Everett, et al. v. United States, 6 Porter's Rep. 166.] *Again;* the Cashier of a bank has a general authority to suspend the collection of notes under protest, and to make such arrangements as may facilitate that object, and to do any thing in relation thereto that an attorney might lawfully do. [Bank of Penn. v. Reed, 1 Watts' Rep. 101.] But an agreement by the President and Cashier of a Bank, that an indorser shall not be liable on his indorsement, is not binding on the Bank. [Bank of U. S. v. Dana, 6 Peters' Rep. 51; Bank of Metropolis v. Jones, 8 Id. 16.] We have made these citations to show that the Cashier is the executive officer of the Bank, and that his acts, if apparently within the regular course of business, in respect to the collection of its debts, will be presumed to be within the scope of his official authority, until the contrary is shown.

But such an implication cannot be indulged to sustain the direction by the President to the sheriff of Montgomery, in the present case; for although he is, in connection with the directors, invested with "the management of the concerns of said Branch Bank," yet, without their co-operation, he can only act in those cases where the charter confers upon him a sole agency; or where an authority may be deduced from the "doctrines of the common law," or "the principles of interpretation." We have seen that the act of incorporation does not devolve upon the President the duty of expediting or delaying the collection of the debts due the bank, and such a power is not deducible from any other source. Conceding therefore, that "John Martin," in his official capacity, ordered the original *fieri facias* to be returned unsatisfied, the lien which it acquired was not impaired; because the order was unauthorized. The *alias fi. fa.* was issued in the vacation which succeeded the term to which it was returnable, and consequently drew to it the lien acquired by the original, so as to overreach and avoid any transfer of the goods of the defendants therein, made in the interval.

This view is decisive to show, that the plaintiff had no right to the goods levied on by the defendant, as against the plaintiff in the execution, if they were in Montgomery county while the original *fi. fa.* was in the sheriff's hands. The jury have affirmed that such was the situation of the goods, or that the plaintiff assented to the acceptance by the directors of the bank, of the proposition of Messrs. C. & S.; for upon one of these hypotheses, or both, their verdict must have been found, as they seem to have been the only *primary* questions of fact referred to the jury. And whether the verdict was influenced by the solution of one or both these questions, no injury could possibly have resulted from the ruling of the Circuit Court. It will then be unnecessary to consider the other questions raised upon the bill of exceptions, as their decision favorable to the plaintiff, would not have entitled him to a verdict. The judgment is therefore affirmed.

CRENSHAW v. HARRISON.

1. The sheriff is a mere executive officer, and is bound to pursue the mandate of the process in his hands, unless otherwise instructed by the plaintiff on record, or his attorney. But he cannot defend a rule for not making the money, on the ground that the plaintiff had agreed with the defendant to to set off a debt, when he has received no instructions from the plaintiff or his attorney to that effect.

Writ of Error to the Circuit Court of Lowndes.

MOTION by J. and S. Crenshaw, (in whose favor there was a judgment for the use of Thomas Williamson against Caswell Garrett, A. Gilchrist and N. Cook,) against Harrison as sheriff of Lowndes, for having failed to make the money on the execution issued the 7th November, 1844, on said judgment.

At the trial it was admitted by the sheriff that the defendants in execution had a sufficiency of property in their possession in Lowndes county, whereof he could have made the money on the execution.

It was further proved, that on the 17th of November, 1842, Thomas Williamson assigned the judgment and execution to one Moseley, and bound himself to make good the transfer against all off sets; to this assignment the sheriff was a subscribing witness, and had notice thereof.

The sheriff then offered to prove by N. Cook, one of the defendants in execution, that Williamson was indebted to him in a sum equal to the amount of the execution, and had agreed with Cook, that his indebtedness should go in discharge of the execution. This evidence, by Cook, was objected to by the plaintiff, but it was admitted to the jury.

Upon this state of proof, the Court charged the jury, if this was an agreement, between Williamson, the plaintiff in execution, and Cook, one of the defendants therein, before the assignment to Mosely, that Williamson's indebtedness to Cook should go in discharge of the judgment against Garrett Gilchrist and Cook, and the jury should be satisfied, also, of a subsisting indebtedness from

Williamson to Cook, equal to the amount of the execution, then such an agreement would be a sufficient excuse to the sheriff for not making the money.

The plaintiff requested the Court to charge, that the matter of excuse offered by the sheriff, could not be inquired of, on this motion, and that the sheriff was bound to comply with the mandate of the execution, without reference to the agreement between Cook and Williamson. This was refused, and the plaintiff excepted to the several rulings of the Court. They are now assigned as error.

ELMORE, for the plaintiff in error, made the following points:

1. Cook was an incompetent witness, inasmuch as the delay of the sheriff was at his instance, and enured to his benefit.

2. The sheriff cannot be permitted to constitute himself an umpire in questions arising between the parties to an execution, and was bound to make the money independent of the agreement, unless instructed to omit it by the plaintiff. [Mason, et al. v. Watts, 7 Ala. Rep. 703.]

GOLDTHWAITE, J.—Without expressing any opinion, whether Cook was a competent witness for the sheriff, under the circumstances disclosed, we think the facts in evidence furnished no excuse to that officer for his omission to make the money. In Mason v. Watts, 7 Ala. Rep. 703, we held that the sheriff could not show a defence of his omission to make the money, that the plaintiff had released one of the defendants. Generally speaking, the sheriff is a mere executive officer, and is bound to pursue the mandate of the process in his hands, unless otherwise instructed by the plaintiff upon the record, or by his attorney; beyond this, it is possible he may be permitted to recognize the interest of a stranger, if that interest is admitted by the plaintiff on the record, or his attorney. But he is not authorized to constitute himself a judge, to determine questions of conflicting interests; to permit him to do so would lead to the greatest abuses. In the present case, it is not pretended that the plaintiff, or his attorney had given any instructions to the sheriff, which authorized him to recognize the agreement with Cook, as an executed contract. On the contrary, it may be inferred, that the sheriff was

informed of the assignment to Moseley, whose instructions it is quite probable, he afterwards was bound to follow.

The result of these considerations is, that the instructions given to the jury are erroneous.

Judgment reversed and remanded.

BEARD v. THE BRANCH BANK AT MOBILE.

1. A dismissal of one of the parties to a motion for judgment, is not a discontinuance of the entire motion, though the party dismissed was notified, and has appeared, and pleaded.

Error to the County Court of Mobile.

Motion by the Bank against the plaintiff in error. The notice issued against the plaintiff in error and two others, and was executed on all. A. Godbold, one of the persons notified, appeared and pleaded *non est factum*. The Bank moved to dismiss against Godbold, and for judgment against Beard, which was granted. The error assigned, is the dismissal of the suit as to Godbold.

Leslie, for plaintiff in error, contended, that the dismissal of the motion against one of the defendants, who had appeared, and pleaded, was a discontinuance of the entire suit.

Fox, contra.

ORMOND, J.—It has been repeatedly held, that in these summary proceedings, the notice has not the effect of process, nor is a suit pending, until a motion for judgment is submitted to the Court upon it. [See Lyon v. The State Bank, 1 Stew. 442; Bondurant v. Woods & Abbott, 1 Ala. Rep. 543; Griffin v. State Bank, 6 ib. 911.] It follows, that the omission to proceed against one of the defendants, cannot work a discontinuance of the mo-

tion. The dismissal as to Godbold, was unnecessary, but cannot prejudice. It amounts merely to a declaration, that the Bank did not desire to proceed against that person.

Let the judgment be affirmed.

O'NEIL, MICHAUX & THOMAS v. TEAGUE AND TEAGUE.

1. The declaration of a father, made to his son-in-law, when he delivered to him several slaves, shortly after his marriage, that they were intended for the use of the donor's daughter, and were not given absolutely as an advancement for her, are admissible evidence, where a deed was subsequently executed for the purpose of carrying out the intention.
2. Where a father conveys personal property to third persons, in trust for a married daughter, and delivers the property accordingly, neither the second section of the statute of frauds, or the act of 1823, "to prevent fraudulent conveyances," make registration necessary to its operation against the creditors of the husband.
3. A deed purporting to convey certain slaves from a father to third persons in trust for the "benefit" of a daughter, then recently married, provided that the daughter, together with her husband, were to retain the possession of the slaves, with their increase during coverture, and the natural life of the daughter; should she die without issue, the slaves were to revert to the donor, or his lawful heirs. Thus, as the deed declares, *conveying the legal inserest to the trustees in trust, and the possessory interest to the daughter and "the heirs of her body forever*, (if any,) if none, according to the terms before set forth:" *Held*, that the deed conferred upon the husband and wife the possession of the slaves during coverture, and the life of the wife; that upon the death of the wife, the possessory interest of the heirs of her body commences, and the husband being in possession, the slaves were subject to seizure and sale under an execution against his estate.
4. *Semble;* that a father who has settled property upon trustees for the benefit of his daughter, is a competent witness for the trustees in a controversy between them and the creditor of the husband, who is seeking to subject it to the payment of the debts of the latter.
5. Where a written agreement contains more or less than the parties intend-

ed, or is variant from the intent of the parties, by expressing something substantially different, if the mistake is made out by satisfactory proof, equity will reform the contract, so as to make it conformable to the intent of the parties. But such extrinsic proof, it seems, is not admissible in the absence of fraud, or some legitimate predicate on which to rest its admission.

Writ of error to the Circuit Court of Shelby.

On the 4th of April, 1844, a writ of *fieri facias* was issued from the Circuit Court of Bibb, at the suit of the plaintiffs in error, commanding that the sum of $3,096 11 damages, besides costs, be made of the goods, &c. of James O'Hara, and James C. O'-Hara. This *fi. fa.* was received by the sheriff of Shelby, on the 2d of May, and on the 16th of the same month levied on two slaves, viz; Caroline, a slave aged about twelve, and Henry, about eight years old, as the property of James C. O'Hara. On the next day, James D. Teague interposed a claim to these slaves on behalf of himself and Eldred B. Teague, and gave bond with surety to try the right, pursuant to the statute. An issue was made up in due form, and the question of the liability of the slaves to satisfy the execution, submitted to a jury, who returned a verdict in favor of the claimants, and judgment was rendered accordingly.

On the trial, the plaintiffs in execution excepted to the ruling of the Court. It appears from the bill of exceptions, that the plaintiffs adduced their execution, and then proved by the sheriff, that the slaves in question, were at the time of its levy, and before, in the possession of James C. O'Hara, one of the defendants in execution; that the girl Caroline was worth from $300 to $325, and the boy, Henry, worth about $300.

The claimants then proved, that in the latter part of August, 1843, John W. Teague sent these slaves to his daughter, who, a short time previously, had intermarried with James C. O'Hara, designing them as a gift to her, and for her own use during life, and to her children, (if any,) on her death, if none, then to revert to him, (the donor,) or his heirs. The father informed the husband of his purpose, at the time he sent the slaves, and that he would have a deed made in order to carry it into effect. To the admission of the proof as to the donor's object, in making the

gift, and the terms of the gift, as stated by him, the plaintiff objected.

The donor testified that a few days after he had sent the slaves to his daughter, he made the deed of gift; he told the subscribing witness, whom he employed to write it, that he wished to convey the slaves to the trustees, for the sole use of his daughter for life, and her children after her death, but if she died without children, then to revert to himself or his heirs. Plaintiffs objected to all this evidence, and especially to the competency of the donor, on the ground of interest; but their objection was overruled.

The claimants then proposed to read to the jury the deed, which is a deed of gift from the father to the claimants, as trustees of the slaves, Caroline and Henry, for the benefit of Eleanor S., who it is provided, "with her husband, the said James C. are to retain the peaceable possession of said negroes, with their increase during coverture, and during the natural life of the said Eleanor. And should said Eleanor die without issue, said negroes to revert back to me, (the donor,) or my lawful heirs—hereby conveying the legal interest to the trustees aforesaid, in trust, and the possessory interest to the said Eleanor and the heirs of her body forever, (if any,) if none according to the terms before set forth." This deed bears date the 29th of August, 1843, and by an indorsement thereon, appears to have been acknowledged by the donor on the day of its date, and filed for registration on the 4th of September of the same year.

The Court refused to allow the deed to be read as a recorded instrument, but permitted it to go in evidence upon proof of its execution, although more than twelve months had elapsed from the time it was made. To its admission the plaintiffs objected.

Claimants also proved, that the indebtedness on which the judgment was founded, was contracted in 1839, that the suit was pending about two years, and before the gift, and that the judgment was rendered in April, 1844.

The plaintiffs' counsel prayed the Court to charge the jury, that if they believed that James C. O'Hara had the possession of the slaves at the time of, and previous to the levy, then the deed coupled therewith, vested in him such an interest as was the subject of levy and sale. This instruction was refused, and the Court charged the jury, that although the indebtedness of defendants in

execution occurred before the deed was executed, and the deed was coupled with the possession, it did not vest in J. C. O'Hara such an interest as could be levied on and sold by the plaintiffs. *Further*, they prayed the Court to charge the jury, that if the slaves, about the time of the execution of the deed, went into the possession of James C. O'Hara, and so remained more than twelve months, and the deed was not recorded, it would, as to the previous creditors of James C. O'Hara, be taken to be fraudulent, if it was not on a consideration deemed valuable in law. This instruction was also refused, and the jury were informed, that the deed was not of that class which the law required to be recorded. The several points made by the bill of exceptions are regularly reserved and presented for revision.

F. W. Bowdon, with whom was B. F. Porter for the plaintiffs in error, contended—1. The parol evidence of the donor's intentions, was calculated to mislead the jury, and went to explain or vary the deed, which was in itself unambiguous. [3 Stew. Rep. 201; 4 S. & P. Rep, 96; 1 Porter's Rep. 359; 2 Porter's Rep. 29; 5 Porter's Rep. 498.] 2. The deed does not vest in Mrs. O'Hara the separate estate in the slaves, and the instructions asked by the plaintiffs upon this point, should have been given to the jury. [Clancy on Rights, &c. 262-8; 2 Porter's Rep. 463; 8 Porter's Rep. 73.] It attempts to create an estate tail, consequently is thus far void, and the absolute estate vests in the husband, [Clay's Dig. 157, § 37; 2 Porter's Rep. 473.] But if this be not so, then it is insisted that the husband is entitled to the slaves for the life of the wife, although they may pass to their children, &c. after her death. [Dunn, et al. v. The Bank of Mobile, et al. 2 Ala. Rep. 152.]

3. The deed was not regularly registered, and was only admitted upon proof made at the bar, of its execution. It is insisted that the Court erred in instructing the jury, that the statute did not require such a deed to be registered.

COLLIER, C. J.—The declarations of the father of Mrs. O'Hara, made to his son-in-law when the slaves were delivered to him, that he intended them for the use of his (donor's) daughter, &c. were admissible, for the purpose of showing that they were not given absolutely, as an advancement for her, and did not thus

vest *jure mariti*, so as to become subject to the husband's debts, or render inoperative any settlement of them which the father might make. Certainly it would not be allowable to expound the deed by a reference to the previous declarations of the donor. Where an act is consummated by writing, all oral statements are merged, and cannot be resorted to for the purpose of ascertaining the meaning of the party making it; unless, perhaps, where fraud is alledged, or an application is made to equity to reform it, that the intention of the parties may be truly expressed.

It is not necessary to consider at length, whether it is essential to the operation of the deed, as against the creditors of the husband, that it should have been registered within a definite period, after its execution. The cases of Swift v. Fitzhugh, 9 Porter's Rep. 39; Thomas & Howard v. Davis, 6 Ala. Rep. 113, very satisfactorily show, that neither the second section of the statute of frauds, nor the act of 1823, "to prevent fraudulent conveyances," require such a deed to be recorded. It cannot come within the first, because possession accompanied the deed and vested in the donee; nor within the second, because it is neither a "deed of trust, or other legal incumbrance," in the sense in which these terms are there used.

The important inquiry is, does the deed create a separate estate in the donor's daughter, or in herself and children, if any? In order to solve this question, it is necessary to make an analysis of the deed. The consideration of the gift is said to be, natural love and affection for the donee, and one dollar paid by the trustees, and the conveyance is made to the claimants, in trust for the benefit of Mrs. O'Hara, and the heirs of her body. It is then provided, that Mrs. O'Hara and her husband are to retain the peaceable possession of the slaves, with their increase during coverture, and during the natural life of the former; and should she die without issue, then the slaves are to revert to the donor, or his heirs. Thus, (as the deed declares,) conveying the legal interest to the trustees, in trust, and the possessory interest to the daughter and the heirs of her body forever; if none, then according to the terms already stated. The first question which naturally presents itself, is, does a conveyance to trustees, for the benefit of a married woman, and the heirs of her body, confer upon her an estate entirely separate and distinct from her husband.

An agreement by a husband, that "his wife shall enjoy and re-

ceive rents and profits," it has been held, gives her a separate estate. [Clancey on Rights, 263.] So also, a bequest to a married woman, "for her own use, and at her own disposal;" for the necessary effect of the words "at her own disposal," in connection with those preceding them, was to give the legacy to the separate use of the wife. [Id. 263-8-9.] But it has been decided, that a legacy to a *feme covert*, to "her own use and benefit," was not to her separate use. [Id. 267-8.] And vesting property in trustees for a married woman, is not alone sufficient to exclude the marital rights of the husband, and to vest in the wife an exclusive property. [Id. 267; Lamb v. Wragg and Stewart, 8 Porter's Rep. 73.]

In Jamison's Ex'r v. Brady and wife, 6 Serg. & R. Rep. 466, it was adjudged that a bequest to a married woman "for her own use," conveyed an interest *for her own separate use.* But this conclusion was attained not alone from the import of the words used, but from what was supposed to be the intention of the testator, as gathered from the will, and inferred from extrinsic circumstances. The indebtedness of the husband to the testator was remarked upon as indicating the testator's intention to vest a separate estate in the wife; otherwise his bounty would be of no avail, but operate rather as a release of the husband. But where the father gave personal property to a trustee, in trust for a married daughter, "for and during the term of her natural life," and after her death to such child or children of her's as might then be living, it was held, that the property was subject to the husband's debts, at least during the wife's life. [Lamb v. Wragg and Stewart, *supra.*]

In Crawford v. Shaver, 2 Iredell's Rep. 238, the testator bequeathed all his estate, both real and personal, to his daughter C. and son T., to have and possess during their lives, and after their death to descend to their children. If T. died without issue, the property devised and bequeathed to him, was to vest in the children of C. It was directed that the slaves given to C. and T. were to be hired out, in, &c. and the profits equally divided between them during life; that the dwelling house of the testator and tract of land on which he lived, should not be rented out, but other lands were to be rented out as they might deem fit. At the date of the will and testator's death, C. was a married woman. It was held, that the wife, under the expressions of the

will, did not take an estate to her separate use; the Court remarking, that a construction will not be forced to raise a trust for that purpose, nor will they gather the intention that a separate estate is limited to her, from terms that are ambiguous or equivocal.

It is said, that a trust to the separate use of a married woman should be very distinctly expressed; that as such claim is against common right, the instrument under which it is made, must clearly speak the donor's intention to bar the husband, else it cannot be allowed. [Clancey on Rights, 262-7; Lamb v. Wragg and Stewart, *supra;* Hawkins, et al. v. Coalter, et al. 2 Porter's Rep. 463; Dunn v. The Bank of Mobile, 2 Ala. Rep. 152; Inge, et al. v. Forrester, 6 Ala. Rep. 418.] And in Thompson, et al. v. McKissick, 3 Hump. Rep. 631, the Court held, that the intention to create a separate estate must appear plainly, by the use of words that denote an exclusion of the husband, or a declaration as to the enjoyment of the property, incompatible with his dominion over it. [See Hunt, et al. v. Booth, et al. Freeman's Rep. 215.]

So where S., by deed of gift, conveyed to F. certain slaves in these words, "in trust for the use and benefit of my daughter, Ann, and her lawful heirs;" "in trust for the proper use and benefit of said Ann, and her heirs forever," it was determined that the daughter took an estate, for her sole and separate use, and that during her life it was not subject to the debts of the husband. [1 Smede & M. Ch. Rep. 647.] But in a conveyance to a married woman, the words "in her own right," would not, by the common law, invest her with a separate estate in the property. [The G. G. Bank v. Barnes, et al. 2 Smede & Rep. 165.]

From this view of the law, it sufficiently appears, that a gift to trustees for the *benefit of* a married woman, and her heirs, does not impart an interest to her beyond the control and dominion of her husband. There is no peculiar potency in the word "benefit," which the terms "in trust for," and "for the use of," do not possess. Every gift, either to a third person directly, or in trust for him, is for his *benefit*, whether or not it is so declared *in totidem verbis;* and the word, so far as the legal effect of the instrument is concerned, is a mere expletive, neither limiting or enlarging the estate of the beneficiary. If, however, the isolated expression were of equivocal import, as it respects the donor's

intention, the declaration that the husband and wife should retain the possession of the slaves during coverture, and the life of the latter, very satisfactorily shows, that it was not intended to exclude the husband from the enjoyment of the property during the life of the wife, or so long as he might live with her. The subsequent provision, that in the event of Mrs. O'Hara's death without issue, the slaves should revert to the donor or his heirs, and declaring that the legal interest was conveyed to the trustees, in trust, and "the possessory interest" to her and her heirs, cannot impair the rights of the husband beyond the limitation prescribed in the preceding part of the deed. The property was only to revert, upon a contingency which could not be manifested until the wife's death. Perhaps it is not necessary to inquire, whether the right, or the enjoyment thereof, vested in Mrs. O'Hara's children, during her life, or whether the term "heirs" is to receive a technical meaning, and their right under the deed, vest upon her death. In either event, the husband, under the terms of the deed, would be entitled to the possession of his wife's interest; and this right, coupled with the actual possession, is the subject of levy and sale under the execution against the husband alone. [Dunn and wife, et al. v. The Bank of Mobile, et al. *supra.*] The fact that the slaves are conveyed to a trustee, for the benefit of the wife, if they come to the possession of the husband, and she has no separate estate, they may be sold for his debts, without a decree in equity. [Inge, et al. v. Forrester, *supra;* Carlton & Co. v. Banks, 7 Ala. Rep.] We may, however, remark, that considering the deed in all its parts, we cannot doubt that it confers upon the husband and wife the right of possession, during the coverture, and during the life of the wife. Upon the death of Mrs. O'Hara, the husband's right of possession ceases; and after that event, the possessory right of the heirs (as it is called,) commences. From this view of the deed it results, that as the husband was in possession of the slaves, they were subject to seizure and sale for the satisfaction of the execution.

The conclusion attained, renders it unnecessary to consider, whether the donor was a competent witness for the claimants; but we cannot very well conceive what interest he had in the result of the suit. True, (as it was natural,) the presumption is, that his feelings were concerned for the success of the trustees, they being the representatives of his daughter's interest. But

the mere matter of feeling does not affect the competency, but the credibility of a witness only.

Where the written agreement contains more or less than the parties intended, or is variant from the intent of the parties, by expressing something substantially different, if the mistake is made out by satisfactory proof, *equity* will reform the contract, so as to make it conformable to the precise intent of the parties. But such proof is not admissible at law, at least under the circumstances of the case before us. [Paysant v. Ware & Barringer, et al. 1 Ala. Rep. 170-1.] Whether such proof can be made as will show a mistake, and authorize a Court of Chancery so to modify the settlement as to secure to Mrs. O'Hara a separate estate in the slaves, is a question not now presented, but proper for the consideration of the parties interested; and whether her children, or those who may be entitled after her death, can protect their future interest, is alike foreign to our inquiries at present.

The consequence is, that the judgment of the Circuit Court is erroneous—it is therefore reversed and the cause remanded.

LOWTHER, ET AL. v. CHAPPELL.

1. An admission made by the principal maker of a note, coupled with a promise to pay, will not revive the debt so as to take it out of the bar of the statute of limitations as against a co-maker, who is his surety.

Writ of Error to the Circuit Court of Macon.

Assumpsit, by Lowther and Taylor, as administrators of Samuel Lowther, against Chappell, as a joint maker of two promissory notes, dated 17th January, 1829, one payable three, and the other four years after date. The suit was commenced 26th August, 1843. The defendant pleaded non-assumpsit within six years; to which the plaintiff replied, that he did promise and undertake, in manner and form as they had declared against him, within six years next before the commencement of the suit.

At the trial, the plaintiffs produced and read in evidence to the jury, the notes described in the declaration, which were signed by Evans Myrick, John D. Chappell, George A. Chappell, W. B. Head, and the defendant. They also proved by one Hardeman, that he, in January, 1838, had received the notes for collection, and then presented them to Myrick, one of the makers, who promised to pay what was due, in the fall of that year; a calculation was made by Myrick and the witness of the sum due, which was ascertained and agreed on. The evidence also conduced to prove, that payments were made by Myrick on these notes, in the years 1834, 1835, and 1836; also, that Myrick was principal and the others his sureties on the notes, which on their faces purported to be joint and several.

Upon this state of proof, the Court charged the jury, that if the debt sued on was barred by the statute of limitations, then a promise made by Myrick, whether he was principal, or only a co-promissor, would not revive the liability of the defendant; and although the jury might be satisfied that Myrick had promised within six years, prior to the commencement of this suit, to pay the notes, the plaintiffs were not entitled to recover.

Also, that partial payments upon a demand prevent the running of the statute, but if more than six years had intervened between the last payment and the commencement of this action, then a promise by Myrick would not prevent the statute from running in favor of the defendant.

The plaintiffs then requested the Court to charge the jury, that if they believed six years had not elapsed between the time of the last payment, and the promise by Myrick, and that this suit was brought within six years after that promise, then the plaintiffs were entitled to recover.

This was refused, and the plaintiff excepted, as well to the charges given, as to the refusal to charge as asked.

The assignment of errors presents the same questions to this Court.

J. E. Belser, for the plaintiffs in error, argued—

1. It is well settled that payment of part prevents the running of the statute. [McGehee v. Greer, 7 Porter, 537.] Here, in 1838, before the statute had run from the last partial payment, a new promise was made by the principal in the note. This being

made before the bar of the statute was complete, is supposed to prevent it from running. [Torbert v. Wilson, 1 S. & P. 200; Garrow v. St. John, 4 Porter, 223; Whitcomb v. Whitney, 2 Doug. 652; Parham v. Raynel, 2 Bing. 306; Jackson v. Fairbanks, 2 H. Black. 340; White v. Hall, 3 Pick. 291; Dinsmore v. Dinsmore, 21 Main. 433; Ballard v. Lathrop, 4 Conn. 336; Burleigh v. Scott, 8 B. & C. 36; Fry v. Baker, 4 Pick. 382; Sigourney v. Drury, 14 Pick. 387; Hunt v. Bridgan, 2 Ib. 581.]

2. Here is a joint obligation, in which an admission by one will be proper evidence to charge the others, so long as the contract remains undischarged; and the current of authority, as between partners, is, that the admission by one is the admission of all. [King v. Hardwick, 11 East, 589; 1 Taunt. 103; 1 M. & S. 249; Peake Ca. 203; 4 D. & K. 17; 3 Mun. 191; 6 John. 269; 15 Ib. 409; 7 Wend. 441; 4 Conn. 336.]

3. An admission by one partner, after the dissolution of the partnership, will take the demand out of the statute. [Smith v. Ludlow, 6 John. 266; Hefflin v. Banks, 6 Cow. 650; Pollard v. Cheek, 7 Wend. 441; Dinsmore v. Dinsmore, 21 Maine, 430.]

4. The case of Bell v. Morrison, 1 Peters, 351, is distinguishable from this, as that was the mere acknowledgement by a partner, *after the statute had run.* [Sigourney v. Drury, 14 Pick. 397; Bostwick v. Lewis, 1 Day. 33; Howard v. Cobb, 3 Ib. 309; Baird v. Lathrop, 4 Conn. 339; Clemenson v. Williams, 8 Cranch, 72.]

G. W. Gunn, for defendant in error.

GOLDTHWAITE, J.—The principle upon which the decision of Whitcomb v. Whiting, 2 Doug. 652, is rested, has often been doubted in the English Courts, and frequently denied in our own. Without reference to the many adjudicated cases on this much vexed question, it will be permitted us to state, the constant leaning now, of all Courts, is to restore the statute of limitations to its proper standing, and give it the effect which its authors evidently intended it to have; i. e. to shut out all litigation upon the expiration of the limited period, unless the original promise is revived by something equivalent to an express promise to pay, by the party sought to be charged. To this effect is Bell v. Morrison, 1 Peters, 351; Clemenson v. Williams, 8 Cranch, 72; Jones

v. Moore, 5 Binn, 573; Levy v. Cadit, 17 S. & R. 175; Ex'n Bank v. Sullivan, 6 N. H. 137; and many other cases might be added. When one person becomes bound with others, either upon a joint contract, or as a surety, there is no reason why the admission of those with whom he is joined, that the debt is unpaid, or their promise to pay it, shall operate to his prejudice, because it seems entirely evident, that such admission, or promise, may be made without a knowledge of the circumstances which exist between the holder of the debt and the other parties, who are sought to be thus charged. In many cases, where the contest is with respect to the validity of the contract, there is great force in the argument, that as all have a common interest under the contract, the admissions of one shall operate against all; but even there it enterely fails, if the contract, in point of fact, was a several one, and other parties are subsequently joined as sureties; it would be most unreasonable to allow the admission of a subsequent surety, to validate a defective contract, so as to bind his principal; and on the other hand, it would be equally so by the admission of the principal to extend the term for which the surety has consented to be bound. Conceding then, that the payments made by the principal debtor, in this cause, in 1836, and his admission of the debt as existing, in 1838, coupled with his promise to pay, had the effect to prevent the statute from running, as to him, yet it in nowise prevented it from doing so as to the sureties. The legal effect of their engagement is, to continue bound for the principal for six years, after the period limited for payment, and no act or admission, which is not their own, can impair this effect of the original contract.

It follows, that the law was correctly ruled by the Circuit Court.

Judgment affirmed.

HOBSON v. KISSAM & CO.
SAME v. CLUTE & MEAD.
SAME v. BAKER, JOHNSON & Co.
MURPHY v. JAMES PAUL.
NIXON v. J. R. W. & J. M. C. FOSTFR.

1. A certificate by the proper officer, indorsed upon a deed of trust, that the maker appeared before him, within the time prescribed by law, "and acknowledged that he signed, sealed and delivered, the foregoing deed of trust, to the aforesaid W. M. M." (the trustee,) is a sufficient acknowledgment of its execution, to authorize its registration.
2. After a levy on property, and bond given to try the right, a junior execution cannot be levied on the same property, pending the trial. An execution issued on an elder judgment, but which has lost its *lien*, by the lapse of a term, will be postponed to one issued on a younger judgment, during such interval.
3. It is improper to send the original papers to this Court, and if sent, will not be looked to, to settle any disputed question.
4. Upon a trial of the right of properry, the fact that an execution from the Federal Court had five years before been levied on the same property, and bond given to try the right, raises no question, until it is shown that the trial is still pending, although the levy of such execution was first made.

Error to the Circuit Court of Tuscaloosa.

TRIAL of the right of property claimed by the plaintiff in error, the defendants in error being execution creditors of Baker Hobson.

From a bill of exceptions, it appears, that the claimant derived his title by virtue of a sale made under a deed of trust, made by the defendant in execution, on the 25th March, 1839—the execution of which he proved by one of the subscribing witnesses—the plaintiff then read the certificate of the probate of the deed, as follows:

The State of Alabama, } Personally appeared before me, Cy-
Tuscaloosa county. } rus A. Miller, a justice of the peace for said county, the within named Baker Hobson, who acknowledged

that he signed, sealed and delivered, the foregoing deed of trust, to the aforesaid William M. Murphy. Given under my hand and seal, this 23d of April, 1839. C. A. Miller.

Filed for registration the 23d of April, 1839, and on the same day and year recorded, in book P. &c.

Test: Moses McGuire, Clerk.

And moved the Court to exclude the deed from the jury, for want of a sufficient certificate of probate—it not appearing thereby, that the deed was executed on the day it bore date—upon which motion the Court rejected the deed, there being no proof of express notice to the plaintiff, of the execution of the deed.

The claimant then introduced certified copies of six alias executions, which issued from the Circuit Court of the United States at Mobile, in favor of Suydam & Nixon v. Baker Hobson, and which were, on the 22d April, 1840, levied on the same slaves as the present execution, and proved, that the said property was claimed by the trustee, and bond given to try the right, and insisted that the slaves were not subject to levy under this execution, because of the previous levies from the Circuit Court of the United States, and bonds given to try the right of property. But the Court held, that as it was not shown affirmatively, that the suits for the trial of the right of property were still pending in the Federal Court, it interposed no obstacle to the levy of the plaintiff.

The claimant then introduced an execution from the County Court of Tuscaloosa, in favor of Baker, Johnson & Co. against Baker Hobson and others, which came to the sheriff's hands on the 24th August, 1839, and was on the 25th January, 1840, levied on the same slaves now in controversy, and that the claimant gave bond for the trial of the right, which was still pending in the Circuit Court of Tuscaloosa, and insisted, that in consequence of this previous levy, they were not subject to the levy of the plaintiff's execution—but the Court held, that as both executions issued from the same Court, and as the trials of the right of property were depending in the same jurisdiction, the said levy could be made.

The claimant then proved, that the first execution in this case, issued on the 8th March, 1839, and was returnable to the July term of the County Court—that no other execution issued until

the 18th November, 1840, under which the levy in this case was made, and insisted that by the lapse of an entire term, the first execution had lost its lien, and that the levy on the last execution must be postponed to those previously mentioned; but the Court overruled the objection, and charged the jury, that the property levied on in this case, was liable to the satisfaction of this execution. To all which the claimant excepted, and which he now assigns as error.

MURPHY and JONES, for the plaintiff in error:

The question upon the probate of the deed, has in effect been decided in this Court, in Bradford v. Dawson & Campbell, 2 Ala. Rep. 203. The different acts on the subject, when collated, show, that the probate is not of the substance of the requisition, necessary to put a deed upon record, though to make it evidence, under the statute, it may be, that the form must be strictly pursued.

The case of Bradford v. Dawson has been repeatedly recognized, and approved by this Court, in 2 Ala. Rep. 314; 3 Ala. R. 629; 4 Ib. 469, and 5 Ib. 297.

The levy of the execution of the Federal Court, placed the property in the custody of the law, and it was not necessary to show, that it was still pending. [10 Peters, 400; 6 Ala. Rep. 45.] The issue, in such a case as this, is to the time of the levy. [5 Ala. Rep. 770; 6 Id. 27-] And having proved that there was a levy, and a bond for trial, it devolves on the other side to show it was at an end.

As to the execution of Baker, Johnson & Co., it was evidently entitled to priority over the execution of the plaintiff.

THORNTON, PECK and CRABB, contra:

The statutes of registration contemplated two purposes, the giving of notice, and the perpetuation of testimony. The first is common to all the acts—the last is confined to absolute deeds of real estate. The law merely requires deeds of trust to be proved as deeds for real estate, and does not make the probate evidence of the execution of the deed. The case of Fipps v. McGehee, 5 Porter, 403, is not shaken by the cases cited from 2 Ala. Rep. 203. That case merely determines, that where the deed is executed on the day of the pro-

bate, the body of the deed may be looked to, in aid of the probate.

The statute has prescribed the manner in which the deed shall be proved to admit it to record, and gives to it when thus proved and recorded, the effect of actual notice. A registration upon an irregular probate, cannot have the effect of constructive notice, as has been repeatedly held. [4 Kent's Com. 174; 2 Binny, 45; 3 Cranch, 155.

As to the second point they contended, that to give effect to the previous levy, it must be shown that the trial of the right of property was still pending.

ORMOND, J.—The principal question in the cause, whether the probate of the deed of trust offered in evidence by the claimant, was sufficient to authorize its registration, depends upon the proper construction of the statute. [Clay's Dig. 152, § 7.] "Any deed of conveyance of real estate may be admitted to record if acknowledged by the makers thereof, or be proved by any of the subscribing witnesses thereto, and the following shall be the form of the certificate of acknowledgment, or probate of all deeds: Personally appeared before me, &c., the above named A. B. who acknowledged that he signed, sealed, and delivered the foregoing deed, on the day and year therein mentioned, to the aforesaid C. D." The succeeding part of the section varies the form when the probate is made by the witnesses to the deed, but in all other respects is the same.

The act of 1828 provided for the probate, and registration of deeds of trust of personal, and real property, requiring the first to be recorded in the County Court, where the maker resided, within thirty days after the execution of the deed, and the last within sixty days, in the County Court of the County where the property is situated, "or to be void against creditors, and subsequent purchasers without notice." A succeeding section declares that "such deeds and conveyances of personal estate, shall be proved or acknowledged as deeds and conveyances of real estate." [Clay's Dig. 256, § 7.]

The design of this act is, to give notice of the deed; for this purpose it is to be recorded, and to authorize its registration, it must be acknowledged by the maker thereof, or be proved by any of the subscribing witnesses thereto, before one of the officers

named in the act. These are the conditions, and the only conditions, prescribed by the act, to the admission of the deed to record, and when they are complied with, the party has the right to have his deed registered.

The act of 1828 does not provide for the mode, or manner of the probate, but by reference to the previous registry acts of absolute deeds of real estate, and in Bradford v. Dawson & Campbell, 2 Ala. Rep. 203, and again in Ravisies v. Alston, 5 Ala. R. 277, we considered, that the reference to the former act was merely for the probate of the deed, and that it was not an adoption of that portion of the act, which made the certificate of the probate evidence. Thus in the first cited case, it is said, "It is obvious that proved, or acknowledged, must refer to the recording of the instrument, and nothing further. The effect of the probate is to admit the deed upon the record, and there it operates as notice to all the world."

The design of the act of 1828 was to prevent frauds; for that purpose it declared the deed void unless recorded within thirty or sixty days. The whole object of the registry was notice; it subserved nothing else. It would be therefore most unreasonable to suppose, that the Legislature made any reference to the "form" of the certificate provided by the act of 1812, when that *form*, if strictly pursued, could accomplish no object whatever. The act of 1812, on the contrary, was not only intended for notice of the transfer of the title, but also to provide evidence of the due execution of the deed, by which the transfer was made. We can see no reason whatever, for departing from the plain, and intelligible language of the act of 1828, that deeds of trust shall "be proved, or acknowledged, as deeds of real estate;" which is, *by the acknowledgment of the maker, or by proof of any of the witnesses thereto.*

The act of 1812, to which reference is made, proceeds further to provide the "form" of the certificate, which the officer appointed to take the probate shall make; the apparent object of this enactment was to produce uniformity in these certificates, which by the terms of the act were to be evidence of the facts recited in them, and by a succeeding section it is declared that they shall be good, if they contained the "substance," whether in the form or not, of that given in the act.

We need not stop to inquire what would be "form," and what

"substance," in a certificate of probate of an absolute deed of real estate; it would be strange however, if any thing could be considered matter of substance, which the statute did not require, and that is peremptory, that the deed shall be recorded, if "acknowledged, or proved, by any of the subscribing witnesses." Certainly, however, that cannot be considered matter of substance in the certificate of probate, which, if inserted, could accomplish no purpose whatsoever. If any thing can be entitled to the appellation of form, it must be that which, if done, attains no object. Such is the case here; if the certificate had been drawn out, in the form given in the statute of 1812, it would have accomplished nothing, beyond putting the deed on record, and to that, by the express terms of the statute, the *cestui que trust* was entitled, upon the acknowledgment of the execution of the deed, by the maker. If he desires to claim any benefit under the deed, against a creditor of the grantor, he must prove its due execution, as well as the adequacy of the consideration.

If it were conceded, that the form of the certificate ascertains the extent, and character of the oath, or acknowledgment which is required to be made, it could not be tolerated, that a mistake in the officer in making his certificate, when the proper proof or acknowledgment had been made, should vitiate the registration. Yet this would seem legitimately to follow, from the doctrine contended for. When the party has complied with the law, and has done all in his power, it cannot be vitiated by the ministerial act of the officer of the law.

This question has been incidentally before this Court, in several cases, in many of which the distinction is drawn, between our registry acts, considered as such, merely, and where the certificate is made evidence. See the cases cited in the argument of the counsel for the plaintiffs in error.

The case relied on of Heister v. Fortner, 2 Binney, 44, merely establishes the general principle, that an irregular registration of a deed, is not notice. In that case, the proof of the execution of the deed, was made before an officer not authorized by law to take the proof, and it was therefore in effect the registration of a deed without proof. So in Hodgson v. Butts, 3 Cranch, 140, the statute required proof of the execution by three witnesses, to place a mortgage on the record, and the instrument was recorded on the proof of two only. There was therefore in this, as in

the last case, a want of power in the recording officer to make the registry of the deed.

There are, however, highly respectable authorities the other way, and going the entire length, that when the object is notice merely, it is sufficient if the instrument is recorded. In Trudeau v. Smith's Syndicks, 12 Martin, 543, 2 Con. Rep. Lou. 372, it was held, that although the code required that mortgages should not be recorded after the expiration of the legal term, without an order of the Court given for that purpose, yet that a mortgage recorded after the expiration of the term, without such order, would be effective as notice to third persons.

Our decision is based upon the fact, that the statute does not require any thing more to the registry of a deed, of this description, than that it be acknowledged by the maker, or its execution proved by any of the witnesses thereto, within thirty days after its execution, if of personal property, and within sixty if it convey real property, and be recorded, it is then notice to all the world. This regulation is not, as is supposed, for the protection of those claiming under the deed; on the contrary, as it respects deeds of trust of personal property, it is a burden imposed on them, for the benefit of creditors, and purchasers, as the deed, if valid, would be effectual at common law, without notice to them, either actual or constructive.

The deed is to be registered to give notice of its existence, and is to be acknowledged, or proved to have been executed, before it is recorded, merely to prevent a spurious instrument from being placed upon the records of the county. This is all that the statute requires, and the entire object of the registry being notice, it would be most unreasonable to infer, in the absence of any statute requiring it, that the certificate of the officer taking the probate, or acknowledgment, should state any thing which the statute had not made a prerequisite to such registration. Whether the deed was executed on the day of its date, and all other matters necessary to its validity, must be established by those claiming under the deed, if their title is questioned. The statement of these facts would be therefore wholly useless, to say the least, in the certificate of the magistrate.

As it respects the trial of right of property, alledged to be pending in the Federal Court, and relied on as a bar to the levy of the plaintiffs' execution, we do not propose to consider any

other question, than that presented on the record; and in that we think there is no error. No presumption arises, that a trial of right of property instituted in 1840, was pending five years afterwards, and until that fact was shown, no question could arise as to priority of *lien*, between the execution from the Federal Court and that of the plaintiffs in execution. If the levy on the Federal Court execution has been abandoned, or is determined, it is as if it never was made, so far at least as it regards the claimant.

It appears that the first execution of the plaintiff, issued on the 8th March, 1839, and was returned to the next return term, in July succeeding. No other execution issued until November, 1840, upon which the levy in this case was made. On the 24th August, 1839 a *fieri facias* issued at the suit of Baker, Johnson & Co. against the same defendant, which, on the 25th January, 1840, was levied on some of the same slaves subsequently levied on by the plaintiffs execution. It is well settled, that an alias execution issued after the lapse of an entire term, after the original, coming in conflict with an execution of a junior judgment creditor, which had come to the sheriff's hands during such interval, will be postponed to the latter. Such was the construction of the act of 1828, relating to the satisfaction of executions, in Wood v. Garey, 5 Ala. Rep. 50. In a contest therefore, between the execution of the plaintiff, and that of Baker, Johnson & Co. the *lien* of the latter will be preferred.

In Langdon & Co. v. Brumby, 7 Ala. Rep. 53, it was held, that where property was levied on, and bond given to try the right, the same property was not subject to levy by a junior execution creditor, until the claim was determined. The same principle was again affirmed in Kemp v. Buckey and Porter, Ib. 138. In this case it appears that the execution of the plaintiffs, by their omission to cause it to be re-issued, during an entire term, had lost its priority over that of Baker, Johnson & Co., which attached whilst the execution of the plaintiff was dormant in the office; it had therefore the superior *lien*, and bond being given to try the right of property, the same property was not subject to be levied on, by the plaintiffs, whose execution by their laches, had become junior to that of Baker, Johnson & Co. This was the precise point in Kemp v. Buckey and Porter, as the converse had been held in Langdon & Co. v. Brumby, previously cited. It does not vary the case, that both trials are depending in the

same Court—the principle of the decision being, that the claimant has given bond for the production of the property to the senior judgment creditor, if he succeeds in condemning it, and it will be no answer to his demand, that it has been taken from his custody by proceedings at the suit of a *junior* creditor. It follows, that the Court erred in its charge upon this point of the cause.

It appears that there was a contest in the Court below, as to the true date of the deed of trust, whether it bore date on the 23d or 25th March. The bill of exceptions contains, what is called a *fac simile* copy of the deed, from which it would seem to be doubtful which was the true date. The original was produced on the argument of the case for the inspection of this Court, which the Court declined to notice. We have on several occasions adverted to the impropriety of sending up the original papers, instead of the record. This is objectionable, not only because it puts in hazard the loss of the originals, by which the parties might be prejudiced, but because this Court has only appellate jurisdiction. All controverted questions of fact, must be settled by the primary tribunal. In this case, indeed, there is no controversy, so far as we can judge from the record, as it is stated that the deed was dated on the 25th March, 1839, We may conjecture that there was some difference of opinion as to the true date of the deed, but whether its date was determined by the Court, or left to the decision of the jury, is not stated. It is perfectly clear however, that no question is raised upon the record in reference to the date of the deed, and if there was, it could not be determined by this Court, by an inspection of the original.

These principles are decisive of all the cases, which must be reversed, and remanded, except Nixon v. J. & J. Foster, which is affirmed.

CHANDLER v. HUDSON, USE, &c.

1. Interrogatories propounded to the plaintiff under the statute, are not in the nature of a *fishing bill*, where, in connection with the affidavit made previous to their being filed, they state the existence of a pertinent fact, which the defendant believes to be within the plaintiff's knowledge, and calls on him to answer in respect thereto.
2. Where interrogatories to the plaintiff are allowed, and an order made that he answer them within a definite time after the service of a copy, the Court impliedly affirms their pertinency, and the defendant cannot be compelled to receive answers irregularly verified or insufficiently authenticated.
3. Where the plaintiff, to whom interrogatories are propounded, is a non-resident, he may pray a commission to some one designated to take his answers, as in other cases where depositions or answers in Chancery are to be taken; but the certificate of an individual, describing himself as a justice of the peace of another State, and affirming that the plaintiff there verified his answers by oath administered by that individual, is not a sufficient verification. The Court cannot judicially know his official character, nor is it competent to prove it by the testimony of a witness who heard it said, at the place where the answers were made, that the person certifiying them was a justice of the peace.
4. *Semble;* where the declaration states that Frederick W. C. made his promissory note, &c., and the note offered in evidence was made by F. W. C., it is sufficiently described to make it admissible evidence.

Writ of Error to the Circuit Court of Randolph.

This was an action of assumpsit at the suit of the defendant in error against the plaintiff. The cause was tried on issues to the pleas of *non-assumpsit*, payment, set off, and accord and satisfaction. On the trial, the defendant excepted to the ruling of the Court, and the bill of exceptions presents the following points: 1. The declaration designates the plaintiff's name as Frederick W. Chandler, and alledges, that he "made his certain promissory note in writing, bearing date on the day and year aforesaid," &c., while the note is subscribed with the name of "F. W. Chandler." The Court held, that the note was not misdescribed, and permitted the same to go in evidence to the jury. 2. An order

was made by the Court, at a term previous to the trial of this cause, requiring the beneficial plaintiff to answer certain interrogatories exhibited by the defendant pursuant to the statute in such cases. These interrogatories were answered, and the answers verified before an individual who describes himself as a justice of the peace of Coweta county, in the State of Georgia; but there was no other proof of his official character, save the statement of a witness, that about three weeks previous to the trial, he was in Georgia, and was there informed, that the person who attested the verification was a justice of the peace of that State. The defendant declined using the answers as proof, and moved the Court to require the plaintiff to answer in proper form, under oath or affirmation, and continue the cause, but the Court refused to require the answers to be otherwise verified, or to order a continuance. Thereupon the defendant moved to dismiss the suit, because the truth of the plaintiff's answers was not sufficiently vouched; this motion was in like manner denied, and the defendant ruled into trial. A verdict was returned for the plaintiff, for the amount of the note and interest, and judgment rendered accordingly.

F. W. Bowdon, for the plaintiff in error. The proof of the official character of the person who certified the plaintiff's answers in Georgia, was clearly inadmissible. The evidence showing that he was a justice of the peace would be the certificate of the proper officer, authenticated by the seal of State. This not being furnished, the suit should have been continued or dismissed.

The note offered in evidence to sustain the declaration was misdescribed and should have been rejected. [Greenl. on Ev. 78, u. 3; Cro. Jac. Rep. 558; Id. 640; Cro. Eliz. Rep. 879; 3 Taunt. Rep. 504.]

S. F. Rice, for the defendant. The case of Mallory v. Matlock, at this term, precludes all inquiry on writ of error as to interrogatories exhibited to a party under the statute. If it does not, it is insisted that the affidavit and interrogatories are in the nature of a fishing bill; being evasive, without stating that there is a set off.

COLLIER, C. J.—Neither the affidavit or interrogatories

are drawn with precision, or accuracy, in the use of language. The former is unnecessarily verbose, yet it affirms that the defendant is entitled to a set off against the note declared on, for $395 26, that he is informed, and believes, that Beadles, for whose use the suit is brought, has no interest therein, but he is made a beneficial plaintiff to embarrass the defence. The interrogatories then call on him to answer, whether the nominal plaintiff was not the proprietor of the note, when the suit was commenced; or if he is the owner of it, when and how he acquired it, and what he gave for it; whether the suit has not been brought for his use, for the purpose of cutting off a defence against the nominal plaintiff. Did he not know, before he became interested in the note, that the defendant had sets off against it for a large amount, and that he was entitled to a set off of $395 26.

This brief recital of the affidavit and interrogatories will sufficiently show, that they are not so much wanting in point and directness as to subject them to the imputation of being in the nature of a *fishing bill;* but that they alledge the existence of a pertinent fact, which the defendant believes to be within the plaintiff's knowledge, and calls upon him to answer in respect to it.

Mallory v. Matlock, is unlike the present case. There it was determined that the refusal to allow interrogatories to be exhibited to a plaintiff at law under the statute, was a matter which did not enter into the judgment of the Court, and could not be revised on error; that if the defendant was prejudiced by their disallowance, he had his remedy by *mandamus*, or some other appropriate proceeding. Here the interrogatories were allowed, and Beadles required to answer them, within sixty days after being served with a copy. The Court expressly affirmed their pertinency, and could not force the defendant to receive answers irregularly verified, or insufficiently authenticated. The statute declares, that if the party to whom the interrogatories are propounded, shall fail to answer the same, or answer evasively, the Court may attach him, or compel him to answer in open Court, or it may continue the cause, and require more direct and explicit answers, or if the party to whom such interrogatories shall be propounded, be defendant in the action, it may set aside his plea or pleas, and give judgment against him, as by default; or if the plaintiff, may order his suit to be dismissed with costs, as shall in the discretion of the Court be deemed most just and proper.

[Clay's Dig. 341, § 160.] In the case cited, the Court refused to act; here it acted so as to render it unnecessary for the defendant to file a bill for a discovery, and the error insisted on is, that it should have followed the act with the consequences which the statute visits upon a failure to answer according to its directions; and this argument, we have seen, is well founded under the circumstances.

The Circuit Court could not regard the certificate and attestation of the individual who affirmed that the answers were made and verified before him, as a justice of the peace of Georgia. It could know nothing of his official character, unless it was vouched by the proper evidence. The testimony of a third person, that he had some time previously when in Georgia, heard it said that the person certifying the answers, was a justice of the peace, could not with propriety be received as evidence of the fact.

It would have been competent for the plaintiff, or his counsel, to have prayed a commission to some one designated therein to take his answers, as in other cases where depositions, or answers in Chancery are to be taken; if that course had been adopted, the authority conferred by the commission would have been sufficient, and no inquiry would have been permitted, whether by the laws of Georgia, the commissioner was competent to administer an oath.

The declaration sets out the defendant's name at length, while the note adduced as evidence is subscribed with the initials only. We are inclined to think the note was sufficiently described to make it admissible, and that it should not have been rejected for the supposed variance. But upon the point previously considered, the judgment is reversed and the cause remanded.

SMOOT & EASTON v. MOREHOUSE.

1. When a bankrupt, previously to his bankruptcy, transferred a due bill for a valid consideration, his indorsement made after his bankruptcy, will invest the indorsee with a legal right of action.
2. The preference given by a bankrupt, by payment or assignment of effects, to a creditor, to be void under the bankrupt act, must be a voluntary preference, not induced by an agreement between the parties, for the creditor's security.

Writ of Error to the County Court of Mobile.

Suit was commenced before a justice of the peace, by Morehouse against Smoot, on a due bill, made by the latter to one Ingraham. Smoot removed the case to the County Court by appeal, and Easton is his surety in the appeal bond.

At the trial, the due bill was produced with Ingraham's name indorsed in blank. The defendant then gave evidence conducing to prove, that Ingraham had passed the note to the plaintiff, in December, 1841, without indorsement, in payment of a debt of several years standing, but that Ingraham had promised to pay the due bill to plaintiff some time before—possibly in 1840. That at the time of the promise so made, and when the due bill was actually delivered, Ingraham was unable to pay his debts; that shortly after the delivery, he filed his petition in the United States District Court, praying a discharge from his debts, and was subsequently discharged, [as a bankrupt.] After his discharge, he was called on by the plaintiff to indorse his name on the paper, which he did. The defendant asked the Court to charge the jury, that if, from the evidence, they believed the note was indorsed by Ingraham after his discharge under a decree of bankruptcy, they must find for the defendant. Also, that if, from the evidence, they believed the due bill was paid or transferred, in contemplation of Bankruptcy, such payment was utterly void, and they must find for the defendant. The charges were refused, and the jury was instructed that a delivery of the note for a valuable consideration, would pass the interest in it, and, after such

delivery, Ingraham was only a trustee for Morehouse, and was bound, whenever called on, to indorse the note. Also, that there was no sufficient defence to the action, on the facts above stated.

The defendant excepted to the refusal of the Court to charge as requested, and to the charges given, which are now assigned as error.

STEWART, for the plaintiff in error, insisted—

1. That by the bankruptcy, the legal title in the due bill passed to Ingraham's assignee, and the indorsement afterwards gave no title to Morehouse. [Owen on Bank. Appex. 51.]

2. The assignee became a trustee of the legal title for Morehouse's benefit, if the assignment of the note was valid. And the proper Court could compel him to indorse it specially. [Ib. 236-7.]

3. All transfers made in contemplation of bankruptcy, by the act, are declared to be void. [Ib. Appx. 50.]

GOLDTHWAITE, J.—The question raised here, as to the authority of the bankrupt, under the circumstances of this case to indorse the due bill, though entirely new in our Courts, seems to have often arisen in those of England. Thus in Smith v. Pickering, Peake's Cases, 50, the drawers of a bill who were also its payers, delivered it to the plaintiff for a valuable consideration, but forgot to indorse it. They afterwards became bankrupt and then indorsed it. In a suit against the acceptor, it was held that the indorsement was valid. So in an anonymous case reported (1 Camp, 422, in notes,) the bill was delivered to the indorsee, more than two months before the commission, with intent to transfer the property in it, but the indorsement was not in effect written within the two months. Lord Ellenborough held, that the writing of the indorsement had reference to the delivery of the bill. In Watkins v. Maule, 2 J. & W. 243, it is said that the administrator of a bankrupt may indorse a bill under such circumstances, for the transfer for consideration is the substance, and the indorsement a mere form, which creates an equitable right, entitling the holder to call for that form. The case of Pease v. Hirst, 10 B. & C. 122, though not stated at length, in the American edition, seems to sustain the right of the payee under such

circumstances to be discharged from a suit by the assignees. In addition to the cases cited, Mr. Chitty has collected many more bearing on the same question, and all seem to concur that the transferee for a valuable consideration, is entitled to have the paper indorsed, either by the bankrupt or the assignee, and that a suit can be maintained, though the indorsement is put on the bill or note after the bankruptcy. [Chitty on Bills, 227, 723-4.] We think the same rule must obtain under our bankrupt act, which vests in the assignee the only beneficial interest of the debtor.

In relation to the second question presented by the bill of exceptions, it is said the delivery of the due bill was made in December, 1841, in accordance with the provision to that effect previously made, and possibly in 1840; that soon afterwards the debtor applied to be discharged as a bankrupt. The charge asked for is, that if the delivery was made in contemplation of bankruptcy, the payment was utterly void. The preference which is spoken of in the second section of the bankrupt act, is also inhibited by the English bankrupt acts, and under them, the uniform construction is, that the preference, to be void, must be a voluntary act of the debtor, and not arise in consequence of any previous agreement with his creditor for security. [Chitty on Bills, 235.] Under the circumstances in evidence, there was nothing before the jury from which a fraudulent preference could be presumed, and therefore the charge requested was properly refused for the reason that the question was not involved by the proof. This point is not much pressed in the brief submitted, but we have thought it best to give it this brief consideration, as it is not abandoned.

We can perceive no error in the action of the Court below, and its judgment is therefore affirmed.

BARNETT v. GAINES AND TOWNSEND.

1. A purchaser of land, who with knowledge of an existing incumbrance proceeds to execute the contract in part, as by taking possession, he will be required to execute it in full, and *a fortiori* will not be allowed to rescind it.
2. A right of dower is an incumbrance.

Appeal from the Chancery Court at Talladega, upon the dissolution of an injunction.

THE bill was filed by the plaintiff in error, and alledges that he purchased from the defendant, Gaines, a tract of land, described in the bill, and that by agreement in writing, Gaines bound himself to make to him, "good and legal title thereto, in fee simple, when the purchase money was paid." That he has paid all the purchase money, and has been let into the possession of the land. That he has tendered a deed and demanded title, but that Gaines refuses, and is unable to make a good title, as his wife refuses to relinquish her dower. That Gaines is wholly insolvent, and that the present value of the land, with the rents and profits, aside from the dower interest, are not equal in value, to the purchase money paid and interest.

The bill further charges, that Gaines has obtained a judgment against him for $210, to which he prays an injunction, that the land be sold and applied to the repayment of the purchase money, and that the judgment be held as a fund to meet any deficiency arising from the sale.

Gaines, in his answer, insists, that complainant knew when he purchased, that his wife would not relinquish her dower, and that he had transferred the judgment to one John H. Townsend, in consideration of a debt due him.

The bill was amended, so as to make Townsend a party, who by his answer, insists, that he is a *bona fide* purchaser of the judgment without notice of complainant's equity, if any exists.

The Chancellor dissolved the injunction, from which com-

plainant appealed to this Court—and which he now assigns as error.

Rice, for the plaintiff in error.
L. E. Parsons, contra.

ORMOND, J.—There is not a particle of equity in this bill. It is certainly true, that a dower interest in lands, is an incumbrance, which in a proper case, would afford a sufficient excuse to the vendee, for refusing to perform the contract on his part, if it were still executory. But this contract has been fully executed, on the part of the vendee, who has paid the purchase money, and been let into the possession of the premises, and who in addition, if that were important, must have known at the time, that the incumbrance existed. It is the established rule in Chancery, that if a purchaser with knowledge of an existing incumbrance, proceeds to execute the contract in part, as by the taking possession of the land, he will be required to execute in full; and *a fortiori* will not be allowed to rescind it, after an execution on his part. Colton v. Wilson, 3 P. Will. 191; and see also Beck v. Simmons and Kornegay, 7 Ala. Rep. 71, where this question was fully considered.

If this were a proper case for equitable interference, there would be no pretence whatever for the injunction prayed for, as the equity of Townsend, a *bona fide* purchaser of the judgment, without notice of the plaintiff's demand or equity, if any existed, is superior to his, and there is no connection whatever, between the judgment thus sought to be arrested, and the claim of the plaintiff, so as to affect Townsend with constructive notice. In every view which can be taken of the case, the bill is utterly destitute of equity, and the decree of the Chancellor dissolving the injunction must be affirmed.

WHITEHURST, USE, &c. v. BOYD.

1. An undertaking in writing, by the defendant, to pay the plaintiff, as agent, several distinct sums of money, for a consideration therein expressed, at definite periods, *provided* the titles which the plaintiff, as agent, executed to him for a tract of land, were "good and sufficient," is a promise, subject to the condition expressed; and it is competent for the defendent, when sued for the money, to prove that the titles were not such as the condition contemplated.
2. *Semble;* where different instruments in writing are made at the same time between the same parties, and relating to the same subject matter, they constitute but one agreement, and the Court will presume such priority in their execution, as will best effect the intent of the parties.
3. Where a promissory note recites that titles to the land had been executed by the vendor to the vendee, and undertakes to pay the purchase money if the title was good and sufficient, it is not enough that the conveyance be in due form; but the vendee may defeat a recovery if the *title itself* be not such as is provided for by the contract.
4. Where the contract of the parties requires that a deed, simultaneously excuted, should convey a good title as a condition to the payment of the purchase money, the vendee, when sued, may plead that the title is in a third person.
5. A replication which answers the plea but in part, leaving a material part unanswered, is bad on demurrer.

Writ of Error to the Circuit Court of Macon.

This was an action of assumpsit, at the suit of the plaintiff in error. The declaration was upon three writings designated as promissory notes; the first of which is of the following tenor, viz: "On the first day of January, 1844, I promise to pay Seaborn J. Whitehurst, agent of James K. Giddins, six hundred dollars, for the east half of a section of land, in Macon couaty, Alabama, provided the titles executed to me by said agent are good and sufficient, and there be no incumbrance against the said land, by judgment, mortgage or any other incumbrance; which is the first of three equal annual payments. C. L. R. Boyd." The second is in all respects like this, save only, that it is payable on the first of January, 1844, and "is the second of three equal annual payments;" and the third only varies from the second in being payable on the first of January, 1845, and "is the third of three equal annual payments."

The first count avers that the half section of land to which the notes refer, is part of section thirty-six, in township sixteen, and

range twenty-two, lying in Macon county, and that the titles executed therefor to the plaintiff, are good and sufficient, "free from incumbrance, by judgment, mortgage or other incumbrance;" and thence deduces the liability to pay. There is added a second count, in which the condition on which the payment was to be made is wholly omitted; and a third count, in which the notes are fully described as in the first, with an averment that the defendant immediately upon his purchase, went into the possession of the premises, and still continues to occupy and cultivate the same.

The defendant demurred to each count of the declaration, and his demurrer being sustained to the third, and overruled to the first and second, he pleaded—1. *Non assumpsit.* 2. That the notes described in the second, are the same as those described in the first count, and none others, admits that they were given in consideration of the sale of the land in the first count mentioned, by the plaintiff, as the agent of Jumes K. Giddins, avers that they were only to be paid upon the contingency expressed upon their face, and sets out a deed purporting to convey the land to the defendant. That deed is dated the 15th January, 1842, "between Seaborn F. Whitehurst, agent of James K. Giddins, and C. L. R. Boyd," &c. "*Witnesseth*, that the said Seaborn F. Whitehurs-, for and in consideration of the sum of eighteen hundred dollars, to him in hand paid, at and before the sealing and delivery of these presents, hath bargained and sold, and by these presents doth bargain, sell and convey," &c. Here follows a description of the land, and the name of the defendant as grantee, and a general warranty of title by Whitehurt, his heirs, executors, and administrators and assigns, to the grantee, his heirs and assigns. The plea then avers, that the plaintiff had no title to the land thus conveyed at the time the deed bears date, or any subsequent thereto; but the title to the north east quarter of the section described therein was, when the notes were made, and down to the time of pleading, in James K. Giddens; and the title to the other quarter section then was, and still is, in S. M. Haggerty & Co,, and this he is ready to verify, &c.

To this plea the plaintiff replied, that admitting the notes in the first and second counts of the declaration mentioned, are identical and correctly described in the plea, the deed therein set forth was executed by the plaintiff in virtue of a power of attorney from Giddins to him. Here follows a formal power from Gid-

dins to the plaintiff, to sell, dispose of, and make and execute titles for the former, of the land described in the plea and conveyance, which purports to have been executed on the 12th January, 1842. The replication concluded with an averment that the deed set out in the plea was good and sufficient. Thereupon the defendant demurred.

The demurrer was overruled as to the plea, and sustained to the replication. Whereupon the plaintiff declining to plead further, the cause was submitted to a jury, who returned a verdict for the defendant, and judgment was rendered accordingly.

Cocke, for the plaintiff in error, made the following points, viz: 1. The third count of the declaration is good, and the demurrer to it should have been overruled. It has been repeatedly decided by this Court, that a purchaser of land cannot resist the payment of the purchase money for defects in the vendor's title, where he has taken and retained the possession. [1 Stew. Rep. 490; 1 Ala. Rep. N. S. 136.] This is upon the ground that possession is beneficial, and he must seek redress by suing upon his vendor's covenant. [6 Ala. Rep. 785; 7 Id. 71, 129, 346.] True, in these cases, the respective stipulations of the vendor and vendee were by distinct instruments; but that can make no difference; for they both evidence but a single contract. [1 Bing. Rep. 196; 2 B. & A. Rep. 680; 5 Pick. Rep. 181, 395; 10 Id. 302.]

Where a deed is executed, the purchaser cannot resist the payment of the purchase money, although he never goes into possession. [1 Ala. Rep. N. S. 273; 4 Id. 83.]

2. The 2d plea is bad—1. Because it does not negative the averment of the declaration, that the conveyance was good and sufficient. 2. Because it does not answer the second count, which is itself good without noticing the condition upon which payment is promised. [4 Mass. Rep. 414; 1 Ala. Rep. N. S. 136; Lockard v. Avery, et al. 8 Ala. Rep. 502.] 3. Because it asserts a legal proposition which is in itself untenable, viz: that the plaintiff was the grantor when he had no title to pass. "A contract to give a sufficient deed, is fulfilled by a valid deed of whatever title the contractor had." [12 Johns. Rep. 442; 16 Id. 268; 20 Id. 130; 15 Pick. Rep. 546.]

3. The replication is an answer to the plea in re-asserting that

the deed of conveyance was good and sufficient, and the issue tendered by it in accordance with the contract, as ascertained by a consideration of its nature, and all its parts. [8 Porter's Reports, 497.] Applying the rules of construction, and it is contended, that the word "titles" in the proviso means "deed"—"executed to me" means "signed, sealed and delivered." The deed being executed by an agent, it is fair to intend that in inserting the proviso, the purchaser merely designed to guard against a defect of authority in the agent, or in the form of the execution of the deed.

The deed is not only good and sufficient in form, but conveys whatever title Giddins had; but if this be not so, or the deed is not such as the contract contemplated, it is then insisted that the demurrer should not have been sustained, but it should have been left to the jury to say, whether, by instituting the action, Giddins did not adopt it as his own. [9 Porter's Rep. 305.]

McLester, for the defendant in error, insisted, that the third count of the declaration is bad, because it does not aver a performance of the condition upon which the writings declared on were made payable. [1 Chitty's Plead. 309-10-11; 10 Johns. Rep. 213; 20 Johns. Rep. 15.] These writings are not notes, but are conditional agreements, and such is the evident intent of the parties to them, as indicated by the terms employed. [9 Mass. Rep. 78.]

The deed made by the plaintiff, is his own deed, and not that of the person whose agent he affirms himself to be. [Sugden on Powers, 205; 9 Porter's Rep. 305; Fowler v. Shearer, 7 Mass. Rep. 14; 4 Hen. & Munf. Rep. 184.] It is perfectly clear, that the contract contemplated not merely a formal deed, but the conveyance of a good title. [Ellis v. Burden, 1 Ala Rep. N. S. 458; 4 Ala. Rep. 21; 4 N. Hamp. Rep. 444; 11 Johns. Rep. 54; 14 Pick Rep. 293.] If one sells and conveys land which belongs to another, the purchaser subjects himself to an action of trespass, at the suit of the true owner, if he enter; hence although the vendee may not be able to defend at law for a defect in his vendor's title, yet he may resist a recovery for a total failure. A note for the purchase money of land is recoverable at law, if the vendor is in possession, where a bond has been executed for the conveyance of a title; because, there the doctrine

of independent covenants applies. [1 Salk. Rep. 172; 1 Ala. Rep. N. S. 138.]

The cases cited by the plaintiff's counsel, do not conflict with these views. The defence was disallowed in 20th Johns. Rep. 130, where the action was founded on a covenant; because, by a statute of N. York, a specialty could not be avoided, except for *illegality* of consideration. [See also, 2 Johns. Rep. 177.] In 11 Johns. Rep. 584, which was assumpsit for the breach of an agreement to purchase land, by the terms of the contract, the vendor and wife were to execute a deed, with warranty of title, upon the payment of a certain part of the purchase money; after the purchase, the vendee learned that there was a mortgage on the land, and refused to pay. It was held that defence could be made at law. The case in 4 Ala. Rep. 83, was, where the vendor undertook to make a title when patents should be received for the land; the notes for the purchase money being payable at certain prescribed times, were held to be recoverable at law, according to the terms of the contract—the vendee had agreed to risk the vendor's title when the patent issued.

COLLIER, C. J.—The writings declared on, present a case unlike any of those cited by the plaintiff's counsel. Here the defendant promises to pay to the plaintiff's agent, &c. certain sums of money, for a consideration expressed at definite periods; *provided*, the titles which the plaintiff, as agent, executed to him, are good and sufficient, &c. Now although times are prescribed when these payments shall be made, yet the defendant's undertaking is not absolute, but is subject to the condition we have stated; and though it may not be necessary to entitle the plaintiff to recover, that he should show that he conveyed a good title, and that the land was unincumbered, it is competent for the defendant to prove the reverse. He provided by the terms of his contract that the existence of either of such a state of things should prevent a liability from attaching, or absolve him from the undertaking to pay. We can conceive nothing in the nature of the agreement, or in the language in which it is expressed, that should prevent the Courts from giving effect to it according to the intention of the parties.

The rules by which the dependency or independency of covenants are to be determined, apply with all force to unsealed wri-

tings. In such cases the intent of the parties are said to extend a controlling influence; and for the purpose of ascertaining this, regard must be had to the whole instrument—no particular form of words being necessary to constitute a test, whether the covenants are, or are not independent. [2 Pick. Rep. 451.] In Watts v. Sheppard, 2 Ala. Rep. 425, we said, that the first general principle in the construction of contracts, is, if possible to carry into effect the intention of the parties. To do this the *subject matter* of the contract, the *situation* of the parties, the *motives* that lead to it, and the *object* to be attained by it, are all to be looked to. *Further*, that such a construction must, if practicable, be placed upon a contract, as will make every clause operative. To the same effect see my opinion in Bates & Hines v. The State Bank, 2 Ala. Rep. 451; 2 Cow. Rep. 781; 3 Miss. Rep. 447; 1 Harring. Rep. 154.]

The case before us, bears no analogy to George & George v. Stockton, 1 Ala. Rep. 136, or any of our previous or subsequent decisions in which the same legal questions are discussed. In that case, it is said to have been "repeatedly adjudged, that the vendee of real estate, who has executed his note for the payment of the purchase money on a day certain, and received from the seller a bond conditioned to make title *generally*, cannot successfully resist an action at law on the note, upon the ground that no title had been made." "This principle rests upon a rule which has been often applied to covenants, viz: when the money is to be paid at an appointed time, and the day of payment is to happen, or may happen, before the thing which is the consideration of the payment of the money is to be performed, the performance of the thing is not a condition precedent to the right to demand the money." The condition of the bond in that case, it is true, was expressed in unusual terms, so as to leave its meaning open to construction. After describing the land, it stated the amount of the purchase money to be "four hundred dollars, payable on the 25th day of December next: now if the above bound John C. Stockton, shall make, or cause to be made, to the said James C. George, a good and equitable title to the above described land, *then* he, the said James C. George, shall pay the said sum of four hundred dollars, *then* the above obligation to be void, otherwise to remain in full force and virtue." We were of opinion, that considering the note and bond, as evidencing but a single con-

tract, the making the title was not a condition precedent, to the right to demand the payment of the note. See also, 1 Chit. Pl. 315; 2 Blacks. Rep. 1313; Willes' Rep. 146, 496.

It is unquestionably true, that where different instruments of writing are made at the same time, between the same parties, and relating to the same subject matter, they constitute but one agreement; and the Court will presume such priority in their execution, as will best effect the intent of the parties. [3 Mass. Rep. 138; 9 Cowen's Rep. 274; 5 Pick. Rep. 395; 10 Id. 250, 302; 13 Wend. Rep. 114; 10 Mass. Rep. 327, 379; 11 Id. 302.] And it may be added that such instruments are to be construed together. [5 Pick. Rep. 181, 395; 10 Pick. Rep. 298; 13 Mass. Rep. 87.] But this proves nothing adverse to the defence set up in the present case. Here, although the defendant promised to pay upon certain days, yet he limited his liability by a *proviso*, which we have already stated, and said that the existence of the state of things against which it guarded would furnish a bar to the action. See the Bank of Columbia v. Hagner, 1 Peter's Rep. 465.

An undertaking to convey a title, it has been held, means a legal title; and where the right to demand the purchase money is dependent thereupon, the convepance of such a title is a conidtion precedent. [Clute v. Robinson, 2 Johns. Rep. 613; 10 Id. 266; 3 Munf. Rep. 159; 6 Id. 170; 12 Johns. Rep. 436; Wright's Rep. 644; 1 Blackf. Rep. 380; 2 Greenl. Rep. 22; 2 Sergt. & R. Rep. 498.]

It is argued for the plaintiff that the *proviso* in the writing declared on, is in effect nothing more than an undertaking to execute a "good and sufficient" deed of conveyance, and that the issue which it was proposed by the declaration and replication to form, narrowed the inquiry to the sufficiency of the deed, in point of form. We will not stop to inquire whether a covenant to execute a deed of that character, refers merely to the deed and not the title; and is consequently performed by the delivery of a formal conveyance. However this may be, we think it perfectly clear the case at bar does not come within the influence of such a principle. Here the writings recite that the deed was already executed, and the defendants object was to be secure in the payment of the money, by reserving to himself the right to scan the title, which the plaintiff had undertaken to convey, and if it

should be found to be defective, or incumbered, then to withhold the purchase money. The language employed, and the obvious purpose of the *proviso* all speak such to have been its meaning.

In respect to the insufficiency of the deed to convey the legal title of the plaintiff's principal, we need not inquire, since the plea alledges that the title to one quarter section of the land which it undertook to convey, was not in Giddins when the deed was executed, but was then, and had been ever since, in Messrs. Hagerty & Co. This plea, if true, is an answer to the action, and in the state of the pleadings, its truth is not open to contestation. The view taken shows that the replication is bad; it answers the plea but in part, by asserting that the deed was executed under a power, which is set out *in extenso*, and thence concluding that it is "good and sufficient;" while it leaves unanswered the allegation of Giddins' want of title.

If the vendor cannot make a good title so as to authorize him to demand the purchase money, perhaps a Court of Chancery is competent to administer relief, so far as may be compatible with the contract of the parties, and in harmony with the justice of the case. But we will not undertake to prescribe a remedy. The decision of this cause does not require it.

It remains but to add, that the judgment of the Circuit Court is affirmed.

SCROGGINS v. McDOUGALD, ET AL.

1. When a vendee is in the occupancy of land, which the vendor afterwards sells to another, to whom he transfers the evidence of legal title, the subsequent purchaser is charged with notice, and will be considered as holding the legal title as a trustee for the first vendee; but is entitled to be reimbursed money expended necessarily in completing the legal title.

Writ of Error to the Court of Chancery for the 14th District.

THE case made by the bill is this:

Certain persons named in the bill were constituted commissioners of the town of Crawford, in Russell county, for the purpose of selling lots therein, and conveying titles to the same. Some-

time in the year 1840, these commissioners sold to one McLean, a certain lot described as No. 27, and executed to him a certificate of the purchase. McLean went into possession of the lot, improved it, by building a log cabin, &c. and afterwards, in March, 1841, sold the lot for $300, to one Bagly, and executed to him a bond conditioned to make titles, whenever he should receive the purchase money. Afterwards, Bagly being indebted to the complainant, transferred to her the bond which McLean had executed to him to make titles. The complainant, at the time of the transfer of the bond, went into possession of the lot, and has remained in possession ever since. After the transfer of the land, Bagly paid the notes executed by him to McLean for the purchase money. McLean, after the transfer of his bond to the complainant by Bagly, in the early part of the year 1842, transferred the certificate issued to him by the commissioners to McDougald, the defendant, without any consideration paid therefor, and McDougald afterwards procured the commissioners to execute a deed conveying to him the fee simple title, upon which he commenced an action at law, to recover the lot from the complainant, and refuses to convey the title to her.

The bill prays that McDougald may be restrained from pursuing his said suit, and compelled to convey titles to the complainant.

McDougald admits that McLean purchased the lot from the commissioners, as stated by the bill, and asserts that McLean transferred the certificate to him in payment of a debt which had been long due. He asserts also, that he was entirely ignorant that McLean had sold the lot to any other person, or that any one was in possession of it when the certificate was transferred, and that he furnished McLean money to pay the last instalment due the commissioners. He admits that a deed in fee has been executed by them to him, which he exhibits.

The bill as to McLean was taken as confessed, and the testimony shows that Bagly was in possession of the lot in the years 1841 and 1842, and possibly longer; also, that the notes given by him to McLean, for the purchase money, have been paid.

It was also admitted by the solicitor for McDougald, that the complainant lived with Bagly on the lot in question, and had no other place of residence; that she was a single woman, and had

no other relative, and lived there with Bagly, at the time when the deed to McDougald was made.

The Chancellor dismissed the bill at the hearing, chiefly because it did not appear from the evidence in the cause, that McDougald knew that the possession of the lot in dispute was with the claimant when the defendant acquired his equitable, as well as legal title to the lot.

This is now assigned as error.

S. Heydenfeldt and Peck, for the plaintiff in error argued the following points:

1. The possession of the claimant was adverse at the time of the execution of the deed, and the deed being void for this, [Dexter v. Nelson, 6 Ala. Rep. 68,] the parties are thrown on their respective equities, and that of the complainant being the oldest, and accompanied by possession, must prevail.

2. If McDougald's purchase was fair, yet he is chargeable with notice of the equity of the complainant, on account of her possession at the time of McDougald's purchase. [1 Atk. 522; 2 Lom. & Stu. 472; 2 Sch. & Lef. 315; 13 Vesey, 120; 14 Ib. 433; 2 Paige, 574; 6 Madd. 59.]

3. McDougald is not a *bona fide* purchaser, for a valuable consideration, and therefore cannot protect himself even if without notice. [4 Paige, 215; 19 John. 282; 20 Ib. 637; 1 Ala. Rep. N. S. 21.]

J. E. Belser, contra.

GOLDTHWAITE, J.—The admissions of the counsel for McDougald, as well as the evidence of the only witness examined in the cause, establishes that the complainant and Bagly, under whom she claims, had the actual possession of the lot at the time when McLean assigned the certificate of the commissioners to McDougald, by means of which he subsequently obtained the title. The only question therefore, in this aspect of the case is, whether the possession so held was a sufficient matter to put the defendant, McDougald, upon inquiry as to the title of the occupants, and thus affect him with notice, although, in point of fact he had no information that the possession was thus held. It is laid down very generally in the books, that whatever is sufficient

to put the purchaser upon inquiry, is good constructive notice. [Atkinson on Marketable titles, 573; 2 Sug. on Vend. 290.] It is difficult to conceive what circumstance can be more strong to induce inquiry, than the fact that the vendor is out of possession and another is in. Accordingly it has been held, that information to a purchaser, that a tenant was in possession, is also notice of his interest. [Hiern v. Wall, 13 Vesey, 120.] And if any part of the estate purchased is in the occupation of a tenant, it is considered full notice of the nature and extent of his interest. [Atkinson on Mark. Tit. 574.] In the American Courts, the rule is very generally recognized, that if a vendee is in possession of lands, a subsequent purchaser or mortgagee has constructive notice of his equitable right. [Brown v. Anderson, 1 Monroe, 201; Johnson v. Gwathney, 4 Litt. 317; Charterman v. Gardner, 5 John. C. 29; Governeur v. Lynch, 2 Paige, 300; Grimstone v. Carter, 3 Ib. 421.] As the complainant in this case was in the occupancy of the land at the time when McDougald acquired it by purchase or transfer from McLean, it is immaterial whether knowledge of the occupany can be traced to him, because the law casts on him the duty of ascertaining how that fact is. If a different rule was admitted, a purchaser residing at a distance from the land, would rarely be charged with notice on this account.

McDougald being chargeable with notice of the equities of the complainant, can take nothing by the transfer made to him by McLean, but holds the title acquired from the commissioners as a trustee. [Legget v. Wall, 2 A. K. Marsh. 149; Pugh v. Bell, 1 J. J. M. 403.] He will therefore be compelled to convey it, upon the re-imbursement to him of the sum actually paid to the commissioners, to perfect the right to a legal title.

The decree, instead of dismissing the bill, should have declared the defendant, McDougald, trustee for the complainant, and directed a reference, to ascertain the sum paid by him to the commissioners, to perfect the legal title to the lot, and on payment of this by the complainant, to vest in her the title of McDougald.

Reversed and remanded to carry out the measures here indicated.

SMITH, ADM'R, v. THE HEIRS OF BOND.

1. The exception in the statute of limitations, that where the debtor is absent from the State, at the time the cause of action accrues, suit may be brought "after his return into the State," means, after his return within the jurisdiction of the State, where the process of the Courts of the State will run. A removal to the Indian nation, where the process of the Courts of the State did not run, is not a return within the State, though within its territorial limits.
2. To complete the bar of the statute, the debtor must have been within the State subject to its process, during the entire period provided as a bar: but such period of time need not be continues, but may be composed of different periods of time.

Error to the Orphans' Court of Sumter.

This was a petition by the plaintiff in error, for leave to sell certain lands of his intestate to satisfy creditors.

The heirs appeared and pleaded severally, the statute of limitations of three years to the open accounts, and of six years to the promissory notes filed as evidence. Replication of a subsequent promise by Bond, the deceased, and that he had removed, and resided beyond the jurisdiction of the Court to the time of his death. A jury was empannelled.

From a bill of exceptions it appears, that testimony was offered to prove, that Bond was indebted to Winthrop & Co., and on 1st December, 1822, executed to them two notes, one due at four, and the other at twelve months from the date. That in February, 1823, he resided at Cotton Gin, in the State of Mississippi, where he continued to reside until the year 1827, when he settled in the Choctaw nation, in what is now called Sumter county, where he lived until his death, in the fall of 1831, but made occasional visits to Mobile, and that during one of these visits, on the 22d February, 1826, he took the benefit of the insolvent debtors law, and filed and swore to a schedule of his debts, among which he represented Josiah Wilkins and Moses Seawall as his creditors for $3,130.

Upon this testimony, the petitioner moved the Court to charge, that if Bond, at the time he contracted the debts, lived out of the State, or before they fell due, removed beyond the jurisdiction of the Courts of Alabama, and continued so to reside until his death, that the notes were not barred by the statute; which charge the Court gave, with this qualification, that if he made occasional visits to Mobile, within the jurisdiction, and this was known to the creditors, and that during these visits, he could have been served with process, then, although he resided abroad, the statute would run in his favor.

He further moved the Court to charge, that if the deceased resided without the jurisdiction, and made occasional visits within it, that the time only of his stay within the jurisdiction could be computed, against the time provided by the statute as a bar. This charge the Court refused, and charged, that the progress of the statute could not be arrested, if these visits were known to the creditors.

The Court was further moved to charge, that the schedule contained evidence of a subsisting debt, at the time, for the amount stated, and that if from that time until his death, in 1831, he resided in the Choctaw nation, the debt was not barred by the statute: which charge the Court gave, with the same qualification as above. To all which the petitioner excepted. The jury found a verdict for the heirs, and judgment accordingly.

The errors assigned, present the propriety of the charges of the Court.

GRAHAM, with whom was HALE, for plaintiff in error.

The civil and criminal jurisdiction of the State, did not extend to that part of the State called Sumter county, until the act of the 16th January, 1832, nor could any cause arising in Sumter, be tried until the act of 12th January, 1833, when it was made part of the seventh judicial circuit. So that Bond, from the time he contracted these debts until 1831, the time of his death, resided beyond the jurisdiction of our Courts, and could not be sued.

The statute of this State, (Clay's Dig. 327,) is unlike most others, as it declares that the time during which the debtor is out of the State, shall not be computed. Although the deceased was for a period of time within the limits of the State, he was without the jurisdiction, and if not within the letter, was clearly within the meaning of the law. [1 Johns. Cases, 80.]

The debt of Wilkins & Seawall was not an open account. [6 Wheaton 514; 8 Porter, 230; 1 Ala. Rep. 62; 3 Ala. Rep. 601.]

F. S. Lyon, contra.

ORMOND, J.—The principal questions presented upon the record, arise out of the exception in the statute of limitations, relating to absence from the State: "If any person, against whom there is, or shall be any cause of action, as is specified in the preceding sections of this act, is, or shall be, out of this State at the time of the cause of such action accruing, or any time during which a suit might be sustained on such cause of action, then the person, or persons, who is, or shall be, entitled to such action, shall be at liberty to bring the same, against such person, after his return into this State; and the time of such person's absence shall not be accounted, or taken as part of the time limited by this act." [Clay's Dig. 327, § 84.]

The defendant in error contends, that the statute would commence running, as soon as the deceased returned to the State, if his visit was notorious, so that he could be sued, and having commenced, would continue to run, notwithstanding his subsequent departure from the State. As it is the established construction, that the statute of limitations, when it begins to run, continues to run, notwithstanding an intervening disability to sue, if our statute had merely provided, that suit might be brought after the return of the debtor into the State, it is probable the true construction would have been, that the statute commenced running from that time, if the return was not clandestine, but open and notorious, so that the creditor might, if he thought proper, institute a suit; and having commenced, would continue to run, notwithstanding the debtor afterwards left the State. Such was the construction put upon a statute of Massachusetts, almost in the precise language of this part of the exception in ours. [Little v. Blount, 16 Pick. 369.]

The exception in our statute does not stop here, but continues further, and provides, "and the time of such person's absence, shall not be accounted, or taken, as a part of the time limited by this act." The construction contended for, renders this clause of the statute wholly inoperative, as without it, it is perfectly obvious, that the time of the absence from the State, would not be

computed, up to the first open, and notorious visit to the State. It is our duty, and such is the well settled rule upon the construction of statutes, to give effect, if possible, to every part of it, and effect can only be given to this clause, by understanding the Legislature to mean, that the statute would not run in favor of the debtor, unless he had been within the State, during the entire period of time provided by the statute as a bar.

By the Revised Statutes of Massachusetts, C. 120, § 9, a similar provision to the one now under discussion, was introduced, and considered in Battle v. Fobes, 18 Pick. 532, more fully reported in 19 Pick, 578, an attempt was there made, to bring this last exception to bear upon the case. The Court, as we understand the opinion, admitted, that under the influence of that exception, the statute would not be a bar, unless the defendant had been within the State during the whole period of time provided as a bar; but it held, that the case was to be governed by the statute in force at the time the plea was pleaded, which made the statute run from the time of the return of the defendant to the State, if such return was open and notorious, so that the creditor if he had thought proper, might have sued.

Our opinion therefore is, that to make the bar of the statute effectual, the debtor must have been within the State, subject to be sued, during the whole period provided as a bar, but it is not necessary that it should be continuous, it may be composed of different portions of time, if the aggregate makes the period of time, which is designated as a bar, which in this case would be six years.

We are next to consider, what is meant by the terms, "out of this State, at the time of the cause of such action accruing," and "return into this State."

The manifest object of the statute was, to prevent the act from operating as a bar, unless during the entire period, the debtor had been subject to be sued within the State, and it would seem very clear, that a residence in the Indian nation, though within the chartered limits of the State, but into which the process of our Courts could not be sent, or executed, would not be a "return into the State," within the meaning of the statute. The clear meaning of the clause is, that the debtor must return within the jurisdiction of the State, so that he may be sued. Indeed the statute is express, that the creditor "shall be at liberty to bring the same,

[a suit,] against such person, or persons, after his, her, or their return into this State." A return, therefore, within the chartered limits of the State, but to which the jurisdiction of the State did not extend, would not be within the exception of the statute, any more than a secret and clandestine return within the jurisdiction of the State. In both cases the intent of the statute would be defeated, the opportunity afforded the creditor of collecting, or at least suing for his debt.

A similar construction has been given to other statutes of limitations, in which the letter of the act has been departed from, to give effect to the clear intent of the statute. Thus the term "beyond seas," in the saving clause, has been held to mean beyond the limits of the State. [Murray's Lessee v. Baker, 3 Wheaton, 541; Shelby v. Gay, 11, Id. 361; Faw v. Roberdeau, 3 Cranch. 174.] These cases are strongly analagous, but the precise point was determined in Sleght v. Kane, 1 Johns. Cas. 76. The question to be decided was, whether the defendant was within the State of New York, at a particular time, at which he alledged a return to the State, so as to bring himself within an exception of the statute. The portion of the State to which he returned, was within the British lines, during the war of the Revolution. The Court held, he was not within the State, within the meaning of the statute, "because he was out of the jurisdiction of the State; he was *quasi* out of the realm; he was where the authority which was exercised, was not derived from the State, but from the King of Great Britain by the right of conquest. No writ of the State could run there, consequently 'no suit could be brought against him' there."

It seems therefore perfectly clear to us, both upon reason and authority, that the time of Bond's residence, in that part of the Indian nation, now Sumter county, before the jurisdiction of the State Courts was extended over it, cannot be computed as part of the time, during which he was in the State, nor his removal there, a "return to the State," within the meaning of the statute.

There can be no doubt, that the admission made by Bond in the schedule made to obtain the benefit of the insolvent debtors law, was an admission of the existence of the debts there enumerated; and whatever might have been their character before, after that time they ceased to be "open accounts."

Let the judgment be reversed and the cause remanded.

KENNEDY v. KENNEDY'S ADM'R.

1. Where the genuineness of a copy of the proceedings of the Probate Court of a sister State are authenticated by the attestation of its clerk, the certificate of the Judge to the official character of the clerk, and the formality of his attestation, and the additional certificate of the clerk, in the terms of the law, to the official qualification of the Judge, its authentication is complete, under the act of Congress of 1804, amendatory of the act of 1790.
2. A person appointed an administrator in another State, may maintain an action as provided by the statute, if no personal representative shall have been appointed and qualified here; and where *a debtor* of the intestate has been appointed administrator in this State, he may plead his appointment and qualification *in bar* of an action by the foreign administrator brought for the recovery of the debt.

Writ of Error to the Circuit Court of Greene.

THE defendant in error declared against the plaintiff in assumpsit upon a promissory note made by the latter, on the 23d December, 1842, for the payment of $963 18, to the intestate on the 18th January next thereafter. To this the defendant pleaded—1. That the plaintiff below was not the administrator, &c. of Margaret Kennedy, "at the time of bringing the said suit," as alledged in his declaration. 2. That before the institution of the plaintiff's action, to wit, on the 12th February, 1844, the defendant was duly appointed administrator, &c. of Margaret Kennedy, deceased, by the Judge of the County Court of Greene county, Alabama, exercising the jurisdiction of the Orphans' Court; that he qualified, and still is the administrator, &c. Wherefore he prays judgment, &c. Issue was joined upon the first plea, and the plaintiff demurred to the second; the demurrer was sustained, the issue of fact tried, a verdict returned for the plaintiff, and judgment rendered accordingly.

At the trial a bill of exceptions was sealed at the instance of the defendant, in which is set out *in extenso* the copy of a paper purporting to be letters of administration upon the goods, chattels and credits of the intestate, granted to the plaintiff by the

Court of Probate of Kemper county, in the State of Mississippi, with the attestation of the clerk and certificate of the Judge of that Court. To the letters of administration it was objected, that it was not admissible evidence, because it was not authenticated pursuant to the act of Congress; but the Court overruled the objection, and permitted the paper to go to the jury.

W. & J. Webb, for the plaintiff in error, contended—1. Conceding that the plaintiff below administered on Margaret Kennedy's estate in Mississippi, yet, if the plaintiff obtained letters of administration in Alabama, he was not liable to be sued here by the foreign administrator. [Clay's Dig. 227.] 2. The matter of the second plea, was perhaps pleadable in abatement, but if this be so, it was certainly good in bar. [1 Chitty's Plead. 8th Am. ed. 445-6, 457; 1 Saund. Rep. (note 3,) 274; Cloud v. Golightly's Adm'r 5 Ala. Rep. 654, does not oppose this position, and it is sustained by Jenks v. Edwards, 6 Ala. Rep. 143, and Stallings v. Williams' Adm'rs, Id 510. 3. The defendant below should have been permitted to amend his pleading—the only discretion which the Circuit Court had upon the subject, was in prescribing the terms of the amendment. [Clay's Dig. 334, § 119; 6 Ala. Rep. 510.] 4. The transcript of the proceedings of the Probate Court of Kemper, should have been certified as an exemplification of an office book, &c. as required by the act of Congress of 1804. [Clay's Dig. 619, 620.] There was no proof that that Court is a Court of record, or it would be conceded that the authentication conformed to the act of 1790. The objection to the authentication is, that it has no sufficient certificate by the clerk, (as required by the act of 1804,) of the official character of the Judge. True, there is such a certificate, but it bears date previous to the certificate made by the Judge.

H. I. Thornton, for the defendant, insisted, that the proceedings of the Probate Court of Kemper were authenticated pursuant to the act of Congress, He contended that Cloud v. Golightly's administrator, 5 Ala. Rep. 654, very clearly established the insufficiency of the second plea, and is not affected by the subsequent decision of Stallings v. Williams' Adm'r, 6 Ala. Rep. 510; *further*, the first plea is treated in the replication as a plea in bar, agreeably to the decision in Jenks v. Edwards, Id. 143.

COLLIER, C. J.—In Hughes v. Harris, 2 Ala. Rep. 269, the proceedings and judgment of the Court of a sister State were certified by the clerk, and attested by the presiding Judge, and in form were such as were had in a Court of record; we held, that it would be intended, without further proof, that the Court rendering the judgment was a Court of record—there being no plea putting that fact in issue. Without stopping to inquire, whether the same intendment should be indulged in favor of the Probate Courts of Mississippi, we are satisfied, that the transcript of the grant of administration to the plaintiff, made in that State, is not obnoxious to the objections which the defendant below has made to it. The clerk first attests the genuineness of the copy, then the Judge certifies to the official character of the clerk, and the formality of his attestation; and lastly, the clerk vouches, in the terms of the law, the regularity of the Judge's qualification, &c. This is in conformity to the act of Congress of 1804, amendatory of the previous enactment of 1790. The attestation of the clerk, and several certificates consequent thereon, are all dated of the same day, and must be intended to have been made in the order in which they follow each other.

By an act passed in 1821, it is enacted, that when letters of administration, &c. on the estate of any intestate, &c. having no known place of residence in this State, at the time of his death, shall have been duly obtained in any other State, &c. and no personal representative of such intestate shall have been appointed, and qualified, in this State, the representative appointed out of this State, "may maintain any action, demand and receive any debt, and shall be entitled to all the rights and privileges which he, she or they could have done, or would have had, if duly appointed, and qualified within this State." [Clay's Dig. 227, § 31.] The question arising upon this statute, in the present case, is, whether a domestic administrator, when sued in our Courts, by one appointed abroad, should plead his appointment in bar.

In Cloud v. Golightly's Adm'r, 5 Ala. Rep. 654, we said, that it was not necessary for a foreign administrator, suing in our Courts, to negative by his declaration, that the intestate had a known place of residence in this State at the time of his death, or that his estate within the same had been committed to a domestic representative. The *dictum* was also added, that if a debtor

of the estate denies the right of an administrator appointed abroad to maintain an action, he should plead in abatement, the existence of those facts which are fatal to the remedy.

In Jenks v. Edwards, 6 Ala. Rep. 143, the question was directly raised, whether, where a suit was brought in the name of one person for the use of another, it was allowable to plead in bar, that the nominal plaintiff was dead *at the commencement of the action.* After a very full examination of the point we said, "Our conclusion from the authorities is, that, where the plaintiff's disability is such, that it cannot, *in rerum natura*, be removed, at any time in future the defendant may alledge it either in bar or abatement." Again, the question is asked, why a plea in bar would not be good? and thus answered: "The nature of it, (the defence,) is such, that it cannot give the plaintiff a better writ, that he may institute another suit; and a verdict upon an issue thus formed, against the plaintiff, will not bar an action by his personal representative, founded upon the same cause. Upon principle then, we think the plea" in bar well pleaded.

The *dictum* in the first case, we are still inclined to think, correctly lays down the law, viz; that a debtor of a deceased person, when sued in Our Courts by a foreign administrator may plead in abatement, that the deceased had a known place of residence in this State, or that his estate within the same had been committed to a personal representative. True it is said that this is the correct practice, yet it is not intimaed, either directly or indirectly, that it is the only mode in which the debtor may object to the want of authority by an administrator appointed abroad to sue in our Courts. There is then nothing in the decision referred to, establishing that a plea in abatement is the exclusive remedy for the defendant in the case supposed, though we will not say that such is not the law. The citation is at most a mere *obiter dictum*, and we should not be inclined to yield to it the force of authority, but if necessary would examine the point as *res integra.*

In Jenks v. Edwards, we supposed that if the plaintiff's disability be *perpetual*, it might be pleaded in bar, but if *temporary only*, it was matter of abatement. Here the right of action, if it ever existed, was entirely lost by the grant of administration to the defendant, by the proper Court in this State. A foreign ad-

ministrator is only permitted to sue here by the favor of the Legislature, and then only when no domestic representative has been duly appointed and qualified. If the defendant could be considered merely as a debtor, and administration had been here committed to some third person, the remedy of the foreign administrator would perhaps be in abeyance, subject to be put in action whenever there shall cease to be a domestic representative; and in such case it may be that the suit could only be arrested by plea in abatement. But the defendant pleads that he had been duly appointed and qualified as an administrator in this State; this being the case, if he was a debtor of the intestate's estate, he would be chargeable with cash to the extent of his indebtedness. In Childress v. Childress, 3 Ala. Rep. 752, we said—"True, it is the duty of an executor to collect the debts due the estate he represents; but there is no process by which he can coerce a collection of himself, and as he is the party who is both to pay and receive the money, the law will regard him as in possession of it, from the time it became due." From the law as here stated, it results, that the debt due by the defendant to the intestate's estate, ceased to be a chose in action after its maturity; but became, in contemplation of law, so much money in possession.

From this view of the law, it would seem, that the matter of the second plea constituted a perpetual bar, and was well pleaded. The demurrer was therefore improperly sustained; the consequence is, the judgment of the Circuit Court is reversed and the cause remanded.

STONE, ET AL. v. LEWIN.

1. The Supreme Court cannot be invested with jurisdiction to examine a cause in Chancery by a writ of error sued out on a decree *pro forma*, entered by consent of the parties. It is competent for the chancellor to set aside such a decree as having been entered without any sufficient authority.

Writ of Error to the Court of Chancery for the 22d District of the Middle Division.

As neither the bill, answers, nor proofs are considered in the judgment of the Court, it is only necessary to state so much of the proceedings and decree as is covered by the opinion.

At the July term, 1842, the cause was continued, because the Chancellor then holding the Court had been of counsel for the complainant. At a special term, held in the same year, an agreement was entered of record to take proof; that at the next term of the Court, the Chancellor who had been of counsel, might determine the question of diligence, in the event of an application for a continuance, and that, when the cause is heard, should he preside, a decree *pro forma* be entered for or against the complainant as she might elect: at the July term, 1844, this entry appears: "This case is submitted for a decree on bill, answers, and exhibits, by consent, with an agreement that a decree *pro forma* be rendered by this Court, in favor of the complainant, perpetuating the injunction heretofore in this case granted. It is therefore ordered, adjudged, and decreed, that the said injunction be, and the same is hereby, rendered perpetual, and that the defendants pay the costs herein.

Peck and L. Clark, for the plaintiffs in error.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—We suggested, in the recent case of Elmes v. Sutherland, *supra*, that it was questionable if this Court was invested with any jurisdiction when a decree is not made by the Chancellor, but is entered *pro forma*, by the consent of the parties, in order to have a decision here more speedily, or from any other cause. This case presents the matter of such a decree so fully, that we must now decide the question, or consider it at rest.

At the formation of our State Government, it was provided, that "the Supreme Court, except in cases otherwise directed by the constitution, shall have *appellate* jurisdiction *only*. This is to be coextensive with the State, under such restrictions and regulations, not repugnant to the constitution, as may from time to

time, be prescribed by law." [Const. Art. 5, § 2.] It is quite unnecessary to speculate upon the reasons which induced the prohibition contained in this section, as there can be no doubt of the intention to exclude the exercise of any original jurisdiction by the Court, as a Court. Our duty certainly is, to give it the effect which its authors intended it should have, and this can only be done by refusing to entertain jurisdiction of cases which have not, in point of fact, been decided by the inferior Courts. It is quite evident, that if the consent of parties can confer what is really original jurisdiction upon this Court, many cases will find their way here, which otherwise might not come; and it might become common to use the inferior Courts as mere offices for the preparation of cases.

In England the jurisdiction of the several Courts is not as with us, defined by a written constitution, but is chiefly ascertained from long continued usage and practice. The Court of the Master of the Rolls, though originally merely a branch of the Court of the Lord Chancellor, had gradually acquired such consideration, that Lord Elden, in Brown v. Higgs, 7 Vesey, 561, entertained serious doubts whether he was authorized to entertain an appeal from a re-hearing had by that Judge, and directed that matter to be argued before him. After hearing the argument and ascertaining that the duty was imposed, he said, "it has been thought, that in cases of this sort, the Court might formally affirm the judgment, and suffer the cause to go to the House of Lords, by reference to other cases, when it is conceived the parties mean to go to the House of Lords. But I consider it contrary to the duty of a Court of justice under any circumstances so to act. The suitors have a right to the deliberate attention and deliberate judgment of every Court, in every stage in which, according to the constitution, the cause may proceed; and there can be no circumstances under which I should ever permit myself to say, as the the cause is to go elsewhere, I give no judgment."

It is true, every suitor has the right to be heard ultimately, in this Court, but because this is so, it does not follow that he can come here in the first instance, or what in effect is the same thing, by consenting that the Court provided by the constitution to first hear his cause, shall decline that duty, and give effect to his con-

sent to remove it here. We are not to be understood as implying any censure upon the Chancellor in this particular instance, as a very satisfactory reason existed why he should not determine the cause, and even if this reason was out of the way, the practice has been so common, that *pro forma* decrees might seem to be entirely warranted by the consent of the parties.

We have endeavored to show, that this practice is in conflict with the letter and spirit of the constitution, and earnestly hope that it may be entirely eradicated, as it is frequently important to a deliberate and correct examination of the cause in this Court, that it should have received a careful examination in the subordinate Courts. It is only when a cause is thus examined in the Court of original jurisdiction, that the many mistakes of the parties can be corrected, deficiencies supplied, and new views presented. If this examination is deferred until the cause comes into the appellate Court, there can, in most cases, be neither amendment or revision of the evidence, or frame of the proceedings, and great injustice may result to suitors. The cause now before us, is an illustration of the evil of this practice, as no evidence was taken to sustain the bill, and the reversal of the Chancellor's decree would conclude the complainant, when if the same deficiency had been disclosed to him, he might have exercised his discretion in permitting the party to take testimony.

The parties were probably induced to the course taken here by the circumstance that the presiding Chancellor had been of counsel for one of them, previous to his taking the office, but this cannot give the Court jurisdiction. If this matter stands in the way of a decision, a change of venue could have been had under the statute. [Clay's Dig. 356, § 73.]

We have had some difficulty, whether a reversal of the decree, or a dismissal of the writ of error, is proper under the circumstances, as we find it stated to have been held, by the House of Lords, in Blundell v. Macartney, 2 Ridge Part C. 557, that a decision founded on an order made by consent, will not be reversed. We have not access to that decision to ascertain its precise extent, but think it would be going entirely too far to say, the parties are concluded by their consent to this *pro forma* decree. We think the proper course is to dismiss the writ of error,

and the party can then apply to the Chancellor to set aside the *pro forma* decree, as unwarranted, and the cause will then proceed to its final termination.

Writ of error dismissed.

VANCE v. WELLS & CO.

1. Where several replications are made to one plea, the Court, on motion, will strike out all the replications but one, and put the plaintiff to his election which he will retain. Or the objection may be made by a demurrer to all the replications, but not by a separate demurrer to each.
2. Where goods are furnished to a married woman, on the faith of her separate estate, or she executes a note as the surety of her husband, there is such a moral obligation to pay the debt, as will support an action at law on a promise to pay, after the coverture has ceased.
3. Where a married woman, having a separate estate, executes a note in her own name, it is *prima facie* evidence that the goods were furnished, or credit given, on the faith of her promise.

Error to the Circuit Court of Russell.

Assumpsit by the defendant against the plaintiff in error.

The declaration is upon a promissory note. The first count is in the usual form upon the note. In the second count, after declaring upon the note in the usual way, it proceeds to alledge that in consideration of her liability upon the note, and in consideration that the plaintiffs would indulge her for the space of three months without suit, the defendant pronounced to pay the sum due upon the note, on request, and an averment that the indulgence was given, and that on request she refuses to pay. To this count the defendant demurred, and her demurrer being overruled, pleaded the general issue. 2. Coverture at the date of the note.

The plaintiffs took issue on the first plea, and to the second, replied—first, that after the death of the defendant's husband, in

consideration of indulgence for three months, she promised to pay the note, and avers that the indulgence was given.

Second, that at the time the note was given by the defendant, she had a separate estate, and after she became discovert promised to pay it.

Third, that when the note was executed by defendant, she had a separate estate, and after she became discovert, in consideration of forbearance, promised to pay the debt, and that the indulgence was given.

To each of these replications the defendent demurred. The Court sustained the demurrer to the second replication, and overruled it as to the first and third—upon which the defendant took issue.

Upon the trial it appeared, that the defendant at the date of the note was a married woman, living with her husband, and testimony was offered, conducing to show, that she had a separate estate, but there was no proof that the plaintiff gave her credit on the faith of her separate property, or that any thing was said about it, at the time; or that the goods purchased, and for which the note was executed, went to her separate use. It was also proved, that after the death of her husband, she promised to pay the note, if an indulgence of four months was given to her, which was accordingly done. It did not appear that when she made the promise, she was aware that she was not liable on the note. Upon this state of facts, the defendants' counsel moved the Court to charge, that before they could find for the plaintiff, they must be satisfied that credit was given to the defendant by the plaintiffs, on account of her separate estate, otherwise the plaintiff could not recover on the subsequent promise.

2. That before the plaintiffs could recover, they must satisfy the jury, that at the time the subsequent promise was made, the defendant knew, that by means of the coverture she was not liable upon the note.

3. That in this form of action, the plaintiff cannot recover, if the defendant had a separate estate at the date of the note, out of which she was bound to discharge it.

4. That no admission made by the defendant, as to her owning a separate estate, made during coverture, and after the death

of her husband was admissible in evidence. These charges the Court refused to give, and the defendant excepted.

The assignments of error are—1. In overruling the demurrer to the second count of the declaration.

2. In overruling the demurrer to the first and third replications.

3. In the refusal to charge as moved for.

BELSER, for plaintiff in error.

No counsel appeared for the defendant.

ORMOND, J. It is now objected that the Court should have sustained the demurrers to the replication to the second plea, because more than one replication to a plea is not allowed. It is true that this Court, in Gray v. White, 5 Ala. Rep. 490, and again in Stiles v. Lacy, 7 Ala. Rep. 17, held that to be the law, but the objection to this vicious pleading, has not been taken in such a way, that in can be noticed by this Court. The proper mode would have been, to move the Court to strike out all the replications but one, and the plaintiff would have been put to his election which he would retain; or it might have been reached by a general demurrer to all the replications. A separate demurrer to each, did not raise this question in the Court below, and for that reason, it cannot be for the first time sprung upon the plaintiff in this Court. We must therefore consider the sufficiency of the pleadings brought to view by the demurrers—the second count of the declaration, and the first and third replications to the second plea.

The law of this case, as expounded by this Court when the case was last here, is, that the defendant was liable upon her promise made after the coverture had ceased, if the promise made during coverture was supported by a moral obligation, and the subsequent promise made upon sufficient consideration.

The moral obligation would be established, by showing either, that the goods for which the note was given, were furnished on the faith of the separate estate which it appears the wife had, or that the note was executed by her as the surety of her husband. That, was the case of Lea v. Muggeridge, 5 Taunton, 37, where the question was elaborately considered, and we think that the fact, that the defendant had a separe estate, and whilst a *feme co-*

vert executed the note in her own name, would be at least *prima facie* evidence that the goods were furnished, or credit given, on the faith of her promise to pay; and that consequently, there was a moral obligation resting on her to pay the debt, which could be enforced at law, upon her subsequent promise. Nor can it be doubted, that the delay would be a sufficient consideration to sustain it.

To apply these principles to this case. The demurrer to the declaration was properly overruled, as it is perfectly good upon its face. The fact of coverture when the note was executed, does not appear in the declaration, but is disclosed by the plea, in answer to which the plaintiff undertakes by his replication to show, that notwithstanding such was the fact, he is still entitled to recover. The inquiry then is, is the replication sufficient, according to the principles above laid down. Neither of the replications are sufficient. It should have been averred, that the note was given under such a state of facts, as would show that the defendant was under a moral obligation to pay it; as for example, that the consideration of the note was goods, or money furnished upon the faith of her separate estate; or that she became the surety of her husband, and that after the death of her husband, she promised on sufficient consideration to pay it. The Court also erred in refusing the first charge moved for by the plaintiff in error. Let the judgment be reversed and the cause remanded.

KIRKSEY, ET AL. vs. MITCHELL.

1. D. sold sundry tracts of land to L. on a credit; L. sold one of them to B., and another to M.; D. agreed with B. to release the tract purchased by him upon the payment of a certain sum of money; but at the time of this agreement D. was not informed that M. was a sub-purchaser of L; D. obtained a decree for the sale of the lands, to satisfy his equitable lien, and assigned the decree to K: *Held*, that the land claimed by M. was not exempted from the operation of the decree by the arrangement which D.

made with B., nor could it be released by the payment of a sum corresponding with what was paid by B., considering the relative value of the two tracts.

2. Neither the purchaser of lands, nor his assignee, can be charged with rents received upon a bill to enforce the equitable lien of the vendor; and if the assignee of the vendee becomes the assignee of the decree recovered by the vendor, a sub-purchaser of a part of the land from the vendee cannot relieve it from the decree, by compelling the assignee to appropriate the amount received by him for rent, to the satisfaction of the decree, *pro tanto*.

Writ of Error to the Court of Chancery sitting in Talladega.

In April, 1840, the defendant in error filed his bill setting forth that on the 17th day of August, 1838, he purchased of Robert L. Lane, the east half of the north west quarter of section thirty-two, in township sixteen, range six in the Coosa Land District, for the sum of five hundred dollars, paid in hand, and received from his vendor a bond conditioned to make "full and sufficient title" to the same. At the time of his purchase, the complainant was put in possession of the land, and thereupon improved the same, by clearing and putting in cultivation one half, and inclosing with a good fence the entire tract. The complainant supposed he was purchasing an unincumbered title, but has recently learned by a newspaper printed in Talladega, that the land in question was advertised for sale on the 4th day of May, 1840, by the Register of the Court of Chancery sitting in that county, as well as other lands of Robert L. Lane, to pay to Eli M. Driver the purchase money for the same. All of which lands the complainant is informed had been sold by Driver to Lane.

It is charged in the bill that Lane had from time to time paid Driver, on account of his purchase, different sums of money; that the land in controversy is the only tract included in Lane's purchase from Driver which the former had disposed of, unless it be another eighty acre tract, for which Driver has received payment since Lane removed from the State.

Complainant is informed that at the last term of the Chancery Court holden in Talladega, Driver obtained a decree in equity, subjecting all the lands purchased by Lane from him, to sale for the purchase money; and which is now advertised as above stated. It is alledged that this decree was obtained through the

fraud and collusion of Driver and Lane, and is, as complainant believes, for more than two thousand dollars, what is due to Driver, and embraces a large amount of usurious interest.

The lands purchased of Driver and which were left undisposed of when Lane removed from this State, it is alledged, were abundantly sufficient to pay off the demands of the former, with costs and charges, without recourse to the eighty acres of which the complainant is in possession.

It is then alledged that Lane absconded from this State, in 1839, and is now believed to be a citizen of Texas; that Driver resides in the State of Mississippi, both of whom it is prayed may be made defendants to the bill. The complainant further prays, that the Register of the Chancery Court may be decreed to sell the lands embraced by the decree referred to, in half quarter sections, that it may command a fair price; that he may be enjoined from selling the land embraced by the complainant's purchase until all the other lands directed to be sold shall have been disposed of, and if these shall be sufficient to satisfy the demand of Driver, then the injunction be made perpetual. And upon final hearing the title of Driver and Lane may be divested, and vested in the complainant, pursuant to the bond of the latter for title. *Lastly* that the decree in favor of Driver against Lane, if ascertained to be usurious, may be opened and corrected, and that such other and further relief as may be proper, be granted.

Upon the coming in of the answer of the defendant, Driver, the injunction was dissolved, on motion, and the bill continued as an original.

The defendant, Driver, in his answer, admits that he sold several tracts of land to his co-defendant, Lane, and executed his bond conditioned to make him titles when the purchase money was paid. *Further*, that the eighty acres claimed by the complainant, were embraced by the sale to Lane, but respondent was not informed of his purchase until his bill was filed.

Respondent admits that he obtained a decree as alledged in the bill, for four thousand dollars, but denies that it was obtained by fraud, or other unjust means, or for a greater amount than is really due him. He denies that decree is swelled by including usurious interest, and concludes with a demurrer, pursuant to the statute.

In August, 1842, a supplemental bill was filed by the com-

plainant, reciting the substance of the original bill, and stating that since the decree was rendered in Driver's favor, all the lands which were ordered to be sold, except the half quarter claimed by the complainant, and the same quantity, to wit, the west half of north east quarter of section twenty-seven, in township sixteen in range six east, had been sole under the decree. This latter tract had been previously purchased of Lane by Robert W. Berry, for which the latter paid six hundred dollars, After the complainant's bill was filed, Berry exhibited his bill, and in like manner obtained an injunction.

It is also alledged, that after the decree in favor of Driver was obtained, and before the sale of the land under the same, Driver sold all his interest in the decree to Isaac Kirksey, who then undertook the sale of the lands. Previous to his purchase, and after the removal of Lane, Kirksey took possession and rented out much of the land, for a sum amounting to five or six hundred dollars—all which should be applied in extinguishment of the equitable lien of Driver, so as to relieve the complainant. When Kirksey was about making the purchase of Driver, he came to complainant to borrow money to enable him to consummate it, saying he would satisfy the decree from the other lands, excluding that claimed by the complainant, and that the latter would be thereby protected. Under the impression that such would be the result, the complainant lent him three hundred dollars, no part of which has ever been refunded.

Further, that Driver and Kirksey have confederated to bring the complainant's land to sale, and to relieve the half quarter purchased by Berry from the operation of the decree. Driver has been fully paid off the sum due him from Lane; that Berry has paid to him two hundred dollars, (which should be entered as a credit upon Driver's lien,) in consideration of which Driver and Kirksey are to exempt his land from sale, and cause the complainant's land to be sold. That if Kirksey would credit the decree of Driver with "rents and profits," received by him, the sum paid or to be paid by Berry, and the amount for which the lands sold, the decree would be satisfied in full; but this he refuses to do.

The bill makes Lane, Driver, Kirksey and Berry defendants, and prays that an account be taken of the balance due on the decree of the "rents and profits" received by Kirksey, and the amount paid by Berry; and if any thing more be due on the de-

cree obtained by Driver, that Berry may contribute with complainant to discharge the same *pro rata:* And upon the complainant's bringing into Court his proposition, of the balance due, then the bill prays that all title to the plaintiff's land may be divested out of Driver, Lane and Kirksey. *Further*, that an injunction may be awarded to restrain a sale of the same, until the further order of the Court. An injunction was accordingly ordered and issued.

Kirksey answered, that he has no knowledge of the "transactions stated in the original and supplemental bills, as between the complainant and the other defendants," but so far as they affect him, he insists that the complainant be put to strict proof. It is true, the respondent "purchased of Driver the benefit of his decree" against Lane, before the lands were sold, and that they were afterwards disposed of by the Register, pursuant to the decree. As to his taking possession before the sale, respondent states that he held a deed in trust executed by Lane to him as *cestui que trust;* the lands were sold by the trustee and purchased by respondent; thereupon, with the exception of one quarter section, (which was not embraced by the sale,) they were conveyed to him. In virtue of that purchase, and not previously, the respondent took possession of, and rented a small part of them —not being able thus to dispose of the residue. The aggregate sum agreed to be paid for rent, would not, it is believed, exceed four hundred dollars; but be it more or less, he is entitled to retain it as his own, without being required to account to any one.

Respondent denies that he made to the complainant any such promises as he represents, in respect to the exemption of his lands from Driver's decree, and making the other lands yield a sufficient sum to satisfy it, or that he undertook to save him harmless. As for the money borrowed, the respondent denies that the loan was influenced by any such inducement as complainant intimates; he gave his note for the return of the same, and expects to refund it "in due time."

If respondent purchased the lands at a low price, it was at a fair sale, where he was the highest bidder. He admits that he agreed that Berry's land should not be sold, but denies that there ever has been such an agreement in respect to the complainant's land. Respondent has no knowledge of any payment having been made to Driver towards the extinguishment of the decree;

he refuses to allow the rents to go towards its discharge because they were his own; and he refuses to allow a credit for any thing on Berry's account, because he has received nothing from him; nor does he know that Driver has received anything, but if he has, it cannot be admitted that the complainant is entitled to the benefit of it. He also embraces in his answer a demurrer to the bill.

Berry, in his answer, denies all knowledge of a combination between Driver and Kirksey to exempt his lands from a lien for the purchase money. He admits his purchase as charged in the bill. On the 20th March, 1839, and before the transfer from Driver to Kirksey, of the interest of the former in the decree, respondent agreed with Driver, to pay and advance to him two hundred dollars, over and above the sum which he (respondent) had paid Lane; in consideration whereof Driver was to execute titles to Lane for his benefit, and discharge his land from the operation of the decree. The two hundred dollars were paid, under a fair and *bona fide* contract, not to affect the interest of any one else, but merely to obtain Driver's relinquishment. This arrangement respondent was authorized to make; especially as he had previously paid to Lane for his purchase, six hundred dollars, the full value of the land.

Testimony was taken at the instance of both parties, but it is not deemed necessary to recite the proof here.

The Chancellor was of opinion that Kirksey was not chargeable with the rents in this suit; that if he received the lands as a purchaser at the trust sale, he was entitled to retain them, and if he received them as a wrong doer they must be recovered in "another *forum*." But as Driver had released Berry's land from his lien, in consideration of two hundred dollars paid him, he could not throw a heavier responsibility upon the complainant, who stood in the same predicament. Thereupon it was referred to the master to estimate and report how much money should be paid by the complainant to make his contribution equal to that accepted from Berry; upon the payment of that sum by the complainant within thirty days, the injunction was made perpetual. Should the complainant fail to pay within that time, the bill was to be dismissed; and in any event the bill as to Berry was dismissed at complainant's costs.

T. D. Clarke and S. F. Rice for Kirksey and Driver who alone assigned errors, made the following points: 1. The bills contained no equity and should have been dismissed. [Abercrombie v. Knox, et al. 3 Ala. Rep. 728.]

2. The lien of the vendor of lands exists against the vendee having an equitable title. [2 Story's Eq. 480; 5 Ala. Rep. 397.] The complainant and Berry stood in the same predicament with Lane, and as the latter might have stipulated with Driver to exempt any part of the land from his lien, and if he had retained the equitable title, Driver might have proceeded against a part, for the purpose of making his lien available, so it was competent for Driver and Berry to make an arrangement which would have that effect.

3. The bill does not alledge that all the lands were purchased at the same time by Lane, and it cannot be intended that the purchase was joint. This being the case, there is no pretence for adjudging contribution as it respects Berry's land, to aid the complainant.

4. The doctrine of apportionment, or contribution, where there is a mortgage in fact, does not apply to a case like the present. If the complainant's land should be sold instead of Berry's, he could not call upon the latter to contribute, and this is a fair test. [1 Story's Eq. 461, and note 1, 462; 1 Johns. Ch. Rep. 409, 415, 425.]

5. If the two hundred dollars paid by Berry to Driver is to be credited upon the decree, Driver to that extent must refund to Kirksey, and of course is an indispensable party. The decree is erroneous because he was not brought in by the service of a *subpoena*, or publication.

6. There was no proof as against Driver and Kirksey to show the payment of two hundred dollars to the former by Berry; the answer of the latter was no evidence against his co-defendants. If there was proof to this point, it is not perceived what benefit the complainant could derive from it. *Besides*, the equities as between the complainant and Berry cannot affect Kirksey. [3 Ala. Rep. 728.]

W. P. Chilton and L. E. Parsons, for the defendant, argued, that the lands sold by Driver to Lane, were charged with a general lien; each part ought to bear no more than its due proportion

of the charge, and equity will compel each party who becomes a sub-purchaser to contribute rateably. [Stephens v. Cooper, 1 Johns. Ch. Rep. 425.] Berry and the complainant stand *in equali jure*, and equity in such case will decree contribution. [Duprey v. Johnson, 1 Bibb's Rep. 562; Peck v. Ellis, 2 Johns. Ch. Rep. 131; Martin v. Lundie, 6 Ala. Rep. 429; 1 Dess. Rep. 500, 542; 1 Rand. Rep. 328; 2 Id. 384.]

When a mortgage embraces several pieces of Land, and there are several purchasers, each one shall contribute, according to the value of his interest at the time the mortgage was executed. See as to Driver's lien, 15 Ves. Rep. 29; 4 Wheat. Rep. 256; 7 Id. 46; 5 Porter's Rep. 542; 3 Ala. Rep. 302.] Kirksey does not occupy a more favorable situation than Driver, and cannot enforce the lien to a greater extent than he could.

COLLIER, C. J.—It is well settled, that both the vendor and vendee of lands, have their mutual liens, the former for the purchase money due, and the latter for what he has paid, if the contract is rescinded, or from any other cause the money is to be refunded. [Foster v. The Trustees of the Athenæum, 3 Ala. Rep. 302; Hall's Ex'r v. Click, 5 Ala. Rep. 363, and authorities there cited; 2 Story's Eq. 462, *et post;* 1 Bibb's Rep. 313; 4 Id. 239; 4 Litt. Rep. 169, 190, 196; 1 Id. 216; 3 Bibb's Rep. 183; 4 J. J. Marsh. Rep. 169; 6 Monr. Rep. 199; 1 Mason's Rep. 212; 7 Wheat. Rep. 46; 9 Cow. Rep. 316.] In the present case this rule is not controverted, but it is contended that the decree in favor of Driver, for the purchase money, must be enforced against every distinct tract of land sold by him to Lane, according to the value of each; and that as this has been rendered impossible, by the discharge of the land purchased by Berry from the lien, the complainant's purchase must also be released upon paying a sum bearing a like proportion to its value.

When different parcels of land are included in the same mortgage, and are afterwards sold to different persons, each holding in fee and severalty the parcel sold to himself; in such case, each purchaser is bound to contribute to the discharge of the common burthen, or charge, in proportion to the value which his parcel bears to the whole included in the mortgage. [1 Story's Eq. 461.] It was accordingly held, that where six separate lots of land were mortgaged, and the mortgagee afterwards released

four of the lots from the mortgage, leaving the original debt as a charge on the others, that the two lots, (which had been transferred to third persons,) were chargeable with their rateable proportion of the debt and interest, according to the relative value of the six lots at the date of the mortgage. A creditor cannot, by any act of his, deprive the co-debtors, or owners of lands conveyed by way of mortgage, of their right of contribution against each other. [Stephens v. Cooper, 1 Johns. Ch. Rep. 423; see also, Id. 409; Morrison's Adm'rs, et al. v. Beckwith, 4 Monr. Rep. 76.]

This rule, it seems, is not confined to cases where the lien is created by a mortgage, deed of trust, &c., but extends to the vendor's lien for the purchase money; and it has consequently been held, that an equitable lien on lands held by several persons should be enforced distributively against each, in proportion to his interest in the estate. [Poston v. Ewbank, 3 J. J. Marsh. Rep. 43; Stephens v. Cooper, 2 Johns. Ch. Rep. 430.]

It may also be stated, as a well established rule in equity that when one person has a lien upon two funds, and another a posterior lien upon only one of them, the person having both liens will be compelled first to exhaust the subject of his exclusive lien, and will be permitted to resort to the other only for a deficiency. [Piatt v. St. Clair's Heirs, 6 Ham. Rep. 233.] In Cheesebrough v. Millard, 1 Johns. Ch. Rep. 409, the Chancellor said, "I admit as a principle of equity, that if a creditor has a lien on two different parcels of land, and another creditor has a lien of a younger date on one of those parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior has a lien, the latter will be entitled, either to have the prior creditor thrown upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford him. This is a rule founded in natural justice, and I believe it is recognized in every cultivated system of jurisprudence." He considers it well settled in the English law, and cites cases to prove it. It is said in the same case, that if a creditor exacts the whole of his demand from one of the sureties, that surety is entitled to be *substituted* in his place, and to a cession of his rights and securities, as if he were a purchaser, either against the principal debtor or his co-sureties. And if a prior creditor has put it out of his power to make the cession, it seems that he will be excluded from so much of his

demand as the *surety*, or subsequent creditor might have obtained, if the cession could have been made. But if the prior creditor, who has disabled himself from making the assignment, has acted with good faith, and without a knowledge of the rights of the other creditor, he is not to be injured by his inability to make the cession; for the doctrine of "substitution rests on the basis of mere equity and benevolence." See also, Cullum v. Emanuel & Gaines, et al. 1 Ala. Rep. N. S. 23; 1 Story's Eq. 472, *et post*, and cases cited in notes; Piatt v. Law, 9 Cranch's Rep, 458; Read v. Simmons, 1 Dess. Rep. 552; Bank of Kentucky v. Vance's Adm'rs, 4 Litt. Rep. 169; Taylor, et al. v. Porter, 7 Mass. Rep. 355.]

Let this statement of principles and citation of authorities suffice to guide us to a conclusion in the present case. As between Driver and Lane, his vendee, the former might have enforced his equitable lien against all, or any part of the land embraced by the sale; or he might have purchased of him one parcel for a less sum than Lane agreed to pay him for it, and have collected the residue of his debt from the other lands. Does a different rule apply as between Driver and his assignee, and a purchaser from Lane?

Driver denies any knowledge of the right set up by the complainant until after his bill was filed, and his denial is not in any manner disproved; consequently it must be taken as true. The sale by Lane to Berry, as well as its confirmation by Driver, was made long before the institution of this suit, and upon principles of equity Driver should not be prejudiced. He was not bound to inquire what disposition his vendee had made of the lands, but might, with the assent of the latter, deal in respect to one parcel of it, as if he was still the proprietor of the residue. The sale by Lane to Berry, with the subsequent assent of Driver, might be treated as a repurchase by the latter, *pro tanto*.

The equitable right of the sub-vendees of land to compel the original vendor to exert his lien for the purchase money against the entire estate, that each separate parcel may be charged in proportion to its value, must, like the doctrine of substitution, have its foundation in equity and moral justice; and if the vendor without a knowledge of the right of a derivative purchaser, has disabled himself from thus proceeding, by an arrangement made with his vendee, in good faith, his lien cannot be impaired. A

rule the opposite of this, would be too severe, and in our judgment cannot be supported either upon principle or authority. Kirksey it is conceded, does not occupy a position more unfavorable than his assignor, and it may be admitted that every defence that was available against the decree before its assignment may still be made.

It is not shown by the proof, that Kirksey took possession of any of the lands, until after he became a purchaser at the trust sale, under the deed executed by Lane for his benefit. His possession after that time, must be regarded as the possession of Lane, or rather as permitted by him. This is proved by the deed, which invests the trustee with the power of sale, and the evidence showing the execution of that power. The rents then, received subsequent to Kirksey's possession under leases thereafter made by him, became his own property, in virtue of the deed and the consequent proceedings. It was clearly competent for Lane thus to stipulate with Kirksey; and as he himself would be entitled to the rents, without being required to account for them to his vendor, he might transfer the same right to another person. See Chambers, et al. v. Mauldin, et al. 4 Ala. Rep. 477.

This view is conclusive to show, that the complainant is not entitled to the relief which he seeks; the decree of the Chancellor is consequently reversed, and the bill dismissed with costs.

WALKER v. HAMPTON, ET AL.

1. A sheriff who has lawfully seized slaves under an attachment is not liable *in an action of trespass*, if he refuse to permit the defendant to replevy them, although a valid bond, with sufficient sureties may be tendered.

Writ of Error to the Circuit Court of St. Clair.

This action is trespass by Walker against Hampton and Chenault for taking and carrying away certain slaves from the pos-

session of Walker. The cause seems to have been tried on the general issue, as no pleas are set out in the transcript.

At the trial, the plaintiff proved his right of property in the slaves named in the declaration, his possession of them in the fall of the year 1843, and that one of the defendants, at the instigation of the other, took the slaves from him.

The defendants then proved, that at the time of the injury complained of, one of them, Chenault, was the sheriff of St. Clair; that as such sheriff, and under and by virtue of a valid writ of attachment against the plaintiff's effects, he took and detained the slaves.

The plaintiff then proved, that after this seizure, Chenault, as sheriff, was tendered a formal and sufficient bond, with good sureties, in order to replevy the slaves, as provided by statute; and that Chenault, under the advice and instigation of Hampton, refused to accept the bond, and to return the slaves to the plaintiff's possession, but kept and detained them, and refused to allow him to replevy.

On this state of facts, the plaintiff's counsel requested the Court to charge the jury, that if the sheriff, Chenault, refused to receive the bond tendered, and continued to hold the slaves, then he and every other person acting in concert with him, would be trespassers. This was refused; and the jury was charged, that the failure of the sheriff to receive the bond, and his detaining the slaves by virtue of an attachment and levy, did not amount to a trespass, and would not sustain this action against him,

This is now assigned as error.

F. W. Bowdon, for the plaintiff in error, insisted, 1, That though a sheriff cannot be treated as a trespasser for a mere *nonfeasance*, yet he may be for a *misfeasance*, as in the case here. [Ackenhead v. Blades, 5 Taunt. 197; The six carpenter's case, 8 Coke. 290; 43 Law Lib. 136; Winterbourne v. Morgan, 11 East, 305; Echester v. Papplewell, 1 East, 139; Lockrider v. McDonald, 10 John. 253; Keor v. Sharp, 14 S. & R. 399; Hopkins v. Hopkins, 10 John. 379.]

2. So, if a sheriff continues in possession after the return day of the bond, this makes him a trespasser, *ab initio*. [46 Law Lib. 465; Gorgrove v. Smith, Salk. 221; Buller's N. P. 81.]

S. F. Rice, for the defendants in error, argued,

1. This action cannot be maintained when no trespass has been committed, though a lawful act may, in consequence of a subsequent unlawful act, and by relation, be a trespass: but even in such a case, the subsequent act must be a trespass. [Waterburg v. Lockwood, 4 Day, 257.]

2. One cannot be made a trespasser, *ab initio*, by mere *misfeasance*. [Six carpenter's case, 8 Coke, 146; Gardner v. Campbell, 15 John. 401; 3 Starkie's Ev. 1445.]

3. A judicial officer cannot be made liable as a trespasser, if he has jurisdiction. Here, the sheriff, as to the taking of the bond, is a judicial officer, and may reject or approve it, according to his judgment. If liable at all, it is in case, for maliciously refusing. [5 Mass. 547.]

GOLDTHWAITE, J.—We think the charge to the jury was a correct exposition of the law of this case. The sheriff, by the attachment, was authorised to seize the slaves, and it is not shown that any act was subsequently done by him in relation to them, which is unlawful. In the Six Carpenter's Case, 8 Coke, 290; S. C. 43 Law Lib. 130, it is said, if the lessor distrain for his rent, and thereupon the lessee tenders him the rent in arrears, and requires his beasts again, and the lessor will not deliver them, this not doing cannot make him a trespasser, *ab initio*.

This is precisely the present case, and shows the charge to be correct.

Judgment affirmed.

THE DISTRIBUTEES OF MITCHELL vs. MITCHELL'S ADM'R.

1. When either money, or property, is advanced to a child, it will *prima facie* be an "advancement" under the statute, and must be brought into *hotch pot*; but it may be shown that it was intended as a gift, and not as

an advancement; or unless it be of such a nature that it cannot be presumed to be an advancement, as trifling presents, money expended for education, &c.

2. Where a father, by deed, conveyed real and personal property to two of his minor children, declaring at the time that it was not given as an advancement, but was to be in addition to their equal share of the residue of his estate—Held, that this was not an advancement, and that the testimony was properly admitted.
3. A father kept an account with his son, upon his books, which was added up, and at the foot of the account was written by the father, "accounted for, as so much that he has had of my estate; if it is over his portion, he must pay it back to them." No question being made of this as a testamentary paper—Held, that it was competent to explain the nature of the items, and to detail a conversation the widow of the deceased had with him in relation to it, to show, that the account was not a debt due from the son, or an advancement under the statute.
4. If a father, who has expended more money upon the education of one of his children, than the rest, wishes to make the others equal with him, by giving him less of his estate, he must do so by a will; he cannot accomplish it by considering the money so paid out, a debt, or an advancement under the statute.
5. The Orphans' Court must decree to husband and wife the distributive share of the wife, unless it is shown that she has a separate estate in it. A Court of Chancery can alone compel him to make a settlement upon her.
6. When an issue is made up to ascertain the amount each of several distributees have received from the estate, the costs of the proceeding is a joint charge upon the estate, and cannot be taxed against those who are most active in making objections.
7. A conveyance by the husband, to his wife, of a life estate in certain property, which conveys to her a present, vested interest, and is not testamentary in its character, will not bar the widow of her dower.

Error to the Orphans' Court of Montgomery.

This was a proceeding to ascertain the share of the distributees of the estate of Thos. J. Mitchell, who had been advanced in unequal proportions, by the deceased in his lifetime. The question being, whether Thomas J. Mitchell and Theacot E. Mitchell, had received certain property as an advancement, or as a gift, a jury was empannelled, who found, under the charge of the Court, that it was not an advancement, but a gift.

To prove that certain property was intended by the deceased as a gift, and not as an advancement, they produced certain deeds

executed by the deceased, and duly recorded, viz: one dated 27th November, 1843, conveying to Thomas J. Mitchell a negro boy, named Joe, and one of the same date to Theacot E. Mitchell, a mulatto boy named George. Also, a deed from the deceased to Thomas and Theacot jointly, dated 27th October, 1843, in consideration of a natural love and affection, certain tracts of land, which are described, including two mills, a dwelling house, all the furniture thereto belonging, and the stock of hogs, cows and mules, and the farming tools of every description, which may be on the premises, "Provided, that should the said Thomas, or Theacot, die during their minority, or without an heir, the surviving brother shall heir the whole estate of the deceased, conveyed by this deed of gift, reserving unto my wife, should she survive me, all and singular, the rights, benefits, rents, and privileges of the aforementioned premises, during the term of her natural life."

The value of the property thus conveyed, being in evidence, the grantees proved, that at the time of the execution of these deeds, the deceased said, the property therein mentioned, was given in addition to the portion to which they would be entitled on distribution of his estate, on account of their youth, inexperience, and want of education; and he wished them, on a division of the residue of his property, to have an equal share with the rest of his children. To the introduction of this testimony, the the other distributees excepted, but the Court overruled the objection, and the jury found, that the said property was not an advancement, but an extra gift.

The advancement to Martha M. Griffin, daughter of the deceased, and wife of B. S. Griffin, was next submitted to the jury, and charges from the books of the intestate, debiting her with the sum of $2,650, as part of her portion of the estate, was read to the jury. The administrator then proposed to read a note, in these words: "One day after date, I promise to pay Thomas Mitchell eleven hundred and fifty dollars, value rec'd, this —— day of ——. MARTHA M. GRIFFIN,
By B. S. GRIFFIN."

This was offered, not as evidence of an advancement, but of an indebtedness of Mrs. Griffin to the intestate. To the introduction of this she objected, on the ground that the Orphans' Court had no jurisdiction of the matter in controversy, and that it could

not be received on this issue, which the Court overruled, and thereupon she pleaded *non est factum.*

The administrator then introduced a witness, who testified, that B. S. Griffin, was the husband of Martha, that they lived together, that he was insolvent, but that she had a separate estate. Another note was produced for fourteen dollars, signed B. S. Griffin, Martha Griffin, payable to witness, the note, and signatures, being all in the hand writing of B. S. Griffin, and had never been paid. The witness proved that he had furnished B. S. Griffin, with some lumber, some of which was charged to Mrs. Griffin, and some to B. S. Griffin. Witness had seen him purchase groceries in Wetumpka, for which he paid cash, which were carried home in his waggon, driven by a negro man belonging to his wife.

The administrator also produced an instrument in writing, purporting to be between Mrs. Griffin and Totty & Beal, to do certain work in the town of Wetumpka, which was signed by B. S. Griffin, as attorney of his wife, in his own handwriting. That the work was done under the superintendence of the husband. Mrs. Griffin lived a mile or two from Wetumpka. There was no proof that Mrs. Griffin knew any thing of these transactions, or ever saw either of the notes.

This being all the evidence to prove the execution of the note, Mrs. Griffin asked the Court to exclude it from the jury, on the ground, that it was not sufficient in law to warrant a recovery on the note. The Court overruled the objection, and suffered the testimony to go to the jury, as circumstances, from which they might infer the agency of B. S. Griffin, for his wife, to which she excepted.

She further moved the Court to charge, that upon this testimony, the plaintiff could not recover upon the note sued on; which the Court refused, and to which she also excepted.

She further moved the Court to charge, that unless it was proved that she sanctioned, authorized, or knew of the acts of her husband, assuming to act as her agent, the testimony offered would not afford grounds for a recovery in this action; which the Court refused, and charged, they were circumstances from which they might infer the agency, to which she also excepted.

The advancements to Columbus W. Mitchell, were next sub-

mitted to the jury, and entries from the books of the intestate were read as follows:

C. W. Mitchell,

To Thos. Mitchell, *Dr.*

1836.	To your expenses at College,	$920 00
	Cash at sundry times,	855 00
	Cash "	380 00
	Do. for sulky and horse,	420 00
	Do.	117 00
1837.	Cash at Springs and Tuscaloosa,	110 00
	" received by you of Gerald,	425 00
	" per order to Gerald,	800 00
1838.	" per self,	200 00
1840.	" paid hire of negroes,	205 00
1842.	" Jesse, Minerva and Betty, negroes,	1800 00
	" paid estate of J. Thrasher,	2400 00
		$8,632 00

Accounted for, as so much that he has received of his portion of my estate. If it is over his portion, he must pay it back to them. All of which was entered in his account book, in his hand writing, and C. Mitchell admitted that he had received the full amount charged, and more. He then offered his mother, widow of the intestate, and offered to prove by her, that many of the charges in the account, were for expenses at College, and at Montgomery reading law, and expenses whilst on a visit to the Springs, and New Orleans, whilst in his minority. Also, that his mother remonstrated with the deceased, against holding him liable for the charges in the book, as he might have prevented his son from incurring these expenditures, which intestate admitted. And also, his declaration, in connection with these remarks, that he had made these charges, that his family might know he had made money, and what had become of it. To the admission of this testimony of Mrs. Mitchell the other distributees, except the two youngest, excepted.

The jury returned their verdict, that John W. Mitchell had received as an advance $2,200; McMorris and wife, $2,100; B. S. Griffin and wife, $2,650, by way of advancement, and fifteen hundred and thirty dollars ninety cents, indebted to the estate;

Columbus W. Mitchell, $4,825 27; Cook and wife, $2,585. Thereupon the Court decreed, that they had received these respective sums as an advancement, and appointed commissioners to distribute the estate, giving to the widow one fifth part of the slaves.

From this decree this writ is prosecuted, and the distributees aggrieved by the decree of the Court, now assign for error—

1. The Court erred in permitting testimony to explain the intention of the grantor, in the conveyances to the minor heirs.

2. In entertaining jurisdiction for the recovery of the note of Mrs. Griffin, in the testimony given, and the charges given, and refused.

3. In decreeing the amount of the note of Mrs Griffin, to be deducted from her portion of the estate.

4. In decreeing the distributive portion of Mrs. Griffin to her, and her husband.

5. In decreeing one-fifth part of the value of the slaves to Mary Mitchell.

6. In taxing B. S. Griffin, and wife, with the costs of the issue to determine the advancement made to Mrs. Griffin.

7. In taxing Griffin and wife, and Cook and wife, with the costs of the issue to determine the advancement made to the minors.

8. In the admission of the testimony of Mary Mitchell.

9. In not taxing C. Mitchell with the costs of the issue in his case.

A. Martin for the plaintiff in error, cited 7 Porter, 437; 8 Id. 176; 1 Camp. 43, note.

ORMOND, J.—The idea of requiring children who had been advanced, during the lifetime of their father, to bring the money or property thus received into *hotchpot*, when he died intestate, appears to have been obtained in England, from the custom of the city of London, and incorporated in the statute of distributions of 22 and 23 Chas. 1st, as stated by Lord Raymond, in Edwards v. Freeman, 2 P. Will. 449; see also, Holt v. Federick, Ib. 356, and Elliott v. Collier, 1 Ves. sen'r. 17.

The custom of London, which was referred to, is, that which

divided the freeman's personal estate into three parts, one of which, after his funeral expenses were paid, went to the widow, one to his children unadvanced by him, in his lifetime, and the other third, called the dead man's share, he might dispose of by will. [2 Bac. Ab. Customs of London, 249, c.] And any of the children who had not been fully advanced in the lifetime of the parent, could by bringing the sum so received into *hotchpot*, share equally with the others in the orphanage part.

Our statute upon this subject is to the following effect: "When any of the children of a person dying intestate, shall have received from such intestate, in his, or her lifetime, any real or personal estate, by way of advancement, and shall choose to come in to the partition of the estate with the other parceners, such advancement, both of real and personal estate, or the value thereof shall be brought into *hotchpot*, with the whole estate, real and personal, descended; and such party bringing such advancement into *hotchpot* as aforesaid, shall thereupon be entitled to his, her, or their portion of the whole estate so descended, both real and personal." [Clay's Dig. 197, § 25.]

The question is, what shall constitute an advancement? By the custom of London, it appears it was not every gift that constituted an advancement. It must be a marriage portion, or "something to set up in the world with." [Elliott v. Collier, 3 Atk. 528.] Presents by the father of small sums, unless expressly given by way of advancement, are not to be brought into *hotchpot*. [Morris v. Borrough, 1 Atk. 403; Elliott v. Collier, 3 Atk. 527.] Neither is money laid out in education or in travelling. [Pusey v. Debouverie, 3 P. Will. 317, in note.] The custom was confined alone to personal property, and a gift of land though expressly intended as an advancement, would be no bar to the orphanage share. [Cevill v. Rich, 1 Vernon, 181.] The father could also, by an act in his life, give away any portion of his personal estate, to one of his children, provided he divested himself of all property in it; but if it was done in *extremis*, and could be considered as a testamentary act, or if any power was reserved over the subject of the gift, it was considered a fraud upon the custom, as it regarded the other children. [Tompkyns v. Ladbroke, 2 Vesey, sen'r. 591; Elliott v. Collier, 1 Id. 15.]

This examination has been made of the custom of London, as it was the original of that portion of the English statute of distri-

butions, requiring advancements to be brought into *hotchpot*, which was the prototype of ours, and is therefore proper to be considered as an aid, in coming to a correct conclusion, as to its true intent and meaning. Our opinion therefore is, that when either money, or property, is advanced to a child, it will *prima facie* be an *advancement* under the statute, and must be brought into *hotchpot;* but, that it may be shown that it was intended as a gift, and not as an advancement. Or, unless it be of such a nature, that it cannot be presumed to be an advancement, as trifling presents, money expended for education, &c. That it lays upon the children to repel the presumption which the statute creates, is shown in the strong case of Gilbert v. Wetherell, 2 Simons & Stu. 254. The father had lent his son £10,000, to commence business, and the son being unfortunate in trade, the father on his death-bed, directed the note which had been executed for the debt to be burned. The Court held, this was merely an extinguishment of the debt, but did not show that it was not intended as an advancement. The theory of the statute is, that every parent wishes to do equal justice to his children, and that money, or property, given to them during his life, is, and was intended, as a part of their portion, unless he manifests the contrary at the time, or unless such a presumption arises from the nature of the gift, or expenditure, of which examples have already been given.

To apply this rule to the facts of this case. At the time of the execution of the deeds to the two minors, Thomas and Thweatt, the father expressed his intention, that it was not given to them as an advancement of the portion of his estate, they would be entitled to at his death, but that it was in addition to their equal share of the residue, in consequence of their youth, inexperience, and want of education, and upon the principles above laid down, was clearly not an advancement, within the meaning of the statute.

The case of Columbus W. Mitchell is one of more difficulty. It appears that the intestate kept an account against his son Columbus, which is added up on the book, and amounts to $8,632, at the close of which is this entry; "Accounted for as so much, that he has had of his portion of my estate, if it is over his portion he must pay it back to them." No question arises upon this instrument, as a testamentary paper, nor does it appear to have been proved as such. It appears to have been offered as

evidence of an advancement, or that he was indebted to that amount, to the estate of his father. Some of the items of which the account is composed, are for expenses at College, whilst travelling, and reading law. It is very certain that some of these items could not be considered as an advancement under the statute, being expenditures which it was the duty of the parent to make, or at least of the propriety of making which he was the sole judge. It is true, a parent who had expended more upon the education of one of his children, than upon the rest, might think it his duty to make the others equal with him, by giving him proportionably less of his estate, but he could only accomplish this by a will; it could not be effected by considering it an advancement, as is shown by the cases cited. How far the relation of debtor, and creditor, could exist between the father, and son, we have not the means of determining; as to some of the items of the account it is obvious it could not. Those for example, relating to expenditures at College, and others no doubt belong to the same category.

The question which it appears was intended to be presented to this Court for revision, is, not the law arising out of this account, and written memorandum of the father, but whether the parol testimony of the widow of the deceased was admissible. We have already remarked, that this memorandum and account was not treated in the Court below as a testamentary paper, nor was any question made in the Court below in reference to it as such, but it appears to have been offered in evidence, as proof that the monies there enumerated, was a debt due from the son, or an advance to him. So considered we can see no objection to the parol evidence. It merely went to show, that as to many of the items, the relation of debtor and creditor could not exist between them, as the witness states, that the expenditures were made during the son's minority, whilst at College, and reading law; or at the Springs and at Tuscaloosa, and other places in quest of pleasure—that she remonstrated with her husband, for these reasons, and because he could have prevented these expenditures, against his charging his son with them. This was certainly competent testimony to establish, that these items of the account did not constitute a debt due from the son, or an advancement under the statute from the father, and for this purpose were properly admitted.

We can perceive no objection whatever to the ascertainment by the jury, of the debt claimed of Mrs. Griffin, on the note executed by her husband. Indeed, whether it was considered a debt or an advancement, was wholly unimportant, if she was chargeable with it, as in either, aspect there was a surplus coming to her, of her distributive share; so that in this case the effect of her owing a debt to the estate, was precisely the same, as if she had been advanced by that amount.

The charge moved for, by her, upon the evidence offered on the plea of *non est factum*, was equivalent to a demurrer to the evidence, and should have been given, as asked. Conceding all the facts to be true as stated by the witnesses, and drawing all the inferences from them which could properly be drawn, there is nothing to show that the husband had any authority to sign the note as her agent, or that he had a general authority to act as such, she having, as it appears, a separate estate. No fact is proved establishing her concurrence with, consent to, or knowledge of, any of the acts said to have been done by him, in her name, and she was therefore entitled to a verdict upon the evidence.

It does not appear from any thing in the record, that the Court erred in decreeing the distributive share of Mrs. Griffin, jointly to her and her husband. It is, to be sure, stated in the record, that she had a separate estate, and that her husband was insolvent, but how this estate was created, or in what it consisted, is not shown; and we cannot from this general expression understand, that she had a separate estate in the distributive share of her father's estate in the hands of the administrator. Nor is it easy to comprehend how such an estate could be created, unless by the act of the husband. In the absence of proof of such an estate existing in her, the Orphans' Court had no option but to decree in favor of the marital rights of the husband; a Court of Chancery could alone compel him to make a settlement upon her.

The Court erred in charging the costs of the trial of the issues made up, to ascertain the amount of the several advancements upon the particular distributees, who appear to have been most active in contesting the facts. The objections, though made by a part of the distributees, were for the benefit of all, and the costs accruing should have been a joint charge upon the estate.

There is nothing in the record from which it can be determined, that it was not proper to decree one-fifth part of the slaves to

the widow. In the absence of a provision made for her by will, one-fifth part is the smallest portion to which she is entitled by statute, and that there was no will is evident from the entire record. The deed executed by the intestate, giving her a life estate in certain land, is not shown to have been testamentary in its character, but conveyed to her a present vested interest, subject to the contingency of her surviving him.

From this examination it appears, that the only error upon the record, is the refusal to charge the jury as requested by Mrs. Griffin, and in charging her with the amount of the note as a debt due from her to the estate; and also, in not taxing the costs of the issues, to ascertain the amount of the several advancements against the estate generally. In all other respects, the decree of the Orphans' Court is affirmed, and the cause remanded, that it may be reformed in these particulars.

CHANEY, EX PARTE.

1. The fortieth section of the 8th chapter of the Penal Code, which declares that no person charged with an offence capitally punished, shall, as a matter of right, be admitted to bail when he is not tried at the term of the Court at which he was first triable, if the failure to try proceeded from the non-attendance of the State's witnesses, "Where an affidavit is made, satisfactorily accounting for their absence," does not make it imperative upon this or any other Court, to admit the accused to bail, because such an affidavit was not made and acted on by the Court in which the indictment is pending; but it is competent for the Judge or Court which directs the prisoner to be brought up on *habeas corpus*, to allow the affidavit to be made.
2. It is competent for this Court, under the constitutional provision, which gives it "a general superintendence and control of inferior jurisdictions," to award a writ of *habeas corpus* upon the refusal of a Judge of the Circuit Court, or Chancellor sitting in vacation, or in term time, and to hear and decide upon the application for the prisoner's release, or adopt such course of proceeding as would make its control complete.

3. It is allowable for a Judge of the Circuit Court, or Chancellor, in vacation, to award a writ of *habeas corpus*, in a capital case, though the accused was, by order made in term time, committed to jail.

The petitioner was indicted for murder at the February term of the Circuit Court of Mobile, holden the present year, and upon his application, the venue was changed to the Circuit Court of Clarke, and the cause transferred accordingly. At the last term of the Court holden for Clarke, the Solicitor was called on to say whether he was ready to proceed with the trial of the petitioner, and answered in the negative. Thereupon he moved to continue the case until the next term, and in support of his motion, read to the Court a written statement, setting forth the names of several witnesses; the most of whom had been summoned, were known to be material, but not in attendance, though it was believed their presence could be procured at the next term. This statement was not verified, nor "required to be sworn to by the Court, or the counsel for the accused." The petititioner's counsel announced his readiness for trial, and opposed a continuance, but they were overruled by the Court, and the cause continued. Afterwards, on the last day of the term, "the prisoner, at the request of his counsel, was brought into Court, when they submitted a motion to admit the prisoner to bail, in conformity with the Constitution and Laws of this State; which motion being argued by counsel, and fully considered by the Court, was refused, and the prisoner remanded to jail. But the Court, considering the questions of law arising on said motion as novel and difficult, and at the request of the prisoner's counsel, referred the same to the Supreme Court for its revision,"

The petitioner has made known the foregoing facts to this Court by the production of the record, and prays that he may be brought up on *habeas corpus*; or that such proceedings may be had as shall result in his release from imprisonment, upon entering into a recognizance with sureties; conditioned for his appearance at the next term of the Circuit Court of Clarke.

J. Gayle and A. F. Hopkins for petitioner.
Attorney-General for the State.

COLLIER, C. J.—It is conceded that it was competent for

the Court, in its discretion, to continue this cause at the instance of the State, upon the statement made by the Solicitor; and that whether the discretion was wisely exercised or not, the decision upon the continuance could not be revised. The only question presented, is, whether the facts disclosed in the record entitle the petitioner to be discharged on bail; and the solution of this question depends upon the construction of the fortieth section of the eighth chapter of the "Penal Code." [Clay's Dig. 444.] This section declares that "No person charged with the commission of an offence capitally punished, shall be admitted to bail as a matter of right, when he is not tried at the first term of the Court, at which he was properly triable, if the failure to try his case proceeded from the non-attendance of the State's witnesses, where an affidavit is made satisfactorily accounting for their absence," &c.

This provision very strongly implies that one charged with an offence of the grade to which it refers, shall be discharged on bail, if not tried at the first term when he is triable, in consequence of the non-attendance of the State's witnesses; unless their absence is accounted for by affidavit; and when considered in reference to the pre-existing enactments of 1807 and 1827, this implication is as conclusive as a positive declaration. These latter enactments made it imperative upon the Court to discharge the prisoner on bail, *upon the last day of the term*, where the affidavit was not made. [Ex parte Simonton, 9 Porter's Reports, 390.]

The act in question was intended, and did very essentially modify the two preceding statutes, not only in the particular in which we have noticed them, but also in other respects, While the acts of 1807 and 1827 entitled the prisoner to bail, *on the last day of the Court*, where he was not tried at the first term, in all cases, unless the continuance was the consequence of the absence of the witnesses for the prosecution, the modification merely declares that he shall not be admitted to bail, as a matter of right, on account of the absence of witnesses, where the affidavit is made. But no time is prescribed within which the affidavit is to be made, and there is nothing in the language employed, indicating that it may not be made after the adjournment of the Court, and we cannot doubt but such a statement may be verified any time before the prisoner is actually discharged on bail.

We are by no means certain that it can be intended from the transcript before us, that the affidavit was not made upon the application for the prisoner's discharge; but it is needless to consider this question, as it is perfectly clear that the order of reference by the Circuit Judge does not authorize this Court to revise his judgment as on appeal. The statute, which gives us jurisdiction of questions referred as novel and difficult, does not confer the power to adjudicate points thus referred, until the cause is disposed of in the primary Court. But in virtue of the constitutional provision which gives us "a general superintendence and control of inferior jurisdictions," it is competent for this Court, upon the refusal of a Judge of the Circuit Court or Chancellor, sitting in term time or vacation, to award a writ of *habeas corpus*, and hear and decide upon the application for the prisoner's release, or adopt such course of proceeding as would make its control complete. We might, upon the showing made, if we judged it a proper case, direct the petitioner to be brought here, but this would afford him no legal advantage which he cannot otherwise obtain; as the provision of the "Penal Code" would make it our duty to receive the affidavit (should one be tendered) and remand the prisoner. If a *habeas corpus* were issued returnable to this Court, it would occasion an unnecessary accumulation of costs, and increase the facility of escape. We therefore think it best to deny the writ; and that the prisoner may not be prejudiced, would again remark, that it is competent for the Judge of the Circuit Court, or Chancellor, notwithstanding the decision at the Circuit, to issue a *habeas corpus* to bring before him the body of the prisoner, and if the affidavit contemplated, is not made, to admit him to bail. Upon an application, duly made, to either of the judicial officers we have named, they will award the writ, and dispose of the prisoner as we have indicated, would be proper.

LATTIMORE v. WILLIAMS, ET AL.

1. Where the claim of a creditor is not already barred by the general statute of non claim, at the time when the estate of his debtor is declared insolvent, he may file his claim at any time within six months after the declaration of insolvency, and it will not be affected by his omission to present it within eighteen months after grant of administration.

Error to the Orphans' Court of Montgomery.

THIS is a proceeding in the Orphans' Court, between a creditor of an estate and its executors, with reference to the liability of the estate, and the right of the creditor to come in for distribution. It is not stated that the proceedings are with reference to the insolvency of the estate, but this may be inferred, as otherwise the Court has no jurisdiction.

It appears that an issue was made up and submitted to a jury, which found for the defendant. On the trial, the creditor, Lattimore, proved the existence and loss of the note sought to be established as a claim; that letters testamentary were granted about seventeen months before the estate was declared insolvent, during all which time there was no presentation of the claim. Afterwards, within six months from the time the estate was declared insolvent, but more than eighteen months from the grant of administration, the claim was filed in the clerk's office of the Orphans' Court of Montgomery county.

On this evidence, the Court charged the jury, that unless the claim in question was presented to the executors, or filed with the clerk, within eighteen months after the grant of administration it was barred by the statute, and the plaintiff could not recover. This was excepted to by the plaintiff, and is now assigned as error.

BELSER, for the plaintiff in error, cited Clay's Dig. 195, § 15.

ELMORE, contra.

GOLDTHWAITE, J.—The general scope and object of the act of 1843, providing for the settlement of insolvent estates, is to withdraw the estate from the control of the administrator, after the declaration of insolvency, and to permit the creditors between themselves to contest their several demands. It would therefore seem, that a presentation to the administrator, after this proceeding, would be entirely useless. The 14th section of the act is predicated on this idea, and provides, that when the estate has been declared insolvent, it shall be unnecessary to present the claims against it to the administrator; but that they may be filed with the clerk, without any such presentment: *Provided*, such claims are not [then] already barred by the statute of non-claim. As the administrator, and other creditors of the estate, are permitted to contest the claims presented against the estate, when filed in the clerk's office, until the expiration of nine months from the period when the estate was declared insolvent; and as every claim *must be filed* within six months, from the same period, it would seem as if the introduction of the latter bar was intended to prevent the operation of the general statute of non-claim, if that had not attached when the estate was declared insolvent. In the recent case of Hollinger v. Holley, (at this term,) we held that the omission to file the claim within six months created an absolute bar. This being the necessary construction of the statute, it cannot, we think, be inferred that the intention was, that one creditor should be allowed a shorter or longer period than another to present his claim. The result of our reflections is, that the charge of the County Court cannot be sustained.

Judgment reversed and remanded.

MARTIN v. AVERY.

1. To authorize a judgment, against a surety of a non-resident plaintiff for the costs of the suit, it must appear affirmatively upon the record, that the suit was commenced by a non-resident—that the person sought to be charged became surety for the costs—and the amount of the costs of the suit. No notice to the surety is necessary.

Error to the Circuit Court of Perry.

THIS was a motion by the defendant in error, against the plaintiff in error, as surety for the costs of a suit, prosecuted by one John Mosely against the defendant in error.

The judgment entry is as follows:

And upon the motion of the defendant aforesaid, for a judgment against the said Levi Martin, the security of the said John Mosely, for the costs of prosecuting this suit, it appearing in proof before the Court, that said Levi Martin had entered into an obligation to be security for said costs of suit. It is therefore considered by the Court, that said Bryant Avery, have and recover of the said Levi Martin, the sum of five hundred and five dollars and twenty-five cents, for which execution may issue against said Levi Martin, as well as against said John Mosely.

The error assigned is, that there is nothing in the record to support the judgment.

THOMAS CHILTON, for plaintiff in error.

ORMOND, J.—From the earliest period of this Court, it has been held that to sustain these summary judgments, it must appear affirmatively upon the record, that every fact was proved to exist, which is necessary to confer the jurisdiction upon the Court. That this rule is applicable to cases of this description, is shown by the case of Barton v. McKinney, 3 S. & P. 274.

The facts which would authorize the rendition of such a judgment as the present, are, the commencement of a suit by a non-resident—that the person sought to be charged became surety

for the costs—that the suit has terminated—and lastly, the amount of the costs of the suit. Of these facts, but one appears from the record to exist—that the plaintiff became the surety of one John Mosely; there is therefore no predicate shown to authorize the rendition of such a judgment. The record in the case of Mosely against the defendant in error, in connection with the bond of the plaintiff in error, might, it is true, show all these facts, as the judgment against the surety, is the consequence of a judgment against the plaintiff in the principal suit; and if a *certiorari* had been asked for, it would have been granted to perfect the record. No suggestion having been made, we are constrained to reverse the judgment.

It is no objection that the surety was not notified of the motion. The statute authorizes the Court to render judgment for the costs, against the surety of a non-resident plaintiff, at the time of rendering final judgment against his principal. [Clay's Dig. 317, § 30.] Let the judgment be reversed and the cause remanded.

ANSLEY v. PEARSON, ET AL.

1. Certain slaves were mortgaged by G. to A., by deed dated in February, 1841, to secure two promissory notes, maturing on the 15th August of the same year; these slaves were levied on in March, 1841, by attachments, at the suit of P. and others, and a claim interposed pursuant to the statute, by the mortgagee, to try the right of property; a trial was accordingly had, and the slaves adjudged liable to the payment of G's debts: afterwards, the mortgagee filed his bill in Equity, alleging that the validity of the mortgage was not controverted by the plaintiffs in attachment, but was rejected by the Court as evidence, on the trial of the right, at the instance of the plaintiffs, on the ground merely, that it did not tend to prove the issue on the part of the claimant; which was, whether G. had such an interest in the slaves as was subject to the attachments. The plaintiffs in the attachments and the mortgagor were made defendants to the bill, which prayed a foreclosure of the mortgage, and that the judgment upon the trial of the right of property might be injoined, &c.—*Held*, that the judgment by

which the slaves were determined to be liable to the attachments, did not, under the facts alledged, impair the equity of the bill; and that the bill was not objectionable for multifariousness.

2. *Quere:* Where several levies are made upon the same property at the same time, and several trials of the right are had, if upon verdict of condemnation, the jury assess the full value of the property, in each case, and judgments are rendered accordingly, is it not competent for the Court in which the trials are had, to correct its judgment, so that the claimant may not be charged beyond the value of the property?

Appeal from the Court of Chancery sitting at Tuskegee.

In March, 1844, the plaintiff in error filed his bill, setting forth that in February, 1841, he sold to Matthew R. Glenn, two slaves, to-wit, Henny, a woman, and Jacob, her child, for the sum of seven hundred dollars; to secure the payment of which, the purchaser, at the time of the sale, made his two promissory notes, one for $400, and the other for $300, payable to the plaintiff, on the 15th August next thereafter; and a mortgage, bearing even date therewith was executed by Glenn to the plaintiff, on the slaves, to secure the payment of the notes. This mortgage, it is alleged, was duly acknowledged and recorded, of which the plaintiffs in attachment had notice. The note for four hundred dollars, was given in payment for the woman, and the other note for the boy; on the former, Glenn paid the plaintiff the sum of three hundred and ninety six dollars and thirty cents, and gave him a note for three dollars and seventy cents, which fully paid off and discharged the same. The small note, and the note for three hundred dollars are still unpaid.

It is further stated, that on the third of March, 1841, three several attachments were issued against the estate of Glenn, viz; one at the suit of John Day, for the use of Charles R. Pearson; another, at the suit of Felix Simonton, for the use of Pearson & Simonton; and a third, in favor of Charles R. Pearson—all returnable to the term of the Circuit Court of Macon next thereafter to be holden. These several attachments were levied on the slaves Henny and Jack, on the 7th March, 1841, then in the possession of Glenn. The plaintiff, under the advice of counsel, interposed a claim to the slaves, and gave bond, with surety, to try the right, pursuant to the statute; afterwards, a trial was had upon the claim, in the Circuit Court, between the plaintiffs in the

attachments and the plaintiff in this cause, and the mortgage was rejected as evidence, because the mortgagor was in possession of the property, and the slaves were therefore adjudged liable to the attachments. The jury estimated the value of Henny at four hundred dollars, in each of the verdicts rendered by them, and Jack at two hundred dollars, in the suit of Day, for the use of Pearson, and in each of the other cases at two hundred and fifty dollars. It is stated that the plaintiff took possession of the slaves, under the mortgage, and they have been demanded of him on his bond, for their forthcoming, upon the right being determined against him; that he has delivered Henny to the sheriff, and tendered him two hundred and fifty dollars, the highest value assessed for Jack, but he refuses to receive the money, and has returned the bonds in all the cases, forfeited, as it respects Jack. Executions have issued in each of the cases for the value which the verdicts have ascertained; thus requiring the sum of seven hundred dollars to be made, when the highest price at which Jack was estimated, was two hundred and fifty dollars.

It is further alleged, that if the slave Jack is sold by the sheriff, the plaintiff will probably lose his debt, as he may be removed without the State, and Glenn is wholly insolvent, has absconded, and gone to parts unknown.

Immediately after the trial of the claim of property, the plaintiff was served with process of garnishment, at the suit of Matilda Daniel, requiring him to appear at the Circuit Court of Macon, and state whether he was indebted, &c. to Charles R. Pearson; which garnishment is still pending. Pearson is insolvent, and has (as plaintiff believes) transferred his interest in the claims on which the attachments are founded, &c.

The bill prays a foreclosure of the mortgage, &c., and that all proceedings on the judgments rendered on the trials of the right of property, may be enjoined, &c.

Simonton asd Pearson answered; publication was made as to Glenn, and as to him and Day the bill was taken *pro confesso*. But it is needless to recite the substance of the answers, as the bill, on motion of the defendants, was dismissed as to Simonton, Pearson and Day, for want of equity.

WILLIAMS and POPE, for the appellant.

N. W. Cocke, for the appellees, made the following points:

1. Where personal property, at the time of the levy, is in possession of the defendant, and a claim is interposed by a mortgagee, if the issue is *general*, a verdict in favor of the plaintiff in execution, is a condemnation *absolutely*, of the property, to the satisfaction of the execution. [Davidson & Stringfellow v. Shipman, et al, 6 Ala. Rep. 27.]

2. A Court of Law may arrest the action of its own process, or if an execution improperly issues, may supersede it. So far then as the bill seeks to control the execution, either for its irregularity or oppressive use, it cannot be entertained. [Lockhart, et al. v. McElroy, 4 Ala. Rep. 572.]

3. The bill is multifarious in seeking to foreclose the mortgage as to Glenn, and to be relieved against the judgments recovered by the other defendants.

COLLIER, C. J.—The precise form of the issue, which was submitted to the jury in the trials of the right of property, is not shown by the record, but as the only proper issue, was an affirmation by the one party that the property levied on was subject to the attachment, and a denial of that fact by the other, we must intend that the issues were thus framed. If the defendant in the attachments had the possession of the slaves in question, as a mortgagor, with an undisputed right of possession as against the complainant, then he had an interest that could be levied on and sold, although the purchaser would take it subject to the incumbrance. [P. & M. Bank of Mobile v. Willis & Co. 5 Ala. Rep. 770.] The verdict and judgment upon such an issue as we have supposed, if in favor of the plaintiff, would be an unqualified condemnation of the property, to the satisfaction of the judgment, and execution. To avoid a result which must necessarily be unfavorable to the claimant, wnere he has not a present legal right, he should not interpose a claim at law, but seek the interference of Chancery, "for the purpose of ascertaining and separating the interests of the mortgagor." Williams & Battle v. Jones, 2 Ala. Rep. 314. See also, 5 Porter's Rep. 182; Davidson & Stringfellow v. Shipman, et al. 6 Ala. Rep. 35.

We are aware, that in several of the cases cited, it is strongly intimated that a verdict against the claimant who was a mortgagee, rendered upon the proper issue, would be conclusive of his

rights under the mortgage; and this whether the mortgage was forfeited or not. But these intimations were not points there arising in judgment, and must be regarded as mere incidental remarks, not of authoritative influence. We will therefore treat the question as *res integra*, and briefly inquire how the judgments at law affect the complainant.

It is laid down generally, "that the judgment or decree of a Court possessing competent jurisdiction, shall be final as to the subject matter thereby determined." [Le Guen v. Governeur, et al. 1 John. Ca. 436. See 1 Blackf. Rep. 360.] So it has been held, that a verdict and judgment upon the merits in a former suit, is, in a subsequent action between the same parties, where the cause of action, damages, or demand is identically the same, conclusive against the plaintiff's right to recover, whether pleaded in bar or given in evidence under the general issue, where such evidence is legally admissible. [Shaffer v. Stonebraker, 4 G. & Johns. Rep. 345. See also, 2 Pick. Rep. 20; 2 Taunt. Rep. 705; 7 Pick. Rep. 341; 8 Id. 171.]

Where the plaintiff offers evidence in relation to a claim contained in one count of his declaration, which evidence is rejected by the judge, and instead of striking out the count to which such evidence is applicable, the plaintiff suffers a general verdict to pass on the whole case, the judgment thereon will bar a new action for the claim so attempted to be established. [Smith v. Whiting, 11 Mass. Rep. 445; Irwin v. Knox, 10 John. Rep. 365; Phillips v. Berrick, 16 Id. 136.] In Wilder v. Case, 16 Wend. Rep. 583, the Court said, "it is well settled, where a matter is improper by way of defence, in a justice's court, (for example by way of set off,) if a party will introduce it, and he goes into the investigation with a view to make it available, and it passes and is submitted to the justice, or a jury, it cannot be heard again." But it is admitted, that if the demand had been rejected in the former suit, on the objection being raised, it would not have been barred; but having been litigated, whether allowed or disallowed, it was barred. The only way in which the defendant in the former suit could have saved his demand from being barred by the judgment therein, was, by stopping short the moment its admission for the purpose proposed, was refused by the justice.

It has been decided, that where an action is brought against a

defendant on two notes indorsed by him, and the case is submitted to the Court, who give an opinion in favor of the plaintiff, on both notes, but afterwards permit him to withdraw one of them, and then renders judgment in his favor for the amount of the other note only, he is not thereby precluded from maintaining a subsequent action against the defendant on the note that was thus withdrawn. [Wood v. Corl, 4 Metc. Rep. 203. See also, Curtis v. Groat, 6 Johns. Rep. 168; McLean v. Hugarin, 13 Id. 184; Wolfe v. Washburn, 6 Cow. Rep. 261; Skelding v. Whitney, 3 Wend. Rep. 154; Beebe v. Bull, 12 Id. 504; 2 C. & H.'s Notes to Phil. Ev. 963-5.]

If the record shows what matters were in issue, and decided, parol evidence is inadmissible to prove that other matters not within the issue were also decided. [Manny v. Harris, 2 Johns. Rep. 24.] It is competent to explain, but not to add to, or contradict a record; and it may now be regarded as settled, in a great majority of the American Courts, that the record of a former suit may be explained and the matters to which it relates identified. Every fact which exists on record, must be proved by the record; but when the question is as to the real subject matter of a suit, or to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action, may be proved by other than record evidence. [3 Pick. Rep. 429, 434; 17 Serg. & R. Rep. 319; 6 T. Rep. 607; 1 N. Hamp. Rep. 35; 2 Id. 26, 61; 5 Mass. Rep. 337; 8 Pick. Rep. 113; 10 Wend. Rep. 80: 3 Cow. Rep. 120; 2 Yerger's Rep. 467; 9 Porter's Rep. 397; 6 Ala. Rep. 27; 7 Ala. Rep.]

The learned annotators upon Phillips on Evidence, (p. 957,) as a deduction from the authorities, say, "Where the matter to be litigated in the second suit was involved in the former issue, and essential to the finding of the verdict, we have seen that it shall be taken conclusively to have been decided, (ante 594, p. 844 seq.) Where the matter might, or might not, have been tried consistently with the issue, it shall be taken to have been *prima facie* passed upon. And accordingly, if the record shows that the first suit was apparently for the same cause of action sought to be litigated in the second, it will be *prima facie* evidence, that such cause of action has once passed *in rem judicatem;* and hence the *onus* will devolve on the party against whom the record is used to

show the contrary." [16 Johns. Rep. 136; 6 Cow. Rep. 225; 9 Sergt. & R. Rep. 424; 2 Verm. Rep. 111, 114.]

The complainant alledges, that the validity of the mortgage was not controverted by the plaintiffs in attachment, that it was rejected by the Court as evidence, on motion of the plaintiffs, not because it was objectionable as a security, but on the ground that it did not tend to prove the issue on the part of the claimant; which was, whether the defendant in attachment had such an interest in the slaves as was subject to the attachments. Assuming this allegation to be true, as we must, upon a motion to dismiss the bill for want of equity, and it is perfectly clear that the validity of the mortgage, (whether an inquiry within the scope of the issue or not,) was not considered by the jury.

The cases of Smith v. Whiting, Irwin v. Knox, and Phillips v. Berrick, *supra*, are not like the present upon the point we are considering. There the evidence was offered by the plaintiff, for the purpose of sustaining one of the counts in the declaration, and though it was rejected, yet the plaintiff did not strike out that count, or enter a *nolle prosequi* thereon, but the jury were permitted to render a general verdict upon the whole case made by the pleadings. The record itself showed that the matter was submitted for trial, while here the validity of the mortgage was not necessarily passed on; and in order to do justice, the complainant should be allowed to show what transpired at the trials of the right of property. Such evidence, instead of contradicting, is merely explanatory of the record.

It may be conceded, so far as this case is concerned, that it was competent for the plaintiff to have waived all objection to the admissibility of the mortgage as evidence, and then have shown that it was invalid. Yet, according to the principles we have stated, and the authority by which they are sustained, it is unquestionably clear, that it was not allowable for the claimant to show, that the mortgage instead of being admitted was in fact rejected. Such proof, (we have seen,) is permissible upon the ground, that the matter though involved in the trial of the right of property was not *essential* to the finding of the verdict.

If the judgments upon the trial of the right of property were irregularly entered, so as to charge the complainant with thrice the value of the slaves; or if the executions were oppressive, or unauthorized by the judgments, we are inclined to think it would

have been competent for the Court of Law, to apply the corrective in some form. But our conclusion upon the point first considered, renders the consideration of this unnecessary.

The objection to the bill for multifariousness, we think, cannot be supported. In order successfully to resist and perpetually enjoin the judgments, it was necessary to show that the mortgage was valid. In a controversy of this character the plaintiffs in the attachments and the mortgagor, were all proper parties. The prayer for an injunction was necessary to make a decree of foreclosure available; and a foreclosure, if the mortgagee was entitled to the benefit of his security, was necessary to the final adjustment of the rights of all the parties in interest. If the slaves are of value more than sufficient to satisfy the complainant's lien, the attaching creditors are entitled to the excess to satisfy their judgments. See Williams & Battle v. Jones, *supra*.

Upon the first question examined, the decree is reversed, and the cause remanded.

DREW v. HAYNE.

1. When the defendant in a suit at law fails in his defence, because the witness relied on to make it appear to the jury, fails to remember the circumstances which he is called to give in evidence, this affords no ground for equitable interposition.

Writ of Error to the Court of Chancery for the 19th District.

The case made by the bill is this:

In August, 1842, Drew purchased from Hayne a horse, under the agreement that he should be allowed to return him within three months, if he went lame of a certain defect, or failed in riding; in which events Hayne was to take the horse back and return the note given for it. On this contract, Drew executed his note for $125, with one Wm. B. Goodgame as surety. When

the contract was made, no one was present but Drew, Hayne and Goodgame. After a few days use, the horse was lame, from the particular defect, and was returned by Drew to Hayne within three weeks after the purchase, telling him in the presence of one Holloway, that he returned the horse according to the agreement. Hayne received the horse and turned him loose in the yard. Afterwards Hayne sued Drew and Goodgame on the note given for the horse, in the County Court of Dallas, in which suit judgment was rendered. Drew made every effort in his power to defend the suit, and states his belief that he would have gained the same, if Holloway, who was sworn as a witness could have remembered what passed between Hayne and himself when he returned the horse. Drew asserts that he could not make a witness of Goodgame, because he was sued in the same action, but if he could have done so, he did not think it necessary because he thought he could succeed on what he supposed would be the testimony of Holloway. Long before the trial of the cause Hayne had left this State for Georgia, and to some part of it unknown to Drew, so that interrogatories could not have been filed according to law.

The relief prayed by the bill is, that Hayne may be enjoined from prosecuting his said judgment; that Drew may be permitted to deposit a sum of money sufficient to answer the judgment, and have leave to examine Goodgame as a witness.

At the hearing, the Chancellor dismissed the bill for want of equity. This is now assigned as error.

G. W. Gayle, for plaintiff in error.
G. R. Evans, contra.

GOLDTHWAITE, J.—The principle which induced the Chancellor to dismiss the bill, is one entirely familiar in this Court, having been frequently acted on. A party cannot be heard to insist, in a Court of Equity, upon a defence which could properly have been interposed in the Court of Law, unless he has been prevented from using it by fraud, or accident, or the act of the opposite party, unmixed with fault or negligence on his own part. [French v. Garner, 7 Porter, 549; Cullum v. Casey, 1 Ala. Rep. N. S. 357; Lee v. Col. Bank, 2 Ib. 21.]

Here it appears that the party was perfectly advised of his

defence, but failed in making it appear, because the witness supposed to be conversant with the facts, failed to establish them. This sometimes happens, but it is not a reason for equitable interposition, as the party might either have filed his bill for discovery against the plaintiff at law, as a non-resident defendant, and thus have obtained relief, even if he omitted to answer. [Arnold v. Sheppard, 6 Ala. Rep. 299.] Or have filed his interrogatories under the statute, which being served on the attorney of record, would have produced the required answers, or a non-suit. [Jackson v. Hughes, 6 Ala. Rep. 257.] The failure then of the complainant in the suit at law, must be attributed to his own laches, in not calling upon the defendant at an earlier day for the discovery which he now seeks—or if otherwise, he is precluded from coming into equity at so late a period.

Decree affirmed.

TREASURER OF MOBILE v. HUGGINS.

1. The Judge of the County Court has no power to adjudicate upon the tax list, and ascertain the amount of insolvencies for which the tax collector is entitled to a credit, except at the time provided by law, viz: the second Monday in September of the current year, or at the succeeding County Court, if the special Court is not held.
2. Upon the failure of the County Judge to act, the power conferred upon the Comptroller to make the allowance, may be exercised by the Commissioners' Court, upon the County tax collected during the period, when State taxation was abolished.

Appeal from the County Court of Mobile.

MOTION by H. Stickney, treasurer of Mobile county, against the defendant in error, sheriff, assessor, and collector of taxes for the year 1842, for five thousand three hundred and five dollars and twenty-eight cents, balance due by him for taxes collected

that year. The Court rendered judgment against him for two thousand one hundred and thirty-four dollars and thirty-three cents, from which the treasurer appealed to this Court.

From a bill of exceptions taken in the cause, it appears that the sheriff claimed allowances for insolvencies for the year 1842, and also for the year 1841, during which year he had also been the assessor and tax collector. The treasurer insisted that he was not entitled to the allowances claimed for either year, upon the ground that they had not been passed upon, within the time, and in the manner provided by law; and that for the year 1841 the taxes had been fully settled, and a receipt in full for that purpose passed to him. He further insisted, that an allowance had been made to him by the Commissioners' Court, and that a further allowance could not now be made. Appended to the record is the proceedings of the Commissioners' Court, on the 22d May, 1844, by which the treasurer was directed, on the payment by Huggins of four thousand dollars, to execute receipts in full to him for the taxes for the years 1841 and 1842.

This motion was made on the 25th November, 1844, and continued until the 21st January, 1845. The County Judge considering, that the action of the Commissioners' Court was not final —that the time had not elapsed within which allowances could be made, and that the acceptance of a receipt from the treasurer for the year 1841, did not preclude the sheriff from going into the enquiry, permitted testimony to be introduced, showing the insolvencies for the years 1841 and 1842, and allowed them, and rendered a judgment for the residue.

These matters are now assigned as error.

Phillips, for plaintiff in error contended, that the County Judge had no authority to sit under the statute. That as to this matter his Court was one of special and limited jurisdiction, and the authority to act should be shewn upon the record. [2 Stew. 334; 19 John. 7; 1 John. C. 20; Hill & Cow. Notes, 906.]— He further contended, that there was no authority whatever for ripping up the settlement made in 1841, and referred to the several statutes. [Clay's Dig. 570, § 68, 69, 70, 244, § 11, 245, § 16, 19.]

CAMPBELL, contra, insisted, that there was no pretext for saying the allowance was not just, and the only question was, whether the Court had jurisdiction, and relied upon the statute on the subject.

ORMOND, J.—The only question presented upon the record, is, whether the Judge of the County Court of Mobile had jurisdiction to pass upon the insolvencies, alleged to exist by the tax collector in Mobile county.

By the general law, as it has existed in this State for many years, a particular tribunal was created, for the ascertainment of the amount of insolvents, included in the general list, showing the gross amount of taxes, for which the tax collector stands charged. This tribunal, was a Court required to be held hy the Judge of the County Court of each county, on the 2d Monday of September of each year, when an examination of the amount of insolvencies was to be made, ascertained, and certified to the Comptroller. [Clay's Dig. 570, § 68.]

When, from any cause, this Court was not held, the Comptroller was himself authorized to make the proper allowance; [Ib. § 69,] and by another section it was provided, that when the special Court, above spoken of, was, from any cause, not held, the duty of making such allowance was devolved on the next County Court, [Ib. § 70.]

As it respects taxes for county purposes, the general law authorized the several County Conrts to levy taxes on the subjects of State taxation, under the same regulations and restrictions, as were provided for the State tax. Thus the law stood until the 9th January, 1836, when an act was passed abolishing State taxation, and authorizing the Commissioners' Courts of the respective counties, to impose taxes for county purposes. On the 13th of February, 1843, an act was passed, again reviving State taxation, and authorizing the Commissioners' Courts to levy taxes for county purposes, not exceeding thirty per cent. on the amount of the State tax.

From this examination of the statutes, it appears, that the Comptroller of the State had no power to act upon the subject in controversy here, and that no tribunal, but that of the special County Court, and the succeeding County Court, if the first was not held, existed for the ascertainment of insolvencies. The pow-

er conferred on the Comptroller, of making such allowances, when the County Judge had failed to act, evidently relates to the general State tax; but his allowance in reference to the State tax, would also operate on the county tax, as the subjects of taxation were the same; the county tax being a *per centum* on the amount assessed as a State tax. During the existence therefore of State taxation, an ultimate tribunal was appointed for the settlement of such questions, but when State taxation ceased, and by necessary consequence, the power of the State Comptroller was at an end, no substitute was provided by law in regard to the county tax, unless the Commissioners' Court, the financial organ of the county, can, under the previously existing law, be considered sufficient for that purpose. Such, in our opinion, is the correct construction of the law.

This Court, by the act creating it, is invested with ample powers for the settlement of such questions. It is declared, that "they shall have control over the funds in the county treasury," which would seem to be an explicit grant of the power in question. [Clay's Dig. 149, § 3.] As the act abolishing State taxation, created no tribunal for the adjustment of this matter, other than the County Court, which had power to sit only at certain prescribed times, and could not legally sit at any other time, we think the Commissioners' Court, having the control and management of the county funds, had the power, upon the failure of the County Court to act, to make the necessary allowance.

It is, we think, very clear, that the Judge of the County Court has no power to make such allowances, but at the times and in the mode pointed out by the statute. The power conferred, does not appertain to the office of Judge of the County Court, either as a Common Law Judge, or as Judge of the Orphans' Court. It is a special grant of power, which upon well established principles, can only be exercised upon the terms on which it is conferred. This is also clear from a consideration of the subject to be acted on, and the evident design in conferring the power The revenue of each year, is wanted for the expenses of that year, and all the machinery was provided, with a view to ensure its prompt collection. The intention was, that the revenue should be collected during the year, to meet the current expenses of the government, and that the accounts of the tax collector should be closed during the year. It would be most mischiev-

ous in its consequences, if the tax collectors could, by their own act, diminish the revenue, by claims for insolvencies of preceding years. To prevent such a state of things, especial care has been taken, by the appointment of a special tribunal, to sit before the close of the fiscal year, and if from any cause, it fails to sit, the necessary deduction may be made by the Comptroller when the taxes are paid in; and if not paid, suit is promptly to be instituted. All these provisions are hostile to the idea, that the time of holding the special County Court is directory merely. It is of the very essence of the power granted, whether considered according to its letter, or to its spirit and design.

These remarks apply equally to the county, as to the State tax. The reason is the same, and the law has made no distinction between them.

The taxes here involved, were collected in 1841 and 1842. It does not appear that in either year, at either the special, or general County Court, any application was made for an allowance of insolvencies, and most certainly the County Judge had no power afterwards to adjudicate them. We have already stated, that the Commissioners' Court had the power to make the proper allowance, although the power of the County Judge, by lapse of time, was gone; and in this case it appears the Commissioners' Court has acted on the subject, and recommended a reduction of thirteen hundred dollars. This was certainly obligatory upon the county, and for that sum the defendant is entitled to a credit.

Let the judgment be reversed, and the cause remanded for further proceedings.

ANSLY v. MOCK.

1. The defendant in a suit at law, filed his bill to enjoin a trial, and pursuant to an order for that purpose, entered into a bond with surety, conditioned to pay the plaintiff "all damages which he might sustain by the

wrongful suing out of the injunction" &c. In a suit by the obligee against the surety, the declaration alledged that the injunction was dissolved, six or seven years after it was awarded; a judgment at law rendered for the plaintiff—the amount thereof; that a *fieri facias* was duly issued thereon, and by the sheriff returned "no property found;" *further*, that when the judgment was rendered and the execution issued, the defendant was insolvent, and unable to pay the same: By reason of all which the bond became forfeited, &c.: *Held*, that the breach was not well assigned, but it should have been shown what was the condition of the principal obligor when the bond was executed; for if he was then insolvent, or became so shortly thereafter, and before, in the ordinary course of proceeding, a judgment could have been recovered, if a trial had not been enjoined, the plaintiff would have sustained no "damages," and nothing more than the costs in Chancery could be recovered.

2. The plea of *nil debit* to an action of debt on a bond, is bad on demurrer; but if the plaintiff demurs to it, the Court should visit the demurrer upon the declaration, if it be defective in substance.
3. In an action against a surety upon a bond, executed in compliance with the order of a Chancellor awarding an injunction to enjoin a trial at law, the records of the suits in Chancery and at law are admissible to show the dissolution of the injunction and the amount of the recovery at law.
4. It is correct as a general proposition, that the penalty of a bond limits the responsibility of one who executes it as a surety, and consequently he is not liable in the event of a breach for interest upon the penalty.

Writ of Error to the Circuit Court of Macon.

THE defendant in error declared against the plaintiff, in debt, setting forth that on the 23d September, 1833, he commenced an action, &c., against Peter Robertson, and on the 31st of October, 1834, the defendant in that action prayed for and obtained an injunction against the further prosecution of the same, upon executing a bond to the plaintiff, in the penal sum of one thousand dollars, conditioned to pay him "all damages which he might sustain by the wrongful suing out of said injunction," &c. In pursuance of the order, Robertson and the defendant signed, sealed, and delivered an injunction bond, dated the 31st day of October, 1834, in the penalty above mentioned, the condition of which recites the proceedings at law, the bill in Chancery, the order thereon, and undertakes the performance of what is there required upon the contingency provided. The bill was filed on the day

the injunction was obtained, and the injunction was served on the the plaintiff on the 10th January, 1835.

It is then alledged, that the injunction was dissolved and bill dismissed in July, 1840, and the plaintiff permitted to proceed in his suit at law. Afterwards, at the spring term, 1842, of the Circuit Court of Lowndes, in which the suit was pending, the plaintiff recovered a judgment against Robertson for the sum of $1,071 32, and costs. *Further*, on the 10th May, 1842, an execution issued on that judgment against the goods and chattels, lands and tenements of the defendant therein, which was received by the sheriff, &c., on, &c., and by him returned "no property found."

The plaintiff then avers, that at the time the judgment was rendered, and the execution issued and returned against Robertson, he was insolvent, and unable to satisfy the same. By reason of all which, the bond declared on became forfeited, &c.

The defendant pleaded—1. *Nil debit.* 2. *Nul tiel record*, as to the judgment alledged in the declaration. 3. That the plaintiff hath not been damnified by reason of any matter, cause, or thing, in the condition of the bond described in the declaration. 4. A set off to an amount beyond the penalty of the bond. To the first and third pleas the plaintiff demurred; his demurrer was sustained to the first, and overruled to the fourth plea. An issue was then joined upon the three last pleas, and the cause submitted to a jury, who returned a verdict for the plaintiff, for $379 15, and judgment was rendered accordingly.

On the trial, the presiding judge sealed a bill of exceptions at the instance of the defendant, which presents the following points: 1, The plaintiff gave in evidence a regularly certified transcript of the record of the suit in Chancery, between Robertson and the plaintiff, in which the bond declared on was executed, notwithstanding the defendant objected to its admissibility. 2. He also laid before the jury the record of the prooceedings and judgment of the suit at law, to enjoin which the bill was filed, although the defendant objected to its competency as evidence. 3. The issue upon the fourth plea required the defendant to prove a promise by the plaintiff to pay the debt proposed to be set off within six years previous to the commencement of this suit. To sustain this issue, it was admitted by the plaintiff, that Robertson would testify that the defendant was entitled to a set off against

the cause of action embraced in this suit, to the amount of five hundred dollars or thereabout. That the set off consists of unsettled claims against the plaintiff, which claims Robertson had entirely lost sight of, as he considered the plaintiff entirely insolvent. It was admitted by the defendant that the set off claimed accrued before the institution of the suit at law, which had been enjoined, viz: previous to 1832. This was all the evidence adduced by the defendant, and the Court decided, that it did not establish a subsequent promise, so as to take the set off out of the influence of the statute of limitations. 4. It was proved that the amount of the judgment recovered in the suit at law was larger than the penalty of the bond with interest thereon. The Court charged the jury, that the measure of the plaintiff's recovery would be the penalty of the bond with interest thereon from the return of the execution against Robertson "no property found." 5. The defendant prayed the Court to instruct the jury, that the plaintiff was bound to prove the execution of the injunction bond by Robertson, the principal therein, and the transcript of the records, which had been given in evidence by the plaintiff, did not show that fact: but the Court refused thus to charge.

It was proved that Robertson was solvent when the injunction was awarded, but became insolvent before the dissolution thereof. It was admitted by the plaintiff in error that a judgment was confessed for part of the demand sued for, previous to the trial, as stated in the argument of the counsel for the defendant in error.

T. Williams, for the plaintiff in error, made these points:— 1. The demurrer to the defendant's first and fourth pleas should have been visited upon the declaration. 2. The transcripts of the records of the proceedings both at law and in equity, should have been excluded. 3. The Court should not have instructed the jury, that the evidence before them did not show a subsequent promise by the plaintiff to pay the demands proposed to be set off; and erred in instructing them, that the plaintiff might recover damages beyond the penalty of the bond. 4. It was essential to the plaintiff's right to recover, that he should have proved the execution of the bond by Robertson, and the Court should have charged the jury that the records offered by the plaintiff did not establish the fact.

J. P. Sanford, for the defendant in error. The main ground upon which the plaintiff in error hopes to reverse the judgment of the Circuit Court, is, that the jury were charged that the measure of damages was the penalty of the bond, with interest thereon from the time the execution against Robertson, the principal obligor, was returned "no property" found. It is admitted that the authorities upon the general question are somewhat contradictory; but in a case like the present, where by long continued litigation, the amount intended to be secured exceeds the penalty of the bond, interest is recoverable. [3 Caine's Rep. 48, and note (a); 2 Burr. Rep. 1094; 6 Ves. Jr. Rep. 92; 1 Vern. Rep. 349; Shower's Parl. Cases, 15; 1 Kinne L. Comp. 151, § 23; 1 Gall. Rep. 348, 360; 9 Cranch's Rep. 104, 112; 2 Dall. Rep. 252; 3 Atk. Rep. 517; 1 Mass. Rep. 308.] The case in 4 Ala. Rep. 671, in which the penalty of the bond is said to be the measure of the recovery, is unlike the present. That was a recognizance in favor of the State.

The declaration it is believed, is free from all objection, and the demurrer of course could not have been visited upon it. [2 Porter's Rep. 249.] No objection has been pointed out to the transcripts of the records, which were offered by the plaintiff; and in respect to the proof of a subsequent promise to take the sets off out of the statute of limitations, it is enough to say that none was given.

None of the issues threw upon the plaintiff the burden of proving the execution of the bond by Robertson. The sets off it may be remarked further, were against Robertson, and if not barred, are inadmissible under the plea.

It is admitted by the plaintiff in error, that the record is imperfect, in not showing a confession of judgment by him, for the sum of $723 21, at a term previous to the trial, in order to obtain a continuance as to the residue of the demand sought to be recovered. If then, the Court should be of opinion, that interest upon the penalty is not recoverable, it is suggested that the proper judgment may be here rendered.

COLLIER, C. J.—1. The declaration seems to us to be fatally defective. It recites the bond at length, avers that it was taken pursuant to the order of the judge who awarded the injunction, alledges the dissolution of the injunction, the recovery at law,

the return of a *fieri facias* against Robertson "no property found," the insolvency of Robertson *when the judgment was rendered and execution issued*, and as a consequence thereof, deduces the forfeiture of the condition of the bond, and the liability of the defendant. This is not a good assignment of a breach. It is not co-extensive with the undertaking of the obligors, and does not comprehend its effect. They engage to pay the plaintiff all damages he may sustain by the wrongful suing out of the injunction. The extent of these damages do not depend upon the dissolution of the injunction, the recovery of a judgment thereon, the insolvency of the principal obligor at that time and afterwards, and the return of "no property found" to a *fieri facias* on that judgment. Yet the plaintiff deduces the liability of the defendant, the surety, from these premises.

It is in general sufficient to assign the breach in the words of the covenant, promise, &c. Thus in an action upon a covenant to repair, it is enough to alledge that the defendant did not repair; or upon a covenant not to permit an escape without a warrant from the sheriff, it is sufficient to say that the defendant permitted the escape of A, without a warrant, without alledging how A was arrested. [Mansel on Dem. 44-5.] But it is said not to be always sufficient to negative the words of the condition of a bond. Accordingly, where the undertaking was to secure certain lands, &c. "free from all legal incumbrances, either by deed or mortgage, or otherwise now in existence, and binding upon the premises;" the breach alleged was, that the defendants "did not free the land from all legal incumbrances, either by deed, mortgage, or otherwise, then in existence, and binding upon the premises." The Court held the declaration bad in substance, for the insufficiency of the assignment, which did not necessarily show a breach. [Julliand v. Burgott, 11 Johns. Rep. 6. See further, U. S. v. Spalding, 2 Mason's Rep. 478; Craghill v. Page, 2 H. & M. Rep. 446; Winslow v. Commonwealth, Id. 459.]

Under the statute of 8 and 9 Wm. III. ch. 11, of which our statute is almost a literal copy, it is held to be *compulsory* on the plaintiff to assign breaches of all the covenants for the breach of which he claims damages, [2 Caine's Rep. 329; 2 Johns. Cas. 406; 4 Johns. Rep. 213.] But the plaintiff has his election to declare for the penalty only, and set forth all such breaches in his replication to the defendant's plea of performance, or to set

them forth in his declaration. If, however, he sets out the condition in his declaration as his cause of action, or a part of it, he should show how it became absolute; and this must be done, so that it may appear, that there has been a breach for which damages are recoverable. And if a good breach be not assigned, the defendant may demur generally. [Mansell on Dem. 44.] In Gentry v. Barnett, 6 Monr. Rep. 114, it was held, that to a plea of conditions performed, the plaintiff may reply and assign breaches, but having assigned one or more specially in his declaration, and been defeated by the pleadings of the defendant, he cannot afterwards assign new breaches. This may suffice to show, that although the plaintiff might have declared for the penalty of the bond, and set out a breach of the condition in a replication; or after judgment by default, or upon demurrer, have suggested breaches on the roll, yet if he elects to do this in his declaration, the breach must be well assigned.

In Dickinson v. McCraw, 4 Rand. Rep. 158, the Court say, that in declaring on an attachment bond, it is not sufficient to alledge, that the defendant "did not pay all such costs, &c. as accrued," it must be expressly averred that costs and damages have been sustained. An averment of a breach of a bond only entitles the plaintiff to recover what he is legally entitled to by reason of the breach. [McDowell v. Burwell, Id. 317; Flanagan v. Gilchrist, at this term.

In the case before us, it is not alledged that Robertson, the complainant in Chancery was solvent when the injunction was granted, and this cannot be assumed or implied from any allegation in the pleadings. Now he may have been entirely unable to respond to the plaintiff when the judgment was recovered and execution issued, and yet have been entirely good when the proceedings at law were enjoined, and so have continued for a half dozen years and more thereafter. Or he may have been insolvent not only at the latter, but at the former period also. The declaration is at fault in omitting to alledge the condition of Robertson at the time the injunction was obtained. And this defect is a substantial one; for if he was then solvent, and so continued for a sufficient length of time as to enable the plaintiff to obtain a judgment and collect the amount according to the regular course of proceeding, had he not been enjoined, then the plaintiff would have sustained damages in consequence of the injunc-

tion, to the amount of the judgment and costs. But if he was then insolvent, and so continued up to the rendition of judgment, the only damages to which the plaintiff is liable is the costs to which he was subjected in Chancery—and for these, no breach is laid.

Having attained this conclusion, the only question upon the point is, should the demurrer to the pleas have been visited upon the declaration. It is said to be a rule, that on demurrer the Court will consider the whole record, and give judgment for the party who appears to be entitled to it. This rule has its exceptions, but the case at bar is not one of them. [Step. on Plead. 144-5; 1 Mass. Rep. 495; 2 Id. 84; 6 Id. 389; 16 Id. 1; 11 Pick. Rep. 70, 75.

The plea of *nil debit* was certainly bad, but the Court (as we have seen,) should have looked at the entire record, and given judgment against the party who committed the first fault in pleading. Now although the proof upon this point was (as it would appear) ample, and the instructions of the Court correct, yet this could not cure the defect in the declaration.

2 and 4. No objection has been pointed out to the admission of the records of the suits at law and in Chancery, and we think they were *prima facie* competent to show the dissolution of the injunction and the amount of the recovery at law. They should not have been rejected upon the ground that they were *res inter alias*. The liability of the defendant in the present suit, is accessorial to Robertson, who was one of the parties to those cases, and this it seems to us, is quite sufficient to have authorized the Courts to admit the transcripts.

3. In the Bank of U. S. v. Magill, et al. 1 Paine's Rep. 669, Mr. Justice Thompson, said, where a bond with a penalty is given for the performance of covenants, the recovery must be limited to the penalty, though damages may have been sustained to a greater extent. That becomes the debt due, upon which interest may be added, according to circumstances. Accordingly it has been held, that interest beyond the penalty of a bond may be recovered in the shape of damages, even against a surety. [Harris v. Clap, 1 Mass. Rep. 308.] And in Smedes v. Hoogh-taling et al. 3 Caine's Rep. 48, *Kent, C. J.* said, "On a review of all the decisions on this subject, the Court think this rule ought to be adopted: That interest is recoverable beyond the penalty

of a bond. But, that the recovery depends on principles of law, and is not arbitrary at the discretion of a jury. See Paine v. McIntier, 1 Mass. Rep. 69; Carter v. Carter, 4 Day's Rep. 30, and cases there cited; Maryland v. Wayman, 2 G. & Johns. Rep. 279; U. S. v. Arnold, 1 Gall. Rep. 348.

In Clark v. Bush, 3 Cow. Rep. 151, the question whether the obligee could recover damages beyond the penalty was considered, and many authorities critically examined. The Court there said, "The weight of the authorities is, I think in favor of the doctrine, that in debt on bond nothing more than the penalty can be recovered, at any rate, nothing beyond that and interest, after a forfeiture, even against the principal obligor." But if the principal may be charged with interest thereon, still it is clear, the extent of the surety's liability "is the penalty of the bond."

In Branguin v. Perrot, 2 Bla. Rep. 1190, Ch. J. DeGrey considered that the penalty by consent of parties, ascertained the *maximum* of the plaintiff's damages, and if that is paid him, he can desire no more. Such was also the decision in White v. Sealy, et al. Doug. Rep. 49; but afterwards, in Lansdale v. Church, 2 T. Rep. 388, Buller, Justice, declared he was not satisfied with the decision in White v. Sealy; and cited Elliott v. Davis, Bunb. Rep. 23; Collins v. Collins, 2 Burr. Rep. 820, and Holdipp v. Otway, 7 T. Rep. 447, in which the plaintiff had been allowed to recover damages exceeding the penalty. Lord Thurlow, in Tew v. The Earl of Winterton, 3 Bro. Ch. R. 490, and Knight v. Maclean, Id. 596, held, that the obligor could not be charged beyond the penalty of the bond; and the King's Bench and Common Pleas have subsequently so laid down the law. See Wilde v. Clarkson, 6 T. Rep. 303; McClure v. Dunkin, 1 East's Rep. 436; Hefford v. Alger, 1 Taunt. Rep. 218.

Many of the American decisions maintain that the obligee may recover interest upon the penalty from the time of the first breach of the condition, if the damages amount to so much. Yet these adjudications are contradictory upon this point, even as it respects the principal obligor, and the learned Judge who delivered the opinion of the Court in Clark v. Bush, *supra*, says Harris v. Clap, in adjudging that the surety may be charged beyond the penalty, stands "solitary and alone." [See Payne v. Ellzey, 2 Wash. Rep. 143; Hardy v. Martin, 1 Cox's Rep. 26; Hal-

ler v. Ardley, 3 C. & P. Rep. 12; Lloyd v. Hatchett, 2 Aust. Rep. 525; Mackworth v. Thomas, 5 Ves. jr. Rep. 529.]

We might add to these many other citations, but we deem this wholly unnecessary, as they may be found referred to in the cases cited. Upon principle, we are entirely satisfied that the penalty must limit the responsibility of the surety. The obligors stipulate to perform a duty should the event provided for by the condition, happen, or if they fail to do so, then to pay the penalty. Although such is the undertaking, the penalty is not regarded as an absolute debt, to which the obligee is entitled upon the obligor's default, but the recovery is to be admeasured by the damages actually sustained. If these damages exceed the penalty, the surety is not liable for the excess; for he has by his contract, provided for his discharge, upon the payment of the sum stipulated. If the law were otherwise, says Lord Kenyon, "an obligor who became bound in a penalty of £1000, conditioned to indemnify the obligee, may be called upon to pay £10,000, or any larger sum, however enormous." True, a Court of Equity has sometimes rendered a decree in favor of the obligee for a sum greater than the penalty. Thus, in Grant v. Grant, [3 Russ. R. 598,] where proceedings were restrained for many years by injunction, without misconduct on the part of the creditor, Lord Eldon said, "In his opinion, the plaintiff's demand was not to be limited to the amount of the penalty of the bond; for he had always considered, on the authority of Duval v. Terry, (Show. P. C. 15,) that a party who had been restrained from proceeding at law, while the debt was under the penalty, had a right in a Court of Equity to principal and interest beyond the penalty of the bond." Again, "With respect to the general jurisdiction, I entertain no doubt whatever, that if a person indebted in a sum of money by the bond, files his bill for an injunction, stating that he is entitled by reason of equitable circumstances, to be relieved from the obligation which presses on him at law, and there is no neglect or default on the part of the defendant, this Court has a right to consider the bond creditor as submitting to do equity when he asks equity; and whatever abstruse and delicate reasoning there may be, as to whether the excess of the debt beyond the penalty, is a specialty debt or a simple contract debt, this Court will find a way to give execution for the difference. On the other hand, if it were the creditor's own fault that he had

not enforced payment of his debt sooner, it would not be competent for him to take the benefit of the same rule." (See also, Clarke v. Seton, 6 Vesey, jr. Rep. 411; Clarke v. Lord Abingdon, 17 Id. 106.) But if it were allowable to apply this equitable rule in a suit at law, it might perhaps be questioned whether the record discloses such a case of protracted and vexatious litigation on the part of the complainant in equity, as to authorise a judgment for interest upon the penalty against the surety in his bond.

Without stopping to inquire whether a recovery might be had against the principal obligor, in an action upon the bond for a larger sum than the penalty, we are satisfied that such a judgment cannot be rendered against the surety. It remains but to add, that the judgment is reversed, and the cause remanded.

HOLLINGER, ET AL. v. HOLLY, ET AL

1. The act of 1843, which requires creditors to file their claims in the clerk's office of the Orphans' Court, within six months after the estate is represented insslvent, creates a bar to all claims not so presented.
2. The omission to verify the claim so filed, by the affidavit of the claimant, is not ground for rejecting the claim, unless an exception to it is filed within the time allowed by the act.

Writ of Error to the County Court of Mobile.

THE writ of error in this case is sued out by several of the creditors of the estate of James M. Ashton, whose claims were rejected by the Court, upon the final settlement of that estate as an insolvent estate.

Albert Mudge presented for allowance, a judgment obtained by him in the Circuit Court against James M. Ashton, in his life time. The claim had been presented to the administrators within eighteen months after letters granted. The administrators ob-

jected to it on the ground that it had not been filed in the clerk's office within six months after the estate was declared insolvent. The objection was sustained.

Thomas P. Fennel presented a similar claim, in which the judgment was against the estate, upon *sci. fa.* against the administrators. This was rejected for the same reason.

William Magee presented a note upon Ashton, which had been presented to the administrators within eighteen months after letters granted. This was rejected for the same reason.

John Hartwell presented an account, which had been presented to the administrators within eighteen months after letters granted. This was rejected for the same reason.

The administrator of D. McLean presented an account for medical services rendered during the last illness of Ashton. This was objected to for the same reason; but the objection was overruled, and the account being proved, was allowed in full.

Peter Clark presented a note, made by Ashton in his life-time, which had been duly presented to the administrators, and was embraced in the schedule of claims against the estate, filed by the administrators when they applied to have the estate represented insolvent, which schedule has remained in the County Court ever since. This was rejected for the same reason.

Wm. De F. Holly, the administrator of the estate, under settlement, presented for allowance a judgment recovered by him in the Circuit Court of Mobile, against Ashton in his life-time, which in the report of insolvency made by him, is expressed thus—Wm De Forest Holly, cash $19,780 34, in the schedule of claims filed by said Holly when he applied to have the estate declared insolvent. The schedule was sworn to by Holly, and was accompanied by a certificate of the clerk of the Court, stating that Holly had recovered such a judgment, setting out dates, &c. &c.

This claim was objected to by William Magee, a creditor, on the ground that it had not been filed in the clerk's office in six months after the estate was declared insolvent. The objection was sustained.

Adam C. Hollinger presented an open account, for goods, wares, &c. sold and delivered Ashton in his life-time. This had been presented to the administrators in due time, and was also filed in the clerk's office within six months after the declared insolvency. When filed it was sworn to as being correct, by one

Carr, according to the best of his belief. The administrators objected to the allowance, because the account was not verified by the oath of the *claimant* The objection was sustained, and the account rejected.

William Magee presented for allowance a note executed by Ashton in his life-time, and which had been presented to the administrators within eighteen months after grant of letters of administration, and before the passage of the act of 1843, relating to the settlement of insolvent estates. The administrators objected to this claim, that it had not been filed in the clerk's office within six months after the estate was declared insolvent. The objection was sustained, and the claim rejected.

The several creditors whose claims were rejected, excepted to the decision of the Court, and they now join in the assignment of errors.

Campbell, for the plaintiffs in error, insisted, that there was nothing in the statute [Clay's Dig. 192,] which creates a forfeiture, although the demand may not be filed according to the terms of the act. The presentation to the administrator seems provided as equivalent to the filing in the clerk's office.

In other States, where the statute is hold as a bar, it is so on account of express terms to that effect. [15 Mass. 264; 6 Pick. 330; 9 Verm. 143; 7 Ib. 136.]

No counsel appeared for the defendants in error.

GOLDTHWAITE, J.—To come to a determination of the several questions arising from this record, it is necessary to refer to statutes not now in force. The course of proceeding, with reference to insolvent estates, was first prescribed by an act passed in 1806. The Orphans' Court, after ascertaining the fact of insolvency, and after directing the lands of the decedent to be sold, was required to appoint two or more commissioners, with full power to receive and examine all claims of the several creditors; to accomplish this, they were required to cause the times and places of their meetings to attend the creditors to be made known in a certain manner; and six months, and such further time, (as the circumstances of the estate should require,) not exceeding eighteen months, was to be allowed to the creditors for

bringing in and proving their claims before the commissioners: at the end of the limited time these were to make their report, and present, on oath, a list of all claims laid before them, with the sum allowed on each respective claim. Notwithstanding the report, any creditor, whose claim, in whole, or in part, was rejected, or any administrator, &c., who should be dissatisfied with the report, or a particular claim, might, for good and sufficient cause shown to the Court, have the claims referred by the Court to referees, whose report and award thereon, was to be final and conclusive. [Aik. Dig. 152.]

Afterwards, by the act of 1821, it was made the duty of the Judge of the County Court to audit and determine the accounts relating to such estates, under the regulations before prescribed for commissioners; and creditors were allowed in all cases, to file the evidences of their claims in the clerk's office. But the Judge was permitted to appoint commissioners when in his opinion the case should require that to be done.

It may be observed here, that under these acts, the administrator retained the control of the estate, and was competent to dispute with the several creditors the validity of their claims; but independent of this authority, the commissioners, under the first act, and the Judge of the County Court, under the last one, were invested with power to *examine* the accounts which were to be *proved* before them. As the claims might be examined and were required to be proved, it is scarcely possible that it was intended a creditor might stand by with his claim, at the time fixed by the Commissioners, or Judge for the hearing, and afterwards be let in to receive a dividend. The permission to a creditor to except to the report, and afterwards, on sufficient cause, to have a reference, is quite conclusive that he was concluded, if he omitted to present his demand before the report was made up.

The act of 1843 evidently was intended to introduce a body of rules, entirely new, to govern the proceedings in relation to insolvent estates. The mode by which the insolvency is to be ascertained, the settlement of the administrator with the Court in that event, the nomination by the creditors of an administrator *de bonis non*, his appointment, or the retention of the administrator in chief, in the event that no nomination is made, are all specially provided for, and with much exactness.

Then follows the particular section, which we are now to construe. It is as follows, to-wit:

Every person having any claim against such insolvent estate, shall file the same in the clerk's office of said Court within six months after such estate is declared insolvent; and every such claim shall be verified by the affidavit of the claimant; and the clerk shall give a receipt therefor to the claimant, his agent or attorney; and shall endorse on such claim the day on which it was filed; and shall keep a docket or list of all such claims, which shall at all times be subject to the inspection of the administrator and creditors of the estate; and if no opposition shall be made to the allowance of such claim, in the manner hereinafter provided, within three months after the time when the said estate was declared insolvent, such claim shall be admitted and allowed as a good and valid claim against the said estate, without further proof.

The manner of contesting the claims, is provided for by another section, in these terms, to-wit;

At any time within nine months after such estate shall be declared insolvent, the administrator, or any creditor or creditors of the estate, in the name of the administrator, may object to the allowance of any claim filed against the estate, by filing in the clerk's office such objection in writing; and thereupon the Court shall cause an issue to be made up between such claimant, as plaintiff, and the administrator, or the contesting creditor in the name of the administrator, as defendant, by pleading therein in the same manner as if the claimant had sued the administrator thereon at common law.

After ascertaining the manner in which the contest thus instituted shall be tried, the statute proceeds to declare that every executor, &c. of an insolvent estate, shall make a settlement of his accounts as such, at such time (not less than nine nor more than twelve months from the time such estate shall be declared insolvent,) as the Court may appoint; and at such settlement the Court shall adjudge and decree to such creditor *whose claim shall have been allowed as herein provided*, his rateable proportion of all monies then found due from the administrator; reserving nevertheless, in the hands of such executor, &c. a rateable proportion of such monies for such claims as may be then contested and undivided; and a similar settlement and rateable distribution

shall be made at least every six months thereafter, at such times as the Court may appoint, until the estate shall be finally settled and distributed.

When the act, from which we have made such copious extracts, is contrasted with the previous legislation, it will be seen, that, formerly, the only opportunity given to the administrator or creditors to contest the claim of another creditor, was at the final settlement.

The act now in force, instead of this, gives the administrator and creditors at least three months, in every case, to ascertain the validity and correctness of every demand exhibited against the estate or claimed from it. Each claim must be filed within six months after the estate is declared insolvent; and if no opposition is made to it, within nine months from the same time, the claim must be allowed.

Although the statute contains no terms which expressly bar a claim which is not presented within the time provided, yet such seems to be the result of the omission; for the chief object of the enactment would be frustrated if the creditors were permitted to come in with claims after the period has elapsed within which other creditors or the administrator are allowed to contest them; and the opportunity and time which is allowed, evidently for the purpose of enabling those having an adverse right to examine into the accuracy and validity of the several claims, would be taken away, if the claims themselves are presented only at the time when the final adjustment and distribution of the assets in hand is made. The practice which prevailed under the former statutes seems to favor this conclusion, and no instance is known or remembered, in which a claim was acted on or allowed by the Court, which had not been presented at the time fixed for the settlement—whether that was made by commissioners or the Judge himself.

It is supposed by the plaintiffs in error, that preferred claims and judgments obtained against the administrator, or against the decedent, form an exception to the general requirements of the statute; but there seems no room for this exception, when the general object is considered. It is possible the administrator may be liable to suit for a preferred claim whenever the assets in his hands are sufficient to answer it; but however this is, it seems certain whenever such a creditor comes into the special tribunal

created by the act, he comes as any other creditor, and is equally subject to have his claim examined and contested.

So too with the judgment creditor; indeed, as to him, there is an express provision of the statute, which seems to strongly fortify the general conclusion. It is provided that no suit against the administrator shall be abated by the suggestion of insolvency; but when that is interposed, the suit proceeds on the other issues to a final determination, and if the insolvency is ascertained, then the judgment is to be certified to the proper Orphans' Court; and upon a duly certified transcript of such judgment being filed as a claim against the estate, *as provided by the act*, then the plaintiff shall be allowed as a creditor, his rateable proportion of the estate.

It is further supposed, that if the claims against the estate are designated in the schedule, which the administrator is required to present as a preliminary to ascertaining the insolvency, this should be considered as equivalent to filing the claims themselves in the clerk's office by the creditors, and the more especially when these claims are due to the administrator himself. The answer to this is, that each creditor, under the act, has the right conferred, to examine into the claim of every other creditor, and can only ascertain who stands in this relation, by the assertion of a claim in the manner indicated by the act. The creditors summoned by the administrator to contest the insolvency, may be those whose demands are sufficient in amount to produce that condition of the estate, but it cannot be known to other creditors that they claim a participation in the assets, until they assert their right in the mode provided; nor could any contest be originated upon the schedule presented by the administrator.

The direction that each claim shall be verified by the affidavit of the claimant, does not seem to be of such a nature as to warrant the rejection of a claim for its omission, when no exception is taken to the claim in the mode pointed out by the act. The creditor or the administrator may doubtless require the claimant thus to verify his claim, but if no exception is taken, there seems no sufficient reason to reject the claim.

These considerations lead us to the conclusion that the provision of the statute requiring all claims to be filed in the clerk's office within six months after the estate is declared insolvent, is im-

perative, and operates so as to entirely bar and exclude from participation in the assets, all creditors who omit to do so.

When the principles here ascertained are applied to the several claims of the creditors shewn upon this record, it will be seen there was no error in rejecting those of Mudge, Fennel, Magee, Hartwell, Clark, and Holly the administrator; and that the claim of Hollinger should have been allowed, as no exception was taken to the claim, when filed in the clerk's office, within the proper time.

The writ of error, however, is irregularly sued out in the names of these creditors jointly, and for this reason must be either dismissed, or so amended as to make Hollinger the sole plaintiff, and the administrator the sole defendant, as provided by the 14th section of the act; if so amended, the judgment of the County Court, upon his claim will be reversed, and the cause remanded, with directions to allow his claim.

BOTHWELL, ET AL. v. HAMILTON, ADM'R.

1. After a will has been admitted to probate, letters testamentary granted thereon, and proceedings had thereon to a final settlement of the estate, the propriety of the probate of the will, cannot for the first time be raised in this Court.
2. When by a will a life estate is given to the wife in all the property of the deceased, with remainder to the children, and the will is proved, and admitted to record, the Orphans' Court has no power to make distribution of the property during the lifetime of the wife. Such a distribution, made during the life of the widow, and at her instance, or by her consent, is not the act of the Court, but is in effect a gift of her life estate, and no matter how unequal it may be, will not prejudice the interests of those in remainder.

Error to the Orphans' Court of Jefferson.

Bothwell, et al. v. Hamilton, Adm'r.

This was a proceeding upon the estate of Audley Hamilton, deceased.

A will being offered for probate by Jane Hamilton, the widow, on the 4th April, 1838, the Court directed a citation to issue to James T. Bothwell and Ellen his wife, to show cause against it. At a subsequent term of the Court, and after several continuances, the Court made the following order, on the 23d October, 1838: "William S. Earnest, one of the subscribing witnesses to said will, being duly sworn and examined touching the execution of the same, and he having to the satisfaction of the Court proved the facts required by law to give validity to a will, it is ordered that said will be recorded, as the last will and testament of Audley Hamilton, dec'd."

The will is as follows:

The State of Alabama—Jefferson County.

I, Audley Hamilton, of said county, on this, the third day of January, one thousand eight hundred and thirty-eight, of sound mind, make this my last will and testament. My soul I return to God, who gave it, and my body to the earth, to be buried in a decent, christian manner, as my beloved wife may direct. My children I wish equally, and well taught, the English language, and in order to enable my wife, Jane Hamilton, to raise and educate my children, in the manner above stated, I will and give her, all my personal and real estate, to be so managed by her, as she may see proper, during her life, and at her death to be equally divided between my children. Except, however, a family of negroes given her by her father, consisting of Esther, David, Kitty, Tom, Bob, and Martha, which I wish to be at her disposal. By prudence and economy, I have money enough to pay all debts; the payment of them I leave to my wife; and should there not be enough, she may sell any property I have to raise funds for this purpose. In testimony of which, I subscribe my name, and affix my seal.

his
Audley ⋈ Hamilton, [l. s.]
mark

In presence of Wm. S. Earnest,
H. D. Palmer,
N. G. Martin.

Jane Hamilton, the widow, was appointed administratrix with

the will annexed, and commissioners were appointed to appraise the personal property, and also to divide the slaves among the children; also, an order for the sale of the personal property except the slaves.

On the 25th February, 1841, the appraisers returned an inventory of the appraisement of the personal estate, and of the division of the property:

To A. S. Hamilton, they assigned two negroes, valued at $1,500, and other personal property, amounting in all to $1,973

To J. J. Bothwell, a negro girl, at $400, the hire of a negro for seven years, $420, and personal property, amounting in all to $1,116 50

To William C. Hamilton, two negroes, valued at $1,200

To C. T. Hamilton, two negroes and a horse, valued at 1,510

To Frances S. Hamilton, two negroes, valued at 850

To Elvira Hamilton, one negro, valued at 300

There is also found in the record, an account of the sale of personal property, signed by Jane Hamilton, to the amount of $811 31, and an inventory of notes to the amount of $298 58. Also, a list of articles said to be retained under the will, amounting in all in value to less than $259.

On the 22d May, 1841, Jane Hamilton resigned her administration of the estate, and on the 18th December, 1841, Andrew S. Hamilton was appointed administrator *de bonis non*, with the will annexed.

On the 3d October, 1843, he stated his account, filed his vouchers and made application to have the same allowed; and final settlement thereon made. The Court ordered that the settlement be made on the fourth Saturday of November next after, and that publication be made, by notice set up at the court house, and three other public places, notifying all persons to appear, &c.

On the 25th November, 1843, it being the fourth Saturday, the following order was made. This day came Andrew S. Hamilton, adm'r, &c., and made final settlement of said estate, which is ordered to be recorded. Then follows a statement of the settlement, by which it appears there is in his hands for distribution the sum of $446 86, upon which the Court made the following order:

By the final settlement of the estate of Audley Hamilton, de-

ceased, this day made, there remains in the hands of the administrator, the sum of $446 86, and it appearing to the satisfaction of the Court, that the widow of the said Audley has received the full amount to which she is entitled under the will, and that he left the following children him surviving, to wit: Andrew S. Hamilton, Ellen, married to James J. Bothwell, Carter T. Hamilton, Frances S., married to James Wilson, and Elvira S. a minor, who under the will are entitled to equal distribution. And it appearing further to the satisfaction of the Court, that the said legatees have received from said estate as follows, viz: [Here follows a statement of the amount received by each as above.] In order that they may be made as equal as may be, by the distribution, it is ordered, that the said sum of $446 86, be allotted, and distributed to the said Elvira S. Hamilton.

From this decree Bothwell and wife prosecute this writ, and assign for error—

1. In admitting probate of the will, without notice to the next of kin.

2. The order requiring the sale of the personal property.

3. The order directing the division of the slaves.

4. The receiving by the Court of the unequal and unjust distribution made.

5. The Court did not audit and state the account of the administrator *de bonis non.*

6. Forty days notice was not given as the law requires.

7. The Court erred in the final decree, and in not appointing a guardian *ad litem* for the minor.

Mudd, for plaintiff in error, cited 4 Ala. Rep. 238; 7 Porter, 272; 1 Ala. Rep. 594; 5 Id. 473.

ORMOND, J.—The assignments of error present many questions which cannot be considered. No question can be here raised, upon the sufficiency of the probate of the will. After a will has been admitted to probate, and has been acted on by the Court without objection, the propriety of its probate cannot be incidentally, and for the first time raised in this Court. The Orphans Court may certainly, and of its own mere motion, repeal, or revoke letters testamentary, and set aside the probate of a will unadvisedly granted; or, it may upon application confirm, or set aside

a probate previously granted, and upon its action, or refusal to act, a writ of error may be prosecuted. But when, as in this case, the probate has never been objected to in the Orphans' Court, and has been the foundation of all the subsequent proceedings, it cannot be thus incidentally questioned. [Shields et al v. Alston, 4 Ala. Rep. 248; Hill v. Hill, 6 Ala. Rep. 166; Boyett v. Kerr, 7 Ala. Rep. 9.]

By the provisions of the will thus admitted to probate, and by the widow taking out letters of administration and thus assenting to the bequests, she became invested with the life estate in the property conveyed by the will, with a vested remainder to the heirs at law of the testator, who take as purchasers. The Orphans' Court had therefore no jurisdiction to make the distribution, which at the instance of the administratrix, it appears was made among the heirs. This distribution is not the act of the Court, but is the act of the administratrix, and if done at her instance, as appears to be the fact from the record, is a gift of her interest, to those amongst whom the property was distributed. The inequality of the distribution is a matter which cannot be questioned, as it does not prejudice the rights of the legatees, who take no present interest under the will, but at the death of their mother will be entitled to their equal share of the estate; a right which no act of her's can impair or abridge.

The Court was equally without jurisdiction to make the distribution, which it appears was made at the instance of the administrator *de bonis non*, as by the will all the property of the testator, real and personal, was vested in the widow during her life, with remainder to his heirs.

These considerations are decisive of the case. No matter how erroneous the action of the Court may have been, as it had no jurisdiction, its acts cannot prejudice any one, being merely void. Let the writ of error be dismissed, there being no judgment of which the plaintiff in error can complain. As it respects the defendant in error, he may, if he thinks proper, prosecute a writ of error to reverse the judgment which the Court rendered against him.

WHITSETT v. WOMACK, USE, &c.

1. A statute provided, that where a steamboat, &c. was seized under process issued upon a proceeding in the nature of a libel in admiralty, that it should be lawful for the master, &c. to enter into a stipulation or bond, with sufficient sureties to answer all the demands which shall be filed against the boat, and the same shall be released and discharged from such lien: *Further*, the clerk of the Court in which the libel was filed shall take the stipulation or bond; and it shall not be void for want of form, but shall be proceeded on and recovered according to the plain intent and meaning thereof: *Held*, that a bond taken under this statute was neither void or voidable, because it did not show that the obligors, or some one of them, were claimants of the boat, or otherwise interested in the litigation respecting it; or because it was made payable to the officer who executed the order of seizure, instead of the libellant; or because it provided for the return of the boat to the obligee, instead of stipulating that the claimant should pay the libellants such judgment as should be rendered on the libel; or because it does not provide, that upon the payment of such decree as may be rendered, the obligors shall be discharged from their obligation to return the boat. Such a stipulation, if voluntarily entered into, and not extorted *colore officii*, may be enforced as a common law bond.
2. Where a statute requires a bond to be executed in a prescribed form, and not otherwise, no recovery can be had on a bond professedly taken under the authority of the act, if it does not conform to it; but if a statute merely prescribes the form, without making a prohibition of any other, a bond which varies from it may be good at common law. So if part of the condition of a bond conform to the statute, and part does not, a recovery may be had for the breach of the former, where so much of the condition as is illegal is not *malum in se*.
3. A sheriff who has duly seized goods, under legal process, has a special property in them, and should provide for their safe keeping. Where a mode is provided by statute in which this may be done, and the appropriate bond is taken, the officer is relieved from the obligation to keep it; but where the statutory bond is not offered, he may provide some other custody—either retain the possession himself, or commit it to a bailee; and if the bailee execute a bond, it will be obligatory, although the plaintiff will not be bound to accept it in lieu of the officer's responsibility.
4. A bond which the declaration alledged was made payable to a sheriff, did not state *in totidem verbis*, that he was such officer: *Held*, that the undertaking in the condition, that the obligors should perform it to the obli-

gee, or his successor in the office of sheriff, sufficiently indicated his official character. *Quere?* Would not the bond be *prima facie* good, so as to devolve the *onus* of impeaching it upon the obligors, though it had omitted to show who the obligee was, otherwise than by stating his name.

5. *Quere?* Would a bond taken by a sheriff, who had seized a boat under process issued upon a libel in nature of an admiralty proceeding, be void because he agreed that the obligors might navigate it to a point not very remote, and unlade its cargo, as the master had undertaken to do. Or would not the obligors be estopped from setting up such an agreement to impair their obligation?

6. Where the words of a bond were not sufficiently explicit, or if literally construed, their meaning would be nonsense, it must be construed in reference to the intention of the parties. In doing this, it is allowable to depart from the letter of the condition, to reject insensible words and to supply obvious omissions.

7. The obligors stipulated to deliver to the sheriff at a place designated, a boat which he had seized under legal process, on demand, if a decree of condemnation should be rendered against it—the sheriff "having execution then against:" *Held*, that the bond did not contemplate a demand at any particular place; and that the form of the execution which the sheriff held when he made the demand, was immaterial; if it was one which warranted the action of the sheriff against the boat.

8. The office of an *innendo* is to explain, not to enlarge, and is the same in effect as "that is to say;" whether used for the purpose of enlarging, or other unauthorized purpose, it is not issuable, and furnishes no warrant for sustaining a demurrer to the declaration.

9. Parties who have entered into a bond as the bailees of property that had been levied on by a deputy sheriff, cannot object that the deputy transcended his powers, where the sheriff himself instead of objecting, affirms the act.

10. The act of 1818, declares that all joint bonds shall have the same effect in law as if they were joint and several; consequently, where a bond executed by a number of persons requires that a demand of performance shall be made in order to put them in default, it is enough to prove a demand of the obligor against whom suit is brought.

11. In an action upon a bond, if there is no issue which imposes upon the plaintiff the *onus* of proving its genuineness, it should not be rejected as evidence, because it has interlineations which he does not account for. Perhaps if it had been offered as evidence without having been made the basis of an action, and the interlineations were such as to warrant the suspicion that they had been made after the bond was executed, or without authority, they should be accounted for.

Writ of Error to the County Court of Sumter.

This was an action of debt, at the suit of the defendant in error against the plaintiff. The declaration contains five counts; the first alledges, that the defendant, together with John Huddleston, (as to whom the suit is discontinued,) and Isaac Smith, deceased, by his bond bearing date of the 7th of March, 1838, bound himself to pay the plaintiff the sum of six hundred and eighteen dollars and forty two cents, on demand. Yet, &c. The second count sets out that a bond of the same date and penalty was executed by the parties, payable on demand, subject to a condition thereunder written, which with its recitals is to the effect following: Whereas, "Andrew Beirne, Lyle B. Fawcett and John J. McMahon, then partners under the firm and style of Beirne, Fawcett & Co. had prepared their libel against the steamboat called the Triumph, for the sum of three hundred and nine dollars and twenty-one cents, the value of certain goods, wares and merchandize, to wit: twenty coils of rope and three kegs of nails, on which said libel an order of seizure had issued against said boat, her tackle, apparel and furniture, returnable to the Circuit Court to be holden in and for said county of Sumter, at the court house thereof, on the first Monday in April next, after the date of said writing obligatory, for further proceedings thereon, in Court. It was, and is, provided that said writing obligatory should be void, if said obligors, the aforesaid Huddleston, Whitsett and Smith, should, in case judgment should be recovered at the suit of said libellants, in their said proceeding against said boat, her tackle, apparel and furniture, produce said boat, her tackle apparel and furniture, to the said Womack, or to his successor in office, [meaning such person as should succeed said Womack in the office of sheriff of said county,] at the port of Gainesville, where said boat then lay, [meaning at the port of Gainesville in said county,] on demand thereof, at said port by said Womack, his deputy, or successor in office, having execution, [meaning thereby an order of sale from said Circuit Court, in said cause,] against said boat, her tackle apparel and furniture. But otherwise, that said writing obligatory should be and remain in full force and effect." It is then alledged, that pending the proceedings upon the libel, Lyle B. Fawcett died, and his survivors, Beirne & McMahon, at a Circuit Court for Sumter county,

commencing on the last Monday in September, 1841, recovered a judgment in said proceedings, for the sum of three hundred and eighty-one dollars and thirteen cents, with costs of suit. Afterwards, on the 1st of November, 1841, an execution, in the form of an order of sale, was issued on that judgment against the "boat, her tackle, apparel and furniture," for the sale thereof; which execution, previous to the 23d November, came to the hands of Mathias E. Gary, then, and ever since, sheriff of Sumter, and as such, successor to the obligee in the bond. On the last mentioned day, and while the said execution was in full force and in his hands, said Gary demanded said boat, her tackle, apparel and furniture of the defendant, at the port of Gainesville; but the defendant refused and neglected to deliver the same, or any part thereof; nor did Huddleston, the other survivor of Smith then produce the same. Nor was said boat, &c. then and there found; nor have they ever since been produced and found—nor have the obligees, or any of them, kept, or performed the condition of their bond, but have wholly failed, &c.

The third count states, that Beirne, Fawcett & Co. commenced their suit by libel on the 20th February, 1838; that the Triumph, her tackle, apparel and furniture, were seized on the 7th March thereafter, at the port of Gainesville, as she was on her passage and way upon the Tombeckbe river, by the obligee, then sheriff of Sumter. That the obligor, Huddleston, then claiming to be an owner in said boat, with the assent of the libellants, executed a bond, together with his co-obligors as sureties; conditioned, as stated in the second count, that she might proceed on her way and passage, according to its original destination; the penalty and date of which bond were the same as stated in the two preceding counts. It is then averred, that upon the execution and receipt of said bond, the plaintiff delivered the boat, &c. to Huddleston; in other respects, this count is substantially the same as the second.

The fourth count is similar to the third, except that it alledges in addition, that although the bond is made payable to Womack, yet it was in fact for the use and benefit of the libellants.

It is alledged in the fifth count, that the bond with its condition, was made and given by the obligors, as and for a bond with condition in form in such case provided by law, and was taken and received of them by the obligee in the belief and expectation

that such was its true character; and in such belief and expectation the obligee delivered the boat, &c. to Huddleston. The bond was voluntarily executed by the libellants, and its acceptance assented to by the libellants. This count is in other respects similar to the second.

The defendant demurred severally to each of the counts, and his demurrers were overruled. In his demurrer to the first count he craved oyer of the bond, and set it out *in haec verba*, viz: "The State of Alabama, county of Sumter. Know all men by these presents, that we, John Huddleston as principal, and John C. Whitsett and Isaac Smith securities, are held and firmly bound unto Jesse Womack, sheriff of the county of Sumter, in sum of six hundred and eighteen dollars and forty-two cents to be paid to the said Jesse Womack, or his certain attorney, or executor, or assigns, firmly by these presents; sealed with our seals, and dated the 7th day of March, A. D. 1838. The condition of the above obligation is such, that whereas, Andrew Beirne, Lyle B. Fawcett, and John J. McMahon, partners under the firm and style of Beirne, Fawcett & Co. preferred their libel against the steamboat called the Triumph, for the sum of three hundred and nine dollars and twenty-one cents, the value of certain goods, wares and merchandize, to wit: twenty coils of rope, one keg of nails, and two kegs of nails, whereon an order of seizure has issued against said boat, her tackle, apparel and furniture, returnable to the Circuit Court to be holden in and for said county of Sumter, at the court house thereof, on the first Monday in April next, for further proceedings in the premises. Now if the said obligors above named, shall in case judgment shall be recovered at the suit of the said libellants, in their said proceedings against said boat, her tackle, apparel and furniture, produce said boat, her tackle, apparel and furniture, to said Womack, or his successors in office, at the port of Gainesville, where she now lies, on demand thereof, thereat, by said Womack, by his deputy or successor in office, having execution then against—then this obligation to be void, otherwise to remain in full force and effect.

JOHN HUDDLESTON, (L. S.)
JOHN C. WHITSETT, (L. S.)
ISAAC SMITH, (L. S.)"

The declaration being adjudged good, the defendant pleaded—1. That the bond was taken without consideration. 2. That he

had performed every thing on his part by the terms of the condition required to be done and performed. 3. That he would have delivered the boat, &c. at any time, if a demand had been made by the sheriff, with an execution, but none was made, and that the defendant has kept and performed his undertaking, &c. 4. That the Triumph was sunk by being snagged in the Chickasawha, and has never been raised, so that she cannot be delivered. 5. That the Triumph was sunk by running against a concealed snag, and has never been raised, &c.

The plaintiff replied by a brief denial of the truth of all the pleas but the second; to that he replied, alledging breaches of the condition of the bond specially; but as no question arises upon this replication, it need not be more particularly noticed.

J. R. Metcalfe, for the plaintiff in error, made the following points—1. Each count in the declaration describes the bond as payable to Jesse Womack, his heirs and executors, and the bond does not show, that at the time it was taken there was any process in his hands, or that in virtue thereof, he had seized the boat, &c.; nor does it appear that he was a sheriff, or other executive officer. 2. It is not shown by the bond that the defendant was the claimant of the boat, or surety for the claimant. 3. If the bond in question was intended as an official bond, or to be payable to an officer as such, still it is illegal; because it does not conform to the intention. A bond to an officer as obligee, when it should have been payable to the plaintiff in the suit, is a nullity. [Purple v. Purple, 5 Pick. Rep. 226.] A bond taken by a sheriff upon permitting a prisoner to escape is void, [4. Mass. Rep. 374; 5 Id. 541; 1 Term Rep. 418,] and upon the same principle, a bond given by a party to an officer, upon receiving property from the latter, on a condition not prescribed by law, is alike void. In the condition of the bond, the obligors undertake to return the boat to the plaintiff, instead of providing that the claimant should pay the libellant such judgment as should be rendered on the libel. [Clay's Dig. 139.] The obligors cannot be regarded as the mere custodians of the boat, &c. for the sheriff, if they are nothing more than his bailees, then they were not authorized to employ the boat in the business of carrying. In respect to this identical bond, this Court has decided that it did not release the boat from the lien, and it was yet within the jurisdiction of

the Court, [2 Ala. Rep. 743.] From this decision it results, that the boat was constructively in the possession of the sheriff, and he might have taken it at any time. In Gayle v. Martin, 3 Ala. Rep. 597, a bond to the plaintiff, who released his lien, was held to be good, but if the lien had still continued in force, it would have been inoperative, in favor of the obligee, and could not have been enforced against the obligors.

4. The law does not authorize any one but the claimant of the boat to replevy, and another person cannot deprive him of his right; besides the claim must be put in on oath. Here it does not appear that any oath was made by the obligors, or that they were claimants. Where, in a case commenced by attachment, a replevy bond was executed by a person who was not the owner of the property, nor his agent or attorney, it was held that such bond was void, [2 Porter's Rep. 497,] both as a common law and statute bond. Here is a case analogous in principle to the present, and the reasoning upon which it rests applies with all force.

5. The condition of the bond is insensible, uncertain, and the obligation cannot be enforced. [2 Buls. Rep. 133; Shep. Touch. 373.] While it provides for the delivery of the boat at, &c. to the obligee, or his successors, having an execution, it omits to state against whom the execution is to be, &c., and what office the obligee holds. When the bond was considered by this Court in this case, *supra*, it was held that the execution must be against the defendants, but the plaintiffs allege that it is to be in the nature of an order of sale against the boat, &c. If the sheriff meant to take a statutory bond, he must have intended that the execution should have been against the obligors, and they are substituted by law for the thing seized. The *inuendos* as to the meaning of this part of the condition, which is contained in all the counts but the first, is not sustained by the condition of the bond, but adds to, and contradicts it, which can no more be done by allegation than proof. The declaration is defective in not alledging that when the boat was demanded the sheriff had an execution against the obligors.

6. The bond is objectionable for the further reason, that it does not provide, that upon the payment of the amount of the judgment, the obligors shall be relieved from the obligation to return the boat. 7. The bond contemplates a demand of the *obligors*,

before they shall be liable for failing to return it, but the declaration only alledges a demand of the defendant, without stating any excuse for the failure to make it of Huddleston. 8. It appears that the boat was taken by a deputy sheriff; conceding that the obligee might make a contract which would bind him individually in respect to property seized under process, yet a deputy could not take upon himself to act as agent in such case.

9. The bond has several interlineations, and as these are presumed to have been made after it was executed, and were not accounted for, it should have been excluded as evidence. It is misdescribed in the declaration, and defects attempted to be supplied by *inuendos* which explain and add to it.

Baldwin, for the defendants in error, stated that the principal question was, whether the bond was founded on a valuable consideration, and not opposed to public policy? If it was not obnoxious to either of these objections, it was good as a common law obligation, although it did not conform to the statute. The delivery of the boat to the principal obligor, was a sufficient consideration, and as to the objection upon the ground of policy, it is believed to be alike untenable.

The case of an indemnity to an officer not discharging his duty, is neither analogous in fact, or principle to the present. There, the bond is void upon obvious grounds of policy; here the objection is to *the form of the security*, and not to the consideration, or inducement which caused it to be taken. Here the sheriff committed an honest mistake, in endeavoring to discharge a legal duty, and the bond must be upheld.

The sheriff has merely bailed the boat, &c. to Huddleston, and all the obligors stipulated that he should return it in a certain event. Now if the event provided for by the condition has actually taken place, it is insisted that the bond has become absolute, and that the action is maintainable. What is to hinder him from bailing property levied on; it may be the cheapest and safest mode of taking care of it; besides his liability as an executive officer, to the plaintiff, still continues, and the bailee is responsible to him. The counsel of the plaintiff in error seeks to avoid the effect of this argument by saying, that although the sheriff may bail property he has seized, yet he cannot authorize the bailee to use it. Now it will be observed, that the declaration, (unless it

be the third count,) does not aver an authority to all or either of the obligors to ply the boat; and the bond itself is silent on this point. But it is not admitted that the sheriff might not employ the boat, either under his personal direction, or through a bailee. If she is injured by such use, he is responsible, but this is the only consequence that follows. What rule of law inhibits a sheriff from working a horse or slave which he has levied on, if he treats him kindly; especially when by so doing the costs are lessened?

As to the legal validity of the bond, see the authorities collected in 1 Pirtle's Dig. Tit. Bonds; 26 Wend. Rep. 502; 1 Wash. Rep. 367; 2 Stew. 509; 2 Porter's Rep. 493; 6 Id. 414; 1 Ala. Rep. N. S. 316; 3 Ala. Rep. 593.

As to the official character of the obligee of the bond, it is sufficiently shown by the penal part of it; in other respects the condition of the bond is not insensible; its meaning may be ascertained by transposing words actually used, or by supplying others necessary to supply the obvious meaning of the parties. The construction given to some parts of the condition, when this case was here at a previous term, was perhaps influenced by the form of the transcript; at any rate it was not a point in controversy. But conceding that the language of the bond is susceptible of two meanings, after verdict it will be intended, that that alledged in the pleading was sustained by the proof.

The stipulation is to return the boat; this is enough to show, that the execution contemplated, was to be against the boat, and not against the obligors. It is admitted that the office of the *inuendo* is to explain and define, not to enlarge, and it is for this purpose that it is used in the declaration—it is by no means admitted, that the declaration would be affected if the inuendos were all stricken out.

The bond, by legal construction, is joint and several, and though in terms it may provide for a demand from the obligors, yet if it is made of either one of them, as to him it is sufficient. But was any demand necessary—was not the service of the writ a sufficient demand?

If the question really arises, it is insisted that the deputy sheriff had all the authority which his principal possessed, to bail the boat. But if the bond be good at common law, the objections to

the declaration, at most go to the form of declaring, and are not available on general demurrer.

In respect to the interlineations of the bond, and its description in the declaration, it is enough to say that there was no plea denying its execution, or the correctness of its description, but the issues all admitted its existence.

Although the bond does not provide for the obligors' discharge, without the return of the boat, it cannot be doubted that they may relieve themselves by paying the amount of the judgment upon the libel.

The omission to aver the value of the boat is not fatal on general demurrer; especially when it is averred that the plaintiffs obtained judgment for a certain sum, and have sustained damage, &c. These damages, it must be intended, were proved.

COLLIER, C. J.—It is said to be a general rule, that a bond, whether required by statute or not, if entered into voluntarily, and for a valid consideration, and not repugnant to the letter or policy of the law, is good at common law. [2 J. J. Marsh. Rep. 418; 3 Id. 437-8; 1 Ala. Rep. N. S. 310; 3 Ala. Rep. 593.] In Sewall v. Franklin, et al. 2 Porter's Rep. 493, this Court, after an extended review of the authorities, concluded, that "bonds taken by civil officers, and in relation to judicial proceedings, though without the authority of our statutes, (like bonds between individuals under other circumstances,) if they appear to have been given on valid and sufficient consideration, such as is neither illegal or immoral, may be good as common law bonds." The bond in that case did not conform to the statute, because it was payable to the *plaintiff*, instead of the *sheriff*, and although the Court was equally divided upon the question, whether it was operative, many adjudications were cited which maintained, that when such a bond is executed voluntarily, it is good at common law. See 1 Call's Rep. 219; 1 Munf. Rep. 500; 5 Mass. Rep. 314; 2 Stew. Rep. 509. But see Purple v. Purple, 5 Pick. Rep. 226.

Replevin, and other bonds required by statute have frequently been adjudged to be valid common law obligations, though not executed in obedience to the legislative direction. [7 John. Rep. 554; 2 Bibb's Rep. 199; 2 Litt. Rep. 306; 4 Id. 235; 3 Monr. Rep. 342; 4 Id. 225; 5 Mass. Rep. 314.]

A statute of Kentucky required that a bond for building a bridge should be made payable to the *Commonwealth*, but instead thereof, the Justices of the County Court were made the obligees. It was held, that as there was "no statutory provision making such a bond void," and the subject matter was such as the parties had a right to contract about, the bond was valid. [2 J. J. Marsh. Rep. 473.]

It is said that a bond taken by a sheriff, when the constable alone has the right to execute the process to which it relates, is void. [3 J. J. Marsh. Rep. 181.] So is a bond given to an officer, in consideration of an act that he has no legal authority to do. [3 Id. 621.] Or as an indemnity to an officer to induce him to perform a duty required of him by law. [5 Monr. Rep. 529.] Or to indemnify him for not returning an execution. [2 Bay's Rep. 67.] But if it be given to a sheriff by one who claims the property levied on by him, to indemnify him for not selling, it is valid. [6 Litt. Rep. 273; 2 Pick. Rep. 285.]

A bond taken of one in custody, by the officer who arrests him, is unlawful and void. [2 Chip. Rep. 11; 5 Mass. Rep. 541; 1 South. Rep. 319.] But a bond given for the prison liberties, though not strictly conformable to the statute, is not a bond for ease and favor, and may be good at common law. [8 Mass. Rep. 373; 3 Greenl. Rep. 156; 5 Id. 240.]

If a statute require that a bond shall be taken in a certain prescribed form, and not otherwise, no recovery can be had thereon, if it vary from the statute, or contain more than the statute requires. [Gilpin's Rep. 155.] But if the statute does not declare, that the bond shall not be taken in another form, a bond not conformable to the statute may be good by the common law. [2 J. J. Marsh. Rep. 473; 4 Monr. Rep. 225; 4 Litt. Rep. 235.] Where the authority to take a bond is wholly derived from the statute, if the bond be in a larger sum than is required, or on conditions, and be not voluntarily given by the obligors, it is void. [7 Cranch's Rep. 287; 3 Wash. C. C. Rep. 10.] And so also, is a bond *exacted* by an officer, when he has no authority. [11 Mass. Rep. 11; 15 Johns. Rep. 256; 2 J. J. Marsh. Rep. 418; 1 Leigh's Rep. 485.]

A bond variant from that prescribed by law, extorted from the principal obligor and his sureties, *colore officii*, it is said, cannot be enforced. [8 Greenl. Rep. 422; 5 Pet. Rep. 129.]

If part of the condition of a bond conform to the statute under which it was taken, and part does not, a recovery may be had for the breach of the former, where so much of the condition as is illegal is not *malum in se*. [Bates and Hines v. The Bank of Ala. 2 Ala. Rep. 484, 487; 4 Wash. C. C. Rep. 620: 2 Bailey's Rep. 501; 7 Monr. Rep. 317; 2 Green's Rep. 479.] And although a statute bond may not embrace every thing required to be inserted in the condition, yet judgment may be recovered to the extent of the breach of the condition. [7 Yerg. Rep. 17.]

A bond to indemnify against an unlawful act or omission already past, it is said, is not unlawful. [1 Caine's Rep. 440.] In Claasen v. Shaw, 5 Watts Rep. 468, it was determined that a bond given by a stranger to a constable, who held an execution against a third person, conditioned for payment of the debt, interest and costs of the execution, or the delivery of the property to satisfy the same, at a certain time and place, is not valid as a statutory obligation; but is good at common law. So where an act in relation to the prison limits was repealed, in March, 1821, and a bond to keep within the same was taken in November of the same year. The bond was payable to the creditor, as required by the repealed statute, which the parties supposed was in force; and the question was whether the bond was valid. It was objected that the bond was void on the ground of ease and favor; but the Court said that the bond was payable to the creditor, and was never intended as a security to the officer. *Further*, the bond is not void, because it restrains liberty, and is thus opposed to public policy. "The principles of the common law give validity to the bond. There is no reason why the bond should not be good at common law, it having been voluntarily entered into for the benefit of the principal, to procure a relaxation of a lawful imprisonment, to which he could not be entitled without giving bond, and the bond being accepted by the obligee, he is entitled to judgment. [Winthrop v. Dockendorff, 3 Greenl. Rep. 156.]

When a sheriff has duly seized goods under a writ of *fieri facias*, he has such a special property in them as to enable him to maintain trespass or trover against any person who may take them out of his possession; for he is answerable to the plaintiff for the value of the goods, and the defendant is discharged from the judgment, and all further execution, if the goods levied on

amount to the debt, although the sheriff does not satisfy the plaintiff. [Watson's Sheriff, 191.] *Further*, it is said, that "the sheriff may, if he please, take a bond conditioned to pay the money into Court, on the return of a *fi. fa.* or to save him harmless against a false return to a *fi. fa.*—such bonds not being void for *ease and favor*, under the statute of 23 Hen. VI. c. 9; that statute extends "only to bonds given by, or for prisoners in custody on *mesne process*. But the sheriff, for releasing the defendant's goods, on taking a bond, would be liable to the plaintiff in an action for a false return, and the sheriff must seek his remedy over upon the bond." [Watson's Sheriff, 190.]

By the act of 1824, (Clay's Dig. 537-8,) proceedings in the nature of a libel in admiralty are given for the collection of certain debts against steamboats, &c. And it is enacted, that if the master, &c. of any boat, &c. shall enter into stipulation or bond, with sufficient sureties to answer all the demands, &c. against the boat, &c. the same shall be released and discharged from such lien. *Further*, the clerk of the Court in which the libel is filed, shall take the bond, or stipulation, and it shall not be void for want of form, but shall be proceeded on and recovered according to the plain intent and meaning thereof.

A subsequent statute, passed avowedly for the security of "merchants, mechanics and others furnishing materials or stores to steamboats, or other water craft, in the State of Alabama," enacts that the claimants of a boat which has been seized, "may replevy by entering into bond with sufficient surety to pay such judgment as shall be rendered on the libel." [Clay's Dig. 139, § 23.]

We have stated these principles, and cited some of the numerous authorities by which they are supported, that it might be seen how closely the law adheres to the dictates of reason and morality in carrying out the intentions of parties as evidenced by their contracts. If these citations are to be recognized as correctly ascertaining the law, it is then perfectly clear, that the bond is not either void or voidable, because it does not show that the obligors, or some one or more of them were claimants of the boat, or otherwise interested in the litigation respecting it; or because it was not made payable to the libellants, instead of the officer who executed the order of seizure. It is clearly the duty of the sheriff to provide for the safe keeping of goods which he

may seize under legal process. The statutes prescribe one mode in which this may be done, and where the appropriate bond with surety is executed, the officer is relieved from the obligation to keep it. But it by no means follows, that these statutes were intended to control the sheriff beyond what their terms indicate; and if the bond they respectively require is not proposed to be executed, he may provide some other custody. Thus he may retain it under his continued supervision, or if he think proper, he may commit it to other hands, upon the bailee's undertaking, either with or without bond, that it shall be returned at some definite time, or upon the happening of some event in the future; and such an engagement will be obligatory upon the bailee, and his sureties. True, a bond executed otherwise than as the statute directs, would not discharge the sheriff from liability to the plaintiff, nor would the plaintiff be required to institute proceedings thereon. Yet if the bond was made payable to the plaintiff, it is difficult to conceive of a well founded objection to the maintenance of an action thereon, in the event of a breach. Such a suit would be the adoption of the act of the sheriff, and operate in law, (at least between the obligor and obligee,) as if the sheriff had acted under an authority previously granted by the latter; and thus the obligor would be estopped from insisting upon the informality of the bond, or the irregularity of the sheriff's proceedings.

It is not perhaps formally alledged, in some one or more of the counts that set out the condition of the bond, that the obligee was a sheriff, or other officer, authorized by process to seize the boat; yet this substantially appears by the undertaking in the condition, that the obligors should deliver it to his successor in the office of sheriff, &c. But would the bond be bad because it did not disclose the circumstances under which it was executed, or the authority of the obligee for taking it? Would not all presumptions be indulged in favor of its validity, and if it is obnoxious to legal objections, or is sustained by no sufficient consideration, does not the *onus* of making this apparent, devolve upon the obligors? These questions we think must be answered affirmatively.

True, the condition of the bond does not stipulate "to pay such judgment as shall be rendered on the libel," but merely for the return of the boat to the obligee and his successors in the sheriffalty. We should not suppose, if it were not so alledged in one count,

that the bond was intended to conform to the statute; but be this as it may, we have seen that it imposes a common law obligation, if it was voluntarily entered into, and is at least a good security for the sheriff, against the obligors. Considered as the undertaking of the custodian of the sheriff, the condition is entirely legal and it would seem most appropriate.

It does not appear from the bond, or the pleadings, that the boat was bailed with the understanding that it was to be navigated. In one or more of the counts, it is stated in substance, that the seizure prevented it from being thus used, and by committing it to the possession of the obligors, it was allowed to continue and complete its passage to the point of destination; but it is not alledged that this was a matter of stipulation between the sheriff, or that it in any manner entered into the contract of the parties. Suppose however, that the obligee did assent to the employment of the boat, can the obligors, after having availed themselves of the benefit derivable from the contract, be permitted to alledge its invalidity? Or could there be any legal objection to the navigation of the boat, if the purpose was to go to some point not very remote, where its master had undertaken to deliver goods, and there unlade? A contract contemplating such an employment, it seems to us, would oppose no rule of policy or law, and could not be prejudicial to either of the parties to the suit.

There was nothing said by us, when this case was previously here, that is decisive of any point now raised. True, we remarked, that "the bond taken by the sheriff in this case, is not the one prescribed by the statute, and therefore the lien was not discharged by it; but continued in full force, and the steamboat is to be considered as yet within the jurisdiction." This is nothing more than a declaration, that as the bond does not conform to the statute, it did not release the boat from the right which the plaintiffs acquired by the seizure, to have the decree in their favor satisfied by its sale; or in other words, that the bond in question did not, *in virtue of the statute*, inure to the plaintiffs, and was not a substitute for the boat. This proposition is not now controverted, and is entirely consistent with the idea, that the bond is a good common law obligation. Does it follow that because the lien upon the boat was not discharged, that the bond was gratuitously given? We think not. The sheriff may have giv-

en some other equivalent for the engagement which the obligors took upon themselves. Such would be the legal intendment, and the reverse cannot be presumed in the absence of a plea and proof drawing the consideration in question.

In Cromwell v. Grundale, 12 Mod. Rep. 194, it was held, that where the words of a bond are not sufficiently explicit, or where their meaning if construed literally would be nonsense, we must endeavor to discover the intent of the obligor, and be guided thereby. In giving a construction to a bond, the Court will look to the intention of the parties at the time it was executed, and expound it as the law then was. [Union Bank v. Ridgely, 1 Har. & G. Rep. 324.] And the condition of the bond ought to be so construed, by rejecting insensible words, as to fulfil the intent of the parties. [Gully v. Gully, 1 Hawk's Rep. 20.] The Court may depart from the letter of the condition of a bond, to carry into effect the intention of the parties. [Cook v. Graham, 3 Cranch's Rep. 229; Minor, et al. v. The Mechanics' Bank of Alexandria, 1 Peter's Rep. 46.]

In Pennyman v. Barrymore, 18 Martin's Rep. 494, it was determined, that the words "fourteen hundred and ten," in a bond, may be understood to mean "fourteen hundred and ten *dollars*." The cases here cited, rest upon a principle so reasonable, and well founded that their authority cannot be questioned; applying them to the condition of the bond declared on, and there can be no difficulty in adjusting its meaning. The undertaking of the obligors as gathered from the terms employed, is, that if the libellants shall recover a judgment, or decree in the suit they had instituted against the steamboat Triumph, her tackle, &c., then they would return her, with tackle, &c. to the obligee, or his successors in office, at the port of Gainesville, where she then lay —demand being made by the obligee, or his successor in office, or the deputy of either of them, having an execution in his hands issued upon the judgment or decree. This exposition of the condition, seems to us perfectly clear, without doing the least violence to the language employed. It was not contemplated that a demand should be made at any particular point; and the form of the execution is wholly immaterial. If it was one that warranted the action of the sheriff against the boat, its sufficiency is indisputable; and as there was no stipulation, such as the statute

requires, the most reasonable inference is, that it was process operating *in rem*, and authorizing the sale of the boat.

The office of an *inuendo* in pleading, it is said, is *to explain, not to enlarge*, "and is the same in effect, as *that is to say*." It is used almost exclusively in practice, in actions for defamation, and in such case the plaintiff cannot merely by force of an *inuendo* apply the words to himself. "The *inuendo* means no more than the words aforesaid." The introduction of facts under it will not be deemed a sufficient averment of them; that which comes after it, is not *issuable;* if an *inuendo* is *repugnant*, it may be rejected, or if intended to enlarge it will be treated as *surplusage*. [4 Bac. Ab. 516; Corbet v. Hill, Cro. Eliz. 609; Dane's Ab. ch. 63, Art. 5 and 8, and citations there found.] It is immaterial then, whether the *inuendo* is used for the purpose of enlarging or other unauthorized purpose, it is not *issuable*, and furnishes no warrant for sustaining a demurrer to the declaration.

It is immaterial whether the bond was taken by the sheriff in person; if the boat was bailed by a deputy, the inference would be, that the act was authorized by the principal, or that it was sanctioned and approved by him. In any event, if the obligors had the benefit of their contract, and there was no effort by the sheriff to disannul it, they cannot be heard to set up the want of authority on the part of the deputy.

Let it be conceded that the bond contemplates a demand as necessary to put the obligors at fault, and entitle the obligee to maintain an action against them, and still we think it clear, that it is quite sufficient, if a demand has been made of the defendant alone. The statute of 1818 enacts, that every joint bond shall be deemed and construed to have the same effect in law, as a joint and several bond; and it shall be lawful to sue out process and proceed to judgment against any one or more of the obligors. [Clay's Dig. 323, § 61.] Thus we see that the obligors undertook each for himself and the others, and that the remedy of the obligee is against each, or all, at his election. This being the law, we think it will not admit of serious question, that a demand of the *party sued*, and a failure to comply, entitled the plaintiff to institute his action.

In respect to the interlineations of the bond, it is perhaps enough to say, that there was no issue which imposed upon the plaintiff the *onus* of proving its genuineness as declared on, or

set out on oyer, and we cannot conceive that the plaintiff was bound to account for its interlineations. If it had been offered merely as evidence, without being the basis of an action, then perhaps, if the *erasures* or *interlineations* were such as to warrant the suspicion that they were made after the bond was executed, or without authority, the obligee should account for them.

This view is decisive of the cause as presented, and the consequence is, that the judgment of the County Court is affirmed.

HUGHES, ET AL. v. GARRETT, ET AL.

1. A surety in a claim bond, in which the principal is trustee for a *feme covert*, has no equitable right to prevent the *feme covert* from removing the property, covered by the condition of the bond, out of the State, previous to a forfeiture of the condition.

Appeal from the Court of Chancery for the 39th District.

THE case made by the bill is this:

Certain executions had been levied on slaves as the property of Warner Washington, a citizen of Cherokee county, which were claimed by William Garrett, jr., as trustee for Arianna Washington, the wife of Warner Washington; and this claimant, on the 9th August, 1841, gave the claim bonds required by law, to which he procured Hughes and McCluny, the complainants, to execute as his sureties. The suit growing out of this claim is yet pending.

One of the slaves covered by the condition of the bond, had been removed before the time of filing the bill, and the others were then in the possession of Arianna Washington, the *cestui que trust*, and of her husband, who were about to remove the slaves out of the State, to parts unknown. That Garrett, the claimant is insolvent, and connives at the removal of the slaves, or

at least is unwilling to do any thing to prevent their removal, and is unable to respond to the complainant in damages, if the claim is determined against him. The prayer of the bill is, for an injunction against removing the slaves out of the State, and for their seizure, as in case of attachment, repleviable however if bond shall be given for the delivery of the slaves, to answer the requisitions of the law, when the claim shall be determined.

Garrett, Washington and his wife, the creditor at whose suit the slaves were levied on, and the co-defendants of Washington, in those suits are made parties defendant.

An injunction and attachment were directed by the order of a Circuit Judge, but the Chancellor, on motion of the defendants, dismissed the bill for want of equity. This is assigned as error.

L. E. Parsons, for the appellants, admitted he was unable to cite any case in which a Court of equity had interposed for a surety, before the maturity of the engagement of his principal, but argued, that relief was due in every instance of fraud, and the removal of the slaves under the circumstances set out in the bill is a fraud on the sureties. In Benson v. Campbell, 6 Porter, 457, the Court seemed to consider that a surety was entitled to relief, if the principal is non-resident. If this was a debt, an attachment at the suit of the creditor would lie, and there is no reason why the surety should not have a similar remedy in equity. He also cited Rives v. Wilborne, 6 Ala. Rep. 47; Campbell v. Macomb, 4 John. C. 534.

W. B. Martin, contra.

GOLDTHWAITE, J.—It seems to us impossible to sustain this bill, upon any recognized principle of equity. The case made by the bill is, in effect, nothing more than a statement by the complainants, that the confidence they had in the integrity of the principal in the bond, when it was executed, has ceased to exist, and the only relief prayed, or indeed which can be given, is, that they may be indemnified by some counter security. It is evident if such a course could be sustained, that every dissatisfied surety would go into equity for the indemnity which he might, in the first instance, have stipulated for. There is no analogy between the principle asserted here, and that which governs bills

quia timet. Although these may be brought when the party fears some future probable injury to his rights or interests, [2 Story's Eq. 155,] yet it is believed no case has ever held, that one would lie where the bill of the complainant depends upon a contingency which may never happen. It is said by the text books, though there are few cases in which a man is not entitled to perpetuate the testimony of witnesses, yet, if upon the face of the bill, the plaintiff appears to have no certain right, or interest in the matter, to which he craves leave to examine, in present or in future, a demurrer will hold. [Mitford, 156; Story's Eq. Pl. § 261.]

In the present case, it may be there never will be a necessity to produce the slaves, as it is uncertain how the judgment will be in the claim suit; and until that is determined, the surety seems to be entitled to no indemnity from his principal, in the absence of all stipulations between them. One ground upon which equity will permit a bill by a surety to compel his principal to pay the debt, or perform the duty after the maturity of the obligation is, that then the principal is in default, and the surety is not required to await the action of the creditor, because in the mean time he may suffer irremedial injury. Though relief could doubtless be had upon the more general principle stated in the cases. [Lord Ranelagh v. Haynes, 1 Vern. 180; Lee v. Rank, Mosley, 318.]

The case of Antrobus v. Davis, 3 Merrivale, 569, is very similar to that made by this bill. There the Colonel of a Regiment having taken a bond of indemnity from his agents, with another as surety, in respect to all charges, &c. to which he may become liable by their default; the agents afterwards became bankrupt, and the government having given notice to the representatives of the Colonel, he being dead, of a demand upon his estate, by virtue of an unliquidated account, a bill by his representatives, against the representatives of the surety, to pay the balance due to the government, and also to set aside a sufficient sum out of their testator's estate to answer future contingent demands, was dismissed, although attempted to be supported on the principle *quia timet.* Sir William Grant, Master of the Rolls, significantly asks the question, "Can a surety say to his principal, bring money into Court, by way of deposit, because it may eventually turn out that a debt may be found to be due by the principal,

for which the surety may become answerable?" [See, also, Campbell v. McComb, 4 John. C. 534.] If the answer is, that he cannot, which we do not doubt, it applies equally to the performance of a duty which is contingent only.

We think the bill was properly dismissed, as it contains no equity. Decree affirmed.

GOODEN & McKEE v. MORROW & Co.

1. Where three persons are sued as partners, upon an open account, in assumpsit, one against whom a judgment by default has been taken, is a competent witness to prove that one of the defendants was not a partner, he having pleaded the general issue.
2. Three persons being sued as partners, proof, that after part of the account sued upon was created, and the partnership dissolved, the retiring partner paid the others a sum of money to cover his responsibility, for the firm debts, is irrelevant and inadmissible.

Error to the Circuit Court of Randolph.

Assumpsit by the plaintiffs, against the defendants in error, for money had and received, &c. The declaration contains the common counts.

The defendant, Morrow, pleaded the general issue, and pleas of set off, failure, and want of consideration, and a judgment by default was taken, against Cameron & Likens, the other defendants.

A bill of exceptions taken pending the trial, discloses, that testimony was introduced, that the defendants for four years were partners in the mercantile business, and were also partners in the business of gold mining, during March, April, and a part of May, 1842; and that Cameron was the active partner in making purchases—that Cameron & Likens, purchased goods of the plain-

tiffs to the amount of $200, which Cameron, in February, 1843, in writing, acknowledged to be correct.

The defendant, Morrow, then proposed to prove, by a witness, the clerk of plaintiffs, that during a portion of the time, that the account sued on was being made, the defendants were not co-partners, and that the witness had heard of the dissolution of the partnership. To this testimony, under the pleadings, the plaintiff objected; also, because it was not competent testimony; but the Court permitted it to go to the jury, and the plaintiff excepted.

The defendant, Morrow, also introduced the articles of co-partnership, dated 16th February, 1842, to which one of the plaintiffs was a subscribing witness, between himself, Cameron, Likens and others, the material parts of which are as follows:

First—It is agreed by the parties to this instrument, that John A. Cameron, be considered, and constituted, secretary and treasurer of the company, whose duty it is to contract for such materials as are necessary to the erection of the necessary machines, that may be agreed on by the company. He is at any time necessity may require, to draw on each one of the company for a proportionate amount of money to appropriate to the use, and benefit of the company, either for the erection of machinery, digging out the rock, or otherwise. And it is agreed, that each or any member of the company, who shall fail at any, or all times, to pay over to the secretary and treasurer, his proportionate amount of money, shall forfeit his interest in the company to the remaining members; provided always, that the secretary shall give the delinquent a written notice of his default, and if he fails to pay over the sum required, his entire interest is forfeited to the remaining members of the company.

The second article provides the means, labor, &c. to be furnished by each of the partners.

The third declares, that if either of the parties wish to sell out his interest, he shall give the preference to the remaining partners.

Signed and sealed.

ROBERT MORROW,
JOHN A. CAMERON,
J. L. BENNETT,
CONRAD HARTWELL,
THOS. M. LIKENS.

The defendant, Morrow, then offered as a witness, the defendant Likens, against whom a writ of inquiry of damages was then

pending, and who, against the objection of the plaintiff, was permitted to testify, that in May, 1842, Morrow sold out his interest in the concern to him, for $200, and that on the 18th June, 1842, Morrow paid to witness and Cameron $225, to cover his proportionate part of the liabilities of the concern, and that they executed to him a receipt therefor, to which there was a subscribing witness. The receipt was produced, but the subscribing witness to it not being present, the plaintiff objected to proof of its contents, or of the payment of the money by parol; which objection the Court overruled and the plaintiffs excepted. The witness also stated, that he informed the plaintiffs of his intention to purchase the interest of Morrow, and a few days after making it, informed them of it; to which the plaintiff also excepted.

The jury found the issue in favor of Morrow, and damages against Likens and Cameron. The plaintiffs now assign for error the several matters embraced in the bill of exceptions.

Bowdon, for the plaintiffs in error.

The rumor of the dissolution of the partnership, was not sufficient to charge the plaintiffs; actual notice should have been brought home to them. [Story on Part. 251; 2 Stew. 280.]

The articles of co-partnership were not evidence against the plaintiffs.

Likens was an incompetent witness, being liable to Morrow for the application of the money placed in his hands, to discharge the liabilities of the firm; his interest therefore was not equal. See 1 Wend. 123; 4 Id 457; 4 Hill N. Y. 549; 18 Pick. 29; 3 Hill, 106; 2 Ala. Rep. 100; 12 Peters, 145; 13 Id. 219.

The receipt was higher evidence than the parol testimony of its contents.

S. F. Rice, contra. When this case was previously here, the Court held Likens to be a competent witness, which is the law of this case. Besides the objection was to the competency of Likens to testify, and not to his evidence when given in.

As the jury have not found that Morrow is not a partner, but merely that he is not liable, this defeats the entire action; as he must recover against all, unless he brings himself within the statute.

ORMOND, J.—The case of Scott v. Jones, 5 Ala. Rep. 694, is an authority in point, that the defendant Likens was a competent witness. In that case, as in this, the witness was a party upon the record—there, as here, a judgment by default had been taken against him, and there as in this case, he was considered competent to prove that his co-defendant was not a partner, because, in establishing that fact, he was fixing a liability entirely upon himself, which otherwise he would have divided with another. The case cited also shows, that in such an action as this, the evidence was admissible under the plea of *non assumpsit.*

It is also urged that Likens was an incompetent witness, because he had received from Morrow a sum of money to extinguish the liabilities of the latter for the firm debts, at the time of the dissolution, and that the testimony itself was incompetent evidence to go to the jury.

It is certainly incontrovertible, that one partner cannot, by any arrangement with his co-partners, shield himself from a liability to a creditor, created whilst he was a member of the firm. It is distinctly stated in the bill of exceptions, that a portion of the account was created whilst Morrow was a member of the firm, and for this amount he was certainly liable to the plaintiffs. The proof that upon the dissolution, Morrow paid to the continuing partners $225 to cover his proportion of the liabilities of the firm, was wholly irrelevant, as he could not by such an act, prevent the creditors of the firm from holding on to his responsibility. Being irrelevant, it should have been excluded, as its tendency was to mislead the jury, and probably did mislead them, as we find they discharged him from all liability, though a part of the account was created before this arrangement was made. For the portion of the account created previous to the dissolution, the plaintiffs were clearly entitled to a verdict.

We can perceive no objection to the introduction of the articles of co-partnership. They provided among other things, for the mode of dissolving the partnership, and of these articles, as well as the fact of the dissolution, it appears from the testimony, the plaintiffs had notice.

These views being decisive of the case, it is unnecessary to consider the other questions argued at the bar. Let the judgment be reversed and the cause remanded.

RENFRO, BY HER NEXT FRIEND, EX PARTE.

1. A cause is not before the Supreme Court, so as to authorize that Court to make an order in respect to it, until the term when the writ of error is returnable.
2. The Supreme Court cannot set aside a *supersedeas* which has been issued upon the suing out a writ of error and executing a bond, on the ground of defects in the bond; in such case the approprite remedy should be sought in the primary Court.

In this case the transcript of a record of the Circuit Court of Macon has been presented, showing that since the commencement of the present term, a writ of error was sued out by Reuben Kelly, to revise a judgment recovered at the term of that Court holden in the spring of this year, by Isabella Renfro, by her next friend, &c. It appears that the writ is returnable to January, 1846, that bond with surety has been executed for the successful prosecution of the same, and that the proceedings on the judgment have been stayed in the meantime.

The plaintiff in the judgment, by her next friend, now moves to set aside the *supersedeas*, and for an order directing the clerk of the Circuit Court to issue an execution forthwith, upon alledged defects in the writ of error bond, which it is insisted make it insufficient and void.

P. Martin, for the motion.

COLLIER, C. J.—The writ of error being returnabte to the next term, the cause is not now before us; and if it was, as the bond by which execution is superseded is consequential to the writ of error, and not at all essential to the jurisdiction of this Court, it is the appropriate duty of the primary Court to determine whether it is a sufficient warrant for a *supersedeas*, and to order an execution to issue, if it shall be adjudged insufficient.

In Mansony ex parte, 1 Ala. Rep. 98, we held that the jurisdiction conferred upon the Supreme Court to issue writs of "injunction, mandamus, &c." is *revisory*, and can only be exercised where justice requires it, in order to control an inferior jurisdic-

tion." And without undertaking to consider whether it was allowable for us to award a *mandamus* to the ministerial officer of another Court, we determined that we could not award it, for the purpose of coercing the clerk of an inferior Court to issue an execution on a judgment of that Court. *Further*, that the proper remedy in such case, is a motion to the Court below, for a mandatory order to the clerk. This case is a conclusive authority against the motion, and it is consequently denied.

TAYLOR v. ACRE.

1. When a suit by attachment is improperly commenced in the name of the party to whom a note not negotiable is transferred without indorsement, instead of using the name of the person having the legal interest, and the cause is afterwards appealed to the Circuit Court, the defect cannot then be cured by substituting the name of the proper party in the declaration: Nor can the note be allowed to go to the jury as evidence under the money counts in a declaration in the name of the holder, without proof of a promise to pay him the note.

Writ of error to the Circuit Court of Lowndes.

This suit was commenced by Taylor, against Acre, and the process is an attachment, returnable before a justice of the peace. Taylor had judgment, and Acre appealed to the Circuit Court, where he filed a statement in the name of S. A. McMeans, for his use, declaring on a promissory note for $25, dated 8th January, 1838, payable to S. A. McMeans or bearer. This statement was stricken from the file on motion of the defendant, on the ground that it made a change of parties. The plaintiff then filed a statement containing the common counts, and under this offered in evidence the same promissory note which is described in the statement stricken out. This was excluded by the Court, the plaintiff not proposing to offer any evidence of the defendant having promised to pay the same.

The plaintiff excepted to these several rulings, and they are now assigned as error.

Boling, for the plaintiff in error, argued, that the course pursued was the only one open to the plaintiff. He could not properly swear the defendant was indebted to McMeans, when he himself held the evidence that the debt was transferred. Being entitled to commence his suit by attachment, some means must be provided to declare in such a suit, and here the only two proper have been pursued. The introduction of McMeans as a party was a formal matter which the Court should have allowed; or if this cannot be allowed, then the evidence of the note should have been let in under the common counts. [Gillespie v. Wesson, 7 Porter, 459.]

No counsel appeared for the defendant.

GOLDTHWAITE, J.—This case is the same as that of Moffat v. Wooldridge, 3 Stewart, 322, and must be governed by that decision, unless the circumstance, that the leading process being attachment, creates a substantial difference. It is supposed the party holding the beneficial interest in a note, without the legal title, must sue in his own name, as he is unable to swear the defendant is indebted to the nominal plaintiff. We can perceive no difficulty in instituting a suit by attachment, which will not obtain to the same extent, in bailable process; but in either case the affidavit would properly be, that the defendant was indebted to the *nominal* for the benefit of the *real* party, and the bond would conform in its recitals to the facts of the cause.

The attempt to introduce the note, under the statement filed subsequently, was properly repelled by the Court, under the circumstances, for the plaintiff could not be permitted to succeed, without showing himself invested with a legal right of action; and to make this out, a promise to pay the note to the party having the beneficial interest was essential, in the absence of an indorsement.

There seems to be no error in the record. Judgment affirmed.

WALKER v. WATROUS.

1. A partition fence, between adjoining proprietors, is, under the statute, the joint property of both, and each is bound to keep the entire fence in good repair. One cannot therefore maintain an action of trespass against the other, for an injury consequent upon an insufficient fence.
2. If a partition fence is out of repair, and one of the proprietors will not aid in repairing it, the other may cause it to be done, and recover the value before the appropriate tribunal, although viewers have not been appointed by the County Court.
3. If adjoining proprietors enter into an agreement, one to keep up one-half the fence, and the other the other half, an action of trespass cannot be maintained by one, against the other, for an injury caused by an insufficient fence, but the remedy is for a breach of the contract.

Error to the Circuit Court of Shelby.

TRESPASS *vi et armis*, by the defendant against the plaintiff in error, for injury done to the crop of plaintiff, by the cattle of the defendant.

The parties went to trial before the jury, upon the plea of not guilty. From a bill of exceptions found in the record, it appears, that the plantations of the plaintiff and defendant, were separated by a partition fence; that one-half of this fence belonged to each, and that the defendant's part was low, dilapidated, and out of repair. It was also proved that the cattle of the defendant jumped into the cotton field of the plaintiff, and committed the injury for which damages were sought in this action.

Whereupon the counsel of defendant, asked the Court to charge, that before the plaintiff was entitled to recover, he must prove that the entire partition fence was five feet high, well staked and ridered, or sufficiently locked, and so close, that the cattle in question could not creep through.

That three householders, upon complaint being made by plaintiff to a justice, should have been appointed by the justice to view the fence, and that their testimony was necessary to determine whether the fence was lawful or not.

That reviewers acting under the authority of the County Court should have found the fence insufficient, and that notice thereof has been given to defendant.

All of which charges were refused, and the defendant excepted. This is now assigned as error.

T. A. Walker, for plaintiff in error.

ORMOND, J.—The decision of this case, must depend upon the proper construction of the act of 1807, in regard to "fences and enclosures." [Clay's Dig. 241.] The 4th section, which is to regulate this enquiry, provides, that "For the better ascertaining, and regulating partition fences, it is hereby directed, that where any neighbors shall improve lands adjacent to each other, or where any person shall enclose any land adjoining to another's land already fenced in, so that any part of the first person's fence becomes the partition fence between them, in both these cases, the charge of such division fence, so far as enclosed on both sides, shall be equally borne and maintained by both parties. To which, and other ends in this law mentioned, each County Court shall nominate, and appoint, so many honest and able men, as they shall think fit, for each county respectively, to view all such fences about which any difference may happen, or arise, and the aforesaid persons in each county respectively, shall be the sole judges of the charge to be borne by the delinquent, or by both, or by either party; and of the sufficiency of all fences, whether partition fences or others. And where they judge any fence to be insufficient, they shall give notice thereof to the owners or possessors; and if any one of the said owners or possessors, refuse the request of the other, and due notice given by the said reviewers, shall refuse to make or repair the said fence or fences, or to pay the moiety of the charge before made, being a division fence, within ten days after notice given, then, upon proof thereof, before two justices of the peace, of the respective counties, it shall be lawful for the said justices, to order the person aggrieved and suffering thereby, to repair the said fence or fences, who shall be reimbursed his costs and charges, from the person so refusing to make good the said partition fence, or fences; and the said costs and charges shall be levied upon the offenders goods

and chattels, under warrant from the said justice, by distress and sale thereof."

This act was a most laudable and praiseworthy effort on the part of the Legislature, to dry up the fertile sources of litigation, and controversy, between neighbors, arising from partition fences. To accomplish this object, the act makes partition fences joint property, equally belonging to the adjoining proprietors, and upon each, and both, the duty is devolved of keeping them in good repair. If one of the parties refuses to perform his portion of the labor in keeping up the fence, and the fence is ascertained to be out of repair, the other has the right to perform the labor himself, for which the statute affords him a prompt and adequate remedy.

It may be, that the County Court has omitted to perform its duty by appointing the "honest and able men," who are to view the fence and "be the sole judges of the charges to be borne by the delinquent:" but this omission of the County Court, to perform this important duty, does not repeal the law. Whether they are appointed or not, a partition fence, whether it was originally erected by one, or is the joint product of both the proprietors of the adjoining lands, remains the joint property of both, and upon each, and upon both, is devolved the duty of keeping every portion of it in good repair. It results necessarily, that neither, can maintain an action against the other, for an injury caused by an insufficient fence, because it is his own fence, which it is his duty to keep in repair, and which, if either will not aid in keeping up, the other may repair at his expense. . . .

If the viewers have not been appointed by the County Court, the insufficiency of the fence could be established by the proof of witnesses; and if upon application by one adjoining proprietor to another, he will not aid in repairing the fence, he may perform the labor himself, and recover the value, either before a justice of the peace, or in the Courts of record, as the case may require.

The bill of exceptions states, that one half of the partition fence belonged to each of the adjoining proprietors; that the defendants part was low and dilapidated, and out of repair, over which the cattle of the latter jumped into the cotton field of the plaintiff, and committed the injury complained of. If by this we are to understand, that there was a special contract between these parties, that one should keep up one half the fence, and the other the re-

maining half, it will not, in our opinion, vary the result, because if that be the predicament of the case, the action should have been for a breach of this contract. The precise object of the statute was to prevent these vexatious suits, which are so productive of bad feeling among neighbors, and to provide a domestic tribunal, which at little, if any expense, would settle these controversies much better than they can ever be settled in Courts of Justice. An appeal to the Courts is effectually prevented by making a partition fence joint property, as already explained, and if this law has been varied by a contract between these parties, a suit should have been brought for its violation, and not an action of trespass, which, under the provisions of the statute cannot be maintained.

It results from these considerations, that the Court erred in its refusal to charge as asked for by the defendant, and its judgment is therefore reversed and the cause remanded.

COLLIER, C. J.—The act cited in the opinion of the Court, provides, that partition fences made under certain circumstances shall be kept up at the mutual expense of the persons whose inclosures are thus separated; but it neither expressly, or by construction takes from one of the parties whose grounds have been trespassed upon, by the cattle of the other, in consequence of the part of the fence which the latter should have repaired, being dilapidated, the right to maintain the action of trespass to recover damages. The remedy which the statute affords would not, nor could have been intended to repair such an injury.

Even if, as supposed by my brethren, there was a contract between the plaintiff and defendant, that the partition fence across which the cattle passed, should be repaired by the defendant, that furnishes no defence to the action in the present case. In a suit upon the contract, could damages be given for the trespass, or would they be limited by the cost of repairing? Be this as it may, I am satisfied that if the action of trespass is not the only, it is maintainable as a cumulative remedy. These views lead me to dissent from the opinion just pronounced.

BROADNAX v. SIMS' EX'R.

1. The testator bequeathed by his will to his children who were married, or had attained their majority, property estimated at $1,190; the same amount to his younger children "in negro property," when they became of age; and to his younger daughters the same amount, in the same description of property, when they became eighteen years of age, or married. After which the following clause was added: "It is my will, that all the property that is not willed to my children, viz: negroes, lands, stock of all kinds, farming utensils, household and kitchen furniture, or all of my remaining effects that is now in my possession, I give unto my wife, E. S. during her natural life, or widowhood, and at her death or intermarriage, then all the property willed to her, to be sold, and equally divided amongst my above named children. E. S. intermarried with T. G., and eighteen months from the grant of letters testamentary having expired, the husband of one the testator's daughters, presented his petition to the Orphans' Court, praying that a rule be made upon the executor, requiring him to sell and distribute that portion of the testator's estate, which was bequeathed to E. S. during her life or widowhood: *Held*, that the estate in the hands of the executor above what was necessary to provide for the legacies was subject to distribution, if the demands of the creditors have been satisfied, or after retaining enough for the payment of debts; the terms of the decree should be such as will most certainly effectuate the intentions of the testator, and give to the children equal portions.

Writ of Error to the Orphans' Court of Autauga.

THE plaintiff in error presented his petition to the Orphans' Court, setting forth that he was the husband of Sarah, one of the daughters of the defendant's testator, and was entitled, in right of his wife, to an undistributed share of the decedent's estate. In the petition, the will is set out *in extenso*, from which it appears that the testator bequeathed to his children who were married, or had attained their majority, property estimated at eleven hundred and ninety dollars. He also gave to his younger sons, when they became of age, "eleven hundred and ninety dollars in negro property;" and to his daughters who were still in their minority, when they became eighteen years of age, or married, property of the same description, and of the same value. The thirteenth clause is as follows: "It is my will that all the property that is

not willed to my children, viz: negroes, lands, stock of all kinds, farming utensils, household and kitchen furniture, or all of my remaining effects that is now in my possession, I give unto my wife Elizabeth Sims during her natural life, or widowhood, and at her death or intermarriage, then all the property willed to her, to be sold, and equally divided amongst my above named children."

It was shown that Mrs. Sims had intermarried with Theophilus Goodwin, that eighteen months from the grant of letters tesmentary had expired previous to the exhibition of the plaintiff's petition, and that the will had been duly proved, &c. in the Orphans' Court of Autauga. The prayer of the petition is, that a rule be made upon the executor, requiring him to sell and distribute that portion of the testator's estate, which was bequeathed to Mrs. Sims, during her life, or widowhood.

The executor admits the facts set out in the petition, affirms that some of the sons of the testator provided for by the will are under twenty-one years of age, and some of the daughters are under eighteen and unmarried. It is therefore insisted that neither the petitioner in right of his wife, or other heirs or distributees, have a right to demand the sale and distribution of the property, which their mother received under the will, until the younger sons and daughters attain the ages when they respectively become entitled to their legacies. That the petitioner has received the legacy given to his wife *eo nomine*, estimated at eleven hundred and ninety dollars, and cannot at this time claim more.

The petitioner demurred to the answer of the executor; his demurrer was overruled, and judgment rendered against the application for a sale and distribution, and that the petitioner pay costs.

J. W. Pryor, for the plaintiff in error, cited Clay's Digest, 196, § 23.

I. E. Hayne, for the defendant, insisted that the legacies did not vest in the infant legatees in the will, until the times appointed for their payment respectively. The portion of the estate then, which vested in the widow, and to which, upon her death or marriage, her children became entitled, cannot be ascertained before these events have transpired; and consequently it cannot be

known sooner what has vested in the executor by Mrs. Sims' marriage, which may be distributed *generally*.

COLLIER, C. J.—The executor does not place his objection to the distribution of the property in respect to which the action of the Orphans' Court is asked, upon the ground that it is not in his possession, or that Mrs. Sims sets up an adverse claim. We then infer that Mrs. Sims has married, and that the contingency has occurred, which is provided for by the thirteenth clause of the will.

In Marr's Exr'x v. McCullough, 6 Porter's Rep. 507, it is stated as a general rule, that a legacy will be vested, if the testator annexed *time* to the *payment only;* but if to the gift, then it will be contingent. But it cannot be inferred merely from the use of a particular word, what the testator's meaning was, if from other parts of the will, or the entire instrument, it appears that such a construction would do violence to his intentions.

The testator, it will be observed, made no provision for the maintenance of his younger children, and must doubtless have intended that they should have been supported by the proceeds of some portion of his estate. It might be supposed if their legacies did not vest until the periods prescribed for their payment, that the estate, real and personal, devised and bequeathed to their mother, should be charged with that burden, and that in the mean time she should retain what was intended to make good their legacies. But there is no necessity for resorting to such far-fetched conjectures upon this point; for the thirteenth clause itself would seem to indicate that it was not intended that the portions of the younger children should vest in their mother. All the legacies specifically bequeathed are expressly excepted from such a destination. It cannot be inferred that they were to remain with the executor for a period longer than the law had appointed, or was necessary to enable him to execute the provisions of the will, so far as they devolved on him. Under all these circumstances, we are strongly inclined to think the legacies to the minor children of the testator vested before they are payable. But if the law were otherwise, the estate in the executor's hands above what was necessary to provide for these legacies, is subject to distribution, if the demands of creditors have been satisfied, or after retaining enough for the payment of debts.

We need not point out what should be the form of the decree to be rendered in the present case. This must depend upon the terms of the will. But we may remark, that eleven hundred and ninety dollars should, beyond all contingency, be so secured, that the sum may be invested for each of the younger children, when they become entitled to the possession of it. In addition to that, *each of the children designated in the will*, are entitled to take share and place alike of the property which may revert to the estate by their mother's marriage.

The decree of the Orphans' Court is reversed, and the cause remanded.

SECOR & BROOKS, ET AL. v. WOODWARD.

1. A Court of Equity has no jurisdiction to injoin a judgment at law, merely because the process from that Court has not been served on the defendant. It is necessary further to show, that the party, by the irregularity, has been precluded from urging a valid defence.

Writ of Error to the Court of Chancery for the 1st District.

The case made by this bill is as follows:

Woodward, the complainant, asserts that Secor & Brooks, for the use of Huntington and Lyon, had recovered a judgment against him in the Circuit Court of Mobile county. That the writ in that suit was sued out against him and one Taylor, as partners, and the cause of action is stated thereon as an open account. The writ, as to the complainant, was returned, not found, but was not executed upon Taylor. At the time of suing out this writ, no copartnership existed between Woodward and Taylor, and one which had previously existed, had been dissolved, and notice of the dissolution published, which was known to the

defendants, or some one of them. The first notice which the complainant had of the judgment, was a demand by the sheriff, upon an execution issued on it.

The bill prays an injunction, and makes the parties previously named, defendants; as also, Harris, the assignee in bankruptcy of Secor & Brooks.

No answer was put in by any of the defendants, but they appeared by counsel, and moved to dismiss the bill for want of equity. After a *pro confesso* decree, they again, at the hearing, urged the same matter, but a decree was rendered perpetually injoining the plaintiffs at law from proceeding on their judgment.

This is assigned as error.

STEWART, for the plaintiffs in error.

CAMPBELL, for the defendant.

GOLDTHWAITE, J.—There is no allegation of any equity in this bill which will authorise a Court to sustain it. There is no pretence that the judgment is unjust, or that a defence could have been made, or that one ever existed at law.

It is in effect, an attempt to question the correctness of the proceedings in the Court of law, for the reason, that the process in that Court was not served on the complainant. Now, we apprehend that all Courts are capable of protecting their own suitors against the consequences of irregularities committed either by their own officers or by the adverse party. And matters of this nature furnish no ground of equitable interposition, unless it can also be shown that the party has a just defence to the action, which he has been precluded from urging in the Court of law, in consequence of the supposed irregularity. [Bateman v. Willoe, 1 Sch. & L. 205.]

The decree must be reversed, and the bill dismissed.

LOCKHARD v. AVERY & SPEED, USE, &c.

1. A note was executed on the 1st April, 1841, for the payment of $140, on 1st January after, with a memorandum underwritten "to be paid for when started;" held, that this was such an ambiguity as might be explained by extrinsic proof.
2. It being proved that the note was given for a cotton gin, which the defendant had the privilege of trying and returning if it was not good—held, that this was a condition for the benefit of the defendant, which he must take advantage of by plea, and that the note might be declared on, as an absolute promise to pay on the 1st January, 1842, without noticing the condition.

Writ of Error to the County Court of Sumter.

Assumpsit by the defendant in error against the plaintiff, on a promissory note of the following tenor;

$140. On the first day of January next, I promise to pay Avery & Speed, one hundred and forty dollars, for value rec'd. 1 April, 1841. To be paid for when started.

Geo. Lockhard.

The declaration is in the usual form upon the note, as a debt due the 1st January, 1842. Pleas, general issue, and failure of consideration.

By a bill of exceptions, it appears, that testimony was introduced tending to prove, that the note sued upon was given for a cotton gin, of Avery & Speed's manufacture, and that the note was given upon the condition, to be paid for when the gin was started, or set at work, and that if it did not perform well, a good gin was to be put in its place, and that this was the purpose for which the memorandum was placed upon the note. It was also proved by a witness, that his farm joined that of the defendant, that he did not know, or believe, that defendant had any gin running upon his plantation up to the time this suit was brought.

Upon this testimony, the defendant moved the Court to charge, that if the testimony was believed by them, the note was variant from that described in the declaration, and the plaintiff could not

recover in this action, which motion the Court refused, and the defendant excepted—which is the matter now assigned as error.

SMITH, for plaintiff in error, submitted the cause.

ORMOND, J.—The question presented upon the record, by the motion to exclude the note from the jury for a variance, is, whether the note is described in the declaration according to its legal effect. It is described as a note falling due on the 1st January, 1842, disregarding the memorandum attached to it, "to be paid for when started." This memorandum, without the aid of extrinsic proof, is without meaning, and neither anticipates or postpones the time of payment agreed upon in the body of the note. It appears therefore to belong to the class of *latent* ambiguities, and open to explanation.

By reference to the proof, it appears that the note was given for a cotton gin, and that by the agreement of the parties, the note was to be paid when the gin was "started," or in other words, when the gin was set at work, and *that if it did not perform well another was to be substituted in its place.*

The intention of the parties doubtless was, that the defendant should have an opportunity of trying the gin, and ascertaining its qualities, before he could be called on for payment. This was clearly a condition inserted in the contract, for the benefit of the defendant, and if the contingency had happened contemplated in the condition, that the gin upon trial did not answer the purpose, he should have pleaded it in abatement, or bar, as the case might have required. The plaintiff was not bound to notice the condition, but might declare upon the positive undertaking of the defendant, to pay by the 1st January, 1842. In the case of a penal bond with condition, the plaintiff may declare on the penalty without noticing the condition, and between that, and the present case, the analogy seems complete. We think therefore the Court did not err in refusing to exclude the note from the jury for a variance, and its judgment is affirmed.

ANDERSON v. SNOW & Co., ET AL.

1. The contents of articles of partnership cannot be proved by the testimony of a witness who states that he saw such a paper subscribed with the defendants' names, and apparently attested by two other persons as subscribing witnesses, but with the hand-writing of all whom he was unacquainted.
2. A partner, or joint promisor, who is not sued, is a competent witness for his co-partner, or co-promisor, where he is required to testify against his interest; and where such evidence is within the scope of the issue, the Court should not assume his incompetency, and reject him *in limine*.
3. Where the bill of exceptions merely states that the defendant offered to show the contents of articles of copartnership by a witness, and that the plaintiff's objection to the evidence was overruled, the fair inference is, that the objection was made because it was not shown that the articles could not be adduced; consequently the evidence was improperly admitted.
4. Evidence was adduced to show that a private stage line had been stopped by the attachment of its "stock," at the suit of one of the defendants. Whereupon that defendant was permitted, upon proof of the loss of the original, to give in evidence "the record of a mortgage," executed to him by one of the alledged proprietors of the line: *Held*, that it can't be presumed that the mortgage was inadmissible; and the registry in the office of the clerk of the County Court was admissible as a copy.

Writ of Error to the Circuit Court of Chambers.

This was an action of assumpsit, at the suit of the plaintiff in error, against the defendants, who are charged as partners in running the Defiance line of stages, under the name and style of W. W. Snow & Co. The declaration alledges that the defendants are indebted to the plaintiff in the sum of one hundred and thirty-three dollars and twenty-eight cents for keeping and feeding stage horses belonging to the defendants, and also for so much money paid, laid out and expended, at their special instance and request. The writ was executed on Snow, Aikin and Havis, and returned *not found* as to Robinson and Thompson, the two other defendants against whom it was sued out.

Aikin appeared and pleaded—1. Non assumpsit. 2. That he was not a partner with the other defendants who were sued

with him. A judgment by default was rendered against Snow and Havis; issues were joined on Aikin's pleas, and the cause thereupon submitted to a jury, who returned a verdict for the defendant, and judgment was rendered accordingly.

A bill of exceptions was sealed at the instance of the plaintiff, which presents the following points: 1. A subscribing witness testified that he was present when the several defendants entered into articles of co-partnership, for the purpose of running the Defiance line of stages; shortly after the articles were signed, the defendant, Snow, who was appointed the general agent of the company, purchased stock. That the line soon after, viz: in 1842, went into operation, and continued until the summer of 1843. Evidence was adduced tending to show, that subsequent to the execution of the articles of partnership, the defendant, Aikin, had them in his possession. Notice was given "to two of the defendants to produce the articles of co-partnership, and thereupon secondary evidence was offered as to their contents. To prove which, a witness testified that he aided Snow in making purchases for the benefit of the stage line; that he saw articles of co-partnership signed with the defendants' names, and attested by two witnesses, but he stated that he was not acquainted with the hand-writing of the parties." To the testimony of this witness, the defendant objected; his objection was sustained, and the plaintiff excepted.

2. The defendant then offered one Lovelace as a witness, whom it was shown was one of the firm of W. W. Snow & Co., though he was not sued in this action. To this witness the plaintiff objected, because he was interested; thereupon the defendant, Aikin, deposited in the clerk's office a sum of money sufficiently large to cover the amount of the judgment that might be recovered, and also released the witness. The plaintiff still objected to the competency of the witness, but his objection was overruled, and the examination proceeded; whereupon the plaintiff excepted.

3. The defendant offered to show the contents of the articles of co-partnership, and was permitted to do so, in despite of an objection by the plaintiff, who thereupon excepted.

4. Evidence was offered by the plaintiff, to show that the stage line was stopped by an attachment of the stock of the company at the suit of the defendant, Aikin. In reply to which Aikin was permitted to give in evidence "the record of a mortgage," execu-

ted to him by Snow—the loss of the original being established. This evidence was objected to by the plaintiff, but his objection was overruled, and thereupon he excepted.

E. W. Peck and L. Clark, for the plaintiff in error, insisted that Lovelace should not have been permitted to give evidence for the defendant; that he was, as a partner, liable to contribution, and the deposit of money could not make him competent. [See Ball v. The State Bank, at this term.] The release was ineffectual for the purpose intended. Aikin could not remove the objection to the witness; if it could have been done, all the partners should have joined in signing and sealing the release.

J. E. Belser, for the defendant, contended that Lovelace was a competent witness for the defendant, even without a release, or the deposit of money. [5 Ala. Rep. 383; Id. 694; 6 Id. 715; 1 Id. 65.] But if he was incompetent, the deposit of the money, and the release, without objection by him, removed all objection to him. [5 Ala. Rep. 508; Ball v. The State Bank, at this term.] The copy of the mortgage from the record was admissible as secondary evidence, the loss of the original being shown.

COLLIER, C. J.—1. The testimony of the witness who was offered to prove the contents of the articles of partnership was properly excluded. True, he saw such a paper in the hands of one of the parties sued in this action, but he could not say that it was signed by them, or by their authority, as he was unacquainted with their hand-writing. It was necessary to establish its genuineness—this fact could not be assumed, in the absence of all proof to the point.

2. It does not appear what facts the defendant proposed to prove by Lovelace, but he was rejected by the Court *in limine*, thus declaring his incompetency to give evidence to any matter within the issue. The cases cited by the defendant's counsel from the first and fifth Alabama Reports, we think, very satisfactorily show, that a partner, or joint promisor, who is not a party, is a competent witness for his partner, &c. where he is called to testify against his interest. However extensive may have been the inquiry tolerated by the pleadings, the *fact* of the defendant being a partner, and his consequent liability, were ex-

plicitly put in issue. To prove this fact, Lovelace was certainly competent. He was not joined as a defendant to the action, and if he was a partner, he was interested in the plaintiff's recovery; for whether the plaintiff was successful or not, he might be called on to contribute to the satisfaction of the judgment, yet his contribution would necessarily be larger if it should be determined that the defendant was not also liable. This conclusion is so fully supported by the cases referred to, that to attempt to reason further upon the point, would be the mere reiteration of what is there said. In this view of the question, it is unnecessary to consider, whether the release or deposit of money by the defendant, could, if the witness were interested, make him competent.

3. The bill of exceptions merely states that the defendant offered to show the contents of the articles of co-partnership, by the witness, Lovelace, and the plaintiff's objection to the evidence was overruled. Now this may, or may not, have been admissible, according to the circumstances, and as the record is entirely silent upon the point, we cannot know whether any foundation was laid for the introduction of secondary proof; but after making every presumption which can reasonably be indulged against the party excepting, we think it would be too much to intend that the proof of the loss was shown. The most natural inference is, that the objection was made because it did not appear that the articles of partnership could not be adduced. The proof offered by the plaintiff to let in secondary evidence upon this point could not avail the defendant anything; for it was insufficient to prove a loss, but was entirely consistent with his possession of the writing.

4. It may be assumed that the mortgage was admissible, as there is nothing to show the contrary, and the Court so ruled. This being the case, and the loss of the original being established, the copy transcribed upon the records of the County Court was competent, because it was as good as any secondary proof that could be adduced, and is made evidence by statute. [Clay's Dig. 155, § 25.]

It follows from what has been said, that the judgment of the Circuit Court must be reversed, and the cause remanded.

ELLIOTT v. HALL.

1. The County Court has no jurisdiction of an action of trespass *quare clausum fregit.*

Writ of Error to the County Court of Mobile.

The writ is at the suit of Hall against Elliott, and requires the latter to appear and answer to the plaintiff in a plea of trespass. The endorsement upon the writ is, that the action is brought to recover damages done by the defendant to the plaintiff by removing locks and portions of locks from the doors, and otherwise injuring the plaintiff's house.

The declaration is in trespass, for breaking and entering into a dwelling-house of the plaintiff in the city of Mobile, and avers that the defendant took and held possession of the house for a long space of time, and that he then and there broke open divers doors and windows belonging to the said dwelling house, and removed, damaged, broke to pieces, and spoiled divers locks belonging to said doors, and wherewith the same were fastened, and other wrongs, &c.

The defendant came in proper person, and pleaded that the County Court had no jurisdiction of a plea of trespass *quare clausum fregit*, and thus, &c. Wherefore he prayed judgment if the said Court ought or would take further cognizance of the cause.

The Court overruled this plea, and thereupon the plaintiff's damages were assessed by a jury, and a judgment rendered for the amount as assessed.

The defendant assigns here as error,

1. The overruling of the plea to the jurisdiction.

2. In ascertaining the damages without first finding the defendant guilty of the trespass.

3. That the verdict and judgment do not conform to the action.

K. B. Seawell, for the plaintiff in error, argued, that the act

of 1807, [Dig. 297, § 5.] expressly excludes jurisdiction in actions of trespass, *quare clausum fregit;* and though afterwards, by the act of 1819, the County Court is invested with concurrent jurisdiction with the Circuit Court, of actions of trespass, this must be understood of the action of trespass, in relation to injuries to personal property. Several statutes indicate that the Legislature generally uses the terms trespass, and trespass *quare clausum fregit*, as entirely distinct. [Digest, 320, § 43; Id. 297.]

The act of 1819 does not repeal that of 1807. [Dwarres on Statutes, 574, 699, 700, 701; Dose v. Grey, 2 Term, 365; 11 East, 377; Foster's case, 11 Rep. 63.]

The verdict and judgment do not respond to the action. [Moody v. Keener, 7 Porter, 218.]

CAMPBELL, contra, insisted that the act of 1819 confers a general jurisdiction over all actions of trespass. There is no reason why the County Court should not have this jurisdiction, as the title rarely comes in question in this form of action. But the action here is not confined to the breaking and entry of the house, but is also to recover for the injury done to the goods and chattles.

The plea is bad, because it assumes to answer the entire action, but in truth, only answers a part. [1 Chitty's Pleading, 163, 523.]

GOLDTHWAITE, J.—When the County Court was established in 1807, it was excluded from all jurisdiction over real actions, actions of ejectment, and of trespass *quare clausum fregit.* [Dig. 207, § 5.] When this Court was reconstituted in 1819, it was invested with concurrent jurisdiction with the Circuit Court, of all actions of debt, assumpsit, case, covenant, trespass, and assault and battery. [Ib. § 7.] We think the evident intention of the Legislature, by the use of the term trespass in this connexion, was, to invest the Court with jurisdiction of the action of trespass, as a remedy for injuries to personal property, and that the exclusion prescribed by the act of 1807, yet continues. In many of the States, trespass *quare clausum fregit* is the common action in which the title to real estate is determined; and even with us is permitted for that purpose. Whatever reason may have induced this exclusion in the first instance, it seems clear that no attempt

has ever been made to authorise that Court to take cognizance of suits involving an enquiry into the title of land. In the form of action here presented, this might form the prominent subject for investigation, as the defendant, under the general issue, would be permitted to show title in himself; and by a plea of *liberum tenementum*, could compel the plaintiff to new assign, and select the specific boundaries of that alledged to be trespassed upon. [1 Chitty, 496.]

As the Court had no jurisdiction of so much of the action as is for breaking the close, it is unnecesary to consider whether the plea answers that part of the count which asserts the breaking and destroying of the personal chattels, as there is but one count, and that for a matter without the jurisdiction.

The judgment must be reversed and remanded, as it is possible from the form of the writ, that a proper count in trespass may be framed on it.

Reversed and remanded.

HALL v. MONTGOMERY.

1. The Registers and Receivers of the different land offices, are constituted by the acts of Congress, a tribunal to settle controversies relating to claims to pre-emption rights, and therefore an oath administered in such a controversy before the Register alone, is *extra judicial*, and as perjury cannot be predicated of such evidence, an action of slander cannot be maintained for a charge of false swearing in such a proceeding.
2. An accusation of perjury implies within itself every thing necessary to constitute the offence, and if the charge has reference to *extra judicial* testimony, the *onus* lies on the defendant of showing it. It is not necessary in such a case to alledge a *colloquium*, showing that the charge related to material testimony in a judicial proceeding.

Error to the Circuit Court of Benton.

SLANDER by the plaintiff against the defendant in error. The declaration contains fourteen counts. The first count, after the formal introduction, proceeds to alledge, that a certain matter was pending before the Register of DeKalb county, who was duly authorized to act in the premises, and try said matters of controversy, when James L. Lewis, by virtue of the pre-emption laws of the United States, passed in the year 1838, was claimant of a certain quarter section of land lying in the district attached to said land office, and a moiety of which said quarter section of land one Charles D. Scroggins claimed adversely to the said James L. Lewis, and the said Scroggins and Lewis, having on the 6th June, 1842, pursuant to previous notice, met at the said office at Lebanon, for the trial of their respective claims, the said Hall was then and there called on by the said Lewis as a witness, to testify in his behalf, and the said Thomas Hall did then and there, and after being duly sworn on his corporal oath, before Simpson C. Newson, a notary public in said county of DeKalb, duly authorized and empowered to administer said oath to the plaintiff, give testimony in behalf of said Lewis, material to the issue and matter then pending. The count then, omitting the formal part, proceeds to alledge, that in a certain discourse, which the defendant then and there had, of and concerning the plaintiff, in the presence and hearing of divers good and worthy citizens of the State in the county aforesaid, falsely and maliciously, spoke and published, of and concerning the plaintiff, and of and concerning the matter which had been so pending, and concerning the said evidence so given in by the said plaintiff, the false, scandalous, malicious, and defamatory words, following, that is to say, Hall, (meaning Thomas Hall, the plaintiff,) has sworn falsely referring to the evidence, and oath of the said Hall, so taken and given as aforesaid.

The succeeding eleven counts, are framed upon the same matter, changing the phraseology of the words alledged to be spoken, in reference to the testimony of the plaintiff, upon the trial in the land office. 13 count. And afterwards, to wit, &c. in a certain other discourse, which the said defendant then and there had, in the presence and hearing of divers other good and worthy citizens of the State, the said defendant further contriving, &c. then and there, in the hearing and presence of the said last mentioned persons, falsely and maliciously, spoke and published, of and con-

cerning said plaintiff, the false, scandalous and malicious, and defamatory words following, that is to say, he, meaning the plaintiff, has perjured himself.

14 count. Same as the last, except that the words charged are, Hall (meaning the plaintiff,) has perjured himself.

The defendant demurred to each count separately, and the Court sustained the demurrer to all the counts of the declaration, and rendered judgment for the defendant. This is now assigned as error.

S. F. Rice and L. E. Parsons, for the plaintiff in error, argued that the Register, or Receiver, is a court to decide controversies, and may administer an oath. [Land Laws, part 1, 378-9, § 2, 3; 431, § 2, 3.] That the oath being administered by the notary public, in the presence of the Register, was the act of the latter. [2 Conn. 40.]

The two last counts are certainly good, as they allédge the charge of perjury, and a reference may be had to the previous counts for dates, &c [Starkie on Slander, 31, 54; 9 East, 95; Cro. Jas. 648; 5 John. 211, 430; 6 Ala. Rep. 281.]

W. P. Chilton and F. W. Bowdon, for defendant in error.

The twelve first counts are clearly bad. They charge a controversy before the Register of the land office, but the Register alone cannot act; the power to act is given him in conjunction with the Receiver. [Land Laws, 1 part, 165, § 3; 429, § 1; 437, § 4; 2 part, 84, No. 57; 729, No. 682.]

The oath was administered by a notary public, instead of the Register and Receiver, who are a statutory court, and was therefore extra judicial. [Land L. part 1, 378-9, § 2, 3; part 2, 431, § 2, 3.]

The power conferred by the laws of this State on notaries public, does not extend to the offices of the Federal government, (Dig. 379,) and at common law he was merely a commercial officer.

The oath being extra judicial, no perjury could be committed. [2 Russ. 540; 3 C. & P. 419; 3 Salk. 269; 14 Eng. C. L. 376; 1 N. & McC. 547.]

The two last counts refer to the preceding, and partake of their character.

The averment of special damage is insufficient. [8 Porter, 487.]

ORMOND, J.—The principal question presented upon the first twelve counts of the declaration, is, whether the trial in which the alledged false swearing took place, was a judicial proceeding. It appears, a certain matter of controversy was pending, before the Register of the land office, in DeKalb county, wherein James L. Lewis, by virtue of the pre-emption law of Congress of the year 1838, was claimant of a quarter section of land, a moiety of which was claimed by one Scroggins adversely to Lewis. That the plaintiff was called upon as a witness by Lewis in support of his claim—that he was sworn to testify in behalf of Lewis, by a notary public, and that it was in reference to the testimony so given in, that the defendant accused him of swearing falsely.

The act of Congress of 22d June, 1838, "to grant pre-emption to settlers on the public lands," gives to settlers on the public lands, under certain limitations not necessary to be noticed, "all the benefits and privileges of an act, entitled an act, to grant pre-emption rights to settlers on the public lands, approved May 9, 1830," with a proviso, that when more than one person had settled on, and cultivated any one quarter section of land, each should have an equal share, or interest. [1 Land Laws, 574.]

This act does not provide for the settlement of controversies, where more than one person claimed a pre-emption upon a quarter section of land, but by reference to the act of 1830, which is in effect embodied in the act of 1838, it appears by the third section, that "the proof of settlement and improvement, should be made to the Register and Receiver, of the land district in which such lands may lie, agreeably to the rules to be prescribed by the Commissioner of the General Land Office, for that purpose."

It is very clear, that the Register and Receiver were acting in a judicial capacity, in thus ascertaining the facts upon which a pre-emption was to issue, and so it has universally been considered by the General Government. Such was the opinion of Mr. Butler, the Attorney General, as expressed upon this law, in answer to inquiries upon this subject. He says, "In weighing the evidence, and deciding on its sufficiency, these officers act in a judicial capacity," and he proceeds to say, no other officer of the

government can reverse their decision. [2 Land Laws, 84, No. 57.] To the same effect is the communication of the Commissioner to the Register and Receiver at Tallahassee. [Id. 729, No. 682.]

This being then a special judicial tribunal, created by Congress, it can only act in the mode, and upon the subjects pointed out in the law. The power being delegated to the Receiver and Register jointly, cannot be exercised by one of them separately, and such separate action would be as destitute of legal validity, as would be the joint action of both, upon a subject not within their cognizance. A reference has been made to the act of 24th May, 1824, for the correction of errors in entries at the land office, 1 Land Laws, 378, by the second section of which power was given to either the Receiver, or Register, to administer the oath to the party, who desired to change his entry, which was to be transmitted to the General Land Office. This act is upon an entirely different subject, in no manner connected with the present, as the Receiver, or Register, receiving the affidavit had no judicial power conferred on them beyond the power of administering the oath, and can have no influence whatever upon the present question.

It results from this view, that the proceeding before the Register alone, was extra judicial—that he did not constitute the Court, appointed by Congress for the ascertainment of the disputed facts, and that consequently, the oath administered, not being in the course of a judicial proceeding, perjury cannot be assigned upon it, or predicated of the testimony, however wrong in a moral point of view it might have been, to have stated a falsehood upon such examination.

These considerations relieve us from the necessity of inquiring whether the oath, though administered by a notary public, who as such had no power to administer it, might not be considered as the act of the Court, and administered by its direction. It also relieves us from the consideration of the numerous counts in detail, in many of which it might perhaps be doubted, whether the words as charged are actionable.

The two last counts of the declaration which charge the speaking of words actionable in themselves, stand upon a different footing. The accusation of perjury, implies within itself, every thing necessary to constitute the offence, and if the accusation had re-

ference to testimony delivered *extra* judicially, the *onus* lies on the defendant of showing it. [Jackson v. Mann, 2 Caine's Rep. 91; Wood v. Clark, 2 John. Rep. 10.] And therefore in such cases no *colloquium*, showing that the charge related to material testimony in a judicial proceeding is necessary.

It is however urged, that we must understand the two last counts as referring to, and adopting all the first count, except the words spoken, and that therefore the declaration itself shows, that perjury in its legal sense, was not charged. This is doubtless true, if the declaration could be so interpreted, but we do not understand the reference in the two last counts, to the preceding, to be any thing more, than an adoption of the formal part of the first count, which for the sake of brevity, is thus silently incorporated into these, and considered as if again repeated. So considering these counts, they are good, and the demurrers to them were improperly sustained.

There is no special damage alledged, as supposed, in these counts of the declaration. The general charge, that in consequence of the words, "divers of his neighbors have refused to have any transaction, acquaintance, or discourse with him," &c. would not have authorized proof of special damage, and amounts to no more than a general allegation of damage, sustained by the speaking of the words.

Let the judgment be reversed and the cause remanded.

THE MAYOR, &c. OF MOBILE v. ROUSE.

1. The corporate authorities of Mobile are invested with power to enact an ordinance to require the keepers of coffee-houses, taverns, &c. within the city, where wine, &c., are sold by the retail, to obtain a licence from the mayor for that purpose; and to impose a fine of fifty dollars for retailing, without first obtaining such license. It is no defence to a proceeding instituted for the recovery of the fine imposed by the ordinance, that the offender is liable to an indictment at the instance of the State.

Appeal from the County Court of Mobile.

This was a proceeding instituted before the Mayor of the city, at the suit of the plaintiff in error against the defendant, for the recovery of the sum of $59, the amount prescribed by an ordinance of the corporation for selling "drink, wine and spirituous liquors," within the limits of the same, without license. Judgment being rendered in favor of the plaintiff, the defendant appealed to the County Court, where, upon a demurrer to the statement of the complaint, it was adjudged that as the retailing of spirituous liquors, &c., was an offence against the State, it was not competent for the corporation to punish it by imposing a penalty therefor.

Dargan, for the appellant.—No objection was, or could be taken to the form of the proceeding; and it had been fully settled by previous decisions of this Court, that the Legislature might confer upon an incorporated town the power to regulate retailers within their limits; and even prohibit it, if judged expedient. [6 Ala. Rep. 653; Id. 899.]

J. A. Campbell, for the defendant.

COLLIER, C. J.—The Mayor and Aldermen, &c. of the city of Mobile are invested with authority by its act of incorporation, to provide for licensing and regulating retailers of liquors within the limits of the city, and annulling the license, on good and sufficient complaint being made against any person holding the same. In the statement made by the plaintiff, so much of the ordinance as is supposed to be material, is set out. From this it appears, that a fine of fifty dollars is imposed on every person who shall retail spirituous liquors, &c. in less quantities than a quart, within the corporation. *Further*, that every person intending to keep a coffee-house, tavern, &c. where drink, wine or spirituous liquors are to be sold by the retail, shall obtain a license from the mayor for that purpose. The charge is, that the defendant did violate the ordinance in selling drink, wine and spirituous liquors, &c., without having applied for and obtained a license, &c.

The power conferred by the charter is very broad, and fully authorised the enactment of the ordinance. This is shown by

the case of the Intendant, &c. of Marion v. Chandler, [6 Ala. R. 899;] and both that case, and The State v. Estabrook, [6 Ala. R. 653,] affirm that the grant of such a power is within the competency of the Legislature. It cannot be admitted, that because the existence of a certain state of facts is made an offence against the State, therefore the corporate authorities of a town can adopt no punitive regulations in respect to the same, where they occur within its limits. Such a restriction would inhibit the punishment of affrays and other breaches of the peace, keeping disorderly houses, public gaming, &c. True, the powers of such a corporation, like all others, must be limited by the expressed will of the Legislature.

The punishment (if it may with propriety be so called,) which is denounced by a municipal corporation, is not intended to vindicate the dignity of the State, but it is a mere police regulation, intended to secure quiet and order within its own borders. There is no constitutional provision, even when most liberally interpreted, which prohibits the exercise of such a power, if conferred by the Legislature, and exercised according to law.

The cases cited, are conclusive to show, that it was competent for the Legislature to grant the power in question; from the case as presented, it seems to have been properly exercised. The judgment is consequently reversed, and the cause remanded.

EVANS, USE, &c. v. STEVENS, ET AL.

1. The Circuit Court has no original jurisdiction of a summary proceeding by motion against a constable for failing to return an execution. The statute only authorizes the motion to be made before the justice of the peace issuing the execution.

Writ of Error to the Circuit Court of Barbour.

This suit was commenced in the Circuit Court, after notice by motion of Evans, and is against Stevens for failing as a constable *to return* an execution placed in his hands, to be levied at the suit of Evans against one Commander. The amount of the execution, at the time of the motion, including interests, costs and damage, exceeded fifty dollars. After the plaintiff had closed his proof, the Court, without any motion being made therefor, dismissed the cause for want of jurisdiction. This is now assigned as error.

P. T. Sayre, for the plaintiffs in error, argued that this specific remedy is given *before a justice of the peace* by the statute. [Dig. 219, § 87.] But a justice of the peace has no jurisdiction of sums over fifty dollars, therefore in this case a justice could not proceed. Hence results the necessity for the Circuit Court to exercise the jurisdiction, as otherwise the plaintiff will be remediless.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—The legislation which authorizes summary proceedings against constables for neglect of duty in failing to return executions, in failing to make the money on them when they might do so by the use of diligence, and in failing to pay over money actually collected, is somewhat peculiar; for it allows the pursuit of the remedy in the two last instances, in the Circuit or County Courts, when the sum in controversy, with the penalty, will exceed fifty dollars, and is silent as to those Courts when the motion is founded on the failure of the constable to return the execution. [Dig. 219, § 87 to 91.] As the several statutes inflict penalties as well as provide remedies, they must be strictly construed, and cannot properly be extended beyond the expressed intention of the legislature. In the present case the amount of the execution, with the costs and interest, will exceed fifty dollars, but the statute authorizes the motion only before the justice issuing the execution. [Ib. § 87.] It is supposed there will be a failure of jurisdiction, if the party cannot proceed in the Circuit or County Court, as the justice has no jurisdiction when the sum in controversy is more than fifty dollars; but it will be seen the case is expressly provided for of the failure

to make the money, if it can be made by the use of diligence; and this shows that the recovery, when there is a failure to return, is a mere penalty; no injustice therefore is done by confining it to the Court which the legislature has provided; the more especially as the remedy allowed by the common law, of an action on the case is open to the party.

Judgment affirmed.

GRANT v. COLE & CO.

1. The fact that a merchant and his clerks kept correct books, and charged promptly all articles purchased at the store—that certain articles charged, were suitable to the wants of the defendant's family—that he traded with the plaintiffs, and was frequently at their store, are too remote to justify the presumption that a particular account is correct.
2. Entries upon the books, may be proved by proof of the hand-writing of a deceased clerk.
3. The "account," or statement of the items of charge, by the plaintiffs, is inadmissible as evidence to go to the jury.
4. A notice to one of the clerks, not to furnish goods for defendant's family, without a written order from himself, or his wife, is not notice to the principals of the house, or the other clerks.
5. To charge one for articles which he did not authorize the purchase of, but which came to the use of his family, it must appear that he knew the fact, and did not object, or offer to return them.

Error to the County Court of Dallas.

Assumpsit by the defendants, against the plaintiff in error, upon a note, and also an open account.

Upon the trial it appeared, that the plaintiff, to establish two open accounts, introduced as a witness their principal clerk, during the year 1842 and 1843, when the accounts were alledged to have been contracted, amounting in all to one hundred and seven dollars; who proved that in the early part of the year 1842,

the defendant instructed him not to sell, or charge to him any article whatsoever, unless purchased by himself or wife, or upon their written order. It did not appear that further instructions were given, or that these were communicated to the other clerks, or the principals of the house. That defendant acted capriciously, sometimes instructing not to trade with his wife, and at other times sanctioning purchases made without his order. The witness then testified to the amount of twenty-five dollars seventy-two cents, for goods sold to Grant and wife, and upon their orders, and also testified that ten dollars twenty-five cents of the account was in the hand writing of a deceased clerk, who he believed was accurate and correct in his entries, but knew nothing of the facts to whom the goods were furnished.

The plaintiffs then proved by another clerk, the sale of other articles charged in the account, bought by Grant himself, amounting to thirty-one dollars and sixty-seven cents. They further proved by the overseer of the defendant, that he had purchased an auger and file, charged in the account, and carried them to the plantation, but could not say whether defendant had any knowledge of it. The plaintiff then proposed to offer the accounts to the jury, as evidence, which the Court, against the objections of defendant's counsel, permitted to go in evidence, subject to the charge to be given; to which the defendant excepted.

The defendant moved the Court to charge the jury, that the plaintiffs could not recover more than they had proved they had sold to Grant and wife, in person, or to their order; which the Court refused, and charged the jury, that the instruction of the defendant to the clerk, was not notice to the plaintiffs, unless it was proved they were communicated to them; and that if they believed from the testimony, that articles were sold by the other clerks, or by the plaintiffs, and carried on the plantation, or came to the possession of himself and family, and thus used, and appropriated for their benefit, that the defendant was properly chargeable with them. In reference to the accounts, the Court charged, that the items not proved by positive, might be established by circumstantial testimony, such as the wants of the family; that defendant traded considerably with plaintiff, and was frequently in their store; the correctness, and accuracy of the plaintiffs and their clerks as accountants, and their practice of making entries

on their day books immediately for all articles sold, but that such circumstances were entitled to but little weight, unless the articles were of the kind and description necessary for the defendant, about his plantation, and in his family. To which the defendant excepted, and which he now assigns as error.

G. W. GAYLE, for plaintiff in error.

ORMOND, J.—There can be no doubt that a merchant's account, like any other fact, may be established by circumstantial evidence; but these circumstances must not be remote, or far-fetched, but such as afford a reasonable presumption, of the facts attempted to be deduced from them. Thus, in this case, the fact that the plaintiffs and their clerks kept correct books, and charged promptly all articles purchased at the store, did not warrant the inference that the particular account was correct. Such a presumption from the facts, was a mere conjecture. The same remarks apply to the facts in evidence, that the goods charged were suitable to the wants of the family of the defendant, and that he traded considerably with the plaintiffs, and was frequently at their store. These are too general and indefinite, to warrant a particular conclusion, especially in a case, from its very nature, susceptible of precise, and definite proof.

The proof of entries upon the books, by proof of the hand-writing of a deceased clerk, was admissible evidence. [Clemens v. Patton & Co. 9th Porter, 289, and cases there cited.]

The "account," by which we understand the paper upon which the items composing the account were stated, was not testimony to the jury for any purpose, as it is the mere written declaration of the party himself. The Court therefore, erred in permitting it to go to the jury, against the objection of the defendant.

The fact that the defendant gave notice to one of the clerks of the house, not to furnish goods for his family without a written order, or the personal direction of himself or his wife, was not notice to the principals of the house or the other clerks; but we are not able to perceive the importance of this fact upon the case, from any thing stated in the record. If from the previous dealings between the defendant and the plaintiffs, he had given his children or servants a credit at the store, he certainly might limit the dealing in future, and put a stop to further credit. But in any

conceivable case, if the goods came to his use with his knowledge or consent, he would be responsible. It would not be sufficient to show that they came to his use merely—as for example that they were purchased by his overseer for the use of the plantation. [Fisher & Johnson v. Campbell, 9th Porter, 210.] But to charge him for any article which he did not authorize the purchase of, it must be shown, that he knew the article was used by his family, without objection, or offer to return it on his part.

Let the judgment be reversed, and the cause remanded.

TURCOTT v. HALL.

1. The act of the 9th of December, 1841, "For the better securing mechanics in the city and county of Mobile," which provides a summary and extraordinary remedy, where the work shall be done towards "the erection or construction of any building," in that city or county, by a journeyman, laborer, cartman, sub-contractor, &c. cannot be construed to give the remedy, provided, to one who has laboured *under employment* by a sub-contractor.
2. Where it is obvious from the proof furnished by the plaintiff himself, that he is not entitled to recover, no matter what may be the ruling of the Court upon other points raised in the cause by a prayer for instructions to the jury, an appellate Court should not reverse a judgment which has been rendered in favor of the defendant.

Writ of Error to the Circuit Court of Mobile.

This was an action of assumpsit at the suit of the plaintiff in error. The declaration contains the common counts; in the first of which it is stated that the work and labor done by the plaintiff was in the erection of a dwelling house in the city of Mobile, "executed under a contract between the said defendant and one Jas. S. Deas. for the said defendant, and at his special instance and request." To the first count there was a demurrer, and to the

others the defendant pleaded *non assumpsit.* No notice was taken of the demurrer, but the cause was submitted to a jury, on issue joined, a verdict returned for the defendant, and judgment rendered accordingly.

On the trial, the plaintiff excepted to the ruling of the presiding judge. From the bill of exceptions it appears, that the plaintiff offered in evidence the following paper, viz:

Mr. Samuel Elliott, To Amarble Turcott, Dr.

"To 32 days work on Mr. Hall's house in Government street, Mobile (as a journeyman carpenter,) viz: from 9th December, 1841, to January, 1th following, at $2 50 per day, ... $80 00

"The above sum is justly due me for work performed as above specified. Mobile, January 31st, 1842.

AMARBLE TURCOTT."

Attest, ANTHONY M. BARNELLE.

The attesting witness proved that he presented this account to the defendant on the 2d of May, next after its date. It was further shown, that the work to which the account refers, was performed by the plaintiff, upon a house erected in the city of Mobile for the defendant. That James S. Deas contracted in writing with the defendant for its erection; that Samuel Elliott was a sub-contractor of Deas, for the building of a part of the house; that the plaintiff was employed to work on the house by Elliott, and that his wages from the 9th December, 1841, until the house was finished about the first of February, thereafter, were unpaid. The plaintiff further proved, that on the 20th May, 1842, there was due from the defendant to Deas, from three to four hundred dollars, and at the same time due from Deas to Elliott about the same amount, all of which still remained unpaid. There was no evidence that a copy of the attested account was ever served by the defendant upon Deas or Elliott.

The Court charged the jury, that the act of the 9th of December, 1841, under which this action was brought, contemplated not only a notice to the owner, but a submission to arbitration; but left it discretionary with the owner to give the notice to his contractor or not; and if the owner, when served with an attested account, did not serve a copy upon his contractor, he could not be made liable under the act. That as the defendant did not give

such notice to his contractor he was not liable, and they must find a verdict in his favor.

And the Court upon the prayer of the plaintiff's counsel for instructions, refused to charge the jury, that it was the duty of the defendant, when served with an attested account, to furnish his contractor with a copy, and that, if he failed to do so, he made himself liable, and the plaintiff must recover.

K. B. Sewall, for the plaintiff in error, insisted, that the statute should not receive the interpretation the Circuit Judge had given it. The owner is required to furnish his contractor with a copy of the account, and if he does not, as a necessary consequence he becomes liable to pay it. Such a construction should be given to the act, that every part of it may, if possible, be operative. [Dwarres on Statutes, 699.]

J. A. Campbell, for defendant.

COLLIER, C. J.—It is conceded that this action is sustainable under the act of the 9th December, 1841, "For the better securing Mechanics in the city and county of Mobile." The first section of that act provides, that every mechanic, workman, or other person, doing or performing any work towards the erection, or construction, of any building in the city or county of Mobile, or who may have furnished materials of any description for the same, erected under a contract in writing or otherwise, between the owner and builder, whether such work shall be performed as journeyman, laborer, cartman, sub-contractor or otherwise, and whose demand for work and labor done and performed, or materials furnished towards the erection of such building, has not been paid and satisfied, may deliver to the owner thereof an attested copy of the amount and value of the work and labor thus performed, or materials furnished, the amount unpaid thereupon, the owner shall retain out of his subsequent payments to the contracter the amount of such work and labor, or materials, for the benfit of the person so performing the same.

The second section directs, that whenever an account as provided by the first, shall be placed in the hands of the owner, or his authorized agent, it shall be the duty of such owner or agent to furnish his or her contractor with a copy of such paper, so that

if there should be any disagreement between such contractor and his creditor, they may, by amicable adjustment between themselves, or by arbitration, ascertain the true sum due. If the contractor shall not, within ten days after the receipt of the account, give the owner written notice that he intends to dispute the claim, or if in ten days after giving such notice, he shall neglect or refuse to have the matter adjusted as above provided, he shall be considered as assenting to the demand, and the owner shall pay the same when due.

The third section prescribes the mode in which arbitrators shall be chosen, and their award made, if the contractor disputes the account of the journeyman, or other person, for work, &c.. and the matter cannot be amicably adjusted.

By the fourth section it is provided, that if the contractor shall not, within ten days after the matter shall be adjusted, pay the amount due the creditor, together with the costs incurred, the owner shall pay the same out of what he owes the contractor; and this amount may be recovered by the creditor from the owner in an action for money had and received, if he owed the contractor so much at the time the first notice was given, or if it subsequently accrued. The fifth and last section has no application to the present case, and consequently needs not be more particularly noticed.

We have thought it proper to recite this statute thus at length because it is peculiar, and the present is the first case that has arisen under it. The striking similarity of its provisions, with an act of the legislature of New York, passed in 1830, and applying to mechanics, workmen, or other persons doing work towards any building in the city of New York, very clearly indicates that that act was consulted in framing it. This being the case, the decisions of that State which determine the meaning of its statute, are particularly pertinent, and may aid us in ascertaining what construction should be placed upon ours; especially in a matter of doubt.

In Wood v. Donaldson, 17 Wend. Rep. 550, the question arose, whether the creditor of a sub-contractor could proceed by notice to the owner to recover his claim in the manner prescribed by the statute. The Court said, "if the *remote workman* under the sub-contractor, in whose contract he has no interest, and over which he can exercise no control, and which therefore may

be injudicious and extravagant for aught that he can do, can, by presenting his attested account to the owner, collect it, so far as any balance due the contractor exists in his hands, the whole fund may be exhausted, in spite of the contractor, though the job may have been but partially finished." To illustrate the injustice of such a construction, a hypothetical case is stated as follows: "A agrees to build B a house for $5,000, and sub-contracts it to C for $4,000. C, by improvident contracts, finds, when the work is half done, that he owes his workmen, and material men, the $4,000, and absconds. They present their attested accounts to the owner, who is bound "to retain out of his subsequent payments to the contractor, the amount of such work, &c., for the benefit of the persons performing the same."

The Court admitted that the first section gave some countenance to the extended construction contended for. In its terms it includes every laborer upon the building, without any limitation in respect to the persons who may have employed him; or the character of his contract. But it was said all the provisions of the statute must be consulted, and if possible construe the first section according to the intent of the legislature, as gathered from the entire enactment—making it all consistent and operative.

The statute of New York, in declaring who shall be entitled to its provisions, uses language almost identical with ours—certainly not more limited in its import, and the reasons assigned for refusing to the *creditor of a sub-contractor* the right to proceed by notice to the owner, &c., are of great force. To these we would however add, that as the act is introductive of a new remedy, entirely out of the ordinary course of procedure, its interpretation should be restricted; especially where the adoption of a different rule would be likely to produce evils quite as great as any for which the statute was intended to provide.

It does not appear that the attention of the Circuit Court was called to the point we have considered, but it is explicitly stated upon the bill of exceptions prepared by the plaintiff's counsel, as well as by the attested account which the plaintiff furnished to the defendant, that he worked under the employment of a sub-contractor. The plaintiff himself has shown (from the view we have taken of the statute,) that he is not entitled to recover in the present case. He cannot therefore have been prejudiced by the

charge of which he complains; for whether the instruction was given as prayed, or not, the jury should have returned a verdict for the defendant. This conclusion relieves us from the necessity of considering the legal questions discussed at the bar.

The result is, that the judgment of the Circuit Court is affirmed.

BELL AND CASEY v. THOMAS.

1. It is premature to render judgment upon a replevy bond, conditioned for the delivery of a steamboat to the sheriff, at the same time that the boat is condemned.
2. If a bond for the delivery of a boat seized under process, in a libel suit, is good as a common law bond, it may be proceeded on as a stipulation, although it does not conform to the statute.

Writ of Error to the County Court of Mobile.

THOMAS, on the 25th January, 1845, sued process of monition and seizure upon a libel filed by him against the steamboat Duquesne, alledging that the boat then was lying at the harbor of Mobile; that he, at the instance of the master of the said boat, performed services on board the same as second engineer, at $50 per month, in all amounting to $169, the particulars and items of which appear by an account filed. He prays the condemnation of the said steam boat, her tackle, apparel, &c, in satisfaction of his demand.

The process of seizure was returned executed, without setting out the mode of doing so, and in the transcript is a bond executed by Bell and Casey, the condition of which recites the seizure of the boat by the sheriff, and therefore they undertook and bound themselves to deliver the steamboat to the sheriff of Mobile county, on the 1st Monday of March, 1845, by 12 o'clock noon, or to pay and satisfy such judgment as should be rendered on the libel.

In either event the bond was to be void, otherwise to remain in full force. This bond is payable to the plaintiff, Thomas, and is in double the sum demanded by the libel.

At the return of the process, no claim or defence being interposed, a decree was rendered for the libellant, for the sum claimed, and the boat, with her tackle, apparel, &c. condemned to his satisfaction. It was also adjudged, that in case Bell and Casey should fail to deliver the boat, according to their stipulation, then the libellant do recover of them, the said stipulators, the said sum, together with the costs in this behalf expended. And execution was awarded. This decree was rendered the 3d of March, 1845. No subsequent proceedings seem to have been had, unless the return of the sheriff upon the bond as forfeited, on the 3d March, 1845, is to be so considered.

This writ of error is prosecuted by Bell and Casey, who here assign—

1. That the libel is insufficient, and does not conform to the statute.

2. That judgment, in this form, should not have been rendered.

3. That the decree is by default, and the Court did not require a refunding bond.

4. That the judgment against the stipulators was premature.

Addison Fox, for the plaintiffs.

E. S. Dargan, for the defendant.

GOLDTHWAITE, J.—1. The judgment in this case, so far as the plaintiffs in error are concerned, seems to have been prematurely rendered, inasmuch as the condition of the bond is to deliver the boat to the sheriff on a particular day, or to pay the judgment of the Court. In point of fact, the day fixed for the delivery of the boat, is the same as that upon which the judgment was rendered. It is essentially different from a stipulation to pay the amount for which judgment shall be rendered. It seems to have been taken under the act of 1841, [Dig. 140, § 28,] and varies in its legal effect from that required by the previous act of 1836. [Dig. 139, § 23.]

2. It is not important to inquire whether the bond taken is in precise conformity with that required by statute, for if it was va-

riant from that, and could only be supported as a common law obligation, yet it is within the jurisdiction of a Court, proceeding according to the course of admiralty practice, to render judgment on such an obligation as an incident to the principal cause. [The Allegator, 1 Gall. 145.]

The other questions raised in the cause, question the sufficiency of the judgment of condemnation against the boat, and cannot be investigated by individuals interested only as stipulators. [Livingston v. Steamboat Tallapoosa, 9 Porter, 111; Witherspoon v. Wallis, 2 Ala. Rep. 667.

For the premature judgment against the stipulators in the bond, the judgment, so far as it affects them, must be reversed, and if the plaintiff chooses, he may proceed to fix their liability.

Reversed as to Bell and Casey.

JOHNSON v. WILLIAMS, SHERIFF, ET AL.

1. The sheriff, by order of the attorney of the plaintiff, returned an execution by mistake a week too soon, and an alias was not issued, until after an execution of a junior judgment creditor, had been issued, and levied on the property of the defendant. Held, that as it did not appear, that the execution was returned, or its re-issuance delayed, for the purpose of favoring the defendant in execution, and as a term had not elapsed, between the return, and the issuance of the *alias*, the prior execution had not lost its *lien*.

Error to the Circuit Court of Perry.

This was a rule against the defendant in error, as sheriff, for an alledged failure to make the money on an execution of the plaintiff, against one Samuel Child. The matter was submitted to the Court on the following state of facts;

The plaintiff obtained judgment against Child, at the February

term, 1842, of Perry County Court, upon which a writ of error was prosecuted to the Supreme Court, and bond given to supersede the judgment, which was affirmed at the June term, 1844. An execution issued upon the affirmed judgment, and came to the sheriff's hands on the 9th August, 1844.

On the 19th December, 1843, the State Bank sued out execution against Child on judgments previously obtained, which came to the sheriff's hands on the 8th April, 1844, and which, by order of A. B. Moore, attorney for the Bank, the sheriff returned to the clerk's office at Tuscaloosa, on the 13th April, 1844. Alias executions issued on these judgments on the 9th August, 1844, (except one, which issued on the 26th August,) came to the sheriff's hands on the 28th of the same month, and were all levied on the same day, on the same property, as that levied on by the plaintiff's execution.

A. B. Moore, attorney for the Bank, testified, that on the representations of the sheriff, that he had not time to make the money and did not want to be ruled, he directed him, the 13th April, 1844, to return the execution; both himself and the sheriff supposing, the Court to which the execution was returnable, was to be on the 5th day of May, when in fact it was held one week later. That this was not done to favor the defendant in execution, and that he did not then know of the resolution of the board of directors hereafter mentioned, which Child did not comply with, nor did the bank express any dissent from his conduct.

The following resolution of the board of directors was also in evidence:

Bank of the State of Alabama—Tuscaloosa, April 19th, 1844.

Samuel Childs' communication was considered, and on motion it was

Resolved, That on the payment of one thousand dollars in cash the sale of his property be postponed, provided no other execution will thereby obtain priority over the Bank's, and he pay A. B. Moore for his services in attending to the business, and on filing assent of all the parties to the postponement.

Also a letter from the Cashier to Mr. Moore, as follows: Within I hand you a resolution, adopted to-day, in relation to S. Childs' debt to this Bank. He has paid the $1,000, and when he complies with the other stipulations of the resolution, you will

please take the necessary steps to carry out the object of the Bank. Very respectfully,

WM. HAWN, *Cash.*

It was also agreed, that the defendant had no other property than that levied on. Upon these facts the Court held, that the sheriff was not liable to the plaintiff, as the executions of the Bank were entitled to be first satisfied; from which judgment this writ is prosecuted.

DAVIS, with whom was PECK, for plaintiff in error.

A. B. MOORE, contra, cited 5 Ala. Rep. 43; 6 Id. 623.

ORMOND, J.—The principle settled in the case of Wood v. Gary, 5 Ala. Rep. 52, is decisive of this case. The facts of that case were, that a plaintiff in execution, a short time before the return day of the execution, directed the sheriff to return it, but without intention to favor the defendant in execution. The execution was not re-issued, until after one upon a younger judgment had been issued, and had come to the sheriff's hands, against the same defendant. This Court held, that the order to return the execution under the facts of the case, did not render it constructively fraudulent. And that the *alias* being issued before another term had elapsed, the *lien* of the original execution was preserved.

The facts of this case are almost identical with that. We may lay out of view the order of the board of directors, because it authorized the suspension of the execution upon a condition which was never complied with, and because in point of fact the return was directed to be made by the attorney of the Bank, previous to any action of the board upon the subject, both being ignorant of the action of the other. This return it appears was directed to be made in good faith, because there was not time to make the money, and not to favor the defendant. The case is then to be considered, as if the execution had been returned by the sheriff, without any order from the bank or its attorney. The only remaining fact is, that the *alias* executions did not come to the sheriff's hands, until a few days after the execution of the plaintiff was received by the sheriff. But as a term had not intervened, the *alias* connected itself with the previous executions, and continued

the *lien* which had been thus acquired, and being prior to that of the plaintiff, was entitled to precedence.

Why the executions of the Bank were not sooner re-issued, we are not informed. There is not however any fact in the case which would authorize the presumption that they were withheld by the direction of the Bank, as the condition upon which the Bank had agreed to a suspension had never been complied with. Whether, if, during this interval, the execution of the plaintiff had been levied, and the property sold, the *lien* of the Bank would not have been lost, we need not inquire.

The facts present merely the case of an omission to cause the executions to be re-issued for about three months, but as it does not appear that this omission was designed to favor the defendant, and as the delay could not by possibility affect injuriously any other creditor of the defendant, it cannot have the effect to render the executions constructively fraudulent, and give the preference to a junior execution creditor.

Our opinion therefore is, that the Circuit Court decided correctly upon the facts in evidence, and its judgment is affirmed.

COURTLAND v. TARLTON & BULLARD.

1. One of the defendants wrote a letter to the plaintiff, from which it appears that the latter had demanded the payment of three notes which the defendants had given for his compensation in selling certain lots in Mobile: the writer of the letter endeavors to convince the plaintiff of the injustice of the requisition, by stating that but a small part of the purchase money had been collected, and proposes to pay him in proportion to the amount received of the purchasers: *Held*, that this letter was a refusal to comply with the plaintiff's demand, and an offer to pay what was believed to be right, evidently made with view to compromise, and consequently was inadmissible as evidence against the defendants.
2. Where a question of law, which should have been decided against the party excepting, is referred to the jury as an inquiry of fact, whose verdict

effects the proper result, the judgment will not be reversed for the irregularity.

3. Whether the admission of *facts*, in a written proposition to compromise, be admissible evidence, or not, it is not error to charge the jury, that if the paper was written with the view to a compromise, and the *promises* contained in it were made for that purpose, the defendant was not bound by *them*. Such a charge does not deny effect to the *facts*.

Writ of error to the Circuit Court of Mobile.

This was an action of assumpsit, at the suit of the plaintiff in error against the defendants. The facts of the case, so far as it is necessary to notice them, are substantially these. In the spring of 1836, the defendants engaged the plaintiff to sell for them three lots of land in the city of Mobile, agreeing to allow for his compensation what they sold for above certain limits prescribed; sales were made by the plaintiff for several thousand dollars more than the prescribed limits, and the purchaser's notes passed to the defendants without objection; the defendants gave the plaintiff their three notes for his compensation under the contract, payable at six, twelve and eighteen months. The defendants had realized one-third of the amount of the sales, had released the purchaser in one instance, upon his giving up to them the property, and in the others had foreclosed mortgages upon the property purchased.

The plaintiff introduced letters of the defendants to him upon the subject of his claim, written in March, 1838 and January, 1841. On the first of May, 1838, the plaintiff brought a suit upon the three notes in the Circuit of the United States, and a verdict was returned for the defendants in April, 1839—the declaration being upon the notes only. It was shown on that trial that the purchasers had not paid for the lots, and that the defendants were not to pay the plaintiff until that was done; that the defendants gave their own notes to the plaintiff, because he said it would accommodate him by enabling him to obtain money on them.

The Court charged the jury, that if they believed the letter of March, 1838, was written with a view to compromise, and that the promises therein contained were made for the purposes of compromise, then the defendants were not bound by them; but if in the last letter written in 1841, and after the decision in the United States Court, other promises were made, these last

promises would bind the defendants. Whereupon the plaintiff excepted. The jury returned a verdict for the defendants, and a judgment was rendered accordingly.

K. B. Sewall, for the plaintiff in error, insisted, that the admission of the defendants, in the letter of March, 1838, does not appear to be confidential, or made with a view to a compromise. If it was, the facts stated therein, would, notwithstanding, be admissible evidence. [2 Starkie's Ev. 22; Greenl. Ev. 224–5; 2 Pick. Rep. 290; 4 Id. 376; 4 Cow. Rep. 635; 5 Conn. Rep. 416–426; Anth. Rep. 190; 4 N. Hamp. R. 501–8–9; 2 Mass. Rep. 175.] And it is even competent to show that a sum of money was offered by way of the compromise of a claim tacitly admitted. [Greenl. Ev. 225; 4 Pick. Rep. 374; 4 Conn. Rep. 148; 1 Mood. & M. Rep. 446; 20 Johns. Rep. 576 to 590; 2 Phil. Ev. C. & H's notes, 218–9–221–2–3.] The admissibility of the letter was a question for the Court, with which the jury had nothing to do, and it was therefore irregular to refer it to them to determine its character. [Greenl. Ev. and notes; 2 Peters' Rep. 25–44–121–137.]

J. A. Campbell, for the defendant.—The plaintiff declares for a *quantum meruit*, and disclaims the intention to recover on the notes—adducing them merely, as evidence to show the excess of the sales above the limits prescribed by the defendants. The letter was evidently intended as a proposition to compromise, and was therefore inadmissible to show what the defendants offered to do. [2 Phil. Ev. C. & H's notes, 219, and cases there cited.]

COLLIER, C. J.—The letter in question was written by the defendant Tarlton alone, and commences with an acknowledgment of the receipt of the plaintiff's letters. The writer says: "In replying to that part of your letter which refers to T. & B's notes now unpaid, I would remark, that the consideration for which these notes were given, has in part failed. The property which you have sold to D. & A., only one note has been paid; that sold to B., one note has been paid; and that sold to R. not one cent has been paid." The question is then asked, if it would not be very hard for the defendants to be compelled to pay their three notes to the plaintiff, when the sale

of the lots made by him turns out to be unproductive. Avowing his desire to do what was right, the writer declares his willingness to pay him in proportion to the amount paid by the purchasers; more he thinks cannot be asked. Should any further sum be collected, he assures the plaintiff that he shall have his proportion. He then remarks, that the amount that the defendants owe the plaintiff, is a portion of the entire sum due from the purchasers, and that the latter never expected to be paid, if the defendants failed to make collections. That he infers from the tenor of the plaintiff's letter that the latter supposed the defendants had made full collections, undeceives him in that particular, and says that if he will instruct him, he will see the plaintiff's proportion paid at once.

The fair inference from this letter is, that the plaintiff demanded payment of the three notes which the defendants had given for the payment of his compensation in selling the lots. Tarlton endeavors to convince him of the injustice of such a requisition, and proposes to pay him in proportion to the amount collected of the purchasers. This was certainly a refusal to comply with the plaintiff's demand, and an offer to pay him what was believed to be right. What is this but a proposition for an adjustment, a promise made with a view to compromise. In this view it is unimportant whether the true character of the letter be a question of law or fact; for whether it be the one or other, the plaintiff is not prejudiced by its reference to the jury, but had an additional chance of success afforded; and cannot therefore alledge the irregularity as an error.

It is laid down, that an offer to do something by way of compromise, as to pay a sum of money, allow certain prices, deliver certain property, or make certain deductions, and the like, are inadmissible evidence against the party making them. This privilege it is said, is strictly construed; for if the proposition is not made expressly without prejudice, or, if it do not carry on its face the character of a peace offering, the privilege is gone. [2 Phillips' Evidence, C. & H.'s 218-9.] *Further*, both in England and America, the nature of the negotiation has been looked to; and that the offer has been intended to be without prejudice, has been inferred from its being plainly an offer with a view to compromise. "Offers of sums, prices, or payments, made during an attempt to compromise, are not ad-

missible, if not accepted." [Mills, J., in Evans v. Smith, 5 Monr. Rep. 363-4.] But it was said to be otherwise as to the existence of a fact. [See 2 Phil. Ev. C. & H.'s Notes, 219 to 223.]

The Circuit Judge did not instruct the jury to discard the independent facts stated in the letter of 1838; he very explicitly charged them, that if the letter was written with a view to a compromise, and the promises contained in it were made for that purpose, then the defendants were not bound by *them*. That the promises were not obligatory upon them, and not that the entire letter should be disregarded. It does not appear that the Court was asked to give more specific instructions. The letter we have seen indicated its true character upon its face; the exposition of the law was correct; and the judgment of the Circuit Court is therefore affirmed.

WILSON v. JONES.

1. A promise to pay a sum of money in Alabama bank or branch notes, is a promise to pay in notes of the Bank of the State of Alabama or its branches, and it is proper for a Court to charge a jury that such is the proper construction, without evidence of the meaning of the terms used.

Writ of Error to the Circuit Court of Lawrence.

Assumpsit by Jones against Wilson, to recover a sum of money upon a note promising to pay three thousand five hundred and sixty dollars and fifteen cents, for value received, payable in Alabama Bank or Branch notes. At the trial, after giving the note in evidence to the jury, the plaintiff offered a witness to prove the value of the bank notes of the Bank of the State of Alabama and its Branches, at the time when the note sued on fell due. This evidence was allowed against the objection of the defendant.

The Court instructed the jury, that the proper construction of

the note was, that the defendant had promised to pay in the bank notes of the Bank of the State of Alabama or its Branches; and if the evidence was believed the jury ought to find for the plaintiff in damages the amount of the value of the sum named in the note, according to the proof.

The defendant excepted to the evidence admitted, and to the charge. Both points are now assigned as error.

L. P. WALKER for the plaintiff in error insisted;

1. That the allegation and proof must agree. The evidence offered was inadmissible; 1, because it tended to establish a contract variant from that declared on—[8 Porter, 70; Ib. 315; Cowen & Hill's notes, 428, 429,]—2, because there is no accordant averment in the declaration that by the promise made, the defendant became thus liable.

2. The Court was bound to know judicially that there was no such Bank as the Alabama Bank, and therefore should have pronounced the contract void. [2 Story's Eq. 537.]

3. There was no ambiguity on the face of the note, and the Court could not therefore construe it. [Greenl. Ev. 340 to 342; 2 Step. N. P. 1544.]

4. The question here is not abstractedly what is the meaning of the promisor, but what is his meaning by the words used, [Comstock v. Van Duson, 5 Pick. 166,] and the *words used* import no ambiguity; there was nothing for the Court to construe.

WM. COOPER, contra, cited Lewis v. Few, 5 Johns. 1; Ward v. Bilkley, 13 Ib. 486; Evans v. Steel, 2 Ala. Rep. 114.

GOLDTHWAITE, J.—We think the charge to the jury upon the meaning to be attached to the words "Alabama Bank or Branch Bank notes," was entirely correct. It is scarcely possible for Courts of justice to be ignorant of that which every one besides would be presumed to know. In the present case, no evidence could make the intention of the contract more clear than it is expressed. In common parlance, the Bank of the State of Alabama is frequently termed the State Bank—the Alabama Bank—the Bank of Alabama; and the promise to pay a sum of money in Alabama Bank or Branch notes, has no other meaning

than that which the Court below gave it. The cases cited by the plaintiff's counsel are quite decisive to shew the correctness of the charge. Judgment affirmed.

BOWLING v. BOWLING, EX'R.

1. A will of lands may be admitted to probate on the proof of two of the subscribing witnesses, upon the additional proof that the other witness resides out of the State, and that he also subscribed his name as a witness by the direction of the testator, and in his presence, notwithstanding the will is contested by the heir at law.
2. An opinion of a witness, that a testator was insane at the time of making his will, is not competent testimony, he admitting at the same time, that he knew no fact or circumstance on which his opinion was founded.

Writ of Error to the Orphans' Court of Lawrence.

Application by the defendant in error, for probate of the will of Alexander Bowling. The will being contested upon the allegation that the testator was not of disposing mind and memory, an issue was made up to try the fact, and submitted to a jury.

The defendant in error introduced two persons who were witnesses to the will, each of whom deposed to the due and proper execution of the will, and that the testator was of sound and disposing mind and memory. They also proved, that one Robert Martin also witnessed the will in their presence, subscribing his name thereto, in their presence, and at the testator's request. It further appeared, that said Martin had left the State, and was now living in Arkansas, and no effort had been made to obtain his testimony, further than by calling him at the court house door. Whereupon the contestant objected to the sufficiency, in law, of the proof to establish the will, and requested the Court so to charge the jury, which the Court refused, and he excepted.

The contestant also introduced a witness, who testified his

opinion and belief to be, that the said decedent was not of sound mind and disposing memory, about the time the instrument purporting to be his will was made, without stating the facts and circumstances on which his opinion and belief was founded, and admitted that he knew no facts on which to sustain this opinion. Which testimony, on plaintiff's request, the Court excluded from the jury, and the contestant excepted. And the jury having found the issues for the plaintiff, the Court gave judgment, establishing the will and admitting it to probate. From which this writ is prosecuted. These matters are now assigned as error.

McClung, for plaintiff in error.

L. P. Walker, contra, cited 7 S. & R. 92; 3 Starkie on Ev. 1707, note 2; 4 Mass. 593; 3 Id. 330; 2 Starkie on Ev. 1681, note 1; 1 McCord, 272; 5 Ala. Rep. 274; 3 Phillips' Ev. 1262.

ORMOND, J.—This being a will of lands, the statute of this State requires, that it should "be signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested by three or more respectable [*reputable*] witnesses, subscribing their names thereto, in the presence of such devisor, saving however to the widow of the testator," &c.

In England, the statute of 29 Charles 2, is substantially the same as ours, and there it has always been held, that one witness who could swear to the execution of the will by the testator, and that he subscribed the will, and also prove its attestation by the other subscribing witnesses, is sufficient proof of the due execution of the will, in a Court of common law. [Longford v. Eyre, 1 P. Will. 741; see the authorities collected in 3 C. & H. of Phill. on Ev. 1349.] The same rule obtains in Chancery, where the direct object of the bill, is not to establish the will, but it is offered as an instrument of evidence. [Concannon v. Cruise, 2 Molloy, 332.] When however the bill is filed for probate of the will, or when an issue is directed out of Chancery, to ascertain whether the will was duly executed, all the witnesses, if alive and within the jurisdiction of the Court, must be produced, or their absence accounted for. If the witness is dead, out of the kingdom, insane, or has become incompetent to testify, his hand-writing may be proved. [See Powell v. Cleaver, 2 Bro. C. C. 504; Carrington v. Payne, 5 Vesey, 411; Burnett v. Taylor, 9 Id. 381.]

In the United States, there have been a great number of decisions to the same effect. In Nalle v. Fenwick, 4 Rand. 585, where a will had been admitted to probate on the proof of one witness, and proof that two others had subscribed it at the request of the testator, and in his presence, but that they resided beyond the limits of the State, the Court held it sufficient, as they were equally beyond the power of the Court, as if they had been dead. To the same effect is Chase v. Lincoln, 3 Mass. 236; Sears v. Dillingham, 12 Id. 358; and see on this head, the cases collected by the annotators on Phillips, 3 vol. 1354.

The will in this case was offered in the Orphans' Court for probate, and although it might be sufficient in a case where the will was not contested, to admit it to probate on the proof of one witness, who subscribed the will, he testifying also to the subscription by the other witnesses, in the presence of, and at the request of the testator, we are clear that in a case like the present, when the heir contests the will, he has the right to demand that all the witnesses be called. They are required by the statute for his protection, and they are best qualified to speak, not only of the fact of the execution of the will, but also of the capacity of the testator to make a will. Yet this right must yield to the necessity of the case. If a subscribing witness be dead, or insane, or from infamy or any other cause, arising afterwards, be incompetent to testify, secondary evidence must be admitted, or great injustice would be done. The reason is the same when the witness is beyond the jurisdiction of the Court, by his own act. His deposition, if is true, might be taken, but without the will, which certainly ought not to be sent out of the State, his evidence would not be more satisfactory than the secondary testimony here offered of the other subscribing witnesses, that he signed the will as a witness, at the request, and in the presence of the testator. Such we understand to be the established practice, both in the United States and in England. In addition to the cases already cited, see those collected by Cow. & Hill, 3 vol. 1351, note 931.

In this Court, in Apperson v. Cottrell, 3 Porter, 66, a will of land had been admitted to probate, on the proof of two witnesses only, but as it did not appear but that the absence of the third witness had been accounted for, or any question made in the Court below, as to the necessity of producing him, the Court held the probate by the two sufficient. This is in effect a direct

decision upon this point, for the objection taken was well founded, if the absence of a witness beyond the jurisdiction, would not excuse his production, either in person or by deposition.

The act of 1806, (Clay's Dig. 598, § 11.) authorizing a commission to issue to take testimony where the subscribing witnesses to a will reside out of the State, does not affect the view here taken. The evident design of the act was, to provide for those cases where all the witnesses to a will resided out of the State, and was probably intended to authorize the transmission of the will beyond the State.

The known and admitted exception to the general rule, that witnesses must relate facts, and cannot detail opinions, is confined to questions of science, trade, &c. The difficult question of insanity appears, at least to some extent, and in some cases, to fall within the same exception, from the difficulty in many cases of detailing to a jury, the facts which induced in the mind of the witness the belief of insanity, and to form a correct conclusion upon which, would require a previous knowledge of the habits, demeanor, and mode of thinking, and acting, of the individual supposed to be insane.

Upon this subject, as might perhaps have been expected, a great difference of opinion is found to exist between different Courts. Some Judges holding, that the witness can only relate facts, whilst others hold, that the opinion of witnesses in connection with the facts, may be given in evidence. Upon the first branch, see Corlis v. Little, 1 Green, 232; Crowell v. Kirk, 3 Dev. 356; and upon the second, Grant v. Thompson, 4 Conn. 203; Pool v. Richardson, 3 Mass. 330; Wogan v. Small, 11 S. & R. 141, and Rambler v. Tryon, 7 Id. 90.

In the State v. Brinyea, 5 Ala. Rep. 243, the question came before this Court, and the general rule is thus stated: "When it is necessary to prove to a jury, that one is insane, this is done by showing a series of actions, or declarations, which evince an alienation of mind; the conclusion of insanity is to be drawn by the jury, and must be deduced from the actions, or declarations of which evidence is given." It is subsequently admitted, that there may be exceptions to the general rule, "arising out of some peculiar relation, or connection of the witness, with the person whose sanity is questioned." It appears also to be conceded, that when evidence has been given of the conduct, manner, and

general appearance of the person, medical men have been allowed to express their judgment as to the question of sanity. [1 Phil. Ev. 290.]

In this case the witness was not permitted to express his opinion to the jury, he admitting at the same time that he knew no facts, or circumstances, on which the opinion was based. As it would seem impossible to form an opinion upon any subject, without something, either real or imaginary, on which it was predicated, it is probable that the witness meant, that his opinion was formed from the general conduct, and demeanor of the testator, which impressed his mind with the opinion he entertained, but which he was unable to explain to others. But even considered with this qualification, we think the evidence was properly excluded. If it could be brought within the exception, hinted at in the case of the State v. Brinyea, previously referred to, still we apprehend, a mere opinion, for which no reason could be assigned, would not be evidence, as it would be mere conjecture. This would be to abandon to the witness the peculiar province of the jury, if such opinion exerted any influence over it.

The only case we have found, in which an opinion alone, without the facts on which it was based, was permitted to go to the jury, is the case of Wogan v. Small, 11 S. & R. 141, where the question, "did you think the testator fit, or unfit, to make a will?" was permitted to be put; but in that case we apprehend, that if the witness had admitted, he had no reason to give for the opinion he entertained, and that it was based upon no facts which he was able to disclose, his opinion would have been entitled to no weight whatever.

It is not shown that this witness stood in any peculiar relation to the testator, so as to give him opportunities of judging, superior to others, and thus to be able to detect the aberrations of the intellect, which others not so well acquainted with him, would not have observed—he is offered as an ordinary witness, and as such, under any possible construction of the bill of exceptions, he was properly excluded.

Let the judgment be affirmed.

TAIT, USE, &c. v. FROW.

1. Where a writ of *capias ad satisfaciendum* issues at the suit of one man for the use of another, the defendant is arrested thereon, and enters into bond with sureties, payable to the nominal plaintiff, for the use, &c. as expressed on the face of the process; conditioned that the defendant will continue a prisoner within the limits of the prison bounds; in an action brought thereon in the name of the obligee for the benefit of the party shown to be really interested, a surety is not estopped from alledging that the obligee died previous to the institution of the suit. Nor does the bond amount to an admission that the obligee was living when it was executed.
2. The statute renders unnecessary the revival of a suit brought in the name of one person for the use of another, where the nominal plaintiff dies during its pendency, but it does not authorise the commencement of a suit in the name of such party, if he be dead; and the defendant may plead his death either *in bar or abatement.*

Writ of Error to the Circuit Court of Dallas.

This was an action of debt, at the suit of the plaintiff in error against defendant, on a bond dated the 29th March, 1842, in the penal sum of seven thousand seven hundred and twenty-six dollars, executed by Elias Parkman as principal, and the defendant, together with Philip J. Weaver as his sureties, and payable to Caleb Tait, for the use of Edward W. Marks; conditioned, that Parkman, a prisoner in the jail of Dallas county, at the suit of Caleb Tait, use of E. W. Marks, should continue a true prisoner within the limits of the prison bounds, &c.

The defendant, among other pleas, pleaded in bar, that the nominal plaintiff, Tait, departed this life previous to the commencement of the action. To this plea the plaintiff demurred, and his demurrer being overruled, he replied, that the bond declared on was taken in conformity to the statute in such cases provided; that Tait was a nominal plaintiff, and that the defendant well knew he was dead before the bond was executed. The defendant demurred to the replication, his demurrer was sustained, and the plaintiff declining to amend, or plead further, a judgment was rendered against him for costs.

G. W. Gayle, for the plaintiff in error, made the following points:

1. The death of the nominal plaintiff should have been pleaded in abatement. It should have been averred in the plea that Tait died after the bond was executed, or if previously, that the defendant was ignorant of the fact when he subscribed the bond. If Tait was dead when the bond was made, Marks was in effect the legal obligee, and might sue thereon in his own name.

2. The bond is itself a record, and no plea can attack its validity; this can only be done by writ of error. [1 Chitty's Pl. 355; 5 Sergt. & R. Rep. 65; 16 Johns. Rep. 55.]

3. The replication is an answer to the plea; for if Tait was dead when the bond was executed, and that fact was known to the defendant, he would be estopped from pleading it. [Chitty on Bills, 177–8, and note 2; 1 H. Bl. Rep. 288; 1 Camp. Rep. 180, C.; 1 Chitty's Pl. 249, and note 1; 3 Taunt. Rep. 504; 1 Saund. on Pl. and Ev. 42.]

C. G. Edwards, for the defendant, insisted, that a suit could not be brought in the name of a dead man; that the replication did not set up matter of estoppel; and that the plea was good either in abatement or bar. [Jenks v. Edwards, use, &c. 6 Ala. Rep. 143.]

COLLIER, C. J.—It is a rule of very extensive application, that where one admits a fact or deed, either by reciting it in an instrument executed by him, or by acting under it, he shall not be received to deny its existence. But when the truth appears from the same deed or record, which would otherwise work the estoppel, then the adverse party shall not be estopped to take advantage of the truth. The obligors in the bond declared on do not admit that Tait, the nominal plaintiff in the execution, was living; the recital which precedes the statutory condition merely states the fact, that Parkman, the principal obligor, was a prisoner in the jail of Dallas county, at the suit of Caleb Tait, use of E. W. Marks, &c. True, Tait, for the use of the same individual, is made the obligee, yet this was intended merely that the bond might conform to the statute, which provides, that "Any prisoner imprisoned in a civil action may enter into bond with sufficient security to the plaintiff in double the sum of the debt or damages,

&c." It cannot be said that the obligors have made any admission, either impliedly or expressly, in respect to the state or condition of the nominal or real party in interest. They admit that process, such as is recited, was in the sheriff's hands, and that Parkman had been arrested under it; but whether that process was at the suit of a living man, or in despite of all objections is valid, are questions not within the scope of the act done, and consequently not concluded by it. This we think perfectly clear, when the character of the bond, and the circumstances under which it was prepared and executed, are looked to.

It is provided by statute, where any person shall institute a suit in the name of another, for his own use, the death of the person for whose use the suit is instituted, shall not abate it; but the same shall progress and be tried in the same manner as if the suit was instituted in the name of the person for whose use it was brought. [Clay's Dig. 313, § 3.] This act, it has been held, renders unnecessary the revival of the action, where the nominal plaintiff dies during its pendency; but it does not authorise the institution of a suit in the name of him who appears to have the legal interest in the cause of action, if he is dead. Such a case is unaffected by statute in this State, and the personal representatives must, as at common law, be the actors of record. [Jenks v. Edwards, use, &c., 6 Ala. Rep. 143.] It is clear then, that the suit could not be instituted in the name of Tait after his death; whether, as he was dead at the time the bond was executed, the legal interest enured to his personal representative, or vested in Marks, the beneficial plaintiff, are questions which are not now presented, and we consequently forbear to consider them.

In Jenks v. Edwards, use, &c. *supra*, it was held, that where a suit is brought in the name of one person for the use of another, the defendant may plead either in bar or abatement, that the nominal plaintiff was dead *at the commencement of the suit*. The objection to the plea, that it does not allege that Tait died after the bond was executed, or if previously, that the defendant was then ignorant of the fact, is sufficiently shown by the view taken, not to be defensible.

It results from what has been said, that the judgment must be affirmed.

NORMAN v. MOLETT.

1. When a contract in reference to the sale of land is signed by the vendor only, and the purchaser afterwards transfers the written contract to another, by indorsement, investing that person with all his interest and claim, the signature of the purchaser withdraws the contract from the influence of the statute of frauds.

Writ of Error to the County Court of Dallas.

Assumpsit by Molett against Norman, to recover $200 and interest agreed to be paid for certain lands.

At the trial, the plaintiff offered in support of his action, a writing in these words, to wit: "I have bargained and sold to Bentley Norman, a piece of land to contain five acres; said piece of land to be laid off in the north-east corner of," &c.; here follows a minute description of the lands, and the writing then proceeds thus: "That lot shall be among the first surveys that I will have executed; immediately after which I will be ready to take a promissory note of said Norman, for two hundred dollars, with interest from this date, payable 1st January, 1839, and to give him my bond for titles, to be made when the note shall be fully paid. December 1st, 1836. This is signed by the plaintiff, and on the back is written an indorsement, in the hand-writing of the defendant, in these words, to wit: "Warrenton, Dallas county, August 12, 1840. For value received, I assign all my right, title, claim and interest to the within described land, to Wm. DeC. Youngblood. J. B. Norman."

The question was, whether this was a sufficient *signing* within the statute of frauds, and the Court instructed the jury that it was. The defendant asked the Court to instruct the jury, that they ought not to find for the plaintiff, unless there was a contract, or memorandum of it, in writing, signed by Norman, and further, that there was no such contract, or memorandum in evidence.

The defendant excepted to the ruling of the Court, and the same question is presented here by the assignment of error.

EDWARDS, for the plaintiff in error, insisted, the indorsement of the agreement to another person, was not sufficient to take the case out of the statute. [Dig. 207, § 1; 14 John. 489.] In this State, the construction of the statute is more strict than in England, and our decisions go far to restore the statute to its original and intended effect. [2 Stewart, 24; Mooney v. Read, June Term, 1842.

G. R. EVANS, contra, cited Shipley v. Derrison, 5 Esp. 191; 2 Stark. Ev. 605; Gale v. Nixon, 6 Cowen, 445; 2 Leigh N. P. 1044; Steph. N. P. 1954; 3 Atky. 503; 20 John. 340; 14 Ib. 210; 16 Wend. 460.

GOLDTHWAITE, J.—The object of the statute of frauds is, to protect individuals from having parol agreements imposed on them against their consent; but it has uniformly been held, not to defeat a parol contract which is afterwards evidenced by a writing signed by the party sought to be charged with it. It is not essential that the signature should be upon the agreement itself, it is sufficient if it be indorsed on it as a notification of the assent of the party, or if it be written in a letter or memorandum which refers to the agreement. [2 Stark. Ev. 605.] In the present case, the contract between the parties was reduced to writing, and signed by Molett, at the time it was entered into, but was not then signed by Norman. Afterwards Norman conveys the beneficial interest in the contract to another person, and assigns, by indorsement, the written evidence of the contract, which he had received from Molett. This seems to bring the cause directly within the influence of the decisions in Shipley v. Derrison, 5 Esp. 190, and Gale v. Nixon, 6 Cowan, 445. Indeed the only difference between those cases and this, is in the circumstance, that in those the indorsement referred to matters of subsequent action between the parties themselves, whilst in this, it is the attempt to invest a third person with the right acquired by the contract, which was parol only. The mischief intended to be prevented by the statute, cannot have place under the matters connected with this case, for if the signature of Norman was necessary, to evince his willingness to be bound by the original stipulations, that is shown by his assigning his interest in it to another.

It is said, however, there is nothing in the terms of the contract expressed in the instrument, which made it obligatory on Norman, to give his notes to Molett, and that the indorsement may have been accompanied with the stipulation on the part of the indorser, to pay to Molett, the sum which he was to receive as the consideration of the sale of the land. If this was conceded, it would not change the legal aspect of the cause, inasmuch as Norman becomes bound to pay the purchase money in the same manner, by his subsequent written recognition of the contract, as if he had signed it at the same time as Molett.

We think the law of the case was correctly ruled in the Court below, and its judgment is therefore affirmed.

WRIGHT v. BOLTON & STRACENER.

1. Where a cause depending before a justice of the peace, is by agreement of the parties, submitted to arbitrators, who made an award which was entered up as the judgment of the Court, and an appeal taken to the Circuit Court, the award is final, unless set aside for corruption, want of notice, or other improper conduct of the arbitrators, as well in the appellate as in the inferior Courts.

Error to the Circuit Court of St. Clair.

This was a warrant, by the plaintiff in error, before a justice of the peace, for the value of a cow, killed by the defendant in error. Upon the trial before the justice, the parties by a verbal agreement, left the matter in dispute to the arbitration of three persons, who being sworn, and having heard the evidence, made their award in writing, and assessed the plaintiff's damages to eleven dollars, which was entered up by the justice as the judgment in the case; from which the defendant appealed to the Circuit Court. Upon the trial in that Court, the plaintiff again proved, and relied on the award, as conclusive. This the Court

overruled, and proceeded to the trial of the cause *de novo*, and evidence being introduced tending to prove, that the defendants were not guilty of the trespass, he rendered a judgment for the defendants, from which the plaintiff in error prosecutes a writ of error to this Court.

Bowdon, for plaintiff in error, contended, that the award, unless impeached for fraud, or some improper conduct of the arbitrators, was conclusive of the rights of the parties, and cited 2 Stew. 130; 4 Porter, 65; 1 Ala. Rep. 184, 278; 6 Cowan, 399; 14 John. 96; 1 Caines, 304; 15 John, 197, 497; 17 Wend. 410; 3 Caine, 166; 1 Litt. 322; Litt. S. C. 264; 4 Monroe, 47, 247; 3 John. 367.

S. F. Rice and Pope, contra.

ORMOND, J.—From the return of the justice of the peace, it appears, that this was an award made pursuant to the statute, (Clay's Dig. 50,) which declares, that the award shall be made the judgment of the Court, "and shall not be invalidated, set aside, or appealed from, unless it shall be made to appear, that the award was obtained by corruption, evident partiality, or other undue means." No such testimony was offered in the Circuit Court, the evidence only tending to show, that the defendants were not guilty of the trespass, whilst the plaintiff proved and relied on the award.

It is however wholly unimportant, whether the award is considered as made under the statute or not, as it is equally conclusive as an award at common law, and can only be impeached for fraud, want of notice, or other improper conduct in the arbitrators. In the absence of such proof, the award is final, and conclusive upon the rights of the parties.

The judgment must be reversed and remanded.

ALFORD AND MIXON v. COLSON, USE, &c.

1. Where there is a defect in proceedings removed by appeal or *certiorari* from a justice of the peace to the Circuit or County Court, a motion to dismiss, if available, should be made at the first term after the parties are in Court, and before a continuance of the cause.
2. An execution was issued by a justice of the peace, at the suit of C. against the goods and chattels of A, and levied on a slave, which A made oath was the property of W; and held by the affiant as his agent: a trial of the right of property was had between the plaintiff in execution and A, as agent, and the slave condemned to satisfy the execution; A then, upon his petition, obtained a *certiorari* and entered into bond with M as his surety, and the cause being removed to the Circuit Court, was dismissed, on motion of C; thereupon W applied for a writ of error, and executed a bond with surety for its prosecution. *Held*, that if W was the owner of the slave, the claim of property and all subsequent proceedings should have been in his name, instead of the name of A, as agent; that W could not prosecute a writ of error on the judgment of dismissal, and that the judgment was correct.

Writ of error to the Circuit Court of Monroe.

An execution was issued by a justice of the peace, at the suit of the defendant in error against the goods and chattels of the plaintiff, Alford, and levied on a female slave, which Alford made affidavit was not his property, but that Henry D. Whippel was her owner. A trial of the right was thereupon had before the justice, between the plaintiff in execution and Alford, the agent of Whippel, claimant, a verdict was rendered in favor of the plaintiff, and judgment rendered condemning the slave to the satisfaction of the execution.

Alford presented his petition praying that *certiorari* might be awarded, to remove the case to a higher Court for trial, which being granted, a bond was executed by the petitioner, with Mixon as his surety; conditioned as usual in such cases. At the second or third term after the cause was removed to the Circuit Court, the plaintiff in execution moved to dismiss it for the want of a proper affidavit. Thereupon it was ordered that the claim be

dismissed, and that the plaintiff recover of Alford and Mixon the costs, &c.

From a bond for the prosecution of a writ of error, it appears, that Whippel applied for the same, and entered into bond with surety. The writ of error describes the cause determined in the Circuit Court to have been between Colson, use, &c. against Alford and Mixon, without noticing Whippel.

W. P. Leslie, for the plaintiff in error, insisted that the cause should not have been dismissed by the Circuit Court, nor a judgment for costs rendered against Alford and his surety.

COLLIER, C. J.—If at any time the Circuit Court should have entertained a motion to dismiss, for a defect in the affidavit by which the claim of property was interposed before the justice, it was certainly too late after one or more continuances of the cause, subsequent to the appearance of the parties. This point has been repeatedly so ruled in analagous cases.

If the slave was the property of Whippel, the claim should have been interposed in his name. But instead of thus proceeding, the defendant in execution declares that he held the slave as the agent of Whippel, and the statement of the case before the justice, as well as the petition for a *certiorari*, and bond consequent thereon, show that in the character of agent, he was the claimant. Conceding that Alford's possession was, as he affirms in his affidavit, and still his principal should have been the party litigant, instead of himself.

It was clearly competent for the Court to have looked into the case, and if it appeared that the claim was made by an improper person, to have dismissed it on motion. This course could not have been productive of injury to any one; for if the cause had been tried upon an issue to the jury, and a verdict returned for Alford, as agent, &c. the judgment must have been arrested. The fact that a writ of error bond was executed by Whippel, and a writ of error applied for by him, as the condition recites, can have no effect upon the case.

We have extensive powers in respect to the amendment of writs of error, so as to adapt them to the transcripts they are intended to remove. But here, there is no want of conformity of

one to the other, and consequently no occasion for the exercise of the power.

It has been shown, that although the claim could not have been dismissed for a defect in the affidavit merely, yet it was properly disposed of, because the claimant was also the defendant in execution, and if, as agent, he could have made the necessary affidavit and executed the bond, yet the proceeding should have been in the name of his principal, and thus progressed to the close. The consequence is, that the judgment must be affirmed.

GRAHAM ET AL v. ABERCROMBIE, ET AL.

1. When the petition of administrators claiming distribution as the representatives of a distributee is dismissed, and the final settlement in the Orphans' Court is made with other parties, the proper mode to revise the proceedings rejecting the claim is by *certiorari*, and a writ of error will be dismissed.
2. The interest of a distributee in an unsettled estate, is the subject of assignment; if one is made, it divests the interest of the distributee, so that no proceeding can be had by his representatives against the administrator; his assignee is thereby invested with all his rights, and they may be asserted by him in his own name.

Writ of Error to the Orphans' Court of Lowndes.

THE transcript of the record of this cause contains the entire proceedings in relation to the estate of Alex. Abercrombie, from the grant of administration to its final settlement. So much as is necessary to the correct understanding of the errors assigned here, will be recited.

Administration was granted on the 2d August, 1841, to Martha Abercrombie, the widow of the decedent, and Thomas Abercrombie; at the same time an order was made, authorizing them

to sell the perishable property of the estate, at public auction, on six months credit.

On the 1st of November of the same year, as the record recites, Mrs. Abercrombie filed her petition, setting forth, that the decedent died without issue, whereby she by law is entitled to one one half of his personal estate; that the estate is in no manner embarrassed, or in debt, and therefore she prayed an order for the division of the estate. An order was accordingly made, that the whole of the personal estate should be divided into two parts, by certain commissioners then named, and that one part should be set apart to her, to be determined by lot. What purports to be a division and allotment is found in the transcript, under the signatures of three of the persons named as commissioners, and at the foot is written, "examined, admitted, and the usual orders to be made." Signed by the judge of the County Court, on the 3d January, 1842.

On the 21st of November, of the same year, Mrs. Abercrombie, as the record recites, petitioned the Judge of the County Court to award a writ of dower, she alledging that her late husband died seized and possessed of certain lands, described on the minutes. The order for the writ was made the same day, and the writ, which is copied into the transcript, was then issued. A return of certain persons styling themselves commissioners, summoned by the sheriff to lay off the dower, &c., appears, allotting her one half the lands described in the return, which are the same as mentioned in the previous order. This return bears date the 21st January, 1842, and was examined and admitted. The clerk was also directed to enter said dower upon record, and to file the return as an office document.

On the 3d July, 1842, Thomas Abercrombie returned a sale bill of one half of the personal property allotted by the commissioners as before stated.

On the 27th March, 1843, Francis M. Abercrombie, and Alex. Graham, as administrators of James Abercrombie, as the transcript recites, petitioned the Court to issue a rule to the administrators of Alex. Abercrombie, to show cause why they should not make final settlement and distribution of the estate among the several heirs; and a rule was accordingly granted for them to show cause, on the 2d Monday of May, then next. An alias rule was ordered by the Court, on the 19th day of June, of the same

year, for the administrators to show cause, on the first Saturday in August, and no further proceedings seem to have been had upon the rule, until the 25th of November, when the minutes recite as follows;

This day the petition of Francis W. Abercrombie and Alex. Graham, administrators of James Abercrombie was considered by the Court. Petitioners claimed to represent their intestate, who was an heir and brother of Alex. Abercrombie, and prayed for a rule, &c. Upon the return of the rule, the administrators of Alex. Abercrombie deceased, appeared in Court and put in their plea, stating that James Abercrombie, in his life-time, duly assigned his distributive share to be paid and delivered to William Burroughs, and that they had duly promised and assumed to pay the said Burroughs. The opposite party did not appear and join issue; the cause was then continued to this term, and upon evidence adduced, the Court was of opinion that said James Abercrombie had assigned away his interest; and that his administrators have no interest in the estate of Alex. Abercrombie. "Whereupon it is ordered by the Court, that said petition be dismissed, at the cost of the petitioners." The Court also ordered the petition to be recorded in the minutes of the Court, and the original, with the pleas, to be filed as office documents. Afterwards, at the same term, a final settlement of the estate was made, and the following persons ascertained as distributees, to wit: Thomas Abercrombie, Archibald Abercrombie, Mary Burroughs, wife of William Burroughs, and James Abercrombie, to William, Isaac, Cyrus, Mary and Eliza, children of Elizabeth Billinsglea, the said Mary being the wife of David Long and the said Eliza, the wife of Hamilton Moore. All these persons named as distributees are the brothers and sisters of the decedent, or children of a sister. The part of Mrs. Billingslea to be divided, share and share alike, between her children, and the part of James Abercrombie to remain in the hands of the administrators, to abide the process of the law. The administrators were ordered to pay the several amounts ascertained to the distributees. Another distribution was made of another portion of the assets, one half to the same parties, and the other half to Martha Lowry, formerly Abercrombie, she having since intermarried with Wm Lowry, who by the intermarriage became, in right of his wife, a co-administrator.

The writ of error is prosecuted by Alexander Graham and Francis W. Abercrombie, as administrators of James Abercrombie; against the other parties to the settlement, and the errors assigned are as follows:

1. The action of the Court in the matter of the petition of Mrs. Abercrombie for a division of the personal estate of the decedent.

2. The action of the Court in granting her petition for dower in the lands, without giving the legal notice.

3. In allowing the return made of the sale of the slaves of the estate.

4. The action of the Court upon the petition of the plaintiffs.

5. In allowing the account of the administrators without proper notice.

6. The action of the Court in the final decree.

A. GRAHAM, for the plaintiffs in error, submitted the following points:

1. The plaintiffs are parties to the final decree, as their intestate is recognized as entitled to a distributive share, therefore they have the right to re-examine all matters affecting his interest.

2. The order to divide the estate is irregular, as no other party was before the Court than the widow. The act evidently applies only to cases where the distributees are not the same persons as the personal representatives. [Dig. 196, § 22.] But if a division was proper under the act, parties were essential, and none are made. If the proceedings are sought to be sustained under the other enactment, [Dig. 173, § 5,] they are not conformable to it in any respect, [Green v. Green, 7 Porter, 19.]

3. The allotment of dower in the real estate is erroneous, in not conforming to the statute. [Dig. 173, § 5, Green v. Green, 7 Porter, 19.]

4. The sale of the slaves, &c. ought not to have been approved, as no necessity existed for the sale. [Dig. 196, § 22; Dearman v. Dearman, 4 Ala. Rep. 521.] As the sale was irregular, the decree should have been for the property in specie, instead of the price. [Dig. 305, § 43.]

5. The petition of the plaintiffs for distribution is founded on the statute. [Dig. 196, § 23.] If the creditors or assignees of a

distributee wish to assert rights to the distributive share, they must resort to another tribunal, but the assignment pretended here cannot be permitted to interrupt the usual course of proceeding. If it is conceded the matter shown was sufficient to dismiss the petition, it furnished no ground to direct the administrators to retain the portion coming to James Abercrombie, or his assignees.

6. The allowance of the accounts was irregular, as no notice was given, nor does it appear when they were stated. There is an entire omission to conform to the statute. [Dig. 229, § 41, 43; see also, Robinson v. Steele, 5 Ala. Rep. 473.]

N. Cook, contra.

GOLDTHWAITE, J.—1. The first inquiry here, is with reference to the rights of these plaintiffs to sue out a writ of error on the final decree. In terms, they certainly are not parties to it, and though in it the assumption is made, that James Abercrombie once was entitled as a distributee, yet the assumption also is made, that his interest was assigned during his life-time to some other person. The decree is neither in his, or his administrators' favor; but the representatives of the estate then settled, are directed to retain his distributive share to abide legal process. In this particular, then, the decree is a denial to recognize him as entitled to distribution, and resolves the question into the same one which the Court below decided, when it dismissed the plaintiffs' petition.

In proceedings at common law, and usually in equity, the plaintiff sets out the nature of his claim upon the record, and that is inquired into at the same time as the other matters in dispute; but the mode of proceeding is different in testamentary causes, before the eclesiastical courts. In these, the administrator, &c. in possession of the fund, is entitled to call upon the party invoking the aid of the Court, to propound his interest, and if the interest is disputed, to controvert it by an exceptive allegation. [McRae v. Pegues, 4 Ala. Rep. 158.] If the interest is made to appear, the petitioner is admitted as a party, and if, upon exception, it cannot be shown, the petition is dismissed, because it is the interest alone in the subject matter of controversy, which entitles the one party to call upon the other. In its very nature, this investigation is al-

ways a preliminary proceeding, and if dismissed, the party has no right to interfere with subsequent proceedings until he is reinstated. In Cawthorne v. Weissinger, 6 Ala. Rep. 714, we applied this rule to a creditor of an insolvent estate, whose claim had been rejected in a proceeding commenced prior to the act of 1843, [Dig. 195, § 14,] and held, that the proper mode of examining the order rejecting his claim, was by *certiorari*. The principle of that decision is supposed to govern this case, and shows, that the proper mode to examine the order dismissing the plaintiffs as parties, is by *certiorari*, and not by writ of error. To avoid any misconception as to the extent of the decision, it is proper to remark, that by virtue of the act before cited, a writ of error is now given to the individual creditor, and to the personal representative when the contest is between them, upon the admission or rejection of a claim against an insolvent estate.

The result of this conclusion is, that the writ of error must be dismissed, but as the parties would probably proceed in the mode indicated, without a decision upon their claim, it is proper now to consider whether the plea assuming the fact stated by it as true, is sufficient to bar the plaintiff from proceeding to enforce distribution.

The act which provides, that any person entitled to the distribution of an intestate's estate, may at any time after eighteen months from the time of granting admininistration, petition the Orphans' Court for a distribution, [Dig. 198, § 23,] merely regulates the mode in which the Court shall proceed; but its jurisdiction over the matter of distribution, may be referred to its general testamentary powers, which are given by another act. [Dig. 300, § 21.] Indeed, this act seems to stand in the place of the statute 22 and 23 Chas. 2, c. 10, by which the ordinaries in England were invested with jurisdiction to compel administrators to settle the estate, and pay the same by due course of eclesiastical law, without the limitation imposed by the subsequent statute of 1 Jas. 2, c. 17, which restricted the compulsory jurisdiction, except at the instance of some person on behalf of a minor, a creditor, or the next of kin. See these statutes cited 4 Burn. E. L. 369.

It is evident, in the very nature of things, that there must be some mode, and some Court, by means of which an administrator may be relieved from the responsibility of ascertaining, who

are entitled to the surplus in his hands, and under whose direction a payment may be safely made. It is true, no adjudication, either English or American, is to be found, which touches the point, but it seems in some degree established by the course of proceedings in the eclesiastical courts. Thus it is said, the creditors to whom the testator owed any thing, and the legatees to whom the testator bequeathed any thing, *and all others having an interest*, are to be cited to be present at the taking of the account; otherwise, the account made in their absence, and they never called, is not prejudicial to them. And again, it behooveth the executor, or administrator, when he is cited by any one of the parties to render an account, to cite the next of kindred, in special, and all others in general, having, or pretending to have, interest in the goods of the deceased, to be present if they think fit at the rendering and passing of the account. And then, upon their appearance, or contempt in not appearing, the Judge will proceed to give sentence, and the account thus determined *will be final*. And this is expedient to be done, whether [the account is settled] at the instance of any party or not. [Burns E. L. 369, citing Swin. 468, and 1 Ought. 354.] After the Court has pronounced on the validity of the accounts, the executor or administrator ought to be acquitted, and discharged from further molestation and suits. [Ib. 371.] In the Archbishop of Canterbury v. Tappan, 8 B. & C. 151, the Court of Kings' Bench admits that an administrator has the right to require the sentence of the ordinary for his own protection, and determined, that no suit could be maintained on his bond without one. If then, the administrator is protected by the decree of the ordinary, when there are distinct claims for distribution, why should he not be protected when the claim is between the distributee and his assignee? or what right can a distributee who has assigned his interest be said to have, which will enable him to cite the administrator to an account? We can find no answer to these questions which do not go the whole extent of denying the validity of any assignment of the interest.

Now the general rule in equity is, that a chose in action is assignable, and vests in the assignee all the interest of the assignor. [Story's Eq. § 1039 to 1057.] Beyond this it has been repeatedly held, that if the debtor assents to the transfer, when the chose in action is a debt, the right of the assignee is complete at law,

so that he may maintain a direct action against the debtor. [See cases cited Story's Eq. § 1039.] A distributive share cannot be said to be in the nature of a debt, as it is entirely uncertain in amount, until ascertained by the settlement, and therefore no suit at common law can be maintained, in the name of the assignee. But in equity he is entitled to proceed, in his own name, directly, against the *cestui que trust*, and we can see no just reason why he may not proceed in the same manner in the Orphans' Court, where the transfer is, with respect to a matter in which that Court possesses concurrent jurisdiction certainly, (if not so exclusively,) with a Court of Equity. It is true the statute of 1843 seems to contemplate that the settlement of estates shall be made by the personal representative on the one hand, with the legatees, or distributees, on the other, as it requires the party to file a statement on oath, of the names of the heirs, or legatees of the estate. [Dig. 229, § 43.] But we have seen that the same matter was necessary according to the common course of practice in testamentary causes, and therefore the proper construction of it is, to consider it as merely affirmatory of what the law then was, and as introducing no new rule. We are the more strongly inclined to this view, as the entire scope of our legislation upon the subject of the rights of distributees and legatees, seems to be, to give the Orphans' Court concurrent jurisdiction, to say the least of it, with Courts of Equity, of all matters affecting their rights. Besides this, any other construction would throw either the assignee or the administrators into a Court of Equity, to restrain the action of those plaintiffs who, upon the record, are shown to have no interest in this litigation.

Our conclusion is that if Mr. Abercrombie, in his life-time, assigned his interest in this estate to another, his representatives are not entitled to be heard in its settlement, and that all his rights have devolved on, and may be asserted by, his assignee, in his own name.

It will be seen, we have omitted to examine the other questions made by the assignments of error; this is not because we consider them unimportant, but because they do not affect the plaintiffs, until they show themselves entitled to raise them, by being parties to the record.

Writ of error dismissed.

WRIGHT v. POWELL.

1. One who contracted with two persons engaged in running a steamboat, as pilot, cannot charge a third person as a partner, who was not in fact a partner, and had never held himself out to the world as such, but who had done some acts from which it might have been inferred he was a partner, but of which the person so contracting, was at the time wholly ignorant, and did not engage as pilot in reference to his responsibility.

Error to the Circuit Court of Dallas.

This action was brought, by the plaintiff in error, against the defendant, as late partner and joint owner, with three other persons, of the steamboat North Star, upon a due bill of the clerk of the boat, to the plaintiff, as pilot of the boat, for $933 50.

Upon the trial, as appears from the bill of exceptions, there was evidence that plaintiff's intestate regarded Abram Powell, and Eldridge Gardner, alone as the owners of the steamboat North Star, until after their insolvency, and that he had contracted with them, on their credit and responsibility alone. There was evidence that Hudson Powell, the defendant, had held himself out to the public as an owner, by calling the boat his, and contracting for supplies, &c. for her. Under this testimony the Court charged the jury, that if the plaintiff looked on Abram Powell, and Eldridge Gardner, alone as the owners, and contracted on their credit and responsibility alone, he could not hold Hudson Powell liable, if not actually an owner, although he might have held himself out to the world as an owner, and was thereby made liable to other third persons, who might have contracted on his credit; to which charge the plaintiff excepted.

The charge of the Court is now assigned as error.

G. W. Gayle, for plaintiff in error, cited Story on Partnership, 95, 97; Watson on Part. 5; Cary on P. 45.

Evans and R. Saffold, contra, cited, 1 Camp. 404, Chitty on Con. 70, 243; 10 East, 264; 11 Wend. 87; Story on Part.

96; Collyer on P. 44, 214; 3 Car. & P. 202; 4 N. Car. R. 127; 1 John. Cas. 171; 6 Pick. 372; 15 Mass. 339.

ORMOND, J.—The general principle that one who holds himself out to the world as a partner with others, is liable for the partnership debts, although in fact he may not be a partner in the concern, or entitled to share in the profits, is undoubted, and is not controverted in this case. But it is insisted, that as this fact was unknown to the plaintiff in error, and as he gave credit to those who in fact were partners in the concern, the rule does not apply. Such is our opinion. The rule is doubtless laid down by the text writers in terms sufficiently broad, to cover the proposition as contended for by the counsel for the plaintiff in error, but in applying it, regard must be had to the reason of the rule, and the necessity which led to its establishment.

In the leading case of Waugh v. Carver, 2 H. B. 246, in the judgment of C. Justice Eyre, the rule, and the reason upon which it is founded, are both stated in the most lucid manner: "Now a case may be stated, in which it is the clear sense of the parties to the contract, that they shall not be partners; that A is to contribute neither labor nor money, and to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three, or four persons, when in fact they lent it only to two of them, to whom without the others they would have lent nothing."

It is very clear, from this opinion, that the reason of the rule is, the credit which is presumed to be given by one, thus holding himself out to the world as a partner, or permitting his name to appear as one of the partners, and the injury which would accrue to the creditor, if the supposed partner was afterwards permitted to contradict it. So in De Berkom v. Smith & Lewis, 1 Esp. N. P. 31, Lord Kenyon says, "though in point of fact parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, both shall be liable."

The decision of Lord Mansfield in Young v. Axtell, cited in 2

H. B. 242, from manuscript, is relied on as an authority, that if the defendant had held himself out at any time as a partner in running the boat, by claiming to be a part owner, and contracting for supplies, he would be responsible to the plaintiff, though he did not know of these acts, and did not contract in reference to his responsibility, but to that of others, who were in truth the only persons engaged in running the boat, as partners. In the case cited, Mrs. Axtell *suffered her name to be used* in carrying on the business, and upon that ground the decision turned, and the expressions used by Lord Mansfield were made. That "as she suffered her name to be used in the busines, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." The reason of this decision evidently is, that by permitting her name to be used in the firm transactions, she gave a credit to the partnership to the public generally; she was ostensibly a partner, and therefore whether one dealing with the firm was ignorant, or not of the fact, he was entitled to treat her as a partner, as she had by her conduct precluded herself from denying it.

No such fact exists in this case. The defendant had not permitted his name to go before the world as one of the partners in the firm transactions, he had merely done acts, from which one cognizant of them, might have presumed he was a partner, and and if, acting on that presumption, he had given credit to the firm considering him as one of its members, there would be great reason in holding him responsible, for the false confidence thus induced. But that is not this case. The defendant was not in fact a partner, nor had he done any act to induce the plaintiff to consider him as one of the firm, nor did the plaintiff, in entering upon his engagement as pilot of the boat, look to his responsibility for the payment of his wages, he cannot therefore succeed in this action.

The principle here laid down, is abundantly sustained by the authorities. See the cases cited by the counsel for the defendant in error.

Let the judgment be affirmed.

WOOD'S ADM'R v. BROWN.

1. The act of December, 1844, declaring that "it shall not be lawful for any of the Judges of the Circuit or County Courts," to sign bills of exception after the adjournment of the Court, unless by counsel's consent, *in writing*, a longer time, not beyond ten days be given; is mandatory in its terms, and intended to provide for an evil which requires that it should be interpreted according to the import of the language employed; consequently a consent extending the time for perfecting the bill must be in writing.

Writ of Error to the County Court of Dallas.

THE defendant in error moves to strike the bill of exceptions from the record, on the ground that it was signed and sealed by the presiding judge after he had adjourned his Court for the term. The facts are substantially these, viz: Certain questions were reserved at the trial, and a bill of exceptions was drawn up by the defendant's counsel, and handed to the judge during the term; as usual in such cases, the judge gave it to the plaintiff's counsel, who then, or not long afterwards, requested that time might be allowed for examining and noting objections to the bill. Thereupon the defendant's counsel expressed a wish to be present when the bill was being examined and passed upon, and asked that a day might be fixed for that purpose. The docket was exceedingly heavy, and being satisfied that the bill could not conveniently be examined during the term, in compliance with the request of the defendant's counsel, a day was appointed exceeding a week from the adjournment of the court. This arrangement, it was understood, was verbally assented to, by the counsel on both sides. Accordingly, on the day appointed, the judge was furnished the notes of objections, alterations and additions of the plaintiff's counsel, and with the aid of the suggestions of the counsel of the respective parties, prepared and signed the bill now found in the record. When the bill was signed, the presiding judge had no intimation that the act of 20th December, 1844, which prohibits the allowance and signing of bills of exception in

vacation had passed, nor is there reason to believe that the counsel on either side were aware of the existence of the act.

G. W. Gayle, for the plaintiff in error.
C. G. Edwards, for the defendant.

COLLIER, C. J.—By the act of 20th December, 1844, it is enacted, "that hereafter it shall not be lawful for any of the judges of the Circuit or County Courts to give or sign bills of exception, after the adjournment of the Court, at which they may preside, at which the exception may be taken: *Provided however*, by the consent of counsel reduced to writing, a longer time may be allowed, not to extend beyond ten days from the adjournment of said Court." Further, "it shall be the duty of each judge of the Circuit and County Courts, when they sign bills of exceptions, to add thereto the correct date of such signing."

The terms of this enactment very clearly indicate, that it is not merely directory to the judges, but that it is mandatory, and its observance imperative. It declares that it *shall not be lawful for any of the judges to sign bills of exception*, &c. and is not a direction to them to perfect bills in term time.

The evil complained of was, that the judges were frequently called upon after the Court at which the causes had been tried, had adjourned, to seal bills of exception, and when the facts and the points reserved had faded from their memory; that sooner than submit to the suspicion of not being willing to have their judgment revised, they sometimes signed bills which were inaccurate, and which occasioned a reversal to the prejudice of the other party. To avoid such a result, the act in question was passed.

The assent of the parties, that the judge might retain the bill, examine and sign it after Court, we think can have no influence. The statute, by way of *proviso* to the sweeping prohibition, declares that the consent of counsel, in writing, may legalize the signing, if made within ten days after the Court closes its sitting. This *proviso* must be regarded as an exception, and equivalent to an express inhibition to sign a bill out of term time, unless the consent is thus given.

We decline considering, at this time, whether the defendant can have the benefit of his bill of exceptions, by adopting the

course prescribed by the act of 1826, where the judge fails or refuses to certify an exception taken on the trial of a cause. A motion having that object in view, will be entertained and adjudicated when it is explicitly made.

Our conclusion is, that in the present aspect of the case, the bill of exceptions cannot be regarded as a part of the record, and will therefore be stricken out.

JONES, ET AL. v. TOMLINSON.

1. It is no sufficient ground to dismiss a *certiorari* cause, that the petition was verified before the clerk of the Court instead of some officer authorised to administer an oath.

Writ of Error to the County Court of Lauderdale county.

This cause was originally a suit before a justice of the peace of Lauderdale county, and was removed to the County Court, upon the petition of the defendants.

When the cause came to the County Court, Tomlinson, the plaintiff, was non-suited, for not appearing; afterwards, on his motion, the non-suit was set aside, and the *certiorari* dismissed, because the petition was sworn to before the clerk of the Court, he having no power to administer an oath. Judgment being rendered for costs against the defendants, they prosecute their writ of error, and assign the dismissing of the *certiorari* as matter of reversal.

Wm. Cooper, for the plaintiffs in error.
No counsel appeared for the defendant.

GOLDTHWAITE, J.—The constant course of practice is to discourage the dismissal of appeal and *certiorari* causes for any matters not connected with the rights of the parties. If it is con-

ceded the clerk of the Court has no authority to administer an oath in vacation, except in cases expressly directed by law; this was no reason to dismiss the *certiorari*, as the Court should have looked to this matter before awarding the writ; or if it afterwards became in any manner important, the petition might have been verified when the cause was proceeding. We do not perceive, however, in what manner a verification of the petition is important, except as shewing the true grounds upon which the *certiorari* is asked; and if all the facts stated were false, it would not affect the validity of the writ, or prevent the cause from being tried *de novo*.

In Curry v. Briant, 1 S. & P. 51, it is said, if the judge granting the *certiorari* deems the facts stated to be sufficient, the Courts will not afterwards entertain motions to dismiss.

We think the dismissing the cause, for the ground stated, was error.

Reversed and remanded.

SORRELL v. CRAIG, ADM'R.

1. A plea to an action of covenant, that since it was made, so much thereof as required the defendant to deliver 1,300 bushels corn, 20,000 lbs. fodder, six horses, 75 head of hogs, and 25 head of cattle, was waived by a subsequent contract between said defendant and said testator, in his lifetime, so that said defendant was not bound to deliver said horses, cattle, oxen and hogs, as may happen to die or be lost, without any neglect of defendant, before the day appointed for their delivery; and defendant avers that a large number of said horses, cattle, and oxen, did die, or were lost, without his default, before the time appointed for their delivery, &c., is bad, because an executory parol contract, cannot be pleaded in bar of an action upon a sealed instrument. And also, because of uncertainty, in not alledging how many of the horses, &c. had died, or were lost.
2. A will by which a testator charged his children with the debts they owed him as a part of their portion, except one child, whose debts were not men-

tioned, does not raise the presumption that such debts were released, the evidences thereof being retained by him uncancelled.

3. When a certain time is fixed for the delivery of ponderous articles, no demand is necessary to put the defendant in default, though he may defend himself against the action, by proving his readiness on the day.

Error to the Circuit Court of Dallas.

COVENANT broken by the defendant in error, against the plaintiff, upon a covenant executed by the defendant, with the testator of the plaintiff, for the lease of certain lands, and the delivery, on the 1st January, 1841, of certain articles therein mentioned.

The defendant pleaded several pleas of performance, upon which issues were taken, and also several special pleas, which were demurred to, the fourth being in substance as follows: That since the execution of the deed, in the plaintiff's declaration mentioned, so much of the covenants in said deed, as required the defendant to deliver 1300 bushels of corn, 20,000 lbs. of fodder, six horses, 75 head of stock hogs, and 25 head of cattle, was waived by a subsequent contract, between said defendant and testator, in his life-time, so that the said defendant was not bound to deliver said horses, cattle, oxen and hogs, which may happen to die or be lost, without any neglect of defendant, before the day appointed for the delivery, and defendant avers that a large number of said horses, cattle and oxen did die, or were lost, without the fault or neglect of the defendant, before the time appointed for their delivery, &c. To this plea the plaintiff demurred, and the Court sustained the demurrer.

The defendant also pleaded, severally, a tender of the articles to the testator, in his life-time, and to the plaintiff, upon which issues were taken.

From a bill of exceptions, it appears that the defendant offered in evidence, the will of the testator, made after the period had elapsed for the delivery of the articles mentioned in the covenant, for the purpose of proving that the testator had charged several of his sons and sons-in-law, with certain amounts which they owed him, giving to each of his sons, and sons-in-law, equal portions of his estate, and deducting such indebtedness from the portion of such indebted son, or son-in-law. That this was done in relation to several of the legatees, but not in relation to the de-

fendant, of whose indebtedness nothing was said in the will—but on motion of the plaintiff, the will was excluded from the jury, to which the defendant excepted. There was no evidence of any demand by the testator in his life-time, or his executor since his death, of any of the articles sued for, and the defendant asked the Court to charge the jury, that to enable the plaintiff to recover, proof of such demand, or something equivalent, was necessary, but the evidence showing that said articles were to be delivered on a certain specific day, and with reference to the state of the pleadings, the charge was refused by the Court, and the defendant excepted. The Court charged the jury, that under the pleadings, it devolved on the defendant to prove that he had delivered the articles, unless it otherwise appeared in the cause; to all which the plaintiff excepted.

He now assigns for error, the judgment on the demurrer to the plea, and the matters set forth in the bill of exceptions.

Evans, for the plaintiff in error, cited 1 Starkie's Ev. 418, 623; 32 Eng. Com. Law, 737; 3 Ala. Rep. 16, 371.

Edwards, contra, cited 5 Ala. Rep. 245; Minor, 411; 1 Stewart, 524; 3 Litt. 199.

ORMOND, J.—The plea relied on in this cause, as a bar to the action, was clearly defective. A contract under seal, may be discharged by a parol executed contract, but an executory parol contract, cannot be pleaded in bar to one under seal. [1 Chitty on Pleading, 484, and cases cited; see also Barelli v. O'Conner, 6 Ala. Rep. 617, and cases cited; and McVoy v. Wheeler, 6 Porter, 201.]

The plea is also bad for uncertainty, for want of an averment of the number of horses, cattle and hogs which died, or were lost, without fault or neglect on his part. This was a matter peculiarly within the knowledge of the defendant, and which he was thefore bound to state with precision. The allegation that a large number of the horses, cattle and oxen, died or were lost, without fault or neglect on his part, presented no point upon which issue could be taken, and the demurrer to the plea was properly sustained for this cause, as well as for the reason previously assigned.

The Court did not err in excluding the will of the father of the defendant from the jury. The inference attempted to be derived from it, was, that as the general scheme of the will, was an equal division amongst all the children, and as the testator had charged some of the children, with the debts they owed him as part of their portion, and had omitted all mention of the claim under this covenant, that it was the intention of the testator to release all claim to this demand. This inference, it appears to us was unwarranted. The general rule is, that a debt is not released by a bequest to the debtor, the evidence of the debt remaining uncancelled, but to produce that result, there must be evidence of a clear intention to release the debt. The law is thus stated by this Court in Sorrlle v. Sorrlle, 5 Ala. Rep. 248, where the question arose upon this will.

The inference therefore arising from the will, would seem to be the reverse of that for which it was introduced. At all events, no implication such as that which it was intended the jury should make, could be deduced from the mere silence of the testator, as to this debt, the evidence of which it appears remained uncancelled amongst his papers, and the will was therefore properly rejected.

There was no necessity for the plaintiff to prove, under the state of the pleadings, that he made a demand of the articles sued for, previous to bringing the suit. When a certain time, as in this case, is fixed for the delivery of ponderous articles, no demand is necessary to put the defendant in default, though he may defend himself against the action, by proving that he was ready and willing at the time and place appointed by the contract, to deliver them. [Thackston v. Edwards, 1 Stewart, 524; McMurray v. The State, 6 Ala. Rep. 326.]

No plea of a readiness to deliver was interposed. The plea of tender is not an equivalent plea, but if it was, the burthen of proving it was assumed by the defendant.

From this examination it appears, that there is no error in the record, and the judgment must be therefore affirmed.

DOE, EX DEM. CHAUDRON v. MAGEE.

1. A *lis pendens* duly prosecuted and not collusive, is notice to a purchaser, so as to affect and bind his interest by the decree; and the *lis pendens* begins at least from the service of the *subpœna* after the bill is filed, and by analogy, after publication regularly made, as to a non-resident defendant. In the latter case, the newspaper in which publication is printed, when aided by the production of the order, and extrinsic proof that the paper was regularly issued as contemplated by it, would be competent evidence to show the pendency of the suit.
2. Whether one purchases of a mortgagor previous or subsequent to the commencement of a suit for the foreclosure of a mortgage, it is not necessary to make him a party, and such subsequent purchaser need not be made a party to affect him with the *lis pendens*.

Writ of Error to the Circuit Court of Mobile.

This was an action of ejectment, for the recovery of certain lots of land situated in the city of Mobile. The defendant entered into the usual consent rule, and the cause was tried on the plea of "not guilty;" the jury returned a verdict for the defendant, and judgment was rendered accordingly. On the trial, the plaintiff excepted to the ruling of the Court, and the bill of exceptions discloses the following case, viz: The plaintiff introduced as evidence the record of a suit determined by the Court of Chancery sitting at Mobile, at the suit of Duval's heirs against George Getz and Joshua Kennedy; the object of which was to foreclose a mortgage executed by Getz to the ancestor of the complainants; or else to set aside a conveyance made by the mortgagee to the mortgagor of the premises in question, and let the complainants into the possession of the same. *Further*, he gave in evidence the deed of the register, by which the mortgaged premises were conveyed to him as the purchaser at the sale made under the decree of foreclosure; and then proved their location, the value of the rents, &c., "and here rested his case." The defendant then "introduced a deed from Getz, the mortgagor, dated the — day of ——, 1836, together with various other deeds; all going to show a conveyance of the property in ques-

tion, after the bill for a foreclosure was filed, and before the decree was pronounced." To prove the pendency of the suit in equity, at the time and previous to the execution of the deeds under which the defendant claims, he adduced the newspaper in which the order made at the March term, 1835, of the Court of Chancery, was published in June and July of that year. The defendant's counsel objected to the admission of this evidence, and it was excluded by the Court.

The plaintiff then offered to prove that Henry Hitchcock, under whom the defendant claimed, was informed at the time that he made the purchase from Getz, of the premises in question, that the bill for a foreclosure was pending; and such proof was actually adduced. *Whereupon*, the Court charged the jury, "that if Hitchcock purchased the property in dispute from Getz during the pendency of the suit in equity, he was not entitled to notice, and is bound by the decree. If he purchased before any suit pending, he ought to have been made a party to the suit by *subpoena*, or publication. The pendency of the suit commences as soon as the defendant is made a party; if made a party by *subpoena*, it commences as soon as the *subpoena* is served; if by publication there must be evidence from the record that publication was made; if there is no such evidence it is to be presumed that he answered as soon as he was notified, and the pendency of the suit commences from the time of his answer. In this case, if Hitchcock purchased before the defendant Getz answered, he ought to have been made a party to the suit."

J. Test, with whom was J. Gayle, for the plaintiff in error, insisted that Hitchcock was not an essential party to the bill to foreclose; he had notice of its pendency, though the complainants may not have been informed of his purchase, and that notice, however communicated, was sufficient to bind him. He stood in the place of the mortgagor, and could only claim the equity of redemption. A notice in fact should certainly be regarded as equivalent to a registry of the mortgage, which by construction, operates a notice, and by statute is declared to be sufficient to prevent an incrumbancer, not in possession, from being defeated by a subsequent purchaser.

COLLIER, C. J.—The question how far the pendency of a

suit was notice to a purchaser from the defendant, was most elaborately considered in Murray v. Ballou, 1 Johns. Ch. Rep. 566. Chancellor Kent there said, "The established rule is, that a *lis pendens*, duly prosecuted and not collusive, is notice to a purchaser, so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the *subpœna* after the bill is filed." To the same effect are Murray v. Finster, 2 Johns. Ch. Rep. 155; Heatley v. Finster, 2 Johns. Ch. Rep. 158; Murray v. Lylburn, 2 Johns. Ch. Rep. 441; Green, et al. v. Slayter, et al., 4 Johns. Ch. Rep. 38. In Culpepper v. Austin, 2 Ch. Cas. 115, the testator had conveyed lands to his executors in fee to pay his debts, and after his death the defendant purchased the lands of the executors for a valuable consideration, pending a bill brought by the heir to have the lands, on the ground that they were not wanted to pay debts. It was held by the Lord Chancellor that the pendency of the suit between the heir and the trustee (although there was no notice in fact,) was sufficient notice in law, and the defendant purchased at his peril; so that if it appeared the sale was unnecessary and improper, the heir would recover against the purchaser. The result was that the defendant lost his purchase, though he had purchased and paid the money the same day the bill was exhibited. [See Self v. Maddox, 1 Vern. Rep. 459; Finch v. Newnham, 2 Id. 216; Newland on Con. 506; Garth v. Ward, 2 Atk. Rep. 174; Worsley v. Scarborough, 3 Id. 392; Harris, et al. v. Carter's adm'r et al. 3 Stew. Rep. 233.] Sir William Grant, Master of the Rolls, said, "He who purchases during the pendency of the suit, is bound by the decree that may be made against the person from whom he derives the title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed. Otherwise, suits would be interminable, or which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it." [The Bishop of Winchester v. Paine, 11 Ves. Rep. 194. See cases collected in Kinne's Law Comp. 131, 132, and 2 Pirtle's Dig. 73–75.]

These citations very satisfactorily show, that the rule we have stated is well established. If it does not operate until process is served upon a resident defendant, we would say after publication

as to a non-resident, there was such a *lis pendens* as would affect a purchaser with notice. Publication is a means provided by statute, for bringing in a non-resident defendant to a suit in Chancery, and as it respects the action of the Court, is equivalent to a *subpoena*. If necessary then, to show that parties were made, in order to overreach and defeat the title of the purchaser acquired *pendente lite*, we can conceive of no objection to the admission of the newspaper in which the order of publication was printed. Perhaps it might be insufficient evidence to make out the fact, in itself; but when aided by the production of the order, and parol evidence that the paper was regularly printed and issued as it purports, the proof would be ample. If the order did not appear of record, it might perhaps be necessary to have it entered *nunc pro tunc*, unless it was recited in a decretal order subsequently made, by which the bill was taken for confessed. But there is nothing in the bill of exceptions to show that the record in Chancery was defective, unless it be the charge to the jury; and this is a mere hypothetical statement of the law, as understood by the Circuit Judge.

In Cullum, et al. v. Batre's ex'r, 2 Ala. Rep. 420, we decided, that to a bill for the foreclosure of a morgage, it was not necessary to make either a prior or subsequent incumbrancer a party; that the rights of the former are paramount, and the latter, where he is not made a party, will not be concluded. [See Judson v. Emanuel, et al. 1 Ala. Rep. 598; Walker, et al. v. The Bank of Mobile, 6 Ala. Rep. 452.] It is perfectly clear, that Hitchcock purchased previous to the institution of the suit by Duval's heirs v. Getz and Kennedy, and under no circumstances was it necessary to have made him a defendant in that case, in order to affect him with the *lis pendens*. He was a purchaser *pendente lite*, and in legal presumption, had notice.

This view is decisive of the cause, and the consequence is, that the judgment is reversed, and the cause remanded.

S. & E. TRAVIS v. TARTT.

1. A proceeding by garnishment is the institution of a suit by the attaching creditor, against the debtor of his debtor, and is governed by the general rules applicable to other suits adapted to the relative position of the parties.
2. When one of a firm is garnisheed the creditor must be considered as electing to proceed against him solely, and on his answer, admitting the indebtedness of the firm, is entitled to have judgment against him.
3. A suit commenced against one partner of a firm, will survive against his personal representatives, and may be revived against them by *sci. fa.*
4. When the creditor omits to proceed against the personal representatives of one deceased for eighteen months, and omits also for the same time to present his claim, the statute of non claim is a good bar to the *sci. ja.*
5. If this defence is asserted by answer, instead of plea to the *sci. fa.* the plaintiff should demur, but the Court ought not, without action by the plaintiff, render a judgment on the *sci. fa.*, disregarding the answer.

Writ of error to the Circuit Court of Sumter.

Brownrigg & Tartt sued out an attachment against one Hodges, returnable to the fall term of the Circuit Court for the year 1839. The return is, that no property was found, but Enoch Travis was summoned as a garnishee. At the return term Travis appeared and filed his answer, by which he admits that himself and brother, Seaborn Travis, as partners, jointly purchased a tract of land from Hodges, for which they gave their joint promissory notes, signed S. & E. Travis; one of them due 1st day of March, 1840, for $1,850, or thereabouts; the other for the same amount, due 1st March, 1841. These notes were payable to Hodges, and delivered to him, and Hodges afterwards delivered them to his wife, by whom, as the garnishee believed, they were taken to North Carolina. What then became of them, the garnishee did not know, but he believed they continued in the possession of Mrs. Hodges.

No further proceedings in the cause appear to have been taken until the spring term, 1842, when it was suggested that Travis, the garnishee, had died since the filing of his answer, and a *sci.*

fa. was ordered to Seaborn Travis, the legal representative of the said garnishee.

At the fall term of the same year, the order for *sci. fa.* was renewed, as it also was at the spring term, 1843, but in both instances to Seaborn Travis, as the administrator upon the estate of Enoch Travis, deceased. Upon this a *sci. fa.* issued but was returned not found. At the fall term 1843, an *alias sci. fa.* was ordered to issue to Seaborn Travis; and in the vacation one issued to Seaborn Travis and Amos Travis, jr., as executors of the last will and testament of Enoch Travis, deceased, to appear and show cause why they should not be made parties, and judgment rendered against them. This *sci. fa.* is returned executed, and at the spring term, 1844, Amos Travis, as executor of Enoch Travis, appeared and filed an answer, in which he admits the appointment and qualification of himself and Seaborn Travis as executors, but asserts that they were qualified in the spring of the year 1841, and that the debt in this behalf was not presented to either of the executors within eighteen months after the grant of letters testamentary. He denies that Enoch Travis was indebted to Hodges, except as partner in the firm of S. & E. Travis, and that the indebtedness of that firm survived to Seaborn Travis, and is not due from the executors of the deceased partner. He also asserts his information, that the debt to Hodges has been paid by Seaborn Travis, in his character of surviving partner.

The Court, upon the appearance by attorney, of both the executors, as is stated in the judgment entry, and upon the answer of Enoch Travis, which was filed at the return of the attachment, rendered judgment against the defendant in attachment, and afterwards against the executors of Enoch Travis, of condemnation of the monies due from S. & E. Travis to Hodges, to the amount of the judgment and costs, and awarded execution to be levied *de bonis testatoris.*

The executors of Travis now assign several errors in the proceedings of the Court below, but of which the principal are—1. That the suit is not such as survived against the personal representatives. 2. That the claim, when sought to be enforced against the executors, was barred by the statute of *non claim.*

E. W. Peck and L. Clark, for the plaintiffs in error.

R. H. Smith, contra, cited Aikin's Digest, 259, § 1, upon the survivorship. A garnishment is a legal suit, and governed by the same general rules as any other suit. [Thomas v. Hopper, 5 Ala. Rep. 442.]

The defence of non-claim cannot be allowed under the circumstances of this cause—1. Because the plaintiff in attachment had not the evidence of the debt within his power, so as to be able to present it. 2. Because the service of the *sci. fa.* relates back to the service of the garnishment, and binds the estate from that time. 3. Because the right of the plaintiff was initiate by the attachment, which stopped the debt, which thereby was placed within the custody of the Court. [Dore v. Dawson, 6 Ala. Rep. 712.]

GOLDTHWAITE, J.—1. The proceeding by garnishment in point of law is the institution of a suit in which the creditor is permitted to proceed against the debtor of his debtor, and therefore would seem to be governed by the general rules applicable to other suits. [Thomas v. Hopper, 5 Ala. Rep. 442.] But in the ancillary suits which grow out of the attachment laws, the proceedings, when not prescribed by the statutes must, to a great extent be adapted to the condition and relative position of the parties. [See Goodwin v. Brooks, 6 Ala. Rep. 836; Graves v. Cooper, at this term; Myatt v. Lockhart, Ib.]

2. We may consider this suit then, as instituted by the plaintiffs in attachment, through the medium of their debtor, against Enoch Travis, and the question arises on his answer, if a judgment could properly be rendered against him, upon the disclosure that he was indebted, as one of a partnership firm, to the defendant in attachment. The act of 1818 provides, that whenever any cause of action may exist against two or more partners, of any denomination whatever, it shall be lawful to prosecute an action against any one or more of them; and when a writ shall be issued against all the partners of a firm, service of the same upon any one of them, shall be deemed equivalent to a service on all. Here the garnishment is issued against one partner only, and therefore the plaintiffs must be considered as having elected to proceed against him solely, and we think it clear they were entitled to have judgment against him upon his answer; but after that was made, and before any judgment rendered upon it, his death intervened, and

therefore the further question arises, whether the suit survives, and was properly revived against his personal representatives.

3. It will be observed the statute does profess to change the liability of partners from joint to joint, and several; it allows the privilege of sueing each *partner* and provides that a service on one shall be equivalent to a service on all. As the statute neither directs that a suit, when once commenced, shall or shall not survive, we must look to the probable intention, to be ascertained in the first instance from the act itself, and beyond it from the then existing law. As the privilege is given the creditor, of considering the service on one as bringing all the partners before the Court, the other clause, which warrants a suit against one only, would seem to be entirely useless, unless such suit, when commenced, would survive, and might be prosecuted against the personal representatives. It is true, that by the common law, upon the death of a partner, the remedy was gone, at law, against his personal representatives, but in equity the liability was held to continue, and, it is said, could be enforced by bill, whether the survivors were solvent or otherwise. [Story on Part. 514, and cases there cited.] Indeed, in this respect, it is now recognized as the well settled doctrine, that there is no distinction between the debts due from partners, and those due from other joint debtors. In equity, all are considered as joint and several, and the creditor may pursue the personal representative of the deceased joint debtor, or partner, whether the survivors are insolvent or otherwise. [Devaynes v. Noble, 1 Mer. 529; Story's Eq. § 676, and cases there cited.] It is true, in Marr v. Southwick, 2 Porter, 351, it was considered by this Court, that a creditor could not pursue the personal representatives of a deceased partner, in equity, without alledging and proving the insolvency of the survivor; but it is there conceded, that if suit was commenced, under the statute, against one of a partnership, it would survive against his personal representatives. See also, as bearing on this subject Von Pheel v. Connelly, 9 Porter, 452; Trann v. Gorman, Ib. 456; Bartlett v. Lang, 2 Ala. Rep. 404; Bean v. Cabbiness, 6 Ib. 343.] The remedy at law, under the act previously cited, was further extended by an act passed in 1839, which gives the right to creditors to sue and recover their demands at law, of the personal representative of a deceased partner, without having first prosecuted the survivor to insolvency. The act is limited by two provi-

sos, in these terms: "*Provided*, the plaintiff shall, before instituting such suit, make affidavit in writing, before the clerk of the Court, or Court itself, to be filed with the papers, that the survivor is insolvent, or unable to pay the amount of the debt; or is beyond the jurisdiction of the Court: *Provided, further*, that when any such representative is sued separately, which may be done without such affidavit, no execution shall issue against such representative until an execution is *bona fide* run, and returned *nulla bona* as to the survivors." The first *proviso* seems to contemplate, that when the suit is commenced against the representatives of the deceased partner, and no suit at that time is instituted against the survivor, that the affidavit is a pre-requisite; the second, that when suit is commenced separately against the representative of the deceased partner, and the survivors at the same time, the affidavit is not necessary, but no execution can be taken out until one is made. From this review of the legislation and the decisions bearing upon this subject, we come to the conclusion that a suit commenced against one partner in his life-time survives, and may be prosecuted against his personal representatives. It follows therefore, that the *sci. fa.* against the personal representatives in this case was proper.

4. In Robinson v. Starr, 3 Stewart, 90, it was held, that a garnishee was not discharged by the omission to take a judgment against him at the return term, no judgment having then been had against the defendant. In Leigh v. Smith, 5 Ala. Rep, 583, a judgment *nunc pro tunc*, was allowed a garnishee several terms after his answer. See also, Gaines v. Bierne, 3 Ala. Rep. 114; Graves v. Cooper, at this term.

It follows from these decisions, that as no judgment was entered against the garnishee, when he made his answer, it might be rendered subsequently, whether of the term it was entered, or *nunc pro tunc* as of the term of his answer; or at the term afterwards, when judgment was rendered against the defendant in attachment. When therefore the personal representatives were called on by *sci. fa.* to show cause why they should not be made parties to the proceedings, it was their privilege to show any cause which existed at that time, to discharge the estate which they represented. The statute of non claim is one intended not only for the protection of the administrator, but is also for the benefit of the heirs and distributees of the decedent. [Thrash v.

Sumwalt, 5 Ala. Rep. 13.] And it is as much a bar to a judgment to which the administrator is not made a party, or which is not presented as a claim to him, as any other demand. Until it is so presented, or until he is made a party to the judgment, he is not chargeable with it. In Hollinger v. Holley, at this term, we considered another similar statute, and held, that even making the necessary parties, did not dispense with the necessity to file the judgment as a claim in the clerk's office, when the estate was represented insolvent.

If an imperfect judgment exists against the decedent, it certainly is as much the duty of the creditor, asserting that as a claim against his estate, to present it within eighteen months, or to take the necessary measures to bring in the administrator, as if it was a perfect proceeding. The fact that the creditor has no control of the evidence of the original debt, cannot make a distinction, because that is not what he is required to present, that is not his claim; the one which he is invested with, arises out of the proceedings instituted by him. Nor is the fact that a suit is pending, a sufficient reason to withdraw the claim from the influence of the statute. [See King v. Mosely, 5 Ala. Rep. 610.]

5. It is said, however, that this defence is not insisted on in the proper mode, as it is attempted to be raised by the answer of the executors, when it should have been by plea to the *sci. fa.* and it is urged, the answer is no part of the record, which can be looked to for the purpose of reversal.

The English practice is, to declare in *sci. fa.* upon the appearance of the party, and to this declaration the defendant pleads either in abatement or bar, as in other suits. [2 Saund. 72 t.] But with us, the universal practice is, to consider the *sci. fa.* as sufficient, without any declaration upon it. Usually, the controversy is determined upon a motion to quash, or upon a demurrer, but in some cases, such as *sci. fa.* against bail, or upon recognizances, pleas are usual and customary. But we do not think an answer as distinguished from a plea, is so entirely irregular as to warrant the Court in entirely disregarding it. If the plaintiff here wished to raise the question whether this mode of defence was proper, he should have demurred, or otherwise in some manner called the attention of the Court and opposite party to the defectiveness of the pleading. As this was not done, and as the an-

swer contains a substantial matter of defence, in view of the statute of non claim, the judgment cannot be sustained; but must be reversed and remanded for further proceedings.

HOOKS & WRIGHT v. BRANCH BANK AT MOBILE.

1. A surety cannot plead that his principal is dead, and due presentment of the claim was not made to his representative. Nor will the omission to present the claim for payment to the representative of the principal in the debt, affect the right of the surety to recover from the estate, if he is compelled to pay the debt.

Error to the Circuit Court of Mobile.

Motion by the Bank against the plaintiffs in error.

Plea, that the defendants were sureties of one C. Hooks, who has departed this life; that administration has been granted on his estate, but that the administrator was not notified of the existence of the debt, by which the estate has been discharged from its payment.

To this plea the Bank demurred, and the Court sustained the demurrer, and rendered judgment for the Bank, from which this writ is prosecuted.

J. Gayle, for plaintiff in error.

Fox, contra.

ORMOND, J.—The exemption from suit, if due presentment of the debt is not made to the representative of an estate, is a privilege appertainining to the estate of the deceased, and those interested in it, and cannot be claimed by any other person liable on the same debt. Nor is the right of one so circumstanced, who may be compelled to pay the debt, to proceed against the estate, at all affected, by the omission of the creditor to present

the claim to the representative of the estate. His right to recover from his principal, arises from the payment of the debt, and is not impaired by the omission of the creditor to make due presentment. This point was expressly ruled in the case of Cawthorne v. Weisinger, 6 Ala. 716, and previously in McBroom v. The Governor, 6 Porter, 32. Let the judgment be affirmed.

SPENCE v. BARCLAY.

1. The doctrine of contribution does not apply as between accommodation indorsers; consequently, in the absence of an express or implied agreement changing the liability of indorsers *inter se*, they are bound to pay in the order in which their names appear on the paper.
2. In an action of assumpsit, at the suit of a subsequent against a prior indorser, to authorise the admission of the note as evidence, it is sufficient to prove the signature of the maker and the defendant; and the recital in a joint judgment rendered upon the note at the suit of a Bank against the defendant, the plaintiff and maker, are evidence in such an action to charge the defendant.
3. In an action by a prior against a subsequent indorser, who has been compelled to pay the note, a declaration which alledges the making of the note, its indorsement, protest for non-payment, and notice to the defendant, and thence deduces his liability, if sustained by proof, entitles the plaintiff to recover; *especially* if a count is added for money paid, laid out and expended.

Writ of Error to the Circuit Court of Talladega.

This was an action of assumpsit, at the suit of the defendant in error against the plaintiff, to recover money which had been paid by the former, but for which the latter was primarily liable. From a bill of exceptions, sealed at the trial, it appears that the plaintiff below produced a promissory note made by Simeon Douglass, on the 18th Dec. 1839, for the payment of three hundred and twenty-two dollars and fifty cents, one hundred and

twenty days after date, to the order of the defendant, "for value received, negotiable and payable at the Branch of the Bank of the State of Alabama, at Decatur." This note was indorsed thus: "Solomon Spence, H. G. Barclay," and the hand-writing of the maker and defendant was both proved. The defendant objected to its admission as evidence, but his objection was overruled.

The plaintiff then offered to read a duly certified transcript of a judgment recovered upon the note above described by the Branch Bank at Decatur against both the plaintiff and defendant, in the County Court of Morgan. The judgment entry in that case recites, that the note was indorsed by the defendant to the plaintiff, and by the latter to the Branch Bank; that it was at maturity presented at the Bank for payment, which was refused; and that it "was then and there protested for non-payment, of which the said indorsers then and there had notice."

It was further proved by the plaintiff, that in the winter or spring of 1843, an execution issued on the judgment in favor of the Bank came to the hands of the coroner of Talladega, that the plaintiff and defendant disputed with each other as to their respective liabilities to pay the same. The plaintiff insisted that the defendant should satisfy it *in toto*, and the defendant contended that they were equally liable, and should each pay one-half. In the summer of 1843, another execution came into the coroner's hands, and the plaintiff and defendant each paid one-half of it, under an agreement that they should leave it to some Court to decide the question of their liability respectively. The witness inclines to think that it was to the Circuit Court of Talladega, then in session.

This was all the evidence in the cause, and the Court charged the jury, that the plaintiff could not recover unless the evidence showed that the note had been duly protested, and notice thereof given in due season to the defendant. The Court, however, remarked, that the judgment entry was *prima facie* evidence that the protest had been made, and notice regularly given.

The defendant then prayed the Court to charge the jury, that if they believed the evidence that had been adduced, they should find for the defendant; this charge was refused. The several questions raised upon the bill of exceptions are duly reserved for revision.

T. D. Clarke, for the plaintiff in error.—The recitals in the judgment in favor of the Bank, either alone, or assisted by the parol evidence, do not support the allegations of the declaration, but are actually variant. The judgment in that case did not establish a protest and notice, and the charges prayed should have been given.

W. P. Chilton, for the defendant, insisted, that the defendant was primarily liable to satisfy the execution of the Bank, as he was the first indorser of the note, and the evidence was sufficient to warrant the finding of the jury, upon the issue submitted to them.

COLLIER, C. J.—In Brahan & Atwood v. Ragland, et al. 3 Stew. Rep. 247, and several subsequent decisions, it is held that the doctrine of contribution does not apply as between accommodation indorsers, unless there was an express or implied agreement to bear parts of the loss as joint sureties, in the event of the inability of the maker, or drawer to pay. The record in the present case does not show whether the parties were indorsers for value, but if necessary to indulge presumptions, such would be the natural inference. This, however, is immaterial, for in the absence of an express or implied agreement changing the liability of indorsers *inter se*, they will be bound to pay in the order in which their names appear on the paper; and this, as we have seen, although they may have indorsed for the accommodation of the maker, or some other person.

The proof of the genuineness of the signatures of Douglass and the defendant was certainly quite sufficient to authorize the Court to allow the note indorsed by the parties, to go in evidence to the jury.

The record of the judgment and proceedings at the suit of the Bank was competent evidence, and the recitals in the judgment entry, so far as they tended to make out the plaintiff's case, were quite as satisfactory, as if the same facts were testified by witnesses examined in Court. It was not allowable for the defendant, after having acquiesced in the judgment and paid a part of it, and insisted upon the plaintiff's paying the residue, in satisfaction of a joint execution against them, to object that the judgment was

obtained upon insufficient evidence, and thus put in litigation the facts concluded by it.

In addition to the effect of the judgment, the conversations between the parties in respect to the execution while it was in the coroner's hands, and the agreement under which it was satisfied, would, even in an ordinary case, be admissible to show, that the defendant had been duly charged by notice of the maker's default.

The declaration states the making of the note, its indorsement, protest for non-payment and notice, and thence deduces the defendant's liability as indorser. A count is also added for money paid, laid out and expended. We are satisfied, that upon the proof, the instruction to the jury was correct, and that there is no error in refusing to give the charge prayed. The judgment is consequently affirmed.

ALLUMS, ET AL. v. HAWLEY.

1. In a summary proceeding against a sheriff and his sureties, where the judgment is by default, it must appear affirmatively on the record, that the sheriff has had three days notice of the motion, or the Court must refer to the notice as proof of notice to the sheriff; and a notice found in the transcript will not be looked to for the purpose of supplying the defect, although a jury has ascertained that all the facts therein stated are true.

Writ of Error to the County Court of Dale.

MOTION by Hawley against Allums, as sheriff of Dale county, and certain persons as his securities in office, for failing to return a writ of *fi. fa.* issued from the County Court of Dale county, in favor of Hawley, against certain persons named in the motion. The notice of the motion is found in the transcript sent to this Court, directed to Allums, as sheriff, and the other persons as his sureties, and upon it appears indorsed: "Rec'd in office 28th Ju-

ly, 1844. Bertis Byrd, coroner. Executed 2d August, 1844. Bertis Byrd, coroner."

At the term of the Court named in the notice, a judgment was given against Allums, and others, the entry of which recites, that the plaintiff came by attorney, and the defendant came not, but made default. Whereupon came a jury, &c. who upon their oaths say, that they find all the averments in the plaintiff's notice true, and further assess, &c. It then proceeds, "that it appearing to the satisfaction of the Court, that A. Metcalf," and other named persons, "are and were the sureties of said Allums, in his official bond as sheriff, it is considered," &c. rendering judgment for the proper sums, according to the averments of the notice.

Allums and his sureties now prosecute their writ of error, and assign as error—

1. That no notice of the motion appears from the record to have been served on the defendants.

2. The notice found in the record is not a public record, or a writ issued by a competent officer, nor addressed to one; therefore its service is not proved by the mere return of "executed," by an officer.

3. If the notice is considered as part of the record, then it is insufficient, as the sheriff is called to answer a failure to return the execution three days before the return day thereof, when the return day itself is three days before the Court.

4. The record does not disclose with sufficient certainty, that the facts necessary to fix the liability of the defendants below were proved.

5. It does not appear from the entry of judgment, that the sureties of the sheriff were such when the execution came to his hands.

6. The notice does not disclose whether the sheriff is sought to be charged under the act of 1807 or 1819.

J. E. Belser, for the plaintiff in error.

P. T. Sayre, for the defendants.

GOLDTHWAITE, J.—The general rule as to summary judgments is, that every fact necessary to sustain the particular jurisdiction exercised, shall appear by affirmative recitals upon the record. [Lyon v. The State Bank, 1 Stewart, 442; Curry

v. Bank of Mobile, 8 Porter, 360.] An exception has been established whenever the judgment entry refers to the notice, or other necessary preliminary proceedings, found in the record; in which event the notice, or other proceeding, will be considered as having been acted on by the Court, and made a part of its judgment. [Bondurant v. Woods, 1 Ala. Rep. N. S. 543; White v. Bank at Decatur, Ib. 435.] In the present case there is no averment or recital in the judgment entry, that the three days notice, which the statute requires as a condition upon which the jurisdiction is to be exercised, in the absence of an appearance by the party, was given; nor is this fact found by the jury. They merely ascertain that the facts stated in the notice are true. In Brown v. Wheeler, 3 Ala. Rep. 287, the entry went so far as to recite the appearance of the parties by their attornies, but we held this insufficient, in cases of this nature, to warrant the inference that the parties were regularly before the Court, either as having had, or as waiving the requisite notice. In the subsequent case of Jordon v. Br. Bank at Huntsville, the entry referred to the notice upon the record, as having been produced as proof of that fact, and the judgment was sustained by looking to its contents. In the case before us, if the Court, or the jury, had affirmed the fact of notice, and referred to the paper found in the record, we should not hesitate to look to it to sustain the judgment; but it is clear this matter escaped the attention both of the Court and jury, and consequently the jurisdiction fails.

The judgment must be reversed and the cause remanded.

GAYLE v. THE CAHAWBA AND MARION RAIL ROAD COMPANY.

1. When a demurrer is overruled to one count of a declaration, which is afterwards abandoned at the trial, this Court will not examine into the sufficiency of such count.

2. A recovery may be had upon the common counts, for an instalment due upon a call of an incorporated company.
3. When objection is made to testimony in the mass, in the Court below, it is in the nature of a demurrer to the evidence, and will prevent particular portions of it, from being submitted to a severe and searching criticism. The objection to such portions of the testimony, should be specifically made in the Court below. In such cases this Court will consider the testimony by the same rules which govern demurrers to evidence.

Error to the Circuit Court of Dallas.

Assumpsit by the defendant against the plaintiff in error, to recover fifty dollars, being the ninth instalment due on his subscription for stock.

The declaration consisted of three special, and the common counts. The defendant demurred separately to the three special counts, which was overruled by the Court, except as to the third, and leave given to the defendant to plead over, after which the plaintiff entered a *nolle prosequi* to the first count, and relied alone upon the second count, and the common counts.

Upon the trial, as appears from a bill of exceptions, the plaintiff proceeded to prove from the books of the company, its organization under its charter. The Court permitted the plaintiff to prove, from the books, the following facts—that the books of subscription contained the name of the defendant, and many other persons signed to an instrument to the following effect: "A book of subscription to the capital stock of the Cahawba and Marion Rail Road Company, opened on the 20th March, 1837, by an order of the board of directors, assembled in the town of Cahawba, on the 17th March, 1837, under the direction of James E. Craig," &c. &c. The names are signed thus:

DATE.	NAMES.	NUMBER OF SHARES.
March 29.	*Matt. Gayle.*	10. . . *Total stock*, $1,000

The plaintiff having averred as its cause of action, and the sole object of the suit, to recover an assessment of five *per cent.* made by the directors, being the ninth instalment, and having offered a resolution to that effect, it was objected to by the defendant as testimony, under the second count, on account of a discrepancy in the dates, but the Court overruled the objection, and permitted the testimony to go to the jury. But afterwards the

Court, with the consent of the plaintiff, excluded all the written evidence which had been offered, including the entries from the books of the company, from the consideration of the jury, so far as related to the second count.

It was further in evidence, that the account, or demand sued for, as aforesaid, had been presented to the defendant, who refused to pay—also, that the account against the defendant for all the other assessments made by the board, some of earlier, and some of later date to said ninth instalment, had been presented to said defendant, but which in like manner he refused to pay. There was evidence conducing to show, that the other instalments had been transferred to creditors of the company.

Upon this testimony, the defendant moved the Court to instruct the jury, that on the above evidence the plaintiff was not entitled to recover on the common counts, which instructions the Court refused, holding that such recovery might be had on the common counts. To all which the defendant excepted, and which he now assigns as error.

R. Saffold, for the plaintiff in error, contended that the charge of the Court was wrong, as there was no proof in the record, that the defendant signed the book of subscription, or that he had notice of the assessment.

Edwards, contra.

ORMOND, J.—We do not consider it necessary to examine the sufficiency of the second count in the declaration, to which the Court overruled the demurrer of the defendant, as it is perfectly clear, that the plaintiff might at the trial, abandon all right to recover under it. This it appears he explicitly did, and relied alone for a recovery upon the common counts in the declaration.

It appears to us that the reasonable construction of the bill of exception is, a request to the Court to charge, that no recovery could be had in this action, upon the common counts. The prayer of the defendant is, "that on the above evidence, the plaintiff is not *entitled* to recover on the common counts;" to which the Court responded, that "such a recovery might be had on the common counts." It is the duty of parties who wish to review the decision of an inferior Court, in this Court, to show affirmatively

that there is error upon the record. If it be left in doubt, whether there is error or not, it is the duty of an appellate Court to presume in favor of the primary tribunal.

It is not now insisted that a recovery could not have been had in this action, upon the common counts; but it is argued that the evidence was insufficient for that purpose; but considered in that aspect, we think the objection alike untenable.

It is objected that it does not appear, that there was proof of the signature of Matt. Gayle, the defendant, to the subscription for the stock; but that from the record it appears, that the book in which the subscription was made, was produced, which, although sufficient for a recovery under the special count, declaring upon it, was not under the common counts, without proof of the signature—and further, that evidence that the "account" sued for was presented to the defendant, does not show that he had notice of the call of the directory for this instalment.

When evidence is objected to in the mass, as in this case, the objection will not be permitted to be taken in this Court, so as to subject particular portions of it to a severe and searching criticism. If the sufficiency of particular parts of it to maintain the issue is denied, the objection should be specifically made in the Court below, when perhaps the objection, if valid, might be removed, or some explanatory testimony offered, removing the difficulty. The objection, when made in this general form, to all the testimony, is calculated to mislead, and ought as far as possible to be discouraged, unless it be in fact a demurrer to the evidence, by analogy to which alone indeed can this motion be sustained. Considered as a demurrer to the evidence, we think the jury might have inferred, that the defendant signed the subscription, and was notified of the call made by the directors. From this it appears, there is no error in the record, and the judgment must be affirmed.

BALL v. THE BANK OF THE STATE OF ALABAMA.

1. Where the Cashier of a Bank in Alabama, which was the holder of a bill payable in New-Orleans, testified that the bill at the time of maturity, was at the place of payment; that in due course of mail thereafter, he received a package containing a large number of protests; that he had no distinct recollection of the one in question, but does not doubt it was regularly received, and that notices were enclosed, enveloped, addressed and mailed to the drawer and indorsers on the same day, as such was his constant practice; if he had received the protest under circumstances indicating that it had not been transmitted from New Orleans in due season, it would have been noted according to the invariable mode of doing business in Bank: *Held*, that the refusal to instruct the jury that the evidence of the cashier was insufficient to charge the indorser with notice of the dishonor of the bill, was not an error; and that the evidence was such as might well have been left to the jury to determine its effect.
2. If a Bank, which is advancing upon cotton, to be shipped through its agents to distant points, in order to place itself in funds there, stipulates with a shipper to pay him two per cent. for exchange upon the nett amount of sales at a designated place, the fluctuation in the price of exchange between the time when the contract was entered into and the cotton sold, can have no effect upon the rights and liability of either party.
3. Where a party offers a witness who will be liable over, if he is unsuccessful, he cannot divest the witnesses interest, and make him competent, by depositing with the clerk a sum of money equal to what would be the amount of the recovery against him. The common law or statute, neither confer upon the clerk of a Court, *virtute officii*, the authority to receive money which may be recovered upon a suit afterwards to be brought; and such payment cannot be pleaded in bar of an action.
4. An attorney at law cannot, in virtue of his retention (by a release, or the deposit of money which will operate as a release, if at all,) remit a liability which his client may enforce, for the purpose of removing the interest of a witness, so as to make him competent to testify.
5. Where a Bank, which was making advances upon cotton, stipulated with a shipper of that article that he should ship only to the agents of the Bank, who were to sell, &c., the stipulation made the agents of the Bank, *pro re nata*, agents of the shipper, and an account of sales duly furnished by such agents to their principal, is evidence against the shipper.

Writ of Error to the County Court of Tuskaloosa.

This was a proceeding by notice and motion, under the statute, at the suit of the defendant in error, against the plaintiff, as the indorser of a bill of exchange. The cause was tried on issues joined, on the pleas of *non assumpsit*, payment, and set off; a verdict was returned for the plaintiff, for five hundred and seventy dollars and twenty-five cents, damages, and judgment was rendered accordingly. On the trial, the defendant excepted to the ruling of the Court. It appears from the bill of exceptions that the plaintiff offered and read to the jury the bill of exchange described in the notice, together with the protest thereof for non-payment, duly made in the city of New-Orleans, where it was payable. To show that the defendant below had due notice of the dishonor of the bill, the plaintiff introduced as a witness the assistant cashier of the Bank, who testified that in March, 1840, at the maturity of the bill, and for some time before and after, he was acting in that character. In that month, a large package of notices of protest, viz, a hundred or more, were received and handed to him by the cashier. It was the duty of the witness to give the notices the proper address, or deposit them in the post-office, which duty he performed on the same day they were handed to him; he had no recollection of the notice of protest in this case, but from the course of business in the Bank, he had no doubt that the notice was received, and properly directed and deposited in the post-office. The defendant then resided in Mobile. Notices of protest of bills were received by the cashier through the mail, and handed immediately to the witness, who directed them to the proper persons, and deposited in the post-office on the day he received them.

The plaintiff then introduced its cashier as a witness, who stated that he held his present office when the bill matured, and holds it up to this time, and that the course of business in Bank was such as his assistant had testified; that as stated by him, and at the time, a large package of notices of protest were received, *post marked* "New Orleans." Witness could not remember whether the envelope had any thing written inside, or not, he was not in the habit of preserving such envelopes, supposed it was lost, but had made no search. Witness had no recollection of the notice of protest in this case; that he immediately handed the notices received to his assistant, whose duty it was to direct and forward them through the mail. From the course of business in

Bank he had no doubt the notice in this case was received; letters from New-Orleans were received in due course of mail in six or eight days from the time they were mailed. Witness had no recollection when the letter containing the notices spoken of was mailed—could not say that it was put into the post office before the leaving of the first mail after protest, or at what time.

The defendant then offered in evidence an agreement between the plaintiff and the drawer of the bill in question, as follows:

"Article 1. The receipt of a responsible warehouse keeper shall accompany the bill. Art. 2. All cotton will be shipped only to the agents of this Bank. Art. 3. The cotton shall in all cases be shipped on account and risk of the owner. The Bank will claim the right of insuring against the dangers of the river and fire. Art. 4. The cotton must be sold within thirty days after its arrival in the port of destination, and by or before the maturity of the bill. All expenses paid by the owner of the cotton. Art. 5. Interest will be refunded from the date of sale of any cotton to the maturity of the bill. Art. 6. If any lot of cotton netts more than the indebtedness of the party shipping, the Bank will refund the surplus, on application, as soon as an account of sales are received. Art. 7. Two per cent. exchange will be allowed to shippers of cotton on the nett amount of sales, if sold in New-Orleans or New-York. Art. 8. Interest will be charged on freights advanced prior to the sale of the cotton. Art. 9. The board will advance on cotton to be sold in Mobile, when the party taking such an advance will apply the total amount of such advance to the payment of debts previously due the institution.

The board of directors have purchased of P. P. Brown a bill of exchange for sixteen hundred and forty seven dollars, payable at the Bank of Louisiana, New-Orleans, on the 1st-4th March, and holds as collateral security a cotton receipt for forty-eight bales of cotton, to be shipped to New-Orleans, agreeable to the above regulations."

This writing was subscribed by the respective parties to it, and appears to have been made at Tuskaloosa, on the 7th January, 1840.

The defendant proved by the individual who was cashier at the time, the agreement set out above was entered into, and that the bill in question was that to which the agreement refers; that the amount advanced on it was only two-thirds the estimated value

of the cotton; this was done that the bill might be fully paid with the proceeds of the cotton. In such case, it was the understanding between the Bank and the shipper, that if the cotton was not sold before the maturity of the bill, no damages should be charged on its protest. Exchange on cotton during the season, when the transaction in question took place, ranged from twelve to seventeen and a quarter per cent.; the average was about fourteen. Messrs. Marr, Brown & Co. were the agents of the Bank, to whom, cotton shipped to New-Orleans for sale, was consigned.

Brown, of the house of Brown, Marr & Co., was then offered as a witness, to prove that the cotton to which the agreement referred, was shipped to that firm, at New-Orleans, was received and sold on account of the Bank, and the proceeds paid over. Plaintiff objected to this witness, because he was the drawer of the bill. The objection was sustained, and the witness rejected; thereupon, the plaintiff excepted. The defendant, not being present in Court, his counsel offered to pay into Court, a sum sufficient to cover the costs, so as to discharge any claim which defendant might have against the witness, if a judgment was recovered in this cause, and again offered the witness, but he was excluded, and the defendant again excepted.

Plaintiff then offered an account of sales of forty-eight bales of cotton, sold for account and risk of Mr. P. P. Brown, the proceeds of which were subject to the order of the State Bank of Alabama. This account is dated the 30th May, 1840, and is signed by Messrs. Kirkman, Abernathy & Hanna, who appear to have acted as factors in the sale of the cotton. The hand-writing of Messrs. K. A. & H. was proved, and it was also shown that they were agents for the Bank. To the reading of the account the defendant objected, because it was the act of the plaintiff's agent, but the objection was overruled, the paper read, and the defendant excepted. The plaintiff then proved that the paper was received as the account of sales of the cotton to which the agreement related.

The defendant prayed the Court to charge the jury, that the testimony of the cashier and his assistant was no evidence that the notice of the protest of the bill was deposited in the post office in New-Orleans in time to be forwarded by the first practicable mail after its dishonor. *Further*, if they believed from the

evidence that the exchange between Tuskaloosa and New-Orleans, at the time the cotton was sold, was more than two per cent., the defendant was entitled to the benefit of it. These charges were both refused by the Court.

The presiding Judge, before sealing the bill of exceptions, added in substance, the following, viz: The cashier, in answer to defendant's counsel, if he knew whether the protest was put into the post-office at New-Orleans, previous to the departure of the first mail, said, that he could not state positively. But whenever the notices of protest did not come in proper time, in due course of mail to fix the liability of the parties, the Bank looked to their agent for the losses sustained thereby; from the fact that there were few cases of loss, and this not one of them, he had no doubt from the course of business in the Bank that the notice in this case was received in due time after protest. In respect to the first charge prayed, the Court did instruct the jury that as the witnesses were in Tuskaloosa, they did not, nor could not swear that the notice was put into the post-office in New-Orleans the first mail after protest. But it would be well to ask themselves how it could get to Tuskaloosa in time to fix the liability of the parties to the bill unless it had been duly mailed in New-Orleans, if they believed the cashier so testified. That the time when the notice was deposited in the post-office might be shown by positive proof, or by facts and circumstances; but the evidence must satisfy their minds that the notice was put into the post-office at New-Orleans for the first mail after the protest. Another witness testified that the bill was only to be protested to fix the liability of the parties, that by agreement no damages were to be charged.

E. W. Peck and L. Clark, for the plaintiff in error, made the following points:

1. A release by the defendant, of P. P. Brown from the payment of costs, would have been sufficient, and the deposit of a sum of money equal to the costs, and to pay it if plaintiff was successful, would have the same effect, even in the case of an accommodation indorser.

2. The record does not show that the defendant was not an indorser for value; and if he was not, it required no

release in order to make the drawer of the bill a competent witness. [4 Ala. Rep. 637; 5 Ala. Rep. 196.]

3. The shipper of the cotton was entitled to the exchange, even if it were more than two per cent., because it was received not in payment, but as collateral security for the bill.

4. The testimony as to the sufficiency of the notice, raised a question of law, and nothing being proved from which the jury could reasonably infer that notice was given, the Court should have instructed the jury, that though they believed all that the witnesses stated, yet the evidence was insufficient to have charged the defendant. [Chitty on Bills, 509–515; 9 Peters' Rep. 33; 4 Wash. Rep. 404; 8 Pick. Rep. 51; 9 Id. 567.]

5. The plaintiffs below could not have offered the account of sales as evidence in their favor, because the factors who sold the cotton was their agents. [2 Stew. & P. Rep. 338; 4 Wash. Rep. 465.]

B. F. Porter, for the defendant in error, insisted,

1. That Brown was not a competent witness, for if the defendant was cast in the suit, the record would be evidence against him. He was offered to prove a payment, and a verdict upon that issue would bar a recovery against him. [2 Phil. Ev. C. & H's notes, 133; 14 Mass. Rep. 312.]

2. The account of sales, was, under the circumstances, properly received in evidence. [2 Stew. & Por. Rep. 339.]

3. The charge of the Court is free from objection; it determines no question of fact; states the law, and refers it to the jury to say what has been proved.

COLLIER, C. J.—1. We think it entirely clear, that the Court very properly refused to charge the jury, that the testimony of the Cashier and his assistant was no evidence, that the notice of the protest of the bill was deposited in the post office in N. Orleans, in time to be forwarded by the first mail after its dishonor. True, these witnesses could not testify that the notice was thus mailed, because they were, at the time of the protest, some hundreds of miles distant from New Orleans; but the facts they state are quite convincing, and inconsistent with the idea that notice was not duly received by the plaintiff, and addressed and mailed in due season by its assistant cashier to the defendant. The manner of

doing business by the Bank, and the absence of any memoranda by the Cashier, showing irregularity in the receipt of the notice, raise a presumption sufficiently strong to sustain a verdict against the defendant. In Carson v. The Bank of the State of Alabama, 4 Ala. Rep. 148, it was held, that the jury would be warranted in inferring a notice of the dishonor of a bill was regularly given.

2. The agreement under which Brown shipped his cotton through the Bank to New Orleans, does not entitle him to the difference of exchange between Alabama Bank paper and par funds at the time the bill matured. It is expressly provided by the seventh article of the agreement, that two per cent. exchange shall be allowed, on the nett amount of the sale, if it be made in New Orleans or New York. This stipulation is not controlled by the fluctuation in the price of exchange, but the drawer of the bill is entitled to the benefit of it, though the paper currency of Alabama might have appreciated so as to be equivalent to gold and silver. And on the other hand, the Bank is entitled to retain a sufficiency of the proceeds of the cotton to extinguish the bill, without allowing more than two per cent. for exchange, though its paper may have greatly depreciated after the purchase, and before the maturity of the bill. The rate of exchange between different places is subject to all the vicissitudes of commerce, and any contract for the payment of a fixed per cent. at a future day, must at best be hazardous. This being the case, the seventh article of the agreement is not obnoxious to the laws against usury, or any rule of policy; and must therefore be supported. *Conventio vincit dat legem.*

3. Mr. Greenleaf, in his treatise on evidence, lays it down generally, that the surety or bail may be made a competent witness for his principal, by depositing in Court a sufficient sum of money to cover his liability, [p. 477.] And such would seem to have been the decision in Bailey v. Hole, 3 C. & P. 560; Pearcy v. Fleming, 5 C. & P. Rep. 503; see also, 1 Mood. & M. Rep. 289. In Allen v Hawks, 13 Pick. Rep. 79, it was held, that where goods attached are returned to the defendant, upon a receipt given by a third person, stating the value of the goods and promising to deliver them to the officer in case the plaintiff should recover, the competency of the receiptor to testify in the suit may be restored by placing in his hands a sum of money equal to the

whole amount for which he can by possibility, be liable on his receipt. To the same effect are Hall v. Baylies, 15 Pick. Rep. 51, and Beckley v. Freeman. Id.; see also, Roberts v. Adams, 9 Greenl. Rep. 9; Chaffee v. Thomas, 7 Cow. Rep. 358; Collins v. McCrummen, 3 Martin's Rep. N. S. 166-9.

In Meeker's assignees v. Williamson, 8 Martin's R. 365, 370, it was adjudged, that if a party interested only on account of costs, deposit, or offer to deposit with the clerk, such sum as shall be directed by the Court, to cover the costs, *in case he shall be decreed to pay any*, his interest will not be thereby removed.

In some of the cases cited, the money was placed in the hands of the party offered as a witness. This was clearly sufficient to neutralize the interest which would otherwise have rendered him incompetent; for if the witness should be charged, he would have the means of payment provided, by which he might relieve himself, and if his liability should not be fixed, he could refund the money deposited with him. So that it would be unimportant to him, whether the one party or the other was successful in the cause. In the other cases a sum of money equal to the immediate, or consequential liability of the witness was deposited with the proper officer of the Court, and this it was held was equivalent in law to a release. If it is competent for a Court to make its clerk the keeper and custodian of money paid under such circumstances, and such payment will satisfy a judgment to be rendered in a suit afterwards to be brought, then it is difficult to conceive of any objection to thus making an interested witness competent to testify. We will briefly consider what are the duties and powers of a clerk in this respect.

The act of 1812 declares, that every clerk shall enter into bond conditioned, (among other things,) "for the due and faithful execution of his office," [Clay's Dig. 143, § 2;] and the bond provided by the act of 1819, is conditioned "for the faithful discharge of the duties of their offices." [Id. § 3.] By the 5th section of the act of 1834, "to provide a more summary mode of collecting money from clerks," [Clay's Dig. 147, § 24,] it is enacted, that in all cases where money shall be paid to the clerk of any Court, the party entitled to receive it, shall have the same remedy for its recovery, and the same damages for its detention, as are now provided and allowed by law, for money paid to clerks on execution, and it is hereby expressly made the duty of all clerks to re-

ceive and account for all such sums of money as may be paid to them by either party, as well after as before the issuance of the execution." A summary remedy by notice and motion for the failure or refusal to pay over money collected or received on execution, is provided by law. [Clay's Dig. 218, § 83; 329, § 94.]

In respect to the act of 1834, it has been decided, that money paid to the clerk of a Court, in satisfaction of a judgment which has been rendered therein, will be a good payment, and will authorise the entry of satisfaction *pro tanto*. [Murray v. Charles, 5 Ala. Rep. 678.] So it has been decided that our statutes relating to the powers and duties of clerks, do not authorize a clerk to receive money in a cause pending and undetermined in his Court. But independent of statutory enactment, it was said, "no case is remembered in which money can be lawfully paid to the clerk in vacation, or in any other manner than as the officer of the Court, in term time, and the receipt of which is always shown by some record of the Court, or some proceeding yet on paper, but progressing to a record." *Again*, "There are several stages in the proceedings of a case, in which the clerk of a Court is by law authorized to be the holder of the money, which may be paid into Court. Thus on plea pleaded, when the cause of action is admitted to a partial extent, and denied as to the residue. So in the case of a tender—so also, when money is paid into Court in satisfaction of a judgment." In these cases, the money is, in legal presumption, in Court, and the clerk holds it merely as a fiduciary. [Currie v. Thomas, 8 Porter's Rep. 293.]

It is clear, that in virtue of our statutes the clerk of a Court has no authority to receive money in discharge of an action which is pending, or probably to be brought in future; and we think the common law does not confer the power in the case now before us. The deposit of a sum equal to the costs to which the witness would be liable to the defendant in the event of the plaintiff's success, if made by the defendant himself, might operate as a release of the costs, and bar a recovery of them by him. But is it competent for an attorney at law, when retained for the purpose of defending a suit, to release from liability to his client a third person whom it is proposed to examine as a witness for him. An attorney has power to bind his client by many acts, being always liable to him for any abuse of his authority. [Alton v. Gilmanton, 2 New Hamp. Rep. 520; Mayer v. Foulkrod, 4

Wash. C. C. Rep. 503.] Thus he may waive the right of appeal. [Pike v. Emerson, 5 New Hamp. Rep. 393; Haskell v. Whitney, 16 Mass. Rep. 396.] So it has been held he may submit a cause to arbitration—[Holker, et al. v. Parker, 7 Cranch's Rep. 436: Talbot v. Magee, et al. 4 Monr. Rep. 375,]—may discontinue a suit—[Gaillard, et al. v. Smart, 6 Cow. Rep. 386]—after judgment may receive payment—[Branch v. Beatly, et al. 1 Call. Rep. 127]—but he cannot assign the judgment without a special authority—Walden v. Grant, et al. 20 Martin's Rep. 565]—nor discharge a debtor by receiving a less sum than was due, or commute a debt by receiving something else than money. [Lewis v. Gamage, et al. 1 Pick. Rep. 347; Smock v. Dade, 4 Rand. Rep. 639; see also, 5 Stew. & P. Rep. 34, 354; 1 Porter's Rep. 212.]

In Murray v. House, 11 John. Rep. 518, the plaintiff's attorney, in order to make an interested witness competent for his client, released him, and he was permitted by the primary Court to give evidence; but the appellate Court held, that a *parol* request to an attorney to represent a party to a suit, does not authorize him to release the interest of a witness. So in Marshall v. Nagel, 1 Bailey's Rep. 308, it was determined that an attorney cannot, without special authority, release a witness who is liable over to his client, and thus render him competent to testify.

The cases which maintain the want of authority in an attorney to release a witness from liability to his client, are perhaps defensible upon the ground that the attorney's appointment is by *parol* merely, and a release which is under seal, must be authorized by an instrument of equal dignity. But they might be rested upon higher ground, viz: the want of power generally. In retaining counsel for the prosecution or defence of a suit, the right to do many acts in respect to the cause, are embraced as ancillary, or incidental to the general authority conferred. It cannot be implied from the power to defend one suit, that the right to discharge other liabilities, which the client may enforce, are also vested in the attorney. It cannot vary the principle, whether these liabilities be for a large or small sum; for costs, or for monies due under an express contract. In neither case does the nature of the employment embrace the authority in question as an incident.

Laying out of view the want of a *sealed* authority, we have

seen that an attorney cannot remit a liability which his client might enforce, for the purpose of removing the interest of a witness. In such case the client's consent is necessary to the validity of the act. How then can the attorney discharge the liability of the witness by the deposit of a sum of money equal thereto? The payment to the clerk will not bar a recovery by the client, though if he pay it over, he may extinguish the judgment *pro tanto*. The interest of the witness then, still continues; though the clerk may be ultimately responsible to him. He must provide the means of payment, so far as the defendant is concerned, and this is quite enough to show his incompetency to testify; for the liability of the clerk may prove unproductive, and if it be such as his sureties are not bound to make good, the indemnity of the witness will of course be less likely to be realized. From this view it results, that the Circuit Court rightly excluded Brown as a witness, upon the propositions of the defendant's counsel. We have considered the case upon the hypothesis, that the defendant was an accommodation indorser, and that the drawer of the bill would be liable to refund to him the costs of the suit, if he was unsuccessful. [The Com. Bank of Columbus v. Whitehead, 4 Ala. Rep. 637.] The facts recited in the bill of exceptions very clearly show, that the defendant and Brown occupied that relation to each other.

4. The second article of the agreement under which the plaintiffs were permitted to control the cotton and receive the proceeds, provides that it should be "shipped only to the agents of the Bank." This stipulation made the agents of the Bank *pro re nata* agents of the drawer of the bill, for whose benefit the shipment was made, to the same extent as if they had been designated by name, although the contract between the shipper and the Bank authorized the latter to select the factors, and call them to an account.

In Black v. Richards, 2 Stewart & P. Rep. 338, the defendant set up as a defence that he had made an agreement with the plaintiff, by which the latter was to ship the defendant's cotton to the house of B. B. & R. of New Orleans, and that he had violated the agreement in consigning it to himself. To show that the cotton had been shipped according to contract, and to prove the amount of sales, the plaintiff offered an account of sales from the house of B. B. & R.; but it was objected to as "secondary evidence," and

excluded from the jury. This Court held, that if the contract were such as the defendant insisted, then he made Messrs. B. B. & R. his agents, and the account of sales made out by them was evidence to show that the plaintiff had performed his undertaking. The fact that an individual is the agent of one of the parties, subject to his direction and control, does not necessarily prevent him from being considered as the agent of the other. Thus in an action by a Bank against a depositor who has overdrawn, the books of the Bank were received to show receipts and payments of money—the officers being so far the agents of both parties. [Union Bank v. Knapp, 3 Pick. Rep. 96.] It is too well settled to be questioned, that the declarations of an agent, while acting and speaking for the principal, and within the scope of his authority, are admissible in evidence against the principal, notwithstanding he is a competent witness. [Boring v. Clarke, 19 Pick. Rep. 220; 2 Phil. Ev. 180 to 185, 189, 190, 684, C. & H.'s notes.] The evidence adduced shows, that Messrs. Kirkman, Abernathy & Hanna were the agents for the plaintiff for the sale of cotton in New Orleans; that the drawer of the bill stipulated with the plaintiff, that the cotton in question should be sold by the agents of the latter, and this was sufficient to have authorized the admission of the account of sales as against the drawer. And as the defendant, an accommodation indorser, set up in his defence the agreement between the Bank and the drawer of the bill, it was competent for the plaintiff to show he had performed it, by such evidence as was admissible against the drawer.

This view disposes of all the questions raised upon the record, and the result is, that the judgment must be affirmed.

SANKEY'S EX'RS v. SANKEYS DISTRIBUTEES.

1. The proceedings in a testamentary cause being reversed back to an account of distributable assets, in a contest between distributees and executors, it was remanded, that a guardian should be appointed to an infant dis-

tributee, with leave to the guardian to investigate the accounts; Held, that the privilege did not extend to the executor, he being named as the testamentary guardian, and after the return of the suit the Court below, qualifying as such.

2. As soon as the fact was disclosed that the infant distributee was represented by the executor, the parties were complete, and the Court should have proceeded to render judgment on the former verdict; which, under these circumstances, it was irregular to set aside.
3. But the party having proceeded and obtained another verdict and judgment, is responsible for any errors they may contain until the irregular proceedings are set aside.
4. It is erroneous to render a joint judgment in favor of all the distributees. The proper judgment is a several one for the amount coming to each, and if an infant is represented by the executor, as guardian, he should be permitted to retain his ward's portion.
5. After a judgment, upon irregular proceedings is reversed, the whole record may be corrected by the judgment of the appellate Court.

Writ of Error to the Circuit Court of Montgomery county.

This proceeding is on behalf of the distributees of Sankey against his executors, to compel a distribution of the assets of his estate. The cause was here at a former term, [see 6 Ala. Rep. 607,] when the decree was reversed because no guardian *ad litem* had been appointed for one of the infant parties interested in the distribution, and because the decree, in part, was rendered in favor of such guardian as should thereafter be appointed. The cause was remanded for further proceedings, to be had in conformity with the opinion then pronounced, which held the proceedings regular down to the ascertainment of the amount in the hands of the executors, and only the decree was reversed, unless the guardian of the minor, afterwards to be appointed, should desire a re-investigation of the accounts of the executors.

When the cause returned to the Orphans' Court, James B. Stephens, one of the executors, was qualified as the testamentary guardian of the minor, and as such guardian proposed to enter upon a re-investigation of the accounts of the executors. This was objected to by the other distributee, but the Court overruled the objection. A jury being demanded, an issue was formed, between Ann Sankey, by her guardian James B. Stephens, and John Elsbury, administrator of Patience Elsbury, against James B. Stephens and James C. Sankey, executors of John Sankey.

A verdict was returned in favor of the distributees, and a joint judgment rendered in their favor against Stephens, for the sum ascertained by the verdict, and against Sankey for the sum appearing due from his account, which the parties admitted as correct.

Upon the trial of the issue, exceptions were taken by Stephens to the admission of certain evidence, and several instructions given by the Court; also, to the refusal to give certain instructions asked for by Stephens.

These matters of exception are here assigned as error, but are unnecessary to be recited, as the judgment of the Court proceeds on reasons independent of them, It is also assigned as error, that the judgment is joint in favor of all the distributees, when it should be several, for the amount due to each one.

HAYNE, for the defendant in error, insisted, that the verdict ought not to be disturbed, it varying slightly only from the one formerly given, and as the re-investigation of the accounts was not in conformity with the previous judgment of this Court.

ELMORE, for the plaintiffs in error, in answer to this objection, insisted that the Court below had the discretion to open the investigation of the account, and was right in doing so; [Hill v. Hill's ex'rs, 6 Ala. Rep. 166,] as otherwise manifest injustice would be done, it being now apparent that the contest is with respect to matters for which the executor is in no manner chargeable.

GOLDTHWAITE, J.—1. When this cause was here at a former term, the judgment then existing was reversed for several reasons, but the proceedings in the Court below were considered regular down to the ascertainment of the amount of the assets in the hands of the executors; the cause was then remanded, that a proper judgment might be rendered, when a guardian should be appointed to the infant distributee, and the privilege was reserved to the guardian to reinvestigate the accounts of the executors, if he should so elect. [6 Ala. Rep. 607.]

It now appears that the executor contesting the settlement was named as the testamentary guardian of the infant, and he having qualified as such, after the return of the cause to the Court below, in that capacity, he moved to set aside the accounts already stat-

ed and ascertained, between himself as executor, and Elsbury as the representative of the sole remaining distributee, which the Court allowed.

2. As soon as the fact was disclosed, that the infant distributee was represented by the same person as guardian with whom the settlement was to be made as executor, all the necessary parties were before the Court to enable it to proceed to a final settlement of the estate, and the opening of the account was evidently not warranted by the opinion delivered when the cause was here before. The privilege reserved to the guardian of the infant distributee, was for the benefit of the ward, and ought not to be used but for this purpose. As the case stood, the presence of this party was necessary, not only that the unity of the cause should be preserved, but a settlement under the provisions of the statute may be compelled, on the petition of any one of those entitled to distribution. [Digest, 196, § 23, 24; Ib. 229, § 41, 43; see also Merrel v. Jones, 2 Ala. Rep. 192; Davis v. Davis, 6 Ib. 611.] After the disclosure that the infant distributee was represented by one of the executors, it was clear that Elsbury was the only person competent to contest the accounts, and those having been ascertained by the verdict between him and Stephens should not have been disturbed. We do not doubt that the Orphans', as well as any other Court, invested with the authority to ascertain facts by means of a jury, may set aside their verdict, but it must be done during the same term of the Court at which it is rendered, unless the motion to set it aside be continued until another term.

3. It seems then that all the proceedings subsequent to the reversal, are irregular, and Elsbury would be entitled to set them aside or have them vacated, on a proper application to this Court, and possibly likewise upon an application to the Court below. No such application having been made, and the judgment remaining in force against Stephens and the other executor, they are entitled to consider the errors which are inherent to it, and if they can, to reverse it, In this view, all of the errors assigned would be examinable.

4. Under the circumstances of this case there is now no way in which the accounts between Stephens and Elsbury can be properly re-examined in the Orphans' Court, it will therefore be immaterial to examine the points made upon the second trial, if there

is any error in the judgment sufficient to reverse it, because Elsbury is entitled to be placed in the same condition as he was, when the Court irregularly set aside the verdict in his favor.

The judgment is joint in favor of Elsbury, as the administrator of his wife, and in favor of the infant ward for the whole of the distributable assets, when it should have been in his favor for one-half only of that sum. The executor Stephens should have been permitted to retain the other half as the guardian of his ward. And as between him and his co-executor, a judgment should have been given for the one-half of the assets to be distributed in that quarter.

5. Under this view, the proceedings of the Orphans' Court must be reversed back to the first settlement, and a judgment rendered in the Court below on that, in conformity with this opinion.

HOLLINGER AND WIFE v. THE BRANCH BANK AT MOBILE.

1. Under the 4th rule of Chancery practice, it is not necessary to serve a subpœna upon a married woman, unless she has a separate estate. It will be sufficient if served upon her husband.
2. An allegation that the mortgagor had failed to pay a promissory note, whereby the legal estate had become absolute, is a sufficient allegation that the debt was not paid, although there were other parties to the note

Error to the Chancery Court of Mobile.

J. Gayle, for plaintiff in error.
Fox, contra.

ORMOND, J.—This was a bill to foreclose a mortgage upon which the ordinary decree was made. The only objections now urged against it are, that the subpœna was served on Mrs.

Hollinger only five days previous to the decree, and that there is no sufficient allegation in the bill, that the debt was not paid.

The first objection depends upon the construction of the 4th rule of Chancery practice, which declares, that "*Femes covert* may be made defendants, by service of *subpœna* upon their husbands," unless the object of the bill is to affect the separate estate of the wife. It is insisted, that although the *subpœna* may be served on the husband, it must issue against the wife, which was not done in this case. The rule does not reqaire a separate *subpœna* against the wife, nor are we able to see what benefit would result from it, unless she had a separate estate; we think there has been a compliance with the rule.

The other objection is alike untenable. The allegation is, that "Adam C. Hollinger, has wholly failed and refused to pay the same, (the promissory note,) whereby the legal estate to the said premises has become absolute in your orator." This is certainly sufficient, especially as the defendants did not appear and answer. Such an allegation would be a sufficient breach in a suit at law upon the note, against the principal, or any one of the parties to the note, and it would not be necessary to alledge that the parties not sued had not paid it.

Let the decree be affirmed.

RANDOLPH v. CARLTON.

1. The levy of an ancillary attachment upon land, operates a lien, and when a judgment is rendered in favor of the plaintiff, the creditor's right to have it sold to satisfy his judgment, will override and defeat all intermediate conveyances made by the defendant.
2. The sheriff returned a writ of *fieri facias*, indorsed thus, viz: "Levied on one tract of land adjoining the lands of Ira Carlton, Mrs. Gray, and others containing two hundred acres, more or less:" *Held*, that the return is sufficiently certain, and the precise location of the land may be shown by extrinsic proof; and as the sheriff was directed to make the money of

the defendant's estate, it will be intended for the purpose of the levy, that the defendant was the proprietor of the land.

3. By receiving possession of land from another under a lease, the tenant impliedly admits that the lessor has such a title as authorized him thus to dispose of the premises; but he cannot be held to affirm any thing in respect to the future; consequently it is allowable for the tenant, when attempted to be ejected by the landlord, to show that the title of the latter *had expired* or *been extinguished by operation of law.*

4. Where a tenant pays the rent, after the expiration of the year, which was due (according to contract) at its close, in an action by the landlord to recover the possession, such payment will not estop him from showing that the landlord's title was extinguished during the year.

5. The land of B being levied on by an attachment, at the suit of W, B conveyed the same to R, under circumstances supposed to indicate an intention to defraud his creditors. R rented the land to C, W then obtained a judgment against B, and the land in question was sold to satisfy it; R brought an action against C, to recover the possession: *Held*, that if C, the tenant, showed no title acquired subsequent to the commencement of his tenure, he could not defeat a recovery, by showing the transaction between B and R to have been intended by them to delay, hinder and defraud creditors.

6. *Semble:* Where an error in a charge to a jury is such as could not prejudice the party excepting, it furnishes no cause for the reversal of the judgment.

7. Where the writ and declaration describes the plaintiff as an administrator suing for the use of another, and his name is merely stated upon the margin of the judgment entry, without indicating that he sues in a representative character, or for the use of another, the title of a purchaser under an execution issued upon the judgment in which the plaintiff's character, &c. is described in the same manner as in the writ and declaration, will not be affected by the discrepancy.

Writ of Error to the Circuit Court of Greene.

This was an action of trespass, brought by the plaintiff in error to try title to certain lands particularly described in the indorsement on the writ and declaration, as well as to recover damages of the defendant for the occupancy of the same. The cause was tried on issue joined, a verdict returned for the defendant, and judgment rendered accordingly. On the trial the plaintiff excepted to the ruling of the Court. From the bill of exceptions it appears that the plaintiff produced and read to the jury a patent

from the United States to Peter R. Beverly, for the lands in controversy, dated the 24th June, 1835, he also adduced a deed from Beverly to himself, dated 13th April, 1840, recorded 20th July, 1841. Also, a paper purporting to be an agreement between the plaintiff and defendant subscribed by the latter, in which he acknowledges he had rented from the former the land in question for the year 1841, and undertaking to pay such sum therefor as two individuals named might consider to be a fair equivalent. On this writing was indorsed a receipt by the plaintiff, dated the 18th of April, 1842, for four hundred dollars of the defendant, in full discharge of the undertaking therein expressed. It was further shown what were the value of the rents and profits, and that the defendant had been in possession of the premises since the 1st of January, 1841.

It was then proved on the part of the defendant, that Wm. D. Wren, describing himself as administrator of Samuel G. Adams, deceased, who sues for the use of John Thompson, jr. caused a suit to be brought in the Circuit Court of Greene, against Peter R. Beverly. The writ issued 15th February, 1839, and was executed the 16th; on the 20th of the same month an ancillary attachment issued in the case, under the 8th section of the act of 1837, which was levied on the 26th of that month, "on one tract of land, adjoinging the land of Ira Carlton, Mrs. Gray and others, containing two hundred acres, more or less." Judgment was rendered the 12th March, 1841, and on the first Monday in August of the same year, the premises in question were sold under a *venditioni exponas*, and although the plaintiff was present at the sale, he did not bid for them. The lands were sold by the number of the quarter section, &c. and so described in the deed which defendant received from the sheriff as a purchaser. The plaintiff objected to the admission of the judgment as evidence, because on the margin of the entry the case was stated "William D. Wren v. Peter R. Beverly," and the parties were not otherwise described; and the *venditioni exponas* was objected to, because it did not conform to the judgment, but stated the parties as in the writ. These objections were overruled and the evidence permitted to go to the jury.

The defendant then gave in evidence a deed bearing date the 19th December, 1840, by which the lands in question, in consideration of three thousand dollars, were conveyed by Beverly to

the defendant, at the foot of which was a memorandum stating that the deed was delivered to the plaintiff, to be held as an escrow, to be delivered to the gaantor upon the happening of a certain event therein provided for. He also, in connection with the foregoing, read to the jury a writing, which recited that a note of three thousand dollars, made by the defendant, was delivered to the plaintiff, which he was to retain until the suit of Wren against Beverly was determined. If Beverly was successful in that case, then the note was to be handed over to him, but if the result was otherwise, the note was to be returned to defendant, and the deed to Beverly. This paper expressed the condition on which the deed became operative, and bore even date therewith. The suit brought by Wren having been determined against Beverly, the contract for the sale of the land was cancelled, and the deed and note returned to the parties respectively entitled to them.

It was proved that Randolph was Beverly's nephew, and with a knowledge of the pendency of Wren's suit, the levy of attachment, &c. he received a deed from Beverly of the same lands; that although the conveyance was absolute, yet he never paid any part of the purchase money; that he had given his note for a large sum, but it was verbally understood between him and Beverly, that he was not to be called on for the money, until the title was freed from the levy of the attachment.

It was not shown that the defendant had notice of the deed to the plaintiff. There was proof tending to show that the deed from Beverly to the plaintiff was intended to delay, hinder and defraud Wren, in the collection of his debt, and that the plaintiff participated in that transaction, with an actual or constructive knowledge of the intention.

The lands were sold by the sheriff, not only under a *venditioni exponas*, but under a *fieri facias*, issued on the judgment in favor of Wren, both of which were in his hands at the same time; and the latter described the land by the appropriate numbers of the government surveys.

The Court charged the jury as follows; 1. If they are satisfied from the evidence, that the lands sued for, were the same as those mentioned in the levy upon the attachment, the levy operated a lien upon them from the day it was made. 2. To make out the defence, the defendant must show a judgment, execution, levy, and sale, and that the deed from Beverly to the plaintiff, being

subsequent to the levy of the attachment, ceased to be operative as against the defendant, after the sale under Wren's judgment. 3. It is a general rule that the payment of rent, is an acknowlegement of tenancy, and that the tenant cannot dispute the title of his landlord; but if the jury believe the lands in question to be the same that were levied on by the attachment; that they were sold by the sheriff under that levy, that the plaintiff was present at that sale, making no effort to buy in the outstanding title, then the defendant had the right to purchase the land, and the title of the latter would be upheld, even against the plaintiff. 4. That the payment of rent by the defendant, in April, 1842, for the entire year 1841, does not deprive him of the right of controverting the plaintiff's title. 5. The levy of the attachment was not void for uncertainty, but if the proof showed that the lands in question answer to the description given in the levy, that Beverly had no other lands than these, in the same locality, then the levy was sufficiently certain, and would operate a lien from its date. That if the levy was upon the land, the plaintiff's purchase, with a knowledge of the fact, could not prevail against the levy, or the defendant's purchase under it. 6. If the proof did not show the identity of the lands in question with those levied on, then it was competent for them to inquire, whether the deed from Beverly to the plaintiff was fraudulent; if it was, and not a real transaction, or made with intent to delay, hinder or defraud Wren of his just demand; if the plaintiff had notice of such intention by Beverly, and yet bought the land, he acquired no title that could prevail over the defendant's purchase. But unless the deed to the plaintiff was fraudulent, it must prevail over defendant's purchase, (because of a prior date,) if the levy was incurably defective.

The plaintiff then prayed the Court to instruct the jury to the following effect: 1. The levy of an ancillary attachment upon lands operated no lien thereon, and that the defendant having entered under the plaintiff, cannot set up the title he acquired under the levy and sale. 2. That the levy of the attachment in favor of Wren, was void for uncertainty. 3. That it is not competent in this case to inquire, whether the deed from Beverly to the plaintiff, was fraudulent. 4. That the payment of rent by Carlton to Randolph, after Carlton's purchase, and which accrued thereafter, though by virtue of a previous contract, estopped him

from denying Randolph's title, or setting up one adverse to it. These several charges were refused.

B. F. Porter, for the plaintiff in error, made the following points: 1. The judgment produced by the defendant to sustain his title, did not follow the process and declaration, in describing the parties to the action, nor did the execution conform to the judgment. 2. The Court permitted the defendant to identify by parol proof the lands levied on, with those the subject of the action. 3. So the defendant was allowed to offer proof, that though the plaintiff had given his note for the land, he had paid no part of the purchase money, and that the sale was made to hinder and delay creditors. In the admission of all this evidence, it is insisted that the Circuit Court erred.

But the most important inquiry is, whether the defendant is not to be regarded as the plaintiff's tenant, and thus considered, can he dispute the title of his landlord? By paying the rent accruing in 1841, the defendant recognized his tenancy as late as April, 1842, although he purchased in August, 1841. If this be not so, then the purchase of the defendant made him a trespasser, as he thereby disclaimed to hold under the plaintiff, and the action is maintainable. [3 Peters' Rep. 49; 6 Id. 382; 13 Id. 1; 14 Id. 102; 7 Johns. Rep. 188, and note 1.]

The defendant cannot be permitted to set up a title adverse to plaintiff, if (as is insisted) he is his tenant. By admitting title in another, a party will not be permitted to set up title in himself, under a deed held when the admission was made. [12 Wend. Rep. 57.] If one enters under A, and afterwards takes a release from B, in an ejectment against him by one holding under A, he cannot deny the title of A. and set up B's as the elder and better title. [10 Johns. Rep. 292; 6 Cow. Rep. 751; 6 Johns. Rep. 34; 7 Id. 157; 1 Caine's Rep. 444; 2 Id. 215; 7 Johns. Rep. 186.]

If the transaction between Beverly and the plaintiff was fraudulent, the fraud could not be inquired into at law. [Davis v. McKinney, 5 Ala. Rep. 728.] And if it could, the charge of the Court was too broad, and calculated to mislead. The motive makes the fraud, and not the mere act of purchase. The case in 22 Wend. Rep. 122-3, relied on by the defendant, is not opposed to the view taken; it merely determines that the lessee may de-

fend himself by showing the lessor has conveyed away, or lost title during the existence of the lease.

J. Erwin and J. B. Clark, for the defendant. The defendant does not set up an outstanding title in a third person, or rely upon the purchase of such a title; but he insists that the plaintiff cannot recover because his title was determined, or extinguished, during the continuance of the lease from the plaintiff to him. That the title of the defendant is superior to, in fact destructive of that on which the plaintiff relies. There was no reason why the defendant should not have been permitted to protect his tenancy, by purchasing the land at the sale of the sheriff. The plaintiff's purchase must have been made subject to the attachment, and as it is the policy of the law to encourage competition at judicial sales, the defendant should have been allowed to bid.

The general rule, that a tenant cannot dispute the title of his landlord is not denied, but it does not obtain universally. Here the plaintiff's title, (which never was good against purchasers and creditors,) expired, or was put an end to, by the sale to, satisfy the lien that had attached, before his deed was executed, and such case forms an exception to the rule. [2 B. Monr. Rep. 234; 6 Wend. Rep. 666; 5 Wend. Rep. 44; 21 Wend. Rep. 121; 1 A. K. Marsh. Rep. 99; Com. Land. & Ten. 520-3; Cro. Eliz. Rep. 398; 5 Cow. Rep. 123, 134-5; 4 Term Rep. 681.] And the tenant may set up the expiration of the landlord's title, although the latter had done no wrongful act, but had been entirely passive. [Com. Land. & Ten. 521.]

COLLIER, C. J.—1. The eighth section of the act of 1837, [Clay's Dig. 61, § 24,] authorizes the plaintiff in a suit at law, commenced in the Circuit or County Court, to cause an attachment to be issued against the defendant's estate, where he absconds or secretes himself, or shall remove, or be about to remove out of this State, or shall be about to remove his property out of this State, or be about to dispose of his property fraudulently, with intent to avoid the payment of the debt sued for. It also provides that the plaintiff shall make oath to the truth of the particular ground upon which the attachment issues, and that the same "shall be issued, executed and returned as near as may be in the same manner as original attachments, and the said affidavit, and bond, and at-

tachment, when returned, shall be filed with the papers in the original suit, and shall constitute a part thereof, and the plaintiff in said suit, may proceed to judgment as in other cases." By the first section of the same statute it is enacted, "Whenever an original attachment shall be issued for, or upon any of the causes now provided by law, it shall be lawful to levy the same upon any land belonging to the defendant in such attachment, by the officer whose duty it may be to levy or execute the same, in the same manner that attachments are or may by law authorized to be levied on goods, chattels, or effects." [Clay's Dig. 60, § 29.] The 9th section provides that any property which may be attached under the provisions of the eighth section, may be replevied, as in other cases of attachment, and after judgment shall be rendered and execution issued against the defendant, if any property replevied, shall not be delivered to the sheriff or his deputy, holding such execution, within ten days after the demand thereof, &c., it shall be the duty of the sheriff, &c. to certify the fact to the clerk issuing the same; whereupon the replevin bond shall be deemed forfeited, and it shall be the duty of the clerk forthwith to issue an execution, against the principal and sureties therein, for the amount of the plaintiff's judgment, with costs: *Further*, when judgment shall be rendered, execution may issue in the usual way, which shall first be levied on the property attached, if to be had, and then upon any other property of the defendant, until a sufficient amount shall be levied on to satisfy the execution in full. [Clay's Dig. 62, § 35.]

In McRae v. McLean, 3 Porter's Rep. 138, it was decided, that an attachment created a lien in favor of an attaching creditor, which cannot be divested by the replevying of the property; and that when attached, it was in the custody of the law, to abide the judgment of the Court. So in Pond v. Griffin, 1 Ala. Rep. 678, N. S., a case which arose subsequent to the passage of the act of 1837, it was held that an attachment levied on slaves created a lien which could not be divested by writs of *fieri facias*, placed in the sheriff's hands afterwards, but on the same day. [See Dore v. Dawson, 6 Ala. Rep. 712.]

It is perfectly clear from the act and the cases cited, that the ancillary attachment which is provided for, by the eighth section, may be levied on land, and that the lien in such case, and in respect to such property, is a necessary consequence of the levy. This

conclusion is so obvious, from these citations, as to require neither argument or illustration.

2. In Webb v. Bumpass, 9 Porter's Rep. 201, which was an action by a purchaser at a sheriff's sale, to recover the possession of land, the levy of the *fieri facias* was indorsed thus:— "Levied on a tract of land, upon which Gabriel Bumpass now lives, in Lauderdale county, adjoining Richard Baugh and ——; supposed to contain eighty acres," &c. We said, "It was certainly no objection to the execution offered in evidence, that the sheriff's return does not describe with more particularity, the land levied on. There is no statute imposing upon the sheriff the duty of making a more particular description." Benjamin v. Smith, [4 Wend. Rep. 462,] is there cited, in which the Court said it was not necessary in a return to an execution, by virtue of which lands have been sold, to describe the land with particularity, but it was competent to show its identity with that levied on by parol proof. [See also, Boylston v. Carver, 11 Mass. Rep. 515; Hedge v. Drew, 12 Pick. Rep. 141; Hubbert v. McCollum, 6 Ala. Rep. 221.]

In the case before us, the attachment was returned levied "on one tract of land adjoining the lands of Ira Carlton, Mrs. Gray, and others, containing two hundred acres, more or less." This is sufficiently certain, and the precise location of the land may be shown by extrinsic proof. It is not necessary that the return should have affirmed that the defendant in attachment was the proprietor of the land; this will be intended even where the regularity of the levy is drawn in question by a direct proceeding. The sheriff, it must be supposed, did his duty, and as he was commanded to attach the defendant's estate, it will not be presumed that he levied upon the property of another person. [Bickerstaff v. Patterson, 8 Porter's Rep. 245; Kirksey, et al. v. Bates, 1 Ala. Rep. N. S. 303; Miller, et al. v. McMillan, et al, 4 Ala. Rep. 527.]

3. It is said a tenant cannot deny the title of his landlord, under which he entered; yet he may show that it has terminated, either by its original limitation, or by conveyance, or by the judgment and operation of law. [Jackson v. Davis, 5 Cow. Rep. 123-134.] In Jackson v. Rowland, 6 Wend. Rep. 666, 671, the defendant, who was the tenant of the lessor of the plaintiff, set up a title acquired by a third person, as a purchaser under execution, issued on judgments against the lessor. In answer to the ar-

gument that the defendant could not avail himself of the outstanding title, the Court said "A tenant cannot dispute the title of his landlord, so long as it remains as it was at the time the tenancy commenced; but he may show that the title under which he entered has *expired*, or has been *extinguished*." *Further*, if the landlord seeks to eject his tenant, surely the latter may set up an outstanding title. "No well founded objection is perceived to the defendant's setting up a title, acquired under a judgment since he became tenant, overreaching the title of his landlord." There, the title set up, was made effective in 1827, but the Court held that it should relate back to the time when the judgments became operative, and thus defeat a mortgage executed by the landlord in the interval. So it has been decided by the same Court, that "so long as a tenant is not expelled, he has in general, no right to question his landlord's title. He cannot deny that he had a right to demise at the time of the lease. He cannot defend on the ground that he has acquired an outstanding title adverse to that of the landlord. But I am not aware that the estoppel goes farther. If the landlord part with his title pending the lease, the duty of the tenant, including that of paying rent, is due to the assignee; and should the tenant buy in the assignee's right, the lease would be extinguished. So, if the landlord sell and release to the lessee. In these cases no action would lie for the rent." Therefore, had there been a sheriff's sale of the whole reversion of the demised premises, and the defendant had redeemed or purchased under the judgment, no action could have been sustained; for a purchase or acquisition of title under a judgment against the lessor, is the same thing as if he had granted by deed. It is, to be sure, acquiring title indirectly, and by operation of law, from the lessor; but it comes through his act and consent, or his neglect, and is therefore the same in legal effect as if he had granted or demised the reversion." [Nellis v. Lathrop, 22 Wend. Rep. 121.]

In Swann v. Wilson, [1 A. K. Marsh. Rep. 99,] the general rule, that a tenant cannot controvert his landlord's title, was admitted; but it was said he may show that the landlord's title has expired; or that a title which he himself acquired has been adjudged by the decree of a court of equity to be the superior one. And in Gregory's heirs v. Crab's heirs, [2 B. Monr. Rep. 234,] it was held, that the tenant is not estopped to show that the landlord

conveyed the premises to a third person subsequent to the tenant's entry, and that allegiance is due to the assignee.

Comyn, in his Treatise on the Law of Landlord and Tenant, 520-523, after stating the general rule, that the defendant cannot defend in ejectment against the landlord, or those claiming under him, upon a supposed defect of title, says: "But though the defendant cannot show that his lessor *never* had title to the demised premises, he may, on admitting that he once had a title, shew, that his interest has expired. As, if the lessor being tenant *per autre vie*, bring debt against the lessee for rent accruing since the death of *cestui que vie*, the tenant may show, (not that the lessor never had title, but admitting that he once had title,) that the interest of the lessor is at an end. Where, therefore, the heir of the lessor brought covenant for want of repairs, and the defendant pleaded that the lessor was only tenant for life, and traversed that the reversion was in him and his heirs, the Court held this to be a good plea." *Further*, the lessee may show that the lessor was only seized in right of his wife for her life, and that she died before the covenant was broken. In Doe ex dem Lowden v. Warson, 2 Starkie's Rep. 230, Lord Ellenborough held, that the tenant in ejectment might show that his landlord had disposed of his interest during the term.

The defence set up in the case before us, when limited to the effect of the attachment, and proceedings consequent thereon, does not deny that the plaintiff had a good title at the time the defendant became his tenant; but it assumes, that that title, be it what it may, has been extinguished since the tenancy commenced, and that the defendant has become the proprietor of the premises in question. By receiving the possession of land from another, under a lease, the tenant impliedly admits that his lessor has such a title as authorized him thus to dispose of the premises, but he cannot be held to affirm any thing in respect to its continuance; consequently it is allowable to show that the title has expired, or been extinguished by operation of law.

We have seen, that by the levy of the attachment on the land, the plaintiff acquired a lien upon it, which continued in force up to the rendition of the judgment, and the statue saved it, and made it available, although a *fieri facias* instead of a *venditioni exponas* was issued upon the judgment. Speaking of the lien which the levy of an attachment operates, the Superior Court of New

Hampshire said, "the existence of the lien or security is, in our view, in no way contingent, conditional or inchoate. Its existence does not depend upon the judgment. It exists in its full force, from the moment the attachment is made; as much so as a lien by judgment, upon the rendition of the judgment in the States where that security is recognized. As we have already seen, it fastens itself upon, and binds the property, at once giving priority of right," &c. [Kittredge v. Warren, January term, 1844; 7 Law Reporter, No. 2.] The plaintiff purchased from Beverly after the levy of Wren's attachment, and after the latter acquired a right to have the land sold to satisfy such judgment as he might obtain in that proceeding. This lien we have seen, was continuing, and paramount to any conveyance of the property which Beverly could make. If a third person had become the purchaser at the sale under the execution, the cases cited show, that the allegiance of the tenant would be transferred to him, if the tenant continued to occupy with the permission of such a purchaser; and without stopping to particularize, in several of the cases, the tenant was allowed to set up his own title, acquired after the extinction of the landlord's; and none of them are opposed to a defence thus sustained.

None of the elementary writers or adjudged cases which have fallen under our observation lay down the general rule, as one of unyielding and universal application; but we have seen that it has many exceptions. Perhaps no case may be found which is *in totidem verbis* like the present, but we think the principle of several of those noticed by us are so strikingly similar, as not to require illustration to make the analogy more manifest.

The title of the plaintiff does not remain as it did at the time the defendant's tenancy commenced. Then, he had as it respects Beverly, an unquestionable right, and if Wren failed in his suit, or the lien of the attachment was discharged, his title would be disembarrassed, unless it could be overturned, because the purchase was not *bona fide*. But the suit was prosecuted to judgment, and execution, the lien of the attachment made available, and all semblance of title divested from the plaintiff. Under such circumstances, the defendant might have resisted a recovery, (as we have seen,) if a third person had purchased, by becoming his tenant; and there being no rule of law which forbids one situated

as the defendant, to purchase, we think he may resist a recovery by setting up the title he has acquired.

4. The payment by the defendant, in April, 1842, of the rent which he had agreed to pay the plaintiff for the enjoyment of the premises during the year 1841, was not an admission of a continuing tenancy, and consequently does not estop him from showing that the plaintiff's title had been extinguished, subsequent to the commencement of the lease.

5. In the sixth instruction to the jury, the Circuit Judge misapprehended the law. He said, if the proof did not show the identity of the lands in question with those levied on, then it was competent for them to inquire into the *bona fides* of the transaction between Beverly and Randolph; and if the conveyance was made, with the intention to defraud Wren of his demand, and so known to the plaintiff, then the plaintiff acquired no title that could prevail against the defendant's purchase. This charge tolerates the right of the tenant to dispute the title of his landlord. It does not refer to any change in the title after the tenancy commenced, but it assumes, that if it was then invalid, the tenant might defend an action for his ouster, by showing its invalidity; and this without reference to any *post factum* right acquired by the tenant. As to defendant's purchase of lands under execution, it did not authorize him to hold them against his landlord, if he could not make it appear that those levied on by the attachment and sold under the execution, were the same which the plaintiff was seeking to recover. Such sale and purchase would avail nothing, and should be thrown entirely out of view in considering the legal question raised upon the charge. When stripped of every thing extraneous, the instruction amounts to this, viz: If the transaction between Beverly and the plaintiff was influenced by the intention to defraud Wren, and the plaintiff was cognizant of the *quo animo* of Beverly, then he could not oust his tenant, though the latter showed no title. It is sufficiently manifest from what has been said, that this charge is not in harmony with the law.

If the question whether the lands which have been attached and sold under the execution were identical with those now in controversy, was one of a legal character, and the record showed their identity, we might perhaps be inclined to hold that the error noticed did not prejudice the plaintiff; and consequently furnished no cause for the reversal of the judgment. But there

is no such proof recited in the record. The declaration describes the land by its numbers, according to the official survey, while (as we have seen,) in the levy of the attachment, it is described by its locality in reference to other proprietors of adjoining lands. Thus it is obvious that parol proof was necessary to settle the question of identity.

6. In respect to the discrepancy between the writ, declaration and judgment, it certainly was not such as should have induced the exclusion of the judgment as evidence. The writ and declaration describe Wren as administrator, suing for the use of another, and his name is merely stated upon the margin of the judgment, without showing in what character he recovered. We should be disposed to treat this objection as untenable, even in a direct proceeding at the suit of Beverly, to reverse Wren's judgment, but coming up collaterally, we have no hesitation in saying it cannot be supported. The judgment furnished a warrant for the execution, and we will not go further back to scan the regularity of the proceedings.

The other points raised in the cause, are either embraced by those considered, or cannot arise upon a future trial. Without extending this opinion to greater length, we have only to add, that the judgment of the Circuit Court is reversed, and the cause remanded.

GOLDTHWAITE, J., *dissenting*.—I am constrained in this case, to dissent from the opinion just delivered, because, in my judgment, the effect of it is to subvert the salutary rule that a tenant shall not be permitted to controvert the title of his landlord.

Having regard to our statutes protecting the actual possession, I doubt the propriety of any exception to this rule, even when the title of the landlord is sold by sheriff's sale, as the tendency of permitting the tenant, in that case, to purchase for himself, is to tempt the fealty which he owes his landlord, and turn one who should be a faithful retainer into a secret enemy; but conceding that as an exception, it does not touch this case. Here, there has been no sale of Randolph's title, but Beverly's is the only one with which the purchaser from the sheriff is invested. Beverly's title is adverse to that of Randolph, and if Carlton had purchased directly from Beverly, no one could properly assert that a title

so acquired could be interposed to defeat Randolph; and can there be a different rule when the title passes by means of the sheriff, who is the mere legal agent of Beverly? It may be said, that Beverly himself could convey no title to another, but, to test the principle, let it be supposed there was a valid contract between Randolph and him for the purchase, made previous to the levy of the attachment, but that the deed was either not executed at all, or was so after the levy. What then is the condition of the parties under the operation of the rule declared? It seems to me, that the decision now made, extends the exceptions to the rule so far as to leave it of little value to the landlord.

In my judgment, the result which is attained by the Court is correct, but I think also, that the principle admitted at the close of the opinion governs the entire cause.

FLANAGAN v. GILCHRIST.

1. In debt upon an attachment bond, the declaration should show that the attachment was wrongfully or vexatiously sued out, and that thereby the obligee has sustained damages.

Writ of Error to the County Court of Lowndes.

Action of debt, by Flanagan against Gilchrist. The declaration sets out that on a certain day, &c. one Wiley Rogers sued out an original attachment before one Stanly, a justice of the peace for Lowndes county, against the effects of the plaintiff, returnable to the Circuit Court of said county, by virtue of which writ the sheriff levied on two slaves, and then detained and kept the same under the said writ. That to procure the said writ the said Rogers entered into bond with Gilchrist and one Bedford as his sureties. The declaration then proceeds to set out the bond, with the condition; which is that the said Rogers should prosecute his attachment to effect, and pay and sa-

tisfy Flanagan all such costs and damages as he might sustain by the wrongful and vexatious suing out of such attachment. The breach assigned is, that Rogers did not prosecute his attachment to effect, nor pay Flanagan the costs, damages, &c. which he sustained by the wrongful and vexatious suing out of the attachment, by means whereof the said bond became forfeited, and the defendant liable to pay the penalty.

The defendant demurred to the declaration, and his demurrer was sustained. This is assigned as error.

G. W. GAYLE, for the plaintiff in error, cited Herndon v. Forney, 4 Ala. Rep. 243.

No counsel appeared for defendant in error.

GOLDTHWAITE, J.—The question involved here has reference to the manner in which a breach of the condition of an attachment bond shall be assigned, when debt is the form of action. In Herndon v. Forney, 4 Ala. Rep. 243, we determined that such an action was proper, although the damages sustained by the obligee had not been ascertained in an action on the case against the person suing out the attachment; but then there was no necessity to determine how the pleadings should be. In the subsequent case of Hill v. Rushing, Ib. 212, the action was covenant, under similar circumstances, and the breaches then assigned were considered sufficient. In that suit, the declaration averred that the attachment had been sued out without any good and sufficient reason, and for wrongful and vexatious purposes; and that the plaintiff thereby had sustained damages to a specific amount, by reason of his slaves being levied on; also, in his having been compelled to pay costs, and employ counsel to defend himself from the attachment, and to regain his slaves; also, in his credit, which had been greatly injured. We further considered, that the action upon the bond was to be governed in all respects by the rules applicable to an action on the case, except that the recovery could not exceed the penalty of the bond.

In the case under consideration the breach is assigned, nearly in the words of the condition; but there is no averment that the attachment was either wrongfully or vexatiously sued out; nor is there a like averment that damages have resulted to the plain-

tiff from wrongfully or vexatiously suing it out. In our judgment the declaration is defective in both these particulars.

The general rule with respect to the assignment of breaches, is that they may be assigned by negativing the terms of the condition, but this is only when the performance does not depend upon some other event; whenever it does that event must be averred. Thus, it is said, that in debt upon a bond, conditioned that one should render an account of monies received, it should be averred that he did receive monies, and that he did not render an account of such monies. [1 Chitty's Plead. 326.] This seems decisive to show, that the averment that the defendant has not paid the costs and damages which the plaintiff has sustained by the wrongful or vexatious suing out of the attachment is defective, without averring that the attachment was sued out with that purpose; or that damages have resulted from it.

We think the demurrer was properly sustained, as the declaration does not conform to these views. Judgment affirmed.

CASKEY, ET ALS. v. NITCHER.

1. A notice that the sheriff "has failed to return an execution," which is described, is sufficient, without an allegation that he failed to return it three days before the return day of the writ.
2. A return of the writ, two days before the return term of the writ, without a sufficient excuse, is in law no return.
3. A notice, that the plaintiff proceeds for the amount specified in the execution, sufficiently indicates under what statute he proceeds.
4. A certified copy of the sheriff's bond, is sufficient, unless the authority of the bond is questioned by plea, when it would be proper for the Court to require the production of the original.

Error to the County Court of Chambers.

Motion by the defendant in error, against the plaintiff in error, as sheriff, and also against his sureties, for failing to return a *fieri facias*.

The notice, after describing the execution, when it issued, and came to the sheriff's hands, alledges that he has "failed to return said writ of execution," and informs him that a motion will be made "for the amount of said writ of execution, and the costs of the motion."

To this notice the defendant demurred, and the Court overruled the demurrer.

An issue being made up between the parties, and submitted to a jury, and it being in proof, that the first day of the term to which the execution was returnable, was the 23d January, 1843, the defendant moved the Court to charge, that if they found that the execution was returned on the 21st January, 1843, they must find the issue for the defendant, which charge the Court refused, but charged the jury, that under the issue formed, if the execution was not returned, three days before the term of the Court to which it was returnable, in the absence of any satisfactory proof of excuse for not so returning it, they must find the issue for the plaintiff; to which the defendant excepted.

A paper, purporting to be a certified copy of the sheriff's bond, was in evidence, and the Court ruled, that as it purported to be approved by the Judge of the County Court, and certified by the clerk, was sufficient to authorize its being read to the jury, without proof of the signatures of the obligors, to which the defendants excepted. The assignments of error relate to the judgment upon the demurrer to the notice, and the matter of the bill of exceptions.

Rice, for plaintiff in error, argued that the notice was defective, in not setting out that the execution was not returned three days before the return day, and in not specifying whether the proceedings were had under the act of 1807, or 1819. [5 Porter, 537.] There is no statute authorizing a motion such as this.

ORMOND, J.—We consider the notice in this case sufficient. The objection is, that it is not alledged that the sheriff failed to return the execution three days before the term of the Court, to which the writ was returnable. The object of the notice is to in-

form the sheriff what he is to answer, and it is impossible to suppose, that he was not distinctly advised that he was proceeded against for a failure to return the process, to the term of the Court indicated in the notice, according to law.

The same remarks apply to the objection, that it is not stated in the notice, whether the proceeding is had under the act of 1807, or 1819, as was held to be necessary in Hill v. The State Bank, 5 Porter, 537. The notice in that case was, "the plaintiff will move the Court for judgment against you, according to the statute in such case made and provided," and there being two statutes upon the subject, one giving a fine of five per cent. on the amount of the judgment, and the other the amount of the judgment itself, upon either of which at his election the plaintiff might proceed, this Court held the notice to be too ambiguous in a case of this penal character. But in this case there is no ambiguity, or room for doubt. The sheriff is distinctly informed, that the plaintiff goes for the amount specified in the writ of execution, which is in truth more definite, than if he had been referred to the statute conferring the right on the plaintiff. The addition "and the costs of this motion," is the legal consequence of the motion if successful, and certainly does not vitiate it.

The certified copy of the sheriff's official bond was doubtless sufficient *prima facie*, that such a bond had been executed, and that the signatures to it were genuine. It appears that the bond was received, and approved by the Judge of the County Court; it then became a record of his Court. The statute, (Clay's Dig. 164, § 15,) requires, that it shall be recorded, and that a copy of the record shall be evidence, unless the Court thinks proper to require the original to be produced. This would be done in proper cases, when the authenticity of the bond was questioned by plea. No such plea was interposed in this case, and nothing shown to cast suspicion upon the certified copy, which was therefore evidence, quite as potent as the original, if produced, would have been.

The statute, (Clay's Dig. 336, § 131,) expressly requires the sheriff "to return the writ three days previous to the term of the Court to which it shall be returnable," and makes him liable to all the penalties provided by law, for a failure so to return it. A return therefore, two days before the first day of the return term,

unless there be some satisfactory excuse shown for the omission is, in law, no return.

Let the judgment be affirmed.

GRIFFIN v. GANAWAY.

1. In an action against a sheriff for failing to levy an attachment upon a sufficiency of property to satisfy the judgment rendered thereon, the measure of damages is the injury sustained by the sheriff's failure to make the proper levy. The value of the property levied on in such case, should be equal to the amount of the debt sought to be recovered, making a proper allowance for depreciation in price, the effect of a forced sale, as also costs and other incidental charges: and evidence of the sum at which the property was sold under the execution, should perhaps be considered more satisfactory as to its value than the opinions of witnesses.

Writ of Error to the County Court of Talladega.

This was an action on the case, at the suit of the defendant in error, to recover damages of the plaintiff, for the failure to levy an attachment placed in his hands, as sheriff, on the 27th of October, 1841, in favor of the former, against the estate of Shelton Kennerly, on a sufficiency of property to satisfy the same. [See this case when previously here, reported in 6 Ala. Rep. 148.] The cause was tried on the general issue, and other pleas, a verdict was returned in favor of the plaintiff for $92 30, and judgment rendered accordingly.

On the trial, the defendant excepted to the ruling of the Court. It was shown by the attachment and by other proof, that it was levied on a horse, as the property of the defendant in attachment, which was proved by one witness to be worth seventy-five dollars, at the time of the levy, and by another to be worth one hundred dollars. The attachment was for $86 07 1-2, issued about three months previous to the trial term of the cause to which it was ancillary, and at which the judgment was obtained. Soon

after the rendition of the judgment, a *venditioni exponas* issued, under which the horse that had been levied on was sold for the sum of forty dollars; of that sum the plaintiff received but ten dollars, the residue being appropriated to the payment of the costs.

Upon these facts, the Court charged the jury, that in estimating the value of the horse levied on, they could look to the price at which he was sold, as well as the other evidence; and that the evidence of the witnesses as to the value was not conclusive. The defendant's counsel then prayed the Court to charge the jury —1. If the defendant was guilty of the neglect charged in the declaration, the measure of the damages was not the difference between the ten dollars which the plaintiff received from the sale of the horse, and the plaintiff's demand sought to be recovered. 2. That the defendant could not be made liable for more than the difference between the value of the horse at the time of the levy, and the amount for which he was required to attach Kennerly's estate. These several charges were refused.

S. F. Rice, for the plaintiff in error, insisted that the first charge was erroneous, because the inquiry was not as to the value of the horse some three or four months after the levy, (and perhaps longer,) when he was sold; and because it makes the sheriff an insurer, that the value of the horse would not depreciate between the levy and sale. The charges refused were obviously proper, and should have been given.

L. E. Parsons, for the defendant. The witness who testified to the value of the horse did not speak in reference to a *public sale for cash*, although the law requires the sheriff thus to dispose of property levied on by him. It was proper for the jury to look at all the facts in coming to a conclusion on this point.

The first charge prayed is a mere negative, without furnishing any rule for ascertaining the damages, and should not have been given. The second was properly refused, because there was no proof of the value of the horse at a *public sale for cash*. The witnesses doubtless had reference to sales made upon negotiations in the ordinary way, between seller and purchaser.

COLLIER, C. J.—The true measure of damages in this case

is, the injury which the plaintiff sustained by the neglect of the defendant to levy the attachment on a sufficiency of property to satisfy the judgment consequent thereupon. It is fairly inferrible from the evidence, that the horse levied on would not, at a forced sale, have sold for a sum equal to that for which the action was brought, to say nothing of the expense of keeping such property before it is replevied, and other costs. If as much of the estate of the defendant in attachment, making a proper allowance for depreciation in price, costs and incidental charges, was levied on, as was necessary to satisfy these, together with the debt, then, perhaps, the sheriff would be discharged, if from causes beyond his control, it should be lost, or become valueless.

The evidence of the defendant's witnesses as to the value of the horse, was inconclusive. These witnesses doubtless spoke in reference to the market price, as ascertained in ordinary contracts between man and man. Now it is known to all who have any knowledge upon the subject, that sales of property for which there is not a great demand, is less likely to command a fair price at a forced than a voluntary sale.

We should consider the price at which the horse sold under the *venditioni exponas*, as furnishing a more certain standard of value, than the testimony of witnesses; especially as there was no evidence tending to show any thing like depreciation from bad treatment or otherwise, between the levy and sale. But, be this as it may, the charge of the Court upon the evidence, assuming the defendant's neglect of official duty, could not possibly prejudice him; for we have already seen, that if neglect was established, the plaintiff is entitled to be compensated to the extent of the injury he has suffered.

From what has been said, it clearly results, that neither of the charges prayed should have been given. They assume that the defendant could not be made liable for more, than the difference between the value of the horse at the time of the levy, and the amount for which the attachment issued. This, it has been shown, is not the law. There is then no error in the points presented, and the judgment is therefore affirmed.

RIGGS v. ANDREWS & CO.

1. In a suit by an indorsee against his immediate indorser, on a note purporting to be made by G. & B. *in liquidation*, by W. B., it is no defect if the latter words are omitted in the declaration, nor can the note be excluded on the ground that it varies from that declared on.
2. It is unnecessary to fill up a blank indorsement, even when the description in the declaration is that the note was indorsed to the plaintiffs.
3. When a person removes and settles his family at a place different from his former residence, the presumption is that such is also his residence, and the mere fact that he returns to his former place of doing business, is insufficient to warrant the presumption that such is his place of transacting business. This is a matter peculiarly within the knowledge of the defendant, and should be made to appear with certainty.

Writ of Error to the County Court of Dallas.

Assumpsit by Andrews & Co. against Riggs, as the indorser of a promissory note, which, in the indorsement on the writ, is thus set out: "Mobile, 28th April, 1841. Three years after date, we promise to pay to Daniel M. Riggs, Esq. or order, six hundred and eighty-two 16-100 dollars, value received, negotiable and payable at the Bank of Mobile.

"Gayle & Bower, in liquidation,
By Wm. Bower."

The declaration describes the note as made by Gayle & Bower.

The defendant appeared, and craved oyer of the writ and indorsement upon it, which being given, he demurred. The Court overruled the demurrer.

He then pleaded several pleas in bar of the action. At the trial, upon the general as well as other issues, the plaintiff gave in evidence the note, which is above recited, on which appeared the blank indorsement of the defendant. To the admissibility of this note as evidence, the defendant objected, on the grounds, 1st. That it was variant from the note described in the declaration, being the note of Wm. Bower only, and not the note of Gayle & Bower. 2. That the indorsement was variant from that set out in the declaration, which is there stated as the indorsement of the

defendant to the plaintiffs, and the note in evidence is indorsed in blank only. The objection was overruled, and the note admitted as evidence to the jury. In the discussion of the last mentioned objection, the counsel for the plaintiffs contended that the indorsement in blank was alone sufficient, and also that they had the right then to fill up the indorsement, so as to direct the payment to be made to the plaintiffs, but did not do so, or express their determination or promise, to do it, until after the note and indorsement had been admitted as evidence; but during the trial they wrote above the name of Riggs the following: "pay the within note to the order of E. L. Andrews & Co."

The plaintiffs also read in evidence a notice of the protest of the said note, purporting to be from a notary public of Mobile, stating that the note had been duly protested by him on the 1st day of May, 1844, and that on the same day he had put notice thereof in the post-office, addressed to the defendant at Selma, and also to Cahawba. They also introduced witnesses, who stated that the defendant had resided with his family in the city of Mobile, several years prior to the month of May, 1844, and during that time had exercised the office of cashier of the Planters' and Merchants' Bank of Mobile; also, that during the latter part of his residence there, he had acted as a commissioner of said Bank for winding up its concerns; that some time prior to the said month of May, 1844, the defendant's family removed to a place about six miles from the town of Selma, and near the same distance from the town of Cahawba, and that his family had resided at the same place since their removal—the settlement having been purchased by the defendant some years previous to their removal; that the defendant at the same time came up the river with his family, saying, they would remain at their settlement in Dallas county, but that he was to return immediately to Mobile to attend to his business there; that afterwards, and before the month of May, 1844, he was several times seen in Dallas county, and that he spent a portion of his time in Mobile; what portion the witness could not say. There was no other evidence than above stated, that the defendant had changed his place of business, or that his said official duties or employments in Mobile had terminated, or ceased, prior to the month of June, 1844, or that he was absent from Mobile on or about the 1st May of that year. It was also in evidence that since the last mentioned date,

the defendant had been in the habit of receiving letters from and using the post office at Selma, which, as well as that at Cahawba, were the nearest offices to him. There was no other evidence that the defendant had ever received said notice of protest.

On this state of evidence, the Court instructed the jury, that if at the date of said protest, the defendant's family had established their residence at their settlement in Dallas, and the defendant considered that place his home, and if the post office at Selma or Cahawba were the nearest to said residence, the notices so sent as aforesaid were sufficient to charge him, notwithstanding he may have spent the greater portion of his time on business in Mobile.

The defendant asked the Court to instruct the jury, that though the defendant's family, prior to the said protest, may have resided at their said place in Dallas, and though the same may have been regarded as the family residence, and the defendant may have made them occasional visits, and spent a portion of his time at the same place, yet if his place of business and employment aforesaid had not terminated in Mobile, but was continued there by him until after the said month of May, 1844, and the greater portion of his time spent in Mobile, in the exercise of his said employment until after that time, then the notices addressed to him by mail to Dallas as aforesaid, were insufficient to fix his liability. This was refused.

The defendant excepted to the several rulings of the Court, and now assigns the same as error.

R. Saffold, for the plaintiff in error, insisted, 1. The demurrer ought to have been sustained, inasmuch as the note sued on was not described according either to its literal import or its legal effect, as respects the maker or makers thereof. [Nat'l Bank v. Norton, 1 Hill, N. Y. 572; Dickerson v. Valpy, 10 B. & C. 128; 6 Esp. 18; 4 Dana, 375; Sanford v. Nickels, 4 John. 224; 1 N. & McC. 561; 1 McCord, 388; 18 Pick. 503.]

2. The demurrer ought also to have been sustained, because the declaration states the note as made by certain persons using the name and style of Gayle & Bower, without shewing what relation they bear to each other generally, or in the particular transaction. Nor does the declaration shew the christian names of the makers of the note, or who composed the company.

3. The Court ought to have excluded the note from the jury,

as the one offered in evidence, in legal effect, was the note of Bower only, and not that of Gayle & Bower, as described.

4. Because the blank indorsement was not filled up when offered in evidence.

5. The charge requested by the defendant should have been given by the Court.

Edwards, contra.

GOLDTHWAITE, J.—1. The demurrer to the declaration for the supposed variance from the indorsement on the writ, and the proposition to exclude the note from the jury, present the same question; and we think it was properly decided in the Court below. Whatever may be the authority of one partner to bind the firm after its dissolution, it is certain he may do so, if he has an express authority given for that purpose, and here the *prima facie* intendment is, that the note declared on and offered in evidence, is the note of Gayle & Bower. The addition after the signature of "in liquidation," need not be carried into the declaration, and if omitted is no variance. [Fairchild v. Grand Gulf Bank, 5 Howard Miss. 597.] Indeed, to the immediate indorsee suing his indorser, it makes no difference whatever, whether the previous names are false or genuine, as the *indorsement* is the cause of action, which, when made, is an admission of the genuineness of the previous signatures. [Free v. Hawkins, Holt, 550.]

2. There is nothing in the objection that the indorsement was in blank when the note went to the jury; the note vested as completely by the blank indorsement as it could by any other mode, if the plaintiffs were the owners; and the production of it by them, indorsed in this manner, is *prima facie* evidence of their ownership. [Chitty on Bills, 255; Chewning v. Gatewood, 5 Howard Miss. 552; 2 Miller's Louis. 192.]

3. The charge refused by the Court, was properly so, because the evidence was not such as is assumed by the defendant as the basis for his legal propositions. Thus it did not appear that his place of business and employment in Mobile, had not terminated at the maturity of the bill, or that it was continued there by him until the month of May; nor that the greater portion of his time was spent in Mobile, in the exercise of the employment in which

he had been engaged previous to the removal of his family. After a *prima facie* case of removal was made out by the evidence; as was in this case, by showing the removal and settlement of the defendant's family at a different place from the one where they formerly had resided, it was incumbent on the defendant to show affirmatively, that his place for the transaction of business was continued at Mobile, for the matter was peculiarly within his knowledge, and could be made to appear with certainty and precision. The Court below did not err, therefore, when it refused a charge based upon evidence which, in our judgment, had no tendency to prove, that the defendant, after the removal of his family, continued to transact his ordinary business in another place.

Judgment affirmed.

LEWIS v. BRADFORD.

1. Where one has the money of another in his hands, and uses it, he cannot avoid the payment of interest, by answering that he does not know what profit was made by its use. In such a case, he is at least liable for interest whilst it was so employed.

Error to the Chancery Court of Talladega.

The bill was filed by the plaintiff in error, to sell land jointly owned by the parties, and for an account of profits in a previous transaction, as partners. The only question made in this Court, arises out of a claim for the profits, or use of a sum of money belonging to the partnership, which it is alledged the defendant in error retained in his hands, and used for several years. The allegation is, "that not long after the purchase of said land, defendant sold one of the tracts for $1,200, and received the money —that defendant refused to account to complainant for his proportion of said money, for several years, and during all that time

he had the same hired out at interest, or otherwise profitably invested."

The prayer of the bill is for a sale of the remaining tracts, and for an account of the moneys received, and of the profits upon the use of the money retained.

The defendant in his answer upon this part of the case, admits the receipt of the money as alledged, in the latter part of 1837—"that he cannot positively say what interest or profit accrued on said money, as he kept no account of the same, considering the same to be deposited with him, subject to be drawn from him when called for." It is also stated, that a suit was depending against him for the land, of which this money was the proceeds, and which he paid over as soon as the suit was determined.

The Chancellor in his decree, refused to require the defendant to account for the profits, considering his answer to amount to a substantial denial that any profits were made, and there being no proof that such was the fact.

From this decree this writ of error is prosecuted.

L. E. Parsons, for plaintiff in error, contended that the matter was within the knowledge of the defendant, and his omission to deny it, was an admission of the fact. [2 Bibb, 67; 3 Monroe, 187; 3 Litt. 57; 1 J. J. M. 212; 4 Id. 87.]

The parties did not go to trial on bill and answer by consent, and therefore the answer is not proof. [5 Ala. Rep. 60; 5 Id. 324.]

A partner, using the partnership funds for his own private purposes, must account, either for the profits made, or at least pay interest. [1 John. C. 466; 1 P. Will. 140; 15 Vesey 218; 5 Id. 539; 17 Id. 298; 7 Cow. 11.]

W. P. Chilton, contra.

ORMOND, J.—The single question presented upon the record is, whether the defendant is liable for interest for the partnership funds whilst he retained them in his hands. The allegation is, that the defendant retained the money in his hands for several years, during which it was put out at interest, or otherwise profitably invested. This is impliedly admitted in the answer of the defendant, who does not deny that the money was employed by

him, but says, "that he cannot positively say what interest, or profit accrued on said money, as he kept no account of the same, considering the same to be deposited with him, subject to be drawn from him when called for." He also insists, that the title to the land, the proceeds of the sale of which was in his hands, was in dispute, and that he retained the money to answer that demand, if the suit should be decided against the firm.

In the case of T. & J. Kirkman v. Vanlier, 7 Ala. Rep. 230, the question of the liability of one for interest, retaining in his hands the money of another, is discussed at length, and many authorities cited; we shall not therefore enter upon the examination of the question further, than to state the general proposition, that where one receives interest from the money of another, or derives an advantage from its use, he shall pay interest to the owner. It is probable, that under the circumstances of this case, and from the trust and confidence reposed by each of the parties in the other, the complainant would have had a right to the profits made by an investment of his money, but as it does not appear what the profits were, he has at least a clear right to interest, whilst it was in the defendant's hands, if used by him, which, as already stated, the answer by strong implication, if not in direct terms, admits.

If, as stated by the Chancellor, the defendant had the right to retain the money, pending the litigation about the title to the land, to exonerate him from the payment of interest, it was his duty to show, that he kept the money on hand, ready to meet the exigency, and that he did not use or employ it, or place it out at interest. But so far is this from being the case, that he admits he did use it, but that he cannot say what profit he made on it, as he kept no account of it. It being therefore clear that he did use the money of complainant, and he declining to state the profit which was actually made by its employment, he must account with the plaintiff for interest, during the time it was in his hands.

The decree of the Chancellor as it regards this matter is therefore reversed, and the cause remanded for an account, in conformity with the principles here laid down.

ARMSTRONG v. TAIT.

1. The defendant, by promise in writing, undertook to pay the plaintiff a definite sum of money on a certain day *in shucks;* shortly after the maturity of the note, the plaintiff demanded the shucks at the defendant's residence; the latter had about one load ready, which he offered to deliver, remarking to the plaintiff that he might haul them off, and the residue should be stripped from the corn as fast as he could take them away; it was shown that the defendant had more shucks on his corn than were sufficient to pay the note, and that the plaintiff insisted on having all delivered at one time, at a point designated by him, within a few few feet of the defendant's corn cribs; and within forty or fifty yards of houses containing a large quantity of cotton seed and fodder; upon being asked by the defendant why he wished the shucks delivered at that place, the plaintiff remarked, to burn, sell, or do whatever he thought proper with them: *Held*, that the readiness of the defendant to perform his contract, and the offer to deliver the shucks whenever the plaintiff would remove them, was a good defence to an action brought for a breach of the undertaking contained in the writing.
2. Where the Court having charged the jury, upon the law as applicable to the evidence adduced, at the request of the defendant's counsel, and upon an inquiry by the jury, remarked, that the plaintiff would not lose his right to recover in another action, though their verdict might be for the defendant; the remark of the Court, whether in conformity to law or not, furnishes no ground for the reversal of the judgment. It could not have misled the jury, and they doubtless sought the information merely to reconcile their consciences to the performance of an imperative legal duty.

Writ of Error to the County Court of Dallas.

This was an action of assumpsit at the suit of the plaintiff in error, upon a writing subscribed by the defendant, of the following tenor, viz: "$60 in shucks. On the first day of January next I promise to pay Thomas Armstrong, sixty dollars, to be paid in corn shucks, this 18th December, 1843." The declaration alledges a failure to deliver the shucks, upon a demand duly made, at the defendant's house, by the plaintiff: and to this the defendant pleaded a tender of shucks equal in value to the amount of the note declared on, at his (defendant's) residence in the county of Dallas, upon a demand there made by the plaintiff; but the lat-

ter refused to accept them: *further*, that the shucks are now there, ready for delivery, and have been ever since the tender, &c. This plea was adjudged good on demurrer, an issue joined thereupon, and the cause submitted to a jury, who returned a a verdict for the defendant, and judgment was rendered accordingly.

From a bill of exceptions, sealed at the instance of the plaintiff, it appears, that when the note became due, or a short time thereafter, he went to the defendant's residence, and demanded the shucks; the defendant then had about one load ready for delivery, which he offered to the plaintiff, remarking that he could haul these off, and he (defendant) would have them stripped from the corn as fast as he could haul them. It was shown that the defendant had more shucks on his corn than was sufficient to pay the note. To this the plaintiff objected, and insisted on having all delivered at once, at a place designated by him, within ten or twelve feet of two cribs of corn, containing about two thousand bushels, and within forty yards of a barn containing cotton seed, and fifty yards of a stable, in which was packed thirty stacks of fodder. The defendant inquired of the plaintiff what he proposed to do with the shucks at that point, and was answered, burn, sell, or do whatever he thought proper with them. There was no other proof of a tender or readiness to deliver the shucks.

The Court charged the jury, that the facts above recited were sufficient to sustain the defendant's plea; that it was immaterial whether the defendant kept on hand and was ready to deliver up to the time this suit was commenced, the same shucks which he had tendered; that if he had on hand other shucks of equal value with the note, that was enough, whether they were stripped off the corn or not. *Further*, if, when the plaintiff demanded the shucks, the defendant had one load ready, told the plaintiff to take them away, and the remainder should be in readiness for him as fast as he could haul them, this was sufficient to sustain the plea of tender, that it was not necessary that all the shucks should have been ready for delivery at the same time, when the demand was made, provided he had enough to pay the note, on his corn.

The Court also charged the jury, at the request of the defendant's counsel, and upon an inquiry by the jury, that the plaintiff would not lose his right to recover the shucks, though the verdict might be for the defendant. Other charges were given and re-

fused, but they present nothing more than the legal questions raised upon the instructions above stated.

C. G. Edwards, for the plaintiff in error, made the following points: 1. There was no tender; to make it complete, the shucks should have been in a deliverable state. [2 Saund. on Plead. & Ev. 840; 6 Taunt. Rep. 336; 2 Stark. Ev. 780.] 2. The vendee is not bound to accept a part, and take the vendor's promise to deliver the remainder. 3. The shucks were not ready to be delivered until they were actually stripped from the corn. [6 Taunt. Rep. *supra;* 7 Greenl. Rep. 91; 6 Pick. Rep. 356.] 4. The remark of the Court to the jury, that if the plaintiff failed in the action, he could recover the shucks in another suit, was incorrect, and calculated to mislead them.

G. W. Gayle, for the defendant. If the plaintiff had not called upon the defendant and made a demand, it may have been necessary for the latter to have informed him of his readiness to deliver; but be this as it may, the defendant need not have proved his readiness at all times. [1 Stew. Rep. 272.] 2. A delivery at the defendant's house would have been a compliance with the contract. [1 Wash. Rep. 326; Minor's Rep. 412.] 3. The offer to have the shucks stripped from the corn and deliver them as fast as they could be hauled off, was a sufficient compliance with the contract. [7 Porter's Rep. 420.] 4. A tender of specific articles need not be pleaded with a *profert in curiam.* [1 Johns. Rep. 65.]

5. The refusal to deliver all the shucks at a point near the defendant's corn cribs, cannot in any manner affect the tender; such a requisition was unreasonable, could not benefit the plaintiff, and might put the defendant to great inconvenience, and subject him to the danger of loss from fire.

COLLIER, C. J.—Upon a mere inspection of the writing declared on, we should not have supposed it to evidence a promise seriously made, and intended to be enforced, by the delivery of the specific article undertaken to be paid. But the contract, as presented on the record is certainly legal, and the earnestness with which the matter was litigated below, very conclusively shows that the controversy is real.

The question to be considered is, whether the facts proved show a tender, or such a readiness to perform on the part of the defendant, as to furnish an answer to the action. It must be conceded, that the decisions do not entirely agree upon the point as to the manner in which a contract to pay in specific articles may be discharged, or the performance excused, where a payment is not made in fact. In some of the cases, it has been held, that in order to make a good tender, the articles must be set apart and designated, so as to enable the creditor to distinguish them from others of the same kind, and that the property so tendered vests in the creditor, and is at his risk. [Smith v. Loomis, 7 Conn. Rep. 110; Wilt, et al. v. Ogden, 13 Johns. Rep. 56; Barnes v. Graham, 4 Cow. Rep. 452; See also, Robinson v. Batchelder, 4 New. Hamp. Rep. 40.]

In Lane v. Kirkman, [Minor's Rep. 411,] it was said, "that in contracts for the payment of specific articles, where no place of delivery is mentioned, the residence of the debtor, by legal construction, is understood to be the place." And in Thaxton v. Edwards, [1 Stew. Rep. 524,] it was held, that it was a good defence to a note for the payment of specific articles, that the defendant was ready, able and willing to deliver them at the appointed time, and that the plaintiff did not make a demand. In Garrard v. Zachariah, [1 Stew. Rep. 272] after the maturity of a debt, it was agreed that the debtor should buy and deliver to the payee specific articles in satisfaction; accordingly, the articles were purchased, but the payee refused to receive them: *held*, that it was not necessary to aver that the defendant still had them ready to deliver; that "The rules which apply to a tender of money ought not to govern a tender of specific articles. Money can be kept without expense, and with little comparative risk." *Further*, that the party who undertakes to pay a debt in such property, if he has it ready on the day, he is not bound to keep it for an indefinite time ready to deliver to the payee on demand, nor is it necessary that he should abandon it in order to be discharged from a performance. But the Court said it may be, that if the debtor converts the property to his own use he would be liable in an action of *trover*. Cobb v. Reed, 2 Stew. Rep. 444, cites and recognizes the cases of Lane v. Kirkman, and Thaxton v. Edwards—*supra*.

Where a party undertook to deliver plank *on demand*, we held, that to subject him to an action he must be put in default by making a demand; "for it cannot be expected that one shall always have a ponderous article ready to be delivered, until some time is ascertained, either by the consent of the parties, or by notice given." [McMurray v. The State, 6 Ala. Rep. 324.]

In Young v. Foster, 7 Porter's Rep. 420, the defendant sold to the plaintiff seven hundred bushels of corn, which he undertook to deliver in the plaintiff's boat at an appointed time, or sooner if he desired it. The defendant, upon the demand being made, refused to deliver a part, because the boat could not carry all the corn at one time. But we held, that if the quantity of corn was too large to be received at one time, according to the ordinary mode of transportation, the law of the contract is, that a refusal to deliver any part of it, because all could not be taken in the boat, was not justifiable. That in "a contract for the purchase and delivery of such a ponderous article as corn, the parties must be presumed to have contracted in reference to the necessity of the case, and to the habits and means of transportation common in the country;" and the law in this respect, is the same, whether the delivery was to be made on a day certain, or on demand.

The cases cited from the decisions of this Court, under its present and earlier organization, furnish principles for the adjudication of that now before us. As to the place of the demand, that is conceded to be the residence of the debtor, but it is insisted that the tender made was not sufficient to prevent the promise to pay in specific articles, from becoming an absolute engagement to pay the amount in money.

If the plaintiff was not bound to remove all the shucks at the same time, he could not insist upon their delivery sooner than he was able to remove them. No reasonable purpose would have been subserved by the defendant's delivering all at once, and at the point designated by the plaintiff; whilst it might have been exceedingly inconvenient for the defendant, and hazardous to the safety of his property, by depositing such a large amount of combustible material in a situation so much exposed. Nor was it necessary that a sufficiency of the shucks, to discharge the debt, should have been stripped from the corn to make the defendant's

readiness or tender complete. They were, while on the corn, in a situation quite as favorable to their preservation as any other, and it was entirely permissible for them to be kept there until the plaintiff was prepared to haul them off.

True, the defendant might have offered to deliver all at the same time, and abandoned them to the plaintiff, and if they had been lost or destroyed without the special interference of the defendant, he would have been absolved from his contract. Yet the defendant was not bound thus to set apart and abandon the article to the plaintiff; it was enough (as we have seen) that he was ready and actually offered to perform.

One of the cases cited, shows, that having been ready and willing to deliver the shucks at the time appointed, the defendant was not obliged to retain the same article; for that might be exceedingly inconvenient, and impose a burden beyond all benefit derivable from the contract.

The remark of the Court to the jury, that if the plaintiff failed in the present suit, that he might recover the article in another action, whether true or not, could not have misled the jury, or have induced them to do any thing more than duty required. The jury, doubtless, felt constrained by the evidence, to return a verdict for the defendant, and to reconcile them to the performance of a duty which seemed to have been hard upon the plaintiff, they made the inquiry of the Court. The instruction upon this point was expressed in such terms that it could not be inferred that the Court laid any particular stress on it, or that the right of the plaintiff to recover in a future action should incline them to find for the defendant.

Our conclusion is, that the judgment of the County Court must be affirmed.

HENDRICKS, ET UX. v. CHILTON, ET AL.

1. Where a creditor has caused a levy to be made on property, which, after the levy, is claimed by a third person, and then the same property is again levied on by another creditor, as belonging to the claimant, and after this the claimant collusively dismisses his claim; these circumstances will not invest a court of equity with jurisdiction of a suit by one creditor against the other, to determine which of their debtors has the right of property. *Quere*—whether a court of law is not competent to direct an issue in the nature of a claim suit, to determine the question, or to protect its officer by enlarging the time for his return.

Appeal from the Court of Chancery for the 39th District.

The case made by the bill, independent of much extraneous matter, is this:

Peletiah Chilton, Rezin R. Chilton and Asahel Chilton were indebted to Julia Harding, who has since intermarried with Hendricks, when a minor, by several notes. Attachments upon these notes were sued out in the name of one Parke, the guardian of Miss Harding, and levied on certain slaves and other effects, which are charged to be the property of R. R. Chilton. About the same time, as the bill states, Calvin and Franklin Morgan, partners, under the firm of C. Morgan & Son, having a judgment against Peletiah Chilton, Asahel Chilton and others, caused an execution to be issued and levied on the same slaves, as the property of Peletiah Chilton. Rezin R. Chilton, immediately after the levy instituted a claim, under the statute, which he subsequently dismissed.

All the Chiltons are charged to be insolvent, and it is alledged that if C. Morgan & Son are permitted to sell the property levied on to satisfy their debt, nothing will remain to satisfy that of the complainant. It is also charged, that Peletiah Chilton has no interest in the property levied on, and that the withdrawal of the claim interposed by R. R. Chilton, was fraudulent and collusive.

The Chiltons, C. Morgan & Son, and Robert S. Porter, sheriff of Benton county, are made defendants to the bill, and its prayer

that Morgan & Son, as well as Porter, as sheriff, may be enjoined and restrained from selling the slaves, &c. under their execution, until the final hearing; and that if necessary an account may be taken, and the property sold, to satisfy the debt of the complainant.

The bill is filed in the name of Julia Harding, suing by her guardian Nath'l Parke, but she having afterwards intermarried with Hendricks, he was made a party, on motion. An injunction was awarded, and afterwards, the principal defendants answered the bill. The Chiltons admit the existence of the debt, and the suing out the attachment as stated by the bill, but insist it was improperly sued out, for reasons which it is unnecessary to state here. They declare that the execution of C. Morgan & Son was levied before the attachment was sued out. They assert that though R. R. Chilton was invested with the legal title to the slaves, it was in consequence of a bill of sale executed by Peletiah Chilton to him for a nominal consideration only, and that the possession was never relinquished by the latter. That the apparent sale was induced from the circumstance that Peletiah Chilton received the slaves with his wife, they having been bequeathed to her by her father, and feared difficulty, if she should die childless, from the other children of her father. They also assert that the debt to C. Morgan & Son, was contracted by Peletiah in 1833 or 1834, previous to the execution of the bill of sale, and thereupon R. R. Chilton withdrew the claim interposed by him, being advised it would convey no rights against a creditor. They therefore answer that the slaves, &c. are the property of Peletiah Chilton, and deny all fraud and collusion.

The answer of Morgan & Son alledges ignorance of all matters connected with the case, except so far as connected with their own judgments, and call for proof of the indebtedness upon which the attachments of the complainant are levied.

They alledge their debt was contracted by Peletiah and Asahel Chilton in 1833, but renewed, and new notes taken afterwards, upon which judgments were obtained against them and Moses L. Barr and Hugh L. Givens.

They state their information and belief, that the sale pretended to have been made by Peleliah to Rezin Chilton of the slaves, was fraudulent and collusive, and insist on their right to have satisfaction of their judgments.

All the defendants who answer, pray the benefit of a demurrer, because the bill contains no equity, and because the complainant has adequate relief at law.

The only evidence in the cause is the examination of two witnesses on the part of the complainant. One of them testifies that he was present when Peletiah Chilton, in the year 1836, sold certain of the slaves, which are the subject of this suit, to Rezin R., and conveyed them to him for the consideration of three thousand dollars. From thence up to the levy of the Morgan & Son execution, they were known as the property of Rezin R. and acknowledged so by both of the parties. The witness did not know what consideration was actually paid, but has heard Peletiah acknowledge that he received three thousand dollars from Rezin R. for the purchase. He was present and witnessed the contract of sale.

The other witness knew nothing of his own knowledge of the sale, but has often heard both Peletiah and Rezin R. admit the former had sold the slaves to the latter. Since 1838 the witness always understood they were the property of Rezin R. He considered Peletiah good for his debts at the time of the conveyance, and for the property conveyed.

The cause was heard before the Chancellor, upon bill, answers and proofs, and on the demurrer to the bill; and he dismissed the bill upon the demurrer, on the ground that as the complainant had not established her demand at law, she was not entitled to proceed in a court of equity. From this decree the complainant appeals, and here assigns that it is erroneous.

S. F. Rice, for the appellant, argued,

1. The jurisdiction of chancery, in this case, rests on the principle upon which it interferes to prevent irreparable injury, as in cases of waste. [Pharr v. Reynolds, 3 Alabama Reports, 521; Porter v. Spencer, 2 Johnson's Ch. 169.] The fraudulent collusion between Morgan & Son and R. R. Chilton, by which the latter abandoned his claim to the property, and thus subjected it to sale, is a matter of equitable jurisdiction. [Scott v. McMillan, 1 Litt. 302.]

2. The answers admit the claims against the Chiltons and the levies under the execution of Morgan & Son. In avoidance of these admissions, it is asserted that the property in 1833 or 1834,

belonged to Peletiah, and that the debt was then contracted, previous to the conveyance of the slaves to Rezin R. The matter of avoidance is not proved.

3. The answer of Morgan & Son, admits that the debt contracted by Peletiah in 1833, was given up, and other security taken from him, long after the sale to Rezin R. Taking this security was a discharge of the old debt, even if that had been proved. [Minor, 299, 312; 1 Stew. 354, 372; 10 Wheat. 333; 2 Stew. 498; 2 Porter, 280, 401.]

W. P. Chilton, contra, insisted,

1. That the decree was proper upon the ground assumed by the Chancellor, to-wit, that the complainant had no right to go into equity until she had exhausted her legal remedies. [Morgan v. Crabb, 3 Porter, 470; Miller v. Thompson, Ib. 196; 2 Leigh, 843; Ib. 299; 2 John. C. 283; 1 Paige, 305; 1 Monroe, 106; 1 Paine, 525; 1 Humphries, 85; 4 Johns. C. 671; 20 Johns. 554; 3 Paige, 320; 1 Litt. 302; 1 McCord C. 410; 2 J. J. M. 301; 1 Dev. Eq. 537; 1 Hill, 297, 301; 10 Yerg. 310; Roper v. Cook, Ala. Rep. Jan. Term, 1845.]

2. But if there is equity in the bill, the decree dismissing the bill is proper, as it was heard on the proofs, &c. as well as the demurrer. [8 Gill & J. 93; 2 Stew. 146; Lenox v. Pearl, 3 Wheat. 527; 2 H. & J. 304, 328.] The answers are strictly responsive to the bill, and deny all its equity, besides calling for proof of the indebtedness on which the complainant founds her right to stop the progress of the execution of C. Morgan & Son. The complainant asserts the title of the slaves is in Rezin R; this is denied; and there is no evidence of it, as the witnesses only speak of the declarations of the parties. [Pope v. Hendon, 5 Ala. Rep. 433.] The declarations are in no way connected with the possession, and therefore is no part of the *res gestae*. [2 Ala. Rep. 526.]

3. The evidence of the witnesses examined, is not sufficient to establish a sale of the slaves, so as to defeat the execution of Morgan & Son. The sale is positively denied by the answers, and no consideration is shown to be paid, either by the witnesses or any other proof. The omission to support the title, under such circumstances, is conclusive. The rights of creditors would stand on flimsy foundations, if they could be defeated by the idle

as well as the false declarations of the debtor. Besides this, the answers of the Chiltons are evidence for Morgan & Son. [Mills v. Gore, 20 Pick. 28.]

GOLDTHWAITE, J.—We are not satisfied that the decree dismissing the bill can be sustained, upon the ground assumed by the Chancellor; for, as it seems to us, the lien created by the levy of an attachment, is not materially different from that which is the result of the levy of an execution; but we shall not examine this point of the case, as there is a reason entirely decisive, which equally sustains the decree.

It is not pretended here that the complainant is pursuing a mere equitable right; on the contrary, it is apparent the aid of equity is sought to protect and advance a claim, which is purely legal. The real contest is between the complainant and Morgan & Son; she claiming to subject the slaves in controversy to the payment of her debt, as the property of one of the Chiltons; and they seeking satisfaction out of the same slaves, as belonging to another person of the same name.

It is evident therefore, if the common law has provided an adequate remedy for the complainant, under the circumstances disclosed, she is entitled to no aid from a Court of Equity.

By the ordinary course of the common law, all questions of the nature of that involved in this case, were determined in a suit against the sheriff, who levies an execution or other process, or omits to do so at his own peril. Not that this officer will not be protected by the Courts of law, when a reasonable doubt exists, or that he will be permitted to exercise his duties vexatiously or capriciously. Ordinarily the officer exercises his best judgment, and protects himself by taking a bond to indemnify himself from the consequences of an improper levy, or from the the consequences of refusing to levy. But if the parties themselves refuse to execute a proper or sufficient indemnity, the Courts, in a proper case, will enlarge the time for making the return, and thus effectually protect their officer. With us, the whole matter is in some degree regulated by statute, as on the one hand, the sheriff, in a case of doubt, is authorized to require an indemnity from the party directing the levy to be made, (Clay's Dig. 210, § 50;) while on the other, he is prevented from doing any material injury to a third person, by making an improper levy, by the enact-

ments which authorize the interposition of a claim suit, at the instance of him whose property is seized.

The case made by the bill assumes, that the sheriff has returned a levy on each of the processes in his hands, and under such a state of fact, it may be questionable whether either party is not entitled to sue him on his return. But to put the difficulty in its strongest possible light, we will suppose that the claim interposed by R. R. Chilton to the property, when levied on as belonging to Peletiah, was dismissed, with the intention to give Morgan & Son an undue preference, and that the sheriff and his official sureties were insolvent, so that no remedy could be had against him, or them, of an effectual character, for his refusal to levy the attachment at the suit of the complainant; still we think the concurrence of all those circumstances would have no effect to invest a Court of Equity with jurisdiction to determine the legal question, whether the property belonged to the one, or the other of the Chiltons.

Nor would the party be without a remedy, unless we arrive at the conclusion that a Court of Law is inefficient to protect its own suitors, from the misconduct of its own officers. We have already indicated, that if it was necessary to protect the officer, that the time for returning the process could be enlarged, and on the other hand, we think, if it should become necessary to protect the parties, it could be done by an inquiry with respect to the appropriation of the money, if the property was levied on and sold, under both, or perhaps either process; or upon a proper representation and proof, that the officer was improperly or capriciously exercising his powers to the prejudice of either party, it possibly would be proper for the Court to interpose, and direct an issue between them, in the nature of a claim suit.

We suggest these considerations, not intending to determine the course to be pursued, but to show that the whole matter is within the control of the Court of Law, and that Equity has no jurisdiction.

The decree dismissing the bill is affirmed, but without prejudice to any proceedings which the complainant may be advised to undertake, if any can be effectual, in the condition the case now is.

PEAKE v. STOUT, INGOLDSBY & Co.

1. A witness cannot be asked, what were the "motives and intentions" of another person in executing a deed.
2. Where one partner had been introduced as a witness to support a deed of assignment, conveying the partnership property, and had sworn that the deed was fairly made, and for the payment of the partnership debts, he may be asked on the cross-examination, whether one of the debts provided for in the deed, was not a debt created by himself, for the purpose of raising money to put into the partnership.

Error to the Circuit Court of Dallas.

TRIAL of the right of property, upon a claim interposed by the plaintiff in error, as trustee in a deed of assignment executed by Bissell & Carvill, an execution at the instance of the defendants in error, having been levied upon some of the property conveyed in the deed.

Upon the trial, the claimant offered as a witness Titus L. Bissel, one of the makers of the deed, who deposed that the debts secured by the deed were partnership debts—that in making the assignment, and in all the transactions connected with it, he acted in good faith, and without any intent to hinder, injure or defraud, the creditors of the firm, but to provide for their payment. The claimant's counsel, then proposed to question the witness, as to his knowledge of the motives and intentions of Geo. W. Carvill, his partner, in making the deed, to which the plaintiff objected, and his objection was sustained by the Court, and the claimant excepted.

On the plaintiff's cross-examination of the witness, to prove fraud, he proposed to prove by him, that at the time, and before the partnership of Bissell & Carvill was contracted, it was agreed between them, that Carvill should raise $3,000 on his own credit to be used in the partnership concern, and that this debt in favor of George G. Carvill, was provided for in the deed, and included as a firm debt of Bissell & Carvill, but was the separate debt of Geo. W. Carvill. To this the claimant's counsel objected, upon

the ground that it was irrelevant testimony—that it would contradict and vary the express terms of the deed, and that the witness was incompetent so to testify; but the Court overruled the objection, and required the witness to testify, to which the claimant excepted, and which he now assigns as error.

R. Saffold, for plaintiff in error. The witness was not asked for his opinions, or inferences of the intentions of his co-partner, but for his knowledge of facts. The case is clearly distinguishable from the case relied on of Borland against the P. & M. Bank, 5 Ala. Rep. 531.

As to the other points, the testimony was clearly irrelevant, and no doubt misled the jury.

Edwards, contra, relied on the case from from 5 Ala. Rep. 531, as fully in point upon the first question presented.

Upon the second, he contended the question was pertinent and proper, especially in a cross-examination, where the assignment was impeached for fraud.

ORMOND, J.—We do not perceive any sensible distinction between this case and that of the Planters and M. Bank v. Borland, 5 Ala. Rep. 546, as it respects the question put to the witness of his knowledge of the intention of his partner, Caryill, in making the deed of assignment. The "motives, or intention," or in other words, the secret purpose of the mind, when an act is done, can only be certainly known to the actor himself, and the Supreme, Omniscient being. When it becomes important for a Court, or jury, to determine with what intent an act was done, the conclusion is attained from the circumstances surrounding it—from the acts and declarations of the actor. This process, it is perfectly obvious, is a deduction from the facts in proof; being therefore a deduction, or inference, from the facts known, or presumed to exist, it cannot be drawn by witnesses, who are not allowed to reason to the jury, but must testify to facts. It is therefore apparent, that when the witness was asked, as to his knowledge of the "motives and intentions" of Caryill, he was not required to speak of a fact within his knowledge, but of his inference from facts, which he was not required to state.

It is argued, that the import of the question, was not as to the

opinion of the witness, but as to the facts from which the jury might deduce the proper conclusion. Such may have been the design of the question; we can only judge of it from the language in which it is couched. That certainly does not call for facts, but for the *intention* of Carvill in making the deed, a question which the witness either could not answer at all, or which, if answered, must necessarily have been the opinion of the witness, from the facts within his knowledge, attending the execution of the deed; and as the answer to the question, if given according to the terms proposed, would have been improper testimony, the Court did not err in excluding it, and could not be required to foresee, that the witness would either refuse to answer it, or else have answered it, by stating, not his own opinion, but the facts from which an opinion might be formed.

The remaining question presented on the bill of exceptions, was also correctly decided by the Court. It appears that the witness, who was one of the makers of a deed of assignment, had been examined, for the purpose of proving that the deed was fair, and *bona fide*, and had stated in substance, upon his examination, in chief, that the property conveyed by the deed, consisting of the effects of the firm, was fairly devoted to the payment of the partnership debts.

Upon the cross-examination, the plaintiff was permitted to ask him, whether one of the debts included in, and provided for by the deed, was not a debt contracted by himself, for the purpose of raising money to put into the partnership. This question was certainly not irrelevant, and therefore should have been answered. It might not have been entitled to much weight before the jury, but whether it did or did not tend to prove the alleged fraud, was a question peculiarly proper for the jury. The design evidently was, to show that there had been a concealment in the deed, by inserting a debt not a partnership debt, and conceding that it was a debt for which the partnership was responsible, the plaintiff had the right to sift the deed, and examine all its provisions. If the testimony, when introduced, was not prejudicial to the claimant, a charge should have been asked as to its effect; it could not be excluded in advance from the jury.

We are unable to perceive any error in the record. Let the judgment be affirmed.

McBRIDE AND WIFE, ET AL. v. THOMPSON.

1. While the declarations of a party in possession of land or of personal property, are admissible as explanatory of his possession, it is not permissible to prove every thing he said in respect to the title, how it was acquired, &c.; and an inquiry embracing so extensive a scope, should be rejected.
2. Plaintiffs claimed title under their grand-father, H. who purchased the slave in question, in 1833, at a sale under execution against the estate of their father, A; in 1839 A made a deed of trust, embracing the slave, to W, to secure W and others for liabilities incurred, and to be incurred, as the sureties of the grantor, with a power of sale to reimburse them for advances; in 1841 the trustee sold the slave to the defendant: *Held*, That it was competent for the defendant to ask A, who was examined as a witness for the plaintiff, the following questions, viz: if W, at a time and place designated, did not ask him, in the presence of S, if there were other liens than the deed to W on the slave? If there were not other liens on the slave when W made the above inquiry? If he did not, after the trust sale in 1841, in the presence of certain persons, admit that he owed W a balance of $1500? Having answered the last question in the negative, the defendant was permitted to disprove the truth of the answer.
3. If one purchase slaves at a sale under a *fieri facias* with the money of the defendant, and then give them to the children of the latter, the donees cannot recover them of a person who afterwards purchases at a sale under a deed of trust subsequently executed by the defendant; if the sale under the deed be irregular, the purchaser may defend himself upon the ground of the trustee's right to the possession.
4. A charge to the jury must be considered in reference to the facts in the cause, and if thus applied it is correct, the judgment will not be reversed, though as a *universal proposition* it may be erroneous.

Writ of Error to the Circuit Court of Macon.

THIS was an action of detinue, at the suit of the plaintiffs, for the recovery of a female slave named Louisa, and her son George, the former aged about twenty-five, and the latter about five years of age. The cause was tried upon the general issue, a verdict was returned for the defendant, and judgment rendered accordingly.

The plaintiffs claimed the slaves in question under their grand-

father, Edmund Hobdy. There was evidence tending to show, that the woman, Louisa, was in 1833, sold at sheriff's sale, in Barbour county, as the property of Samuel G. B. Adams, that Hobdy purchased her at the sale with the money of Adams, and took her into his possession. Plaintiff then proposed to prove what Hobdy said as to his title to Louisa, whilst she was in his possession; the defendant objected to the introduction of this evidence; his objection was sustained, and the evidence excluded.

In 1839, Adams made a deed of trust to Thomas S. Woodward, of land, slaves, &c. in which was included the woman Louisa, to secure the trustee and others for liabilities incurred, and to be incurred, as the sureties of the grantor; with a power of sale to reimburse them for advances. In 1841, the trustee sold the slaves to the defendant, and made him a bill of sale with a warranty of title.

It was also in evidence, that Adams, in 1837, executed a deed of trust to Devereux and Thompson, in which the woman Louisa was embraced.

For the purpose of contradicting Adams, who was examined as a witness for the plaintiffs, the defendant asked him, if Woodward, at a certain time and place, in presence of George Stone, did not ask him, Adams, if there was any other lien on the property. The plaintiff objected to this question being answered, but the Court overruled the objection. The defendant asked Adams, for the same purpose, if there were not other liens on the property in question when Woodward made the above inquiry, and this question was adjudged admissible, though objected to by the plaintiff.

The defendant then asked Adams, if he did not, after the trust sale in 1841, before certain persons, admit that he still owed Woodward a balance of fifteen hundred dollars, and he denied having made such an admission. Defendant then offered to prove that Adams made such an admission after the trust sale; plaintiff objected, but his objection was overruled.

Defendant also offered to prove, that Woodward and Stone had paid money as the sureties of Adams, previous to the sale, under the deed of trust, and this evidence was admitted, notwithstanding the plaintiff objected.

The Court charged the jury, that if they believed there was

fraud in the purchase made by Hobdy at the sheriff's sale in Barbour; that the woman Louisa, was paid for by the purchaser with Adams' money, then Hobdy acquired no title by his purchase. The several questions arising upon the admission and rejection of the evidence, and the charge of the Court, are duly reserved by the bill of exceptions.

S. F. Rice, and T. D. Clarke for the plaintiff in error, made the following points: 1. The declarations made by Hobdy, while he was in possession, were admissible, (Oden v. Stubblefield, 4 Ala. Rep. 40;) and even if he was a competent witness, his admissions should have been received. 2. Neither the time, place, or persons to whom Adams was supposed to have made the statements are particularized, nor was their materiality shown; and they should have been excluded. It was a question of law upon facts, whether there were other liens; the fact and not the conclusion should have been stated in inquiring what Adams said on this point. [6 Ala. Rep. 169.] 3. The deed of trust only authorized the trustee to sell the property conveyed by it, when a *judgment was rendered and an execution issued* against Woodward and Stone, and proof that money was paid by them as Adams' sureties was not in itself sufficient to have authorized the sale. 4. The charge to the jury cannot be supported, it assumes that Hobdy, in using Adams' money to pay for Louisa, did not borrow it, and has not since refunded it; but that he expended it with a view to Adams' benefit, and to defraud his creditors; &c. It is further objectionable in assuming that the fact of the payment having been made with Adams' money is true, and that a title acquired by a purchaser under execution may be impeached by a person who had no interest in the property, or connection with the title at the time of the sale. [4 Ala. Rep. 321; 5 Id. 58, 199; 9 Porter's Rep. 679.]

No counsel appeared for the defendant.

COLLIER, C. J.—The declarations of a tenant in the possession of land are admissible as part of the *res gestae*, (Bliss v. Winston, 1 Ala. Rep. 344; 2 Phil. Ev. C. & H. notes, 592 to 601;) and it has been often held that the same rule prevails in its utmost extent as to personal property. [Oden v. Stubblefield, 4

Ala. Rep. 40; see also, Phil. Ev. C. & H.'s notes, 592 to 601, 644.] But it is not to be understood that such declarations are admissible to every conceivable extent. True, the affirmation of the party in possession, that he held in his own right, or under another, is proper evidence as part of the *res gestae*, which *res gestae* is his continuous possession; but his declarations beyond this are no part of the *subject matter, or thing done*, and cannot be received as such. While it is allowable to prove statements of one in possession, and explanatory thereof, it is not permissible to show every thing that may have been said by him in respect to the title; as that it was acquired *bona fide*, and for a valuable consideration; was paid for by the money of a third person, or his own, &c. This we have seen, instead of being a part of the *res gestae*, would be something beyond and independent of it. Declarations, although not admissible upon the principle we have stated, are sometimes received, because they were against the interest of the party at the time they were made. It is needless to consider cases of the latter description, as it is clear that the declarations of Hobdy do not appear to have been against his interest.

The record is at fault in not disclosing with particularity what were the statements of Hobdy which the plaintiffs offered to prove; and the proposition was so broad, viz: *what he said as to his title to the slave Louisa*, that its rejection was entirely proper. It embraced not only what he said in respect to, and explanatory of his possession, but declarations as to the title, how, when, from whom, &c. he acquired it.

The objection made to the questions proposed to Adams were properly overruled. He was asked if, at a certain time and place, in the presence of a certain person, (naming him,) the inquiry was not made of him, whether there was any other lien on the property in controversy. This question was proposed by the defendant, upon the cross-examination of the plaintiff's witness, who it must be presumed had given testimony tending to sustain their title. Its tendency was to weaken that title and impair the effect of the testimony of the witness upon his examination in chief. An answer to the second inquiry, viz. whether there were not other liens on Louisa, when Woodward asked that question, might be important to the defendant, and could not prejudice the plaintiffs if their title was good. The same remark applies to the third question proposed to Adams.

In respect to the proof of the payment of money by the beneficiaries in the deed of trust, before the sale was made thereunder, it cannot be regarded as at all important in the present posture of this case. The cause was put to the jury upon the *bona fides* of Hobdy's purchase, and they were informed, that if they believed he paid for the woman with Adams' money, he acquired no title. This charge, as against Adams himself, or one who does not defend upon the ground of an interest in himself, or a third person, acquired for a valuable consideration, cannot perhaps be sustained. The bill of exceptions does not state the points intended to be presented with as much distinctness as it should have done, and we must give to it such an interpretation as seems to us most natural and reasonable.

Adams, it will be remarked, when asked whether he had not admitted, after the sale under the deed of trust in 1841, that he still owed Woodward a balance of fifteen hundred dollars, denied that he made such an admission. The defendant disproved the truth of the denial, and then proved that Woodward and Stone had paid money as sureties of Adams, previous to the sale by the trustee. This latter evidence was objected to, generally, but adjudged competent. It does not appear from all this, that there was any controversy as to the regularity of the sale under the deed, or whether the contingency occurred upon which the trustee was authorized to sell, viz; that a judgment was rendered against Woodward alone, or himself and Stone. No charge of the Court was prayed which brings up this question, and we cannot presume that it was intended to raise it.

The charge then must not be taken as the assertion of a universal proposition, but should be considered in reference to the case before the jury. In this view we may suppose the trustee had the right, under the deed, to seize the slaves conveyed by it, and it may be presumed, in the absence of all controversy upon the point, that the sale was regular. But if the defendant could claim nothing by his purchase, he might successfully resist a recovery, if Hobdy's purchase was fraudulent against creditors, by setting up the right of the trustee to hold the property under the deed.

This view is decisive of the case, and the result is, that the judgment must be affirmed.

SNEDICOR v. CARNES.

1. Previous to the act of 1845, the Orphans' Court was not invested with the jurisdiction to compel the executor or administrator of a guardian to appear and settle the accounts of the deceased guardian.

Writ of Error to the Orphans' Court of Greene.

This proceeding was commenced by Joseph Carnes, as the administrator of William B. Carnes, against George G. Snedicor as the administrator of James Snedicor, who in his life-time was the guardian, appointed by the same Court, of said William B. Carnes; and was instituted to compel the administrator of Snedicor to pay over the money due by Snedicor to his ward at the time of his death, which happened about four months before he became of age. The guardianship commenced when the ward was five or six years old, and the money which came to the guardian's hands was shown to be about ninety dollars. The guardian offered evidence, showing the delivery of a horse to his ward, valued at ninety-five dollars, in the year 1839. He also produced, and proved a receipt made by his ward, admitting the receipt of one hundred and forty dollars, in full for his part of his father's estate. There was evidence also of the admissions of the plaintiff, that he knew his brother, the deceased, had been paid every thing which was due him by his guardian.

Two questions were presented, 1. Whether the Court below had jurisdiction to proceed against the *administrator* of the guardian.

2. Whether, under the circumstances in proof, the judgment should not have been for the defendant.

A. Graham, of Greene, for the plaintiff in error.

J. B. Clark, contra.

GOLDTHWAITE, J.—The objection to the exercise of jurisdiction by the Orphans' Court, is conclusive of the case. None of the statutes conferring powers upon the Orphans' Courts, ex-

tend so far as to invest them with authority to cite the administrator or executor of a guardian to account concerning the guardianship of their testator or intestate; and these Courts certainly possess no general jurisdiction over guardians independent of statutory regulations. If the matter was doubtful as to executors and administrators, it seems certain as to guardians.

In Talliaferro v. Bassét, [3 Ala. Rep. 670,] we held, upon great consideration, that the statutes were defective in this particular, with respect to administrators, &c., and since then, but after this decree, a general statute has been passed, conferring the necessary jurisdiction. [See Acts of 1845, page 167.]

As the Court had no jurisdiction over the subject matter at the time the decree was made, it is manifestly improper to express a decided opinion upon the merits of the case; though we feel constrained to say, that the receipt of the ward, coupled with the other evidence, seems persuasive, at least, to show that the whole sum due to the ward was received by him. And no effort being made to controvert the *bonâ fides* of the payments, we should probably feel inclined to consider them as not improperly made.

For the want of jurisdiction, the judgment must be reversed.

SEAMANS, ET AL. v. WHITE.

1. When a claim is interposed to property levied on by attachment, the claim suit is wholly independent of the attachment suit, at least so long as it is pending. If the claim suit is determined against the claimant, the proper judgment is a condemnation of the property, viz: that it is subject to the levy of the attachment, and be sold to satisfy the judgment in the attachment suit, if one then exists, or is afterwards obtained. No execution can issue upon this judgment, except for the costs of the claim suit.
2. The assessment by the jury in the claim suit, of the value of the property levied on, is mere surplusage, and does not vitiate.
3. When the creditors of a vendor levy on property claimed by another, by a previous purchase and delivery, if any suspicion is cast upon the fairness

of the sale, the jury may infer fraud, unless an adequate consideration is proved.

4. When, by order of the Court, new securities are substituted for those originally given in a claim suit, the former are discharged.

5. The surety is not bound beyond the penalty of the bond, and a judgment against him for a larger sum, will be here amended at the costs of the plaintiff in error.

6. When an order is made for the reference of a cause to arbitration, and a trial is afterwards had before a jury, without setting aside such order, it will be considered to have been waived.

Error to the Circuit Court of Lawrence.

THE defendant in error commenced a suit by attachment, against John McBride, for fifty dollars, before a justice of the peace, as an absconding debtor, which was levied on a waggon. The waggon was claimed by Joshua Seamans, who gave bond to try the right. A trial was had before the justice, and verdict and judgment that the property was subject to the levy. From this judgment Seamans appealed to the Circuit Court, and gave bond in the penalty of one hundred dollars, for its prosecution, with A. Woodall and H. Crowley as his securities; and subsequently, upon an order that he give new security or be dismissed, gave a new bond with Dukemenier as surety, in the penalty of one hundred dollars. After several continuances, an order was entered of record, that by agreement of the parties, the matter was referred to the arbitrament of certain persons who are named in the order. No action appears, from the record, to have been had upon this order, but after several continuances, the parties went to trial upon an issue before the jury, whether the waggon was the property of Seamans, or subject to the levy of the attachment. The jury found the issue for the plaintiff, and that the waggon was at the time of the levy, the property of John McBride, and liable to the satisfaction of the plaintiff's demand. They also assessed the value of the waggon at fifty dollars.

Upon the trial, it appeared in evidence, that a short time before McBride left the State, Seamans purchased from him a carryall, which he afterwards exchanged with him for the ox cart or waggon levied upon, and left the waggon in the possession of a third person. Facts were also proved, tending to show that Seamans was privy to, and aiding McBride in escaping to Tennessee, to

avoid the payment of a debt due by him to the Bank. Upon these facts, the Court charged the jury, that if McBride owned and possessed the carryall and waggon, until within a few days of his going to Tennessee, and that the claimant purchased the carryall of him, and at the same time and before he took possession of it, exchanged it with McBride for the waggon, and had not shown to the jury, any or what consideration he gave for the carryall, his failure to prove the consideration, was a circumstance from which unexplained they might infer, that claimant held the waggon fraudulently, to which the claimant excepted.

The Court rendered judgment upon the verdict, that the waggon was liable to the levy of the plaintiff's attachment; that he recover the property levied on for the satisfaction of his attachment, and that he recover of Seamans and Dukemenier his surety in the appeal bond, the costs, which from the certificate of the clerk, it appears, amounted to two hundred and seventy-nine dollars and twenty-eight cents.

The assignments of error are,

1. The matter of the bill of exceptions.

2. In rendering judgment without disposing of the order for arbitration.

3. In giving judgment for the plaintiff for the property claimed.

4. In giving judgment that the property was subject to the attachment, before a judgment in favor of the plaintiff upon the attachment.

5. The verdict was not responsive to the issue.

6. In giving judgment against Dukemenier, and not against the other sureties to the appeal bond.

7. In rendering an indefinite judgment against the surety to the appeal.

8. In giving judgment against the surety for a greater amount than the penalty of his bond.

Ligon and Peters, for plaintiffs in error, cited 9 Porter, 39, 70; 5 Ala. 383; 4 Id. 367; 2 Id. 354; 5 Ala. 297; 2 Bouv. Law Dic. title "Purchaser;" Chitty on Con. 111; Clay's Dig. 50, § 1; Id. 211, § 52, 55; Id. 57, § 11; 5 Ala. 770; 6 Id. 27; 5 Id. 778; 6 Id. 32; 7 Porter, 218; 6 Id. 718; Minor, 185; 4 Ala. 671; 5 Id. 531.

L. P. Walker and W. Cooper, contra.

ORMOND, J.—When a claim is interposed under the statute, to property levied on by an attaching creditor, the suit consequent upon the interposition of the claim, is wholly independent of the attachment, at least, so long as the attachment suit is pending. It is therefore unimportant when the claim suit is determined, whether a judgment has been obtained by the plaintiff against the defendant in attachment, or whether the suit is still pending. If it has not been determined against the plaintiff in attachment, upon obtaining a verdict in the claim suit, against the claimant, he is entitled to a judgment of condemnation of the property, viz: that it is subject to the levy of the attachment, and that it be condemned to the satisfaction of the judgment, if one is obtained.

Such is, in effect, the judgment of the Court in this case. The attachment suit being in the justice's court, it does not appear whether a judgment has been obtained against the defendant, or not. If such a judgment has been or is hereafter obtained, the waggon may be sold under an execution issued upon that judgment. If no such judgment exists now, or is rendered hereafter, the claimant cannot be prejudiced, because in no event can an execution issue upon this judgment, except for the costs. The finding of the jury that the waggon was liable to the plaintiff's demand, and their assessment of its value, was mere surplusage which does not vitiate the residue of the verdict, in which they find the issue for the plaintiff.

We can perceive no error in the charge of the Court. Although ordinarily, when it is proved that an article has been sold and delivered, the payment of the consideration may be presumed until the contrary is shewn, yet when the creditors of the vendor assert a claim to the property thus sold, and circumstances exist raising a doubt of the fairness of the transaction, between the vendor and vendee, it is incumbent on the latter to prove the payment of an adequate consideration. The facts proved in this case were sufficient, if believed by the jury, to cast suspicion upon the sale, and to justify the jury in inferring that the transaction was fraudulent, unless shown to be otherwise by proof of a sufficient consideration.

The original security given for the appeal, being objected to as

insufficient, an order was made that "the plaintiff give new security in sixty days, or be dismissed." Pursuant to this order, a new bond was executed, with Dukemenier as surety, which it appears was accepted. This was a substitution of the new for the former surety, and operated to discharge the former from all liability. The surety was not, however liable beyond the penalty of his bond, and the judgment against him for an indefinite sum—the costs of the action, which might be for more than the penalty of the bond, and in this case was greatly beyond it, was unauthorized. The proper judgment to be rendered was, against the plaintiff and his surety for the costs, not exceeding the penalty of the bond, and for the excess, if any, against the plaintiff.

Such a judgment as the present, was held to be a clerical misentry, in McBarnett & Kerr v. Breed, 6 Ala. 476, and as such a judgment could have been amended in the Court below, by motion of the plaintiff, it will be amended in this Court at his costs. Such must be the judgment entered in this case.

As the parties went to trial before a jury, without notice of the former order, to arbitrate the matter, it must, in this Court, be considered a waiver of the order.

Let the judgment be remanded, at the cost of the plaintiffs in error.

TREADWELL, GUARDIAN, &c. v. BURDEN, ADM'R.

1. Where a guardian voluntarily files his accounts for final settlement, with the Orphans' Court, he cannot object on error, that the publication required by the statute was not made—the notice contemplated by the act being intended for the benefit of the ward, or others interested in the settlement.
2. All decrees made by the Orphans' Court, upon the final settlement of the accounts of the guardians of idiots, lunatics, and others, have the force and effect of judgments at law, and execution may issue for the amount ascertained to be due against the guardian: And when an execution issued on such decree, shall be returned by the sheriff "not found," gene-

rally, or as to a part thereof, execution may forthwith issue against the sureties of the guardian.

3. In settling the accounts of a guardian, it is not competent for the Orphans' Court to render a decree against his sureties; and such is not the effect of a decree, which declares that a guardian and his sureties, (without designating them by name,) shall be charged with the amount ascertained to be due, and made liable to the administrator of his ward, "for which he is authorized to proceed in the collection according to law;" such a decree does not impair the rights of the sureties to make them parties. And if an execution issue against the sureties it may be arrested by *supersedeas*, and quashed, but the sureties cannot join the guardian in prosecuting a writ of error to revise the decree.

Writ of Error to the Orphans' Court of Randolph.

The facts in this case as shown by the record are as follows: On the 27th December, 1842, Sarah Treadwell applied for letters of guardianship of the estate of Stephen Treadwell, a lunatic, which were granted upon her entering into a bond with sureties, as required by law in such cases; and on the 3d January, 1843, filed in the Orphans' Court a return of the notes and accounts of the lunatic, which being stated and examined, were ordered to be recorded.

On the 7th February, 1843, the guardian made a return of her account with the lunatic's estate, which was examined, received, and ordered to be entered of record.

An order was made the fifth of September, 1843, reciting that Sarah Treadwell, guardian of Stephen Treadwell, deceased, who when in life was *non compos mentis*, had filed her account for final settlement; that the first Monday in October was set apart, and that the clerk would issue citations to the heirs of the decedent, notifying them thereof, that they might appear and defend, &c. Accordingly, on the first day of October a final decree was rendered, reciting that a *deficit* in the assets of the estate appeared to the amount of $80 26, as rendered by the guardian, and ordering that herself and sureties be charged with that *deficit*, and made liable to the administrator of the decedent's estate, and that "he is authorized to proceed in its collection according to law." *Further*, "that the said Sarah Treadwell, guardian, &c. surrender to James Burden, administrator of said estate, all the effects belonging to the same now in her hands."

An execution in the form of a *fieri facsas* was issued on the 30th January, 1844, against the guardian and her sureties, requiring the deficit of $80 26, to be made, &c. This execution was superseded upon a writ of error being sued out by the guardian and her sureties, and a bond executed for its prosecution, &c.

J. FALKNER, for the plaintiffs in error.

T. D. CLARKE, for the defendants.

COLLIER, C. J.—It is assigned for error—1. That the Orphans' Court disallowed the account of the guardian, returned the 7th February, 1843, and rejected other accounts. 2. That there was no notice shown in the record, either by advertisement or otherwise, and consequently no parties to the settlement. 3. The decree is uncertain and void.

1. The first assignment is not sustained by the record. There was no exception taken to any decision of the Orphans' Court, and it does not appear that the accounts of the guardian were not in all things allowed, as they were made out and filed by her.

2. In respect to the objection that there were no parties to the settlement, it appears that the guardian voluntarily filed her accounts and vouchers for final settlement, and she cannot be heard to object that the publication required by law was not made. In Davis v. Davis, et al. 6 Ala. Rep. 614, we considered the effect of the act of 1806, (Clay's Dig. 226, § 27,) which directs that the judge of the County Court shall take, receive and audit all accounts of guardians, &c., and after examining and auditing them, and causing them to be properly stated, shall report the same for allowance to the next term of the Orphans' Court: *And further*, that forty days notice shall be given, &c. of the time when the account will be reported, &c. We there re-affirmed the case of Williamson, et al. v. Hill, (6 Porter's Rep. 184,) and held, that it was not for an executor, or administrator, to object that the notice contemplated by the act was not given; that notice was not intended for his benefit, but for creditors, distributees, &c. In Taylor and Wife, et al. v. Reese, Adm'r, 4 Ala. Rep. 121, it was said, that the object of the statute in requiring notice, is, "that those interested may have time and opportunity to examine the account, and come prepared to contest it."

The act of 1819 places the guardians of idiots and lunatics upon the same footing as guardians of orphans, and makes them subject to the same rules, orders and restrictions. [Clay's Dig. 302, § 29; and the statue of 1830 enacts, that "all decrees made by the Orphans' Court, on final settlement of accounts of executors, administrators and guardians, shall have the force and effect of judgments at law, and executions may issue thereon, for the collection of the several distributive amounts against snch executor, administrator or guardian. [Id. 304, § 42.] The act of 1832 provides, that whenever an execution issued on a decree of the Orphans' Court, on the final settlement of the accounts of a guardian, &c. shall be returned by the sheriff "not found," generally, or as to a part thereof, execution may forthwith issue against the sureties of such guardian, &c. [Clay's Dig. 315, § 45.] Under this latter enactment, it has been held, that it is not competent for the Orphans' Court to render a decree against the sureties upon the bond. [Clarke v. West, et al. 5 Ala. Rep. 117.]

In the present case, the decree is, that "Sarah Treadwell and sureties be charged with said deficit, and be made liable to the administrator of the estate of the said Stephen Treadwell, now deceased, for which he is authorized to proceed in the collection according to law." Assuming the premises as correct, (and the reverse is not shown,) the guardian and her sureties are chargeable with what she was in arrear to the estate of the deceased ward. The law, as we have already seen, points out the manner in which the collection is to be made, and the decree does not impair the rights of the sureties, or deprive them of any defence which they may be able to make. In fact, the sureties cannot be considered as parties to the decree—they are not mentioned *eo nomine;* but there is nothing more than a mere reiteration of what the law is, viz: that the guardian and her sureties are chargeable with her default. Such a decree does not authorize an execution against the persons who may appear to be the sureties, although it is competent to issue it against them, upon a return as prescribed by the statute, being made to an execution first issued against their principal.

The execution, if irregularly issued, (as it would seem it was,) should have been arrested by a supersedeas and quashed; the irregularity is not available on error. We have seen that the sureties *eo nomine,* are not parties to the decree, and consequen-

ly they cannot join their principal in a writ of error. The writ must then, be amended, so as to make the guardian the sole plaintiff, and the decree will be affirmed.

TUCK v. THE STATE.

1. The statutes of this State authorizing Courts to tax prosecutors with costs whenever the prosecution is frivolous or malicious, extends only to misdemeanors, and does not warrant such a taxation in a prosecution for grand larceny.

Writ of error to the Circuit Court of St. Clair.

At the spring term for the year 1845, J. C. was tried upon an indictment for grand larceny, found at the spring term 1843, and acquitted. After the acquittal, on motion of the Attorney General, the Court taxed Tuck, who, as the entry asserts, was the prosecutor in the case, with the costs, the prosecution appearing to the Court to be frivolous and malicious.

It is now complained, that in prosecutions for felony, the Circuit Court is not invested with this authority.

F. W. Bowdon, for the plaintiff in error, cited Burns v. The State, 5 Ala. Rep. 227.

Attorney General, contra, cited the Acts of 1803, Laws of Ala. 216; of 1801, Ib. 223; of 1807, Ib. 391, of 1826, p. 79; and insisted the last act was passed to cover the ground not occupied by the preceding acts, and to extend the power of the judges over *all* prosecutions.

GOLDTHWAITE, J.—The only difference between this prosecution and that acted on by this Court in Burns' case, 5 Ala. Rep. 227, is, that then the Court acted on the motion of the in-

dividual indicted, and the record did not show affirmatively that the prosecution was frivolous or malicious; whilst here the motion is made by the Attorney General, and the record shews that the Court considered the prosecution both frivolous and malicious. The act of 1826 has been called to our attention, but its terms are no more general than the previous statutes contain. The act evidently treats throughout of misdemeanors as distinguished from crimes. The first section provides that grand juries shall not be continued in session for more than four days, unless cause be shown to the Court for the detention. The next is the one supposed to bear on this case, but it evidently refers to laws then in existence, and makes it the duty of the Court, with or without a motion to that effect, to tax the prosecutor with the costs, in all cases in which the prosecution shall appear to be either frivolous or malicious. Mr. Aikin in his Digest, notices the statute, and incorporates it in the general law, as effective only to invest power in the Court, *with or without motion*, to tax, &c., (Aik. Dig. 123, § 55;) and in the same way it is carried into our present Digest, by Gov. Clay. [Clay's Dig. 482, § 37.]

We have given this matter more consideration than we should have done, but from the circumstance that it is supposed this discretion to tax the prosecutor is proper, to put down frivolous and malicious prosecutions of all kinds and description. This, perhaps, is the appropriate province of a grand jury, in offences of a criminal character, as well as in misdemeanors; but in the latter cases only, in our judgment, has the laws of the country invested the Courts with power to tax the costs. The policy of any enactment giving this discretion beyond offences of a minor grade may well be questioned; as tending either to prevent prosecutions which should be originated, or in letting off too easily such individuals as might conspire to alledge crime against innocent persons.

The judgment awarding the costs must be reversed, as having been rendered without warrant of law.

O'BRIEN AND DEVINE, EX'RS v. LEWIS.

1. To authorise a *ca. sa.* to be issued, the affidavit which the act of 1839 requires to be made, must be made, although the defendant was held to bail previous to the passage of that act.
2. If no such affidavit is made, the bail may take advantage of it by plea to the *scire facias*, to subject them to the payment of the judgment.

Appeal from the Circuit Court of Mobile.

Scire facias by the defendant in error, to subject the plaintiffs in error, as executors of one Young, to satisfaction of a judgment, as the bail of one John T. Burton. Pleas *nul tiel record*, and a special plea, that the *ca. sa.* which issued against Burton, and was returned *non est inventus*, was issued without the affidavit being made, which the act of 1839 requires. To this plea the plaintiff demurred, and the Court sustained the demurrer; and having found the issue on the plea of *nul tiel record*, against the defendant, rendered judgment, for the amount of the judgment against Burton, interest, and costs.

The errors assigned, are, the judgment upon the demurrer, and the rendition of a judgment for interest and damages, upon the original judgment.

J. A. Campbell, for plaintiff in error, argued, that there could be no valid arrest, without the affidavit which the statute requires, and therefore the *ca. sa.* was insufficient. That any objection which the defendant to the judgment could make, is open to the bail. [1 McLean, 528; 2 Ib. 322; 7 Mon. 130; 9 Peters, 329; 4 Dana, 452; 15 Vermont, 502; 14 Id. 306; 2 Strange, 993; 2 Mass. 481; 13 Id. 93; 1 H. B. 74; 9 Porter, 208; 3 S. & P. 225.]

The recovery is too large. The "condemnation money," does not mean interest subsequent to the condemnation. [Doug. 316; 6 East, 312; 11 East, 316; Petersdorf on Bail, 214, § 3.]

There can be no damages on a *sci. fa.* [1 Salk. 208; 2 Strange, 807; Burr. 1791.]

STEWART and DARGAN, contra, contended, that the statute did not contain any clause discharging those from arrest, who were in custody when the law passed. That from the principles decided in the case of Kennedy v. Rice, 1 Ala. 11, it was clear, that the party was under arrest when the law passed, being in custody of his bail; and as *they* could have delivered him into close custody, without affidavit, the creditor may also, . . .

But if an affidavit was necessary to make the *ca. sa.* regular, the want of it was a mere irregularity, which the bail cannot take advantage of. [2 Sellon's P. 46; 16 Johns. 117; 3 Conn. —; 2 Ld. Raym. 1096; Viner's Ab. 507; 2 Com. Dig. 58.] To show that the *ca. sa.* was not void, but voidable, they cited 5 Howard, 253; 13 Peters, 15; 13 John. 549; 2 Binney, 40.

In England, judgments do not carry interest; here they do, and a *scire facias* carries costs.

ORMOND, J.—The bail bond in this case, was executed previous to the passage of the act of 1st February, 1839, to abolish imprisonment for debt. This statute received a construction by this Court, in the case of Kennedy v. Rice, 1 Ala. 11, where it was held, that it did not preclude the bail from surrendering their principal in discharge of the condition of their bond, because the act was not intended as a discharge to persons then in actual confinement, and that the defendant was in custody of the bail.

This decision, it is insisted, is conclusive of this case, as it is argued, that the right of the bail to deliver up his principal to close confinement, is derived from right of the creditor, and when it is shown that the bail may do this without an affidavit, it follows that the creditor may do so in like manner. The right of the bail to deliver up his principal, flows from his undertaking to pay the debt, or deliver the person of the debtor in its discharge. This obligation makes him the custodian of the person of the debtor, and by consequence confers on him the right of substituting the common jail, for his own personal custody. The right of the creditor to imprison his debtor, is derived from the law, and as the right to imprison is merely a remedy for the collection of the debt, doubtless it may be modified, altered, or abridged, at the pleasure of the Legislature; and if the remedy is sought by the creditor, he must seek it in the mode pointed out by law.

The act, as we have seen, did not apply to, or discharge those persons who were in actual confinement at the time of its passage, but that principle does not apply to those who were constructively in confinement, but in fact were at large upon bail. The whole scope and design of the act forbids such an interpretation. The design was to prevent actual, and not constructive imprisonments, and to accomplish this it was declared "not to be lawful, to take the body of any person in custody to answer for a civil demand." We think therefore, that the plaintiff could not, after the passage of the act, arrest the debtor, but in the mode pointed out by the act.

We proceed to the enquiry, whether the bail can take advantage of the want of the necessary affidavit to authorize the *ca. sa.* to issue.

In Toulmin v. Bennett & Laidlaw, 3 S. & P. 225, and in Wood v. Yonge, 9 Porter, 208, this Court held, that it was competent for the bail to shew by plea, in answer to the *scire facias*, that the plaintiff had not given the security for costs, which the law required as a condition, upon which bail was to be demanded, and we think the principle of those decisions apply to this case. The defendant could not have been rightfully arrested on the *ca. sa.* which issued in this case, and therefore the bail, as in the cases cited, may take advantage of it by plea. Indeed, this case appears to be much stronger than the cases above cited, because here, there has been no implied admission, or waiver of the debtor, who never has been, and could not be rightfully taken uner the *ca. sa.*: and as it could not have been effectual against the debtor, advantage may be taken of it by the bail. (See the authorities cited on the brief of the counsel for the plaintiff in error.)

Let the judgment be reversed, and the cause remanded.

POND, ET AL. v. LOCKWOOD, ET AL.

1. The act of 1828, places promissory notes in respect to the remedy, on the same footing with bills of exchange, and declares that they shall all be governed by the rules of the law merchant, &c.; consequently, where such a note is indorsed *before its maturity* in payment of *a pre-existing debt*, its collection may be enforced by the indorsee against the maker, though the latter may have a defence which implicates its validity, as between himself and the payee.
2. Where the maker of notes had received them several years previously, and delivered the notes of third persons in payment of them, it may be presumed that they were destroyed or otherwise cancelled, so as to let in secondary evidence of their contents, without a notice to produce them, in a controversy in respect to the substituted paper.
3. It is not competent for the makers of promissory notes that have been received of the payees by attorneys at law, in payment of demands in their hands for collection, to object that the latter transcended their authority, where their clients have approved the transaction.
4. Where a note is indorsed to one person, with the assent of all interested, in payment of debts due the indorsee and several others, the indorsee may maintain an action thereon in his own name, and no defence can be interposed to avoid its payment, which would not avail if the note had been indorsed and the suit brought in the names of all who were entitled to receive portions of the sum collected.
5. Where the *primary* object of the bill, and that which alone gives jurisdiction to a court of equity, is not made out, the complainant is not entitled to relief upon a ground merely *consequential*, and which contemplates a decree for a demand which may be enforced by action at law.

Writ of Error to the Court of Chancery sitting at Montgomery.

THE plaintiffs in error filed their bill, setting forth that on or about the first of March, 1838, the complainant, Pond, purchased of Robert Harwell a certain lot situate in the city of Montgomery, the number, size and location of which are particularly described. Harwell covenanted with his vendee that he was lawfully seized in fee of the premises, that they were free from incumbrances, and that he had good right to sell and convey the

same: *Further*, that he would warrant and defend the premises to Pond, his heirs, &c. On the 16th March, of the same year, the wife of the vendor relinquished her right of dower—all which will appear by the deed of conveyance, which is exhibited with the bill.

To secure the amount of the purchase money, Pond made his three promissory notes, for the payment of the sum of three thousand three hundred and thirty-three dollars and thirty-three and one-third cents, each, payable on the third of March, 1839, 1840, 1841. The note first falling due, has been paid, with the exception of the sum of more than eight hundred dollars; for which a new note has been given, and which, as complainants are informed, and believe, has been transferred, &c. To secure the payment of the note which next fell due, mortgages have been executed, and this as well as the renewed note, are in the hands of persons unknown to the complainants. On the note which last matured, suit has been brought, and is pending in the County Court of Montgomery, in the name of John and Walter Lockwood, for the use of sundry persons, all of whose names are mentioned.

It is also alledged that Harwell, in 1835, mortgaged the premises (which he subsequently sold to Pond,) to Samuel Houston, now of the city of New-Orleans. That the complainants, nor either of them, were advised of the existence of this lien, until long after the purchase of Pond—in fact not until the first note was in part paid, and the renewed note given for the balance. Further, that Harwell is wholly insolvent, and will be unable to pay them any part of the damages they may sustain in the premises. The bill makes all the parties who are interested, adversely to the complainants, defendants to the same; prays that the suit at law may be enjoined, that the contract between Harwell and Pond may be rescinded, &c.

The complainants afterwards filed an amended bill, in which they state that the plaintiffs in the suit at law became the assignees of the note in question, in payment of a precedent debt, and call upon them to state by what means, and when, Harwell became indebted to them, and whether the assignment was not made to pay a debt previously due. They also insist, that as they were not advised of the mortgage to Houston, at the time Messrs. Ball and Crommelin applied to them as the attorneys of the assignees

to learn if they had any sets off against the note, therefore they should not be bound or prejudiced in any manner by their admission that the note was good.

The greater number of the defendants answered the bill, stating each for himself, that on the first day of October, 1838, Harwell was indebted to them respectively, in sums which are particularly designated, that the claims of each of them were in the hands of Messrs. Ball & Crommelin, for collection; that Harwell was then solvent, and offered to settle their demands by the transfer of good paper, among which was the note of the complainants. The amount of the note in question was so great, that their attorneys preferred it to other notes for small amounts, though the makers of the latter were entirely able to pay. In order to be certain that the complainants had no defence to make against the payment of their note, Messrs. Ball & Crommelin called upon Pond & Wadsworth before the conclusion of the negotiation with Harwell for the purchase and transfer of the same, and inquired of them if there were any sets off, or contingencies, about the payment of the note, and whether it would be paid at maturity. In answer to this inquiry, both Pond and Wadsworth informed Messrs. B. & C. that the note was perfectly good, that there were no sets off against it, and that it would be paid at maturity without defalcation. Influenced by this assurance, the parties interested in a recovery at law, became the proprietors of the note, by an assignment to the legal plaintiffs, on the 5th October, 1838. At that time Harwell was solvent, and could have satisfied the demands by the transfer of other paper, but he has since become insolvent, and been discharged as a bankrupt under the act of Congress of 1841, &c.

After the coming in of the answers, the plaintiffs filed a supplemental bill, in which they state that they were mistaken in supposing that the consideration for the assignment of the note was the payment of a precedent debt due by Harwell, to the persons who claim to be assignees thereof. They affirm that they have but recently acquired information of their mistake, and charge that the assignment was only made as a collateral security for the payment of a debt.

Some of the defendants, in answer to the supplemental bill, admit that the complainants may have been informed that the note in question was assigned as a collateral security for the pay-

ment of their demands against Harwell, but they positively deny the truth of such information, and reiterate the declaration, that it was received by them in payment of such debts, being first assured by Pond and Wadsworth, that they would be paid. Upon this assurance they were received by Messrs. B. & C. and the claims against Harwell at the same time delivered up to him, and his indebtedness cancelled. Some of the defendants filed amended answers, denying that the mortgage by Harwell to Houston is a subsisting lien, and insisting that the same has been fully paid off, and satisfied, before the original bill was filed.

It appears that the note, as to which the complainants are seeking to enjoin proceedings at law, was on its face made "negotiable and payable at the Branch of the Bank at Montgomery, Ala." and from proof found in the record, it is shown that the balance due on the first note, and the entire amount of the second, made by the complainants to Harwell, has been paid off since the commencement of this suit. *Further*, that about twelve hundred and seventy dollars was paid in 1841, in full satisfaction of the mortgage to Houston. Several depositions were taken at the instance of both parties, and exceptions taken to their admission by both parties, but it is unnecessary to notice these here.

A decree was rendered, dismissing the complainant's bill with costs.

T. Williams and I. W. Hayne, for the plaintiffs in error, insisted—1. The assignment of the complainant's note was in payment of a pre-existing debt, and under the law merchant does not place the indorsees in such a condition that the makers can make no defence against them. It could not have been transferred in the usual course of trade, unless a present consideration passed to the indorser.

Taking a note in the *usual course of trade*, must mean that course of dealing which is usual among merchants, it cannot embrace a mere exchange of one paper security for another, of a solvent for an insolvent debtor; but it means a *valuable consideration, created* by a *present agreement* between the parties.

The suit at law is in the names of J. & W. Lockwood, for the use of themselves and others; they alone are the indorsees, while they insist that Harwell was only indebted to them in the sum of $399. Thus far only, do they claim to be indorsees, and as to

the remainder of the note, they are mere trustees for the other persons for whose use the suit is brought: so that in no point of view, neither J. & W. L, alone, or associated with others are the legal holders of paper acquired in the regular course of trade.

It is insisted that the testimony of Harwell and the receipt of B. & Crommelin exhibited by him, show, that the note was not even transferred to pay precedent debts, but that it was taken by B. & C. as a collateral security for those debts in their hands for collection; and consequently the complainants are not cut off from any defence which they could have made against the payee.

The testimony of Crommelin, which contradicts that of Harwell, is not responsive to the interrogatories proposed to him, and upon the exceptions to it, should have been rejected. His testimony should have been excluded, upon the further ground, that he testified as to notes given up to Harwell, stated their amounts, &c., though notice was given to produce them.

Further, B. & C. as attorneys at law, had no right to exchange their clients' notes with Harwell, and the transaction was not confirmed by the clients until after the bill in this case was filed. [See 3 Stew. Rep. 23; 6 Stew. & P. Rep. 340; 1 Porter's Rep. 212.]

The testimony shows that Pond was absent from the State at the time the negotiation between Harwell and B. & C. was consummated and for some time before and after; so that he could not have admitted that there was no defence to the notes before Harwell transferred it.

A. F. Hopkins, with whom was G. O. Ball, for the defendant in error, made the following points: 1. The recovery of a note in the hands of a *bona fide* holder, who has received the same for a valuable consideration, before maturity, and without notice, cannot be defeated by the failure of consideration, or sets off against the original payee if it is negotiable and payable in Bank. [6 Porter's Rep. 384; 9 Id. 451; 2 Ala. Rep. 367; 3 Id. 297; 6 Ala. Rep. 156; 1 Munf. Rep. 533; 9 Cranch's Rep. 9; 16 Pet. Rep. 1.]

2. Where a debtor on application admits a debt to be justly owing, and upon the strength of such admission, the person thus applying takes a transfer thereof, the debtor is estopped from

setting up a failure of consideration, even if it is taken for a precedent debt, or as security for a precedent debt. [19 Wend. R. 563; 21 Id. 94, 172; 21 Id. 499.] And if a note is purchased on a promise by the maker to pay, he will be compelled to pay at all events. [2 Ala. Rep. 514-9; 1 B & Ad. 142; 2 Yeates' Rep. 541; 3 C. & P. Rep, 136; 16 Sergt. & R. Rep. 18.]

The mortgage from Harwell to Houston being on record, Pond was charged with a constructive notice of its contents as against the complainants, who became *bona fide* holders of the note before its maturity, without notice of any objection to its payment by the makers.

COLLIER, C. J.—In Swift v. Tyson, 16 Peter's Rep. 1, the Court say, there is no doubt that a *bona fide* holder of a negotiable instrument, for a valuable consideration, without any notice of the facts which implicate its validity, as between the antecedent parties, if he take under an indorsement made before the same becomes due, holds the title unaffected by those facts; and may recover thereon, although as between the antecedent parties, the transaction may be without any legal validity. *And further*, where one acquires negotiable paper before it is due, he is not bound to prove that he is a *bona fide* holder for a valuable consideration, without notice; for the law will presume such to be the fact, in the absence of all rebutting evidence. It is therefore incumbent on the defendant to make satisfactory proof to the contrary, and thus to overcome the *prima facie* title of the plaintiff.

We have repeatedly held, that a note negotiable and payable in Bank, and assigned before due, is not subject to a set off against the original payee. [2 Ala. Rep. 367; 3 Id. 297; 6 Ala. Rep. 156.] In Smith v. Strader, Perrine & Co. 9 Porter's Rep. 451, after citing the act of 1828, (Clay's Dig. 383, § 11,) which declares that the remedy "on bills of exchange, foreign and inland, and on promissory notes payable in Bank, shall be governed by the rules of the law merchant," &c., it is said, "We apprehend therefore, that the legislature intended to make promissory notes payable in Bank, *negotiable* as *inland bills of exchange*, and to be governed and regulated by the same law." See also, 6 Ala. Rep. 353.

In the Bank of Mobile et al. v. Hall, 6 Ala. Rep. 639, the ques-

tion directly arose, whether the indorsement of a negotiable promissory note before its maturity, in payment of a pre-existing debt, or as indemnity against the consequences of a suretyship, invests the holder with a right to recover, which cannot be defeated by proof of a latent equity between the payee and the makers. We there held, that the receipt of a negotiable instrument in payment of a precedent debt, was in the usual course of trade, and if received under the circumstances supposed, could be enforced by the indorsee. "It appears to us," (say the Court.) "there is no sensible distinction between receiving a bill in payment of a pre-existing debt, and purchasing it with money or property. In either case, the consideration is a valuable one; and all the reasons which apply to protect the holder against latent equities between the original parties, of which he had no notice, apply with the same force in the one as in the other." [See also, Brush v. Scribna, 11 Con. Rep. 338.] But where the transfer is made to indemnify the indorsee, and save him harmless from loss on his suretyship, it is not a transaction within the usual course of trade so as to protect the holder from a defence that might have been set up against the payee. [See also, Cullum v. The Branch B'k at Mobile, 4 Ala. Rep. 21.]

It is objected by the defendant's counsel, that it does not appear that the note in question was assigned by Harwell in payment of a debt, but was merely delivered to Messrs. Ball & Crommelin as a security for sundry demands which, as attorneys at law, they held against Harwell. This is denied by the defendants, who have answered, at least according to their information and belief. Harwell's deposition was taken at the instance of the complainants, and fully sustains the objection. There can be no question, but this witness testifies what he honestly believes, but it is probable that his memory is at fault. Be this however as it may, the consideration of the assignment is a fact put in issue by the pleadings, and it is incumbent upon the complainants to show such a state of facts as would authorize them to set up the mortgage by Harwell to Houston, and perpetually enjoin a recovery to the extent of the amount which Pond has paid thereon, to discharge the incumbrance. Crommelin expressly negatives the testimony of Harwell, and thus creates an *equilibrium* of proof. In this posture of the case, it may be regarded as if no evidence had been taken upon the point,

and the answers must, according to the practice in Chancery be considered as true.

It was supposed by the plaintiff's counsel, that the testimony of Crommelin was gratuitously given; that is, that it was not called for by the questions propounded to him. However this may be, in respect to some part of his testimony, we have not thought it necessary to inquire; for we think it clear, that the interrogatories directly called for a disclosure of the inducements to the transfer of the note, and the circumstances under which it was made.

The failure to produce the notes delivered to Harwell in exchange for the complainant's note, did not authorize the exclusion of Crommelin's testimony. These notes he affirms were paid off by the exchange, and may, especially as the transaction has been consummated for several years, be presumed to be destroyed, or otherwise cancelled. Besides a notice to produce them would have been unavailing, as Harwell's testimony shows that they are not in his possession.

It is not competent for the complainants to object, that Ball & Crommelin could not receive the note in payment of demands placed in their hands for collection. Perhaps it might be competent for their clients to refuse to abide by what they have done, and to insist upon charging Harwell upon his indebtedness, or making them liable for a breach of duty, but such an objection by any third person is not permissible; especially after the exchange has been ratified by the clients.

In respect to the objection that all the creditors of Harwell who are interested in the note are not made its indorsees, we think it cannot be supported. The consideration for the indorsement was equal to the note, viz: the amount of the debts due the indorsees, and the other creditors whose debts were thus extinguished. The latter would be entitled to receive their demands when collected; and the indorsees, should they collect it, would hold that amount in trust for them. The fact that *all those* who are entitled to the proceeds of the note, are not made its *legal proprietors*, cannot enlarge the grounds upon which the complainants may resist its payment. The assignment was certainly made in the due course of trade, for an adequate consideration, and we must intend, in good faith; as there is nothing in the record from which it can be inferred that Messrs. Ball & Cromme-

lin, or their clients, had notice of the equity set up by the complainants, until several years after the transaction took place.

The object of the bill was to enjoin the judgment against the complainants, and if unsuccessful in this, then to recover of Harwell the amount they had paid under the mortgage to Houston. In respect to the latter, a Court of law is competent to afford relief, and Chancery could only interpose upon the ground that where a person goes into equity for one purpose, that Court may take jurisdiction of the entire case, and do complete justice between the parties. It cannot be regarded as a primary ground of equity, but at most consequential only. As to the principal matter, we have seen, the complainants have failed to make out their case, and it is shown that the law is in favor of the defendants. This being so, there is nothing on which to rest the jurisdiction of the Court, as to the prayer for relief against Harwell. If it could be entertained, because upon the face it appeared unobjectionable, then it would be competent to transfer to equity many cases of pure legal cognizance, by making them dependent upon a suppositious statement of facts. This would be a state of things not to be endured, and need but be mentioned, to show that the Chancellor properly refused to render a decree against Harwell.

Other questions are raised upon the record, and were discussed at bar, but the view taken is decisive of the case, and we will only add that the decree is affirmed.

TILMAN, ET AL. v. McRAE.

1. When the judgment of the Circuit Court, in a cause of forcible entry, is reversed because the complaint was dismissed, instead of being remanded that it might be amended in the Justices Court, and the Circuit Court is directed so to enter its judgment, if it afterwards does so and renders costs against the plaintiff in the *certiorari*, this is irregular, but the error is a clerical misprision, and will be here amended at the cost of the plaintiff in error.

Tilman, et al. v. McRae.

Writ of Error to the Circuit Court of Sumter.

THE judgment in this cause, when it was here at a former term upon a writ of error sued out by McRae, was reversed because the Circuit Court should have remanded the proceedings to the Justices Court, in order that the complaint might be amended there, instead of dismissing it in the Circuit Court, as was its judgment. [See 6 Ala. Rep. 486.] When the cause came again before the Circuit Court, on the mandate from this Court, that Court remanded the cause to the Justice's Court, but rendered judgment for costs in favor of McRae, against the plaintiffs in the *certiorari*, who were in point of fact the successful parties. They now prosecute the writ of error, and insist that costs should not have been given against them; but that the judgment should have been for them to recover of McRae.

LYON, for the plaintiff in error.
R. H. SMITH, contra.

GOLDTHWAITE, J.—There is no question as to the error in this judgment, as the party who has succeeded in establishing the incorrectness of the complaint has been condemned in costs. The only doubt we have felt is, whether this ought not to be considered a clerial misprision, and as such, amendable at the cost of the plaintiff in error. In point of law, the costs generally follow the defeated party, and it is properly the province of the clerk so to enter the judgment.

In the present case, there is nothing in the record which warrants us in saying, that the Court specially directed this entry; and as it is clearly irregular, the injured party could have had it corrected on motion, and had the proper judgment entered *nunc pro tunc*. As this course was not pursued, the judgment, under the authority of the statute, (Clay's Dig. 322, § 55,) will be amended here, at the cost of the plaintiff in error.

WALKER, ET ALS. v. TURNIPSEED.

1. When a motion is made against a sheriff, a variance between the *fi. fa.* described in the notice, and the one produced in evidence, cannot be aided by the production of the original *fi. fa.*, which corresponded with the notice, the motion being made upon an *alias*.
2. When a notice is pleaded to by the sheriff, it is in the nature of a declaration, and may be amended on motion.

Writ of Error to the Circuit Court of Randolph.

MOTION by the defendant in error, against the plaintiff in error, as sheriff of Randolph county, and his sureties.

L. E. PARSONS, for plaintiff in error.
T. D. CLARKE, contra.

ORMOND, J.—The notice in this case informs the sheriff, that a motion will be made against him for failing to pay over on demand, the amonnt of an execution which is particularly described, which issued on a judgment for $106 55. After a demurrer to the notice, the parties went to trial upon an issue before a jury, when the sheriff moved to exclude the execution, for a variance between it, and the *fi. fa.* described in the notice, the execution, when produced, being for $100 65. The plaintiff to explain it, produced the original *fi. fa.*, which was for the correct amount, the money having been collected on an *alias fi. fa.*, and offered both in evidence. The Court refused to exclude the *alias* from the jury, and permitted the original to go to the jury, as explanatory of it, and to show the true amount of the judgment. This, according to the decision in Johnson v. Gray, 6 Ala. Rep. 276, was erroneous, where it was held that the question before the jury in such cases, is not only whether the money was collected, but whether it was collected by virtue of the particular execution described in the notice; and that a misdescription of the execution, is a fatal defect. That decision applies fully to this case.

We think however, that where, as in this case, the notice is pleaded to, it is in *lieu* of a declaration, and may be amended; but no such motion was submitted to the Court.

As the cause must be reversed for this error, we decline a further examination of the assignments of error, as they may not again arise.

Let the judgment be reversed and the cause remanded.

JULIAN, ET AL. v. REYNOLDS, ET AL.

1. An administrator with an interest may purchase at a sale made of the intestate's estate, and if he uses the assets of the estate in making such purchase, the distributees may elect to consider the appropriation a conversion, or may treat the administrator as a trustee; this being the law, he cannot make *a gift* of the property so as to defeat the trust.
2. An answer in Chancery, when offered in evidence, is regarded as a declaration or admission of the party making it, and when the confession of the respondent would, with respect to others, be *res inter alios*, it cannot be received.
3. The declarations of a donor made subsequent to the execution of a deed of gift, are not admissible to defeat the gift.
4. Although administration may be granted in another State upon the estate of one who there dies intestate, if slaves belonging to the estate are brought to this State by the administrator, a Court of Chancery may here entertain a bill by a distributee to enforce a distribution.
5. To a bill for distribution against an administrator, appointed abroad, who brings a portion of the assets into this State, all the distributees should be made parties; but a personal representative of a husband of one of the distributees, who never reduced his wife's share into possession, need not be joined.

Writ of Error to the Court of Chancery sitting in Lowndes county.

THE complainants, Benjamin Reynolds and Sally his wife,

Wiley Turner and Frances his wife, Thomas W. Turner and Harriett his wife, alledge, that in right of their respective wives, they are distributees and heirs of James Mosely, deceased. That the decedent died in the State of South Carolina, and that there administration was duly granted of his estate to his widow, Mary, and his son, John Mosely, who sold the real and personal property belonging to the intestate. At the sale thus made, the administratrix purchased the slaves with the effects of the estate, and removed with them to Alabama, where she now resides—the administrator still remaining in South Carolina. It is further stated, that "some of the slaves have had increase," some have been exchanged for other slaves, and others have been purchased with money belonging to the estate. That the administratrix has purchased a tract of land and other property with money of the estate, and has conveyed by deed of gift to her daughters, Eliza, (now Mrs. Julian,) and Martha, all the slaves and personal property, which she acquired by purchase, exchange, &c.

The bill prays an account of the intestate's estate, and that distribution be made of the slaves and other property now in the possession of the administratrix, and that the deed of gift be cancelled, &c.

Mrs. Mosely admits, by her answer, the material allegations of the bill, that she purchased the slaves for the heirs of the intestate, with money arising from the estate, and that the money accruing from the sale of the lands has been applied to the payment of the intestate's debts.

Geo. G. Julian, the husband of Eliza, also answers, says that he does not know whether the slaves were purchased with the effects of the estate of the intestate or not, but he claims the slaves in right of his wife, as Martha Mosely, the other donee, has since died. He objects to the relief sought, on the ground that the complainants should prosecute their remedy on the administration bond in South Carolina, before they can proceed against the property in question; Further, that the answer of the administratrix cannot be used as evidence to defeat, or in any manner affect the deed of gift she has made.

The Chancellor ordered and adjudged that the deed of gift be cancelled and set aside, that the Register take an account

of the estate of the intestate, brought to this State by the administratrix, including the slaves purchased by her at the sale in S. Carolina, together with their increase; also, those purchased by her since that time, with the assets of the estate, or acquired by exchange; besides the land and other property purchased with the money to which the distributees were entitled.

The Register was directed further to take an account of how much each of the heirs and distributees may have received towards their portion of the estate; who are the heirs and distributees, and the *quantum* of interest to which they are respectively entitled, under the law of descents and distribution, &c.

T. Williams, for the plaintiff in error, made the following points: 1. Mrs Mosely was an administratrix with an interest, and might purchase at a sale of her intestate's estate. [2 Stew. Rep. 47; 4 Porter's Rep. 283; 6 Ala. Rep. 894.] 2. It is not alledged that the deed from Mrs. Mosely to Mrs. Julian, any Martha Mosely was fraudulent, and such a presumption cannot be indulged. 3. The answer of Mrs. Mosely is no evidence to defeat the gift she made her daughters. 4. If it was competent to call the administratrix and administrator to an account in the Courts of this State, the decree should have been for an account against them, and a partition of the estate which was chargeable. 5. All the distributees should have been made parties—two of them, viz: John Mosely and Jacob Tillman, are not before the Court.

J. M. Boling, for the defendant in error. The distributees may elect to compel Mrs. Mosely to account for the assets of the estate of the intestate with interest, or they can treat her as a trustee in respect to the slaves, &c. purchased with the money. [2 Johns. Ch. Rep. 30, 104; 4 Id. 305; 1 Monr. Rep. 44.] She cannot make herself the owner of the money, or by a gift or otherwise, change the destination to which it was designed when she purchased. [1 Johns. Ch. Rep. 119; 1 Dess. Rep. 154.]

The bill shows that John Mosely had received his distributive share, and resided without the State; that Jacob Tillman is dead, and the objection for want of parties cannot be supported. As

to all the defendants but Mrs. Mosely and Julian, the bill is taken for confessed; they answer, but Julian alone assigns errors. The answer of Mrs. Mosely is evidence against her co-defendant, who claims as her donee, [6 Cranch's Rep. 8, 19, 25; 9 Wheat. Rep. 831;] and his answer may be overbalanced by the positive testimony of a single witness, as the bill does not charge him with knowledge, and he merely states his opinion, belief, &c.

COLLIER, C. J.—1. There can be no question, according to the decisions in this State, that Mrs. Mosely might have purchased the property of her intestate's estate, at a sale thereof made according to law; and in the absence of any thing shown to the contrary, it will be presumed that the common law of South Carolina is accordant with our decisions. This is sufficiently established by the cases cited by the counsel for the plaintiff in error.

These are principles which we do not understand are controverted in the present case. Mrs. Mosely admits that she purchased the slaves with money belonging to the estate, for the benefit of the distributees; and hence it is contended that she acquired no title to them in her own right, but, that she held them in trust, and they must be distributed as the money would have been, had she retained it. That the distributees, had they so elected, might have considered the purchase as a conversion of the assets of the estate, and charged her with the money and interest, but they have thought proper to treat her as a trustee. This argument, we think, is well founded, both in reason and upon authority. Such being the law, Mrs. Mosely could not defeat the trust, by the gift she made to her daughters, and consequently it is not essential to the relief prayed, that the bill should alledge, that the deed sought to be set aside is tainted with fraud.

2. It is said to be a strict rule, that the answer of one defendant shall not be read in evidence against another; the reason being, that there is no issue between the parties, and there has been no opportunity for cross-examination. [Gresly's Eq. Ev. 24.] But this rule it is said, does not apply to cases where the other defendant claims through him, whose answer is offered in evidence; nor to cases where they have a joint interest, either as partners or

otherwise, in the transaction. [Greenl. Ev. 210; 3 Phil. Ev. C. & H.'s notes, 931-2, and cases there cited.

An answer in Chancery, when offered in evidence, is regarded as a declaration, or admission of the party making it, and where the confession of the respondent would, with respect to others, be *res inter alios*, it cannot be received. [1 Starkie's Ev. 288, 291; 2 Id. 36-7; Greenl. Ev. 210-11, and cases cited in the notes to each of these.] None of the cases cited for the defendant in error allow greater latitude in admitting an answer than this. Osborn v. The U. S. Bank, 9 Wheat. Rep. 831, recognizes the rule as we have laid it down, and holds, that where a defendant dies after having answered a bill, his answer is evidence against one who comes in as his representative.

The defendant, Julian, declares that he does not know, that Mrs. Mosely purchased the slaves which she gave to his wife and daughter Martha, with the money of her intestate's estate; and the answer of Mrs. Mosely is offered to countervail the effect of that declaration, made under oath, in response to the bill. It is perfectly clear, that a deed of gift cannot be defeated by the statements of the donor, made subsequent to its execution; and the answer of a co-defendant cannot be received for that purpose, where his declarations would be incompetent. There was then no evidence to show that the deed to Mrs. Julian and her sister, was inoperative, in consequence of the invalidity of the donor's title.

3. Although the intestate died in South Carolina, his estate was there administered on, and the slaves were there sold, and purchased by Mrs. Mosely, yet as they were brought by her to this State, a Court of Chancery may entertain a bill at the suit of a distributee, to coerce their distribution, &c. Calhoun v. King, et al. 5 Ala. Rep. 523, is a conclusive authority upon this point.

4. To a bill like the present, all persons interested as heirs, or distributees of the intestate should be made parties, that their rights may be adjusted, and the estate finally disposed of. Although John Mosely may have received his share, it is perhaps proper that he should be made a party, that the decree may conclude him. If Jacob Tillman is dead, we can perceive no reason why his personal representative should be joined; never having reduced his wife's share into possession, either actually

or constructively, no interest vested in him, that could be transmitted on his death.

For the second point considered, the decree is reversed, and the cause remanded.

BURNETT v. HANDLEY.

1. When a slave is levied on at the suit of three creditors, and is claimed by a stranger, who executes a claim bond to the junior execution only, and that creditor alone contests the title with the claimant, and succeeds in condemning the slave, the other creditors have no right to claim the money which he receives from the claimant, in discharge of the claim bond.

Writ of Error to the Circuit Court of Wilcox.

This was a motion by Burnett, as sheriff of Wilcox county, against Handley; and its object is to obtain the judgment of the Court with reference to the appropriation of money between certain execution creditors. The motion, by consent of parties, was heard and determined by the Judge, without the intervention of a jury, upon the following state of facts, to wit:

Handley obtained judgment against one Joseph B. Dossey, at the fall term, 1842; his execution issued on the 5th of December, 1842, and the same day was levied on a slave named George, as Dossey's property. Thereupon the sheriff demanded a bond of indemnity from Handley, which was executed. Afterwards, this slave was claimed by William Dossey, and a bond given to try the right of property. At the fall term, 1843, the slave was held liable to satisfy this execution, and his value assessed at $550, which sum was thereupon paid by the claimant to the attorney of Handley, who now holds the same, subject to the direction of the Court, with respect to its application.

On the same day when the sheriff levied Handley's execution, he also levied upon the same slave three others, one in favor of

Francis Bettis, against the said Dossey and James H. McIlvain; one in favor of Wm. T. Matthews against Dossey and David Mandeville, and one in favor of the same plaintiff against Dossey, Wm. F. Daniel and John D. Caldwell. These executions were received by the sheriff on the 22d of August, 1842. There was no proof that any indemnity bond was executed by the plaintiffs in those three cases, or that any indemnity was demanded. It was proved that in the case of Bettis, the money had been paid to his attorney by Burnett the sheriff. It was proved by Matthews, the plaintiff in the two other cases, that the sheriff, Burnett, paid to him the sum of four hundred dollars, and it appeared from the executions, that sum was more than sufficient to satisfy both. At the time the sheriff paid this sum, he was called on to do so by Matthews, and the money was paid at the sheriff's office, and at, and immediately before the payment, the executions were in his hands. Matthews did not receipt to the sheriff for the money in the cases, nor did he assign them to the sheriff, but it was understood and considered by him, when he received the money, that it was received on those executions.

The Court, upon this evidence, considered Handley as entitled to have the money applied to the discharge of his execution, and so ordered. To this decision Burnett excepted, and insisted upon the application of the money to the discharge of the other executions.

The judgment of the Circuit Court upon this matter is assigned as error.

Chas. Dear, for the plaintiff in error, insisted that the execution of the indemnity bond by Handley, gave him no superior rights to the slave, unless the other plaintiffs had refused, upon request made, to indemnify also. Here the sheriff may have become liable, and a third party cannot be allowed to show the payment by him, as the ground for acquiring the exclusive right to the money realized from the sale.

Sellers, contra.

GOLDTHWAITE, J.—In point of fact, there is no contest here between the several creditors of Dossey as to the appropriation of the money. The sheriff, it seems, conceded his liability to sat-

isfy the executions which had issued at the suit of Bettis and Matthews: whether this liability grew out of his neglect to require a claim bond from the claimant of the slave levied on, or from his omission to make the money from the other persons against whom as well as Dossey, these executions were issued, does not appear; nor is this material, because, if these creditors were now contesting the right of Handley to the money in the hands of his attorney, it could not be said their's was superior. Handley has, in legal effect, done no more than enter into an arrangement with the claimant, in the nature of an accorded satisfaction of the condition of the claim bond executed by the latter. This right is personal to him, and is not affected, even if the other creditors had a paramount lien upon the slave. In this view of the case, it is unnecessary to determine whether the lien of the other creditors was destroyed by the omission of the sheriff to require a claim bond on their executions.

Judgment affirmed.

McLEMORE, ET AL. v. McLEMORE, ADM'R.

1. A testator devised the residue of his estate, as his executors thought proper, to his wife, to rear and educate his children, during her life, and proceeds: "As the balance of my children come of age, I will that they receive such a part, of their part of my estate, as my executors shall think proper to give them at that time. Also, I will, that when my daughter, Eliza McLemore becomes of age, and marries, that she receive a part, of her part of my estate as the executors may think proper. I will when my youngest child comes of age, or my wife should marry, then in either case, I will that there be a division take place between my wife, and my children, and each one share an equal part of all my estate." Finally, he declares, "I will, at the death of my wife, all my children to share all my estate equally." Held, that these legacies were vested, the enjoyment of them being postponed until the contingencies happened.
2. One of the legatees having died before the contingency happened, leaving one child by a former wife, and three others by a subsequent marriage,

and two of the last children having also died: Held, that the portion of the two last children, in their father's legacy, would descend to their sister of the whole blood, to the exclusion of the remaining sister of the half blood.

Error to the Orphans' Court of Montgomery.

This proceeding was a motion by Moses McLemore, adm'r, for distribution of two slaves among the distributees of his intestate, William McLemore. It appears that the slaves to be distributed, came by the will of James McLemore, the father of William. That William McLemore, at his death, left a widow and four children—one, Mary, by a former marriage, and three by the last marriage, two of which have died, leaving one, Evelina, surviving. It further appeared that William McLemore died before the youngest child of James McLemore arrived at the age of twenty-one years. The will of James McLemore was also in evidence, but need not be here set out, as it is sufficiently described in the opinion of the Court.

The Court held, that the two slaves were to be equally divided between the two snrviving children of William McLemore, and directed distribution accordingly; from which this writ is prosecuted, and which is now assigned as error.

Hayne & Elmore, for the plaintiffs in error, contended, that William McLemore took a vested interest in the slaves, under the will of his father. [6 Vesey, 239; 6 Porter, 507; 5 Ala. Rep. 143; 6 Id. 236; 3 Murphy, 318.] That the interest having vested in him, at the death of his father, James McLemore, descended to his heirs at law, and having died before the contingency happened, upon which it was payable, descended to his heirs at law—and that the estate would go to the child of the whole blood, under the statute of distributions.

Belser, contra, argued, to show, that by the provisions of the will of James McLemore, it was clear the property not divided by his will, was not intended to vest, until the youngest child came of age. That as this event did not happen until after the death of William McLemore, the property vested in him, and that his share will be equally divided among all his children equally, whether of the whole or half blood, who will take directly

from their grandfather, and not through their father. That grand children may take under the term children, he cited 4 S. & P. 286. Upon the construction of the will, he cited 6 Porter, 21, 507, 523; 11 Wend. 259; 4 Hawks, 227; 6 Vesey, 239; 6 Ala. Rep. 236; 14 Vesey, 389; 3 Murphy, 318; 14 Pick. 318.

ORMOND, J.—The question to be decided in this case arises under the will of James McLemore, and is, whether his children took an absolute vested interest in that portion of his estate, or whether it was contingent, and not to vest until the period appointed in the will for its distribution.

The general rule upon this subject is, that where the time annexed to the payment of the legacy, is of the substance of the gift, as a bequest to A, *when* he attains the age of twenty-one years, it does not vest until the contingency happens. This rule, however, like all others adopted for the purpose of expounding wills, yields to an intention inferrible from other parts of the will, that it was to vest immediately. As where the interest is to be paid in the mean time to the legatee. [Fonnereau v. Fonnerean, 3 Atk. 644; and see also, Marr, Ex. v. McCullough, 6 Porter, 507, and McLeod v. McDonnel and wife, 6 Ala. Rep. 236, where this question was elaborately discussed, and the authorities considered.

There is indeed no difficulty in ascertaining the rule, which is well settled, but in making the application of it to the particular case. We are then to ascertain, if possible, what the testator meant. He first gives such of his estate as remains, and as his executors think proper, to his wife, to rear and educate his children, during her life. He further provides for specific bequests to some of the children, and proceeds, "as the balance of my children become of age, I will, that they receive such a part, of their part of my estate, as my executors shall think proper to give them, at that time. Also, I will, that when my daughter Eliza becomes of age and marries, that she receive a part, of her part of my estate, as the executors may think proper. I will, when my youngest child comes of age, or my wife should marry, then, in either case, I will that there be a division take place between my wife, and my children, and each one share an equal part of all my estate. I also will, should any of my children die

without a lawful heir of their body, that part they receive from my estate, shall be equally divided among the balance of my children. And I will, at the death of my wife, all my children to share all my estate equally."

We think it is evident from the general conception, as well as from the particular expressions employed in this will, that the legacies were intended to vest immediately. The children were to be equally interested in all the property, but the immediate enjoyment of it was postponed, because it was considered necessary to preserve it as a fund for the support and education of the younger children. Yet, as it might not all be wanting for this purpose, the executors were invested with a discretion to pay over such portion of it as they might think proper, when the children severally came of age, which is significantly called "a part of their part" of the estate. Finally, when the youngest child came of age, or if the wife married again before that period, an equal division was to take place. The very term "division," implies an interest in the fund to be divided, nor can a doubt be entertained upon the entire will, that it was the intention of the testator that the legacies should vest immediately. The case of McLeod v. McDonald, 6 Ala. Rep. 236, in which the same conclusion was attained, was not near so strong a case as the present.

It appears, that William McLemore died before the contingency happened, upon which the division of the residue was to take place, leaving at the time of his death, a widow and four children. One, Sarah, by a former marriage, and three by the last marriage, of whom two have died, since their father's decease. It also appears, that two slaves having been received since the death of William, from the estate of James McLemore, the Court directed them to be equally divided between the two surviving children, supposing the legacy to William McLemore to be contingent, and that the children of James could inherit under the will, directly from their grandfather.

This order, it appears from the view taken, was erroneous. The legacy to William McLemore being vested, at his death, his interest in the residue of James McLemore's estate, passed to his widow and heirs at law, one fifth part to the widow, and the residue to his children. Two of these having died since their father, their share of their father's estate will pass to the surviv-

ing sister of the whole blood, to the exclusion of the sister of the half blood, as provided by the statute of descents, (Clay's Dig. 168, § 2,) which prefers the kindred of the whole blood in equal degree, to the kindred of the half blood in the same degree.

Let the decree of the Orphans' Court be reversed, and the cause remanded for further proceedings.

SIMINGTON, USE, &c. v. KENT'S EX'R.

1. A written notice to the attorney at law of a party, to produce a paper to be used as evidence, is declared by statute to be valid and legal to all intents and purposes, as if served on the party in person.
2. Where a suit is brought in the name of one person for the use of another, a notice to the attorney of record of the plaintiff, to produce a writing which merely describes the suit as between the nominal plaintiff and the defendant is sufficiently certain, and the attorney cannot excuse the non-production, by proof that he was retained by the plaintiff really interested.

Writ of error to the Circuit Court of Perry.

THE plaintiff in error declared against the defendant for work and labor done, for goods, wares and merchandize sold and delivered, and upon an account stated. The defendant pleaded—1. *Non assumpsit.* 2. That the defendant had no license to practice medicine at the time the account was made, for the recovery of which this action is brought. Thereupon the cause was submitted to a jury, who returned a verdict for the defendant, and judgment was rendered accordingly.

On the trial, a bill of exceptions was sealed, at the instance of the plaintiff, which presents the following point: After the plaintiff had proved his accounts, which were for services rendered as a physician, and the testimony had closed on both sides, the attorneys for the defendant produced a notice entitled and addressed thus: "W. A. Simington v. A. G. McCraw, Ex'r of Robert F. Kent.

Perry Circuit Court. To Hugh Davis, attorney of record for W. A. Simington, the plaintiff." The notice then informed the attorney, "that the license, or permit, of W. A. Simington to practice medicine and surgery will be required to be produced on the trial of the above stated case, in which said Simington is plaintiff, and A. G. McCraw defendant, and which stands for trial at the next term of the Circuit Court of Perry county," &c. "to be holden," &c. "in September, 1843." This notice was subscribed by the defendant's attorneys, and acknowledged to have been received by the person who appeared to be the attorney of record for the plaintiff, some weeks previous to the commencement of the term of the Court at which the production of the paper was required. But the attorney on whom the notice was served, denied that he represented Simington, but insisted that he was the attorney of the beneficial plaintiff. For that reason, and because the notice was not served on either Simington or the party for whose use the suit was brought, he insisted that it was insufficient to require the production of the license; but the Court ruled otherwise.

H. Davis, for the plaintiff in error, insisted that the service of the notice upon the attorney of the real plaintiff, was insufficient to draw from the plaintiff a paper which he must be presumed to have in his possession. [Clay's Dig. 491. See Meek's Sup. 117.] The case in 6 Ala. Rep. 257, is unlike the present. There the notice was to aid in giving effect to a remedial statute; in other cases attorneys should be considered incompetent to accept service, unless they are expressly embraced by statute. The Court seemed to require the production of a license, though a diploma would have been sufficient.

A. B. Moore, for the defendant.

COLLIER, C. J.—The notice, it is true, does not entitle the cause as being brought for the use of the beneficial plaintiff, yet we think the designation of the parties was sufficiently precise to have enabled the attorney to understand in what case it was proposed to use the paper as evidence.

Our statute *in totidem verbis* declares, that in all cases pending before any of the Courts of record, written notice to the at-

torney of record, shall be as valid and legal to all intents and purposes, as if served on the party in person. [Clay's Dig. 337, § 137.] In Jefford's Adm'r. v. Ringgold & Co. 6 Ala. Rep. 549, a notice was served on the defendant's attorney, in Lowndes county, on Friday preceding the term of the Court, when the cause was tried, to produce a paper at the trial. It was proved that the paper was seen in the possession of the defendant, in Charleston, South Carolina, and that he had not lately been in this State. We considered the notice sufficient, and remarked, that "If the party to whom the notice is given, has had *prima facie* sufficient notice to produce the paper, and is still unable to do so, if he is unwilling that its contents should be proved by parol, he may apply for a continuance; but an objection at the trial, that the notice was too short to enable him to comply with it, would be listened to with little favor." See also, Jackson v. Hughes, 6 Ala, Rep. 257. These cases, if other authority than the statute itself were necessary, very conclusively settle that a notice to the attorney of a party, pending a cause, is notice to the party himself.

The fact that the attorney in the present case was retained by the real, instead of the nominal plaintiff, we think altogether unimportant. Whether he represent the one party or the other, either himself or his client are presumed to be in possession of the papers which may be material on the trial of the cause. If he has them not then, he should advise his client of the requisition, but whether he pursues this course or not, if the papers are not produced after reasonable notice, then parol evidence will be received. Although the paper demanded may be such as belongs to the nominal plaintiff, yet a notice to the beneficial plaintiff, or his attorney, is regular. This is the necessary result of what has been said—the judgment is consequently affirmed.

MARRIOTT & HARDESTY, ET AL. v. GIVENS.

1. A mortgagee, or *cestui que trust*, may proceed to foreclose a mortgage, or deed of trust, in a Court of Equity, although the deed confers a power of sale.
2. When a creditor procures a levy to be made upon personal property conveyed by mortgage or deed of trust, previous to the law day of the deed, the mortgagee, or *cestui que trust*, may file a bill to ascertain and separate his interest and that which remains in the debtor, in consequence of the stipulation that he shall remain in possession until the breach of the condition of payment.
3. There is no necessity for the mortgagee, or *cestui que trust*, to go into equity to protect themselves against a creditor of their debtor, who levies on the property covered by the mortgage, or trust deed, upon the expiration of the law day, as a claim then interposed under the deed will be sustained.
4. A creditor who alledges fraud in the conveyance of a debtor, by a mortgage or deed of trust, cannot be prevented from trying this question in a Court of law, before a jury.
5. A stipulation in a trust deed, to secure the payment of certain debts, providing that the debtor shall remain in possession of the property until a named day, and afterwards until the trustee should be required, in writing, by his *cestui que trust*, to proceed and sell, does not extend the law day of the deed beyond the time fixed for the payment of the debt; and if a levy is made after that time, by a creditor, the trustee may protect the property by interposing a claim under the statute.
6. The trustee, after the time fixed for payment by the terms of a trust deed, is invested with the legal title, and at law, is the proper party to contest the legal sufficiency of the deed, and a verdict for or against him, if obtained without collusion and fraud, is binding and conclusive on his *cestui que trust*.
7. When personal property is improperly levied on, the party claiming it cannot enjoin the creditor from proceeding at law, on the ground that another person has interposed a claim to it by mistake. The true owner has an adequate remedy at law, by suit, or by interposing a claim under the statute.
8. After the determination of a claim suit against a trustee, his *cestui que trust* is not entitled to re-examine the question of title, on the ground that he was a stranger to the claim.
9. When personal property, conveyed by a trust deed, is levied on by creditors of the grantor, and claimed by the trustee under the statute, his *cestui*

que trust is not entitled in equity to restrain the creditors from proceeding in the claim suits, upon the ground that he desires a foreclosure.

10. When real estate is conveyed by a trust deed, to secure the *cestui que trust*, he may proceed in equity to foreclose the trust, and other creditors who have levied their executions on the trust estate, are entitled to redeem and therefore are proper parties, defendants to the bill of foreclosure.—Query, as to the proper course if they contest the validity of the deed as fraudulent, and assert the right to determine this question in a Court of Law.

11. Under our course of practice, which does not permit a demurrer without answer, when an objection is sustained against a bill demurred to as multifarious, it is proper that the complainant should amend his bill, or at least be put to an election upon which ground he will proceed. Quere, as to the practice in an appellate Court if the objection is overruled, and the bill is heard upon all the distinct grounds.

12. When the claimant asserts an absolute title to slaves levied on as the property of a debtor, and the proof shows that a portion of these slaves were purchased with money or funds of the debtor, and that the bills of sale were taken in the name of the complainant, the possession remaining with the debtor, this is evidence of fraud.

13. The assertion by a *cestui que trust* against creditors, that the grantor in a trust deed is indebted to him in a larger sum than he is enabled to prove, is evidence of fraud, unless the suspicion of unfairness is removed by evidence.

Appeal from the Court of Chancery for the 39th District.

This bill was filed by William T. Givens, against certain execution creditors of Ed. Herndon, and the case made by it is as follows.

Herndon being largely indebted to Givens, made and executed two deeds of trust, conveying certain real and personal estate to one Jesse C. Cobb, upon trusts which will be recited hereafter; one of these deeds is dated the 20th, the other the 21st April, 1840. These deeds were duly recorded in the proper office. Afterwards, Marriott & Hardesty obtained a judgment against Herndon, and also against Cobb, the trustee, as partners, and procured an execution to be levied on the trust property, then remaining in the possession of Herndon, and also upon four slaves which were the idividual property of Givens. Cobb, as trustee, interposed a claim under the statute, to the trust property, and also, by mistake, to the four slaves belonging to Givens, supposing

them to be included in the trust deed. The claim thus interposed by Cobb, was decided against him; and thereupon the property claimed by him was found subject to the execution. Givens asserts, that he was a stranger to these proceedings, and prays that the property covered by the trust deed may be subjected to the payment of the debts to which it was appropriated; that Marriott and Hardesty may be enjoined from proceeding against the trust property; and also against the four slaves, as well as upon the claim bond executed by Cobb and his sureties for their delivery.

Marriott & Hardesty, and Thomas A. Walker, are charged with fraudulently combining to effect a sale of the trust property, and with Herndon and Cobb are made defendants. Afterwards Givens filed an amended bill, in which he alledged the indebtedness of Herndon as amounting to $17,000, and that this indebtedness arose from the loan of funds in his charge, as the executor of one Mayberry, in the State of Tennessee, as well as from his own resources, and property sold to Herndon, who is his son-in-law. That he procured the deeds of trust to be executed to secure himself, fearing the consequences of the revulsion which then had recently occurred; that the stipulation in the deeds that Herndon should remain in possession until the trustee should be required by Givens to proceed to sell, was induced, in part, by the relationship existing between him and Herndon, and from the fact that the situation of his daughter required the aid of some domestics. Under these circumstances, and the deeds having been duly recorded, he did not feel disposed to close the deeds so long as he was not called on to settle the estate of Mayberry. After the execution of the trust deeds, he ascertained that Bright & Ledyard of Mobile, had obtained two judgments previous to the execution of the deeds, one for $2,371, and the other for $203, besides costs, upon which executions had issued. These constituting a lien on the trust property, were discharged by Givens, and are insisted on as an equitable charge against the trust estate. It also alledges, Henry Burgess, for the use of Andrew Rankin, and Caleb Garrison had levied executions procured against Herndon, on the same trust property, as well as on the four slaves owned by Givens. That Cobb, as trustee, had claimed all the property levied on, committing the same mistake in each of the claims, with respect to the four slaves; and that Giv-

ens had become Cobb's surety in the claim bonds, without being aware that the claims covered his own slaves: so soon as he became aware of the mistake, he himself interposed claims in all of the cases, in his own name, to the four slaves belonging to him; which claims, as well those of Cobb as his own, remain undetermined, except that of Cobb against Marriott & Hardesty. Kemp and Bucky had also procured a *fi. fa.* to be levied on the same property, and after its return a *vend. ex.* which is in the sheriff's hands.

It further alledges, that Cobb has removed from the county of Benton, where the trust property was levied on, and is inefficient as a trustee, and incapable of protecting it from the combined assaults of the creditors.

It prays injunctions against the several named creditors, the removal of Cobb as trustee, and the sale of the trust property, in satisfaction of the debts due to the complainant, charging it with the amounts paid to discharge the incumbrances, to Bright and Ledyard.

Afterwards a supplemental bill was filed, which alledges that Herndon, on the 9th day of January, 1843, was duly declared a bankrupt, and was discharged from his debts as such; and that the said Herndon had become the purchaser of all the interest resulting to him under said trust deed, at a sale thereof made by his assignee.

The trust deeds, which were executed by Herndon only, recite the indebtedness to Givens, and the trusts, as follows, to wit: The one of 20th April, an indebtedness of $21,000, by notes, thus described—

One dated 30th October, 1838, at 12 months,	$4,370
" 10th " " 1839, at one day,	6,160
" 15th June, 1839, at one day,	6,810
" 11th January, 1839, at one day,	2,750
A receipt, dated 16th January, 1839,	910

The property conveyed is, divers tracts and lots of land, one piano, two horses, two head of Durham cattle, all the household and kitchen furniture, and several slaves. "To have and to hold, &c. under the express stipulation, that the property mentioned as conveyed in trust, is to remain in possession of Edward Herndon until as hereinafter provided; that if the said debts shall not be paid against the 25th day of December, 1840, then when-

ever the said Givens, his agent, &c. shall require the said Cobb, in writing, to proceed in execution of the trust reposed in him, he shall immediately take possession of the property, and sell the same at public aution, to the highest bidder, for cash, at the court house door, after giving thirty days notice, and at three public places in the county, and after paying the expenses of the trust, pay the said debts to the said Givens; and if any thing remain, shall pay it over to the said Herndon; but if the said Herndon shall, in good faith, pay the said Givens the said debts, and interest, by the 25th day of December, 1840, then the deed was to be void.

The second deed recites the indebtedness of Herndon to Givens, which it is intended to secure, as a large amount due by promissory notes, as follows:

One dated 10th October, 1839, at one day, for	$6,160
" 11th January, 1839, at one day,	2,750

The property conveyed in trust by this deed, is 12 slaves, and the trusts are in similar words as by the other deed.

All the defendants answered the bill except Cobb and Rankin. Such as are creditors, pray their answers may be taken as demurrers to the relief sought, and to the bill for want of equity; most of them deny all knowledge of the allegations of the bill, except as to the indebtedness of Herndon to them severally, and the obtaining judgment and execution. They also insist, that the deeds of trust are fraudulent and void, and that they were made with intent to delay, hinder and defraud creditors, themselves among the number. Some of them assert that there exists no real indebtedness from Herndon to Givens, and that the latter never had the ability to become the creditor of his son-in-law, to the amount stated, either individually, or as the executor of Maberry, and that he has permitted Herndon to dispose of the trust property to pay his debts, when exorbitant prices could be obtained for it. Walker disclaims any interest in the subject matter of the suit. Marriott & Hardesty insist, that no distinction was made by the jury, between the slaves alledged by the complainant to be his own, and those which are called trust property. They also assert that Givens was active in aiding Cobb in carrying on the claim interposed, and once continued the suit on his own affidavit. They all deny fraud and combination, and pray to be dismissed with costs.

At the hearing, the complainant proved the execution of the deeds of trust exhibited; and that the same were duly recorded in the proper office, within thirty days afterwards.

It was also proved, by the production of the certificate, that Herndon was discharged as a bankrupt, as charged in the supplemental bill.

The evidence on behalf of the complainant, in support of the consideration for the deeds of trust may be thus stated:

1. A note dated 30th October, 1838, at 12 months, for $4,370 was produced, purporting to have been made by Edward Herndon, E. L. Givens, and Robert L. Lane, payable to James Cox and Wm. T. Givens, executors of J. A. Maberry, deceased. The hand-writing of the makers was proved before the Master; and, other evidence, taken by deposition, established that it was given for the price of slaves purchased by Herndon, at the sale of Maberry's estate, and that the other makers were his sureties.

Cox, the other executor, proves that this note was in his possession in April, 1840, and that on the 20th November of that year, he put it in the hands of his co-executor, Givens.

2. As to the debt described in the deed as due by note, dated 10th October, 1839, at one day for $6,160, no note was produced by the complainant; but the deposition of Cox, the co-executor, establishes that a debt for the sum of $6,410, was due by Samuel V. Carnick and others, by note, and that he handed this note to his co-executor, Givens, who loaned it to Herndon. This note was dated 26th October, 1837, payable 12 months after date. The deposition of Hugh P. Carnick, one of its makers, proves the payment of $5,500 upon it, to Herndon, on the 5th November, 1838; to one Samuel McGee of $100, on the 17th January, 1839, and of $300 to W. C. Kelly, on the 7th February, 1839. A new note for $315 was executed to Herndon for the balance due after the former note, on the 8th June, 1839, and as Carnick, supposes $195 was then paid in money. All these payments appear to have been made at Sparta, Tennessee. These two items, to wit: the loan of the Carnick note for $6,410, and the one for $4,370, given for the slaves, are also proved by other witnesses.

3. As to the debt described in the deed as due by note, dated 15th June, 1839, at one day, for $6,810, there is no evidence whatever, unless that just stated relates to this, and not to the other.

4. A note dated 10th January, 1839, at one day for $2,750, was produced, purporting to be signed by Herndon and one Russel J. Allen, payable to Wm. T. Givens and James Cox, as executors of Maberry's estate. Allen states in his deposition that he executed it as Herndon's surety, and that he believes it was given for borrowed money. Edward L. Givens states, in relation to this note, that some time in 1839, or 1840, Herndon came to Alexandria, the residence of the witness, and Wm. T. Givens, and brought with him a blank, upon which were written the names of Herndon and Russel J. Allen. By the instructions of Herndon and Wm. T. Givens, the witness wrote above the signatures, a note, payable to Wm. T. Givens, as executor of J. A. Maberry, deceased, for $2,700, or thereabout. Witness understood, from both Herndon and Givens, that the note was given for money belonging to the estate of Maberry, and loaned by Givens to Herndon.

5. As to the debt described in the deed as a receipt, dated 16th January, 1839, for $910, the only testimony is that of Edward L. Givens, who says he has seen a receipt in the possession of Wm. T. Givens, which he understood, both from Givens and Herndon, was given by the latter for money collected by him in Sparta, Tennessee, and belonging to Givens, as the executor of Maberry. This receipt, as the witness believed, was for about $900.

The depositions of Joseph Davenport, and John F. Pate, taken in behalf of the complainant, declare, in answer to the cross-interrogatories, that they visited Alabama in 1843, and took from Wm. T. Givens a deed of trust, on lands and negroes, to secure Allen Campbell and William Morriss, who were Givens' sureties for his administration, as one of the executors of Maberry's estate; this deed of trust was intended to cover the claim due from Herndon to the executor, or executors; Pate holding Givens responsible, as the latter had made settlement for the amount, and Pate being the guardian of the minor heirs of Maberry. These witnesses, as well as Cox, the co-executor, speak of no other indebtedness from Herndon, than for the Carnick note, and the one made for the slaves purchased at the sale, and answer that they know of no other, if any such existed.

The depositions of Thomas R. Williams, Christopher Haynes, and William C. Kelly, established, that about the time of the execution of the trust deeds, Herndon had sent many of the slaves

conveyed by these instruments to the counties of Greene and Perry; that the two first named persons were employed as agents for the Bank at Rome, to pursue the slaves with an attachment; that they overtook the slaves, and levied on them in Greene county, in the possession of Kelly, and one Brown. Kelly left Benton county after the suing out the attachment, and before the execution of the deeds of trust, which however he had heard spoken of. He passed Williams and Haynes on the road, and was invested with the power to dispose of the slaves as he chose.

The charge, insisted on by some of the answers, that Givens permitted Herndon to deal with the property conveyed by the trust deeds, after the law-day, in payment of his debts, is attempted to be sustained by the depositions of Thomas R. Williams, Christopher Haynes, and W. C. Kelly. The two first named state, that Herndon, in 1841, sold to the Bank of Rome, a tract of land of 300 or more acres, and six or seven slaves, covered by the deeds; that the contract was made in the presence, and with the assent of Givens, who executed a quit-claim in writing, to the land, which was conveyed by Herndon. Kelly states the sale, by Herndon, of some five lots, on two of which were houses, and also, that the purchasers were informed they were covered by the deed, and that Givens would make titles. But he knew nothing of his own knowledge of any titles being made by Givens, or that he took any part in the sale.

As to the four slaves, which the bill asserts are the individual property of Givens, but claimed by Cobb, under a mistaken notion that they were included in the deeds of trust, there is no evidence of ownership on the part of the complainant. On the part of the defendant it was proved, by the deposition of Lawrence Brock, that he sold a slave named Henry, one of the three slaves, to Herndon, in February or March, 1841, and received payment from him in notes due to Herndon & Kelly. The bill of sale was made to Givens, at the request of Herndon. Kelly's deposition proves, that when Schuyler and Bill, two others of the slaves were sold at sheriff's sale, Schuyler was bid off by one Copeland, but paid for by Herndon; but who furnished the money, the witness did not know. Kelly bid off Bill, and took the bill of sale in his own name. He furnished half the money, and Herndon the other half. Afterwards, he sold the slave to Givens,

and executed a bill of sale to him; both these slaves have remained in Herndon's possession, ever since the sheriff's sale. What consideration was paid by Givens to Kelly, is not stated by the witness.

At the final hearing, the Chancellor decreed a perpetual injunction as to the four slaves asserted by the bill to belong to Givens; sustained the trust deeds, and directed the master to state an account of the indebtedness from Herndon to Givens, as well as the amount paid by the latter on account of the previous incumbrance arising out of the judgments in favor of Bright and Ledyard.

The master stated his account, consisting of these items:

1. The note given on account of the purchase of slaves, with interest, $5,562 12.

2. The sum due for the loan of the Carnick note, and interest, $8,621 45.

3. The amount of the note for two thousand seven hundred and fifty dollars, and interest, $3,960 67.

4. The amount paid on the prior incumbrances of Bright & Ledyard, $1,708 23.

The defendants excepted to this report, but the exceptions need not be stated, as the judgment here turns on other reasons. The report was confirmed, and a decree made directing a sale of the trust property, to satisfy the debts due to Givens.

The defendants appealed from this decree, and the creditors here open the cause entirely by the several assignments of error.

Pryor and T. A. Walker for the appellants made the following points:

1. There is no equity in the bill, inasmuch as the party had a clear remedy at law, which has been determined, so far as Marriott & Hardesty are concerned. Cobb represented the interest of his *cestui que trust*, and was competent to do so.

2. As to the four slaves asserted to be the property of the complainant, there is no reason whatever that the claim suits should not proceed.

3. The demurrers should have been sustained, 1. Because the bill is multifarious in confounding the remedy as to the four slaves with the remedy for the trust property. 2. Because improper parties are joined as defendants. There is no reason why one of

the creditors should be at the delay and cost of examining the matters in dispute between the complainant and other creditors. 3. The matters introduced into the amended bill are properly matters for a supplemental bill, and one good cause of demurrer appearing on the record, others may be insisted on in this Court. [Story's E. P. § 332, 443.]

4. The final decree is erroneous, 1. Because the complainant did not prove that the debts named in the trust deeds were due and owing to him. 2. The deeds were not made upon a sufficient legal consideration to support them as against creditors. 3. The deeds were not made in good faith.

The evidence describes debts which are essentially different from those stated in the deeds, and the bill contains no allegation of mistake. Conceding that an indebtedness on account of the Carnick note is made out, that is not the ground of the deed. The note for $4,370 is due to another person as well as the complainant, and no consideration is proved for the note of $2,750. The mere production of the note, without proof of the consideration, is not sufficient against a creditor. [McCain v. Wood, 4 Ala. Rep. 258; Smith v. Acker, 23 Wend. 653, 679; Hanford v. Aulden, 4 Hill, 271, 295; Russell v. Woodward, 10 Pick. 408; Blew v. Maynard, 2 Leigh, 29.]

5. But if the consideration of the deeds was sufficiently established, still they are void as having the effect to defraud creditors, and the proof is that they were made for that purpose.

1. On account of the pretended consideration of debts which had no existence, the bill alledges that the complainant *procured* the deeds to be executed. It was then a fraudulent attempt to cover the property of Herndon from other creditors. The bill alleges that the second deed was executed to secure several claims not embraced by the first, thus seeking to impose the recitals in the deeds as proof that there were different debts of the same amount.

2. The reservation of the use of the property to Herndon is such, that other creditors must be delayed. [Garland v. Rives, 4 Rand. 282; 2 B. Monroe, 239.]

As this possession was liable to be defeated at every moment, by Cobb, the trustee, it was not such an interest as the creditors could levy on and sell. [Otis v. Ward, 3 Wend. 498; 2 Cowen, 543; Harford v. Artcher, 4 Hill, 271.]

3. The deeds had the effect to defraud creditors then in existence, and were made with this intention. The proof shows they were made about the time when the Rome Bank sued out an attachment, and the property was run off. In addition to this, agents were invested with authority to sell the slaves, independent of the deeds. [Head v. Folonertack, 8 Watts, 489; Damer v. Pickering, 2 Pick. 411; Davis v. McLaughlin, 2 Wend. 596; Collins v. Brush, 9 Wend. 189.]

4. Possession was retained by Herndon until the filing of the bill, 29th October, 1842, nearly two years after the law day, and there is no sufficient excuse or reason alledged or proved for thus favoring the debtor. This is evidence of fraud. [Camp v. Camp, 2 Hill, 623; Harford v. Arteher, 4 Hill, 271; Wiswall v. Ticknor, 6 Ala. R. 178; White v. Cole, 24 Wend. 131; Collins v Brush, 9 Ib. 198; Deene v. Eddy, 16 Wend. 522.] When a sale is impeached for fraud by creditors, it is the duty of the party claiming to remove all doubt of the fairness of the transaction. [Struper v. Echart, 2 Whart. 302.]

5. The bill should contain an allegation that the property was not more than sufficient to pay the debts secured by it; without such allegation the bill is fatally defective. [Widgery v. Haskell, 5 Mass. 144; Borden v. Sumner, 4 Pick. 265; Struper v. Echart, 2 Whart. 302.] If the deed as to the overplus, is fraudulent, it is void. [Murray v. Riggs, 15 Johns. 586; Mecker v. Cain, 5 Cowen, 547.]

Wm. P. Chilton and S. F. Rice, contra,

1. The possession remaining with the grantor, is consistent with the deed, and therefore no badge of fraud.

2. As a debtor may lawfully secure one creditor in preference to another, he may do so, notwithstanding the creditor, who is not to be preferred, endeavors to obtain a preference by attachment. The right to prefer cannot be impaired by any effort of the creditor, which is not complete at the time of conveyance.

3. The admission of Herndon, that it was his intention to delay the Rome Bank, cannot defeat the conveyance. [McCain v. Wood, 4 Ala. Rep. 258; Jones v. Norris, 2 Ala. Rep. 526; Haden v. Baird, 1 Litt. S. Ca. 340; Turpin v. Marksberry, 3 J. J. M. 627.]

4. It was competent for Givens to consent that Herndon should

sell portions of the trust estate, and credit the notes with the proceeds, and the notes were thus credited.

5. If the defendants here claim any thing out of the transaction with the Rome Bank, they must show an existing debt. [Lelan v. Hodges, 3 Dana, 439.]

6. But if the conduct of Herndon was improper, Givens is not connected with it, and therefore cannot be affected. [Garland v. Rives, 4 Rand. 282; Roberts v. Anderson, 3 Johns. C. 377; 1 Story's Eq. 373, 75, 119, 396, 399 note, 402, 406, 405, 407.]

7. The discharge of Herndon, under the bankrupt law, is a discharge of all his debts. [McDougald v. Reed, 5 Ala. Rep. 810; Bank. act, 2 sec. sec. 5.] And by the discharge, the lien of the creditors upon his estate was gone. When this matter was disclosed by the supplemental bill, the creditors became strangers to the suit, and had no right to proceed further. [Dunklin v. Wilkins, 5 Ala. Rep. 199.]

8. The bill seeks to separate the interest of the grantor, which was subject to levy, from that of the *cestui que trust*, which is not the subject of sale. [Williams v. Jones, 2 Ala. R. 770; Ib. 664.] So it seeks to remove the trustee as incompetent. The money paid to extinguish the prior lien of Bright & Ledyard, is a matter of equitable jurisdiction. [McMillan v. Gordon, 4 Ala. Rep. 716.] So is also the danger of wasting the trust fund. [Calhoun v. King, 5 Ib. 523.]

9. Neither the mistake of Cobb in interposing his claim, which in itself is a sufficient ground for relief, as the complainant may become liable on the bond given, nor the unsuccessful claim, will preclude relief, as a separation of the fund is necessary. (Callaway v. McElroy, 3 Ala. Rep. 304.)

10. The deeds are in the usual form, and of course not fraudulent *per se*. [Pope v. Wilson, January Term, 1845.] Nor are they shown to be fraudulent. [Steele v. Kinkle, 3 Ala. Rep. 352; Jones v. Norris, 2 Ib. 526; Oden v. Rippeto, 4 Ib. 68.]

GOLDTHWAITE, J.—This bill presents several distinct features, which it is proper to advert to, previous to the consideration of the questions raised upon the record. One of them is, that the complainant asserts an absolute title to four of the slaves involved in this controversy, and as to them seeks no ultimate disposition by the decree; but only to restrain the creditors of a

third person from pursuing these at law, in satisfaction of their claims against him; in other terms, the bill claims that the Court of Equity shall interfere to ascertain where the legal title in these slaves is. The only assigned reason for this interposition is, that other personal estate, with some real property, was assigned by the debtor to a trustee as a security to the complainant for certain debts due to him; and that this trustee, supposing these slaves to be conveyed to him by the deed conveying the other property, by mistake interposed a claim to them, in common with that other property, when all of it was levied on by executions at the suits of creditors of that third person; and that the complainant was a stranger to this claim. Another feature is, that personal as well as the real estate conveyed by the trust deed, has been levied on by the several creditors of the grantor of the deed, and the common object of the bill is to restrain those creditors from proceeding at law against any of the property thus levied on. The reason for this interposition is assumed to arise out of the right which the complainant has to foreclose his trust deed, and that this right is interfered with or obstructed by their levies.

1. We entertain no doubt that a mortgagee or *cestui que trust* may, in the first instance, proceed in a Court of Equity to foreclose his mortgage or deed of trust, although by the deed a power is conferred to sell. [McGowan v. Br. B. at Mobile, January term, 1845.]

2. Nor is it a question, when a creditor, previous to the expiration of the law day named in a mortgage or deed of trust, procures a levy to be made, that the mortgagee or *cestui que trust* may file a bill to ascertain and separate his interest from that which remains in the grantor, in consequence of the usual stipulation in the deed that he shall retain possession of the property, conditionally conveyed, until the forfeiture of the condition. [Williams v. Jones, 2 Ala. Rep. 319.] Indeed, it results from former decisions by the Court, that the interposition of a claim under the statute, by the mortgagee or trustee, will be ineffectual, if made before the expiration of the law day, as until that time the grantor is entitled to retain the property; and this right of possession for a determinate period, is subject to levy and sale, and carries with it the equity of redemption. The consequence of the premature interposition of a claim by the trustee, &c. under such circum-

stances, is, that the claim suit must be determined against the claimant, as his title is incomplete until a forfeiture of the condition of the deed. In view of this difficulty, we have several times suggested, that another effect of a premature claim, might be to conclude the title of the trustee, &c., upon the idea that the deed itself might be questioned as involved in such a suit. [Williams v. Jones, 2 Ala. Rep. 319; P. & M. Bank v. Willis, 5 Ib. 770.] However this may be, when the claim is premature, the case last cited establishes that the trustee, &c., when the law day has expired, may interpose his claim under the deed, although the levy was previously made. To the same effect is Magee v. Carpenter, 4 Ala. Rep. 469, and Davidson v. Shipman, 6 Ib. 27.]

3. The consequence of these decisions is, that there is no necessity for the mortgagee or *cestui que trust*, to go into equity to protect themselves against the creditor of the mortgagor, unless the levy of his execution is made before the expiration of the law day. And the same rule seems to govern any creditor of the property when the mortgagee or trustee is invested by the deed with the power to determine the possession of the grantor in the property conveyed. (See cases last cited.)

4. It seems then to be clear, that the statute authorising a claim suit, invests the person whose property is levied on, with the right to have his claim determined at law; but here the converse of this matter is presented; and the question arises, whether a creditor alleging fraud in the conveyance of his debtor, can be prevented from trying that question in a court of law before a jury? By the course of proceeding, under the common law, this question was generally tried in a suit against the sheriff for a false return of *nulla bona*, if he omitted to levy; or in an action of trespass or trover, if he improperly levied on the goods of a third person; or it might be in an action directly against the plaintiff for directing the levy; or in trover or detinue against the purchaser at the sheriff's sale. In relation to real estate, the same question was usually tried in action of ejectment by the purchaser under the sheriff against the tenant in possession, claiming under the disputed title. Independant of these modes of ascertaining the fact of fraud, by a legal suit, the creditor was permitted, in equity, to set aside the fraudulent conveyance, as an obstruction to his legal right.

From these principles it seems clear that a creditor's right to

attack a conveyance for fraud, is one which may be asserted either at law or in equity, and we have been unable to meet with any adjudicated case which warrants the idea that its determination can be withdrawn from the forum which the creditor selects.

The levies, which it is the principal object of the bill to enjoin, seem, all of them, to have been made after the expiration of the term fixed by the trust deeds for the payment of the debts; but it seems to have been supposed the property must necessarily have been condemned without reference to the question of fraud, from the circumstance that the deeds of trust both provide, not only that Herndon, the debtor, should remain in possession of the property until the law day, but also until the trustee should be required, in writing, by the complainant, to proceed and sell. Under ordinary circumstances, the trustee is considered as representing his *cestui que trust*, and rarely, if ever proceeds in opposition to his will; the insertion of this stipulation was probably intended, at least such is the presumption, considering the deeds to be *bona fide*, to save the debtor, from the captious of vexatious interference of the trustee; but we think it has no effect to open the law day of the deed from a definite to an indefinite period. It follows then, that the trustee was authorised, under the deeds, to interpose his claim to the property; and at the time he did so there was no interest remaining in the debtor which could sustain the levy, always supposing the deeds as *bona fide*. [P. & M. Bank v. Willis, 5 Ala. Rep. 770.]

6. The trustee in a deed of the description before us, is invested with the legal title to the property conveyed, and is, at law, the proper party to contest its legal sufficiency; from this proposition it follows, that a verdict either for or against him, if obtained without collusion or fraud, is binding and conclusive on the *cestui que trust*.

The application of these principles will enable us to ascertain what and how much equity the bill under consideration contains.

7. As to the four slaves asserted to belong absolutely to the complainant, there is no equity whatever for the mistake of the trustee in claiming them, or even a wrongful claim by him could not affect the true owner. His remedy as to these, was either to pursue the common law modes of relief or he might properly propound a new claim, in his own name, after delivering the

slaves in discharge of the condition of the bond binding him to deliver them.

8. So likewise as to the personal property levied on at the instance of Marriott & Hardesty, there is no equity; because their right to have satisfaction out of it was ascertained by the verdict upon the claim interposed by the trustee under the deeds. According to what has already been ascertained, this verdict must have been predicated on the fact of the invalidity of the deeds, because, when the claim was interposed, there was no interest remaining with the debtor which could defeat the claim of his trustee.

9. The same want of equity is apparent as to all the personal property covered by the trust deed, and levied on by the other creditors. As to this, they had asserted a legal right which they are entitled to have determined in a Court of Law. The levies being made after the law day, there is no interest in the debtor which can defeat the claim on that account; and the only question involved is the validity of the deeds of trust. The determination of these suits in favor of the one or the other of the several parties, is decisive, so far as that creditor, or the complainant is concerned.

10. With reference to the real estate, we consider the bill as containing upon its face a proper and legitimate equity; and that all the defendants are properly made parties. We have before said, that a mortgagee or *cestui que trust* might come into equity to foreclose his mortgage, or deed of trust, even though a power to sell was one of the terms. The defendants are all judgment creditors, and according to many authorities, as such, would be entitled to redeem. [2 Story's Eq. § 1023; Story's Eq. Pl. § 193, and cases there cited.] Consequently they are proper parties to a bill to foreclose. It is to be remarked here, that with respect to the real estate, the bill does not alledge any matter from which it can be inferred that the creditors have enforced the levy upon this description of the property, or consummated it by sale; nor do they pray that they may, as to this, be permitted to contest the deed in a Court of Law, upon the ground of fraud. What would be the effect of such a prayer, and the course to be pursued, are matters which we decline to consider at this time.

11. Having ascertained what is the equity of the bill, we shall

proceed to the objection that it is multifarious. That it is so, to some extent, is apparent from what has already been said. There is no connection whatever between the trust property and the slaves to which an absolute title is asserted; and whatever interest Herndon may have in the trust property, none in him is shown for these slaves. Multifariousness is the improperly joining in one bill, distinct and independent matters, thereby confounding them. [Story's Eq. Pl. 271.] But it is said, that although a bill is ordinarily open to objection, for this reason, where it contains two distinct subject matters, wholly disconnected, yet if one of them be clearly without the jurisdiction of equity for redress, the bill will be treated as if it was single, and the Court proceed with the matter over which it has jurisdiction, as if that constituted the sole object of the bill. [Id. § 283.] In Yarick v. Smith, 5 Paige, 160, the proper course is said to be, to answer as to the proper matter, and to demur to the other for want of equity; or the defendant may answer as to both and make the exception as to the latter at the hearing. It might be asked how it is if both the misjoined matters are of equity jurisdiction?

Whatever may be the rule elsewhere, and in Courts which permit a demurrer separate from an answer, we think, according to our practice, when a demurrer for this cause is interposed and *sustained*, the complainant should be put to an amendment of his bill; or, at least, to an election for which cause he will proceed.

It is difficult to say what the proper practice is in an appellate Court, when the cause has been heard after a demurrer for this cause *overruled*, and determined upon both the distinct matters. As this matter is immaterial in this case, we shall leave it open, and proceed to the examination of the decree upon the merits.

12. As to the slaves claimed to be the absolute property of the complainant, it would, from the view already taken, be unnecessary to say any thing, but for the influence the assertion of this claim, if unfounded and fraudulent, may have upon the deeds of trust. There is a total deficiency of proof by the complainant to sustain the assertions of his bill; but beyond this, it is clearly proved, as to one of the slaves, that it was purchased and paid for by Herndon, the debtor, with notes due to him and a partner; and that the seller, at his request, made the bill of sale to the complainant. Another was purchased by Herndon at the sheriff's

sale, through the medium of a third person, and the third by him and another person jointly, in the name of the other person—Herndon paying one half of the money, and the slave being conveyed by the part owner to the complainant, without any proof of a consideration. Independent too of all this, the proof is, that all the slaves were in Herndon's possession for a long time, and until levied on. We are forced, by this evidence, to the conclusion, not only that the complainant is without just title to these slaves, but also, that he is asserting a simulated one, to withdraw Herndon's property from the grasp of his creditors.

It is not material to consider what influence evidence like this, in relation to one branch of the cause, will have upon the other, if that is apparently fair; because, in our judgment, the deeds of trust were executed by Herndon as a cloak to cover his property, and if the complainant was innocent in the first instance, of a participation in that intention, it is more than questionable if he has not made himself a party to it by attempting to carry out the unlawful purpose.

13. The indebtedness of Herndon is declared by the deeds of trust, to be something over $20,000, by notes of different dates, in addition to a debt of $900 by a receipt. The only notes proved as exhibits, amount to little more than $7,000, in both cases excluding interest. No reason is assigned in the bill why the proper vouchers cannot be produced, and the testimony is equally silent. There is no attempt whatever to sustain the deeds as to the note of $6,800—the largest of the enumerated sums, and the evidence in relation to the other items, induces the suspicion, when critically examined, that nothing is due to the complainant individually, and nothing more than the amount of the notes exhibited to him as co-executor of Maberry. The co-executor is examined as a witness, and proves beyond a doubt that Herndon never had any transactions with the executors, within his knowledge, except the purchase of some slaves, for which the $4,370 note, *which is exhibited*, was given, and the loan by the complainant to him of the Carnick note, belonging to the estate, for $8,410. The $2,750 note, *not exhibited*, is payable to the complainant and Cox jointly, as executors of Maberry. How could this debt have become due to the estate without the knowledge of the co-executor, unless it was a security to the complainant for a portion of the Carnick note? The witnesses say it was given, as

they understood, for borrowed money, and this is consistent only with the circumstance that the note of the estate was lent to Herndon. One of the same witnesses speaks of seeing a receipt in the complainant's hands, for money collected in Sparta, Tennessee, for $900. Where that receipt was at the hearing, does not appear, but the testimony of the Carnicks shows, that they paid their note at Sparta; and it is not a little peculiar, that $910 should be the precise balance due upon the note, after the principal payment. In the absence of the note which if given at all, was evidently so for the Carnick note, and the receipt, without any attempt to account for them, the inference is irresistible, that both are settled, and it is quite strong that the $2,750 note was given upon the final liquidation of these two items, as otherwise there is no explanation why the note was for money borrowed, and is made payable to the executors of the estate. We think it clear then, that the only judgment which the law authorizes us to pronounce upon the case, left in this condition by the evidence is, that the deeds describe debts which are not shown to be due; and the inference is proper, that they were executed, not for the *bona fide* purpose of securing debts actually due to the complainant, but that making use of that indebtedness and simulating it to be greatly more than it was, the chief intention was to hinder and delay creditors.

Without entering into the question, whether the complainant might avail himself of deeds executed with such a purpose, if in point of fact he was ignorant of it, we think he is entitled to no benefit, when he has been a party to the attempt to carry the purpose into effect, by pretending to be a larger creditor than he really is, or what produces the same effect—than he is able to prove himself to be. No rule is better established, or is more salutary in its effects, than that which declares it the imperative duty of the grantee in a deed attacked by creditors for fraud, to remove any suspicion of unfairness from the transaction. [Strupper v. Eckart, 2 Whar. 302.] This has not been done in the present case, and the effect of such suspicion is to pronounce against the validity of the deeds.

Here our task, necessarily a painful one, ends, as the other questions are unnecessary to be determined; inasmuch as the supposed incumbrance of Bright & Ledyard cannot be tacked to an invalid deed; and the question arising out of Herndon's bank-

ruptcy and subsequent purchase of his supposed interest in the property conveyed by the deeds of trust is immaterial, if the bill is dismissed.

Such is our conclusion, and the decree here will be, that the Chancellor's be reversed, and the bill dismissed.

HUNT v. TEST.

1. T. undertook to proceed to Washington City, "and to do all in his power to prevent the confirmation of Eslava's claim, or to obtain the passage of some act, or else have it inserted in the confirmation of Eslava, in such manner that the land office department may issue patents to said G. & H. for the land embraced within said claim, and for which they have the government title"—Held, that it was not unlawful to solicit Congress in behalf of private land claimants, as the acts of Congress on this subject, though laws in form, were in effect judicial decisions—That the undertaking "to do all in his power," did not on its face import the use of unlawful, or improper means, and that the contract was not void as being against public policy—Whether such a contract, to solicit the passage of a public law, would be valid, *Quere.*
2. T. agreed with H. for a reward, dependent upon his success, to attend at Washington city, and do certain things, in reference to a controversy about a private land claim depending before Congress, between H. & E., T. attended two sessions of Congress, when the matter was compromised between E. & H.—Held, that if T. was not privy to the compromise, he could not be required to prove that he could have performed his undertaking, as that had been rendered impossible, by the act of H. If T. assented to the compromise, and did not abandon his claim for services rendered, the law would imply a promise from H., to pay the value of the services, to be admeasured by the contract, but could not exceed the amount he had stipulated for.
3. To a plea of *non assumpsit*, the defendant appended an affidavit, "that the paper sued upon by the said John Test is not his act and deed"—Held, that this was sufficient to put the execution of the instrument sued upon in issue, though it was not a sealed instrument.

Error to the County Court of Mobile.

Assumpsit by the defendant against the plaintiff in error. The declaration consists of two special counts, framed upon an alledged contract in writing, and also the common counts. The defendant pleaded non-assumpsit, and also the same plea with an affidavit, "that the paper sued upon by the said John Test," is not his act and deed. This plea the plaintiff demurred to, and the Court overruled the demurrer. The defendant also demurred to the first and second counts of the declaration, which was overruled by the Court, and upon the verdict of the jury upon the issues of fact, a judgment was rendered for the plaintiff.

Pending the trial, as appears from a bill of exceptions, the plaintiff introduced an instrument of writing, in the following words:

"Memorandum of an agreement between John Test of one part, and Jonathan Hunt, and A. H. Gazzam of the other part. Said Test agrees to proceed to Washington City, and do all in his power to prevent the confirmation of a large claim by the heirs of Eslava, for 5,787 acres, which they are now endeavoring to urge through Congress. Also, he agrees, if he can, to obtain the passage of some act, or else have it inserted in the confirmation of Eslava, in such manner that the land office department may issue patents to said Gazzam and Hunt, for the tracts embraced within said claim, and for which they have the government title. Said Gazzam and Hunt hereby agree to pay said Test, three hundred dollars, and to pay him two hundred more in Washington City, and in case their titles are quieted by the passage of any act, or law, so as to give them their patents, or so as they can get their patents, and be secure from Eslava's claim, then said Gazzam and Hunt to pay said Test two thousand dollars, making his fee for full success, twenty-five hundred dollars.

A. H. Gazzam, *for himself and*
Jonathan Hunt,
John Test."

The defendant, by his counsel, objected to the introduction of this contract as evidence, because it varied from the contract declared on, and also, because no evidence of authority was produced, authorizing Gazzam to make the contract for Hunt. The

Court overruled the objection, and permitted the evidence to be read to the jury.

The plaintiff also proved by witnesses, that he attended upon Congress during both the sessions of the 26th Congress, and whilst there, was actively engaged in attempting to obstruct the passage of a law, confirming the title of the heirs of Eslava to a tract of land in the city of Mobile for 5,787 acres, referred to in the above contract. That he submitted in 1840, to the committee on private land claims in the Senate, before whom this claim was pending, a written argument of between thirty and forty pages, to endeavor to show that this claim ought not to be confirmed by Congress, and was also active in his endeavors to persuade members of the Senate to oppose the claim. That Hunt and Gazzam had land falling within the limits of the Eslava claim, and were both interested in defeating it. That Hunt, during the winter and spring of 1840, had numerous and long consultations with plaintiff about the claim.

He further proved, that the act of Congress of 3d March, 1841, being the 15th chapter of the private acts of that session, was the conclusion of the action of Congress, on this subject, and that the act was agreed to by all parties, as a compromise; which act, with the report referred to in it, 5 American State Papers, 623 Public Lands, is a part of the bill of exceptions. M. Eslava also testified to the efficiency of his services, that he made all the mischief in his case. The interest of Gazzam embraced 1,600 acres, and that of Hunt several hundred acres, worth at that time from $50 to $75 per acre.

The defendants introduced the testimony of King & Wilson, that they had been retained by Hunt, to oppose the confirmation of Eslava's claim, and paid by him. That they knew of the plaintiff's opposition to Eslava's claim, and supposed that he was retained by Gazzam, &c. Mr. Smith testified that Hunt's interest in the land was 671 acres, purchased from Gazzam, in 1838, for $9,000, with Gazzam's deed of warranty. That he, Smith, was the confidential and general agent of Hunt in Mobile, that Gazzam was not his agent to his knowledge, and proved various other facts, tending to show, that Hunt did not authorize, or know of the contract made with Gazzam. That in 1839, Gazzam was reputed to be embarrassed, made an assignment in 1840, and had

proved insolvent. It was in proof that King & Wilson were land agents, and not attornies at law.

The Court charged the Jury, that the affidavit attached to the plea, did not put the plaintiff on proof of the instrument, and that without regarding the evidence offered impeaching the execution of the instrument offered in evidence, and for want of the proper plea and affidavit, the defendant could not object to the want of authority in Gazzam. That the plaintiff was entitled to recover on the contract, if he had performed the conditions. That the act of Congress produced in evidence, was not the fulfilment of the condition of the contract, but if the plaintiff had been ready to endeavor to procure the passage of the act of Congress specified in the contract, and had been prevented from attempting to do so by the compromise between the parties, he was entitled to recover, as if the conditions had been performed. That if the compromise was made by the consent, or without objection from the plaintiff, the contract was to be considered out of the question, and that then the plaintiff might recover upon the general counts, and the jury might go beyond the provisions of the contract, in fixing the value of the plaintiff's services, if they thought them worth more.

The defendant's counsel asked the Court to charge, that to enable the plaintiff to recover the two thousand dollars mentioned in the contract, he must prove that he was able and willing to procure the act of Congress specified in the contract, or to enable Hunt and Gazzam to get their patents, and be secure from Eslava's claim. This the Court refused, and charged that a readiness to endeavor to procure the act, was all that was necessary.

They further moved the Court to charge, that to enable the plaintiff to recover on the contract, in consequence of a compromise, the plaintiff must show that it was against his consent, and that he could have performed the conditions of the contract; which the Court refused, so far as it was inconsistent with the charge previously given.

Further, that upon all the evidence, the plaintiff cannot recover of the defendant, for the non-fulfilment of that term of the contract which provides for the payment of $2,000, which the Court refused.

Also, that there is no evidence before the jury, showing any

ability on the part of the plaintiff to fulfil, or the fulfilment of that term of the contract, that provides for the security of the titles of Hunt and Gazzam, and without such proof he cannot recover, which the Court refused.

To all which the defendant excepted, and now assigns for error—

1. The judgment on the demurrer to the declaration.
2. The matter of the bill of exceptions.

Campbell, for the plaintiff in error, made the following points: The declaration consisted of special and common counts, and as to the latter, it was clear the instrument required proof. [3 Stew. 48.] The objection to the affidavit is not well founded, and could not have been taken after the judgment on the demurrer to the plea. [2 Ala. Rep. 401, 726; 4 Id. 200; 3 Port. 433 422.]

The agreement was invalid, being against public policy, and this question was raised by the demurrer to the declaration. It provides for the use of all the means in the plaintiff's power, to prevent the passage of an act of Congress of a particular description. The use of fair and honorable means, as well as the sly, and subtle acts of electioneering, importunity, intrigue, personal influence, are all within the import of the engagement. The law declares all such contracts void, from their tendency to create an improper, and corrupt interference, with the law making power. [7 J. J. Marsh. 640; 7 Watts, —; 5 Watts & Ser. 315; 6 Dana, 366; 18 Pick. 472; 2 Madd. C. R. 356; 5 Hill's 27; 5 Am. Dig. 144.]

The Court below admitted that the act of Congress was not a fulfilment of the undertaking. There must be either a performance, or an offer to perform, to excuse the non-performance. [Chitty on Con. 274.] But the Court held, that a "readiness to endeavor," was sufficient. Before the plaintiff can recover, if he was prevented by the acts of the defendant from endeavoring to procure the passage of the act of Congress, he must show a readiness to fulfil the condition and perform his contract. [2 Pick. 155, 270; 4 Id. 101; 4 Por. 170; 1 Ala. Rep. 140.]

If the plaintiff consented to the compromise, no right to compensation could arise further than has already been paid. The effect of the compromise is, that the plaintiff, and defendant, mu-

tually surrendered their claims on each other. But the Court even told the jury, that they might assess damages beyond the provisions of the contract. Although it was admitted the contract was not performed, the Court refused to charge that there could be no recovery for the term of the contract promising to pay $2,000. It is also contended, that after an unsuccessful solicitation for two winters, the defendant was justified in compromising. The plaintiff was bound to fulfilment in a reasonable time. [2 Taunton, 325; 20 Eng. Com. Law, 126.]

J. Test, *pro se.* He considered it to be clear law, that what it was lawful for a man to do himself, in regard to his interest, he may employ an agent to do for him. This is, in fact the settlement of a private claim, not the passage of a public law, and in England nothing is more common than for counsel to be employed in the passage of private bills. Nor is any thing more common in Washington city, than for counsel to appear before committees of both houses of Congress in the case of private land claims.

This was a mere private bill, in which neither the people, or the government, had any concern, further than their justice or their bounty were concerned, and the undertaking was not as seems to be supposed, to pervert justice—to accomplish the act by any means, fair or foul; the contract warrants no such interpretation. The legal presumption, until the contrary is shown, must be, that proper means alone were to be resorted to.

The cases cited have but little if any analogy to this case. A promise as an inducement to solicit the executive for a pardon for a convict, evidently stand upon a different footing from the present case. Nor is the case cited from 2 Madd. 356, at all like the present. That was a contract fraudulently to withdraw opposition to the passage of a bill, which was calculated to injure the public. The case cited from 6 Dana, is directly in point against the defendant, so far as the case is any authority.

Authority cannot be necessary to show, that a man may employ an agent to appear before a legislative body, but if it is, a reference to the American State Papers, vol. 1, 1638 to 1721, will show that agents have been employed to solicit the passage of private bills, and have been heard at the bar of the house.

The affidavit, that the paper sued upon was not the "act and deed" of the defendant, was insufficient to put the party on proof of the execution of the instrument, which was a simple contract. It was not in law or in fact, his *act and deed*, and if he had in truth authorized its execution, he could not have been convicted of perjury on this affidavit. An affidavit of the truth of the plea would have been sufficient, but that is not done; certain facts are sworn to, from which the legal conclusion is drawn, that he did not assume, &c. but the facts do not warrant any such conclusion.

ORMOND, J.—The principal question in the cause is, the legality of the contract, which has been assailed by the defendant's counsel, as contrary to public policy. It appears that M. Eslava was urging on Congress the confirmation of a claim derived from the Spanish government, for 5,787 acres of land in the neighborhood of Mobile, and one Gazzam, and the plaintiff in error, asserted a right to a portion of the same land, which would be prejudiced by the confirmation of Eslava's claim. The undertaking of the defendant in error, was, to proceed to Washington City, "and to do all in his power to prevent the confirmation of Eslava's claim." He also agreed to endeavor to obtain "the passage of some act, or else have it inserted in the confirmation of Eslava, in such manner that the land office department may issue patents to said Gazzam and Hunt for the land embraced within said claim, and for which they have the government title."

It is very clear that a contract by which one engaged to procure, or to endeavor to procure the passage of a law by sinister means, as by personal influence to be exerted with the members of the legislature, by urging any false consideration of public policy, or by the concealment of any thing necessary to be known to the formation of a correct judgment, would be contrary to public policy, and therefore void. The legislature should act from high considerations of public duty, and the State has a deep interest in protecting the legislative body against all assaults, or solicitations, which may hazard either the purity or wisdom of its acts.

It is strongly urged, that although the contract in this case does not in terms stipulate for the employment of sinister means, it

does provide, that the agent shall do all in his power to accomplish the object in view; that this includes improper, as well as proper means, and that the necessary tendency of permitting such solicitation, is to expose the legislative body to improper influences. Doubtless there is great force in this view of the matter, as it would in most instances be difficult, if not impossible, to ascertain, whether the agent was exerting a personal influence, or endeavoring to convince the mind—whether he was giving the results of his own unbribed judgment, or whether he was merely acting the part of an advocate. We do not however intend to pass upon this question, as a general proposition applicable to all laws, in which the public have a direct or immediate interest, because we think the law to be obtained in this case, is clearly distinguishable from such general laws.

The acts of Congress confirming incomplete titles within the territory acquired from other nations, though laws in form, are in their essence judicial determinations. It is the judgment of the nation, upon the facts ascertained, appealing to its honor, and sense of right and justice. To a proper decision, it is necessary that the facts should be ascertained, and the law understood as applicable thereto. It is no impeachment, either of the diligence, or wisdom of the national legislature, that it should devolve on others, the collection of the facts, or avail itself of the knowledge and experience of professed lawyers. Such is the habit of all Courts, and such in effect is Congress, in the settlement of these questions. It would doubtless frequently happen, as was the fact here, that the claims of different individuals to the same land would come in conflict, and in such cases it appears to us, that the opportunity for a correct decision would be much greater, after all had been said in favor of each claim by those interested in making the most of it, than if Congress had been obliged to work out the problem, unaided by the ingenuity of interested counsel, and such appears to be the course pursued at Washington, as well as at London, in such cases.

The contract on its face does not import that any unfair, or improper means were to be resorted to. *To do all in his power*, evidently means to exert his utmost diligence and ability in establishing the claim of his employer, and is what the law would have implied, if it had not been expressed.

The cases cited, do not bear out the argument founded upon

them. There is evidently a broad distinction between soliciting a pardon from the executive, and such a case as the present. The pardoning power is a high trust lodged with the executive, to be exercised in proper cases by him, on the part of the State as its representative. The opinion of enlightened and virtuous individuals, as to the propriety of extending mercy in a given case, would always have great weight with the executive, as an exponent of the wishes of the State, and it is a fraud upon the executive if this opinion is not expressed in good faith. But it is obvious, if one is hired to express this opinion, or by operating on the sympathy of others, to induce them to express it, it should have no weight whatever, as its tendency, instead of informing, would be to mislead.

Neither is the case of the Vauxhall Bridge Co. v. Earl Spencer, 2 Madd. C. R. 356, a case in point. In that case, an act had passed the House of Commons for the erection of a bridge over the Thames, with a clause giving a compensation to the proprietors of the Battersea Bridge, for the probable injury they would sustain by the erection of the new bridge. Objection was made in the House of Lords to this clause, making compensation. Upon this, to prevent delay, or the possible rejection of the bill, nine persons, forming a committee of the subscribers of the new bridge, secretly agreed to place a sum of money in the hands of trustees, to be paid to the proprietors of the Battersea Bridge. The clause of the bill was stricken out, and the bill passed. A bill was afterwards filed in Chancery by the subscribers of the new bridge, to prevent the money from being paid over. The Vice Chancellor held, that this secret agreement was a fraud upon the legislature, and the public, and therefore void, as against public policy. That by this secret agreement, the legislature were induced to give their sanction to the bill, supposing the claim to compensation had been given up, when but for this artifice, they might have refused to pass the bill.

It is obvious, the principle of this case has nothing to do with the case at bar. Nor is the case of Wood v. McCann, 6 Dana, 366 more in point, where the Court affirms, that an unconditional promise to pay a sum of money, in consideration of the obligee attending the legislature of Kentucky, and procuring the passage of an act legalizing the marriage of the obligor, and divorcing him from his former wife, was valid; it not appearing that the

act was to be obtained by the personal influence of the obligee, or that any improper means were to be resorted to. This case, indeed, goes far beyond any principle intended to be asserted here.

Without pursuing this interesting question any further, we are satisfied, that in the present instance the contract is not on its face opposed to public policy, and should be upheld.

It appears that an act was finally passed, as a compromise between the parties interested, and the Court ruled, that as the condition precedent was not performed, the plaintiff could not recover upon the contract, but that if he had been *ready to endeavor*, to perform it, and was prevented by the act of the other party, he was excused from the performance of the condition. That if the compromise was made with his consent, the contract was to be considered as abandoned, and then he could recover upon the common counts, what his services rendered were worth, although it might exceed the two thousand dollars he had stipulated for.

It is certainly clear law, as a general proposition, that an offer to perform or do an act, which is prevented by the party in whose favor it is to be done, or performed, is, in law, equivalent to a performance, or rather is a valid excuse for not performing it. The undertaking of the plaintiff was to prevent, if practicable, the confirmation of Eslava's claim; if that could not be effected, then to procure the insertion of a clause, that patents should issue to the defendant, and Gazzam, for the land they claimed within Eslava's tract—or to accomplish the same thing by an independent act. It appears that during a protracted contest, extending over two sessions of Congress, the plaintiff succeeded in preventing the unqualified confirmation of the claim of Eslava, and it would be most unjust that the defendant, by a compromise with the adverse party, should snatch from the plaintiff the fruits of his labor, and deprive him of the power of performing his contract. It is urged in argument, that to show that he was injured by this interference, he must make it appear, that he could have fulfilled his engagement. His contract was to "do all in his power," to produce a certain result, and if successful in producing that result, he was to receive the stipulated reward. Now, it is apparent, that the plaintiff cannot prove that he could certainly have produced this result, which depended upon the passage of an act of Congress. All therefore that he can, from the

nature of the case, be required to prove, is, that the matter was in progress, and that a successful termination might reasonably have been expected. It does appear from the testimony, that the services of the plaintiff were efficient, as M. Eslava himself testifies, that the plaintiff "made all the mischief in his case;" that is, prevented his obtaining an unqualified confirmation. Nor can the defendant object, that the plaintiff does not prove unequivocally, that he could have performed his contract, when the inability to make such proof is caused by his own act. He has himself produced the necessity of substituting probability for certainty, and cannot complain of it.

Thus far, the case has been considered, as if the defendant had by his own act terminated the controversy between himself and Eslava, by the compromise, but it was also put to the jury upon the hypothesis, that the plaintiff had consented to the compromise.

The effect of this consent, if given without any other stipulation, was clearly a rescission of the contract between the plaintiff and defendant, as it rendered it impossible for the former to perform it; assuming what is indeed admitted that a different result was thereby produced, from that which was to entitle the plaintiff to the compensation agreed on. But although the contract was rescinded, so far that the defendant could not insist on its performance as a condition precedent, it must be looked to for some purposes, otherwise the services of the plaintiff would be gratuitous. He cannot prove they were rendered at the instance of the defendant, but by the contract, and although as there was no abandonment of these services, at the time of the compromise, the law will imply a promise to pay their value, no presumption can arise of a promise to pay more for partial, than was considered by the defendant himself adequate compensation for complete success; and it would be strange if the compromise was more beneficial to the defendant than the full consummation of his wishes. We think therefore, under the circumstances of this case, the implied promise, is to pay the value of the services actually rendered, to be admeasured by the contract. [Green v. Linton, 7 Porter, 133, Haywood v. Leonard, 7 Pick. 181.]

The question argued here, that the contract was to be performed in a reasonable time, and that the defendant had the right

to put an end to it, if the consummation was unreasonably delayed, does not arise upon the record.

The remaining question arises upon the pleadings and evidence, relating to the execution of the contract. The defendant pleaded *non-assumpsit*, with an affidavit, "that the paper sued on by the said John Test, in the above cause described, and now pending in the County Court of Mobile, is not his act and deed." To this plea, as appears from the minutes of the Court, a demurrer was interposed by the plaintiff, and overruled, whereupon he took issue upon the plea. In the case of McAlpin v. May, 1 Stew. 520, it was held, that a demurrer to a plea reached the want of an affidavit, when one was necessary. This decision has been repeatedly recognized since. [McWhorter v. Lewis, 4 Ala. Rep. 198.] In all cases where, under our statute, or according to our practice, a plea must be verified by oath, the oath is a part of the plea, so much so, that without it, the plea may be stricken out, on motion. [Sorelle v. Elmes, 6 Ala. Rep. 706.] The judgment of the Court then, upon the demurrer, was a judicial determination of the sufficiency of the affidavit, and whilst that judgment was permitted to stand, it drew after it the consequence, that the plaintiff was required to establish, to the satisfaction of the jury, that the writing sued upon was the defendant's act, in fact, or in law.

Upon the trial, the defendant introduced testimony for the purpose of showing that Gazzam, who had signed the contract on his behalf, was not his agent, and had no authority to execute it in his name. This testimony, the Court instructed the jury, they were not to consider, but they were to regard the execution of the instrument as established. It is clear, that the Court had not the power to instruct the jury as to the effect of the evidence, nor is that contended for here, but the argument is, as it doubtless was in the Court below, that there was no affidavit such as the statute requires, to put in issue the execution of a written instrument, the foundation of a suit. [Clay's Dig. 340, § 52.]

This argument is founded upon the language employed in the affidavit, "that it is not his *act and deed.*" According to repeated decisions of this Court, no evidence can be adduced to contradict, either the execution in fact of any instrument, the foundation of a suit, or its binding efficacy in law as his act, but under a plea putting the fact in issue, supported by affidavit. [Martin v.

Dortch, 1 Stew. 479; Winston v. Moffat, 9 Porter, 523, Lazarus v. Shearer, 2 Ala. Rep. 718; Sorelle v. Elmes, 6 Id. 706.] When therefore, the defendant denied, that the instrument declared on was his act, he asserted that Gazzam had no authority to sign it in his name. It is true, he adds it is not his "deed," but this cannot vitiate what precedes it, nor indeed are we sure, that it is proper to consider this word in its technical sense. This affidavit was made in *pais*, and it should rather be construed in its popular sense, and so considered, the term *deed* simply means an act, or fact, and is a word of most extensive use, and import. It is impossible to doubt the intention of the party, as he says, "the paper sued on by the said John Test, in the above case, &c., is not his act, and deed," and if he has sworn falsely in this matter, is guilty of perjury, and may be punished.

If therefore it could be considered, that the effect of this charge was to set aside the previous judgment on the demurrer to the plea, and to render a judgment sustaining it, still the Court erred, as in our judgment the affidavit was sufficient, to put the execution of the paper sued upon in issue.

These views render it unnecessary to consider the other question argued at the bar. Let the judgment be reversed, and the cause remanded.

Judge GOLDTHWAITE not sitting.

FANT v. CATHCART,

1. The Court may, in its discretion, permit a plaintiff to adduce additional testimony, after he has announced that his evidence had closed and the defendant tendered a demurrer to it.
2. A *bill single* made by an infant, although the consideration be something else than necessaries, is voidable merely, and may be ratified by him after he attains his majority, so as to entitle the payee to maintain an action *thereon*.
3. Where the plaintiff replies to the plea of infancy, that the defendant pro-

mised to pay the debt in question after he attained his majority, the fact of infancy is admitted, and it devolves upon the plaintiff to prove the subsequent promise.

4. An appellate Court will not reverse a judgment because testimony unnecessary and superflous, but which could not have misled the jury, has been permitted to be adduced by the successful party.

Writ of Error to the Circuit Court of Talladega.

This was an action of assumpsit, at the suit of the defendant in error, on a writing obligatory, made by the plaintiff, the 21st January, 1837, for the payment of the sum of three hundred and thirty-eight dollars and sixty-nine cents, three days after date.

The defendant below pleaded, "1. The general issue. 2. That he was under twenty-one years of age when the note in the plaintiff's declaration mentioned, was executed. 3. Payment." On the first and third pleas the plaintiff took issue, and to the second he replied a subsequent promise after the defendant attained his majority, and the cause was submitted to a jury. On the trial the defendant excepted to the ruling of the Court. It appears that the plaintiff read to the jury the note described in his declaration, and announced that he would there close his testimony. The defendant offered no evidence, but demurred to that adduced by the plaintiff; instead of joining in the demurrer, the plaintiff asked leave to offer additional testimony, which the Court permitted in despite of an objection by the defendant. The plaintiff then adduced the depositions of James Elder, and the defendant objected to either of the questions or answers, or any clause or sub-division of either question or answer; but the Court overruled the objection, and permitted the questions and answers to be severally read, except so much as spoke of the plaintiff's keeping correct books, and witnesses opinion, belief, or information derived from others, as to where the note sued on was; also witnesses statement as to defendant's age.

The deposition is set out *in extenso*, and need only be here noticed, so far as the arguments of counsel, or the opinion of the Court have adverted to it. The witness speaks of his acquaintance with the defendant from 1832 up to 1837; that he repeatedly sold him goods for the plaintiff; such as were suited to his circumstances, profession, and circle in which he moved. That he never considered the defendant extravagant; his father was

"very comfortably off," having property sufficient to support himself and family in a very genteel way. Defendant boarded with witness "over three years, and contracted debts and accounts on his own account"—"he dealt on his own account nearly all the time he resided in Winnsborough," South-Carolina, where the witness knew him, and sold him goods.

Witness also testified that he had examined the account attached to his deposition, and which was closed by the writing on which the suit is founded, and that it is correct as taken from the books of the plaintiff; that the account was made out by witness, and is a true copy from the books: *Further*, that witness sold many of the articles named in the account, and they are correctly charged. Sometime in the year 1837, witness heard the defendant say that he would pay him what he owed him, as soon as he could make the money. To the several decisions of the Court adverse to the defendant, he excepted, and they are duly reserved. A verdict was returned for the plaintiff, and a judgment was rendered accordingly.

S. F. Rice, for the plaintiff in error.—Where a demurrer is interposed to written evidence, the Court has no discretion, but must either compel the opposite party to join in the demurrer, or waive his evidence. [Mansel on Dem. 120 et post.; 3 H. Bl. Rep. 187 to 211; 4 Porter's Rep. 405; 8 Id. 360.] The defendant has been prejudiced by the refusal of the Court to compel the joinder; for the writing declared on did not support the replication to the second plea, the *onus* of proving which rested on the plaintiff.

There should have been a verdict *non obstante veredicto* upon the second plea. The declaration was upon a sealed instrument, and cannot be recovered on by proving a parol promise after the defendant obtained his majority. [6 Ala. Rep. 617.] The action should have been *assumpsit* upon the subsequent promise, and the specialty stated by way of inducement. The replication is a palpable departure from the declaration; a subsequent parol promise could not be replied or given in evidence under a single count upon the writing.

It was not necessary for the defendant to demur to the replication; he may object on error. The rule is, "where the plaintiff in his replication makes a title, and it *thereby appears* that he has

a bad title, a rejoinder cannot by implication make it good." [5 Mass. Rep. 125–132.]

An infant cannot make a sealed note or bond; the replication confessed the plea, and the promise set up, could not, in a case like the present, avoid its effect.

The deposition of Elder was irrelevant under the issues, and could not fail to mislead the jury. It was certainly inadmissible to prove that the defendant below boarded with the witness three years, contracted debts on his own account, &c.; that his father was comfortably off, &c.

F. W. Bowdon, for the defendant, insisted, that the cases cited for the plaintiff in error have no application to the present. Here, the question was, as to the right of the Court to permit additional proof to be offered. [See 2 Ala. Rep. 694–7.] This was a matter of discretion, and neither party could complain on error, that it was improperly decided.

The case cited from 6 Ala. Rep. 617, is alike inapplicable. Here, the question upon the replication to the second plea, is not as to the discharging of a contract, but as to its confirmation, and that case shows that a contract under seal may be discharged by a parol agreement founded on a consideration.

If the replication was bad it should have been demurred to. But it is good; for the modern doctrine is, that the contracts of infants, when not shown to be to their prejudice, are voidable only, although they may have been evidenced by an instrument under seal; and may be confirmed by a parol promise. [See Co. Litt. 172; 1 T. Rep. 41; 10 Peters' Rep. 59; 1 Metc. Rep. 559; 13 Pick. Rep. 1–7; 6 Mass. Rep. 78–80; 15 Id. 220; 19 Pick. Rep. 572–3; 3 Wend. Rep. 479; 7 Cow. Rep. 22–179; 1 Lev. Rep. 86; 3 Burr. Rep. 1800; Chitty's Bills, 20.] It was not necessary to sue on the subsequent promise, the rule being that the promise validates the existing contract. [1 M. & S. Rep. 724–5; 14 Mass. Rep. 457; 4 Pick. Rep. 48; 17 Wend. Rep. 419.]

If the plaintiff was entitled to a verdict upon the issue to the second plea, he should have prayed the Court to instruct the jury, and cannot now complain of an error in which he acquiesced.

The testimony of Elder was necessary to show that the specialty declared on was sustained by a good consideration. To

do this, the defendant's rank and condition in life, his father's property, whether he lived at home, &c. was admissible evidence. The form of the issue made it necessary to prove when the defendant attained his majority. [See 41 Law Lib. (top page,) 316–7.]

Our statute permits the consideration of a sealed instrument to be impeached at law, and thus removes the reason upon which the old decisions rest, which maintain that an infant cannot bind himself by a writing obligatory.

COLLIER, C. J.—It was clearly competent to permit the plaintiff to adduce other testimony, after he had announced that his evidence was closed. The fact that the defendant tendered a demurrer to the evidence can make no difference. It has been frequently held, that the Court, in its discretion, may permit either party to produce additional proof, even after a cause has been argued, and the jury charged, and we can see nothing so potent in a demurrer as to take from the Court such a discretion. The question then is, not, whether or when a party should be compelled to join in a demurrer which embraces all the evidence he proposes to give, but whether, if from inadvertence or other cause he has declared the intention neither to give or adduce more proof, the Court may not permit a change of purpose, and allow the introduction of other testimony. Upon this point, we can't doubt the correctness of the ruling of the Circuit Court.

In Roof v. Stafford, 7 Cow. Rep. 179, it was said to be well settled, that the contracts of an infant, not only such as take effect by his actual delivery of the subject matter (as a feoffment with livery, or a sale and manual delivery of goods;) but all his deeds, whether at common law or under the statute of uses, whether relating to real or personal property, are voidable merely. [See also 5 Cow. Rep. 475; 1 N. Hamp. Rep. 74; 2 Id. 51; 1 N. & McC. Rep. 1; 11 Johns. Rep. 539; 3 Burr. Rep. 1794.]

In Kline v. Bebee, 6 Conn. Rep. 494, the Court said that there was a contradiction in the books in respect to the line of discrimination between those acts of an infant which require affirmance to render them valid, or disaffirmance to avoid their operation. But they generally agree that whenever the act done may be beneficial to the infant, it shall not be deemed void; but voidable merely. This rule, it is added, is highly reasonable, for the inter-

est of the infant, and sanctioned by many judicial decisions. [See 3 G. & Johns. Rep. 103; 2 N. Hamp. Rep. 456.]

That an infant may affirm a voidable contract, made during his minority, is a proposition too well settled to be now controverted. This may be done by express ratification; in some cases by the performance of an act from which an affirmance may be reasonably implied; and in others the omission to disaffirm a contract in a reasonable time after attaining majority, has been held sufficient evidence of a ratification. These several modes of affirmance are not alike applicable to every description; but upon this point it is needless to be more specific, than to say, that a contract, such as that now under consideration, may be confirmed by a promise of payment. [6 Conn. Rep. 505; 4 Pick. Rep. 48; 11 Sergt. & R. Rep. 305; 4 McC. Rep. 241; 14 Johns. Rep. 124; 1 Pick. Rep. 221; 6 Greenl. Rep. 89; 2 South. Rep. 460; 1 Strange's Rep. 690; 1 Atk. Rep. 489; 4 Camp. Rep. 164.]

In Reed v. Batchelder, [1 Metc. Rep. 559,] it was decided that a negotiable note made by an infant, is voidable, and not void; and if after coming of age, he promise the payee that it shall be paid, the payee may negotiate it, and the holder may maintain an action in his own name against the maker. So it has been adjudged that where a single bill was given by an infant for necessaries, who after he became of age promised to pay the amount, the action must be brought on the specialty, which was a higher security than the parol promise, and validated by it. [Bull. N. P. 155.] But it was held that as the bond of an infant, with a penalty, *was void*, it did not merge the simple contract debt; and the action must be founded upon the new promise, and not on the bond. [3 M. & S. Rep. 477; 2 B. & C. Rep. 824.]

It is laid down by McPherson, in his Treatise on Infants, p. 498, that although an infant cannot bind himself in an obligation, or other writing, with a penalty, even for the payment of necessaries, yet an obligation from him in the *precise sum* disbursed, was good, and in such case, judgment was given for the plaintiff in debt, on a bill single. [See 1 Lev. Rep. 86; 1 Camp. Rep. 552, note.] So it is said, that all deeds which are merely voidable, may be confirmed at full age. [McPherson on Inf. 486–7.]

This view of the law may suffice to show, that the writing de-

clared on, is not void, but voidable only, (if not for necessaries,) that the defendant might ratify it after he became of full age, and that if ratified, the action thereon is maintainable.

The replication to the second plea, was, in legal effect, an admission that the defendant was under twenty-one years of age, when he executed the writing in question, and devolved upon the plaintiff the *onus* of proving a promise to pay it after he had attained his majority. Evidence was adduced to this point in the deposition excepted to; whether it was sufficient or not, is a question not now before us; it was certainly pertinent, and properly received, and if the defendant had desired, he could have prayed the instructions of the Court upon it. It was not necessary for the plaintiff to show that the specialty was given for *necessaries* sold to the defendant; we have seen that it was merely voidable at the election of the defendant, and when he acquired capacity to contract, might be affirmed by his parol promise. The issue then being upon the fact of the promise *alone*, the testimony of Elder, except as it tended to establish it, was unnecessary and superfluous. Whether the answers of the witness would be evidence in a case that required such proof, it is needless to inquire, since in the case before us, it could not have misled the jury; at least, there is nothing in the record that warrants such an inference.

The conclusion is, that the judgment is affirmed.

CHILDS v. CRAWFORD.

1. In *certiorari* cases, it is error to award judgment for damages on account of delay merely, although the jury so find. A judgment so entered cannot be considered as a clerical misprision, but is the fault of the party taking it, and will be reversed and here rendered for the proper sum.

Writ of Error to the County Court of Randolph.

This suit was commenced in a Justice's Court, by Crawford against S. & J. J. Childs, and after judgment was removed by *certiorari* into the County Court, upon the application of the defendants. In the County Court, the cause was submitted to a jury, and it appears from the judgment entry, that the verdict was for the plaintiff for $55 58, and fifteen per cent damages on the same for delay. The judgment was rendered by the Court for the sum so ascertained by the verdict, with fifteen per cent. upon it.

This is now assigned as error.

J. Falkoner, for the plaintiff in error.

S. F. Rice and T. D. Clark, for the defendant in error.

GOLDTHWAITE, J,—The statute which gives damages when it appears to the Court that an appeal was taken for delay merely, (Dig. 315, § 13,) does not in terms include suits removed by *certiorari;* and in Hudnell v. McCarty, Minor, 402, it was held not to warrant the assessment of damages in such a suit. The fact that the jury have returned a verdict for this amount of damages will not sustain the judgment rendered on it, because that was not a matter within the issue, and the plaintiff should not have taken judgment for any thing but the sum found due upon his demand.

It is supposed this, at most, is a clerical misprision, which could be corrected on motion, in the Court below; we should have been pleased if we could have arrived at this conclusion; but the duty of the clerk is to enter the judgments according to the verdicts, unless otherwise directed by the Court, which itself is merely passive. In point of law, it is the duty of the party so to free the verdict and judgment from extraneous matter, as not to create error, to the injury of the opposite party.

Judgment reversed, and here rendered on the verdict for the proper sum.

ANDERSON v. JOHN AND THOMAS DICKSON.

1. In declaring on a bond with condition, the plaintiff may declare upon the penalty, or set out the condition and assign breaches at his election. If he pursues the latter course, advantage may be taken of an insuffiient assignment of breaches, in the same manner as if they had been assigned in answer to a plea of performance.
2. It is not necessary to assign as a breach any fact which is admitted by the bond itself.
3. The only breach necessary to be assigned in a suit upon the bond which the plaintiff in detinue is required to execute, upon suing out the writ, is the failure of the plaintiff in the suit.
4. This Court will judicially notice when the terms of the Courts are held.

Error to the County Court of Marengo.

DEBT, by the plaintiff against the defendants in error, upon a bond in the penal sum of $8,000, made by the latter, to the former under the statute, for the prosecution of an action of detinue for certain slaves.

The declaration, after reciting the obligatory part of the bond, proceeds to recite the condition, "to wit: That is, the said John Dickson had, on the day of the date of said bond, issued out of the office of the clerk of the Circuit Court of Marengo County, a writ in detinue, as guardian of William J. White, and Thomas D. White, returnable to a certain term of said Court, to be holden in and for said county, on the fourth Monday after the fourth Monday in March, 1843, to recover of the said John B. Anderson, certain slaves, to wit: &c. &c. then in the possession of the said Anderson. It was therefore conditioned, that if the said J. Dickson should fail in the said suit, he should pay the said plaintiff, John B. Anderson, all costs and damages which he might sustain by the wrongful suing out of said writ, then this obligation should be null and void, as by the said writing obligatory and the condition thereof will more fully and at large appear. And the said plaintiff avers, that afterwards, to wit: at the fall term of the Circuit Court of the county aforesaid, in the year 1843, the said action of detinue, in the said condition mentioned, was tried, and legally terminated,

and the said J. Dickson did fail in said suit. And the said plaintiff also avers, that by the wrongful suing out said writ in detinue, he has sustained costs and damages to a very large amount, to wit, the amount of one thousand dollars, of all which the defendants had notice, no part of which the defendants have as yet paid, although often requested; by reason of which said breach, the said writing obligatory became and was forfeited, and an action hath accrued to the plaintiff, to demand and have of the said defendant the said sum of $8,000, &c.

To this declaration the defendants demurred, and the Court sustained the demurrer, and rendered judgment for the defendants, which is now assigned for error.

Lyon and Hopkins, for the plaintiff in error, contended, that the averment of the time of commencing the suit was sufficiently certain. That the plaintiff was not bound to assign breaches until a plea of performance. [4 Ala. Rep. 243; 2 Stew. 370; 5 Porter, 395.]

Peck and Brooks, contra. The declaration is uncertain,—

In not alledging the time and place where the action was commenced, nor when and where it was determined. It is not shown that the sheriff was authorized to seize, or did seize the property of the plaintiff.

Every material averment must be alledged with precision and certainty, and not by way of recital.

It is not shown that the plaintiff was damaged. [1 Ala. 454; 21 Wend. 270.]

ORMOND, J.—Our statute authorizing the plaintiff to assign as many breaches as he thinks proper, Clay's Dig. 330, § 97, is a transcript of the 8 and 9 Wm. 3, c. 3, under which it has always been held, that the plaintiff may sue for the penalty of the bond, and need not assign breaches until the defendant craved oyer of the condition of the bond, and pleaded performance. [Gainesford v. Griffith, 1 Saunders, 72, in note.] But the learned commentator upon Saunders suggests, that the better plan is to set out the condition, and assign breaches in the declaration. When that is the course pursued, as in this case, it must certainly be attended by the same consequences, as if the breaches had been

assigned in a replication to the plea of performance, and if they would be insufficient in the latter case, they must be so also in the former. We proceed therefore to the consideration of the breaches assigned.

It is objected that the breaches are insufficient, in not alledging when, and where, the action of detinue was commenced—nor when and where, it was determined—nor that the sheriff was authorized to seize, and did seize, the slaves of the plaintiff.

The bond upon which this action is brought is provided by statute, (Clay's Dig. 317, § 31, 32,) by which the plaintiff, upon making affidavit, and executing a bond, with the condition to pay the plaintiff all costs and damages he may sustain by the wrongful suing out of the writ, confers authority upon the clerk to direct the sheriff to take the property sued for into his possession, and if the defendant does not, within five days thereafter, execute a bond for the indemnity of the plaintiff, the sheriff delivers the property to the plaintiff, on his executing a bond, with condition to deliver the property to the defendant, in case he fails in the suit. It is upon the first of these bonds that this suit is brought.

It certainly is not necessary that the plaintiff should assign as a breach of the condition of the bond, any fact which is admitted by the bond itself; it is only necessary to alledge the existence of those facts, upon the happening of which, by the condition of the bond, the penalty of the bond attached. The condition of the bond contains a distinct admission, that a writ had been sued out, in detinue by the plaintiff at a particular time, returnable at a particular time, to the Circuit Court of Marengo, to recover of the defendant certain slaves, then in his possession. These facts the present defendant is estopped by his deed from denying, and it was therefore not necessary to aver their existence, further than by the recital of the condition.

The only fact upon the happening of which the penalty was to be forfeited, is the failure of the plaintiffs in the suit. This is sufficiently alledged by the averment, "that afterwards, to wit, at the fall term of the Circuit Court for the county aforesaid, in the year 1843, the said action of detinue, in the said condition mentioned, was legally terminated, and the said John Dickson did fail in said suit." The time when the Courts are held being regulated by statute, will be judicially noticed; the averment is

therefore sufficiently certain, as the "fall," or autumnal term in the year 1843, must have been held at the time required by law.

No question is made upon the record as to the measure of damages for a breach of the condition of the bond here sued upon. Let the judgment be reversed and the cause remanded.

SMITH v. HOUSTON.

1. B having executed several deeds of trust to H, to indemnify S, and others, his sureties in certain bonds for the prosecution of writs of error, afterwards it was agreed between S, B, H, and another of the sureties, that B should give to H the control of his growing crop of cotton, to be shipped to Mobile, sold, and the proceeds applied according to the trust expressed in the deed. The cotton, amounting to fifty-one bales, was accordingly marked with the initials of H's name, by B and one of his sureties, and shipped by them to Messrs. D, S & Co. who received and sold the same, and held the proceeds, amounting to about $1,900. To reimburse S $1,030, which the property sold under the deeds of trust failed to pay, H drew on Messrs. D, S & Co. in favor of S, for the proceeds of the fifty-one bales, which in the bill it was recited he had shipped them as trustee, &c.; on this draft the drawees offered to pay about $500—insisting upon the right to retain the residue of the money in their hands for the payment of demands, which they had against B. S refused to receive the $500, caused the bill to be protested, and gave notice to H. Messrs. D, S & Co. were subsequently garnisheed by a creditor, who recovered a judgment against them for the $500. H was advised of the pendency of the garnishment, but did not inform the garnishees of his claim to the money, except as above stated: *Held*, that the proof of the foregoing facts did not show the loan, advance, or payment of money by S for H; nor do they show that the latter had received money for the use of the former, or that he was indebted to him upon an account stated; that the fair inference is, that H drew upon D, S & Co. merely to carry out the agreement between B and his sureties, and the fact of drawing did not impose upon him the legal duty of coercing

payment of the drawees: *Further*, the facts above stated do not show that B gave to H the control of his cotton crop—that H shipped it, or that D, S & Co. were instructed to place the proceeds to his credit.

2. Where, giving full credit to all the plaintiff's proof, it fails to make out such a case as entitles him to recover, a charge to the jury which is erroneous, as the assertion of a legal proposition, furnishes no ground for the reversal of a judgment against him.

Writ of error to the Circuit Court of Sumter.

THIS was an action of assumpsit at the suit of the plaintiff in error against the defendant. The declaration contained counts for money lent and advanced, paid, laid out, &c., had and received, and upon an account stated. In addition to these, there was a special count, alledging that the plaintiff, Thomas Bevill and Calvin Davis had become responsible for John B. Bunn, for a large sum of money, as his surety in bonds for the prosecution of writs of error, &c. That Bunn had executed two deeds of trust to the defendant, as trustee, upon lands and slaves, to secure the plaintiff and his co-sureties in the event of their liability being fixed, &c.; and with a view further to secure them it was agreed between the plaintiff, defendant, Bunn and Bevill, before the sale under the deeds of trust, that Bunn should give to the defendant the control of his growing crop of cotton, to be shipped to Mobile, sold, and the proceeds applied according to the trusts provided by the deed. The liability of the sureties was fixed by an affirmance of the judgments upon which the writs of error were sued out; and pursuant to the agreement, the crop of cotton of Bunn, amounting to fifty one bales, were shipped to Desha, Sheppard & Co., to be sold, and was received by the consignees. Afterwards the property conveyed by the deeds of trust was sold for the benefit of the sureties, and the proceeds applied, still leaving the plaintiff in advance for Bunn, one thousand and thirty dollars; the defendant, to reimburse this sum, by an instrument in writing, requested Messrs. D, S & Co. to pay to the plaintiff the proceeds of the fifty-one bales of cotton, marked R. F. H., which he had shipped to them as trustee in a deed of trust executed by John B. Bunn, to secure the plaintiff and his co-sureties. It is further alledged, that at the time the writing above mentioned was made and presented to Messrs. D, S & Co. they had

in their hands the proceeds, amounting to about nineteen hundred dollars, yet they refused to pay the same—of all which the defendant had notice, yet he refused to pay the plaintiff, or to enforce payment by Messrs. D, S & Co.

The cause was tried by a jury, who returned a verdict for the defendant, and judgment was rendered accordingly. On the trial, the plaintiff excepted to the ruling of the Court. It appears from a comparison of the facts recited in the bill of exceptions with the last count of the declaration, that that count was proved, saving perhaps so much of it, as relates to the shipment of the cotton by the defendant. The evidence upon that point was as follows, viz: Bevill and Bunn, about two weeks before the sale under the trust deeds, marked the fifty-one bales of cotton with the initials R. F. H. shipped it to D, S & Co. and informed the defendant thereof. To reimburse the defendant one thousand and thirty dollars, which the property sold under the trust deed failed to pay, the defendant drew as follows: "Livingston, April 16th, 1842, Messrs. Desha, Sheppard & Co.—Gent. Please pay over to Dr. Joseph A. Smith, the proceeds of the fifty-one bales of cotton, marked R. F. H., which cotton I shipped you, as trustee in a deed of trust, executed by John B. Bunn to secure Thomas L. Bevill and Joseph A. Smith, and much oblige your most ob't serv't." (Signed,) "R. F. Houston, Trustee." This draft was delivered to the plaintiff, its payee, who presented it to the drawees. Payment was refused, Messrs. D, S & Co. insisting upon their right to retain all but about five hundred dollars of the proceeds of the cotton for the payment of demands which they had against Bunn, and offered to pay that sum to the plaintiff, if they were indemnified; but the plaintiff declined receiving it upon the terms proposed, and caused the draft to be protested for non-payment, and notice thereof duly sent to the defendant, through the post office.

The defendant made no efforts to settle with D, S & Co.; they were subsequently garnisheed by a creditor of Bunn, of which the defendant had notice, but he never informed the garnishees of his claim, except as above stated, and a judgment for about five hundred dollars was recovered upon the garnishment. There was no evidence that the plaintiff offered to return the draft to the defendant before he instituted this suit.

Upon this evidence the Court charged the jury, that matters

of trust could only be settled in equity; that though the defendant might be there liable, or in an action on the case, they would not consider this upon the issue before them. To make the defendant liable, he must have made an express or implied agreement for a valuable consideration. Had he received any benefit? Had he possession of, or controlled the cotton, or became liable by express agreement? Although there was a verbal agreement that the cotton was to be held on the same trusts as the property conveyed by the deeds, yet to constitute a trust it must have been in writing. The verbal agreement did not prevent Bunn's creditors from subjecting the cotton, or Messrs. D, S & Co. from appropriating the proceeds to the payment of their demands against him. That the order by the defendant did not impose a liability upon him, as he drew as trustee, and that the defendant if chargeable, should be sued in Chancery, or in another form of action; his neglect to endeavor to collect the proceeds of the cotton from Messrs. D, S & Co. did not authorize a verdict against him in the present case.

R. H. Smith, for the plaintiff in error, made the following points: 1. The facts proved fully sustained the last count in the declaration, and the plaintiff was entitled to a verdict. 2. The verbal agreement in respect to the cotton was good—no rule of law requiring trusts to be in writing. 3. The order drawn by the defendant would support an action. [Chitty on Bills, 11, 154 to 159, 593; 4 Porter's Rep. 205.]

4. If the order on Desha, Sheppard & Co. and their failure to pay, did not constitute a good cause of action, these, when coupled with defendant's negligence, entitled the plaintiff to recover.

F. S. Lyon, for the defendant, insisted, that the order for the proceeds of the cotton, drawn by the defendant on Messrs. D, S & Co. was not a bill of exchange and was not so treated by the declaration. The facts disclosed, as well as the writing itself, show, that it was not sustained by a valuable consideration. It was given by the defendant to the plaintiff, to enable the latter to receive the proceeds of the cotton, under an arrangement between Bunn and the beneficiaries in the deeds of trust. [Waters v. Carlton, 4 Porter's Rep. 205; 1 Bibb's Rep. 503.]

The plaintiff can't recover upon the common counts, because the defendant did not receive any part of the proceeds of the cotton; nor could he recover in case on the ground of the defendant's negligence. The plaintiff had interposed and undertaken to become the collector of the money, and he should have returned the order before he could ask the trustee to interfere.

Conceding that the charge of the Court was incorrect, in laying down legal propositions, yet, if from the entire facts disclosed in the record, the plaintiff can't recover, the error of the Court does not authorize the reversal of the judgment. [Porter v. Nash, 1 Ala. Rep. N. S. 452.

COLLIER, C. J.—The facts proved at the trial did not sustain either of the common counts. They do not establish the loan, advance, or payment of money by the plaintiff for the defendant, nor do they show that the latter had received money for the use of the former, or that he was indebted to him upon an account stated. It appears that Bunn and one of the beneficiaries in the deeds of trust marked the cotton of the former with the initials of the defendant's name, shipped it to Messrs. D, S & Co., and informed him thereof. To reimburse the plaintiff for his advances, the order in question was addressed to the consignees.

It will be observed, that the defendant never did take the cotton into his possession; it was merely shipped in his name for sale, and there is no proof that he ever assented to the transaction by undertaking to supervise the sale and withdraw the proceeds, to be appropriated for the purposes provided by the deed. The reasonable inference from the case as presented to us, is, that the defendant gave the order to the plaintiff merely to carry out the agreement of the grantor in the deeds, and his sureties. No previous obligation rested upon the defendant in respect to the cotton or its proceeds, and the order, under the circumstances, did not impose on him the legal duty of coercing payment of Messrs. D, S & Co., if they refused to honor it. It is not pretended that any consideration moved to the defendant, which could make him liable to make good the default of the drawees; and the order, especially when connected with the extrinsic proof, shows a case in which the defendant was employed as a mere instrument for

the performance of a gratuitous duty, which others had devolved upon him.

The defendant has done every thing which he undertook to do. He has directed the payment of the money to the person entitled to it; whether paid or not, his legal and moral duty is at an end, and he cannot be required to compel the consignees to account for the proceeds of the cotton. This conclusion seems to us, to result so clearly from the nature and extent of the defendant's engagement as trustee, that the argument to sustain it, will not admit of amplification.

Without stopping to inquire whether the last count is unobjectionable, we are inclined to think that it is not sustained by the proof. It alledged that Messrs. D, S & Co. "had received said cotton for sale from said defendant, for the benefit of plaintiff and Bevill, as aforesaid," &c. Now although it is alledged that Bunn had agreed to give the plaintiff the control of his cotton crop, yet we have seen that the agreement was not performed, and that instead of placing it in the defendant's possession, or shipping it to his order, Bunn and Bevill merely marked it in his name, and shipped it to the consignees. This proof does not sustain the allegation that the defendant was the shipper of it, or that Messrs. D, S & Co. received it from him. It does not appear that the consignees were instructed to sell for the account of the defendant, or to place the proceeds to his credit. There is then, a defect in the proof, in showing that the cotton was placed under the defendant's control. Whether he might not, by the employment of legal coercion, have compelled Messrs. D, S & Co. to account to him, we need not consider, as he was under no obligation to adopt such measures. And perhaps, if such an inquiry were now proper, no satisfactory conclusion could be attained from the facts in the record. The statement in the order, that the defendant had shipped the cotton, as trustee, does not conclude the defendant against the facts proved at the trial.

The discrepancy noticed between the allegation and the proof, relates to a part of the account as material as any other, if indeed all of it together states a legal duty. From this view of the case, it results, that the plaintiff did not sustain his declaration, that he was not entitled to a verdict, and whether the charge to the jury laid down the law correctly or not, it worked no injury to him,

and the error, if any, does not authorize a reversal of the judgment.

The conclusion expressed, relieves us from the necessity of inquiring whether, if the special count be bad, yet supported by the evidence, a general charge against the plaintiff would furnish a ground for a reversal, or whether the plaintiff should not have prayed the Court to instruct the jury on that count alone. See Cullum v. The Branch Bank at Mobile, 4 Ala. Rep. 39.

We have only to add, that the judgment of the Circuit Court is affirmed.

WOODS' ADM'RS v. BROWN.

1. Where the counsel for both parties agree that an exception taken at the trial shall be examined after the adjournment of the Court, and the bill of exceptions then sealed and allowed, this is not a failure or refusal of the Judge, within the act of 1826, so as to warrant the Supreme Court to allow the exceptions.

After the bill of exceptions was stricken from the record, a motion was submitted on behalf of the plaintiffs in error, to file it as the exceptions taken at the trial, and to proceed with the cause in the same manner as if it had been certified by the Judge who tried the cause. In support of the motion, the certificate appended to the bill, which has already been stated *supra* 563, was read as evidence, in addition to an affidavit of one of the counsel, setting out the same facts substantially.

Hopkins and Edwards, in support of the motion, insisted that the facts disclosed seemed to present a case directly within the act of 1826. [Clay's Digest, 307, § 5.]

G. W. Gayle, contra, argued, there could be no failure when the Judge actually had sealed and allowed the exceptions. The

facts shew only that the bill was sealed and allowed at a time when the Court had no power whatever to act.

GOLDTHWAITE, J.—My own opinion is, that the act of 1826, in one of its aspects, was intended to cover precisely such a case as this. It provides for the failure of the Judge, as well as for his refusal to certify an exception; but it does not follow that a failure must be established in the same manner as a refusal. I can conceive of no case of failure, except the single instance of the death of the presiding Judge, in which the act of 1826 can afford relief, if it is denied in this case. But in this opinion I stand alone; the other members of the Court consider the case merely one of great hardship under the circumstances, as every thing was conducted with perfect fairness and good faith. In their judgment there is nothing in the case, as presented, which shows any failure or refusal on the part of the Judge, and therefore that it is not within the intent or meaning of the act. Motion refused.

KNOTTS v. TARVER.

1. It is not sufficient to give a Court of Chancery jurisdiction, that an account exists between the parties, or that a fraud has been practised. There must be a discovery wanted to disclose the fraud, or in aid of the account, or the accounts must be so complicated, as to require the aid of a Court of Chancery to adjust them.

Error to the Chancery Court of Russell.

The bill was filed by the plaintiff in error, and charges in substance, that the defendant as his agent, undertook to purchase for him from one John Freeman, a tract of land which is described. That it was supposed the land could be purchased for $1,100, and to enable the agent to make it, he executed two notes paya-

ble to Freeman, for $550 each, and delivered them to him. That he proceeded to make the purchase. and did purchase the land from Freeman for $1,100, giving him the two notes of complainant, and taking a bond for title from Freeman to complainant. That on his return, he represented to complainant, that he was compelled to pay Freeman $1,500 for the land, before he could obtain it, and that in addition to the two notes for $1,100, he had paid Freeman $400 of his own money. That complainant, supposing his representations to be true, paid him $330 in cash, and executed his note to him for $70, all of which except five dollars he has paid. The bill charges fraud, prays a discovery, and for a decree for the money thus fraudulently obtained by the agent.

Tarver denies the material allegations of the bill, but they are fully sustained by the evidence.

The chancellor, at the hearing, dismissed the bill for want of equity; from which this writ is prosecuted.

McLester, for plaintiff in error.—The complainant is entitled to recover the money fraudulently obtained by the agent, as so much money paid for his own property. [1 Sug. on Vend. 307; 1 Vesey, sr. 126; 2 Id. 304; 4 Bibb, 343.]

The Court having jurisdiction for discovery, will retain it for relief. [1 Story's Eq. 87; 10 Johns. Rep. 587; 7 Cranch, 69.] The jurisdiction of the Court is sustainable on the ground of fraud, [1 Story's Eq. 85,] and also because an account was necessary to ascertain the amount due on the note unpaid.

Peck, contra, insisted that the party had a full and adequate remedy at law.

ORMOND, J.—If this bill can be sustained, it must be on the ground of fraud, or that there is an account to be settled between the parties. These acknowledged heads of equity, are not of themselves sufficient to confer jurisdiction on a court of chancery. No matter how gross the fraud may be, if the party can have full, complete and adequate redress at law, he cannot go into a court of equity. This is a well established principle, and the contrary doctrine would fill the courts of chancery with suits, which could be better, and more cheaply adjudicated in the courts of law. The principle was recognized by this Court, in Sadler v. Robin-

son, 2 Stewart, 5, 22. The Court say, "no reason is suggested by the bill, why the appellee's cannot have justice administered to them at law; no discovery is asked for, as essential to enable them to prosecute their rights, no deficiency of strict legal proof is complained of. On what ground, then, the appellees ask the interposition of equity, we are unable to comprehend. It cannot be, because they charge their vendor with fraud, for every circumstance alledged as fraudulent, could it avail them, is fully examinable at law."

We have quoted this passage, because it is precisely apposite to this case. Here, no discovery is sought from the defendant, to enable the complainant to establish his case, and no obstacle shown to a full and complete remedy at law.

Nor is there any reason for sustaining the jurisdiction on the score of an account. There is in truth no matter of account between these parties, and if there was, that circumstance alone would not confer the jurisdiction. There must be a discovery wanted in aid of the account, or to disclose the fraud, or the matters involved in it must be so complicated as to require the aid of a court of chancery to adjust them, otherwise there is a complete remedy at law. (See this question fully examined in Vanlier v. Kirkman, 7 Ala. 217.)

The note which was executed by the complainant to the agent, upon his false representation, is void, and no obstacle exists to a full defence at law. Although the bill discloses a gross, and most offensive fraud, we are constrained to refuse relief, when sought in this mode. The decree of the chancellor dismissing the bill, must therefore be affirmed.

GIVENS, ET AL. v. TIDMORE.

1. A party bearing the same name with one of several defendants in a judgment may resist the levy on, and sale of his property under a *fieri facias* by suit in equity, upon the allegation that he is not a party to the note on

which the action was founded, and that he was not served with process.

2. Where a party against whom a judgment is sought to be enforced, alledged in a bill for an injunction, that he was not served with process, and did not make the note on which it was founded, the deposition of a person of the same name, declaring that he made a note of the same amount and date in which the complainant did not unite, will be sufficient to sustain the latter branch of the allegation, if uncontradicted.
3. An answer which negatives a positive allegation, by way of opinion and belief may be overbalanced by proof less stringent and conclusive, than if the defendant's denial had been made upon his own knowledge.
4. It is a general rule, that the party holding the affirmative of the issue, must support it by proof; but this rule has its exceptions.
5. Where, by a bill to enjoin a judgment recovered on a promissory note, the record of the proceedings at law, and the note, are all made evidence, proof in respect to the non-execution of the note should not be excluded because the note is not produced.
6. Where it appears from the process at law, that it was served on an individual bearing the same name of the complainant in equity, who alledges in his bill, that it was served on him, the presumption will be against the truth of the allegation; but when it is shown that the note on which the action was founded, was not made by the complainant, but by another person of the same name, resident in the same county, the presumption will be repelled, and the *onus* of showing that the writ was executed on the complainant will devolve upon the defendant.

Appeal from the Court of Chancery sitting at Jacksonville.

In October, 1842, defendant in error filed his bill, setting forth that at the County Court of Benton, holden in July preceding, a judgment was rendered againnt him and one William Tidmore, in favor of Messrs. Herndon & Kelly, for the use of James A. Givens, for the sum of $1438 debt and damages, besides $14 06¼ costs. An execution was issued on this judgment, which was levied on the complainant's land. *Further*, the judgment was recovered without any notice by the service of legal process or otherwise, given to the complainant, and he affirms that it is unjust and oppressive, as he never, by note, account or otherwise, was liable to Herndon & Kelly, or Givens, in any manner, or for any cause. Complainant cannot particularly impeach the judgment, as he is a stranger to the grounds upon which the suit was prosecuted against him, but he charges that it is fraudulent, and without consideration, and the result of an unlawful combination

between Herndon & Kelly, Givens and Wm. Tidmore, all whom are made defendants. The bill concludes with a prayer, that process of *subpœna* may issue, and that all further proceedings upon the execution may be enjoined as it respects the complainant, until the matters alledged shall be heard and determined in equity. An injunction was accordingly granted and issued.

Herndon & Kelly, in their answer, admit the rendition of a judgment against the complainant, upon a note made by him and Wm. Tidmore, and which was received by the respondents under these circumstances, viz: Previous to making the note, Wm. Tidmore came to the respondent's store, in Jacksonville, to purchase goods, but not being disposed to sell to him on a credit, required surety to be given; he informed them that he could give either of his brothers, the complainant, or Adam Tidmore. One of the respondents then wrote a note for the amount of the bill of goods, which was signed by Wm. Tidmore, who took the note and went off, as he said, to obtain the signature of one of his brothers. In three or four days he returned and presented the note to the respondents, subscribed with the complainant's name, and not doubting the genuineness of the signature, they received the note and delivered the goods. The complainant and William Tidmore, resided several miles from respondent's place of business, but near to each other. Respondents never heard, until a considerable length of time after they had transferred the note for a valuable consideration, that the complainant's signature was denied; the goods sold by them to William Tidmore, were taken near the complainant's residence, and they believe he was aware of the entire transaction, signed the note, or if he did not, knew that William Tidmore practised a fraud upon the respondents, and connived at it. The answer also embraces a demurrer to the bill.

The defendant, Givens, states that he traded for the note in question with his co-defendant, Herndon, on the 21st July, 1841, who transferred the same by his indorsement; that respondent caused suit to be brought thereon against John and Wm. Tidmore, to the first Court of the county of their residence, which was holden after he received the note; that he is informed, and believes, that process was regularly issued and served, upon both of them, and that failing to make defence, a judgment by default was rendered against them at the second term thereafter. Res-

pondent knows nothing of the execution of the note, but believes that it was made by both the Tidmores whose names appear as makers. He denies all fraud, &c., and in his answer insists upon the benefit of a demurrer.

Wm. Tidmore answers and says, that the John Tidmore who united with him in making the note in question, is not the same who has exhibited the bill in this cause, but another and different person; that he does not know whether process was ever served on the complainant informing him of the pendency of the suit at law, or whether his co-maker was ever served with such process.

Depositions were taken at the instance of the complainant, in which it is positively proved that a note was made by a son of the defendant, Tidmore, (together with his father,) who bears the same name as the complainant, dated about the 15th April, 1841, for the payment, on the 1st of January thereafter, of a sum between thirteen and fourteen hundred dollars to Messrs. Herndon & Kelly.

The Chancellor was of opinion, upon a view of all the circumstances, that the note in question was not made by the complainant, but by the defendant Tidmore and his son; this being so, he concluded that it must be intended that the process issued in the suit at law, was served on the makers of the note, consequently it was ordered and adjudged that the injunction be perpetuated, and that the defendants, Messrs. Herndon & Kelly, and Givens, pay the costs of the suit.

S. F. Rice, for the plaintiff in error, made the following points: 1. The complainant should not have sought relief in equity, even conceding the truth of every allegation in his bill; but he should have prosecuted a writ of error to reverse the judgment, because process had not been served on him, and upon the cause being remanded, he should have denied that he made the note, and had the issue tried at law. 2. The allegations of the bill are not supported by proof—the note was not produced—the witnesses speak of *a note*, but they do not identify the one in question. The want of proof cannot be supplied by using the defendant's answers as evidence against each other. [Moore, et al. v. Hubbard, et al. 4 Ala. Rep. 187.] 3. There is no evidence that the writ was not served on the complainant; this might have been

shown, by the officer who was charged with its execution, or perhaps by the production of the process, if the allegation is true in point of fact. If he had notice, and failed to defend at law, he cannot come into equity. [French v. Garner, 7 Porter's Rep. 549.] 4. Conceding that the note of which the witnesses speak agrees in description with the one in question, yet there is no proof of its delivery, but for any thing appearing to the contrary, it may have been destroyed. The complainant might have examined the defendant, Wm. T., on this point, but the defendants could not, because his interest was favorable to their success. 5. It was objected at the hearing, that the proof made by the complainant in respect to the note, was not admissible, because the note itself was not produced, or its absence accounted for, and though the objection does not appear in the original decree, yet the Chancellor certified it by way of amendment; and it is insisted that it should be sustained. 6. *Lastly;* the complainant alledges that the judgment was obtained against him, and he alledges no excuse for not defending at law.

W. B. Martin, for the defendant in error.

COLLIER, C. J.—It does not appear, either by the bill, answers, or proof, that the record of the cause at law, shows that the process was not served on the complainant, but the fair inference is, that the record does not sustain the allegation of the bill, or the Chancellor would doubtless have noticed it in his decree. Be this as it may, the complainant was not bound to sue out a writ of error to reverse the judgment, that he might defend himself at law, but he might waive his legal remedy, if an appellate Court could have afforded one, and seek to annul the judgment against him through the medium of a Court of Equity. Reynolds v. Dothard, et al. 7 Ala. Rep. 664, is conclusive upon this point.

This case does not come within the influence of Lockhart, et al. v. McElroy, 4 Ala. Rep. 572, in which it was held to be competent for a Court to prevent an improper from use being made of an execution issued under its authority, by awarding a *supersedeas;* and this although the objection does not appear of record. Here the objection is not, that the execution was not warranted by the judgment; this is conceded by the bill, which affirms that the

judgment has been rendered against the complainant. The questions to be considered, are, does the case stated in the bill authorize the interference of equity, and is the decree supported by the proof?

It is explicitly alledged that the judgment was rendered against the complainant without consideration, fraudulently, and though no notice was given him of the pendency of the suit, by the service of process or otherwise. Taking this to be true, and it is clear that there was no opportunity to defend at law. If, under such circumstances, Chancery could not give relief, then the complainant, though he have moral justice on his side, and might have made defence at law, if he had notice, is now remediless without any fault of his. It may be that the sheriff's return is a matter of record, and cannot be falsified by a plea, yet we have have always considered, that it is not so conclusive but a defendant may alledge the want of notice as an excuse for not making defence at law. [See Brooks, et al. v. Harrison, 2 Ala. Rep. 209; Gibbs & Labuzan v. Frost & Dickinson, 4 Ala. Rep. 720.]

It does not appear, by proof so conclusive as to make it impossible to be otherwise, that the son of the defendant, Tidmore, signed the note in question instead of the complainant. Yet we think it cannot be reasonably doubted, that the note of which the witnesses spoke, is the one on which the judgment was obtained. They agree in their amounts and dates, and as it does not appear that the son ever signed more than one note for his father, it may be fairly inferred that the complainant did not unite with the father as a co-maker; especially, in the absence of all proof tending to such a conclusion.

The defendants do not positively affirm that the service of process was effected upon the complainant, but their answers are merely an expression of their opinion or belief. To overbalance such a denial of an allegation, it certainly does not require proof the most stringent and conclusive.

It is a general rule, that the party holding the affirmative of the issue, must sustain it by proof, but there are some exceptions in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions, it is said, includes those cases in which the plaintiff *grounds his right of action upon a negative allegation*, and where, of

course, the establishment of this negative is an essential element in his case. But where the subject matter of the negative averment lies *peculiarly within the knowledge* of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor. So where the negative allegation involves a charge of *criminal neglect of duty*, whether official or otherwise; fraud, or wrongful violation of actual lawful possession of property, making the party the allegation must prove it. So where infancy is alledged, illegitimacy, (under some circumstances,) insanity, or death, where the presumption in favor of the latter cannot be indulged from lapse of time; the burden of proof is on the party making the allegation, notwithstanding its negative character. [Greenl. on Ev. 89 to 92; Gresly's Eq. Ev. 288-9; C. & H.'s Notes to Phil. Ev. 483 to 486, 490-1, 544-5; Carpenter v. Devon, et al. 6 Ala. Rep. 718.]

In respect to the objection, that the proof offered by the complainant, touching the note, should not have been received, we think it cannot be supported. The bill and answers all admit the existence of the note to which it is supposed the testimony relates, as the foundation of the action in which the judgment was recovered. It is conceded that such a note as is indicated by the record is really in existence, and the only question is, whether it was made by the complainant or some one bearing his name, The pleadings make the note, with all the proceeding at law thereon, evidence. Either of the parties may use it, if they think proper, but the failure to produce the note, will not render incompetent all evidence tending to show which of several persons of the same name made it. If such evidence is insufficient, without the production of the note in fact, of course the Chancellor will only accord to it its proper effect, but there would be no warrant for its exclusion *in toto*.

If it appeared from the writ, that it was served upon an individual of the complainant's name, the *prima facie* intendment would be, that it was duly executed, and that he had notice of the pendency of his suit. But whenever it was shown that the complainant was not a party to the writing, but it was made by another person of the same name, resident in the same county, then the presumption would be wholly repelled, and no inference

adverse to the complainant could be predicated of the sheriff's return. In this predicament of the case, it would be incumbent upon the defendants to show that the complainant was served with process, in order to fix on him the imputation of neglect, and thus prevent him from asserting his defence in equity. It follows from this view, that the injunction was perpetuated upon satisfactory evidence; the decree is therefore affirmed.

PARKS v. STONUM.

1. The rendition of a decree by the Orphans' Court, for the distributive share of the wife, in the name of the husband alone, is a clerical *misprision*, and may be amended; it is not an error of which he can complain.
2. Where infants are cited and do not appear, it is not error to render a decree without the appointment of a guardian *ad litem*.
3. When the record states, "that the exhibits and accounts, were ordered to be recorded, and spread upon the minutes of the Court, and reported for allowance," at a particular day, more than forty days afterwards, it is equivalent to stating that the accounts were examined and audited.
4. When the Orphans' Court of Conecuh directed notice to be published of the time of the settlement for six weeks, in a paper in Mobile, it is sufficient if the first publication is made as soon after the Court as might be.

Writ of Error to the County Court of Conecuh.

THE writ of error is sued out by those ascertained, by the final decree, to be entitled to distribution of the estate of Joseph Stonum, deceased, against George Stonum, the executor of said Joseph, to revise the proceedings had in said Court, on the matters of the estate, at, and previous to, the final settlement.

So much of the record as is material to the understanding of the errors assigned will be recited.

Letters testamentary were granted to George Stonum, on the 18th of April. 1836, and some time afterwards, (when, does not

appear from the transcript,) he was appointed guardian to Seaborn, George, Sylvia, John, Henry, and Bryan, minor heirs of the said Joseph.

On the 11th of June, 1838, the executor presented an account, charging himself with the sum of $2,386, on account of notes belonging to his testator, as his part of the uncollected notes of the firm of Geo. & J. D. Stonum, as well as for some other items of personal property; also, two other accounts, showing assets to the amount of $7,365.

The Court ordered that the account should be received and spread on its records, and reported for allowance on the first Monday in August then next. Also, that notice according to law be given of the same. By a subsequent order, the date of which does not appear, this account was allowed, the necessary notice, as the record recites, having been given.

On the 3d of September, 1842, the executor, in compliance with an order previously made, (at whose instance, or when, does not appear,) appeared and presented his exhibits, accounts, and vouchers, for a final settlement of the estate. The vouchers were received and ordered to be filed in the clerk's office, and the exhibits and account ordered to be received and spread on the minutes of the Court, and reported for allowance at the regular return term of the Court, on the third Monday of October then next. The account thus reported for allowance, seems to be a full account of the estate, and ascertains the sum of $34,956 19, to be due from the executor, and divisible between six heirs, who are not named, making the share of each $5,826 03, due on the 1st January, 1839.

At the regular return term, held on the 17th of October, 1842, the executor came and made his application for a final settlement.

It appeared to the satisfaction of the Court, that the notice for the final settlement had been published for six weeks in the Mobile Advertiser, requiring all persons interested in said estate to appear at the time fixed for the final settlement, and except, plead, or demur to said exhibit, and no person appearing to except, plead, or demur to said exhibit, it was therefore ordered that the said exhibit be allowed to, &c., and that the same be held and taken as a final settlement. The Court then proceeded to ascertain that the executor was indebted to the several heirs of the

said estate in the following manner, to wit: John Crittenden, in right of his wife, formerly Caroline E. Stonum, heir of the said Joseph D. for $5,826 03; in favor of George D. Stonum, another heir for the same sum; in favor of Henry B. Stonum, another heir, for the same sum; in favor of Joseph Stonum, another heir, for the same sum; in favor of Martha Stonum, another heir, for the same sum; and in favor of George Stonum, another heir, for the same sum; making the aggregate of the sum to be distributed. The Court then proceeded to render judgment in favor of Crittenden, in right of his wife, and in favor of said heirs, in the name of their next friend and guardian John Crittenden for the several sums so ascertained.

Afterwards, on the 25th May, 1843, the executor was appointed guardian to George D. and on the 2d of November, 1843, he presented his accounts as guardian of George D., Martha, John, Henry B. and Joseph D. the said minor heirs of Joseph D., and charged himself in that character with their several distributive shares, with interest from the 1st January, 1839. Afterwards, on the 13th February, 1844, he presented an account of his guardianship of Martha D., and exhibited the receipt of Isaac C. Parks, purporting to be in right of his wife, the said Martha.

At the same time he exhibited an account current between himself and Crittenden and wife, showing a payment of the entire sum due them.

The writ of error is sued out in the names of the minors, they suing by their next friend, Isaac C. Parks; and Parks, in right of his wife, as well as Crittenden, are made parties.

The errors assigned are these—

1. In rendering judgment for Crittenden, in right of his wife.

2. In proceeding to final settlement without the appointment of a guardian, *ad litem*, for the minor distributees.

3. In not having audited and examined the account of 11th June, 1838.

4. In allowing that account, no notice having been given.

5. In not having audited and examined the account for final settlement.

6. In allowing the account—the notice required by law not having been given.

7. In rendering the order, or decree, for final settlement.

LESLIE, for the plaintiffs in error, cited the following cases—On the first assignment, Blackwell v. Vastbinder, 6 Ala. Rep. 218. As to the 2d, 4 Ala. Rep. 121—3d and 5th, Clay's Dig. 226, § 27. As to the 4th and 7th, Ib. 226, § 27.

No counsel appeared for defendant in error.

GOLDTHWAITE, J.—The circumstance that the judgment for the distributive share of Mrs. Crittenden, was rendered in favor of the husband, in right of his wife, is not an error of which he will be heard to complain, as it is a matter which results to his benefit, if it has really any effect whatever, and because it was induced by his own action. It is possible the executor might complain of this as an irregular judgment, as was the case in Blackwell v. Vastbinder, 6 Ala. Rep. 218, but even if the complaint was by him, the error would be considered as a clerical misprision, and corrected so as to render it in favor of husband and wife.

2. It is also urged as a reason for reversal, that the settlement was made against infants, and that no guardian *ad litem* was appointed to protect their interests. This would be an error, if the infants had appeared previous to the decree of final settlement, and for the purpose of contesting it. (Taylor v. Reese, 4 Ala. Rep. 121,) but the record recites that no one appeared to contest the account reported for allowance, and the consequence is, that it cannot now be set aside, if the proceedings of publication and auditing have been in conformity with the statute. The judgment rendered in favor of the distributees seems to have been pronounced after the final settlement, and was entirely within the jurisdiction of the Court, if the executor was cited, or assented to the judgment. See Graham v. Abercrombie, at this term.

3. It is said however, that the proceedings preparatory to the final settlement, are not in accordance with the statute, and previous decisions of this Court, inasmuch as the account was not examined and stated for allowance by the Judge of the County Court. The act which governs these proceedings, is that to be found in Aikin's Dig. 183, § 27, and provides that the Judge of the County Court, after examining and auditing the accounts presented by the executor, &c. and causing them to be properly stated, "shall report the same for allowance to the next term of the

Orphans Court," the executor, &c. giving at least forty days notice of his intention of having such account presented to the said Court for allowance at such term. In Horn v. Grayson, 7 Porter, 270, we say, "If an executor, &c. wishes to settle his accounts, the law makes it his duty to present his vouchers to the Judge of the County Court, who is to hear, examine and state them, and report them for allowance. The object of the law is manifest. The account is to be stated—that all persons interested in it may examine it, and prepare, if necessary to contest it." Again, in Douthitt v. Douthitt, 1 Ala. Rep. 594, we say, "the Judge should have caused the account of the administrator, so far as it seems to be properly vouched to be stated at length and in form, that the true condition of the estate might be seen at one view. This being done, the account would be open to exception, in the same manner that the report of a Master in Chancery is; hence the publication should give notice of the time when the Judge of the County Court would report the account for allowance. And upon publication being duly made, and no exception taken or allowed, the account as stated should be allowed." In the present case, the record does not state that the Judge examined and audited the accounts, in the precise terms of the act, but the exhibits and accounts were ordered to be received and spread upon the minutes of the Court and reported for allowance at a particular day, more than forty days afterwards. We think this must be considered as equivalent to stating that the accounts were examined and audited, for otherwise there is no reason, either for the order to place the account on the minutes or to report it for allowance.

Our conclusion on this point is, that the record shows substantially a compliance with the statute, and therefore there is no error in this particular.

4. It is further objected, that the allowance of this account was irregular, because the notice prescribed by law was not given. The order for publication was made on the 3d September, and directed to be published for six weeks in the Mobile Advertiser. The settlement was to be had on the 17th of October. Conceding that it would take more than a day for the advertisement to pass from Conecuh to Mobile, this circumstance will not affect the order, as even then more than forty days notice might be

given, and all that could be required under the order was to publish it as soon after the Court as might be.

5. With respect to the accounts supposed to be allowed on the 11th June, 1839, it may be said, that even if there was a manifest error in this, we do not see how it can be re-examined after a valid final settlement. But the effect of that account seems to be entirely misconceived; it is not an attempt to charge the estate, but is a return by the adminstrator of certain assets belonging to it, which have come to his hands, and its allowance or disallowance could produce no conclusive effect upon the final settlement of the estate.

On a review of the whole transcript, we can perceive no error which injuriously affects the parties now complaining, and therefore the judgment is affirmed.

WILSON v. CALVERT, ADM'R.

1. Confessions, or admissions, must be taken altogether, but the jury are not bound to give equal credence to every part of the statement. When the admission is not a whole, or entire thing, but consists of parts, the jury cannot capriciously reject the portion favorable to the party making it; though slight facts or circumstances would be sufficient to justify them in disregarding it.
2. In such a case, the jury, and not the Court, is the proper judge of the credit to be given to the different parts of the admission.

Error to the County Court of Mobile.

Assumpsit by the defendant, against the plaintiff in error.

The declaration contains the common counts. The defendant pleaded non-assumpsit, set off, and the statute of limitations.

Upon the trial, it appears by a bill of exceptions, that the plaintiff proved a presentation, in 1841, of an account attached to the bill of exceptions, which is made out against the defendant, in fa-

vor of Charles Hammond, which includes the amount of two other accounts against the defendant, in favor of Hogan & Hammond, and that the defendant, after looking over it, said, that it was correct, but that he had a larger demand against Hammond, plaintiff's intestate. Defendant and Hammond were merchants in Mobile, and had mutual dealings. This being all the testimony, the defendant requested the Court to charge the jury, that under the testimony, they must find for the defendant; and further, that the plaintiff was entitled to recover nominal damages only. These charges the Court refused, and charged the jury, that if they believed the testimony of the witness, they must find for the plaintiff the amount of the account; to which the defendant excepted, and now assigns for error.

Fox, for plaintiff in error.

K. B. Sewall, contra, cited Greenl. Ev. 233; 17 Pick. 183; Ry. & M. 257; 1 Dall. 240, 392; Douglass, 757; 5 Ala. Rep. 20, 616; 2 Stew. 445; 4 S. & P. 52.

ORMOND, J.—The established rule, as to confessions, or admissions, is, that they must be taken altogether, that which makes for the party, as well as that which makes against him. But the jury are not bound to give equal credence to every part of the statement; they may for sufficient reasons, give effect to one part of the admission, and reject the other. What facts, or circumstances, would authorize the jury to reject one part of the statement, and receive the other, is a question not raised upon the record. It may however be stated, that where the admission is not a whole, or entire thing, but as here, consists of parts, though the jury may reject the part, making for the party asserting it, such rejection cannot be capriciously made, though evidence of slight facts, or circumstances, would be sufficient to authorize the jury to refuse to give credence to a part of the statement. [Smith v. Hunt, 1 McCord, 449; Newman v. Bradley, 1 Dall. 240; Turner v. Child, 1 Dev. 133; Randle v. Blackburn, 5 Taunton, 245.]

The charges moved for, were properly rejected, as they propose to take from the jury, the right to judge of the credit to be given to the different parts of the admission, and for the same

reason, the Court erred in the charge given, by which it assumed to charge upon the facts, and in effect directed the jury to reject all that part of the testimony, by which the defendant discharged himself.

Let the judgment be reversed and the cause remanded.

LEACH v. WILLIAMS AND ANOTHER.

1. Whether an attorney at law, charged with the collection of a debt be authorized to receive money upon an execution of a stranger under an agreement with him, that the execution shall remain open for his benefit, is not material, if the money thus received is paid over to the plaintiff in the judgment; in such case the party thus paying the money shall be entitled to an exction in their names for his reimbursement.
2. In a contest between execution creditors, it appeared that an original, *alias*, and *pluries fi. fa.* had regularly issued upon the defendant's judgment, the last of which was placed in the sheriff's hands, before the original *fi. fa.* in favor of the plaintiff issued: *Held*, that no question could arise as to the dormancy of the defendant's first *fi. fa.* as between him and the plaintiff—as his subsequent executions, which were regularly proceeded in, were entitled to priority of the plaintiff's.
3. Where goods levied on are removed by the defendant, or by his permission or connivance, or are delivered to him under a forthcoming bond, which he forfeits, the plaintiff may have a new *fi. fa.*

4. The sheriff should levy a *fi. fa.* on a sufficiency of the defendant's property, if to be found, to satisfy it; but the mere omission of the sheriff to do his duty in this respect, will not postpone an elder to a junior *fi. fa.* at the suit of another party.

5. The remark of the plaintiff in a *fi. fa.* to the sheriff, that he would do nothing that could affect his lien, nor must he (the sheriff,) do any thing that would cause him to lose it, but if he failed to make the money by a sale of property, he would not rule him, will not make the *fi. fa.* dormant and inoperative, if the sheriff failed to proceed thereon, unless the plaintiff intended to assent to, and approve the delay, with the view of aiding the defendants, or protecting their property.

Leach v. Williams and another.

Writ of Error to the Circuit Court of Perry.

This was a proceeding under the statute, suggesting that a writ of *fieri facias* had been issued from the Circuit Court of Perry, at the suit of the plaintiff in error, against the goods, &c. of McLaughlin & Townes, and placed in the hands of the defendant, Williams, as sheriff of that county, for execution, who failed to make the money thereon three days previous to the term of the Court when the same was returnable, although the money could have been made by due diligence. The plaintiff made a special statement of the facts, of which his right to recover is predicated; from this it appears that the liability of the sheriff depends upon the fact, whether the plaintiff's *fi. fa.* or one in favor of Messrs. Dunn, McIlvain & Brownlee, (of which John Lockhart claims to be assignee,) is entitled to priority. Notice was given to Lockhart, of the proceeding against the sheriff, and he was permitted to come in and unite in making defence against the suggestion. By consent of parties, the facts and law of the case were submitted to the Court, and judgment was rendered in favor of the defendants, and against the plaintiff for costs.

The facts of the case are certified, on which the judgment of the Court is founded, and the plaintiffs exception thereto. It is stated, that the plaintiff produced the several writs of *fi. fa.* issued on his judgment; the first of which went into the hands of the defendant, Williams, as the sheriff of Perry, on the 14th December, 1843, and on the 17th January, 1844, was levied on three slaves, the property of the defendant, McLaughlin. A replevy bond was executed for the delivery of these slaves, on the first Monday of February thereafter, which was forfeited, and so certified on the 5th February. On the 12th of the same month, a second *fi. fa.* issued on the forfeited bond, and was returned "no property found," on the 3d May, 1844. The slaves which had been levied on, were seized and sold under a *fi. fa.* in favor of Dunn, McIlvain & Brownlee, against Hopkins, McLaughlin, Lea, Moore, McKinney, and Williams, and the proceeds appropriated to its payment. On the 8th of June, 1844, the plaintiff sued out a third execution, which was levied upon the slaves, the proceeds of which are in dispute. This *fi. fa.* and that in favor of Dunn, McIlvain & Brownlee, were levied on the 22d October, 1844, on six slaves which had not been levied on before by the execu-

tion of either party. These slaves were offered for sale under the levies on the 1st Monday of November, and purchased by Lockhart, for about $1,500, who claimed the right to credit the amount on the execution of Messrs. D., McI. & B. The plaintiff insisted that his execution was entitled to priority, and gave notice to the sheriff not to allow the credit to be made.

Lockhart then produced an execution against sundry defendants, including McLaughlin, in favor of Dunn, McIlvain & Brownlee, for $10,746 08. This execution was received by the sheriff of Perry, on the 14th December, 1842, and levied on two slaves as the property of McLaughlin, and other slaves as the property of some of the other defendants, and on the 30th of May, 1843, was returned by order of the plaintiffs therein, without any sale of the property levied on. An *alias* execution was issued, and received by the same sheriff, on the day the first was returned, and on the 30th of September thereafter, was levied on sundry slaves, as the property of McLaughlin and two of the other defendants. On the same day the defendants replevied their respective slaves, by executing delivery bonds, conditioned for their forthcoming on the first Monday in November, 1843, all which were forfeited, and so certified on the 10th November. A *pluries fi. fa.* against the defendant's estate was issued, and placed in the hands of the sheriff of Perry, on the 5th of December, 1843; this execution also embraced the sureties in the delivery bonds. Under this *fi. fa.* the sheriff sold twelve of the negroes that had been levied on by the second execution in favor of D., McI. & & B., on the first Monday of May, 1844, the remaining eight had not been sold, but were still in the possession of the defendants. The eight slaves referred to, had never been levied on by the *pluries fi. fa.*, nor in the actual possession of the sheriff, but by his permission remained with the defendants, to be delivered to him when required to be sold, under the execution of D., McI. & B. Before the day appointed for the sale, the sheriff called upon Lockhart to know if he must sell enough property to satisfy the execution, the latter replied he would do nothing that would affect his lien, nor must he (the sheriff,) do any thing that would cause him to lose it; but if he did not make the money by a sale of the property, he (Lockhart,) would not rule him for not making it. The sheriff then took the advice of counsel and did not

sell the property to satisfy Lockhart's part of the execution; but would have sold and satisfied it, if he had not been told that he would not have been ruled. Lockhart refused to give the sheriff an order "to release the execution without making the money." The application of the sheriff to Lockhart was made a few days before the 1st Monday in May, 1844, and when he could by a sale of the remaining eight slaves on that day, have made a sufficient sum of money to satisfy the execution. The negroes which were sold, brought $3,941, which had been paid to D., McI. & B.

Lockhart proved that he had paid to Edwards, Lapsley & Hunter, the attorneys of D., McI. & B. $3,500, and in consideration thereof, on the 9th of March, 1843, they (the attornies) made a written transfer of an interest in the judgment, amounting to the same sum. One of the attornies, shortly thereafter, gave notice to the sheriff of Perry, that Lockhart had the above interest in the judgment, and that he must, as to that amount, be governed by his instructions, and informed the sheriff, that his orders were, not to interfere with Lockhart's rights. The same attorney testified, that before the execution supposed to have a preference of the plaintiff in the rule, was issued, D., McI. & B. had obtained satisfaction for their interest in the judgment, except four hundred dollars, which sum he had received within a few days, not of the sheriff, or either of the defendants in the execution, but of a third person.

The defendant then produced a fourth *fi. fa.* in favor of D., McI. & B. issued the 10th of May, 1844, and levied on the same slaves which were seized under the *fi. fa.* of the plaintiff, on the 22d October, 1844, and purchased by Lockhart on the first Monday of November, as stated above. On these facts it was adjudged, that the plaintiff should take nothing by his motion, &c.

H. Davis, for the plaintiff, insisted—1. The payment of $3,500 was a satisfaction of the judgment in favor of D., McI. & B. *pro tanto*. There could be no division of the judgment, so as to give Lockhart an interest in a part of it; besides the transfer of the attornies was not within the scope of their powers, and consequently void. If the plaintiffs in that judgment had never received the money, might they not have proceeded with an execution regardless of Lockhart's claim, and if they received it, is not the

judgment thus far paid off. 2. The facts show that the judgment of D., McI. & B. was in fact satisfied, (6 Porter's Rep. 432,) and as against the plaintiff, the law will consider it satisfied. [9 Porter's Rep. 201; 4 Ala. Rep. 427; 4 Mass. Rep. 402; 2 Pick. Rep. 586; 4 Dall. Rep. 358; 3 Wash. C. C. Rep. 60.]

3. The levy of the execution of D., McI. & B. on the twenty slaves, to the extent of their value, amounted to a satisfaction, and the subsequent seizure of the six, on which the plaintiff's *fi. fa.* was levied, cannot operate to the prejudice of the latter. Crawford v. The Bank of Mobile, 5 Ala. Rep. 55, is unlike the present case. There the controversy was between the parties to the execution—here between different execution creditors.

4. The third execution issued in favor of D., McI. & B. lost its lien, and if not dormant, was fraudulently kept open. [5 Ala. Rep. 43.] This *fi. fa.* having become inoperative as against the plaintiff, the one last issued, must operate *per se*, without the aid of any previous execution, and cannot postpone the plaintiff's lien which dates back to the time when his first execution was placed in the sheriff's hands.

A. F. Hopkins, for the defendant in error. 1. The transfer of an interest in an execution to the officer who holds it for collection, it is admitted is against public policy, and void. [15 John. Rep. 443.] But no principle of law inhibits such a transfer as that under which Lockhart claims, and it is not objectionable because it was made by attornies at law; it imposes no responsibility upon their clients, is therefore beneficial to them, and their assent will be presumed; the more especially as it appears that more than a year has elapsed, and they have not dissented from it. [Paley on Ag. 143-4; 12 John. Rep. 300.] But it appears from what was said by one of the attornies of D., McI. & B., to the sheriff, that they were informed of the transfer, and really approved of it. [1 Johns. Cases, 110; 1 Caine's Rep. 539; 12 Mass. Rep. 60; 3 Wash. C. C. Rep. 254; 14 Sergt. & R. 27.]

2. Lockhart did not control the execution so as to protect the property of the defendants therein from the demands of other creditors; he did not direct the sheriff not to sell enough to satisfy it *in toto*, but the sheriff of his own accord gave the indulgence. Lockhart did not assent that any thing should be done, or omitted by the sheriff, which could impair his lien; to this he

objected, and only agreed that if he failed to make the money, he would not rule him for a failure. His lien does not depend upon his right to such a remedy, but is wholly distinct from it. It is perfectly certain that the sheriff acted upon his own responsibility, after having taken the advice of his own counsel. What Lockhart said did not confer a discretionary power upon the sheriff; for he expressly said his lien was not to be impaired.

3. To make an execution dormant, the plaintiff, or some one authorized to act for him, *must be the actor in directing the course of the sheriff.* [5 Ala. Rep. 43, 53-4; 5 Cow. Rep. 390.]

4. If the execution under which Lockhart claims was entitled to the money, then he may retain the amount of his purchase, and have it credited on the execution. [19 Johns. Rep. 84; 1 Wash. C. C. Rep. 241; 3 Marsh. Rep. 68; 5 Cow. Rep., *supra.*]

COLLIER, C. J.—The motion against the defendant attributes neglect to the sheriff for failing to make the money on the plaintiff's execution, issued on the 8th June, 1844, and is intended to test the question of priority between that and the *fieri facias* at the suit of Dunn, McIlvain & Brownlee, which was simultaneously levied. It is conceded that the latter caused an execution to be placed in the sheriff's hands one year previous to the time when the first execution upon the plaintiff's judgment, issued; but it is insisted, that the judgment in favor of Messrs. D. McI. & B., has been satisfied by the money advanced by Lockhart; that the levy of their *alias fi. fa.* on the twenty slaves was a satisfaction thereof; that their *pluries* execution became dormant, and was fraudulently kept open; and lastly, the lien of the plaintiff's *fi. fa.* which was levied simultaneously with it, should not be postponed by it.

True, an attorney at law may not have the power to assign a judgment after it is satisfied to one who became liable to its payment, (6 Ala. Rep. 432,) yet if a person on whom no duty of that kind rests, thinks proper to advance his money for the accommodation of either plaintiff or defendant, it is difficult to conceive of an objection to keeping the judgment open for his re-imbursement. Such an advance cannot be regarded as a payment, but rather as a mere loan of money, with the agreement that the

lender shall have an interest in the judgment equal to the money lent. It is needless to inquire whether the powers of an attorney for the collection of a debt authorize him to enter into such an arrangement. If such an inquiry were necessary, we should perhaps be inclined to sustain the authority, where the client cannot be burthened with costs, or otherwise prejudiced. But in the present case, it appears that the attornies have paid over the money to the plaintiffs in the judgment, and we think it clear, that Lockhart is entitled to an execution in the plaintiff's name, until he is reimbused; unless the judgment shall be sooner satisfied.

The first execution issued upon the judgment under which Lockhart's claims was levied and returned without a sale by the order of the plaintiff therein; the second was levied on the twenty slaves, delivery bonds given and forfeited; under the third, which was issued on the 5th of December, 1843, twelve of the slaves seized under the second were levied on and sold; the remaining eight had not been taken possession of by the sheriff, but still remained in the hands of the defendants in execution.

No question can arise in this case, whether the first execution of Messrs. D., McI. & B. was dormant; for the first *fi. fa.* at the suit of the plaintiffs, did not go into the sheriffs hands until nine days after their *plures fi. fa.* had been delivered. Now although it is not explicitly stated, yet the fair inference from the entire case, is, that the property levied on by the first execution was either returned or taken possession of by the defendants, to whom it belonged. As to the second, it is shown that they were returned upon the delivery bonds being given.

It is laid down, that if the sheriff take goods in execution, under a *fi. fa.* whether he shall sell them or not, the defendant shall not be liable to a second execution. But where the goods levied on are removed by the defendant, or by his permission, or connivance, or they are delivered to him upon giving a forthcoming bond, which he forfeits, so that they cannot be sold, the plaintiff may have a new execution. [9 Porter's Rep. 201; 4 Ala. Rep. 427.] These citations are conclusive to show, that the levy of the second *fi. fa.* and proceedings consequent thereon, do not amount to a satisfaction in law.

In respect to the third execution of Messrs. D., McI. & B., it should have been levied upon a sufficiency of property to satisfy

it, if to be found, unless the sheriff was otherwise instructed by those authorized to control it. The fact that it exerted a paramount lien over the *fi. fa.* of the plaintiff, did not justify the sheriff in failing to levy the latter, if the defendant therein had property which had not been seized under the former. [8 Porter's Rep. 147.] But the omission of the sheriff to do his duty in this respect, cannot postpone an elder to a junior execution, especially if the plaintiff in the former is merely passive, without attempting to control the action of the sheriff. [4 Ala. Rep. 93, 98.]

It is insisted that Lockhart's answer to the sheriff, when asked if he must sell enough property to satisfy the execution in which he was interested, that he would do nothing that could affect his lien, nor must, (the sheriff,) do any thing that would cause him to lose it; but if he failed to make the money by a sale of property, he would not rule him for the failure, made the third *fi. fa.* of D. McI. & B. dormant, and inoperative. The authorities very generally concur, that in order to make an execution dormant, and constructively fraudulent, against one of a junior date, there must be an active interference on the part of the plaintiff, or some person authorised to represent him. A mere acquiesence in the neglect of the sheriff cannot have that effect. [See Wood v. Gary, et al. 5 Ala. Rep. 43, 55, and authorities there cited.]

Lockhart did not authorize the sheriff not to proceed upon the execution under which he claims; so far from giving such instructions, he peremptorily refused to do any thing that could affect his lien, and prohibited the sheriff from so acting as to prejudice it. The remark that he should not rule him if the money was not made by the levy on, and sale of property, amounted to nothing more than this, that he would pretermit a remedy against the sheriff, which he was not bound to pursue, in order to the continuance of his lien against a junior execution creditor. This afforded no warrant to the sheriff for the failure to enforce a collection of the third *fi. fa.* of Messrs. D., McI. & B. His omission may perhaps have been influenced by what was said by Lockhart in the conversation referred to. Yet if the latter did not intend to assent to and approve the delay, with the view of aiding the defendants in execution, or some of them, and thus by the effect of his paramount lien secure their property from junior

executions, the remark that he would not rule the sheriff, cannot have the effect to render the execution in respect to which it was made, dormant, and fraudulent by construction, as against the plaintiff. There is nothing in the record to warrant the imputation of such an intention, and we cannot consequently infer its existence. This conclusion being attained, it is not (as we understood it,) pretended that the fourth *fi. fa.* of Messrs. D., McI. & B., the lien of which, by relation, dates back to a period before the plaintiff's first execution issued, is to be postponed to it. The lien of its predecessor being unimpaired by the causes considered, the plaintiff is not entitled to any part of the money for which the six slaves were sold to Lockhart.

This view disposes of the entire case, and the consequence is, that the judgment is affirmed.

CRAFTS v. DEXTER.

1. A defendant against whom a judgment has been rendered, may have relief in chancery, upon the allegation that the writ, though returned executed, by the sheriff, had never been served upon him.
2. It is not sufficient to alledge that he had no notice of the suit; he must also show that the judgment is unjust, and that he had a defence to the action.
3. Where an endorser of a bill of exchange seeks to enjoin a judgment, on the ground that he had not been served with process, it is not a sufficient allegation, that he had never received notice of the dishonor of the bill, he must alledge that notice was not given. This averment must be made, though the burden of proof would lay on the other side.

Error to the Chancery Court at Montgomery.

THE bill was filed by the defendant in error, and alledges, that on the 24th April, 1838, the Selma and Tennessee Rail Road Company being indebted to him, he drew a bill of exchange up-

on Gilbert Shearer, its president, in favor of one Henry Lazarus, for the payment of $1276 89, on the first of January, 1839, negotiable and payable at the Bank of Mobile, which was duly accepted by Shearer. That some time after the 26th April, 1841, he ascertained that a judgment had been rendered against him in the Circuit Court of Dallas, as the drawer of said bill of exchange, by default, in favor of said Lazarus, for the use of R. A. Crafts. That the writ issued in the cause purports to have been served on Crafts, by the deputy sheriff of Dallas county, on the 8th June, 1840, and that execution has been issued thereon, and levied on his property. He denies that the writ was ever served on him, or that he knew any thing of the pendency of the suit, until after the judgment was obtained. That he never received notice of the protest of the bill, and did not know that there was any intention to hold him responsible, and supposed that the Rail Road Company had paid the bill, and could have successfully defended the suit if he had known that it was pending. The bill further alledges, that Crafts is a non-resident of the State, but where he resides is unknown to complainant. The prayer of the bill is for an injunction, and for general relief.

The register made an order directing publication to be made, requiring Crafts to appear and answer, or the bill would be taken as confessed. Subsequently, in vacation, the register made an order, reciting, that publication had been made, and that the bill be taken as confessed as to Crafts.

By leave of the Court, a supplemental bill was filed, alledging that since the filing of the original bill, the amount due on the bill of exchange had been paid to Crafts, upon an execution which issued on a judgment obtained against Shearer, as acceptor of the bill, and prayed that Crafts be compelled to answer.

Publication was again made, and an order by the register, that the supplemental bill be taken as confessed as to Crafts.

Testimony was taken by the complainant, but the Court rejected it, because due notice had not been given, and rendered a decree in favor of the complainant, perpetuating the injunction; to reverse which this writ is prosecuted.

Campbell, for plaintiff in error.—There was no affidavit to the supplemental bill of the non-residence of Crafts, and there is no evidence that publication was made.

The Court erred in rendering a decree, in the absence of Lazarus, who had the legal title to the judgment. [Story's Eq. Pl. 187.]

There is no equity in the bill, as the sheriff's return cannot be impeached collaterally. [5 Litt. 199; 4 Ala. 279; 10 Gill & J. 358.]

The allegation that notice was not received, is a mere evasion. The allegation should have been, that the holder did not give notice, and that he had a fixed residence, [10 Peters, 573; 2 Stew. 280.]

The supplemental bill should have been verified, and process issued as in other cases. [2 Paige, 333; 1 Metc. 76; 1 Ala. 379; 11, 40 and 46 rules Chancery Practice, 1 Smith's Ch. Pr. 527.]

J. P. Saffold, contra.—No objection was made below to the decrees *pro confesso*. They were taken before the register, and therefore the proof of publication need not appear in the record. The bill was sworn to, and the 40th rule complied with. The objection cannot be made for the first time on error, and by a party in contempt. [1 Ala. 386; 2 Id. 415; 9 Porter, 272; 5 Ala. 163, 173; 1 Hoffman's Ch. Pr. 405, Story's Eq. P. 278.]

Lazarus was a mere formal party, and no objection can be taken for that omission in this Court, as it was waived in the Court below. [Story's Eq. Pl. 78, 148, 198, 416; 2 Stew. 291; 2 Stew. & P. 361.]

As to the equity of the bill, the Kentucky cases are answered by the decision of this Court, (2 Ala. 209,) which is, in principle, the same as this case.

ORMOND, J.—The bill seeks to open a judgment obtained at law, upon the ground, that the writ was not served upon the defendant at law, by the sheriff, and that he had no notice that the suit was pending against him, until the judgment was obtained. That if he had been notified of the existence of the suit, he could have successfully defended against it. The writ having been returned executed by the sheriff, it has been argued, that upon principles of public policy, the complainant must be remitted to his action against him.

It is certainly the general rule, that the Court gives credence

to the acts of its own officers, and will not permit their truth to be disputed, otherwise the Court would be impeded at every step in its progress, by the trial of collateral issues of fact. When, however, the suit has ripened into a judgment, new considerations present themselves, and it becomes then a question of great difficulty, whether one, against whom an unjust judgment has been obtained, and who has been deprived of all means of defence in the proper tribunal, by the mistake or fraud of the sheriff, shall be compelled, from considerations of public policy, to pay the judgment, and seek redress from the officer, or whether the preventive justice of a court of chancery will not interpose, and afford an opportunity of proving the invalidity of the demand, without requiring him first to pay the judgment? The solution of this question, appears to depend upon the relative merits of the public interest, and the private injury involved, and we are aware, that it has been decided that in such a case, the private must yield to the public interest.

We abstain, however, from entering, at this time, into the merits of this controversy, because we think the principle has been settled in the case of Brooks v. Harrison, 2 Ala. 209, in favor of the relief. In that case, it was held, that one whose name had been forged to a forthcoming bond which had been returned forfeited, could be relieved in chancery against the statute judgment entered upon the forfeiture. This case involves the precise principle which must govern the case at bar, and which may be thus stated: when by an unauthorized act of an officer of court, a judgment is improperly rendered against one, without his knowledge or consent, he may be relieved in chancery, though the plaintiff in the judgment was not privy to the act of the officer. That is this case, and therefore without further comment, we proceed to consider, whether the bill is in other respects correct, for it is not sufficient to alledge the improper conduct of the officer, but it must also be shown that injury has resulted from this misconduct.

The suit at law in this case, was against the complainant, as the drawer of a bill of exchange, by the holder, the acceptor having refused payment. The defence which the complainant relies on, is, that he was not notified of the dishonor of the bill, and supposed that it was paid, until he learned of the existence of the judgment against him. The allegations of the bill, on this point, are, "that he did not consider himself liable, as he had never re-

ceived notice of the protest of said bill, and did not know there was any intention to render him liable, until after said judgment had been rendered against him." Again, he states, "that he had a good defence to said bill of exchange; that he never did receive any notice that said bill of exchange had been protested for non-payment, but on the contrary thereof he believed, after the said bill had fallen due, that the Selma and Tennessee Rail Road Company had paid said bill of exchange, which it was in duty bound to do," &c.

It is very clear, that the ability of the complainant to defend himself at law, did not depend upon the fact whether he had, or had not received the notice. The bill was payable at the Bank of Mobile; the complainant, it appears from the judgment, resided in Dallas county, and if notice of the dishonor of the bill, was, in point of fact, and in due time, according to law, transmitted to him by mail, his liability on the bill would have been fixed, though it had been in his power to have proved that he never received it. It is therefore not shown upon the bill, that the judgment is unjust, and if he was liable upon the bill of exchange, it is wholly unimportant in this proceeding, whether he had notice that the suit was pending against him, or not.

It does not vary the case, that if the allegation had been made that due notice of the dishonor of the bill was not given, the proof would have been with the defendant. It was a necessary allegation, because without it, there is no equity in the bill; as it must appear by an affirmative allegation, that the demand upon which the judgment is founded has no legal validity. If from the nature of the case he could not positively alledge it, as of his own knowledge, he should have stated the fact to be so according to his information and belief. It is perfectly consistent with every allegation in the bill, that the complainant knew that his liability had been fixed by due notice.

This question was considered in the case of Carpenter v. Devon, [6 Ala. 718,] where it was held, that negative allegations when necessary to establish a right, must be made in equity, as well as in pleading at law, and that a party averring the non-existence of a fact, will not always be bound to support the allegation by testimony.

This conclusion renders it unnecessary to examine the other

questions made in the cause, as they will not probably arise again.

Let the decree of the chancellor be reversed, and as this question was not made in the Court below, the defendant having failed to appear, the cause will be remanded, that the complainant may, if he thinks proper, obtain leave to amend his bill.

THE BANK OF MOBILE v. THE PLANTERS' AND MERCHANTS' BANK OF MOBILE, ET AL.

1. R. executed a mortgage to the B. of M. in which, after describing certain lands with particularity, proceeded thus: "together with three hundred and fifty acres of land belonging to the said R., contiguous to the lands above described, or situated near the same:" *Held*, that upon a bill to foreclose, it was allowable for the mortgagee to prove what lands were embraced by the term "contiguous" to those specifically described; at least to adduce proof that R. was the proprietor of three hundred and fifty acres, and no more, adjoining, or near to the lands designated.
2. Where a mortgage describes lands generally as "contiguous" to others it specially designates, and a bill brought for its foreclosure particularizes them, and alledges that a third person (made a defendant) purchased them with a knowledge of the mortgagee's lien; it is sufficient to throw the *onus* of sustaining the allegation upon the complainant, for such defendant to answer, that he did not know that the lands in question were embraced by the complainant's mortgage, and insists upon proof of the fact; *further*, that he was a purchaser for a valuable consideration, without notice of the complainant's claim.
3. The failure of the defendant to answer an allegation, not charged to be within his knowledge, and which cannot be so intended, will not be construed into an admission of its truth; if, in such case, the answer is defective, the complainant should except, and pray the Court to require one more complete.

Writ of Error to the Court of Chancery sitting in Lowndes.

The plaintiff in error filed a bill to foreclose the equity of redemption to certain lands, described as follows, viz: The west half of the north-west quarter of section three, of township fifteen, in range twelve, containing eighty-five 83½-100 acres; the west half of the south-west quarter of section thirty-five, township sixteen, and range twelve, containing eighty 20-100 acres; the north-east quarter of section two, in township fifteen, range twelve, containing one hundred and fifty-eight 30-100 acres; the south-east quarter of section thirty-three, in township sixteen, range twelve, containing one hundred and sixty acres; the west half of the south-west quarter of section thirty-three, of township sixteen, range twelve, containing eighty acres; the east half of the south-west quarter of section thirty-three, of township sixteen, in range twelve, containing eighty acres, "together with three hundred and fifty acres of land belonging to the said Robertson, contiguous to the lands above described, or situate near the same," —all of which lands it is alledged lie in the county of Dallas. These lands were conveyed by way of mortgage on the 21st day of February, 1838, by the defendant, Robertson, to secure the repayment of $11,680 60, which had been lent to him by the complainant.

The complainant's bill was afterwards amended, and in the amended bill it is alledged that the lands which are described in the mortgage as lying contiguous, &c. to those particularly designated, are the following, viz: the west half of the north-west quarter, and the west half of the south-west quarter of section four, in township fifteen, and range twelve; and the north-east quarter of section five, in township fifteen, and range twelve, situate in the county of Dallas, and within the Cahawba land district. It is then stated, that the Planters' and Merchants' Bank of Mobile, and one Abigail McKenzie, with a knowledge of the fact that these lands were embraced by the complainant's mortgage, respectively purchased certain portions of the same; but what part each one of these claims is unknown, and the complainant therefore prays, that they may disclose and set forth their deeds thereto. To this is superadded a charge, that the Planters' and Merchants' Bank claim the whole of these lands, at a sale made under an execution against the estate of the defendant, Robertson; that they are all the lands that the mortgagor owned "contiguous" to those particularly described in the mortgage, and

this fact was well known to the Planters' and Merchants' Bank at the time of its purchase. The original and amended bills each pray an account of what is due to the complainant, for principal and interest, and a decree of foreclosure and sale, not only of the lands specifically described in the mortgage, but those referred to as contiguous, &c.

The Planters' and Merchants' Bank answers, that it knows nothing of the contracts or dealings of the defendant, Robertson, with the complainant, but avers that he was indebted to this respondent, in the sum of $2,780, due 15th February, 1839, which having failed to pay, a judgment was recovered therefor, and under an execution issued on that judgment, the lands described in the complainant's bill as embraced by the general designation in the mortgage, were levied on and sold by the sheriff of Dallas. At that sale, this respondent became the purchaser, and received the proper conveyance. Whether the lands were intended to be embraced by the mortgage the respondent does not know, but insists that the complainant shall be held to strict proof.

The defendant, Robertson, and McKenzie having failed to answer the bill, the same was taken for confessed as to them.

The cause was heard, by consent, upon bill and answer, and the Chancellor adjudged, that as the answer of the Planters' and Merchants' Bank denied all knowledge as to the fact, whether the lands which it claims under the purchase at the sheriff's sale, were embraced by the mortgage, the *onus* of proving the affirmative, rested upon the complainant. There being an entire want of proof on this point, thus far, the bill was dismissed without prejudice, as to the Planters' and Merchants' Bank. An account was then ordered to be taken, and a decree of foreclosure and sale rendered as to the lands about which there was no controversy.

C. G. Edwards, for the plaintiff in error. The registration of the mortgage operated a constructive notice to creditors and purchasers of the mortgagor, of the lien which it created upon the *contiguous three hundred and fifty acres.* The point upon which the Chancellor rested his opinion does not arise. It is not denied by the answer, "that the mortgage refers to the lands in dispute," "that it included all the lands which Robertson owned," "that

Robertson owned no other lands contiguous." These allegations must be taken as admitted—the complainant could not be held to prove that Robertson had no other lands.

R. SAFFOLD, contra, made the following points: 1. If the description of lands be so uncertain that the locality of those intended to be conveyed cannot be known, then the conveyance is void for uncertainty. [4 Mass. Rep. 196, 205; Greenl. Ev. 349-50, and note; 6 Peters' Rep. 328, 345.] 2. After showing the state of things at the time the mortgage was executed, it must operate without the aid of parol testimony—the ambiguity is *patent*, and cannot be explained by parol testimony, but by an instrument under seal only. [6 Peters' Rep. *supra;* 1 Hill's Rep. (N. Y.) 17; 4 Id. 584; 19 Wend. Rep. 320.]

3. The cause being heard upon bill and answer, the evidences of debt intended to be secured, should have been produced, and the consideration of the mortgage proved. [2 McC. Ch. Rep. 14; 5 Ala. Rep. 9; 3 Hawk.'s Rep. 203; 2 Paige's Rep. 301.]

4. The registry of a mortgage should give full information, it is not enough that it should merely put a party upon inquiry to ascertain what property was intended to be conveyed. [1 Johns. Ch. Rep. 299; 18 Johns. Rep. 544; 2 Johns. Ch. Rep. 182; 15 Johns. Rep. 555; 2 Johns. Rep. 611-12.

5. Matter in avoidance stated in an answer, need not be proved by the defendant, when the cause is brought to a hearing *by consent*, on bill and answer. [2 Stew. & P. Rep. 189; 5 Id. 131, 141; 2 Ala. Rep. 215-7.]

COLLIER, C. J.—The authorities are uniform in declaring, that an ambiguity which does not appear on the face of the instrument, but is generated by some extrinsic collateral matter, is susceptible of explanation by a development of extrinsic facts; and there are adjudications which maintain that the rule that parol evidence is inadmissible to explain a patent ambiguity in a deed is by no means universal. In Colpoys v. Colpoys, Jacobs' Rep. 451, the Master of the Rolls said, "Where the person, or the thing is designated on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or

expressly for the ascertainment and completion of the meaning, to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of these circumstances, that the ambiguity was patent, manifested on the face of the instrument. When a legacy is given to one by his surname, and the christian name is not mentioned, is not that a patent ambiguity? Yet it is decided that extrinsic evidence is admissible. So where a gift is of the testator's stock, that is ambiguous; it has different meanings when used by a farmer and merchant." He cited the case of Doe ex dem Jersey v. Smith, 2 Brod. & Bing. Rep. 553, in which Mr. Justice Bayley thus states the principle on which extrinsic evidence is admitted in cases of a patent ambiguity: "The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct, and accurately described; *but because there is an ambiguity on the face of the instrument;* because an indefinite expression is used, capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settler had, the situation in which she stood in regard to the property she was settling, to see whether that estate or interest, or situation, would assist us in judging what was her meaning by that indefinite expression." It was added by the Master of the Rolls, that if necessary, he could "refer to many other instances of resorting to extrinsic matter in cases of patent ambiguity." See also, Ely v. Adams, 19 Johns. Rep. 313-7.

A patent ambiguity within the rule laid down by Lord Bacon, which is not subject to explanation by extrinsic evidence exists, when it appears plainly from the face of the instrument, that something else must be added in order to enable one to determinine what was intended by the grantor. The admission of parol evidence in many cases would be, as his Lordship said, "to make that pass without deed, which the law appointeth shall not pass but by deed." Upon this principle it has been held, that where one person gave a bond to another for the conveyance of a certain number of acres of land, being parcel of a much larger tract, it was not permissible to show by extrinsic proof, what part of the tract it was intended to sell, and that the bond was void; unless an election might be coerced and a conveyance consummated of the number of acres designated, in some part of the entire tract.

[Hunt v. Gist, 2 H. & Johns. Rep. 498.] It is said, if the description in a conveyance be so uncertain that it cannot be known what estate was intended, the deed is void; where there is a doubt, the construction must be against the grantor; and every deed ought to be so construed, if it can, that the intent of the parties may prevail. When the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain it, no estate will pass, except such as will agree to every particular of the description. But if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, *ut res magis valeat quam pereat.* [Worthington, et al v. Hylyer, et al. 4 Mass. Rep. 196; Jackson v. Marsh. 6 Cow. Rep. 281; Jackson v. Clark, 7 John. Rep. 217.]

In Starling, et al. v. Blair, 4 Bibb's Rep. 288, a debtor, for the purpose of securing the payment of a considerable sum of money, gave a mortgage to his creditor upon "all the lots that he then owned in the town of Frankfort, whether he had a legal or equitable title thereto;" it was objected that the description of the lots intended to be conveyed was too general. The Court considered the objection novel in its nature, and were aware of no authority to support, or reason to justify it. "The expression," it was said, "though general, is not uncertain. It clearly and explicitly manifests the intention of the parties, and there is nothing unlawful in that intention. There may indeed be more difficulty in ascertaining the lots intended to be conveyed, where the language used in describing them is thus general, than if the lots had been designated by their numbers. But it is in the degree, and not in the nature of the difficulty that the two cases differ. It results in neither case from no abiguity on the face of the deed, but from extrinsic circumstances, and in both cases resort must be had to evidence *aliunde*, for the purpose of identifying the lots which are the subject of the conveyance." In Havens, et al. v. Richardson, 5 N. Hamp. Rep. 113, the deed contained these general terms: "All and singular other real estate of what nature soever, wheresoever situate, belonging to the said Reuben at the time of his decease." It was insisted that the description was too loose and insufficient to pass the title to any particular estate; but the Court said, "a general description is

sufficient, if the thing granted can be ascertained. Here it can be ascertained of what land Reuben Shopley died seized." So a conveyance of lands in the patent of B. and of all other lands in the province of New York belonging to the grantor, will pass the residue of his lands in New York. [Jackson v. Delancey, 11 Johns. Rep. 365, S. C; 13 Johns. Rep. 537.] But in Jackson ex dem Carman, et al. v. Roosevelt, 13 Johns. Rep. 97, the deed relied on was a conveyance to a purchaser, at a sale made by a sheriff under legal process, and described the estate thus: "All the lands of Elizabeth Ellis, (and others,) situate, lying, and being in the patent commonly called and known by the name of the Hardenburgh patent." The Court ruled that the description was too general to authorize the recovery in ejectment of any specific tract of land—that it did not define the lots, or parts of lots of land owned by the defendant named in the judgment.

The case of Ellis v. Burden, 1 Ala. Rep. 458, is strikingly applicable to the point we are considering. That was a bill for the specific performance of a contract, by which the defendant had stipulated to convey to the complainant three of sixteen tenements, the brick work and plastering of which was to be done by the latter. It was objected that the contract did not specify which of the tenements were conveyed to the complainant. This Court said, "If the houses in this case had been built, when the agreement to convey three of them, was entered into between the parties, parol evidence would have been admissible to show to which of them the contract related, or, in the language of the case just cited, to explain the subject of the contract. But this is a much stronger case." The case referred to was Ogilvie v. Foljambe, 3 Mer. Rep. 52, in which the Master of Rolls said, "the subject matter of the agreement is left, indeed, to be ascertained by extrinsic evidence, and for that purpose such evidence may be received. The defendant speaks of "Mr. Ogilvie's house," and agrees to give £1400 for the "premises," and parol evidence has always been admitted in such a case, to show to what house, and to what premises the treaty related. [See also, Den ex dem. Riddick v. Leggott, 3 Murph. Rep. 539; Den ex dem. Belk v. Love, 1 Dev. & Batt. Rep. 65.]

This notice of the authorities is quite sufficient to show, that every deed in which the lands proposed to be conveyed by it, is so generally described that they cannot be ascertained without

the aid of extrinsic proof, is not void, or inoperative. In the present case, the description is imperfect and equivocal, admitting in itself of no meaning, or of different applications, referring for the location of the lands in question to others which were particularly described in the same deed. These facts bring the case fully within the principle so clearly expressed in the citations from Jacobs and Broderip & Bingham.

In giving effect to a conveyance, it often becomes necessary to determine the locality of lands, and in such cases it is allowable to show by extrinsic proof, where was the line of conterminous tracts at some period in the past, and at what point descriptive monuments were then located, &c. It is not necessary that the description in a deed should be so exact as to show with unerring precision what property was conveyed; in the language of Sir Wm. Grant in the case cited from 3 Merivale, *supra*, "the subject matter of the agreement," may be shown "by extrinsic evidence, and for that purpose such evidence may be received." This principle is explicitly recognized in Ellis v. Burden, *supra*.

We have seen that a general description is sufficient, if the thing granted can be ascertained, and in one of the cases cited, where the conveyance was of all other real estate of which a deceased person died siezed, it was held competent to show by parol evidence what lands were embraced by the description.

Upon the principles deduced from the citations we have made, it is perfectly clear that evidence was admissible to prove what lands were embraced by those contiguous or near to those specifically described. At least to adduce proof that Robertson was the proprietor of three hundred and fifty acres, and no more, adjoining or near to the lands referred to. This would be, but to identify the subject matter of the conveyance, and to make perfect and certain that which it had left imperfect and equivocal in contemplation of extrinsic evidence.

Let us however inquire whether it is inferrible from the bill and answer, that the lands now in controversy are embraced by the complainant's mortgage; for if such an inference cannot be indulged, the decree of the Chancellor must be affirmed. The allegations of the bill upon this point are substantially as follows: 1. That the lands described as being three hundred and fifty acres, &c., did by the contract and understanding of the parties refer to and include all the lands that the mortgagor owned, which were

situated near those specifically described in the mortgage, and that he was the proprietor of no other land than that against which the complainant seeks a decree of foreclosure and sale, situated contiguous or near thereto. 2. That the Planters' and Merchants' Bank, well knowing the premises, purchased certain portions of the three hundred and fifty acres of land, &c.

To these allegations the Planters' and Merchants' Bank answered, that it did not know that the land alledged to have been purchased by it, was part of the lands embraced by the mortgage of Robertson to the complainant. This defendant avowing its ignorance of this fact denied the same, and prayed that the complainant may be held to strict proof thereof—*and further*, averred that its purchase was made for a valuable consideration, without notice that the land in controversy had been previously conveyed by the mortgagor to the complainant.

It is objected by the complainant, that the Planters' and Merchants' Bank should have answered specially, whether the land purchased by it was near those particularly described in the mortgage, and whether the mortgagor owned any other lands contiguous or near to them; that the silence of the answer was equivalent to an admission of the averment of the bill on this point. The general rule, that whatever is specifically alledged in the bill, and not denied in the answer, must be taken as true, it is said, is subject to many exceptions and restrictions. In Thorington v. Carson, et al. 1 Porter's Rep. 257, our predecessors held, that the rule "must be confined to averments of matters within the knowledge of the defendant, a party or privy to the particular transaction; in such a case it would seem that the positive averment by one party, of the truth of the fact ought to be received as true, if not denied by the other."

The allegations that are unanswered cannot be intended to be within the defendant's knowledge. In respect to the first, any one acqainted with the manner in which lands are surveyed and numbered by the United States, might ascertain, without the assistance of proof, or personal observation, the relative position of all the lands described in the bill; but as it regards the second allegation, the fact it affirms, is one of which the mortgagor alone may be said to have certain knowledge. The Planters' and Merchants' Bank was neither party nor privy to the mortgage executed by Robertson to the complainant, or to any transaction

which would enable it positively to admit or deny the averments which it is insisted are unanswered. The failure then to answer specifically to these allegations, cannot be received as an implied admission of their truth.

We need not consider whether the answer is sufficiently responsive to the bill, in stating that the respondent does not know that the lands in controversy were intended to be embraced by the mortgage from Robertson to the complainant, and requiring that the same should be proved; or rather, whether the sum of all the allegations we are now considering amount to more than this, viz: that the lands claimed by the Planters' and Merchants' Bank are part of the three hundred and fifty acres described generally by their locality in respect to others, and were so known to it when it became the purchaser. Be this as it may, if the answer is defective, the complainant should have excepted to it, and cannot insist with success, that the bill should be taken for confessed, so far as it is unanswered.

It results from this view, that as there is no evidence to sustain the bill, the Chancellor could not have rendered a decree in favor of the complainant as to the lands to which the Planters' and Merchants' Bank set up a title. We need not consider the other questions raised at the argument, and will merely add that the decree is affirmed with costs.

EILAND, Judge, &c. v. CHANDLER.

1. No action can be maintained against a guardian, or his sureties, on his official bond, whilst the relation of guardian and ward subsists.
2. The removal of a guardian beyond the limits of the State, is a sufficient reason for severing the relation, and revoking the appointment.

Error to the Circuit Court of Perry.

Debt by the plaintiff in error, for the use of William C. Harlor, against the defendant in error, as surety of Elijah Harlor, guardian of William C. Harlor, on his bond in the penalty of one thousand four hundred dollars.

The declaration, after setting out the bond and condition, proceeds to allege "that Elijah Harlor, as guardian aforesaid, did not well and truly perform the duties required of him by law, &c., in this, that the said Elijah Harlor did not deliver an inventory on oath of all the estate, real and personal, which he had received as such guardian, into the office of the County Court, within three months, &c., and so the said plaintiff says, the said Elijah wasted the estate of the said William.

"And the said plaintiff in fact saith, that the said Elijah, whilst acting as such guardian, to-wit, on the 30th of March, 1837, became, and was, possessed of the sum of $727 25, as principal, and the sum of $58 18 as interest on the same, the property of said minor; and the plaintiff avers, that said Elijah, guardian as aforesaid, afterwards, to-wit, on the —— day of ——, removed beyond the limits of the State of Alabama, without settling his accounts as such guardian, with the Orphans' Court of Perry county. By reason whereof, an action hath accrued to the plaintiff, to demand, and have of, and from the said defendant, the said sum of $1,400 above demanded, yet, &c."

To this declaration the defendant demurred, and the Court sustained the demurrer, and the plaintiff declining to plead over, judgment final was rendered for the defendant.

The judgment on the demurrer is now assigned for error.

Davis, for plaintiff in error.—The single question is, whether this action can be maintained against the surety, on the bond, no judgment having been had against the principal, he having left the State. To show that the action can be maintained, I refer to 1 Call, 333; 6 Porter, 394.

Thomas Chilton, contra, insisted, that the declaration was too vague and uncertain to be sustained. That it did not appear whether the ward had attained his majority, or was still an infant, and if the latter, who was his guardian, as all infants must sue by guardian, or *prochein amie*.

ORMOND, J.—This is a suit against the sureties of a guardian, upon his official bond, by the Judge of the County Court for the use of the ward. No judgment has been obtained against the principal in the bond, but as an excuse for not ascertaining the amount in his hands, it is alledged that the guardian has wasted the assets, and absconded from the State.

At the time this suit was brought, our statutes did not provide any means for the settlement of a guardian's account, when he had left the State. This has been remedied by the act of 1843, [Clay's Dig. 230, § 47,] which authorizes the Judge of the Orphans' Court, when the executor, administrator, or guardian removes beyond the State, and fails to appear and settle his accounts, to state the account himself, and render a judgment against him *ex parte*.

We do not consider it necessary to enter upon the enquiry, whether, in this case, a sufficient excuse is not shown for not ascertaining the amount in the guardian's hands, previous to a suit on the bond, because so long as the relation of guardian and ward subsists, the latter cannot maintain an action at law against the former.

The removal of the guardian from the State was, doubtless a sufficient reason for severing that relation, and upon application to the Orphans' Court, the letters would have been revoked, and under the existing statute, upon application, the account can also be settled, after which no obstacle willl exist to a suit on the bond.

From this, it appears, the suit was prematurely brought, and the demurrer to the declaration was properly sustained.

Let the judgment be affirmed.

DUNN v. DUNN.

1. Where the payee of a note deposits it in the hands of an agent to be collected, who causes a suit to be instituted thereon in the payee's name, for his own use, and upon a judgment being obtained, refuses to yield the control thereof, but insists upon collecting and appropriating the proceeds to himself, a Court of Equity may enjoin the agent from all further interference, and the defendants in the judgment from paying the same, until the matters shall be there heard and adjudicated.
2. The complainant alledges that he placed a note in the hands of the defendant to collect, on which the latter recovered a judgment for his own use, and insisted on appropriating the proceeds; the defendant, in his answer, insisted that the note was placed in his hands to collect, and pay him self what the complainant then owed him, and for subsequent advances: Held, that so far as the answer seeks to charge the complainant, it is irresponsive to the bill, and the *onus* of sustaining it rests upon the defendant.
3. The assignment of an account by the party to whom it purports to be due, and testimony that he (having since died) kept correct accounts, does not sufficiently establish its justness to authorize the assignee to set it off to a suit in equity against him, brought by the person charged with it.
4. A reference to the Master, prematurely made, and embracing a matter which the Court should have first considered, will not be available on error, where the parties acquiesced in the irregularity.
5. Where a bill is for *discovery* and *relief*, if the answer, instead of furnishing a discovery, is a denial of the matter alledged, it is competent for the complainant to make out his case by proof.

Writ of Error to the Chancery Court of Benton.

THE defendant in error filed his bill, setting forth, that on the first of January, 1838, Peter Walden and John Boozer, made their bill single, by which they promised to pay to him, or bearer, the sum of six hundred dollars, twelve months after date; that in February, 1839, being about to leave the State, he deposited the same in the hands of Henry Dunn as his agent, without investing him, either by contract or otherwise, with any other interest therein; that afterwards, his agent caused the writing to be put in suit in the name of the complainant, for his own use, and thus

recovered a judgment against the obligors in the Circuit Court of Benton, for the sum of five hundred and ninety dollars, besides costs.

It is further stated, that an execution had issued on the judgment and was in the hands of Robert S. Porter, the sheriff of Benton, at the time of the exhibition of the bill; that the complainant had given notice to the attorneys who conducted the suit at law, as well as to the defendants in the judgment, and the sheriff, of his claim to the money that might be collected thereon; and prohibited its payment to his agent. The complainant had demanded of Harris Dunn the attorney's receipt which he had taken, or that the control of the judgment be given to him, which was refused, &c. The bill concludes with a prayer for an *injunction* and *subpoena;* both of which were regularly issued.

The bill was answered by Henry Dunn, denying that the writing in question was left with him as the complainant's agent, to put into an attorney's hands for collection, and take a receipt therefor in the complainant's name, and alledging that he received it under the following circumstances, viz: The complainant being about to leave the State, to remain abroad for an indefinite period, purchased some property of respondent, (which is particularly mentioned,) was indebted to him in the sum of one hundred and twelve dollars for merchandize sold, and money lent, also in several promissory notes, the amounts and dates of which are particularly stated. To secure these several sums the complainant gave respondent the specialty, to collect by suit and apply the proceeds to the payment of his own demand. It was further agreed between the complainant and defendant, that as the latter was to leave his wife and children in this State, the former should give them such necessary assistance as he could during the absence of the defendant. Under this branch of the agreement, the respondent paid several sums of money, and gave his individual notes in order to protect his property from being seized and sold by his creditors, and his family from being distressed, all which are particularly stated with reference to the creditors, amount, &c. These payments it is alledged, were made at the request of the complainant's wife. In addition to this, respondent alledges, that he has had to encounter difficult and protracted litigation in the recovery of the judgment. Whenever the

complainant will pay respondent what he justly owes him, he will renounce his lien upon the judgment, and so informed the complainant before he filed his bill.

The defendants, Walden and Boozer, moved the Court to dismiss the bill as to them, for want of equity, which motion was overruled. Then the defendant, Dunn, moved the Court to dissolve the injunction, upon his answer; this motion was granted upon the execution of a refunding bond; and it was thereupon referred to the Master to ascertain the facts in respect to the alledged agreement by the complainant to pledge the specialty in question to the respondent, and to take and report an account of the sums paid by the latter for the former, or due from the former to the latter.

The evidence taken before the Master accompanies his report, and is referred to; his conclusions are, 1. That the note of Walden and Boozer was only delivered to the respondent as a friend of the complainant, to be collected for the use of the complainant, and not as collateral security as alledged in the answer of respondent. 2. That at the time the note was placed in the hands of the respondent, the complainant owed him but a small sum of money, if any thing; but since that time the respondent has paid money for him, &c., which in equity should be refunded, the aggregate amount of all which is $372 05. 3. That after deducting the sum due the respondent, the balance of the judgment, viz: $263 66, should be paid to the complainant.

Exceptions were taken to the report by the respondent, and overruled. The Chancellor was of opinion that from the proof, it was difficult, if not impossible to ascertain with exactness, the state of accounts between the parties, that the report of the Master was as favorable to respondent as it could be, and rendered a decree accordingly, adjudging that each of the parties in controversy pay a moiety of the costs. The defendant, Dunn, alone assigns error.

S. F. Rice, for the plaintiff in error, made the following points: 1. The complainant had a plain and adequate remedy at law for the conversion of the specialty, and consequently the bill should have been dismissed for want of equity. [1 Story's Eq. 439-40; 2 Johns. Ch. Rep. 169, 171; 1 Litt. Rep. 86; 22 Maine's Rep. 207; 8 Porter's Rep. 63; 3 Ala. Rep. 521; 7 Ala. Rep. 585.]

2. The bill should have been dismissed because the answer did not make the discovery sought, (1 Story's Eq. 436-7,) or because the *allegata* and *probata* did not correspond, or because there was no proof that the complainant demanded the writing before the bill was filed. 3. The decree is founded upon the report of the Master, which is opposed to the proof, and entirely misconceives it. One witness testified that Walden and Boozer's note was given to Henry Dunn to secure him in what the complainant owed, that the balance due thereon was to be collected for the use of the complainant's family, and that the complainant said the defendant, Dunn, should lose nothing for attending to his business. Three other witnesses who were examined, merely state that the paper was placed in Henry Dunn's hands *for collection*, without denying that he had a lien upon it. The testimony of these witnesses is clearly reconcileable with each other.

4. The items of the account of Henry Dunn, on which the Master reported favorably, amounted to $436 91, on the 18th July, 1843, and those rejected by him amount to $265 05, and leave a balance in favor of the defendant, after allowing him to appropriate the entire judgment, of $53 03. This will appear from the evidence and the answer, which fully sustains the rejected items. 5. No costs should have been adjudged against the defendant, Dunn. [6 Ala. Rep. 518.]

No counsel appeared for the defendant in error.

COLLIER, C. J.—In Kirkman, et al. v. Vanlier, 7 Ala. Rep. 217, we stated quite at large the grounds upon which Courts of Equity exercise jurisdiction in matters of account, and it is not necessary here to repeat them. In cases of agency, a more enlarged jurisdiction has sometimes been assumed. It has been said, that although an action at law will lie against one in whose hands money had been deposited to lay out in the purchase of an estate, or any other thing, yet a bill in equity may be filed against him, praying that he may lay out the money, upon the hypothesis that he is a trustee. And where an assignment is made to a factor, for sale, bills have been entertained, notwithstanding there is a clear remedy at law, if the principal had thought proper to proceed in that way. [See Scott v. Surman, Willes's Rep. 405.] But Mr. Justice Story says, that the true

source of jurisdiction in such cases, is not the mere notion of a virtual trust; for then equity jurisdiction would cover every case of bailment. But it is the necessity of reaching the facts by a discovery—having jurisdiction for such a purpose, the Court, to avoid multiplicity of suits, will proceed to administer the proper relief. Hence, says he, a Court of Equity, under the head of discovery, will entertain a suit for relief in the case of a single consignment to a factor for sale. [1 vol. Com on Eq. 444-5; see also Halstead v. Robb, 8 Porter's Rep. 63.]

In Russ v. Wilson, 22 Maine Rep. 207, the plaintiff set forth in his bill, that he had left with the defendant, an attorney at law, certain demands against different persons for collection, under an agreement that the defendant should apply the proceeds, when collected, to the payment of a note then held by the defendant against the plaintiff, and should account for the surplus, and avers that more than sufficient had been collected to pay the note, but that the defendant had failed to apply the same, or otherwise account for it: *Held*, that the plaintiff had a plain and adequate remedy at law, and his bill could not be entertained. And in Ashley's Adm'rs and Heirs v. Denton, 1 Litt. Rep. 86, the Court said, that the jurisdiction of Chancery, exercised upon the ground of a trust, ought to be confined to the controlling of legal rights vested and remaining in trustees, created as such in some legal manner, and not extended to all cases of abused confidence.

In the present case, the object of the bill is not to recover damages of the defendant for having converted the note which the plaintiff left in his hands to be collected, nor is it to recover upon an allegation that the defendant has received the amount, or a part of it, due thereon. If the bill had been framed upon either of these hypotheses, we should be inclined to think it could not be entertained; for then the remedy would be plain and unembarrassed at law. In the first case trover, and in the second assumpsit for money had and received, would lie.

But the plaintiff does not elect to consider the acts of the defendant as a conversion, so as to divest his property in the note, and put him to an action at law for his indemnity. He insists upon his right to it as still continuing, notwithstanding it has been sued in the defendant's name, and denies that he ever gave him a lien upon it, or authorised an appropriation of its proceeds to any amount. If the plaintiff never invested the defendant with any

interest in it, but merely deposited it with him to be placed in the hands of an attorney for collection, his right to it was not lost, by the form in which the suit was brought. This being the case he was certainly entitled to the fruit of the judgment, and should consequently be allowed to control it. This right, the defendant refused to concede, and we cannot very well conceive how the plaintiff could avail himself of it, unless equity should lend him its assistance.

In May, et al. v. Nabors, [6 Ala. Rep. 24,] it was alledged in the bill that N. left in the hands of P. a promissory note, made by S. and W., for collection; that P. afterwards transferred the same to M. for an equivalent paid him by the latter; M. brought a suit against the makers in the name of N., for his use, and recovered a judgment against them. Afterwards N. filed a bill setting out the facts, alledging P's insolvency and removal from the State, and praying that M. surrender to him all control over the judgment and the collection of the money; and that M., his attorney, &c., be restrained from collecting the same. The allegations of the bill were sustained by proof, and the chancellor adjudged that the complainant was entitled to the relief sought. This Court, on error, held, that as N. had never transferred his interest in the note, it was incumbent on M. to satisfy himself of P's right to dispose of it, and that P's agency did not authorise him to transfer it. The decree was consequently affirmed. [See also Kirk v. Glover, 5 Stew. & P. Rep. 340.]

In the case cited from 6 Ala. Rep. the question of jurisdiction does not seem to have been made, or considered by the Court. The allegation of P's insolvency could not have been regarded as essential; for if insolvency was necessary to confer jurisdiction, it should have been alledged that M. was in that predicament. As to him N. would not have been remediless at law; for if he had received the money due upon the judgment, it might have been recovered of him by an action for money had and received, if the transfer of the note by P. was unauthorized. The principle then, which influenced our judgment in May, et al. v. Nabors, applies with all force to the case at bar.

We agree with the chancellor, that the proof in the cause is so loose and unsatisfactory, that it is difficult to do exact justice between the parties. The witnesses are not, as to some of the facts they relate, sufficiently explicit as to time, &c., so that it can

not be known what was the extent of the complainant's liability to Henry Dunn, when he sold him the horses, &c., and how the price agreed to be paid for them was appropriated. It must however be remembered that the *onus* of establishing the indebtedness of the complainant to the defendant, Henry Dunn, devolves upon the latter. The bill is framed upon the hypothesis that the complainant never parted with his interest in the note, or in any manner pledged any part of its proceeds. This is not only denied by the answer of the principal defendant, but he sets up a contract between himself and the complainant, by which he was to be paid from the amount collected on the note what the latter was then indebted to him, and be allowed for subsequent advances for the complainant's family. So far as the answer seeks to charge the complainant, it is affirmative, irresponsive to the bill, and must be proved by the party alledging it.

It is perfectly clear that the defendant has failed to prove his entire demand. There is no legal proof of the justness of the medical account, which he insists he has paid; nor is the fact of payment shown otherwise than by an assignment of the account, by the person in whose favor it is stated. The testimony that the physician kept just accounts, (although he was dead) was not evidence to establish its correctness. [Nolley v. Holmes, 3 Ala. Rep. 642.]

It is proved by one witness, that the defendant, Dunn, informed him when the note was sent to an attorney to put in suit, that the complainant was indebted to him but ninety dollars. Another witness testifies, that in the spring of 1842, (about the time the judgment at law was obtained,) he heard the same defendant say that his claim upon the note amounted to only two hundred dollars. These admissions of the defendant, taken in connection with the proof, forbid us to disturb the decree in the cause.

We will not consider whether the reference to the master was not prematurely made, and did not embrace at least one inquiry, that should have been made and considered by the Court. The reference seems to have been acquiesced in by both parties, and could not now be objected to as irregular, if either party was inclined to complain of it.

The objection that it does not appear that the complainant demanded the note, or the control of the judgment, is not well founded. It is clearly inferrable from the answer of Dunn, if not from

the testimony taken before the master, that the complainant had sought an adjustment, and that this defendant had refused to yield the right to the judgment, unless the complainant would extinguish the demand which the defendant set up against him.

The bill is not for a discovery merely, but it is for relief also, and should not have been dismissed, because its allegations were denied by the answer of the defendant Dunn. It is competent for the complainant to make out his case by evidence; and the assumption that the *allegata and probata* do not correspond, can not be supported.

In respect to the question of costs, it sufficiently appears from what has been said, that the defendant was not free from fault, and we can not say that he has been improperly taxed with a part of the costs.

Our conclusion, from a view of the entire case, is, that the decree must be affirmed, with costs.

JOHNSON v. GAINES.

1. Although the writ, and declaration, may describe the defendant as an executor, yet if the declaration shows that the action cannot be maintained against him in his representative capacity, it will be considered as a description merely of the person, and a judgment will be rendered against him in his individual character.

Error to the County Court of Mobile.

Assumpsit by the plaintiff, against the defendant in error. The writ issued against the defendant in error and Abner S. Lipscomb, executors of Catharine V. George, deceased, which was returned executed on Gaines, and not found as to Lipscomb. The declaration alledges that Abner S. Lipscomb, at the time the writ issued, and ever since, has not resided within the State of Alabama, but is without the jurisdiction of the Court, and has no

property or estate within the State of Alabama, and discontinues the action as to him.

The indebtedness is charged to be for work and labor, &c. done, performed, and bestowed, in and about the business of the said defendant, as executor aforesaid, and at his special instance and request; also for money paid, laid out and expended, and money had and received to, and for the use of the plaintiff; and also upon an account stated. And being so indebted, he the said defendant, in consideration thereof, &c.

To this declaration the defendant demurred, and the Court sustained the demurrer, and rendered judgment for the defendant.

SEWALL, for plaintiff in error, contended, that the only proper judgment that could be rendered upon the declaration, was, a judgment *de bonis propriis*; that the allegation that he was an executor, was a mere description of the person. He cited 4th Ala. 271; 1 H. B. 108; 7 Taunton, 586; 4 Term, 347.

As to the right to proceed against one executor, when the other leaves the State, he cited 5 Mass. 195; 9 Conn. 437; 8 Porter, 584; 2 Ala. 126.

J. HALL, contra, contended, that at all events, there was a misjoinder of counts, which was fatal on demurrer. [2 Porter, 33; Minor, 276; 1 Chitty's Pl. 208; 6 Ala. 544.]

ORMOND, J.—It is probable this action was commenced, upon the mistaken supposition, that the estate was responsible for debts created by the executor, and that it was the intention to sue the executor as such. Be this as it may, it is very clear the declaration shows, that no action can be maintained against the defendant in his representative character, as the debt was created by him, since his qualification as executor, and although the work may have been done, or the money advanced for the benefit of the estate, he represents, it as a charge against him individually. This being ascertained, the naming him as executor in the writ, and declaration, as it neither adds to, or diminishes his individual responsibility, is matter of form and not substance, as by reference to the claim asserted against him, it is evident he is not sued as executor, though described as such. This is

then merely *descriptio personae*, which, according to all the authorities, does not vitiate.

The demurrer to the declaration was improperly sustained, and the judgment must be reversed, and the cause remanded.

COLE, USE, &c. v. JUSTICE.

1. The payee of a note brought an action thereon for the use of a third person, who had become its proprietor, against one of the promisors, a surety; the consideration of the note was the sale of a tract of land by the payee to the principal maker; at the time of the sale there was an unsatisfied judgment against the vendor, operating a lien upon the land, this judgment the beneficial plaintiff authorized the principal to discharge, and promised to allow it as credit against the note; and it was accordingly discharged: *Held*, that the promise to the principal enured to the surety; that it was a direct and original undertaking to allow the payment, not obnoxious to the statute of frauds, and *eo instanti* it was made, extinguished the note *pro tanto*.
2. Although the vendee of land, with whom the vendor has covenanted that the estate is free from incumbrance, has a right to extinguish outstanding incumbrances to perfect his title, yet the amount thus paid will not be allowed as a *set off* in an action for the purchase money, nor will it avail the vendee *at law*, under the plea of failure of consideration.

Writ of Error to the Circuit Court of Barbour.

THIS was an action of assumpsit at the suit of the plaintiff in error against the defendant. The cause was tried upon issues to the pleas of *non-assumpsit*, set off, and the failure of consideration, a verdict returned for the defendant, and judgment rendered accordingly.

On the trial, the plaintiff excepted to the ruling of the Court. From the bill of exceptions, it appears that the consideration of the note declared on, was the sale of a tract of land by the nominal plaintiff, to James B. Smith; and that the defendant was the

surety of the latter. Process not being served on Smith, the suit was discontinued as to him.

The defendant released Smith from all liability to pay the costs of this action, and he was permitted to give evidence, notwithstanding the plaintiff objected.

Although the plaintiff made the sale of the land to Smith, yet by agreement, one Douglass, in whom the legal title was vested, made the conveyance to the purchaser. At the time of the sale, there was an unsatisfied judgment against Douglass, which operated a lien upon the land; on which an execution being issued and levied, the defendant, to prevent a sale of the land paid off the same.

It was shown that Bullock, the beneficial plaintiff, had authorized Smith to satisfy the judgment, and promised to allow such payment as a credit on the note in question; and that after this authority was given, $83 50 was paid.

The plaintiff prayed the Court to charge the jury, that the authority to Smith, and payment, was no defence for the defendant, but could only be set up by the vendee. This charge was refused, and the Court instructed the jury that these facts might be set up by the defendant to the extent to which they would avail his principal. *Further*, that if the beneficial plaintiff agreed to allow the defendant a credit upon the note declared on, if he would satisfy the judgment against Douglass, then a payment by the defendant under such agreement is a good defence to the action as far as it goes.

The Court also charged the jury, that if there was a legal incumbrance upon the land at the time of Smith's purchase, under which it could have been sold, then, either Smith or the defendant would be authorized to pay off such incumbrance, and set up the payment as a defence to this action.

P. T. Sayre, for the plaintiff in error, made the following points: 1. The charges which assume that a payment by either the defendant or his principal under the authority of the beneficial plaintiff, would constitute a good defence, cannot be supported: conceding that there was such an agreement, it was obnoxious to the statute of frauds, because it was an undertaking to answer for the default of a third person. 2. If there was a covenant, or other stipulation, binding the vendor of the land to

remove the incumbrance which the judgment against Douglass created, the breach of such covenant or stipulation would be regarded as unliquidated damages, and could not be set off under the statute. The discharge of that incumbrance by the purchaser or his surety. (if allowable,) would not vary the character of the defence. [Dunn, use, &c. v. White & McCurdy, 1 Ala. Rep. N. S. 645.]

J. Buford, for the defendant, insisted, that the payment of the outstanding judgment against Douglass was authorized by the contract for the sale of the land, as well as Bullock's directions to Smith; and whether considered in reference to one or the other, the defendant may avail himself of the payment as a payment, or set off. The agreement of Bullock to allow it, if the inbumbrance was extinguished, requires no other consideration to entitle the defendant to set up the payment in his defence.

COLLIER, C. J.—The promise by Bullock to Smith to allow as a payment on the note in question, the amount of the judgment against Douglass if he would discharge it, though it may have been made to him alone, enured to the defendant, his surety. If a principal obtain a claim against his creditor, which he may use as a set off, in a several action against a surety, the latter may with the assent of his principal, avail himself of the set off, as a defence to the action. This point was so ruled in Winston v. Metcalf, 6 Ala. Rep. 756. Here the right of the surety to set up as a defence, a matter to which the principal contributed, is even less questionable. The beneficial plaintiff agreed to allow the money advanced by Smith as a payment; and *eo instanti* upon the advance being made, the note was thus far extinguished, and was not enforceable, against either the principal or his surety.

Such a promise by Bullock, is not obnoxious to the statute of frauds, as supposed in argument. It is not an undertaking to answer for the debt or default of another; but it is a direct and original promise to pay Smith if he would satisfy the judgment against Douglass. The engagement became absolute by the performance of the condition, viz: the payment of the money.

In Dunn, use, &c. v. White & McCurdy, 1 Ala. Rep. N. S.

645, we held that the vendee of land has the right to extinguish outstanding incumbrances, and charge the vendor with the amount thus paid to perfect his title, if the vendor has entered into a covenant with him, that the estate is free from incumbrance. Yet, although such was the law, the amount paid to extinguish an incumbrance, could not be allowed as a set off in an action for the purchase money, nor would it avail the defendant *at law*, under the plea of failure of consideration. The case here cited, is decisive to show, that the last charge given cannot be supported.

The judgment is consequently reversed, and the cause remanded.

ALEXANDER v. ALEXANDER.

1. The guardian of a lunatic, under our statute, has the same powers, and is subject to the same restrictions, as the guardian of an infant.
2. A guardian cannot charge his ward's estate with any counsel fees he may choose to pay; it must appear that the services were required, and the compensation such as is usual, and customary for such services. Where no proof is made, it is competent for the chancellor to determine the value of counsel fees in his own Court, and this Court will not revise his decision.
3. An agreement to receive the services of a negro, for the board of an individual, is not cancelled by the slave becoming sick before the time expires.
4. A guardian cannot charge a commission for the custody and safe keeping, of either money, or *choses in action.*
5. The value of the board of a lunatic, depends upon his condition, and the care, attention, and watchfulness, necessary to be bestowed upon him, to be ascertained by proof. Declarations of persons, "that they would not board him for $500 a year," is not proof that it was worth that sum.
6. When a party to a suit in chancery, is examined before the master, upon an account taken by him, his answers to the points upon which he is examined, are evidence for him; he cannot introduce irrelevant matter as to which he is not questioned, and make it evidence for him. The statute authorizing a party to prove items not exceeding $10, by his own oath,

has no reference whatever to the practice in chancery, when a party is required by the chancellor to submit to an examination before the master.

7. In transporting the lunatic from place to place, it is the duty of the guardian to select the cheapest mode consistent with the comfort and safety of the lunatic; if the public conveyance is suitable, and cheaper than a private one, it is his duty to take it.
8. To authorize a charge for attention to a sick negro, it should be shown how long he was sick, and the nature and value of the attention bestowed upon him.
9. An account receipted for the board of the lunatic, is not a sufficient voucher, without proving, that the services were rendered, the money paid, and the charge reasonable.
10. Acts done by the guardian, without authority, on account of the ward, will not bind the ward, unless beneficial to him. Therefore, when the guardian of a lunatic, undertook to commence the business of planting on behalf of the lunatic, purchasing mules, provisions, &c., and the enterprize proved unfortunate, he was held responsible for the hire of the slaves. It was the duty of the guardian, if he considered it more beneficial to the lunatic to work the slaves, than to hire them out, to apply to the proper tribunal for authority so to act.
11. Where the guardian made an exchange of two of the slaves of the lunatic's estate, those interested in the estate, had the right to disaffirm the contract, and charge him with the value of the slaves so exchanged.
12. The appropriate function of an exception to a master's report, is, to point with distinctness, and precision, to the error complained of. An objection to the result attained by the master upon the settlement of an account, is too general to be noticed. It is the duty of the party objecting, to except to the particular items allowed, or refused, and it will then be the duty of the master, to certify the evidence by which the disputed item, was admitted or rejected.
13. When costs are directed to be paid out of the estate, if the litigation is unnecessarily protracted, for the purpose of vexation, the Court will apply the proper corrective, by taxing the party so acting, with the costs.

Error to the Chancery Court at Montgomery.

This case comes here upon exceptions to the master's report, in two cases, heard together, by consent; one filed by the plaintiff in error, as guardian of a lunatic, to dissolve the marriage; the other, by the wife, for a divorce and alimony. The chancellor decreed the marriage valid, and taxed the complainant with the costs. This decree was so far modified by this Court, as to

require the costs to be paid out of the lunatic's estate. An account being ordered of the lunatic's estate in the hunds of the guardian, the master reported, rejecting many of the charges set up by the guardian, to which he filed twenty-two exceptions, and the wife five. The chancellor overruled most of the exceptions of the complainant, and sustained three of those made by the wife of the lunatic, which is now assigned for error, but which need not be noticed further, than they are in the opinion of the Court.

Tho. Williams and J. P. Saffold, for plaintiff in error.—A comittee of a lunatic is entitled to an allowance for his services in receiving and disbursing money, &c. [3 Johns. Ch. 43.] He is permitted to employ counsel to aid in the management of the estate, and is allowed the costs of suit. [4 Dess. 394.]

The maintenance of a lunatic ought always to be ample, and in proportion to the estate of the party, and increase with the increase of the estate. [23 Law Lib. 107; top page, 1 McCord's Ch. 4.]

A trustee may employ agents, [Lewin on Trusts, 448, 449, 451,] and is only required to act as prudently for the trust, as he would have acted for himself. A trustee acting in good faith, is entitled to a prompt indemnity for his necessary disbursements. [6 Johns. C. 62; 2 McCord's Rep. 82; 1 Gill & J. 273; 2 Bland, 409.]

Hayne, contra.—The account presents the startling fact, that in four years, an estate amounting to $7766, and of the average annual value of $970, has been reduced by the management of the guardian, to $4,720.

It is in proof, that the guardian said he intended to consume the estate in litigation; and we find that he has already paid $800 in counsel fees, and upwards of that sum in costs of Court; and has made charges in his own favor of about $3,300. An examination of the testimony will show an utter disregard of the interests of the lunatic, and an attempt to use the property for his own benefit, and that the decision of the chancellor is strictly correct.

ORMOND, J.—The chancellor, in acting upon the decree, made in this cause, when it was formerly before this Court, [5 Ala. 520,] where it was held, that the costs of the proceeding

must be paid out of the estate of the lunatic, understands it to mean, "that all reasonable and necessary costs, and expenses, incurred by either of the parties, in prosecuting, or defending the suits, should be paid out of the estate of the lunatic." This is doubtless a correct exposition of the rule laid down by this Court, which was made in reference to the suit instituted by the guardian of the lunatic, to dissolve the marriage. As it respects the settlement of the accounts of the guardian of the lunatic, the act of 1819 ascertains what shall be his powers, duties, and responsibilities, and declares, "that he shall have the same power, to all intents, constructions, and purposes, and be subject to the same rules, orders, and restrictions, as guardians of orphans."

We shall take up the exceptions in the order they are found in the record. The first relates to the rejection by the Chancellor, of the allowance by the Master, of $800 as counsel fees, which was reduced by him to $300. It is urged, that as there was no evidence of the nature of the services, the Chancellor had no means by which to determine, whether the allowance was correct or not, and that the allowance made by the Register, must be presumed to be correct *prima facie*.

We take it to be a clear proposition, that a guardian cannot charge his wards estate, with any counsel fee he may choose to pay, but that before he can be allowed the benefit of money thus paid, in his account with the ward, it must appear in some mode, that the compensation thus allowed was reasonable and proper. No proof having been made, it was doubtless competent for the Chancellor to determine the fact of the reasonableness of the compensation, for professional services in a case depending in his own Court. Nor has this Court the means of determining, that his decision is not correct. As the guardian required the assistance of counsel to enable him to conduct the cause, he would doubtless be compelled to pay such compensation as was usual, and customary for such services—and if thus paid, it should have been allowed him; but there is no such proof, and we cannot perceive from any thing in the record, that the allowance of three hundred dollars, made by the Chancellor, was not a fair and adequate compensation.

2. The Register reported that many of the expenditures of the guardian were unreasonable and unnecessary, and that the reduction of the estate in the guardian's hands was unwarranted,

&c. This was excepted to, and properly overruled by the Chancellor, as it presented no point for determination, being merely introductory to the examination of the particular items of the account, which were afterwards rejected.

3. The 3d and 4th exceptions, are for rejecting a charge of $125, for boarding Ethelbert Alexander, (the lunatic,) two and a half months, and $20 for the board of a negro girl named Lish, for the same time. It appears from the exceptions and the testimony, that there was an agreement to take the services of the negro for the board of the lunatic. This was in the year 1839, whilst he was able to contract, and we think with the Chancellor, that if, as appears to be the fact, there was such a contract, it was not cancelled or rescinded by the negro afterwards becoming sick, and of no value, any more than it would have been if the contract had been to pay for her services in money.

4. The fifth exception relates to the rejection by the Register, of the charge of two and a half per cent, for keeping the notes belonging to the lunatic. Guardians are entitled to a fair compensation for their receipts and disbursements, but there is neither law or usage, which will justify their charging a commission for the mere safe keeping of money, and *a fortiori*, not for the custody of securities for money. This exception was properly overruled.

5. The guardian having charged the lunatic at the rate of fifty dollars per month for his board, the register reduced the compensation to $250 *per annum*, that being the rate of boarding at the Lunatic Assylum, in South Carolina. The Chancellor sustained this exception, so far as to allow $400 per annum, justly observing, that the rate of boarding established at a public institution in another State, could afford no criterion of the value of board in a private family in Alabama. The value of the board of a lunatic, must depend upon his condition, and the care, attention, and watchfulness necessary to be bestowed upon him. This, it is obvious, is matter of proof, but there is no testimony which is satisfactory upon this point. The witnesses do not state, what the value of the board of this person was, but say, that *they* would not board him for less than five or six hundred dollars a year—and we do not doubt witnesses might have been found in abundance, who would not have boarded him for twice that amount. This is no criterion of its value, and we cannot therefore say,

that the allowance made by the Chancellor, is not ample. So far indeed as we can judge, from the account given of the lunatic by the witnesses, it appears to be sufficiently liberal, as he was not a furious madman, requiring constant attention, and in fact did not receive it.

6. The Register rejected the charge of $30, for keeping three horses two months, assigning as his reason, that there was no proof of the fact, but the testimony of the guardian himself. The Chancellor sustained the rejection, upon the ground, that the guardian was not competent to prove items in his own account, above the sum of ten dollars.

The defendant was examined as a witness, by the direction of the Chancellor, in the interlocutory decree, directing an account to be taken. The design of the statute (Clay's Dig. 352, § 43) authorizing a party to prove items not exceeding ten dollars, by his own oath, has no reference whatever to the practice in Chancery when a defendant is required by an order of the Chancellor to submit to an examination as a witness. In Hart v. Ten Eyck, 2 Johns. Ch. 513, Chancellor Kent says, a reference in such a case, under the usual order, has the effect of a supplemental bill of discovery, and in Templeman v. Fauntleroy, 3 Rand. 444, it is said, "the examination has the same effect, as that of an answer to the bill." To the points then, to which the guardian, as defendant, was examined by the wife and child of the lunatic, his answers are evidence for him, precisely, as they would have been in an answer to a bill for a discovery. He cannot give evidence for himself upon matters to which he is not examined by the opposite party. [Armsby v. Wood, Hopkins C. Rep. 229.] As it does not appear that the guardian was examined as to this charge in his account, by the opposite party, his testimony was properly rejected by the register.

7. The eighth exception relates to the rejection of the charge made by the guardian, for conveying the lunatic to Columbia, S. Carolina. The allowance made by the Register was the cost of travelling by the public stage, and two dollars a day for the trouble of the guardian. It appears from the testimony that the lunatic was not a furious madman, and it is evident that he could have been conveyed as well by the stage coach, as by private conveyance. Indeed the latter would be the cheaper mode, though in this case it seems that it cost more. It was the duty of

the guardian to select the cheapest mode, consistent with the comfort and safety of the lunatic, and he cannot be allowed more.

8. We think with the Chancellor, that the charge of forty-five dollars for attention to Silas, is not sufficiently proved. It is not shown how long he was sick, nor how much it was worth. The whole amount of the testimony is, that the guardian, "charged $45 for attending to Silas nine months, during which time he was sick." This is too general, vague, and indefinite, to authorize the Register to make the allowance. It should have been shown how long he was sick, and what was the nature and value of the attention bestowed upon him.

9. The 11th exception is for sustaining the Register, in rejecting a claim for $182, (voucher 12,) money paid to one Doster, for board, &c. of the lunatic, for the year 1839. The Register rejected this because there was no proof other than the account of Doster, receipted, that the board was furnished, and because the item was contradicted by other facts in the record. The Chancellor appears to have considered, that the item was proved by the guardian himself. Upon looking into his testimony, we are unable to find any such proof. He says, "In 1839, Ethelbert boarded with me five or six months; $182 was a fair compensation for his board that year." This is certainly not proof of the fact, and the account of Doster, is for the entire year, at a given rate per month. Before this item could have been admitted, it should have been proved, that the services were rendered and the money paid; also, that the charge was reasonable. These facts are not shown by the production of the receipt, but on the contrary, as the Register remarks, it is contradicted by other parts of the testimony and facts in the cause. This exception was therefore properly overruled.

10. The 11th assignment is, that the Chancellor erred in overruling the 13th exception, which was for rejecting the account of 1842, being the result of the labor of the slaves for that year, and charging him with hire, without proof of the value of the hire. It appears that the guardian hired out the slaves, in 1840, and 1841, but that in 1842 he undertook to work them for the benefit of the lunatic, purchasing mules, provisions, &c. These, it appears, the guardian purchased from himself, and upon the breaking up of the establishment, and sale of the property, became

again himself the purchaser at a greatly reduced price. By this operation, as might have been expected, the estate of the lunatic sustained considerable loss. We entirely agree with the Chancellor, that this proceeding is wholly unjustifiable. Independent of the manner in which the guardian conducted the matter, by buying from and selling to himself, a course of conduct necessarily leading to abuse, and which could not be tolerated, it was the duty of the guardian, if he considered that the interest of the estate required that the slaves should not be hired out, but should be employed in this mode, to have applied to the appropriate tribunal, for the necessary authority—an authority, which we think no Court, under the circumstances of this case would have granted. The cases must be very rare, where an estate in the absence of its owner, will be made to yield what the slaves would have hired for. The general rule is, that acts done by the guardian without authority, will not bind the ward, unless beneficial to him. [Macpherson on Infants, 329, and cases there cited.] Doubtless, there may exist cases, where a guardian finding his ward in possession of an estate in lands and slaves, would be justified in keeping the estate together, and working it for the benefit of the infant; and upon an enlarged view, this might be most beneficial to the minor. That is not this case. Here the slaves had been previously hired out. To commence the business of planting, a considerable outlay was necessary, in the purchase of mules, plantation utensils, &c., and this too, with the strong probability existing, that the enterprize would not yield, what would be realized, by the more simple, and customary mode of hiring out the property. Upon every view which we are able to take of the case, we are satisfied the decision of the Chancellor was correct —that this project, by which the property was diverted from its natural, and customary channel, to a difficult, and to say the least, doubtful experiment, though done in good faith, was at the risk of the guardian, and he must sustain the loss. The further objection urged, is, not that the hire was charged at too high a rate, but that there was no testimony of its value. The evidence was of the value of the hire, the two preceding, and the succeeding years, from which, certainly, a just inference might be drawn of its value during the intermediate period. And if put down by the Register at too high a rate, might easily have been corrected below.

11. The 12th assignment is, that the Chancellor overruled the 14th and 15th exceptions, that the Register charged the guardian with the value of two slaves, which he had exchanged for other negroes.

The guardian had no authority whatever to make the exchange of the slaves, Ned, and Malinda, and upon the principles laid down in regard to the previous exception, acted therein at his peril, and subject to have his contract affirmed, if beneficial to the estate, and disallowed if not. Here it appears to be the interest of the estate to disaffirm it; such is the opinion of the Register, and such is also the opinion of those representing the interests of the wife and child. This was sufficient evidence for the Chancellor, and is for this Court, of the true interest of the estate. He was therefore properly charged with their value, of which there was abundant testimony.

12. The 13th assignment relates to the charge against the guardian, of $8,324 43, of notes, contrary to the proof. This, which was the 20th exception to the Master's report, the Court rejected for its generality, and because it imposed on the Court the necessity of examining a great mass of evidence, without pointing out where the error was.

It is most undeniable, that the appropriate function of an exception is, to point with distinctness, and precision, to the error complained of. It is too much to ask of the Court, to grope through a vast mass of testimony, and documentary evidence, in search of an error, which is alledged to exist somewhere, and by connecting in this instance, the accountant with the Judge, to ascertain what the error is. For it is not stated in the exception, what is the true amount of the notes, in the hands of the guardian.

Upon looking into the account presented by the guardian, (as we presume it to be,) he charges himself with notes of the estate and interest to January 1, 1840, to the amount of $7,633 83, describing each note particularly. The Master presents as the result of the testimony, a schedule, which accompanies his report, by which he charges the guardian—

January 1, 1840, with notes, property of the ward,	$8,324 43
Subtract guardian's credit,	197 52
Amount due to ward, January 1, 1840,	$8,126 91

It was sufficient for the Master to state the result of his finding, and if the opposite party was dissatisfied with the amount thus stated, it was his duty to except to such items as he considered improperly charged; it would then have been the duty of the Master to certify the evidence by which the disputed item was sustained. This not being done, and a mere general objection made to the Master's conclusion, it is impossible for the Chancellor, if he was willing to encounter the labor, to investigate the matter with any approach to certainty. The exception was therefore properly overruled. [See Kirkman v. Vanlier, 7 Ala. Rep. 227.]

13. The 14th assignment of error, is the overruling the 21st exception to the report of the Master, charging four months hire for the slave Silas. Upon what testimony this charge was made, does not appear. It does appear however that the guardian had possession of the slave at the commencement of the year, and the proof when he became blind and of no value, should properly have come from the other side. In the absence of any such proof we cannot say the charge is incorrect. The presumption must be, that such proof was made, otherwise it would have been the duty of the Register, to have charged hire for the entire year.

The last assignment, calling in question the result of the Master's report, need not be considered, as we have anticipated it, in the examination of the various parts, of which it is composed.

The result of this protracted examination is, that the decree of the Chancellor must be affirmed. According to the former decision of this Court, the costs were to be paid out of the estate, upon the presumption that the litigation was *bona fide*. From some evidence found in the record, it would seem to be doubtful, whether the guardian was not unnecessarily protracting the controversy, for the purpose of vexation. If this was clearly made out, we should not hesitate to apply the proper corrective, by taxing him with the costs. We do not think however, the evidence sufficiently strong to warrant this course. Let the costs be paid out of the estate in the hands of the guardian, except the costs of this court, which will be paid by the plaintiff in error.

Since the decree rendered in this cause, at the present term, a motion has been made by the counsel for the plaintiff in error,

to modify the decree, as it regards the fees of the solicitors, reduced by the chancellor, upon the ground that the exception taken before the master, was not to the amount of the allowance, but to its being a charge upon the estate; that the decree of the chancellor was made in vacation, and they had not therefore an opportunity to make this explanation, or procure the necessary proof of the reasonableness of the charge; and this being admitted by the solicitors of the defendant in error, and they assenting to the proposition, it is ordered, that the decree heretofore made by this Court, be so far modified, that the cause be remanded, that a reference may be made to the master, to ascertain whether the fees paid to the solicitors were reasonable, and proper, and such as is usual in such cases.

CRAWFORD v. WHITTLESEY.

1. The writ and declaration were at the suit of J. A. R., assignee, &c. of S. A. W. and A. R.; on the margin of the judgment entry the case is thus stated, J. A. W. assignee, &c. of W. and R: *Held*, that if the names of the parties had been entirely omitted on the margin of the judgment, the writ and declaration might perhaps have been referred to, to sustain it; but however this may be, the error was a "clerical misprision in entering judgment," and under the act of 1824, is amendable at the costs of the plaintiff in error, where a correction is first sought in an appellate court.

Writ of error to the Circuit Court of Barbour.

THE writ and declaration in this case are in the name of Jacob A. Robertson, assignee of the debts, estate and effects of Samuel A. Whittlesey and Alexander Robertson, late partners, &c. On the margin of the judgment entry, the case is thus stated. "Jacob A. Whittlesey, assignee of Whittlesey & Robertson v. Alexander P. Crawford." The judgment is by default, and writ of inquiry executed.

BELSER and CRAWFORD, for the plaintiff in error, contended that the judgment departed from the writ and declaration in making another party plaintiff, and was not authorised by either.

No counsel appeared for the defendant.

COLLIER, C. J.—If the names of the parties had been omitted entirely on the margin of the entry, it would perhaps have been competent to refer to the writ and declaration to sustain it. But be this as it may, it is perfectly clear that the designation of the parties is a mere clerical mistake, in writing the plaintiff's name "Jacob A. Whittlesey," instead of "Jacob A. Robertson."

None of our previous decisions are precisely analagous to this; but it seems to us that it is just such a case as is contemplated by the fourth section of the act of 1824, "to regulate pleadings at common law." [Clay's Dig. 322, § 54.] That section is in these words: "No cause shall be reversed by the Supreme Court, or any Circuit Court, for any miscalculation of interest, or other clerical misprision in entering judgment, so as to give costs to the plaintiff in error; but in all such cases, the Supreme Court may order the judgment to be amended at the costs of the plaintiff in error."

We feel constrained thus to order the judgment to be amended, by substituting upon the margin the name of the plaintiff in the declaration, instead of Whittlesey.

BOGAN v. J. & S. MARTIN.

1. "Received of J. & S. Martin $256 97, for a negro boy named Bob, aged about forty years, which I warrant, &c., given under my hand and seal, this 19 December, 1841. S. BOGAN, (Seal.)
Endorsed, "It is further understood, that if the said S. Bogan, shall well and truly pay to the said J. & S. Martin, the said sum of $256 97, within four months from this date, the said Bogan is to have the liberty of re-purchasing the said boy Bob. It is also understood, that if the said boy Bob

should die within the said term of four months, he dies the property of the said Bogan, and the said Bogan in that event, is to be justly indebted to the said J. & S. Martin, in the said sum of $256 97.

J. & S. Martin.
S. Bogan."

Held, that the legal effect of this instrument, taken altogether, was, that it was a conditional sale of the slave, with the right to re-purchase. That the right to the slave vested immediately in J. & S. Martin, subject to be divested by the re-payment of the purchase money in four months. That the instrument did not, on its face, import an indebtedness from Bogan to the Martins, but if the slave died, or if Bogan sold him to a third person, J. & S. Martin could recover in assumpsit, the amount specified as his purchase money.

2. J. & S. Martin transferred this paper to a third person, and having afterwards re-possessed themselves of it, might erase the indorsement, and sue in their own names.

Error to the Circuit Court of Cherokee.

Assumpsit by the defendant against the plaintiff in error.

Upon the trial, the plaintiffs offered in evidence a writing as follows:

"Received of J. & S. Martin, two hundred and fifty six dollars ninety-seven cents, for a negro boy named Bob, aged about forty years; which I warrant, &c. Given under my hand and seal, this 19 December, 1841.

S. Bogan," (Seal.)

Upon which was the following indorsement:

"It is further understood, that if the said S. Bogan shall well and truly pay to the said J. & S. Martin, the said sum of two hundred and fifty-six dollars ninety-seven cents, within four months from this date, the said Bogan is to have the liberty of re-purchasing the said boy Bob. It is also understood, that if the said boy Bob should die within the said term of four months, the said boy dies the property of the said Bogan, and the said Bogan in that event, is to be justly indebted to the said J. & S. Martin, in the said sum of two hundred and fifty-six dollars ninety-seven cents.

J. & S. Martin,
S. Bogan."

The plaintiffs introduced testimony tending to show, that the

slave remained in the possession of Bogan, and that subsequent to January, 1842, he sold him to a third person.

The Court charged the jury, that the article of agreement between the parties was evidence of indebtedness from defendant to plaintiffs. And further, that if they believed that the negro sold by defendant to plaintiffs, remained in the possession of the defendant, and was by him sold, then plaintiffs were entitled to recover the amount recited in the bill of sale.

The defendant moved the Court to charge, that although the defendant may have retained possession of, and sold the slave, the plaintiffs could not recover in this action, but must sue in an action *ex delicto*, which the Court refused.

Upon the bill of sale offered in evidence, was the following assignment:

"We assign the above bill of sale to G. W. Lawrence, and empower him to take possession of the boy Bob, in our name, or to collect his value."

J. & S. Martin.

This assignment, against the objection of the defendant, the Court permitted the plaintiffs to strike out. The defendant also moved the Court to charge the jury, that under the proof they must find for the defendant, which the Court refused. To all which the defendant excepted, and which he now assigns as error.

T. A. Walker, for plaintiff in error.

ORMOND, J.—The instrument offered in evidence, must be considered in connection with the defeasance, and so considered, it is a conditional sale of the slave mentioned in the bill of sale, by Bogan to the Martins. The right to the slave vested immediately in them, subject to be divested by the re-payment of the purchase money in four months. Upon proof of the death of the slave, within the four months, or upon proof that Bogan retained the possession, and afterwards sold the slave to a third person, the plaintiffs could recover from him the amount specified as his purchase money, but the instrument does not, on its face, import an indebtedness from the defendant to the plaintiffs. The legal intendment is, that the possession, and the title of the slave, passed to them, subject to be divested by the re-payment of the purchase money, within the time limited. The Court therefore erred

in the first charge to the jury, and this error is not relieved by the fact, that the Court charged correctly upon the parol proof in the cause, as it is impossible for this Court to say, upon what the jury decided.

There can be no doubt that the action of assumpsit was proper; the plaintiffs have the right to waive the *tort*, and sue for money had and received to their use.

It is equally clear, that having become re-possessed of the paper they had transferred, they could strike out the assignment. For the error of the Court in the first charge, the judgment must be reversed, and the cause remanded.

MOONEY, USE, &c. v. IVEY.

1. After a cause commenced before a justice of the peace has been removed by appeal or *certiorari* to a higher Court, the parties cannot be changed, unless death or some other cause has supervened.
2. Although the amount in controversy is less than fifty dollars, and the suit was commenced before a justice of the peace, yet the plaintiff who sues for the use of another, cannot recover for work and labor done for the beneficial plaintiff, unless he stood in such a relation that the right to compensation inured to him.

Writ of Error to the County Court of Montgomery.

This was a suit instituted before a justice of the peace. The warrant was at the suit of Egbert Mooney for the use of John Mooney, and the defendant failing to appear a judgment was rendered against him for $27 50, besides costs. Upon the petition of the defendant the cause was removed to the County Court by *certiorari*. Thereupon a statement of the demand was filed in the name of "John Mooney, by his next friend, Egbert Mooney;" but the defendant refused to plead to the same, and moved the Court to set it aside and cause the plaintiff to file another, corresponding as it respected the parties, with the warrant. The

motion was granted, and thereupon the plaintiff excepted. Another statement being accordingly made, and an issue thereon submitted to a jury, the plaintiff offered to prove that the defendant was indebted to John Mooney for work and labor done, but the Court would not permit such evidence to go to the jury under the pleadings, and thereupon the plaintiff excepted. A verdict was returned for the defendant, and judgment rendered accordingly.

J. E. Belser, for the plaintiff in error.
J. A. Elmore, for the defendant.

COLLIER, C. J.—Taylor v. Acre, at this term, in conformity with previous decisions, determines that in suits commenced before justices of the peace, the appellate Court will not permit the parties to be changed, unless death or some other cause has supervened, which makes such change necessary. Here it is conceded that both the nominal and beneficial plaintiff are living, and it is not pretended that their interests have been affected by any thing occurring since the warrant issued.

If work and labor were done by the party for whose use the suit was brought, the nominal plaintiff could not recover the price of it, unless he stood in such a relation that the right to compensation inured to him. The record does not show any thing from which such an inference can be deduced, and there can be no such legal intendment. The evidence then was properly excluded, and the judgment is consequently affirmed.

GRAVES v. COOPER.

1. It is irregular to permit the defendant whose debtor is summoned as a garnishee, to contest the garnishee's answer, unless it is done at the term when the answer is filed, or unless an order is then made for that purpose.
2. The proper course of practice in such cases is, for the defendant to deny

the correctness of the answer by oath, and to file a suggestion of the nature of the garnishee's indebtedness, as in a declaration, to which the garnishee may plead. The judgment, if against the garnishee, is one of condemnation to pay the plaintiff's demand.

Writ of Error to the Circuit Court of Dallas.

This proceeding is by Cooper, as a judgment creditor of the Selma and Tennessee Rail Road Company by garnishee process against Graves as a debtor stockholder of the same. The garnishment was issued 14th February, 1842, returnable to the spring term of that year. Upon the return of the process, Graves appeared and filed his answer in writing, in which he sets out at length the proceedings preparatory to the organization of the Company, his subscription for a hundred shares of the stock, under the belief and impression produced by the commissioners, that he would be permitted to relinquish it by forfeiting what he should pay thereon. Afterwards he relinquished one half of his stock, and reduced it from 100 to 50 shares. He admits the directors have called for instalments, amounting in all to 17½ per cent. of which he has paid 10 per cent. but refused to pay the remainder, offering to relinquish his stock. If, under the circumstances stated, he is indebted to the company any thing, then he admits a debt of $375, that being 7½ per cent. on 50 shares.

No further proceedings on Graves' answer were taken at the spring term, 1842; but at the fall term, 1843, as the judgment entry recites, the parties came by their attornies, and the said Graves having at a former term of this Court filed his answer, to wit: on the 14th day of May, 1842, by consent of the plaintiff; which answer is ordered to be filed with the records of the Court and the same taken as a part of the entry on the minutes. And thereupon came the said Selma and Tennessee Rail Road Company, and suggest that the said garnishee is indebted to said Company as a stockholder therein, for the calls mentioned in his answer and at this time in a greater amount, to wit: the sum of $1,687 45, than he is willing to admit on oath, prays the Court that it may be allowed to show the same by competent testimony, which being granted by the Court, the garnishee declines to make any plea in reply to said suggestion; and thereupon came a jury, to wit: &c., who being duly elected, tried and sworn to

inquire of the true indebtednes of the said garnishee aforesaid, upon their oath do say, &c. returning an assessment of $1,687 45, for which judgment was given by the Court.

At the trial, it was in evidence that David Cooper, the deceased partner of the plaintiff was present at the meeting of the board of directors of the Rail Road Company, when the board passed a certain resolution referred to in the answer of the garnishee, whereby the subscribers to the capital stock were allowed the privilege of relinquishing one half of their said stock; there was no evidence tending to show that the garnishee had, or had not, relinquished his stock, as was asserted in his answer. The defendant asked the Court to charge the jury, that if, from the evidence, they believed the deceased partner of the plaintiff was present at the meeting of the board which passed the resolution of relinquishment, and sanctioned the same, they should find the defendant to be no farther indebted than was admitted by his answer. This was refused. The Court charged the jury that said resolution of relinquishment was not binding either upon the plaintiff or upon the Rail Road Company. To the charge and refusal to charge the defendant excepted.

He now assigns as error, that the Court erred—

1. In refusing the charge asked.

2. In the charge given.

3. In permitting the Rail Road Company to contest his answer at the term after it was made.

4. In rendering judgment for the calls due on the whole stock subscribed, when the defendant was liable only for one half.

Elmore, for the plaintiff in error, insisted—

1. That it was competent for the Company to relieve the defendant, by resolution, from the contract for 100 shares, and to reduce it to 50. [Charter, §§ 1, 5, 6, 15 and 17, Acts 1836, p. 37; Selma and T. Rail Road Co. v. Tipton, 5 Ala. Rep. 808.]

2. The answer of the garnishee was made at the spring term, 1842, but not contested until the fall term, 1843. It is true a judgment may be rendered upon an answer of a garnishee after an irregular continuance over without notice, but that is considered as a judgment *nunc pro tunc* pronounced on the facts as ascertained; but here there was no authority to contest the answer when it was contested. The failure to contest the answer

at the term when made, is not a waiver of the right, for the statute contemplates a denial at the term when the answer is made. [Dig. 60, §§ 24, 25.]

3. The defendant did not waive any right acquired by the neglect to contest the answer, on the contrary he refused to answer to the suggestion of the Company, or plead to it in any manner. The mere employment of, or appearance by, an attorney, when forced to proceed, cannot affect the defendant. [Sheppard v. Buford, 7 Ala. Rep. 90.]

EDWARDS, for the defendants in error, made the following points:

1. The charge asked for may be considered as entirely abstract, for there is no evidence shown to warrant it.

2. The directors of a stock company have no authority to reduce the capital stock, or exempt the subscribers from liability for calls. [Angel & Ames on Corp. 243, 239, 476, 478; Digest, 260, §§ 8, 9; 6 Ala. Rep. 741.]

3. The Court properly allowed the Company to contest the answer of the garnishee. [Dig. 60, § 24; 6 Ala. Rep. 705]

GOLDTHWAITE, J.—1. A preliminary question is raised in this case, whether the Court could allow the defendant in execution to contest the indebtedness of the garnishee, to a greater amount than admitted by his answer at a term subsequent to that when the answer was received and filed. At first view, we were inclined to suppose this point must be considered as waived, from the circumstance that the garnishee appeared by attorney; but we conclude this appearance must be referred to the matter which he was bound to appear to, and not to an irregular proceeding, in which he refused to join. It was held in Robinson v. Starr, (3 Stew. 90,) that a garnishee was not necessarily discharged by the omission to take a judgment *ni. si.* at the return term, no judgment having then been rendered against the defendant in attachment. And in Gaines v. Beirne, (3 Ala. Rep. 114,) a judgment against a garnishee at a subsequent term, was sustained upon his answer made and filed at a former term. In Leigh v. Smith, [5 Ib. 583,] a judgment entered *nunc pro tunc* against the garnishee, several terms after his answer, was held to be regular. These decisions fully establish, that whenever a garnishee submits to answer, or when the suit is not terminated by

a judgment against the defendant in attachment, the garnishee continues before the Court for the purpose of receiving the judgment upon his answer. But this we conceive is materially different from considering him as before the Court for the purpose of contesting his answer, whether that is done by the plaintiff or the defendant in the attachment.

In the present case the garnishee appeared, and with the consent of the plaintiff in the proceedings, filed his answer in writing, at the Spring term, 1842, and no order was then taken for the allowance of further time to contest it, either on the part of the creditor or of the debtor. At the Fall term, 1843, the debtor corporation was allowed to suggest that the garnishee was indebted to it in a larger sum than he was willing to admit on oath, and it was prayed they might be permitted to show the same by competent testimony. The garnishee declined to make any plea or reply, and no inference can be drawn that he assented to this proceeding, from the fact that he was represented by counsel before the Court; because he was there for the purpose, if necessary, of receiving a judgment on his answer.

For this reason we consider the judgment entirely erroneous, and decline to enter upon the consideration of the more important questions which grew out of the charge of the Court.

2. As the practice is quite unsettled on the peculiar statute under which this proceeding was attempted, it is proper to state how it should be. The difficulty of giving the proper effect to this statute was felt in Cameron v. Stollenwerck, [6 Ala. Rep. 704.] but we then declined its consideration.

The 24th section of the general attachment law provides, that the defendant may, in all cases, shew, by competent testimony, that a garnishee is indebted to him in a greater amount than he is willing to admit on oath, but there is no mode pointed out by which the cause is to proceed, when the defendant chooses to avail himself of this privilege. We think other parts of the statute furnish analogies which must govern the proceedings in this. Thus, under the 25th section, the same privilege is given to the plaintiff, but he is required to make oath that he believes the answer to be incorrect; and upon making this oath an issue is to be formed and tried as in other cases. [Clay's Dig. § 24, 25.] The 40th section of the same act provides, in the same defective manner, for a contest between the creditor and the transferee of the

debt owed in the first instance to the debtor, when the garnishee assumes that he has been notified of its transfer. And in Goodwin v. Brooks, (6 Ala. Rep. 836,) we considered that it was the business of the plaintiff to proceed against the party, after appearance, by an allegation that the transfer or assignment to him was invalid. This case, and the practice which prevails under other sections of the act, seem to require that the defendant in attachment, when he seeks to controvert the answer, should do it in the same manner as the plaintiff, by filing an oath that he believes the answer to be incorrect. Beyond this, as the mode and manner of the garnishee's indebtedness must be known to his creditor, the suggestion of this indebtedness should be as ample as a declaration in ordinary cases, and would be controverted by plea of the garnishee. The issue, thus formed, is to be tried as in other suits, but the judgment, if for the creditor, will be of condemnation to the plaintiff in the attachment. As to costs, &c. we purposely omit to construe the statute until some case arises upon it.

As there has been no attempt at conformity with what we consider the proper practice, the judgment must be reversed, and the cause remanded, that such judgment may be rendered on the answer of the garnishee as is proper.

Reversed and remanded.

STRANGE, ET AL. v. KEENAN, ET AL.

1. Where land is sold by order of the Orphans' Court, to make more equal distribution among the heirs, and security is not required to be taken for the purchase money, the heirs have an equitable lien upon the land for the purchase money, which may be enforced either against the original purchaser, or against a purchaser from him, with notice of the facts.
2. In such a case, where the administratrix was the purchaser, the heirs may proceed to enforce their *lien* against a second purchaser with notice, and cannot be required to resort in the first instance to the sureties of the administratrix on her official bond, she having paid no part of the purchase money, and being insolvent.

Error to the Chancery Court of Macon.

THE bill is filed by the infant and adult heirs at law, of Welborn D. Westmoreland, and charges that administration was granted of his estate by the Orphans' Court of Macon to one Seaborn J. Westmoreland, who now resides in parts unknown, and to Elizabeth Westmoreland, who has since intermarried with one Patrick Cousins. That the intestate died possessed of certain real estate, and that on the 1st Monday in March, 1841, the Orphans' Court of Macon county, upon the petition of the said Elizabeth, as administratrix, and in order to make an equal and fair division amongst the heirs of the intestate, directed the said real estate to be sold at public auction, and appointed commissioners to carry the order into effect, by a sale of the lands. That the commissioners exposed the land to sale on the 3d July, of the same year, on a credit until the 1st January after, when the lands were sold to the administratrix, who was the highest and best bidder for the sum of six thousand dollars. That the commissioners received from her, her individual note for the purchase money, without personal, or other security, and reported their action on the subject to the Orphans' Court, by which it was confirmed on the 3d day of August succeeding, and they directed to make title to the administratrix to the land, which was accordingly done, by their deed, bearing date 3d July, 1841.

The bill further charges, that the note for six thousand dollars is still due, and unpaid, and that the administratrix and her husband are both insolvent. The bill further charges, that on the 27th January, 1842, Cousins and his wife, by their deed of that date, conveyed to the defendant, Keenan, the land so purchased, for the consideration, as expressed in the deed, of seven thousand dollars, but that the true consideration was a debt due from the said Elizabeth to the said Keenan, and that at the time of his pretended purchase, and execution of the deed, he knew that the purchase money was due and unpaid.

The prayer of the bill is, that the equitable lien of the heirs at law for the purchase money unpaid, be enforced. Cousins and wife, and Keenan were made defendants, but omitted to answer the bill, and a decree *pro confesso* was taken against them. The proof fully establishes the allegations of the bill. Upon the hear-

ing, the Chancellor dismissed the bill for want of equity, from which this writ is prosecuted, and which is the error now assigned.

WILLIAMS, MCLESTER and DOUGHERTY, for plaintiffs in error, cited 2 Story's Eq. 462, 469; 15 Vesey, 328.

HAYNE, contra.

ORMOND, J.—The general principle is undoubted, that a vendor of land, who does not take security for the purchase money, has a lien upon the land itself for its payment, which may be enforced either against the vendee, or a purchaser from him with notice, unless it can be inferred from the circumstances of the case, that credit was given exclusively to the person, and the land was not relied on as a fund to reimburse the vendor. In Macreth v. Simmons, 15 Vesey, 329, Lord Eldon held, that even where security was given, it "depended upon upon the circumstances of each case, whether the Court was to infer that the *lien* was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken."

This question was fully considered by this Court, in Foster v. The Athenæum, 3 Ala. Rep. 302, and there held, that the vendor of land has a *lien* in equity, for the unpaid purchase money, where he has not taken personal security for its payment, or a distinct collateral security, as a pledge or mortgage. In this case no security whatever was taken for the payment of the purchase money, and the defendant, Keenan, the second vendee, purchased with full knowledge of the fact. The only question therefore in the cause is, whether the rule applies to sales made by order of the Orphans' Court.

By our statute law, the Judge of the Orphans' Cour, upon the petition of the administrator, and for the causes assigned in the statute, may order a sale of the land of a deceased person, and is invested with a discretion to direct the land to be sold, either "for money, or on credit, as may be most just and equitable." The object of the sale in this instance, being to make more equal distribution amongst the heirs, the Court directed the sale to be made on a credit, and did not require security to be taken for

the payment of the purchase money. We can perceive no reason why sales of this description should not be subject to the law applicable to all sales of real estate. If the Judge of the Orphans' Court, acting for the heirs, thinks proper to order a sale on credit, and does not require security to be given for the purchase money, the land must be considered as the primary fund for its payment.

It was contended, that the statute contemplated that in these judicial sales by the Orphans' Court, the title should pass to the purchaser, untramelled by this implied *lien*. It is difficult to suppose, that in sales of this description, made without the consent of those interested, and in which infants are generally concerned, a right is taken away which is secured to adults acting for themselves; such a construction of the law would be most unreasonable. The only security which the Judge of the Orphans' Court is required to take in such cases, is, a bond from the administrator, with security for the faithful application of the money when collected, which it is obvious, would afford no security whatever, if the money could not be collected from the purchaser of the land. The same remark applies to the sureties of the administrator in his official bond; they do not become responsible until the money comes to the hands of the administrator, or is lost by his negligence, and therefore could not have been contemplated as a security for the payment of the purchase money.

It is further urged, that as the administratrix became herself the purchaser, in legal estimation the money is in her hands, subject to distribution, as was held by this Court in Childress v. Childress, [3 Ala. 752.] It is doubtless true, that the heirs might, if they thought proper, elect to consider the money as in her hands, as she cannot sue herself; but it is equally clear, they cannot be compelled to make such election, when, as in this case, the administratrix has not paid any part of the purchase money, and being insolvent, cannot be compelled to pay it. If the land had been retained by the administratrix, it can admit of no doubt, that the heirs by a decree in chancery, could have sold it for the payment of the purchase money, and the defendant, Keenan, having purchased with notice of all the facts, can be in no better condition; he is charged with notice of this trust, and took the title subject to it.

The concession that the heirs might elect to consider the purchase money paid, and after a decree in the Orphans' Court against the administratrix, proceed against the sureties on her official bond, cannot avail the defendant, Keenan. He cannot insist, they should forego the enforcement of a clear right against him, because they have another means of reimbursement, from another source. For aught this Court can know, that would prove unavailing, as the sureties to the official bond of the administratrix may not be able to respond. In every aspect in which we have been able to consider this case, we think that the heirs have a *lien* for the purchase money unpaid, upon the land in the hands of Keenan, he having purchased with notice that it was unpaid; it is therefore unnecessary to consider, whether he was a *bona fide* purchaser or not.

The defendants declined answering the bill, and the cause was heard on the bill, decree *pro confesso*, and proof. The cause was therefore ripe for a hearing, and we can perceive no reason whatever for remanding it, but must proceed to render such decree on the merits, as the Court below should have rendered. Let the decree of the Chancellor dismissing the bill be reversed, and a decree be here rendered, declaring, that the heirs have a *lien* on the land for the purchase money unpaid, and that the cause be remanded for a reference to the Master, to ascertain the amount of the purchase money still due.

STRAWBRIDGE v. SPANN.

1. Where a witness upon a preliminary examination disavows all interest in the result of the cause, and the facts disclosed by him are consistent with such disavowal, it is the duty of the Court to permit his testimony to go to the jury.
2. It is competent to inquire whether an account against a party was not

charged to him by his directions, and whether it is correct, and it is allowable for the witness to answer that it was copied from the defendant's books, and believed to be correct.

3. Where a witness testifies as to work and labor done, and money received, for which the plaintiff is seeking to recover, it is competent to inquire whether other work had been done, or money received. Such a question, though it directs the attention of the witness that he may state the facts fully, cannot be said to be *leading*.
4. Where evidence is admitted which is merely unnecessary, but cannot prejudice the opposite party, or mislead the jury, it furnishes no cause for the reversal of the judgment.
5. Where the acts of the agent bind the principal, his representations and declarations respecting the subject matter, will also bind him, if made at the same time, and constitute part of the *res gestæ*; but *Quere?* Is it competent to establish the fact of agency by the declarations of the supposed agent.
6. Where a witness denied that in a certain transaction which was drawn in question, he acted as the plaintiff's agent, it was held competent to prove, in order to impair the effect of his testimony, that he had made contradictory statements upon other occasions.
7. Where a party is permitted to give incompetent testimony to support an account, and afterwards becoming satisfied that the evidence is insufficient or inadmissible, withdraws the account, the error in admitting the assistant proof is cured.

Writ of Error to the County Court of Dallas.

THIS was an action of *assumpsit* at the suit of the defendant in error, for goods wares and merchandize, sold and delivered, and upon an account stated, &c. The cause was tried upon issues on the pleas of *non-assumpsit*, set off, payment, and fraud; a verdict was returned for the plaintiff and judgment rendered accordingly. On the trial the defendant excepted to the ruling of the Court. It is shown by the bill of exceptions that the plaintiff offered to read to the jury the deposition of Jesse Israel, that the defendant objected to its admission on the ground of the witnesses interest, and being overruled in this, he then objected to several of the interrogatories and answers thereto; all of which objections were overruled. The witness testified that he hauled with the plaintiff's team for the defendant, and that defendant received money from other persons for hauling done with the same team by the witness. After declaring that he had no interest in

the event of the suit, the witness stated that he worked for the plaintiff, without any special contract at the time he entered into an agreement with the defendant.

Witness stated that he acted as the plaintiff's agent in driving his team, and was then asked whether an account produced was not made up of items charged to the defendant by his directions, and if so, whether it was not correct; to which he answered that the account, or the greater part of it, was taken from the defendant's books, and he believed the charges were correct. He further answered, that the team in his possession belonging to the plaintiff had hauled for several persons on the defendant's account, was permitted to answer for whom it next hauled, and what additional hauling was done by it: *Further*, he was permitted to state whether any money, and how much more of the earnings of the plaintiff's wagon were paid to the defendant beyond what the witness had previously mentioned. The facts stated in this paragraph, and the questions which elicited them, were objected to by the defendant.

Being cross-examined, the witness stated that he bought of the defendant a wagon and team at an agreed price of six hundred dollars, and afterwards sold him the same team and another wagon for four hundred dollars, leaving two hundred dollars due to him. Witness "traded for the wagon for the plaintiff," without being authorized by him to do so. He had a general authority to trade for the plaintiff as far as was necessary to keep up his wagon and team; but stated that it was not necessary to purchase the wagon of the defendant "in order to keep up the team of the plaintiff."

Witness said Spann was not pleased with his purchase of the wagon when it was carried to his house, but some time afterwards claimed it, and has it in possession.

Upon the re-examination the witness was asked who drove "the wagon" he obtained from the defendant, and answered that the negro boy he hired of the defendant drove it the first trip, and that Mr. Newsom drove it afterwards. This question and answer were both objected to. Witness stated that the plaintiff's wagon was "a tolerably good one," when he took it from his, the plaintiff's house, but did not wear well, and broke down some three or four weeks afterwards, though previous to the purchase of the defendant. *Further*, he bought the wagon and team on

his own account, and in his own right, and was to pay for them when he earned the money by their employment. Witness told the defendant that he did not wish any of the money of the plaintiff to be applied to pay him, as he expected the latter wanted all the earnings of his own team.

The plaintiff had no interest in the earnings of the wagon and team which the witness purchased of the defendant, while the defendant drove the team. Witness's object in retaining the wagon he purchased of the defendant, when he sold the latter the team, was, that he might have a better one than the plaintiff furnished. The sale of the team, and plaintiff's wagon was made on the witness's responsibility, and upon his own account, to enable him to extinguish the greater part of the debt he had contracted with the defendant, and which he could not otherwise pay. He was bound to replace the wagon which he received of the plaintiff, and gave him in lieu thereof the one he purchased of the defendant. If any thing was due to the defendant for the wagon, witness owed it.

The defendant then introduced a witness, and asked him if he was present when Israel made the purchase of the wagon and team of the defendant, and the re-sale of the team and another wagon to the defendant, and whether Israel then represented himself as purchasing and selling upon his own account, or for the plaintiff. But the Court decided that the declarations made by Israel as to who was the purchaser, or on whose account the wagon was purchased, were inadmissible; and consequently refused to permit the witness to answer the question.

In the course of the examination of the plaintiff's witness, he was asked whether an account produced, and made out under his direction and inspection, was not correct; to which he answered that he could not say, but stated it was drawn off under his inspection. Thereupon the plaintiff proposed to withdraw it, leave was granted for that purpose; and thereupon defendant excepted.

R. L. Downman, for the plaintiff in error.—The account, to the correctness of which the plaintiff's witness testified, was not in the witness' hand-writing, and he should not have been allowed to refresh his memory by inspecting it; and though this account was afterwards withdrawn, the error was not thereby repaired.

[2 Phil. Ev. C & H's Notes, 757; 3 Id. 1239.] Besides this, the witness was incompetent from interest, because he was interested in the result of the suit.

The declarations of Israel, conceding that he was only the plaintiff's agent, were competent evidence to charge his principal. [1 Phil. Ev. 100, 101.]

C. G. Edwards, for the defendant in error.—The question is, whether the two hundred dollars which are due the defendant upon the sale and purchase of a wagon and team, is a debt chargeable upon the plaintiff, so as to make it a set-off in this action. The evidence shows that Israel made the several contracts with the defendant out of which the indebtedness arose, and that he alone is personally responsible. Witness denied that he acted in the business as the plaintiff's agent; without evidence tending to show such a connection, the declarations of Israel were properly excluded. These declarations standing alone and unassisted, proved nothing material—indeed, they were irrelevant. [1 Ala. Rep. N. S. 160.]

There is no just pretence for saying that Israel had an interest in the result of the cause, and that therefore his deposition should have been rejected. The witness denied it repeatedly, and the facts disclosed by him show that his denial is consistent with truth.

COLLIER, C. J.—The witness, both upon the preliminary examination, and throughout his entire deposition, disavowed all interest in the result of the suit; the facts disclosed by him do not contradict his disavowal; consequently, the decision of the Court, in favor of his competency, we think was correct.

It was clearly competent to inquire whether an account shown to the witness was not charged to the defendant by the directions of the latter, and if so, whether it was not correct. He may from memory, without reference to any written memoranda, have been prepared to vouch its correctness; and even have stated each distinct item without looking into the account. His answer was equally unexceptionable, viz: that the account was copied from the defendant's books, and that he believed it to be correct. The fact that the charges were made in the defendant's book of accounts, should be regarded as presumptive evidence of

their justness as against him, and an expression of the witness' belief that this presumption was well founded, even if predicated of the premises, without any knowledge possessed by him, was certainly allowable; it could do no harm, as it was a mere affirmation of what was a legal inference, in the absence of opposing proof.

The additional question proposed, viz: whether any more, and what hauling was done by plaintiff's team, and whether any, and how much more of the earnings of it, were paid to the defendant than the witness had already stated, we think was unobjectionable. The facts sought to be elicited were *prima facie* admissible, and the question cannot be said to be leading. It does not affirm the existence of a fact, but merely directs the attention of the witness, that he may state the truth of the case fully, rather than suggest to him what answer he is desired to make. [Greenl. Ev. 481.]

We are at a loss to conceive how the defendant could be prejudiced by the witness stating who was the teamster. It may have been a fact that could not materially aid the deliberations of the jury upon the matters litigated; but it was at least harmless in the aspect in which the case is presented, and does not furnish a warrant for the reversal of the judgment.

It is laid down generally, that whatever an agent does in the lawful prosecution of the business intrusted to him by his principal, is the act of the latter. And "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject matter, will also bind him, if made at the same time, and constituting part of the *res gestae*." [1 Story on Ag. 124 to 129.] But the admission or declaration of an agent binds only when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestae*, that it is admissible at all. [Greenl. Ev. 125 to 134; 1 Phil. Ev. (ed. of 1839,) 99, 100, and the cases cited by these authors.] The fact of agency, it is said, must be first established, before the declarations of a supposed agent can be received. For this purpose the admissions of the principal are evidence against himself; or the fact may be proved directly by the agent. [2 Phil. Ev. C. & H's Notes, 188, 189.] In Langhorn v. Allnutt, 4 Taunt. Rep. 519, Gibbs, Justice, said, "When it is proved that

A. is agent of B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B.; but it is not admissible as his account of what passes." In Johnson v. Ward, 6 Esp. Rep. 48, which was an action on a policy of insurance, the affidavit of a person, stating that he subscribed the policy on behalf of the defendant, (which affidavit the defendant himself had previously used, on a motion to put off the trial,) was, under the particular circumstances, properly admitted as proof of agency. The defendant having used the affidavit for such purpose, must be considered as having made and adopted its contents. But the single circumstance, that the affidavit purports to have been made by a person as agent, would not be sufficient proof of his being invested with that authority.

In Scott v. Crane, 1 Conn. Rep. 255, the question directly arose whether, and under what circumstances, the acts or declarations of an agent are admissible. The Court said, "it is clear that the doings or concessions of an agent, when acting for the principal, are binding on the principal; but to let in the proof of them, it is necessary that the agency should be first proved. The defendant having offered no proof of the agency, it was proper for the Court to refuse evidence of the acts done by him." To the same effect are Lessee of Plumsted, et al. v. Rudebagh, 1 Yeates' Rep. 502; Lessee of James v. Stookey, et al. 1 Wash. C. C. Rep. 330.

We have been thus particular in stating the law in respect to the admissibility of the declarations of an agent; but as it is unnecessary, we will not conclude ourselves by deciding that the fact of agency cannot be established by the acts or declarations of the agent; that question will be left for future adjudication.

The plaintiff's witness explicitly denied that in purchasing the wagon and team from the defendant, and in the sale made to him he acted as the plaintiff's agent. Now although his acts and declarations might not be admissible to prove the fact of agency, yet they are competent evidence to show that he had made contradictory statements, and thus impair or destroy the effect of his testimony upon this point.

It was certainly allowable for the plaintiff to withdraw the account which he offered, when he ascertained he could not estab-

lish it by satisfactory proof; and the account being withdrawn, the assistant proof was no longer before the jury; this was all we understand he proposed to do. But the refusal of the Court to permit the defendant to prove what the plaintiff's witness said as to his agency, is an error; and for this, the judgment is reversed, and the cause remanded.

REPORTS

OF

CASES ARGUED AND DETERMINED,

JANUARY TERM, 1846.

McGEHEE v. POWELL.

1. Notes made by a trading company, and for which the plaintiff's intestate might have been liable as a partner, are not admissible to the jury under the pleas of non-assumpsit, want of, or failure of consideration.
2. There can, under the statute, be no limited partnership for the purpose of banking, or making insurance, and an association formed in 1838, for the

purpose of issuing bills to circulate as money, was not prohibited by the statute from doing the act. The only consequence resulting from the act is to make all the partners alike responsible.

3. Although the issuance of bills of a less denomination than three dollars was prohibited, at the time when a contract for the loan of the bills of an unchartered association was made, yet the mere fact that bills for less than three dollars were received, does not avoid the contract.
4. When the defendant borrowed bills from an unchartered association, which he endeavored to show originated in a conspiracy to cheat the public by getting its bills in circulation without the means or the intention to redeem them, his request for the Court to instruct the jury, that if he was a party to the conspiracy, by engaging to aid in the circulation of the bills, this would avoid the contract under which the bills were borrowed, will be considered as merely abstract, and therefore properly refused, when there is no evidence before the jury to connect him with the conspiracy.

Writ of error to the Circuit Court of Benton.

Assumpsit by Powell, as the administrator of Isaac Lyon, against McGehee. The declaration contains four counts to the following effect, to wit: the first is against him as the maker of a note for $1,000, dated 19th November, 1838, payable to Lyon or order, four months after date, negotiable and payable at the office of the Wetumpka Trading Company. The only averment in this count is, that the time of payment has passed. The second describes the same as payable in notes of the Wetumpka Trading Company, or State Bank notes, and contains the averment that the defendant failed to pay according to either condition, at the maturity of the note. There is the further averment that the notes of the State Bank, and notes of the Wetumpka Trading Company, to the sum of $1,000 with interest, were worth, at the maturity of the note, $1,026 66, and the count concludes with a *super se assumpsit* for that sum. The third count is unnecessary to be stated, as the plaintiff entered a *nolle proseque* on that previous to the trial. The fourth was demurred to and the demurrer sustained, therefore its statement here is also unnecessary. The fifth is a general one, including all the common counts for $1,026 66, due from the defendant to the plaintiff's intestate.

The defendant demurred to each count severally, and upon his demurrers being overruled to those which are above set out in

substance, then pleaded—1. Non-assumpsit. 2. That he executed a certain note, which he sets out in his plea, and which is the same as that described in the second count of the declaration, and then avers that the note is the only one he ever executed to Lyon in any character whatever. He further avers that this note was executed to Lyon in consideration alone of the notes of a company of individuals, to wit: the said Lyon, Erastus B. Smith, John D. Champlin, who were the general partners of the said company, and Thomas E. Stone, Erastus S. Smith, Edmund Lyon, and Henry Morgan, who were special partners; the said company calling themselves and commonly known as the Wetumpka Trading Company, alias, the Wetumpka Trading Company of the State of Alabama. He further averred, that the notes of said company were negotiated and delivered to him by the said Lyon, as the President of the said Company, with the intention that the same should circulate as money, and the same were then so emitted to the defendant, in the State of Alabama. He further avers, that his note was executed to Lyon as the President of the Company, and not to him in his individual character, nor for his individual benefit. 3. Tender of the full sum in the notes of the Wetumpka Trading Company. 4. The failure of consideration. 5. Want of consideration. 6. Payment into Court of the amount in notes of the Wetumpka Trading Company. The second plea was verified by affidavit, and all the others are pleaded in short, that is, by stating the names only of the pleas. The Court sustained a demurrer to the second plea, and struck out the pleas of tender and payment into Court.

At the trial, on issues formed on the other pleas, the plaintiff produced and read in evidence, the note described in his second count, and showed the value of Alabama Bank notes was two per cent. less than specie, at the maturity of the note of the defendant. He also proved that a small amount of the bills of the Wetumpka Trading Company were passed off in payment for goods at about 10 per cent. higher than the same goods could have been purchased for other money, and this took place between the 1st February and the 1st March, 1839.

The defendant then offered evidence, the substance of which may be thus stated, to wit:

The note of the defendant was made in consideration of $1,000 in bills of the Wetumpka Trading Company, loaned to him by

the plaintiff's intestate, acting for and in behalf of the company, for the purpose, and with the intention on the part of Lyon, to emit the bills for circulation as money, within this State. The company went into operation in September, 1838, and transacted what is usually termed banking business, that is, they loaned their own bills, discounted drafts, purchased cotton and emitted engraved promissory notes or bills for circulation as money. During the months of November and December, 1838, the company redeemed their bills with specie, and then circulated as well as specie for a short time, but sometime about the last of February, or 1st of March, 1839, the bills having ceased to circulate, a committee was appointed to examine the affairs of the company, which committee reported favorably. The report produced no effect, and soon afterwards the company failed, and Smith, the Cashier runaway, who was followed, some three or four weeks afterwards by Lyon, the President, leaving a large amount of the bills of the company in circulation, without any effects of the company to meet them. The tendency of the evidence was to show that the loan to the defendant was made for him to put the bills of the company in circulation in the up country, and other persons were induced to borrow bills to effect the same object. At the time the defendant's note fell due, the notes of the company were valueless.

The company was an unchartered association of individuals, pretending to have formed a limited co-partnership. The articles of partnership, in the form of a certificate signed by the three general partners, was placed on record in the clerk's office of the County Court of Coosa county, and ordered by the Judge to be published in the Wetumpka Argus. The articles recite, that the partnership consists of Isaac Lyon, John D. Champlin, and Erastus B. Smith, as general partners; and Thomas E. Stone, Erastus E. Smith, Edmund Lyon, and Henry Morgan, as special partners; that each of the special partners put in $25,000 to the common stock, and that the general partners had pledged to trustees real estate valued at $100,000, which was to be kept for the purpose of saving harmless the special partners and the public. The general partners, Lyon and Champlin, are described as residents of Wetumpka, Erastus B. Smith as late of New York, Thomas E. Stone of Georgia, Erastus T. Smith of Massachuseets, and the other special partners of New York. The bus-

iness to be conducted under the name of the Wetumpka Trading Company, and it was to be confined strictly to that which was mercantile, and such acts and things as would enable it to carry on the mercantile business, in all its branches and forms. The company was also to buy, improve and sell real estate to a limited extent, but in no instance for speculation. All the debts and transactions of the company, were to be in writing, signed by Lyon as President, and countersigned by Erastus B. Smith. It was not to contract debts by any other kind of promissory notes than those of the denomination of 3, 4, 5, 10, 20, 50, 100, 500, and 1,000 dollars, except at the earnest solicitation of their creditors, it may be of public utility to contract debts and give their notes for less amounts; but not then in any case after the banks of the State shall resume specie payments. The partnership was to commence the 1st September 1838, and end on the 25th of December, 1850. Other stipulations are contained in the articles, but these are all which bear upon the questions raised. On the 29th of August, 1838, the then general partners subscribed an affidavit, made before the Judge of the County Court of Coosa county, in which they swear that the special partners had paid into the common stock the amount contributed by each, and specified in the certificate, (i. e. the articles)

A short time before Lyon absconded he was heard to state, and confess, that the company was a swindling operation, which he then could not help. Neither of the general partners have been back since they ranaway, and the special partners are unknown to the witnesses examined.

It was also in evidence that the present plaintiff had said he had no interest in this suit, nor any title or claim whatever, nor was he aware of any, either in his own right, or as administrator of Lyon in Benton county; that he had directed no such suit, nor was the note sued on ever in his possession. In a subsequent conversation, he reiterated the same statement, but then added that he understood he had been appointed administrator, to enable a person then named to bring suits for his own benefit, or for that of some other person.

The defendant then proved the execution of —— hundred dollars in amount of the notes of the said company, each signed by Lyon as President, and offered each note under the several pleas; the notes so offered in evidence were of all denominations, from

$3 to $50, and were payable to W: W. Mason, or bearer, on demand, at the office of the Wetumpka Trading Company. On motion of the plaintiff, these bills were rejected.

On this evidence, the Court charged the jury, that if the defendant was in Wetumpka at the time the note sued on fell due, and then tendered the full amount, in either Alabama bank notes or in notes of the Wetumpka Trading Company, or if the defendant was prevented by any act of the plaintiff from making such tender, then, in either event, the note was discharged.

The defendant then asked, and the Court refused, the following charges, to wit:

1. That if the jury believe all the evidence to be true, they ought to find for the defendant.

2. If the payee of the note sued on, with others, associated themselves under the name of the Wetumpka Trading Company, and entered into the articles read to the jury, and issued the notes of said company for circulation as money, and kept a banking house, and discounted notes for persons who would borrow the notes of the company, and that Lyon was President of the Company, and that the note sued on was given to him for the notes of the company loaned to the defendant, at the date of the note, and issued to him by Lyon, to be put in circulation as money, then the jury ought to find for the defendant.

3. That if the note sued on was given for the notes of the Wetumpka trading Co. loaned to the defendant by an officer of the company, with the intention on the part of the lender, that said notes should circulate as money, then the jury ought to find for the defendant.

4. That if the note was executed to the President of the company, and that the same was the property of the company, and not the property of Lyon, and if the plaintiff, since the commencement of this suit, had said he had no interest in the same, nor did he know the suit was pending, and if the defendant has just demands against the company, and that the note never was in the hands of the plaintiff, or reported as assets of the estate of Lyon, then the jury ought to find for the defendant.

5. That if the note was executed to the President of the company, and that it was an unchartered banking company, and that the note was given in consideration of notes of the company, which were to be put in circulation as money, in this State, then

the contract is void, and the jury ought to find for the defendant.

6. If Lyon, the plaintiff's intestate, with others, formed an association for the purpose of banking, and issued notes for circulation as money, under the name of the Wetumpka Trading Co., knowing at the time they formed such association, they had not the means to redeem their notes, put in circulation, and designing to defraud the community, by issuing paper for circulation as money, putting it in circulation and then not redeeming it, then that a note given to the company, or to its President, with the intention on the part of the maker, and payee, to promote their circulation as money, such note would be void, and could not be collected in a Court of Law.

The defendant excepted to the charge given by the Court, as well as its refusal to give those requested by him. He now assigns as error—

1. That the Court erred in overruling his demurrers to such counts of the declaration as were held good.

2. In sustaining the demurrer to the second plea.

3. In excluding the notes of the Company as evidence.

4. In the several refusals to charge as requested, and in the charge as given.

T. A. Walker, S. F. Rice, and H. P. Douthitt, for the plaintiff in error, insisted—

1. That the plea overruled presented a sufficient defence to the action, as it was the defendant's right to show the note sued on was the property of a third person, against whom existed a set off. [9 Porter. 309; 8 Ib. 523; 5 Ala. Rep. 135.]

2. If the facts in evidence constituted a defence, it was error to refuse the charge asked in this connection. [6 Ala. Rep. 753.]

3. The association making the contract was a limited partnership, and such are expressly restrained from banking, by the act which warrants them to be formed. [Dig. 389, § 1.] Independent of this, as banking is a franchise, the contract is void under the constitution. All contracts in violation of positive law, are void. [5 Ala. Rep. 257; 7 Paige, 653; 8 Ohio, 286.]

4. The interest in the contract sued on being disclaimed by

the plaintiff on the record, the action could not be maintained. [Moore v. Penn, 5 Ala. Rep. 135.]

5. It is impossible, at this day, to say that the refusal to give the charge last requested is not error. All contracts contrary to public policy are void. [1 Ala. Rep. 34; 6 Ib. 20; Chitty on Con. 519; 2 Stew. 175; 1 P. Wms. 181; 5 John. 327; 17 Mass. 258; 3 Wheat. 204; 2 Burr. 924; 6 Mass. 261; 5 Ib. 386; 3 Hall, 55; 11 Wheat. 58; 11 S. & R. 164; 6 Term, 61.]

6. The notes of the company were admissible, in connection with the other evidence, to show the indebtedness and insolvency of the company. The insolvency of the company would defeat the action, if the note sued on belonged to them at any time. [Clay's Dig. 391, §§ 14, 15, 21, 23.]

A. F. Hopkins, W. P. Chilton, and F. W. Bowdon, contra, argued—

1. That no serious question arises upon the declaration.

2. As to the main question arising on the second plea, and the evidence, the statute regulating limited partnerships, cannot affect this case, because the company here was not organized under that act. The addition of company cannot be used. Not being a limited partnership, all the partners are bound as general partners, and there is no pretence to say that such a firm was not allowed to bank, when banking was not prohibited. [Br. Bank v. Crocheron, 5 Ala. Rep. 256; Nance v. Hemphill, 1 Ala. Rep. 558.]

3. But if the company was a limited partnership, there is nothing in the act which prohibits them to bank; the proviso is the mere exclusion of the grant of such authority to those kinds of partnerships.

4. The notes offered in evidence were *prima facie* irrelevant, there being no plea of tender or set off.

5. The last charge asked for was entirely abstract, as there was no evidence to sustain it.

6. The fourth charge had no issue to sustain it, and therefore was properly refused. [Bryant v. Owen, 1 Por. 201; 9 Porter, 309; 5 Ala. Rep. 135.]

GOLDTHWAITE, J.—1. Before entering upon the consideration of the questions we intend to decide in this case, we think

proper to remark, that no serious objection is stated to the counts of the declaration upon which the cause went to the jury; nor has any particular stress been laid on the exclusion from the jury of the notes of the Trading Company offered in evidence. The only plea on which, if at all, these were admissible, had previously been stricken out, and the indebtedness and insolvency of the company were entirely immaterial facts, in the manner in which the suit was defended.

2. Nor is it material to notice the decision upon the demurrer to the second plea, as the same defence was proper, if available at all, under the general issue, and the proof is more explicit of the facts upon which the defence is supposed to arise. The argument assumed by the defendant is, that at the time of this contract, one of the contracting parties was a limited partnership, and as such, was inhibited from emitting notes for circulation as money. The act of 1837, first authorized the formation of limited partnerships, but at the same time declared that nothing in it should be so construed as to authorize any such partnership for the purpose of banking or making insurance. [Dig. 389, § 1.] When this statute was passed, there was no restrictive act in force to prevent individuals, or associations of individuals, from transacting banking business; and there is nothing in our State constitution which takes away their common law right. [Nance v. Hemphill, 1 Ala. Rep. N. S. 551.] Certainly there is nothing in the terms of the enactment to warrant the inference that the intention of the legislature was to restrict such partnerships only. On the contrary, it seems to have been intended, that as to insurance and banking, no limited partnership should be allowed; but that, in this description of business, all the partners should be responsible, as in cases of other partnerships. We dismiss then, all consideration of the supposed defects in complying with the requisitions of the statute regulating limited partnerships, as our opinion is, that if all had been complied with, no other than a general partnership could exist as to this kind of business. It then comes to no more than this—the association, though formed as a limited partnership, has, by the articles bringing them together, contracted to carry on a business which could then be done by general partners only, and the consequence is, all are liable as such. Beyond this, the decision cited shows, that at the time of

the contract, bills might be lawfully issued for circulation as money, by a general partnership.

This conclusion necessarily sustains the refusal by the Court, of the charges growing out of the supposed construction of the act regulating limited partnerships.

3. It is urged however, that the jury might properly have inferred, the contract was with relation to bills of three dollars; the circulation of which was restrained at the time of the contract. We are not prepared to say that the proof before the jury was such as to warrant this conclusion; certainly, however, it was not one which they were constrained to infer, and in the absence of any specific request for a charge upon this point of the case, there was no error in refusing to instruct the jury, that their verdict ought to be for the defendant. In the case of the Bank at Montgomery v. Crocheron, [5 Ala. Rep. 256,] a similar question was presented, and we then held, that the receipt of bills of this denomination, or less, under a general contract to receive and circulate as money the bills of a corporation, did not render the contract void *per se*, and that the question of intention was proper to be left to the jury. Our final conclusion is in entire accordance with that decision.

4. It remains only to consider whether the last charge should have been given. We do not understand the counsel for the plaintiff as denying the correctness of this proposition, as a matter of law, but as insisting, that applied to the facts of this case, it was merely abstract, as there was no evidence that the defendant entered into the conspiracy of the general partners, if indeed there was any such, to defraud the public. Undoubtedly the proposition is correct, and well sustained by adjudged cases in our Courts, and elsewhere. [Bank v. Crocheron, 5 Ala. Rep. 256; Boyd v. Barclay, 1 Id. 34; McGehee v. Lindsay, 6 Ib., 16, and cases there cited.] But in the present case, we are constrained to say, that the evidence will not sustain the party in his attempt to stultify himself. There is no evidence to connect him with the attempt to defraud the public, even if it was conceded there is sufficient to implicate the partners in the trading company. The merely contracting for the loan of bills with a company, which at the time had credit, and the making arrangements for a loan to another person, is not sufficient to identify the defendant with the conspiracy, if there was one in the first instance.

Indeed, it would seem, if he was aiding and abetting in this object, he was engaged at a very low compensation, or that the confederates dealt with little liberality to each other.

It is useless to speculate, however, upon such points, as our opinion is clear, there is no evidence to connect the defendant with the intention to cheat the public, and therefore the request of his counsel, in this connexion, was properly refused.

We arrive at the conclusion that the judgment of the Circuit Court should be affirmed; and in this we are not aware that injury to the defendant can be the result. If, at the commencement of this suit he was the *bona fide* holder of the bills of the company, it is conceived the recent decision of Lyon v. Moore and Chandler, will indicate his proper remedy; but if he has speculated on the bills, upon his chance of a verdict, he is entitled to no relief here or elsewhere.

Judgment affirmed.

GAREY v. HINES.

1. Where a judgment is obtained in a suit commenced by attachment, the plaintiff may, at his election, take out a *venditioni exponas* for the sale of the property attached, or he may sue out an ordinary *fi. fa.* In the latter case it would be proper for the clerk to endorse on the writ a description of the property attached, and of the persons by whom it was replevied, that the sheriff might demand the property seized by the attachment, and if not delivered, return the bond forfeited. If the property attached is not delivered, or is insufficient to satisfy the judgment, it would be the duty of the sheriff to levy on other property.

Error to the County Court of Sumter.

This was a motion against the plaintiff in error, as sheriff of Sumter, for failing to make the money on an execution of the defendant in error.

The parties having gone to trial on an issue, it appears from the

bill of exceptions found in the record, that the execution which came to the sheriff's hands, was a *fieri facias*, issued upon a judgment obtained in a suit commenced by original attachment, which was levied on a number of slaves, of value more than sufficient to pay the debt, and an endorsement of this fact was made upon the *fi. fa.*, and of the property levied on by the attachment, which had been replevied and returned to the defendant.

That the sheriff proceeded under the execution, to levy on the slaves of the defendant, so replevied, who appeared with his gun, and threatened to shoot the sheriff, if he persisted in taking the negroes. The sheriff abandoned the slaves, and the defendant carried them off the next day. The sheriff returned upon the execution a demand and refusal to deliver the property replevied, and forfeiture of the bond: an execution, issued upon the forfeited bond, was afterwards quashed.

The Court charged the jury, that the execution on its face, was an ordinary *fi. fa.*, and was not controlled, or modified by the endorsement. That it was the duty of the sheriff to have levied on sufficient property, and that a demand of the property mentioned in the endorsement on the execution, and return of forfeiture of the bond, was not a compliance with his duty. That the process was not a *venditioni exponas*, and that the endorsement of the clerk was improper; that therefore the action of the sheriff in conformity with it was improper.

The defendant requested the Court to charge, that in this case the sheriff had no power to levy; that it was his duty to demand the property mentioned in the clerk's indorsement; and on failure to deliver it, to make the return he did. That if he did seize the property under the process in his hands, he was justified in delivering it on the demand of the defendant in execution. That the sheriff had no power to levy, or take any other property than that mentioned in the endorsement.

Also to charge, that the clerk had no power to issue an execution against the defendant's land and goods generally. Further, that if the sheriff rightly made the levy, and believed his life in jeopardy, under the threat made, he was excusable in relinquishing the levy.

The Court left it to the jury to say whether the sheriff's life was in jeopardy, and refused the other charges moved for. To

the charge given, and to those refused, the defendant excepted, and now assigns as error.

R. H. Smith, for plaintiff in error.—The *lien* of the plaintiff continued, notwithstanding the execution of the replevy bond, and that levy being sufficient, no other can be made until it is exhausted. [Clay's Dig. 61, § 33, 35; 1 Ala. 678; 7th Id. 138.] The sheriff is not bound to risk his life, and of that he is the proper judge.

Hair, contra, cited 9th Porter, 70, 405; Clay's Dig. 205, § 18, 21; 203, § 9.

ORMOND, J.—The attachment law of 1837, [Clay's Dig. 61, § 33,] evidently contemplated, that the property levied on should continue in specie for the satisfaction of the judgment when obtained, but it does not follow, that the plaintiff in attachment can not resort to other property of the defendant for the satisfaction of the judgment. That an ordinary *fi. fa.* may be issued in such a case, is expressly provided by statute; [Clay's Dig. 62, § 35,]—"that where judgment shall be rendered, execution may be issued in the usual way, which shall be first levied on the property attached, if to be had, and then upon any other property of the defendant." This section, it is true, relates to ancillary attachments sued out after the commencement of the action; but it is evident, that such attachments are, in all respects, upon the same footing, with a suit commenced in the first instance by attachment.

The plaintiff in attachment may therefore, at his election, sue out a *venditioni exponas* for the sale of the property attached, or he may take out an ordinary *fi. fa.*, which may be levied on the property originally seized, or on any other effects of the defendant. If the latter mode is resorted to, it is certainly proper that the clerk should endorse upon the writ, a description of the property attached, and of those by whom it was replevied, that the sheriff may make demand of the property, and if not delivered, return the replevy bond forfeited. This endorsement, however, does not change the character of the writ, or deprive the sheriff of the power of levying on any other property of the defendant. If the property attached is not delivered up on demand, or is in-

sufficient to satisfy the judgment, it would be his duty to levy on other property, if to be had.

No question arises upon the fact, that the sheriff delivered up to the defendant the property he had levied on, upon a threat of personal violence, as the Court left it to the jury to say, whether the life of the sheriff was in jeopardy, in accordance with the charge moved for upon that point.

Let the judgment be affirmed.

MEAD, USE, &c. BROOKS.

1. When a note has been paid and delivered up, it will not be presumed that the maker afterwards retains it in his possession; consequently parol evidence is admissible to prove a payment when it becomes a material inquiry, without calling upon the party to whom the writing was delivered to produce it.

Writ of Error to the Circuit Court of Blount.

This was a suit commenced before a justice of the peace, by the plaintiff in error, to recover of the defendant the sum of $20, upon a promise in writing. The cause was removed by appeal to the Circuit Court, where it was tried by a jury upon the plea of *non-assumpsit*, a verdict was returned for the defendant and judgment rendered accordingly.

From a bill of exceptions sealed at the instance of the plaintiff, it appears that he gave in evidence a writing of the following tenor, viz: "Col. Mead. Dear Sir: I will pay twenty dollars for Mr. Decker, on to-morrow week. I have no other money but Georgia money, and Mr. Hale says you wont take that. I have a draft on Decatur, which I shall send for next week, and immediately will bring it to you. Your compliance will much oblige, yours, respectfully, J. S. Brooks. 18th Feb'y, 1841." Here the plaintiff rested his case. The defendant then introduced a witness, who testified that subsequent to the 18th February, 1841,

the plaintiff gave to the defendant a note for fifty dollars; witness was not present when the note was given, but knew its date, from the fact that it had been in his possession, and he observed its date. Witness stated that he gave up the note to the plaintiff when he paid it off. No notice had been given to the plaintiff to produce the note; thereupon his counsel moved that the evidence in respect to it, might be excluded from the jury; which motion was overruled, and the testimony admitted.

C. E. B. Strode, for the plaintiff in error, insisted, that to authorize the admission of secondary evidence of the contents of a writing, the loss of the writing should be shown, or if in the possession of the opposite party, due notice should have been given to produce it. [He cited 1 Johns. Rep. 339; 13 Id. 90; 3 Day Rep. 283; 8 Pick. Rep. 552; 1 Binn. Rep. 273; 6 Sergt. & R. Rep. 154: 7 Ala. Rep. 698; 3 Yeates' Rep. 271, 3 Phil. Ev. C. & H.'s notes, 1182.

W. S. Mudd, for the defendant.

COLLIER, C. J.—The object of the evidence adduced by the defendant, though not explicitly stated by the bill of exceptions, was doubtless to lay a predicate for the presumption that the cause of action set up by the plaintiff had been fully discharged. This inference it is supposed was fairly deducible from the fact, that subsequent to the defendant's assumption, the plaintiff made his note to him for a larger amount, and afterwards discharged that note *in toto*, without claiming a deduction for, or saying any thing about the indebtedness of the defendant. It is clear that such a state of facts was not irrelevant to the issue, and certainly were well worthy of consideration by the jury in determining whether the liability of the defendant was still subsisting.

It is then material to inquire whether the testimony objected to was rightly received. There can be no question but the general rule in regard to the admission of parol proof of facts which are evidenced by writing, is quite as stringent as has been insisted for by the plaintiff. But does not the case at bar form an exception to the rule? Can the presumption be indulged after a note or other evidence of debt has been discharged and delivered to the debtor, that he still retains it in his possession? We have upon

several occasions intimated otherwise, and still think that in such case parol evidence is admissible to prove a payment, without calling upon the party to whom the writing was delivered, to produce it. [P. & M. Bank of Mobile v. Borland, 5 Ala. Rep. 531; P. & M. Bank of Mobile v. Willis & Co. Id. 770; See also, Berthoud v. Barboroux, 4 Louis. Rep. N. S. 543.]

It results from what has been said, that the law was rightly ruled by the Circuit Court. Its judgment is consequently affirmed.

WILSON v. AULD.

1. Where a judgment is obtained against one as the executor of an estate after the resignation of the trust, the judgment has no effect upon a succeeding administrator, and therefore an execution may lawfully issue to the sheriff, although he is the succeeding representative of the same estate.

Writ of Error to the County Court of Mobile.

Motion by Auld to quash a writ of *fi. fa.* issued against him as the executor of one Viner, at the suit of Wilson. The writ issued on the 15th April, 1842, and commanded the sheriff to make a sum therein specified, out of the goods of Viner, in the hands of Auld to be administered. The reason assigned to quash it is, that the writ improperly issued to the sheriff.

At the hearing of the motion, it was shown that Wilson recovered judgment against Auld, as the executor of Viner, for one thousand seven hundred and nine dollars and eleven cents, at the February term of the County Court. The judgment is entered to be levied *de bonis testatoris.* The *fi. fa.* was delivered to the sheriff of Mobile county, that office then being filled by George Huggins, who on the 10th June of the same year, returned the *fi. fa.* "no property."

From the record of the original suit, it appears the defendant pleaded *puis darrein continuance,* that he had resigned his office

as executor; and paid over the assets of the estate then in his hands, to his successor, George Huggins, administrator *de bonis non*, and the judgment is entered upon a verdict of a jury. Afterwards, a motion was submitted to correct this entry, so as to show that the plea above stated, was overruled on demurrer, and was not submitted to the jury. This motion seems to have been overruled for some cause, independent of the affidavits, inasmuch as they establish the fact assumed by the motion. After the return of the *fi. fa.*, the subject of this motion, another was issued, executed to the coroner, though directed generally, to any sheriff, upon which one hundred and twenty-one dollars was returned as made.

It was also shewn that Auld resigned the office of executor on the 8th December, 1841. On the 17th of the same month, the sheriff, George Huggins, was appointed administrator, *de bonis non* of the same estate. Auld made a final settlement with the County Court, on the 10th January, 1842, when that Court made an order for him to pay over the balance ascertained to be in his hands, to Huggins, his successor, and also to turn over such assets as remained in specie. Auld produced the receipt of Huggins, dated the 13th January, 1842, showing the payment of the sum ascertained to be due, and the delivery to him of the assets of the estate. Huggins continued as administrator *de bonis non*, from the time of his appointment, until the hearing of the motion. On this state of facts, the Court quashed the execution, on the ground that it was improperly issued against Auld, he having resigned previous to the rendition of the judgment, and also, because Huggins was the administrator *de bonis non*, when the *fi. fa.* was issued and returned.

This is now assigned as error.

J. A. Campbell, for the plaintiff in error, insisted,

1. That the execution was properly issued, the record containing no evidence of any change in the parties, or the resignation of Auld. The matter of the motion was attempted by plea, but was pronounced insufficient. [6 Bacon's Ab. 165, S. M. Dalton, Sh'ff, 96.]

2. The sheriff, Huggins, had no interest in the execution, and his predecessor's conduct was not a subject of inquiry for him. Chamberlain v. Bates, 2 Porter, 550.]

3. If the defendant wished to change the direction of the writ, he should have suggested the change of parties on the roll. [Dalton, Sh'ff, 97.]

4. The motion is made three years after the return, and the Court will not quash it for the reason of delay. [1 Metc. 514; Sewell on Shff. 88; 3 S. & P. 345; 9 Porter, 275; 5 Stew. & P. 402.]

K. B. Sewell, contra, contended,

1. That whenever a sheriff is incompetent to act as such in a particular case, an execution issued to him is irregular, and will be set aside on motion, [Clay's Dig. 159, § 2; Pope v. Stout, 1 Stew. 375; Bing. on Ex. 222; Williams v. Gregg, 7 Taunt. 233.] And the matter from which the incompetency arises, may be shown by the record or by affidavit. [Wistor v. Carlton, 1 Black. Rep. 506.]

2. Huggins was incompetent to act as sheriff in this case.

1. Because he was the sole representative of the estate. Auld by his resignation, ceased to represent the estate, as completely, as if he had been removed. [Clay's Dig. 222, § 9; Elliott v. Eslava, 3 Ala. Rep. 570; Harbin v. Levi, 6 Ib. 403; Taylor v. Savage, 1 Howard, 286.]

2. Huggins was a privy in estate, and a privy in estate is a privy in interest. [Dale v. Roosevelt, 8 Cowen, 339; King v. Griffin, 6 Ala. Rep. 387; Greenl. on Ev. 221.]

3. Huggins was entitled to all the assets and effects of the estate not duly administered or applied. [Clay's Dig. 222, § 9; Harbin v. Levi, 6 Ala. Rep. 403; Turner v. Davies, 2 Saund. 155; King v. Griffin, 6 Ala. Rep. 387; Jewett v. Jewett, 5 Mass. Rep. 275.]

4. Huggins, in truth, was a party to the record, as appears by the plea, and is conceded to be so, by issuing the alias execution to the coroner.

5. It was unnecessary for Auld to plead his resignation. He was discharged by operation of law, of which the plaintiff had notice, through the proceedings in the Orphans' Court. [King v. Griffin, 6 Ala. Rep. 357; Greenl. on Ev. 586, § 550.] It was incumbent on the plaintiff, if he wished to prosecute his suit, to suggest the resignation of Auld. [Clay's Dig. 227.] And if Huggins, the successor in representation, was not made a party in the

case after the resignation of Auld, then all subsequent proceedings are wholly void. [Taylor v. Savage, 1 Howard, 286.]

3. It is not the policy of our laws to make a personal representative liable, except for actual waste. [Ewing v. Peters, 3 Term, 656; Jewett v. Jewett, 5 Mass. 275; 2 Kent's Com. 418.]

4. The motion to set aside process, is limited in time only by the sound discretion of the Court. This seems to be the only rule deducible from the cases. [9 Porter, 279; 5 S. & P. 402; 3 John. 523; 13 John. 537; 1 Cowen, 711; 7 John. 556; 4 Wend. 217; Hubbert v. McCollum, 6 Ala. Rep. 224.]

GOLDTHWAITE, J.—This case involves, to some extent, the consideration of the same principle, decided in the case of Skinner v. Frierson, *supra*. It is evident, if no privity exists between the sheriff, who was the administrator succeeding Auld, and Auld himself, in the execution sought to be quashed, then there is no reason why this officer, as well as any other, may not perform the necessary duties. As observed, in the case cited, after the resignation of Auld, he ceased in law, as well as in fact, to represent the estate, and the plaintiff's only object in pursuing the suit further against him, was to make him or his sureties personally responsible. This could be done through the medium of a return of no property. We fully concede the proposition insisted on by the defendant, that the judgment obtained against him is of no force against a succeeding representative, if obtained at a time when he had ceased to represent the estate. To this effect is Taylor v. Savage, [2 Howard, 282.] and the same principle is admitted in Elliott v. Eslava. [3 Ala. Rep. 570.]

In this view it is apparent the sheriff is in no privity with Auld, so far as his duties are connected with the execution sought to be quashed.

Judgment quashing the execution reversed.

HOUSTON, ADM'R. v. PREWITT.

1. The ttransferor of a *chose in action*, is an incompetent witness for the transferee, in a suit brought by him for its recovery; and it seems that a release would not restore his competency.
2. A bankrupt who had transferred bills of exchange as collateral security, to one of his scheduled creditors, is an incompetent witness for the creditor, because the discharge of the debt by the bills, would release the estate of the bankrupt from its payment, and increase the surplus.

Error to the Circuit Court of Mobile.

Assumpsit by the intestate of plaintiff in error, as bearer of two bills of exchange against the defendant, as drawer and acceptor of two bills of exchange, which are in the usual form, except that no person is mentioned in the bills to whom the money is payable. The declaration contains two counts in the usual form, and also the common counts.

The plaintiff introduced the bills of exchange, and offered to introduce Patrick O'Neil as a witness, he being a certificated bankrupt. The defendant objected that he was incompetent, being interested in the event of the suit. To show his interest, they introduced several depositions, by which it appeared, that the bills of exchange were given by the drawers to Patrick O'Neil, in settlement of a judgment of O'Neil, against one T. Coopwood, the drawer of one of the bills, and that the bills were drawn in this peculiar manner at the request of O'Neil.

To rebut this testimony, the plaintiff introduced other depositions, by which it appeared, that the plaintiff and his intestate were the sureties of Patrick O'Neil, had been compelled to pay about $5,000 for him, and that these bills were deposited with them, and relied on by them, for their re-imbursement. The Court excluded the witness, and the plaintiff excepted.

Phillips, for plaintiff in error. The interest which will disqualify a witness must be certain, not possible, or even probable.

[1 Salk. 283; 6 Bing. 399; 3 Term, 27. 1 S. & R. 36; 3 John. 256; 2 Y. & J. 45.]

The witness was called to diminish, rather than increase the assigned estate, and for this purpose was certainly competent. [Gren. on Ev. 437.]

The evidence of O'Neil might have authorized a recovery on the common counts, which distinguishes the case from the position it occupied when here before; although the papers were not technically bills of exchange, they should be regarded as an acknowledgment, that the acceptor had the funds of the drawer, and would pay it over to the person who should demand the same. To show that there might be a recovery on the common counts, he cited 12 John. 90; 1 Cranch, 440; 5 Cowen, 75; 5 N. H. 577; Bayley on Bills, 244.

CAMPBELL, contra, contended, that the case was not varied since it was last here—the bills stood alone; no evidence of delivery to the plaintiff—no evidence of consideration, to relieve them from the infirmity of their condition. He cited 6 Wend. 644; 13 Mass. 158.

The testimony shows, that O'Neil was interested. If these bills are collected, it will relieve his estate from the payment of the debt which they were intended to secure. It would relieve his estate from the claims of this creditor, and increase the surplus in the hands of the assignee. This point was decided in 7 Ala. Rep. 498.

ORMOND, J.—If the plaintiff, and his intestate, are to be considered as scheduled creditors of the witness, then it appears to us, the principle of the case of Cromwell & Johnson v. Comegys, 7 Ala. Rep. 498 would apply to this case, because the payment of that debt, which would be the consequence of a successful prosecution of this suit, would relieve his estate from paying it, and thus increase the surplus by that amount, for which purpose he would not, on the authority of the case cited, be competent.

Further, on grounds of public policy, we think he is incompetent to testify. The consideration upon which these bills were made, passed from him to the drawers, and it also appears the bills were delivered to him; he cannot therefore be permitted, by his own testimony, to maintain an action brought upon them, in

the name of another. To tolerate this, would be to introduce the evils of champerty and maintenance. In the case of Bell v. Smith, 5 Barn. & Cress. 188, which is very similar to this, in its facts, and entirely analagous in principle, the Court held, that the witness, though not the nominal, was the real plaintiff in the action; and Bayley, Justice, added, "But I think, that Armet (the witness) was incompetent upon higher grounds. The action was brought at the instance of Armet, and three others; it was then found they had not sufficient evidence to support it, and machinery was resorted to, calculated to introduce all the evils of champerty, and maintenance. First, Armet, without consideration released all his interest to the nominal plaintiffs in the suit; that was not considered sufficient, and then, in consideration of ten shillings, all the parties joined in a conveyance to Lackland and Robertson. It is difficult to put a stronger case of maintenance or champerty."

In the case at bar, the bills of exchange must be considered as transferred to the plaintiffs, by the witness, the consideration upon which the bills were drawn having passed from him, to the drawers, and the bills having been delivered to him. It is then, the naked case of the transferror of a *chose in action*, introduced as a witness to establish the debt. It is perfectly clear, this cannot be tolerated, nor, as shown by the case cited, would a release from the transferee restore his competency. In any view we have been able to take of this case, the decision of the Court below was correct, and its judgment is therefore affirmed.

MABRY, GILLER & WALKER v. HERNDON.

1. There is no inhibition in the bankrupt act of 1841, or in the relation which the State and Federal Governments bear to each other, or in the grants or restraints of power conferred upon them respectively, which deny to the State Courts the right to entertain an inquiry into the validity of a discharge and certificate upon an allegation duly interposed, that the bank-

rupt did not render a full and complete inventory of his "property, rights of property, and rights and credits," but fraudulently concealed the same.

2. *Quere?* May not the discharge and certificate of a bankrupt be impeached for fraud by one not a party to the proceedings in bankruptcy, according to the principles of the common law, without reference to the provisions of the act, and in such case is it not sufficient for the pleadings to state in what the fraud consists, without giving the formal notice which the act seems to contemplate.
3. *Semble;* A plea which merely alledges that the debt sought to be recovered is of a *fiduciary character*, is bad; because it states a legal conclusion, instead of disclosing the facts, that the Court may determine whether the debt is founded upon a trust, such as is excepted from the operation of the bankrupt act.
4. It is not an available objection on error, that notice of an intention to impeach a bankrupt's discharge and certificate, was not given until after the commencement of the term of the Court when the cause was triable; the act of Congress does not prescribe the time when the notice must be given, and if too short to allow the necessary preparation to be made for trial, a continuance should be asked.
5. Where a defendant in execution sets up his discharge and certificate as a bankrupt, by a petition, upon which a *supersedeas* is awarded, it is competent for the plaintiff to impeach the same for any of the causes provided by the act of Congress of 1841, and make up an issue to try the facts.

Writ of error to the Circuit Court of Benton.

THE defendant in error presented his petition to a Judge in vacation, setting forth that a writ of *fieri facias*, (which he particularly described,) had been issued against his estate, upon a judgment recovered by the plaintiff in error, in October, 1842; that in November, 1843, he was regularly declared a bankrupt, by the District Court of the United States for the Northern District of Alabama, and thereby fully discharged from all the debts he owed previous to the 9th January, preceding, the day when he instituted proceedings in bankruptcy. Thereupon he prayed that the *fieri facias* in question might be superseded, until the term of the Circuit Court of Benton next thereafter to be holden; that then the same might be quashed, and the levy discharged. The *supersedeas* was accordingly granted.

The plaintiffs in execution gave notice in writing to the defendant, that they would impeach his certificate of final discharge in bankruptcy, for fraudulent concealment in failing to render a

full and complete inventory of his "property, rights of property, and rights and credits," pursuant to the bankrupt act of Congress, passed in 1841; setting out particularly the property, &c. omitted to be discovered to the District Court and submitted to its action.

The plaintiffs in execution interposed several pleas, alledging that although the defendant was the owner of the property, &c. described in the notice, previous to, and at the time when he filed his petition in bankruptcy, yet he fraudulently concealed the same, &c. *Further*, that the debt, the collection of which is sought to be enforced by the *fieri facias*, was a "fiduciary debt," and contracted by the defendant in a "fiduciary capacity."

The defendant moved the Court to strike out the pleas that had been filed to his petition to the *supersedeas;* which motion was granted, the pleas stricken out, and a judgment rendered quashing the execution at the plaintiff's costs.

T. A. Walker, G. W. Gayle, and J. W. Pryor, for the plaintiffs in error. The certificate in bankruptcy is the evidence that the decree recited has been rendered by a Court of limited or special jurisdiction; and by the common law, every judgment, sentence, or decree, of a Court of general, or limited, or exclusive or concurrent jurisdiction, may be impeached for fraud, in any Court where it is attempted to be set up, by all who are injured by the fraud, and who are not parties to the judgment, &c. Whether parties to the judgment are not bound by it, so long as it stands, and can only avoid it by some direct proceeding, it is not necessary to inquire; for the plaintiffs were not parties to the proceedings in bankruptcy—not having proved their claims, &c.

It must be assumed, that the pleas interposed to the petition for the *supersedeas* are true; that they state such a case as avoids the certificate for fraud, cannot be questioned. See Bankrupt Act of 1841, §§ 4, 5.

The bankrupt law does not expressly, nor by implication, deprive the State Courts of their common law right, of examining an allegation of fraud against a decree under which a certificate issues; and there is nothing in the character of such a decree to exempt it from the ordinary objections to which other judgments are subject. No rule of policy would be opposed, nor would the harmony of conflicting jurisdictions be disturbed by the exercise of

such a power by the State Courts; and it cannot be taken away by strained construction and remote inferences.

If the decree may be attacked for fraud in the bankrupt Court, every creditor who was not a party, or if a party, has discovered fraud since the decree was rendered, must be allowed to institute his separate proceeding, for the purpose of testing its validity. And thus there would be quite as much expense and vexatious litigation, as if the right of contesting it when attempted to be set up, were conceded to all Courts, both State and Federal.

There can be no doubt but the State Courts can decide questions arising under the United States laws. [Judiciary Act of 1789, § 25, 2 vol. U. S. Laws, 65.] The fourth section of the bankrupt law of 1841, impliedly confers the jurisdiction, and the sixth section does not take it away. Suppose both parties, viz: the bankrupt and his creditor reside in the State, the latter can institute no proceeding in the Federal Courts against the former; so that if the validity of the certificate could not be tried in the State Courts, it could not be impeached. *Besides*, the State tribunals have jurisdiction over the person and property of its citizens, and it is not competent for Congress to forbid or interrupt its exercise.

The fifteenth section of the first article of the constitution of Alabama, and the eighteenth section of the same, guaranty to the citizen a remedy for every grievance, and secure to the creditor the right to arrest a debtor where there is strong presumption of fraud. This being the case, the right to sue and exhaust the remedies afforded by the State Courts cannot be taken away, although the Supreme Court of the United States may have the ultimate jurisdiction, if the subordinate tribunals decide against the validity of the proceeding under the act of Congress. In the matter of Comstock, 5 Law Rep. 163; 2 Bibb's Rep. 204.

The argument, that the defendant should be sued on the judgment against him, that he might plead his discharge, and thus test the question of fraud *vel non*, cannot be supported. Graham v. Pierson, 6 Hill's Rep. (N. Y.) 147, does not discuss the question, and, as an authority, is worth nothing. If such a suit were brought, it would be a waiver of the lien of the judgment and execution thereon (if any,) which the creditor should not be constrained to make. See Bankrupt Act, last proviso to 2d section, and Kittredge v. Emerson, 7 Law. Rep. 317.

McDougald v. Reid and Talbot, 5 Ala. Rep. 810, is unlike the present. The judgment there was subsequent to the institution of the proceeding in bankruptcy, though previous to the certificate of discharge; the petition related back to the filing of the petition, and prevented the lien of the judgment from attaching. Under our statute, the judgment creditor acquires rights which no Court can take away. [Clay's Dig. 199, § 1.] The bankrupt must avail himself of his certificate by petition for a *supersedeas*, or suit in Chancery; and in either form of proceeding, an issue may be framed to try whether the certificate was obtained by fraud.

Fiduciary debts are excepted from the operation of the bankrupt law, and the plea alledging that fact was a sufficient answer to the petition for a *supersedeas*. In the matter of Horace Lord, 5 Law. Rep. 258; In the matter of George Brown, 5 Law. Rep. 121, 258; In the matter of Tebbetts, 4 Law Rep. 259; see also 5 Law. Rep 258; 2 How. Rep. (U. S) 202; 5 Hill's (N. Y.) Rep. 327.

A. F. Hopkins and W. P. Chilton, for the defendant in error. The decree in bankruptcy is in itself a discharge of the bankrupt from his debts, whether they are reduced to judgment or not; and if a judgment has been rendered, no execution can issue thereon; if it does issue, it is a mere nullity. [Bankrupt Act, § 4; McDougal v. Reid & Talbot, 5 Ala. Rep. 810.] The uniform practice in such cases is, to direct a perpetual stay of execution on motion. [1 Bos. & P. Rep. 426; 1 Cow. Rep. 42; Id. 44; Id. 165; 1 Caine's Rep. 249; 4 John. Rep. 191; 9 Wend. Rep. 431; 6 Hill's Rep. (N. Y.) 247; Id. 250; 9 Johns. 259.] If the creditor insists that the bankrupt obtained his certificate by fraud, he must institute some direct proceeding to try that question.

It is admitted that debts of a fiduciary character are excepted from the operation of the bankrupt law, and that over these the District Court had no jurisdiction. But the plea alledging that the certificate was void for that cause, was itself a mere nullity; it did not disclose the facts which showed that such was the character of the debt; it merely affirmed a legal conclusion. A party should not be put to his demurrer to such a plea. [See 3 Stew. Rep. 172.] But if it was irregular to strike out the plea on mo-

tion, the error was repaired by giving leave to plead over, although the defendant did not avail himself of it.

The bankrupt act contemplates that the creditor shall become the actor in impeaching the certificate, not by issuing an execution, but by notice and suit; the mode adopted, (in effect,) makes the bankrupt the plaintiff, by his petition for a *supersedeas*, and denies to him the right of availing himself of his certificate, unless he shall enter into bond with surety to indemnify the plaintiff if he is unsuccessful in resisting the execution. If this be the regular course of proceeding, the bankrupt law will often fail in effecting the purpose intended, and the debtor lose the benefit of his discharge. It is no objection to this view, that the judgment and execution operate a lien upon the bankrupt's estate. The property of the bankrupt passes to the assignee, who takes it *cum onere;* the law expressly reserves the lien from the operation of the decree, and of consequence affords the means for its enforcement. As to the property on which the lien attached, the judgment remains in full force, and it may be seized under an execution; but there is no lien upon after acquired property—as to this, the judgment is wholly inoperative. [Ex parte Newall, assignee of Brown, 5 Law Rep. 306.]

There was no sufficient notice that the decree and certificate would be impeached for fraud. It was not given until three days after the commencement of the term of the Court.

The State Courts have not jurisdiction to inquire into the fact of fraud or wilful concealment by the bankrupt. If the discharge is successfully impeached, it is set aside and annulled *in toto;* whereas, if it was adjudged void by a State tribunal, such decision would affect it only in the particular case, while it would continue in force as to all other cases. The certificate it is declared, is a complete discharge of all debts proveable under the act. Now suppose a majority of the creditors were to object before the District Court, that the bankrupt had made a fraudulent conveyance, or that he had intentionally concealed a part of his property, an issue was made up and determined in favor of the latter; would not the decision conclude all creditors, whether before the Court or not, and prevent a collateral impeachment of the decree? The subject of bankruptcy is in its nature exclusive, and should not depend for the uniformity of its administration,

upon the various conflicting adjudications of different jurisdictions.

The jurisdiction of the District Court by the 6th section of the act, extends not only to creditors who prove their debts, but to those whose debts constitute present subsisting claims capable of being asserted; and the District Courts have uniformly interposed to suspend and control proceedings in the State Courts which interfered with the administration of the bankrupt's estate. [See ex parte Winthrop, 5 Law Repo. 19-24; Kittredge v. Warren, 5 Law Repo. 77; Christie v. The City Bank of New-Orleans, 7 Law Repo. 553.] "The power both as regards the enactment of the law, and giving effect to it, belongs to the federal government exclusively." [Ex parte Bellows & Peck, 7 Law Repo. 119; 1 Western Law Journal, 15] In the case last cited from the seventh Law Reporter, it is said, "If the bankrupt obtains his discharge, and pleads it as a bar, and the creditor means to contest its validity, by replying fraud, or that the debt is not otherwise within the discharge, the creditor should apply to the District Court for leave to proceed in the cause, and to test the validity of the discharge by a trial in the State Court, which is granted of course, upon suitable proofs and affidavits." The District Court has plenary chancery powers to be exercised in a summary way, and may well award the issue to the law court of the State.

COLLIER, C. J.—The act of 1841, "To establish a uniform system of bankruptcy throughout the United States," invests the District Court of each District with jurisdiction in all matters and proceedings in bankruptcy, arising under that or any subsequent enactment upon the same subject; and the District Judge may adjourn any point or question arising in such case, into the Circuit Court for the District, in his discretion, to be there heard and determined. "And the jurisdiction hereby conferred on the District Court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under and in

virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."—[Sec. 6.] By the eighth section, the Circuit Court of the District where the decree of bankruptcy is passed, is authorized to exercise concurrent jurisdiction with the District Court, of all suits at law and in equity which shall be brought by any assignee against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of the bankrupt, "transferrable to, or vested in such assignee; and no suit at law, or in equity, shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any Court whatsoever, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued." These are the only provisions of the act that confer or inhibit the exercise of jurisdiction, save only the authority expressly delegated to compel obedience to all orders and decrees in bankruptcy, "by process of contempt and other remedial process," and "to prescribe suitable rules, regulations and forms of proceeding in all matters of bankruptcy," &c., in advancement of the purposes for which the law was enacted.—(Sec. 6.)

The act then, does not affirmatively authorize the District or Circuit Court to entertain a direct proceeding with the view to annul the certificate of a bankrupt, and if such a power is inferrible by construction, it is certain there are no negative terms employed which inhibit any Court from considering the validity of the certificate when it is drawn in question by the pleadings. To impugn the certificate because of the fraud of the bankrupt in obtaining it, is certainly not a proceeding, case, or controversy in bankruptcy, at the suit of the bankrupt; or between himself and a creditor claiming a debt or demand *under the bankruptcy*; or between the assignee and a creditor; or between the assignee and the bankrupt. And with no semblance of reason can it be considered as an "act, matter, or thing to be done under and in virtue of the bankruptcy." This latter class of cases is limited in terms to matters accruing previous to "final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." Without more particularly noticing

the purport of the eighth section, it is quite enough to say, that it does not embrace the case of a creditor seeking to enforce by execution the collection of his judgment against a certificated bankrupt.

The fourth section of the act provides that, if a bankrupt "shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors, contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such Court, or to conform to any other requisites of this act, or shall in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate," &c. *Further*, a "discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which are proveable under this act, and shall be, and may be pleaded as a full and complete bar to all suits brought in any Court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice, specifying in writing such fraud or concealment." [See also, Eden on Bankr. 411; Owen on Bankr. 222; 5 Law Repo. 321; 6 Id. 261-272; 2 How. Rep. U. S. 202.] These several provisions are so perfectly clear, that it is not necessary to call to our assistance any of the rules of construction which judicial decisions have established for the interpretation of statutes. The former declares, if the "bankrupt shall be guilty of any fraud, or wilful concealment," &c., he shall not be entitled to a discharge or certificate; while the latter provides, that a discharge, duly granted, shall, in all courts of justice be a complete discharge of all debts, &c., proveable under the act, and shall be pleaded as a bar to all suits brought, &c., unless the same may be impeached for fraud, or wilful concealment, &c. Thus we see, that although the statute contemplated a boon to the debtor, viz: a release from indebtedness, it exacted, on his part, perfect integrity, in yielding up every thing that was liable to his debts. If this was not done, but something was wilfully withheld, to which the creditors were entitled, the fact of concealment is denounced as a fraud, and upon its being made known, the Court was re-

quired to refuse its sanction to the bankrupt's discharge. And if the proceedings are formally consummated by a final decree, and a certificate consequent thereon, it is competent for any court of judicature, upon the fraud being established, to treat the certificate as a nullity. What other conclusion could be attained? The terms of that part of the act, we are now considering, are exceedingly comprehensive. It makes the discharge and certificate a complete discharge of all debts which were proveable against the bankrupt, unless the same shall be impeached, &c. The restraint upon the effect of the discharge and certificate, when superinduced by fraud, must be regarded as the antithesis of the influence accorded to them when duly granted, and is quite as potent as if the exception had been followed by an affirmative declaration of their invalidity when successfully impeached. This we think cannot be seriously questioned, nor do we understand that it has been attempted in the argument at the bar.

We cannot understand by the terms "all courts of justice," and "any court of judicature whatever," that none other than the federal courts are competent to entertain an objection to the validity of the discharge and certificate of a bankrupt. In employing words of most extensive application and import, upon an occasion when every thing said, was, or at least should have been well considered, it cannot be intended that Congress designed to convey a meaning much more limited than is expressed. The fair and natural inference is, that as the discharge and certificate, when duly granted, were effectual in all judicial tribunals, in which they should be drawn in question, so they should be invalid in every Court in which the bankrupt was sued, and relied on them as a bar, if impeachable for any one of the causes for which they are declared to be inoperative. If competent for Congress to have withheld from the State Courts the rights to examine the validity of a bankrupt's discharge for extrinsic objections, it is enough to say that this has not only not been done, but, that the power has been conferred in terms of unequivocal signification. Whether the exercise of such a jurisdiction is incompatible with the structure of the federal government, and the powers accorded to either of its departments, is an inquiry to which we may devote some consideration before we close this opinion.

It was insisted that no issue could be made up in a suit brought for the recovery of a debt, by which the validity of the bankrupt's

discharge could be controverted; that in order to nullify it, it must be impugned by a direct proceeding, alledging it to be obnoxious to some one of the objections prescribed by the act. This argument, we think, is clearly indefensible. It is opposed to language which is very explicit and free from ambiguity in itself. The act, we have seen, expressly authorizes the bankrupt *to plead his discharge and certificate*, and declares that when duly granted, shall they be a bar, *unless impeached for fraud, or wilful concealment, &c.* The mere fact of interposing the plea is not a conclusive bar, but it is allowable for the defendant to reply by way of avoidance, any state of facts which show that the bankrupt's discharge is impeachable. In thus placing in juxta-position the declaration as to the effect of the discharge, and allowing it to be pleaded and proved, with the denial of its efficacy when impeached, we think the reasonable inference is, that in all cases where the bankrupt relied on it as a bar, the opposite party may join issue upon its validity.

It was undeniably allowable while the proceedings in bankruptcy were *in fieri*, for the creditors of the bankrupt to object to his discharge for any one of the causes designated in the fourth section of the act, and the Court would direct an issue to be made up to try the truth of the objection, if the facts were controverted. The same section reiterates several of these objections, and we have seen, makes the discharge void, when it is impeached, and any one of them is made apparent from the proof. How can the invalidity be shown where it depends upon extrinsic facts, otherwise than by pleadings interposed according to the regular forms of proceedings, the introduction of evidence and a verdict thereupon? We cannot doubt that while it was the intention of the act to accord to the discharge, when "duly granted," all efficacy and virtue, that it has also secured to the adverse party the right to impeach it whenever it is set up as a bar to the bankrupt's liability.

It has been held that an officer arresting has no power to discharge a bankrupt, upon the mere production of his certificate, and that if he do so, the Court will not stay proceedings against him for an escape. [Sherwood v. Benson, 4 Taunt. Rep. 631.] The Court has even refused to decide upon motion the effect of a discharge under a foreign bankruptcy. [Quin v. Keefe, 2 H. Bl. Rep. 553; Pedder v. McMaster, 8 T. Rep. 609; Philpotts v.

Reed, 1 B. & B. Rep. 13; Whittingham v De La Rieu, 2 Chitty's Rep. 53; Earlier v. Languishe, Id. 55; Bampfield v. Anderson, 5 Moore's Rep. 331.] So it has been determined that the Court will not discharge without giving the party arresting, time to show that the certificate was fraudulently obtained; and any of the reasons mentioned in the statute may be given in opposition to his discharge; and wherever it is shown that the validity of the certificate is to be disputed, the Court will not discharge in a summary manner; and it has, when necessary, directed the commission to be tried on a feigned issue. [Eden on Bankr. 428, and cases cited.] True, these citations are adjudicated cases upon the English bankrupt statutes, yet in principle they are strictly applicable to the effect of the certificate, as declared by the fourth section of our own act, and serve very satisfactorily to show, that it is permissible to impeach it for any of the reasons which impair its validity.

In Kittredge v. Emerson, (a case decided by the Superior Court of Judicature of New-Hampshire, in July, 1844,) the effect of the proviso of the second section of the bankrupt act of 1841, upon a lien acquired by the institution of proceedings in a State Court, was elaborately and learnedly considered. The Court there, speaking of the effect of the proceedings in bankruptcy, upon suits pending against the petitioner, remarks, that where the Court has jurisdiction of the cause and the parties, the suit will not abate because the defendant has "filed a petition in bankruptcy, nor by reason of his having obtained a certificate. That certificate must be pleaded, that its validity may, in some way, be contested. Had the plaintiff in this case replied that the certificate was fraudulently obtained, no doubt seems to be expressed in *Ex parte* Bellows & Peck, that a judgment entered upon a verdict finding such an issue in favor of the plaintiffs, would be valid and binding upon parties and privies." [4 vol. Am. L. Mag. 236-7; see Thompson v. Hewett, 6 Hill's Rep. 254: Sackett v. Andross, 5 Hill's Rep. 327.]

We will now address ourselves to the consideration of the question of the power of a State Court, to inquire into the validity of the bankrupt's discharge, or rather, whether there is anything in the relation which the State and Federal Governments bear to each other, which inhibits the Courts of the former from the exercise of jurisdiction in such a case.

In the eighty-second number of the Federalist, it is said, that the only thing that has the semblance of confining causes of federal cognizance to the federal courts, is contained in the first section of the third article of the constitution, viz: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." "This," says the learned author, "might either be construed to signify, that the Supreme and subordinate courts of the Union should alone have the power of deciding those causes, to which their authority is to extend, or simply to denote that the organs of the National judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested through one Supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the State tribunals: and as the first would amount to an alienation of State power, by implication, the last appears to me the most defensible construction."

But the doctrine of concurrent jurisdiction, it was supposed, was only clearly applicable to causes of which the State courts previously had cognizance. In respect to cases which grow out of, and are peculiar to the constitution, it was said not to be equally evident. *Further*, says the author just cited, "I hold, that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will, of course take cognizance of the causes to which those acts may give birth. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant parts of the globe. When, in addition to this, we consider the State governments and the National government as they truly are, in the light of kindred systems, and as parts of *one whole*, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

In Hunter v. Martin, 1 Wheat. Rep. 304, it was said that the 2d section of the 3d article of the constitution, enumerated two classes of cases of which the courts of the United States are authorized to exercise jurisdiction. In the first class the expression is, that the judicial power shall extend to *all cases*; but in the subsequent part of the section, the word "*all*" is dropped, seemingly by *ex industria*. "From this difference of phraseology, perhaps a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power, either in an original or appellate form, *to all cases;* and in the latter class to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate."

Congress may permit the State courts to exercise a concurrent jurisdiction in many cases; but those courts then derive no authority from Congress over the subject matter, but are simply left the exercise of such jurisdiction as is conferred on them by the State constitution and laws. [See Martin v. Hunter, *supra;* Houston v. Moore, 5 Wheat. Rep. 27; 3 Story on Cons. 613 to 626; 1 Kent's Com. 370 to 379; The United States v. Dodge, 14 Johns. Rep. 95; The United States v. Lathrop, 17 Johns. Rep. 4; The United States v. Campbell, Hall's L Journal 113; Sergt. Const Law, 272.]

In the exercise of the jurisdiction confided to the State courts, and those courts of the United States (where the latter have not appellate jurisdiction) it is plain, says Mr. Justice Story, that neither can have any right to interfere with, or control the operations of the other. "It has accordingly been settled, that no State court can issue an injunction upon any judgment in a court of the United States; the latter having an exclusive authority over its own judgments and proceedings. Nor can any State court, or State legislature, annul the judgments of the courts of the United States, or destroy the rights acquired under them." [3 Story's Com. on Cons. 624-5; 1 Kent's Com. 1st ed. 382-7; McKim v. Voorhis, 7 Cranch's Rep. 279.]

We have stated the law thus at length in respect to the jurisdiction of the federal judiciary, showing in what cases those who have claimed for it the greatest potency, assert its exclusiveness. Instead of denying the right of the State tribunals to declare the discharge and certificate of a bankrupt void for any one of the reasons prescribed by the statute, the authorities very satisfactorily establish such a power.

It is undeniably competent for Congress to declare a decree in bankruptcy invalid, when irregularly or unfairly obtained, whenever and wherever it may be drawn in question; to allow it to be impeached for fraud, or other kindred cause; and upon the allegation being established, to authorize all courts to pronounce it invalid. The bankrupt act of 1841 has done this, almost *in totidem verbis*. It is true that it might not be within the legislative power of Congress to confer upon State tribunals the jurisdiction of cases in bankruptcy from their initiation to their conclusion; but if this be so, a question we need not consider, it by no means follows that the State courts should accord to the final decree and certificate consequent upon it, a conclusive verity, when Congress have declared that it shall be open to impeachment. While the proceedings in bankruptcy were *in fieri*, the case was one which grew out of an act of Congress, passed under the sanction of the constitution; but being concluded, the question is, whether the certificate can avail the bankrupt so as to bar a regular proceeding against him for the recovery of a debt. If the State courts have jurisdiction of the case, they must entertain the defence; because the right to do so, instead of being taken away, is expressly conceded by the statute, the constitutionality of which *on this point*, cannot be questioned. This can only be done so as to administer complete justice by receiving the evidence to impeach the discharge, upon an issue adapted to that purpose.

There is certainly nothing in the State or federal constitution which inhibits our courts from taking cognizance of causes in which it becomes necessary to consider the effect of an act of Congress; the more especially where Congress has not asserted an exclusive jurisdiction, and the act is invoked by the defendant. It is said, in the number of the Federalist from which we have already quoted, that the State courts, "in every case in which they were not expressly excluded by the future acts of the na-

tional legislature, will of course take cognizance of the causes, to which those acts may give birth." This concession is in harmony with all the citations we have made, and goes even beyond what the present case requires. It cannot then, be necessary further to amplify the point.

We have forborne to inquire whether, according to the principles of the common law, the discharge of a bankrupt can be impeached for fraud in obtaining it, when pleaded in bar to an action by one who was not a party to the proceeding in bankruptcy. See however, 13 Pick. Rep. 53; 4 Scam. Rep. 536; 3 Cranch's Rep. 300; 3 Phil. Ev. C. & H's notes, 854 to 856, 898; Story's Conf. of L. 495, 503, and cases cited in notes; 3 How. Rep. U. S. 751; 2 Stew. Rep. 151; 1 Kinne's L. Comp. 515-6; 5 Id. 117, in both of which the cases upon the point are collected. If it is competent, without reference to the provisions of the act of 1841, to impeach a certificate for fraud, is it necessary to pursue the terms of the act, or may not a plea or replication, &c, be interposed alledging the invalidity of the certificate, and particularly disclosing in what the fraud consists? The ground upon which we have rested the right of the creditor to contest the bankrupt's certificate, seems to us to be so unquestionable, that we are indisposed to inquire whether there is any other course of reasoning which leads to the same result; and the manner in which it has been done in this case is in conformity to the statute.

We are inclined to think, that the plea which alledges that the debt of the plaintiff in execution, is of a *fiduciary* character, was bad. The objection to the plea is, that it states a legal conclusion instead of specially disclosing the facts, that the court might determine whether the debt sought to be collected by execution, was founded upon a trust, such as is excepted from the operation of the act.

It is objected that notice of an intention to impeach the bankrupt's discharge was not given until the commencement of the term of the court to which the *supersedeas* was returned. Without stopping to inquire whether this be so, we are sure that it furnished no cause for the refusal to entertain the defence to the petition. The act of Congress does not prescribe any time previous to the trial within which notice must be given. If the notice was not sufficient to allow the petitioner to procure the necessa-

ry evidence to sustain his discharge, he should have applied for a continuance; which would doubtless have been accorded to him.

In Lockhart, et al. v. McElroy, 4 Ala. Rep. 572, it was determined, that an execution will be superseded upon the petition of the defendant, if an unjust or improper use is attempted to be made of it, although the execution be authorized by the judgment. This being the case, the plaintiff in execution must be permitted to controvert any material allegation of extrinsic facts contained in the petition. The petitioner, for the purpose of avoiding the effect of the judgment, and consequently perpetually superseding the execution, set up his discharge and certificate as a bankrupt. The act of Congress makes these conclusive, unless their validity shall be drawn in question for certain causes which it specifies. The defendant, by his petition, pleads his discharge in bar to proceedings on the judgment and execution; the plaintiff in execution gives the notice provided by the act, and impeaches the discharge and certificate, by admitting their existence, and affirming their invalidity. We can conceive of no objection to this course of procedure on the part of the plaintiff—it is in our judgment sustained both by the letter and spirit of the act.

The requisition of a bond with sureties, by a statute of this State, as a prerequisite to awarding a *supersedeas*, cannot in any manner affect the right of the plaintiff in execution to impeach the petitioner's discharge, any more than in another case, to show that the grounds upon which the *supersedeas* was awarded could not be supported.

If the *dictum* of Judge Story, in the matter of Bellows and Peck 7 Law Rep. 119, is to be understood as affirming that where the bankrupt pleads his discharge, the plaintiff cannot controvert its validity in a State court, without first obtaining leave of the District court, we should certainly refuse to recognize it. But we are disposed to think, that the learned Judge was speaking in reference to a case in which the plaintiff in the State tribunal had been enjoined from proceeding, by the District court, pending the proceedings in bankruptcy.

The view we have taken of this case embraces all the points now necessary to be considered. The result is, that the judgment is reversed, and the cause remanded.

BRADFORD v. BAYLES, ET AL.

1. Where a party is already before the Court, and the suit is improperly dismissed, a writ of error is the proper remedy.

Writ of Error to the Circuit Court of Monroe.

SAMUEL BRADFORD commenced this action, which is trespass, under the statute, to try the title to the land described in the pleadings. His death was suggested at the spring term, 1843, and Keturah Bradford, his executrix, made a party. The cause was continued for several terms, and disposed of at the fall term for 1845, by this entry: "Death of Samuel Bradford suggested, and the Court adjudged that the suit abate."

A bill of exceptions was taken by the plaintiff, which explains the proceeding then had.

It was suggested the cause of action did not survive, and therefore, although the executrix was made a party at a former term, the cause should be dismissed from the docket. Of this opinion was the Court, and so ordered. The plaintiff excepted to this ruling, and now assigns it as error.

F. S. BLOUNT, for the plaintiff in error, cited State ex rel Nabors, 7 Ala. Rep. 459.

E. W. PECK, contra, insisted there was no judgment in the cause, and therefore the writ of error was premature. The proper course of practice is *mandamus*, to reinstate the case.

GOLDTHWAITE, J.—We think sufficient matter appears for us to make out the consideration of the Court upon the fact stated. Although this is a very informal entry of judgment, yet no one can doubt its legal effect is to abate the suit, and this opinion is fully confirmed by the bill of exceptions, which shows that such was the intention of the Court.

Although when a party is dismissed out of Court, there are some instances in which a *mandamus* may be the proper mode

to reinstate himself, as it is where the amount in controversy is too small to warrant a writ of error, yet in general he may redress himself by writ of error. It will be seen the party had actually been admitted to the suit, some terms previous to that at which the abatement was ordered.

The case of State ex rel Nabors, 7 Ala. Rep. 459, is in point, to show that the suit could be revived, and we are constrained to infer the proper party was made, till the contrary is shown.

As the Court erred in dismissing the suit, the judgment is reversed and the cause remanded.

OHIO LIFE INSURANCE AND TRUST COMPANY v. LEDYARD;

AND

THE BANK OF MOBILE v. SAYRE & LEDYARD.

1. Under our statutes of registration, actual notice of the existence of a deed, is equivalent to the constructive notice afforded by registration.
2. The design of the statutes requiring registration, was to give notice, that creditors, and purchasers, might not be deluded, and defrauded, and as to all such, who have not notice in fact, the unregistered deed is void.
3. The creditors spoken of in the statute, are not creditors at large; but a creditor whose debt is liquidated, and a lien given on property by the debtor for its payment, is protected by the statute, against prior unregistered deeds, of which he had no notice.
4. One who purchases at a sale made by order of the Court of Chancery, foreclosing a mortgage, without notice of a prior unregistered deed, is a purchaser for a valuable consideration, within the meaning of our registry acts.
5. A creditor is entitled to the benefit of all pledges or securities, given to, or in the hands of a surety of the debtor, for his indemnity, and this, whether the surety is damnified or not, as it is a trust created for the better security of the debt, and attaches to it.
6. G., and S. & C., made a purchase of a piece of land of L., and executed a mortgage to secure the purchase money; afterwards, G. executed a deed

of trust, by which he conveyed an undivided half of the land, for the payment of certain debts, under which a sale was ordered by the Court of Chancery, the sale made, and the interest of G. purchased by one ignorant of the unregistered mortgage of L—Held, that L. might enforce his mortgage against the residue of the land, for the debt remaining unpaid, and that S. & C. must look to G. for their reimbursement.

Appeal from the Chancery Court of Mobile.

These causes were heard together, and present the following state of facts.

In 1836, Ledyard sold to Sayre, Converse & Co., and Rufus Greene, a lot of land in Mobile, and received a mortgage to secure the payment of the purchase money, but failed to have it recorded. All of the purchase money has been paid, except about $2,000. After the forfeiture of the mortgage, Greene conveyed his interest to R. G. Gordon, who conveyed to Henry Meyers, who conveyed to James West. Converse conveyed his interest to Sayre, who conveyed to the Bank of Mobile, an undivided half of the lot, to secure debts due in 1839, and from thence to 1840. This mortgage was made in August, 1837. Ledyard filed his bill to foreclose the mortgage. Greene, Meyers, and Sayre, have been declared bankrupts, and P. T. Harris is the assignee.

The Bank of Mobile, by its answer, denies all knowledge of the existence of the mortgage of Ledyard, and alledges that it received the mortgage as a security for a debt due from Sayre, of $53,658 25, and that $26,390 75, is still due, for the payment of which the mortgage is an inadequate security.

A supplemental bill and bill of review was filed by Ledyard, alledging that the Ohio Life Ins. and Trust Co., hold one-half of the premises described in complainant's mortgage, and charged that it is subordinate to his right.

The Ohio Life Insurance and Trust Co. in its answer, claims to be a purchaser at a sale of the Chancery Court of Mobile, under the following state of facts: Rufus Greene in 1837, made a deed to Robert G. Gordon, to indemnify Robertson, Beal & Co. upon four notes, for the gross amount of upwards of $40,009, upon which they were endorsers, two of which had been dishonored, and the others were running to maturity: That the notes mentioned in the deed, were then held by C. B. & T. J. Mathews:

That neither Mathews, Gordon, or Robertson, Beal & Co. had any knowledge of the mortgage of complainant, when the deed was executed: That upon a bill filed by Mathews, to subject the property to the payment of the notes, by the decree of the Court, the property was directed to be sold, and was purchased by the Company for $18,000, which received the register's deed therefor, on the 5th June, 1843. They deny all knowledge of the complainant's mortgage. Ledyard was not a party to the bill. It was admitted that Robertson, Beall & Co., and Greene, became bankrupts in 1842, and left no property for distribution.

The Bank of Mobile also filed a bill to foreclose the mortgage of Sayre & Converse.

Evidence was taken, which is sufficiently noticed in the opinion of the Court.

The chancellor was of the opinion, that the Bank had notice of Ledyard's mortgage, when it obtained the mortgage of Sayre, on the same property, and that the Ohio Life and Trust Company had not established their claim as *bona fide* purchasers, and decreed accordingly in favor of Ledyard.

These matters are assigned as error by the Bank, and the Life and Trust Insurance Company.

Dargan, for the Life and Trust Company.—The allegation of the bill, is, that the Company were purchasers with notice of complainant's mortgage. Notice is denied, and it is admitted there was none. Upon the bill then, no decree could be had against the Company, which is not charged as a volunteer, or purchaser without consideration.

The purchase under the sale by the master, invested the Company with all the rights of a creditor, and the fact that money was not paid, but that the Company controlled the decree, is wholly unimportant.

The rule, that a conveyance is void as to creditors, means as to those creditors whose debts have attached on the property before notice. [10 Leigh, 497; 1 Pick. 164; 1 Metcalfe, 202; 4th Halstead, 193.]

Phillips, for the Bank of Mobile, contended—That the Chancellor erred in his conclusions from the proof in the cause, which he insisted did not authorize the inference that the Bank knew of

Ledyard's mortgage, when it obtained the mortgage from Sayre, and examined the testimony at some length.

He further contended, that the "notice" spoken of in the act of 1828, was notice by registration, and that no other kind of notice was sufficient.

He also argued, that the words *without notice*, in the statute, applied to purchasers only, and not to creditors—that the design of the statute was only to assert the rule in equity. [4 Rand. 208.] That the Bank was a creditor, because it relinquished a security for a pre-existing debt, which was tantamount to a new credit. [2 Paige, 300; 4 Id. 215.]

Ledyard's mortgage was such an instrument, as the act of 1828 required to be recorded. [4 Ala. 473.]

CAMPBELL, contra.—He examined at some length, the testimony, and insisted that it warranted the conclusion drawn by the chancellor. [7 Porter, 182.]

He contended that the plaintiffs in error were not creditors; that where one obtains land in payment of a debt, he is a purchaser and not a creditor. [2 Leigh, 84.]

A creditor within the purview of the act, is one who has obtained a specific lien by action at law upon the property. [10 Leigh, 499.]

A mortgage of land given to secure a debt, as is the case here, does not fall within any of our statutes of registration, except the act of 1823, [Clay's Dig. 154, § 18,] which contains no provision in favor of creditors. The act of the 15th January, 1828, refers only to absolute deeds, and the act of the same session passed the 11th of the same month, only to deeds of trust. The design of the act was to suppress frauds by embarrassed debtors. Mortgages on real estate are the approved securities between solvent persons.

A failure to record a deed under the act of 1823, avoids a mortgage only as against a purchaser. [2 Stewart, 488; 1 Paige, 125; 2 Id. 217; 6 Id. 316; 11 G. & J. 314.]

The Ohio Life and Trust Co., and the Bank, are not purchasers within the meaning of the statute, as they took the property in payment of debts. The legal title is in Ledyard, and he has equal equity, and in the absence of the statute, must prevail. [6 Ala. 639; 20 Johns. 647; 10 N. H. 266; 13 Wend. 605; 3 B.

Mon. 636; 11 S. & R. 388; 4 Paige, 215; 5 Id. 644; 6 Ib. 310; 11 Wend. 534; 1 Dev. 103.]

Mathews had, at no time, an interest superior to that of Ledyard; he was not a party to the deed, though its object was the payment of his debt. It was a voluntary conveyance, without valuable consideration. Before the decree, he had no right to the land. What did he get by the decree? If he, or Gordon the trustee, had not the legal estate, it did not pass by the master's sale; the purchaser at the sale, took their interest, and no more. [1 Ala. 727; 20 Wend. 260.]

The receipt on the master's docket, is not the payment of a valuable consideration. The security was not given to Mathews; he did not contract for it, and Robertson & Beal, to whom it was given, were at the time, discharged bankrupts, without any estate to distribute. [6 Hill, N. Y.]

ORMOND, J.—The controversy in this case, arises between a mortgagee of land, who failed to record his mortgage, and others claiming the same lands by subsequent conveyances from the mortgagor, without notice of the previous mortgage.

The unregistered mortgage was made by Sayre, Converse & Co., to Ledyard, in April, 1836, and the mortgage of the same parties to the Bank of Mobile, in August, 1837. The President of the Bank has been examined as a witness, and admits that the Bank, after it obtained the mortgage, and possibly at the time, knew there was a previous incumbrance on the property, but does not know whether it was the mortgage of Ledyard, or some other incumbrance, of which the Bank had notice. Mr. Sayre was also examined, and says that he is under the impression, the officers of the Bank knew of the mortgage. That they did have knowledge of its existence, is, in our judgment, the necessary presumption from their subsequent conduct.

It appears that Mr. Sayre, by the consent of the officers of the Bank, applied the rent of the mortgaged premises in discharge of Ledyard's mortgage, from 1838 to 1841, and was only prevented from extinguishing the incumbrance by this process, by the accidental falling down of the warehouse erected on the land, which made it necessary to employ the rents in its reconstruction. This conduct on the part of the Bank, is a concession of the prior right of Ledyard, and is indeed inexplicable on any

other hypothesis. It is probable, that the Bank did not know that the prior mortgage had not been recorded, as it appears from the testimony of Mr. Sanford, its President, that as soon as it was ascertained that the mortgage had not been recorded, the permission to pay over the rent to Ledyard was withdrawn; but that its existence was known by the officers of the Bank, at the time the mortgage of Sayre and Converse to the Bank was made, is, in our opinion, the necessary inference from the conduct of the Bank, taken in connection with the facts proved.

It is now contended, that no notice of the existence of a deed required by law to be recorded, is available, but the notice afforded by its registration. We think it perfectly clear, that both the acts of 1823, (Clay's Dig. 154, § 18,) and the act of 1828, (Ib. 255, § 5,) under one of which this deed must come, evidently contemplate, that actual notice shall be equivalent to the constructive notice afforded by the registration of the deed. The language admits of no other interpretation; the whole object and design of the statutes being to give notice of the existence of the deed.

We come now to the consideration of the more difficult question, whether the Ohio Life Insurance and Trust Co., are creditors, or purchasers, for a valuable consideration, it being admitted that it had no notice, either actual or constructive, of Ledyard's prior incumbrance.

Rufus Green, who claimed to be the owner in fee, of an undivided half of the same lot, covered by the unregistered mortgage of Ledyard, executed a conveyance of the same, to R. G. Gordon, upon the following trust. Green was the maker of four promissory notes, two for the sum of $10,600, each due at the date of the deed, and two others for $10,900 each, payable eighteen months after date, but not then due. Upon these notes, Robertson, Beal & Co. were indorsers, and to indemnify them as indorsers, the deed was made, and upon the non-payment of the notes within seventeen months from the date of the deed, the trustee was authorized, and required, to sell a sufficiency of the property conveyed by the deed, to pay off and discharge the trust. It does not appear from the deed, who were the holders of the notes, but by the testimony of Green, it appears that T. C. Mathews held them at that time. Green, and Robertson, Beale & Co. became bankrupt, and were discharged in 1842, leaving

no property to be divided among their creditors. The Messrs. Mathews filed a bill in Chancery, to obtain the benefit of the deed made by Green, and obtained a decree for the sale of the property. A sale was made under the decree, and in 1843 the land was purchased by the Ohio L. I. & T. Co., which sale was afterwards confirmed.

It is now strenuously urged, that the equity of Mathews before the decree, and under the deed, was not greater than that of Ledyard, who was clothed with the legal title. That under the sale made in virtue of the decree, no title passed, which was not previously vested in the party against whom the decree was obtained. That *caveat emptor* is the rule at a Master's sale.

In the case of Toulmin v. Hamilton, 7 Ala. Rep. 367, which, upon this point, is in principle identical with this, we had occasion to consider this question. It was there, upon great consideration, held, that when a deed of trust was given to indemnify an accommodation acceptor, the holders of the paper might resort to the trust property for the payment of the paper when dishonored. That is the precise predicament of this case. The deed of trust was executed to secure, or indemnify, Robertson, Beale & Co., as indorsers of certain notes, which it appears by the testimony of Green, had previously been given to T. & C. Mathews. The rule as established by that case, is, that the creditor is entitled to the benefit of all pledges, or securities given to, or in the hands of the surety, for his indemnity, to be applied to the payment of the debt. It does not in the slightest degree vary the case, that the indorsers have become bankrupt, and have no estate for distribution. The right of the holder to the benefit of this security, does not depend upon the liability of the surety to be damnified; it is because it is a trust created for the better security and protection of the debt. It therefore attaches to the debt, and those interested in it, may affirm the trust, and enforce its performance. [Moses v. Murgatroyd, 1 John. C. 129.] It is also to be observed, that the right to sell vested in the trustee, did not depend upon the fact that the indorsers of the notes were compelled to pay upon their indorsement, but the trust was, to sell if the notes were not paid by Green the maker, in seventeen months, and to pay and discharge the notes.

It is certainly true, as contended, that upon a sale by the Master, no title is acquired which has not been put in litigation, and

adjudicated by the Court, the parties in interest being before it, but we do not perceive, how this admitted principle affects this question. When this deed of trust was made, Green had the legal title to an undivided half of the lot; upon this there was an incumbrance in favor of Ledyard, but of its existence, neither the trustee, nor any of the beneficiaries had notice, either actual or constructive. It is therefore, as to them, as if it never had existed. In the language of the statute, it is "void," and being void, no right can be derived from it, prejudicial to any right secured by the deed of trust, which though *posterior* in point of time, being received in ignorance of the existing unregistered incumbrance, is by the statute *prior* in right.

It is further urged, that although the payment of the debt to Mathews, was the object of the deed, it was a voluntary conveyance, without valuable consideration, within the meaning of the statute.

This objection has, to some extent been anticipated. It may be conceded that the "creditors" spoken of in the act of 1828, are not creditors at large, for in no just sense can a creditor whose debt is liquidated, admitted to be just, and a *lien* given by the debtor on a particular fund, for its payment, be considered a creditor at large. He is rather to be considered a purchaser, of which the debt forms the consideration. The case of Liggat, et al. v. Morgan, 2 Leigh, 841, is a direct authority, that such a creditor is to be considered a purchaser, within the meaning of the statute of the 13 Elizabeth. So in Coffin v. Ray, 1 Metcalfe, 214, it is said, "the attachment of real estate is considered as in the nature of a purchase, and the attaching creditor affected with notice of a prior conveyance, in the same manner as a purchaser." To the same effect is Priest v. Rice, 1 Pick. 164, and Bryan v. Cole, 10 Leigh, 500. The plain and obvious design of our statute, in requiring registration, is, to give notice that creditors, and subsequent purchasers may not be deluded or defrauded; and as to all such, who have not notice in fact, the unregistered deed is void; any other decision would make the provision in favor of creditors utterly fruitless.

But if we were to consider the prior unregistered incumbrance as an equitable lien, and equal in dignity with the lien of a creditor subsequently obtained on the same property, certainly the equity of the creditor is superior, after he has obtained a decree for the en-

forcement of his lien, and has actually enforced it, by sale. In such a case it cannot be doubted, that the purchaser would have, with the legal title, the superior equity, as he would be literally a purchaser for a valuable consideraiion without notice of the prior equity. That is this case. The Ohio L. I. & T. Co. purchased at the sale, made under the decree. It is true, it does not appear that the Messrs. Mathews have received the money, but it does appear that the sale was confirmed, and the title has been made to the company, and that the costs of the suit have been paid. This is in effect, an admission by them, of the payment of the money, as on no other hypothesis can the fact of their permitting the sale to be confirmed, be explained. Nor is this question put in issue by the bill. It is not alledged that the Life Insurance and Trust Co., is not a *bona fide* purchaser, but that it was a purchaser with notice of the prior unregistered deed. The decree in favor of the Messrs. Mathews, is not before us; their demand, to satisfy which the decree was made, was for upwards of forty thousand dollars, and as the maker and indorsers of the notes are all certificated bankrupts, without any estate to divide, as is admitted upon the record, the sale of this property was their only means of reimbursement, if indeed they were not, as is most probable, trustees merely for the Life I. & T. Co.

The cases cited by the counsel for the defendant in error, from Paige & Wendell, to be found on his brief, are based upon a principle which does not obtain in this State—that the payment, or discharge of a pre.existing debt, is not a valuable consideration, in the same sense, as paying money, or parting with property would be. See also, Coddington v. Bay, 20 Johns. 637, where this principle is asserted in reference to negotiable paper. This doctrine is controverted in Swift v. Tyson, 16 Peters, 1, where this question was elaborately considered, and the New York authorities denied to be law, and to the same effect is the decision of this Court in the Bank of Mobile v. Hale, 6 Ala. Rep. 639. The analogy between negotiable paper, and the question here discussed, appears to be perfect, and is so considered in the New York cases. Upon the whole, we are satisfied, that there is error in the decree, so far as it determines that the Ohio Life Insurand and Trust Co. were not purchasers for a valuable consideration.

The view here taken, renders it unnecessary to determine the

question, whether a mortgage of lands is to be registered under the act of 1823, (Clay's Dig. 154, § 18.) as maintained by the counsel for the defendant in error, or under the act of 1828, (Ib. 255, § 5.) as contended by the counsel for the plaintiff in error, as we hold that the Life I. & T. Co. were *purchasers* for a valuable consideration, and therefore within the saving of both statutes. The decree of the Chancellor must be reformed, so as to subject the undivided half of the lot claimed by the Bank, to the whole amount of Ledyard's mortgage. The costs of this Court to be equally divided between Ledyard and the Bank of Mobile. The costs of the Court below to be paid out of the fund. Let the cause be remanded for further proceedings.

ORMOND, J.—A motion has been made for a rehearing in this case, and modification of the decree. The ground of our decision, that the Bank of Mobile had notice of Ledyard's mortgage, when it obtained the mortgage of Sayre & Converse on a portion of the same land, is, that the Bank has not attempted to repel the inference arising from their permitting the rent of the mortgaged estate to be applied to the payment of Ledyard's debt. That the persons having the management of the Bank, should permit this appropriation to be made for several years, without inquiry, is on its face incredible. It is then, material to consider, that no attempt is made at explanation, that this yearly appropriation was permitted by mistake. The only rational inference is, that the only mistake the Bank was under, was in supposing that the mortgage was recorded.

As to the decree. It is insisted, that Ledyard having lost the right to look to the undivided half of the mortgaged estate originally owned by Green, he can only subject the residue of the estate to the payment of half the debt now remaining due on the mortgage.

By the mortgage to Ledyard, by Sayre & Converse, and Green, the former acquired a right to satisfaction of his debt, out of all and every part of the land. In what way has this right been impaired? The failure on his part to record the mortgage, certainly could not have this effect, because he was under no obligation to record it. This may have been necessary to protect him against creditors, and subsequent purchasers without notice, but as between the parties to it, it is as valid to all intents and

purposes, as if recorded. If by the omission to put the mortgage on record, its lien is lost on a part of the land, it is not caused by Ledyard, but by the improper conduct of Green, in again encumbering the land, without giving notice of the prior mortgage, and if the whole burthen is thrown upon the other half of the land, it is not the fault of Ledyard, who has done no act calculated to impair his rights.

If then by the conduct of Green, the whole burthen is cast upon Sayre & Converse, or those representing them, they will have the right to call upon Green to reimburse them. This point was in effect decided at the present term in the case of Andrews & Brothers v. McCoy.

THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT MOBILE v. HUNT, EL AL.

1. Where a third person becomes the pnrchaser of the equity of redemption, and afterwards pending a bill against the mortgagor for a foreclosnre, obtains an assignment of the mortgage, he acquires all the title of the mortgagor, with the incumbrance discharged; yet he may (especially if the mortgagee does not object,) prosecute the suit in the mortgagee's name, to a decree of foreclosure and sale, for the purpose of more effectually securing his title.
2. A report by the Master, of a sale under the decree of the Court of Chancery, requires the confirmation of the Court, which can only be regularly made after notice to the parties adversely interested, that they may show cause against it.
3. Where a sale is made by the Master, in virtue of a decree, but, under a misconception of the wishes and intentions of the parties in interest, the sale may be set aside, if it has not been subsequently assented to, or acquiesced in for sueh a long time as to warrant the inference that it was assented to.
4. The remark of the President of an incorporated Bank, to a Master in Chancery, who informed him that the sale of certain property in which the cor-

poration was interested, had been postponed, that he had acted properly, amounts to nothing more than the approbation of what the master had done; but it cannot be inferred that he was informed when the property would be again offered; that he regarded the Master's communication as a notice, or approved a subsequent sale; even conceding that the President, in virtue of his generl powers, was authorized to act in the premises.

Appeal from the Court of Chancery sitting at Mobile.

The plaintiff in error, who is complainant, by its bill, states that William Wallace, on the 26th February, 1836, executed to T. W. McCoy and T. M. English, a mortgage of certain real estate, (particularly described,) situate in the city of Mobile, to secure to the mortgagees one hundred and twenty-three thousand and nine hundred dollars. Afterwards, the mortgagor conveyed parts of the mortgaged property to several individuals, and the mortgagees confirmed the sales, so that the mortgage continued a lien upon the residue only, consisting of a lot in front on the water, on which a wharf has been erected and to which pertains water privileges.

About the 1st of April, 1837, the mortgagor conveyed all his interest to the water lot, wharf, and water privileges, by deed to John A. Campbell for the purposes therein expressed; and Campbell in virtue of the powers vested in him, did on the 28th December, 1837, convey the same to William Sayre and Wm. P. Converse. Afterwards, on the 25th April, 1839, the grantees in the last deed, conveyed the water lot, &c. to J. W. J. Pritchard, in trust for the purpose of securing the complainant the payment of forty thousand dollars, due from Sayre & Converse. It is further alledged, that on the 23d March, 1842, Pritchard, under the authority of the trust conferred upon him, conveyed the same property to the complainant, who thereby became solely and exclusively invested with the equity of redemption in the premises. To show all which, the complainant refers to the several deeds and conveyances above recited.

It is further alledged, that in June, 1841, McCoy & English filed their bill to foreclose the mortgage executed to them by Wallace, for the water lot, wharf and water privileges, to which the complainant, Sayre, and Converse were defendants. Soon after the filing of that bill, the complainants therein, assigned their interest in the mortgage from Wallace to the present complainant.

On the —— day of April, 1842, a decree of foreclosure and sale was rendered on the bill filed by McCoy and English to pay the sum ascertained to be due on the mortgage, &c.; and under the authority of that decree, the register did on the first Monday in December, 1842, offer for sale the water lot, &c. At that sale, Jonathan Hunt became the purchaser for the sum of three thousand dollars, and received a deed for the property. Afterwards Hunt was let into possession under an order of the Court confirming the sale, and still retains the same.

It is alledged that the lot, &c. in controversy was worth thirty-five or forty thousand dollars at the time Hunt became the purchaser; that the complainant had no notice of the sale, nor was any one then present to protect its interest. In fact it was not until after the sale was confirmed that the complainant had any notice that it had taken place. *Further*, the proceedings throughout were conducted in the name of English and McCoy, the complainant never having instructed the register to sell under the decree; but on the contrary, when the register offered the premises for sale at a previous day, he was stopped by its president, and no authority afterwards given him to sell the same.

The complainant further states, that its interest was known to Hunt at the time of his purchase, and that he did not expect to get an indefeasible title: that conceiving it had a right to redeem under the act of January 1842, it has tendered to Hunt the sum of three thousand dollars, with ten per cent. thereon; offered to pay him for all improvements erected by him since he took possession, and to pay all the expenses incident to a conveyance from him to the complainant. The purchase money paid by Hunt has not been withdrawn from the register; and notwithstanding this and all the facts stated, Hunt refuses to convey the premises to the complainant.

Hunt, McCoy, English and Pritchard are made defendants, and the bill concludes with a prayer as follows, viz: that the decree on the bill of English and McCoy against the complainant, and Sayre & Converse, the sale made thereunder, and the deed of the register to Hunt be set aside and held for nothing, and the complainant restored to its rights in the premises: That the water lot, &c. be sold, and the proceeds applied to the debts due the complainant, secured by the several liens of which it is the pro-

prietor; or that it be permitted to redeem the same upon paying such charges as are proper, which they hereby offer to pay. If this relief cannot be granted, that then the complainant be permitted to redeem the premises under the act of January, 1842, upon paying Hunt the amount of his purchase money, with ten per cent. thereon, and paying for such improvements as have been erected by him since he has been in possession. *Further*, that such other relief as may be proper and equitable, be granted.

Hunt answered the bill, admitting the mortgage from Wallace to McCoy and English, the filing of the bill, and the decree of foreclosure and sale thereon rendered. Respondent also admits that Sayre & Converse had some interest in the property, but has no knowledge, information or belief in respect to it; admits that the complainant had some interest in the same by the assignments of its debtors, but has no other information in respect thereto, than what is imparted by the bill.

Respondent further admits, that he made the purchase of the premises in question at a sale made by the register of the Chancery Court, that he paid the entire amount of the purchase money, and received a deed, under the impression that the sale was *bona fide*, and that he was receiving an unconditional title. He is informed and believes that the property was advertised for sale by the register at his own motion, and upon its having been offered, and no agent of the Bank appearing, he then withdrew it: afterwards the president of the Bank approved what he had done, and directed him to advertise anew; and at the next sale day respondent became the purchaser.

If the register was not authorized to sell, or in any manner violated the instructions of the Bank, the respondent is, and was unconscious of it, and that he paid his money under the impression that the sale was made in conformity to the wishes of those interested in the mortgage. It is prayed that the answer may be considered as a demurrer, pursuant to the statute regulating the practice in chancery.

The cause was submitted for hearing on the bill, answer and proofs, having been taken for cofessed as to McCoy and English. The chancellor was of opinion that the complainant had no right to redeem under the act of 1842, that, that statute did not, by its terms, become operative, until after the decree in favor of McCoy and English was rendered; and consequently could not

affect the proceedings directed by it. *Further*, that the charge of negligence and misconduct in the sale, which is the only remaining ground upon which the interference of equity was asked, is not sufficient to annul the sale; to authorise such an order, there should be some unfair practice, or those interested should have been surprised without fault, or negligence on their part. After confirmation the sale will not be set aside, unless fraud can be imputed to the purchaser, which was unknown to the parties interested, when the sale was confirmed. Neither of the grounds stated, it was believed, were shown to exist. Thereupon, it was ordered and adjudged that the bill be dismissed at the complainant's costs.

E. S. Dargan, with whom was A. Fox, for the appellant, made the following points. 1. That as Pritchard was not made a party to the bill filed by McCoy and English, Hunt should be treated as a trustee for the creditors, for whose benefit P. held the property in question, or their assignees; consequently the bill in the present case, in the aspect in which it is framed, should have been sustained, and relief administered. [1 R. & Mylne's Rep. 741; Story's Eq. Plead. 171-177; 6 Ves. Rep. 573-5; 2 Johns. Ch. Rep. 238; 3 Id. 459.]

2. The complainant was entitled to redeem under the act of 1842, no contract would be impaired by permitting it, and consequently no provision of the State or Federal Constitution violated. [2 Story on Cons. 250; 4 Wheat. Rep. 197-200.]

3. No one can complain that his rights are affected by a statute, unless it operates against him, although in some sense it may impair the obligation of a contract. [8 Cow. Rep. 542-579.]

4. Inadequacy of price—the failure of the register, or Hunt to disclose to the complainant what had been done—the retention of the money by the former, until after confirmation of the sale: the manner in which Hunt's agent obtained possession, believing at the time he purchased, that he acquired a redeemable estate, should induce the Court to set aside the sale. [4 Johns. Ch. Rep. 122; 9 Johns. Ch. Rep. 679; see also 6 Porter's Rep. 432; 1 Cow. Rep. 622.]

5. True, the title of a purchaser has been sustained, although the judgment or decree under which the sale took place was pre-

viously satisfied; but there the sale must be fair and *bona fide*, and for a full and valuable consideration. [6 Porter's Rep. 432.] In the present case, nothing can be claimed from the fairness of the purchase, or the fullness of the consideration. [4 Dall. Rep. 221; Brown's Rep. (Pa.) 193; 3 Ves. jr. Rep. 170; 2 Litt. R. 118; 3 Cow. Rep. 189-193.]

6. To the second and third points made, the appellant's counsel cited the following authorities. [4 Wheat. Rep. 122; 2 Pet. Rep. 413; 3 Id. 290; 8 Id. 88-110; 11 Id. 539, 540; 3 Story's Con. 247; 3 Mason's Rep. 88; 12 Wheat. Rep. 370; 1 Bald. C. C. Rep. 74; 2 How. Rep. 613; 5 Cow. Rep. 542, 579; 4 Yerger's Rep. 10; 5 Id. 220-240;]—And contended that the omission to make Pritchard a party to the bill was not cured by the conveyance of the title vested in him *pendente lite*. True, the Bank thereby acquired the entire interest in the mortgaged property, but this fact could only appear by an amendment of the bill.

7. McCoy and English admit that as it respects themselves, their mortgage is satisfied; Hunt succeeds to their rights with the understanding that the title he acquired was subject to the redemption law of 1842, and it would be a fraud now to permit him to claim more under his contract. *Besides this*, is it competent for Hunt, a stranger to the mortgage, to insist that the rights of the mortgagee have been impaired?

J. A. Campbell, for the appellee.—There is nothing in the record which indicates that the complainant did not desire a sale of the property under the decree in favor of McCoy and English. That suit, after the complainant purchased the interest in the mortgage, was prosecuted for the benefit, and under the direction of the complainant. It is apparent from the letter of Fisher, one of the counsel of McCoy and English, and the testimony of the president of the Branch Bank, that the postponement of the sale was known to the Bank and its attornies, and assented to with the understanding that the property would be offered again.

The purchaser at a judicial sale is not required to look beyond the decree; this itself is conclusive of indebtedness, and though the fact be otherwise, or the debt has been extinguished since the decree, yet the purchaser's title will not be affected. [2 Sch. &

Lef. Rep. 566; 11 Sergt. & R. Rep. 430; 6 Porter's Rep. 219-38; 7 Id. 552; 1 Ala. 356.]

The fact that the mortgage was assigned before the decree was rendered, can make no difference, as no change was made in the parties, and the proceedings were consummated in the name of the mortgagees. McGehee v. Boren, cited from 6 Porter, shows that a payment by the debtor will not affect the title acquired by a purchaser under the decree. That there are cases in which a sale under a judicial decree will be set aside, is not denied, [See 2 Ala. Rep. 256; 26 Wend. Rep. 143; 10 Paige's Rep. 24.]

The sale was made in the ordinary mode, upon notice—four months afterwards, upon motion of the counsel of the then complainants, a confirmation is ordered, possession delivered, and a deed executed; all this, it is conceived, should prevent the Court from administering the relief prayed. [5 Porter's Rep. 547; 7 Id. 549; 1 Ala. Rep. N. S. 356; 2 Id. 256; 2 Johns. Ch. Rep. 228,]

Inadequacy of price, in the case of a public sale by a judicial officer, conducted according to legal forms, is no evidence that the purchase was not fairly made. In such case, proof should be adduced of fraud or other circumstance affecting its validity.

There is not the slightest pretence for saying that the defendant Hunt, or his agent, at the time of his purchase, had notice that McCoy and English had parted with their interest in the mortgage and debt secured. In fact, there is nothing in the record which casts the imputation of *mala fides*, either directly, or by inference, upon Hunt, or the master who executed the decree.

Even conceding that the master was informed of the interest of the Bank in the decree, still he was not bound to give it notice, and ask whether he should sell as it directed. But if such notice was necessary, then we insist that it was given to the president of the corporation, and that its attorney was also advised of the day for which the sale was advertised.

Smith purchased as the agent of Hunt, and for any thing appearing to the contrary, he was a special agent. If he supposed that he was purchasing a title redeemable under the act of 1842, Hunt would not be affected by his opinion. But it seems that he had no opinion on the subject.

The statute took effect in July, 1842, and the decree was ren-

dered in April preceding, and the question is, can the statute affect the decree, or in any manner impair the legal efficacy it possessed at the time it was rendered? Is it competent for the Legislature to modify, even by general legislation, judgments and decrees already rendered. Such an enactment would obstruct the course of justice, by hindering and delaying its administration. The bill of rights is declaratory of common law principles, and was intended to maintain the rights of the citizen from the invasion or interference of the government. [2 B. Monr. Rep. 368.]

The decree of foreclosure, if the debt is not paid by the appointed day, so that a sale takes place, is a divestiture of the mortgagor's title, and an unconditional conveyance is to be made to the purchaser, upon his compliance with the terms of sale. Can the Legislature thus change the character of the decree, to the prejudice of the mortgagee or his assignee, any more than it can impart validity to a fraudulent assignment, or make an absolute conveyance conditional? [11 Mass. Rep. 396.] The act in question must be limited to sales made under mortgages and deeds of trust executed after it went into operation. [1 Ala. Rep. N. S. 226; 2 Ala. Rep. 56; 1 How. Rep. U. S. 311; 2 Id. —; 4 Litt. Rep. 34-64; 12 Wheat. Rep. 313; 7 Monr. Rep. 544-587

It is entirely competent for Hunt to object to the application of the statute, for the reason we have already shown, viz: that it did not enter into the decree, and it was not competent for the Legislature to give it a retrospective operation.

The failure to make Pritchard a party, is an unavailable objection—the rights of the parties to the decree are concluded by it. [2 B. Monr. Rep. 436.]

COLLIER, C. J.—The conveyance from the mortgagor, Wallace, to Campbell, from the latter to Sayre & Converse, from them to Pritchard, and from him to the complainant, invested the Bank with the equity of redemption in the premises in question; and when McCoy and English transferred their interest as mortgagees, the complainant was clothed with all the title that Wallace previously had. McCoy and English having disposed of their lien as incumbrancers, could have had no further inducement to prosecute the suit they had instituted, than merely to see that it was so terminated as not to subject them to costs. Their

assignee might, at least, if they did not object, have continued its prosecution for the purpose of more effectually securing a title by a foreclosure and sale. It is possible that this purpose might have been effected, and it is difficult to conceive of any other that could have prevented its dismissal.

We will consider the case upon the hypothesis that in advertising and selling the property, the register was endeavoring honestly to discharge his duty ; for there is nothing in the record to warrant the imputation of *mala fides*. It is unnecessary to inquire how judicial sales are conducted by a master in chancery in England, or whether it is his duty to inform the parties, or their solicitors, of the time when the bidding will be opened and closed: suffice it to say, that it is, in many respects, essentially different from the course of procedure in this country. [See Bennet' Pr. 162 to 167 ; 2 Smith's Ch. Prac. 178-9 ; Collier v. Whipple, 13 Wend. Rep. 233-4, by Maison, Senator ; Collier v. The Bank of Newbern, 1 Dev. & Bat. Eq. Rep. 328.]

According to the practice of the English Chancery, some of the reports of a master are complete as soon as they are filed, and do not require confirmation by the Court. But there are others which involve a question of law, or of fact, upon which the Court may be called upon to give a legal decision, and of this description, is the report, allowing the highest bidder at a sale under a decree, to be the purchaser. This latter class of reports, it is said, must be confirmed by orders *nisi* and absolute, before any proceedings can be regularly taken upon them, and until this is done, no " consequential directions upon it," can be ordered. [2 Smith's Ch. Pr. 358 ; Scott v. Livesey, 1 Cond. Eng. Ch. Rep. 467.] Bennet, in his practice in the master's office, 167-8, thus states the mode of proceeding, viz : " The sale having been completed, the purchaser, in case he shall be a willing one, procures the report of the master of his having been the purchaser at the sale, or the solicitors for the vendor may, if it be delayed by the purchaser, obtain this report. When obtained, the party who procures it, having had it duly filed at the report office, and an office copy thereof taken, may on the next seal after the date of the report, move on petition for an order *nisi*, to confirm such report: copies of this having been served on the clerks in Court of all the proper parties in the cause, and no cause shown within the usual time, the report of his being the purchaser is confirmed absolutely."

The act of 1841, "to regulate the practice in the Courts of Chancery in this State," enacts, that "unless exceptions have been filed to the report of the Master, the same shall be confirmed by the Court, after two days notice." [Clay's Dig. 355, § 65.] And the fifty-first rule for the regulation of the practice in Chancery, provides, that "the rules of the English Court of Chancery, not inconsistent with the statutes of this State, and the rules and decisions of this Court, so far as consistent with the institutions of this country, are hereby adopted as rules of practice in Courts of Chancery in this State." [Clay's Dig. 618.] The rules which prescribe the mode of proceeding, in order to confirm the Master's report of a sale, are certainly in harmony with our decisions, at least so far as they require a notice to be given to the parties interested, or their solicitors, and are not opposed by any consideration of policy. Our rules are silent as to the manner in which the order shall be obtained, and if the case is not embraced by the act of 1841, recourse must be had to the English practice.

In the case at bar, there is no pretence that notice was ever given, that a confirmation of the sale, and consequent order to let the purchaser into possession, would ever be moved for. The Register, in his deposition, states that the complainant has never received the proceeds of the sale, and that he never gave it any information about the sale, either before or after it was confirmed. Under this state of facts, the confirmation cannot be sustained—notice, or something which the law regards equivalent, is *in general* an essential pre-requisite to judicial action; and where a Court assumes to act without it, its decisions are merely void. This being the case, the order of confirmation cannot be allowed to prejudice the complainant's rights, but we must consider the application to set aside the sale, as if that order had never been made.

The manner of proceeding in order to open the biddings, after a sale has been made under a decree of a Court of Equity, either by a party to the cause, or a stranger, as well before as after confirmation, is fully pointed out by the elementary writers, upon the Chancery practice, and occasionally stated in an adjudged case. [2 Smith's Ch. Prac. 236, *et post*; Bennet's Prac. 171, *et post;* 2 Har. & Gill's Rep. 346; 13 Wend. Rep. 224.] But it is unnecessary here to consider how this result is effected; for the point has already been examined by this Court. In Littell v. Zuntz, 2

Ala. Rep. 256, we said, "when a stranger is the purchaser at a mortgage sale, it will not be set aside for mere inadequacy, no matter how gross, unless there be some unfair practice at the sale, or unless those interested are surprised without fault or negligence on their part." "But where the mortgagee is the purchaser, and the debt secured by the mortgage is not discharged by the sale, no reason is perceived why the bidding should not be opened once, upon the offer of a reasonable advance on the former sale, together with the purchaser's costs and expenses, which should be deposited in Court." The reason for the distinction between the purchase by a stranger, and the mortgagee, may perhaps be considered well founded, but as it does not form an element in our judgment, in the present case, it need not be here noticed. It is however conceded, that "the right to set aside a sale made by an order of the Court of Chancery, when a proper case is presented, must of necessity be an attribute of that Court, as the same power is exercised by a Court of Law, when its process has been abused, and the power of a Court of Chancery cannot be inferior."

In the Mobile Cotton Press, &c. v. Moore & Magee, 9 Porter's Rep. 679, we considered at length the right of a Court to interfere summarily, where a *fieri facias* issued by its clerk had been executed irregularly, &c.; and made these deductions from the authorities there reviewed, viz: "1. A party injured by the improper execution of a *fieri facias* may obtain redress, on motion to the court from which the writ issued. 2. That a sale of land will be set aside where the sheriff is guilty of a mistake, irregularity, or fraud, to the prejudice of either party, or a third person. 3. So the misrepresentation or fraud of a purchaser, furnishes just ground for invalidating the sale." Again, we say, "considering the case upon the facts, which are not denied by the answers, and we think it clearly appears, that the sale was made by the sheriff, either under a misapprehension of duty, or else a misconception of the arrangement between the parties, which they endeavored to communicate to him. In either view, the result would be the same—the sale should be set aside."

It was said, in Jackson v. Roberts, 7 Wend. Rep. 83, that "a party who may be injured by the mistake of a sheriff, can have relief by a summary application to the court under whose authority the officer acts, or through the medium of a court of equity."

So in Arnott & Copper v. Nichols, 1 Har. & Johns. Rep. 471, it was held that a court possesses an equitable control over its executions, and may, on motion, quash the return of a sheriff. And a sale made *en masse* of divers lots of ground, situated in the same town, but detached from each other, was set aside on motion; the court remarking that such a sale was *prima facie* void, and he who seeks to sustain it, must show its justice and expediency. [Nesbit v. Dallam, 7 Gill & Johns. Rep. 512.] In that case it was shown that the property did not sell for more than one third of its intrinsic value; upon which the court observed, that "such a disparity between the price and value of the property sold, furnishes intrinsic evidence of the irregularity, impropriety, or unfairness of the sale; and connected with any of the several omissions of duty, or indiscretions of the sheriff, leaves not a shadow of discretion. as to vacating this sale."

Mere inadequacy of price, it has been held, is not *per se* a sufficient cause for setting aside a sale of lands under execution, but coupled with other circumstances it may be. [Stockton v. Owing, Litt. Sel. Cases, 256; Tripp v. Cook, 26 Wend. Rep. 143.] In Knight v. Applegate's Heirs, 3 Monr. Rep. 388, the clerk omitted to notice on the *fieri facias*, a credit for about half the judgment entered at its foot, and the sheriff raised the entire sum by the sale of land, the title of the land it was considered would not pass to the purchaser. See also, Collier v. Whipple, 13 Wen. Rep. 224; Tripp v. Cook, 26 Wend. Rep. 143.

In the case at bar, we have seen that the complainant became the sole proprietor of the premises in question, so far as the title was vested in the mortgagor, or the mortgagees and the assignee, who claimed under the latter. This title, for any thing shown to the contrary, was complete, and it may, if necessary, be so assumed. The complainant then, may be considered the only party in interest to the cause and decree in favor of McCoy & English, by which the equity of redemption under the mortgage executed by Wallace was foreclosed.

It sufficiently appears, we think, that the sale by the Master was made under a misconception of the wishes and intentions of the complainant. True, the master was not informed what were the intentions of the complainant, yet as there was no other person who appeared to have an interest in the premises, we cannot think that the want of such information forms an objection

against the power or propriety of setting aside the sale. We think the application of the cpmplainant comes within the principles recognized in the Mobile Cotton Press, &c. v. Moore & Magee, 9 Porter's Rep. *supra.*

The remark made by the Master to the President of the Bank, immediately after the postponement of the sale, when the property was first offered, and the reply of the President, amounts to nothing more than a declaration by the latter, when informed of the fact, that there could be no objection to what the Master had done. It cannot certainly be inferred that the President was aware of the time when the premises would be again offered for sale, or that he regarded the communication of the Master as intended to operate as a notice, or concurred in what he afterwards did.

But if the argument of the defendant's counsel be defensible upon this branch of the case, what consequences result from it? Is it competent for the President of a banking corporation to take upon himself the right to control the collection of its debts, or direct the sale of its property? [Spyker v. Spence, at the last term.] To confer such power, must not a resolution, or some other equivalent act of the directory be shown? The view we take of the facts, makes it unnecessary to decide this point.

It is perfectly clear that the assent of the complainant to the sale by the master, cannot be inferred from any act or omission subsequent to that time; for it does not appear that any notice was ever given to the complainant, or that it was otherwise informed that a sale had been made.

There is no pretence for inferring that complainant was informed of what had been done, and assented to it; consequently it is not necessary to consider within what time proceedings should ordinarily be instituted to set aside a sale by the master. From what has been said, it results that the decree must be reversed, and the cause remanded.

SHEFFIELD & Co. v. PARMLEE.

1. When the charge of the Court assumes that the tranfer of a note is *bona fide* for a full consideration, and the evidence is such as to led to this conclusion, if believed by the jury, it is no error.
2. Where the defendants remitted a bill, indorsed by them, to a correspondent house, to whom they were then indebted, with instructions to credit them in account, and that house procured the bill to be discounted, and credited the remitters with the proceeds, and advised them of the facts; these circumstances constitute a sufficient consideration for the indorsement, to enable the correspondent house to maintain an action on the bill, when subsequently paid by them as indorsers, against the remitters.
3. And a holder to whom this house indorsed the bill, after its maturity, and subsequent to its being taken up by them, is not affected by a set off then held by the defendants against their correspondents.

Error to the Circuit Court of Mobile.

Assumpsit by Parmlee, as indorsee of a bill of exchange, drawn by J. C. Dubose, on and accepted by Isaiah Dubose, in favor of Goodman, Miller & Co. who indorsed it to Gayle & Bower, and they to the defendants, who indorsed it to J. R. St, John & Co, and they to the plaintiff. The bill is for the sum of $5,300, dated 18th February, 1837, and payable at Charleston, ninety days after date.

At the trial, upon the issues of non-assumpsit, set off, and payment, the plaintiff read the bill of exchange, indorsed as described, in evidence, as well as evidence of its protest, and notice to the defendants. The plaintiff then proved by a witness, who was a clerk for J. R. St. John & Co. in 1837, that the business carried on by them, was an exchange, or general business, and Sheffield & Co. transacted the same kind of business at Mobile. These two houses drew on each other as occasion required, in carrying on their exchange business, neither house charging the other any commissions. The account of Sheffield & Co. with St. John & Co. during the year 1837 stood as follows:

On the 1st January a credit of		$20,715 55
" 1st February, a debit of		16,062 67
" 1st March,	"	21,293 54
" 1st April,	"	15,864 64
" 1st May,	"	3,512 54
" 1st July,	"	3,292 54

And this last item yet continues open.

The bill of exchange in suit was remitted by Sheffield & Co. in a letter dated 7th February, post marked 22d February, 1837, addressed to St. John & Co. at Augusta, Georgia, with instructions to credit them in account. The bill was offered by St. John & Co. for discount, to the Georgia Rail Road and Banking Co, who discounted it, and the witness carried the proceeds to the credit of Sheffield & Co's account. After the protest of the bill, for non-payment, and its return to the Banking Company, several demands were made of St. John & Co. for payment, but they could not take it up without making greater sacrifices than they felt disposed to submit to, and the Banking Company threatened a suit against Sheffield & Co. St. John & Co. supposing the drawer and acceptor to be responsible men, and to avoid being sued themselves, and to prevent the Banking Company from going on Sheffield & Co. induced the agent of the plaintiff to take it up. It was supposed, at the time, that Parmlee would have all the names upon the paper bound to him for the payment of it, and it was then considered, that he took it out of bank for the honor of all the parties. This was the understanding of the witness at the time, and it was then believed the acceptor would pay it without a suit. The witness was positive that the confidence of St. John & Co. in the ability of the acceptor, induced them to get Parmlee to take it out of bank, and also, that they then did not anticipate that any of the other parties would have to be proceeded against. The draft never came to the possession of St. John & Co. after they passed it to the bank.

The defendant put in evidence the deposition of the cashier of the Georgia Rail Road and Banking Company, in which it is stated, the bill was discounted by that bank and sent to Charleston for collection. On the 22d September, 1837, it was taken up by D. W. St. John, one of the firm of St. John & Co. On the 14th September, 1837, the bank, by letter, informed Sheffield & Co. it would be constrained to institute a suit, if satisfactory arrange-

ments were not made. In answer to this, under date of 25th September, Sheffield & Co. expressed their intention to call on the other parties to see what could be done, and to communicate the result. Sheffield had previously, on the 25th of April, in a letter, signed by him individually, informed the bank of the contemplated suspension upon all drafts purchased for St. John & Co. of New York, New Orleans, Savannah and Charleston, and expressed his intention to endeavor to procure additional security from the drawers and indorsers of such bills.

They also put in the deposition of J. R. St. John, one of the firm of J. R. St. John & Co., who stated the firm of St. John & Co. to consist of himself and D. W. St. John. They did business as brokers, and had offices in New York and Augusta, Ga. as well as elsewhere. The office in Augusta was kept by D. W. St. John, and that at New York by the witness. St. John & Co. at the maturity of the bill in suit, were indebted to Sheffield & Co. in a sum greater than the amount of the bill, and have been ever since until the discharge of the witness under the bankrupt law. D. W. St. John died in August, 1838. St. John & Co. had no right to claim payment of the bill sued on from the defendants, for the reason that they were creditors of the firm to a larger sum; and in no event had St. John & Co. a claim on Sheffield & Co. for the payment of more than half of the bill, as it was bought on joint account.

In answer to cross interrogatories this witness states, the houses of St. John & Co. and Sheffield & Co. were not connected in any transactions, except in doing a joint account business in bills of exchange, notes, &c., between the house of St. John & Co. in New York, and Sheffield & Co. at Mobile; but the business which was done between Sheffield & Co. and the offices of St. John & Co. in places other than New York was not done on joint account. Sheffield & Co. however, would sometimes transmit funds intended for the house of St. John & Co. New York, through their other offices. They were interested in each others transactions so far, that any profits that might arise upon the joint account transactions, were to be equally divided, as well as the losses, between the two houses. The houses were not, in point of fact, partners, nor mutually interested in each other's gains or losses, any farther than as before stated. The witness was unable to state upon what consideration the bill was remit-

ed by Sheffield & Co., to the office of St. John & Co. at Augusta, or what was the state of accounts with that office at the time. Much other testimony was given by this witness, as from information and belief, but this was all stricken out and excluded by the court.

On this state of proof the court charged the jury, that if the defendants remitted the bill to the house of St. John & Co. at Augusta, as agents for collection, and they put the bill in bank, and after it became due, took it out of bank, the plaintiff could not recover, but if the defendants remitted the bill to St. John & Co. their names being indorsed on the back, and St. John & Co. indorsed their names on it to the bank, raised money on it, and after it was due paid it out of their own funds, and then transferred it to the plaintiff, after it became due, then the plaintiff could recover, notwithstanding St. John & Co. were indebted to the defendants in a larger amount, growing out of separate transactions.

The defendants prayed the court to instruct the jury, that if St. John & Co. were indebted to them in a larger amount than the bill, at the time of the transfer to the plaintiff, then the plaintiff could not recover. This was refused, and the defendants excepted, both to the charge given and the refusal to charge as asked. It is assigned that the court erred in both particulars.

Dargan, for the plaintiff in error, insisted—

1. That the charge given, relieved the jury from weighing the evidence, and deciding the conflict between the witnesses. In fact, the charge is based upon the supposition, that if the facts stated by the defendants' witnesses are true, the plaintiff is yet entitled to recover.

2. Assuming the evidence for the defendant to be true, the plaintiff is not entitled to recover, because every indorsement of a bill is a distinct contract, and when a bill is transferred after its dishonor, the holder takes it in the same plight and condition as his immediate indorser held it. If his immediate indorser can maintain no action, the indorsement imparts no right to the indorsee. [12 John. 159.] St. John & Co. have paid nothing to Sheffield & Co. for their indorsement. The bill was discounted by the bank, St. John & Co. received the proceeds, and afterwards took up the bill, thus standing in relation to Sheffield &

Co. precisely as they stood before; during the whole time they were debtors of Sheffield & Co.

3. Sheffield & Co. having received nothing for their indorsement, it is without consideration, and this is a sufficient defence against a holder, who acquires his title after maturity. If the entry of a credit to Sheffield & Co. is considered a consideration sufficient to enable St. John & Co. to maintain an action, then under the proof as to the state of accounts, the law will deem the indorsement paid as soon as the bill was taken up by St. John & Co. [Chitty on Bills, 436, 8 ed. and notes.]

4. The payment of a bill by the drawer, after its maturity is a discharge of a mere accommodation acceptor. [Story on Bills, 422, § 99.] Now are not Sheffield & Co. as between them and St. John & Co. entitled to be considered as mere accommodation indorsers?

5. The debt due from St. John & Co. to the defendants is a good set off, and is not avoided by the transfer of the bill to the plaintiff. [Bridges v. Johnson, 5 Wend. 343; 5 Pick. 312; Ranger v. Cary, 1 Metc. 369; 4 Green, 92.] If under these decisions, the case of Robinson v. Breedlove, 7 Porter, 541, is to control, then the distinction stated in McDuffie v. Darne, 11 N. H. 244, that it is incumbent on the holder to show that he gave value for the bill, must obtain. Here there is no such proof, and therefore the defendants were entitled to a verdict. [Woodhall v. Holmes, 10 John. 231; Wardell v. Howell, 9 Wend. 170.]

Campbell, contra, argued, that the precise question involved here, was determined in Robinson v. Breedlove, 7 Poter, 541.

The rule declared in that case, is conceded on all sides, to be that of the English courts. [Chitty on Bills, 220; 43 En. Com. L. 61.

The weight of authority in the American courts is to the same effect. [6 N. H. 470; 11 Verm. 70; 6 Cowen, 693; 10 N. H. 366; 10 Conn. 30, 55; 2 Bailey, 298; 1 Hill S. Car, 1; Bank v. Hann, 3 Harrison, N. J. 223.]

The case cited from 5 Pick. 312, is on the construction of the Massachusetts statute of set off, and so considered in 1 Metc. 369. Our statutes have received constructions in Stocking v. Toulmin, 3 S. & P. 35, and Kennedy v. Manship, 1 Ala. Rep.

43, in both of which cases it was held, that the statute gives no right to set off a demand against an intermediate indorser.

As to the *bona fides* of the consideration paid by the plaintiff for the bill, no charge was asked, therefore it is immaterial to consider whether the law is correctly held in the case cited from 11 N. H. 244. The evidence of one of the witnesses was, that the plaintiff took the note out of bank, and of the other, that St. John took it out, but there was no dispute before the jury, that the plaintiff took it either from St. John or the bank for a valuable consideration. The charge assumes that it was transferred to the plaintiff, and if the question at issue was its *bona fides*, a specific charge in explanation should have been requested. The rule of this decision is questionable, as will be seen from Bank v. Hann, 3 Harrison, N. J. 223.

GOLDTHWAITE, J.—1. It is our uniform course to construe the charge of a court in connection with the evidence before it, and the questions raised. In the court below there was a discrepancy in the testimony of two of the witnesses, with respect to the person by whom the bill was taken from the bank; one of them asserting it was taken up by the plaintiff, at the solicitation of St. John & Co. and the other stating the same act as performed by a member of that firm. It is not easy to perceive what difference there could be in the result, whether the plaintiff furnished St. John & Co. with the money, for them to take up the bill, or whether he took it up with his own money at their solicitation, if he was to hold the bill for his security, as the condition of his advancing the money. However this may be, it is evident the instructions to the jury were given in view of these different statements; and although the charge assumes a broader ground than is covered by the evidence, yet that is no reason for reversal, if, as given, it is free from legal objection. It assumes, that if the bill was paid by St. John & Co. with their own funds, and afterwards transferred to the plaintiff, he was entitled to recover upon the legal effect of the evidence before the jury. If the question as to the consideration and *bona fides* of the transfer of the bill to the plaintiff, had been expressly raised before the jury, the testimony before them, if believed, was certainly sufficient to warrant the conclusion, that the full sum was paid by the plaintiff. One of the witnesses states the circumstances under which

the plaintiff became the holder of the bill. St. John & Co. were unable to take it up, without making greater sacrifices than they were willing to do; but induced the plaintiff to take it up for them. The inference that he paid or lent them the money, is entirely legitimate; the more especially, as a single question to the witness, if the matter was otherwise, would have removed the difficulty, or elicited the necessary explanation.

If the charge had been asked directly upon the effect of this evidence, the case would then be within the influence of the rule laid down in Carson v. The State Bank, 4 Ala. Rep. 151, and Dearing v. Smith, Ib. 431. Many more cases to the same effect might be cited if necessary, but these, as settling the rule in this court, are quite sufficient. This conclusion relieves us from any further examination of the position, that no consideration for the transfer is shown by the evidence; but it is proper to add to what has already been said, that we do not decide the question, how far a defence of this nature could be insisted on without a special plea, asserting the transfer to be colorable, and insisting on the set off against the indorser.

2. The questions before us are thus narrowed to the consideration passing to Sheffield & Co. for their indorsement of the bill; and the set off insisted upon by them against St. John & Co. As to the first, it is asserted that no consideration passed, and the proposition is advanced, that when a bill is transferred after its maturity, the holder can maintain no action upon it, when his immediate indorser cannot maintain one. If this proposition is understood as confined to the original validity of the bill, or of the indorsement, independent of any defence arising out of other transactions, it is unnecessary to controvert it; because we think that is not the condition of this case. The bill, indorsed by Sheffield & Co., then debtors to the house in Augusta, was transmitted to St. John & Co. with instructions to credit them in account. This firm indorsed the bill, procured it to be discounted, placed the proceeds to the credit of Sheffield & Co. and advised them of the facts. Here the money went directly to the use of Sheffield & Co. and there seems to us no grounds whatever for the pretence that the indorsement was without consideration. If St. John & Co. were now suing on it, and these facts were shown, could their right to recover be gainsayed, independent of the set off?

3. The other, however, is the material question, and it seems to be concluded by other decisions of this court. It will be remembered that we have two distinct classes of paper, the one negotiable, or rather assignable merely, by virtue of our statutes; and the other negotiable at the common law. Independent of our general statute allowing sets off of mutual debts, that which renders promissory notes assignable, provides that the defendant shall be allowed the benefit of all payments, discounts, and sets off possessed against the same, previous to notice of the assignment. In Stocking v. Toulmin, 3 S. & P. 35, this statute was held not to let in the right of set off against an intermediate holder of a note, whether he derived his title by assignment or otherwise; and the evils supposed likely to arise out of a different construction are fully considered. In Robinson v. Breedlove, 7 Porter, 543, a similar question arose, but in relation to a note payable to bearer, which previous decisions had held to be negotiable without the aid of the statute. We then conformed to what seems to be the unquestioned rule of the English courts; and, in analogy with the previous decision of Stocking v. Toulmin, held that the fact of becoming the holder of a negotiable instrument, after its maturity, did not subject the holder to a set off against the payee. Even if we were now dissatisfied with these decisions, it is too late to correct them, as they have long furnished a guide to the commercial transactions of the State. It is conceived, however, they are well sustained by the weight of authority, as well as by the reasons on which they are based. In England, as before observed, the rule never has been seriously questioned. [Burroughs v. Moss, 10 B. & C. 558.] It obtains in Connecticut, New Hampshire, Vermont, New Jersey, and South Carolina; Robinson v. Lyman, 10 Conn. 30; Stedman v. Jelleund, Ib. 55: Chandler v. Drew, 6 N. H. 469; 11 Verm. 70; 2 Bailey, 298; 1 Hill S. C. 1; Bank v. Hann, 3 Harrison.] In Massachusetts a different practice prevails, (Sargent v. Southgate, 5 Pick. 312,) induced, it is said, by a liberal construction of her statute of set off. [Ranger v. Cary, 1 Metc. 369.] In New York, the earlier decisions seem to have been adverse to the rnle adopted by us; (see the cases cited in Bridges v. Johnson, 5 Wend. 342;) but these were departed from in Johnson v. Bridges, 6 Cowen, 693, which decision was afterwards affirmed on a divided court of errors. [See Bridges v. Johnson, before cited.] The legislature then in-

terposed, and restored by statute the previously recognized rule. It is highly probable the same subject has received the consideration of the courts in other States, but we have confined our examination chiefly to the cases cited, considering this point as controlled by our previous decisions.

The result of our examination of the record, is the affirmance of the judgment.

TURNIPSEED v. CROOK, ADM'R, ET AL.

1. When it appears by the allegations of the bill, that the complainant is seeking relief against the defendant, in another bill, for the same cause of action, the bill will be dismissed, whether such previous suit is, or is not then pending.

Error to the Chancery Court of Benton.

THE bill was filed by the plaintiff in error, and alledges, that in the year 1835, he held as his own property, two notes on one Allen Elston, amounting to $1,100. That Samuel F. Clauson (defendant's intestate,) being anxious to make a profit by the purchase, and sale of a tract of land, (which is described,) applied to complainant for the notes of Elston, to enable him to make the purchase; whereupon it was agreed between him and complainant, that Clauson should purchase the land with the notes, and as soon as he could make sale thereof, he would return to complainant the amount of the notes, and also pay complainant one-half the profit that might be realized by a sale of the land. That Clauson received the notes upon this agreement, and with them, together with $1,400 of his own money, purchased the land. That some time after the purchase, Clauson could have sold the land for $8,000, but refused to sell it, and declared that he intended to keep it for his own use. These facts did not come to complain-

ant's knowledge until 1842. That the land has since greatly diminished in value, and that Clauson, upon application to him to sell the land under the contract, denied the agreement as here stated, and refused to execute it.

The bill further alledges, that on the 4th September, 1839, the complainant filed a bill in chancery against Clauson and others, for the settlement of certain partnership accounts, between himself, Clauson and others, in which bill the transaction here narrated, was inserted, which was done under the advice of counsel, to avoid multiplicity of suits, as it was possible that the chancellor, under that bill, would also determine the rights of complainant, as well under said contract, as under the partnership transactions. That the bill was objected to for multifariousness, and overruled by the chancellor, on the ground that relief was not prayed under the agreement, but that it was stated in explanation of the partnership transactions.

The heirs and representatives of Clauson are made defendants, and the prayer of the bill is for such relief in the premises as the nature and circumstances of the case may require.

The chancellor, on motion, dismissed the bill, from which this writ is prosecuted.

T. D. Clarke, for plaintiff in error, insisted,

1. That although the agreement was not in writing, relief could be afforded.

2. That equity would regard Clauson as holding the land in trust for the benefit of complainant, to the extent of his interest. [2 Story, 449, § 1206 and 1207; 2 Ves. & B. 388; 7 Vesey, 453, 425, 435; 1 Cox, 165; 3 M. & S. 562; 3 Mason, 347, 360; 3 Bibb, 15; 2 Johns. Ch. 409; 1 R. & M. 53; 3 Hayw. 253; 4 J. J. M. 593; 2 Eq. Dig. 475, § 43, 62; 4 Bibb, 102.]

W. P. Chilton.—This is a parol agreement to buy a particular tract of land, and is within the statute of frauds. There is no partnership alledged—no loss could be charged upon the complainant. Nor can any trust be raised by implication of law, as the frame of the bill is not designed to present that question, but is for a sale of the land, and division of the profits. The Court will not go beyond the averments of the bill.

ORMOND, J.—Waiving the question, whether the bill states such a contract as could be enforced, not being in writing, and relating to the purchase and sale of lands, we think it sufficiently appears by the bill, that the complainant at the time his bill was filed, was seeking relief against the defendants, in a bill filed by him against the defendants and others, upon the claim here insisted on. It was moved to dismiss that bill for multifariousness, which the chancellor refused, upon the ground that the complainant had properly brought it to the notice of the Court, as a portion of the partnership effects there sought to be settled, which had gone into the hands of Clauson, the ancestor of the present defendants. It is too late now for him to contend, that it was more advantageous to him, to consider it as a contract between him and Clauson, in which the partnership had no interest. In that aspect of the case his bill for a settlement of the partnership accounts was multifarious, and it was only by affirming the complainant's view of it, that it was not an individual contract, between himself and Clauson, but was in substance an allegation merely, that the Elston note was partnership property, and having been received by Clauson, it was right he should be charged with it, and account for it, that the bill could be sustained.

These facts being admitted by the bill, it cannot be sustained, as the complainant might, if this were to be tolerated, recover twice upon the same cause of action. Although not necessary, it may be proper to state, that the bill filed by the complainant for settlement of the partnership accounts, has been before us at the present term, and in the account there stated, Clauson was charged with these notes as partnership property. The result however would be the same, if the bill was still pending. The same matter here attempted to be introduced, being there put in issue, must be there determined.

The decree of the chancellor dismissing the bill, is affirmed.

CARLOS, USE, &c. v. ANSLEY.

1. The mere right of property in chattels, unaccompanied with the possession, cannot be levied on and sold under a *fieri facias*, where the possession is holden *bona fide*, adversely to the defendant in execution.
2. Where a surety against whom, with the principal, a judgment is rendered, points out the property of the latter to the constable, and upon its being levied on and offered for sale, produces a mortgage on the same property, executed by the principal for his indemnity, and forbids the constable to sell, in consequencc of which he purchased the property at about one eighth of its value: Afterwards a *fieri facias* against the principal upon another judgment was levied on the same property, a claim interposed by the surety, and an issue made up to try the right: *Held*, that the *bona fides* of the claimant's purchase should have been referred to the jury, and if found against him, the property should be subjected to the plaintiff's execution.
3. At a sale under execution of the principal's property, it is competent for the surety to purchase, although the judgment and *fieri facias* may be against them jointly.

Writ of Error to the County Court of Macon.

A *fieri facias* was issued from the County Court of Macon, on the 10th of September, 1844, at the suit of the plaintiff in error, against the goods, and chattels, &c. of John Bedell and Thomas M. Robinson; which writ was levied upon a negro man named Harry, as the property of Robinson, on the 24th December, 1844, a claim was interposed by the defendant in error, and a bond executed, with surety, to try the right pursuant to the statute. An issue being made up as required in such cases, the cause was submitted to a jury, who returned a verdict for the claimant, and judgment was rendered accordingly.

On the trial, a bill of exceptions was sealed at the instance of the plaintiff; from which it appears, that before a lien attached in his favor, the slave in question was levied on by a constable, and regularly sold, according to law. At that sale, one Sampson Lanier became the purchaser, for the sum of fifty dollars, as the agent of the claimant, and with money furnished by him. The sale was made under a *fi. fa.* against the property of Robinson, and the

claimant, as his surety in several forthcoming bonds, amounting to the sum of one hundred and fifty dollars; all which were paid off by the claimant. There were many persons present when the slave was sold, and the sale in all respects regular, yet fifty dollars was the highest bid made for him. The claimant took possession of the slave in july, 1844, and retained him until the levy was made, in December of that year.

When the levy was made by the constable, the claimant pointed out to him the slave in question, as the property of Robinson; and when he was offered for sale, the claimant was present, forbid the sale, and exhibited a paper, which he said was a mortgage on the slave.

The proof tended to show, that these acts and declarations of the claimant, caused the slave to sell at so small a sum, and but for them, he would have sold for four hundred dollars, or thereabout. The mortgage was dated in January, 1844, and was pronounced void by the court; because it professed to be made for the sole purpose of securing the claimant against all liabilities he might incur by becoming the surety for Robinson; which he stipulated to become in all cases when desired by the latter.

It was shown that the claimant became the surety for Robinson for about three hundred and fifty dollars—part of which he had paid, and the balance would have to pay. Robinson, at the time the mortgage was executed, was indebted beyond his ability to pay.

The court charged the jury—1. That the mortgage was void. 2. That if the slave in question was in the adverse possession of the claimant, when the levy was made, then the levy was irregular, and they should find for the claimant.

Thereupon the plaintiff's counsel prayed the court to charge the jury—1. That if by means of the fraudulent mortgage, the claimant became the purchaser of the slave for less than he otherwise would have sold for, then he acquired no title by his purchase, and they should find the property subject to the execution; which charge the court refused. 2. That if the claimant bought the slave at a sale under execution, to which he was a party defendant, then his purchase created no change of title; which charge was also refused.

3. The court then charged the jury, that if the claimant purchased the slave in question, at a sale by a constable, made in

conformity to the directions of the law, and took and retained possession under such purchase, then he held adversely to the defendant in execution.

To the charges given, with the exception of the first, and to those refused, the plaintiff excepted.

Cocke, and S. Williams, for the plaintiff in error.

S. F. Rice, for the defendant in error, cited 4 Ala. Rep. 321, 402, 442; 6 Ala. Rep. 690, 894; Horton v. Smith, 8 Ala. Rep. 73; 4 Litt. Rep. 273.

COLLIER, C. J.—It may well be questioned, whether a mortgage made avowedly for the purpose of securing the mortgagee against advances made *in futuro*, may not be supported, if it was executed in good faith. [Stover v. Herrington et al. 7 Ala. Rep. 142.] But as this question, though made upon the record, is not presented for revision, we decline considering it.

In Wier v. Davis and Humphries, 4 Ala. Rep. 442, it was held, that an execution against the goods and chattels of a party, could not be so used as to transfer a mere title unaccompanied by the possession; that such a power would be liable to abuse from collusive arrangements, by which a person out of possession, and with a doubtful title, would substitute another in his place, clothed with the more imposing title of purchaser, under a sheriff's sale. Added to this advantage, the possession itself would be changed by the seizure, and transferred to the purchaser. "We apprehend," say the court, that "it is well settled, that the mere right of action of a defendant in execution to personal property, is not the subject of a levy." This case is cited with approbation in Horton v. Smith, 8 Ala. Rep. 73, where it is also added, that the *bona fides* of the adverse possession is always a question for the jury; "if this is wanting, the transfer, whether by sale or execution, will be inoperative."

We will not undertake to pass judgment upon the acts and declarations of the claimant, in directing the slave to be levied on, then appearing on the day of sale, exhibiting his mortgage, and forbidding the constable to proceed, in consequence of which the slave sold for about one eighth of the sum he would otherwise have commanded. But the existence of these facts are of such a

character, that it should have been referred to the jury, to inquire whether the claimant was influenced by integrity of purpose; or whether his intention was not to defraud the creditors of Robinson, by purchasing the slave at a depreciation. If the claimant used his mortgage with the intention to produce either of these results, then he cannot be allowed to derive any advantage from his purchase. One or more of the charges withdrew the question of fraud from the jury, and supposed that the mere fact of an adverse possession by the claimant, whether acquired *in good faith or not*, made the subsequent levy irregular and unauthorized. In this we have seen that the Circuit Judge misapprehended the law. See Horton v. Smith, *supra.*

The fact that the claimant was, as the surety of Robinson, a joint defendant in the *fi. fa.* did not take from him the right to purchase the property of his principal, when sold to satisfy it. We can conceive of no reason why his rights in this respect should be restricted; especially when by allowing a joint defendant to become a competitor, at a sale under execution of his co-defendant's property, he may the better protect his own interests, without injuriously affecting the plaintiff in execution, or others.

Without adding any thing more, we have but to declare, that the judgment is reversed, and the cause remanded.

CALLER v. VIVIAN, ET AL.

1. Where the holder of a note agrees to transfer a judgment obtained by him against the maker, if the indorser will confess a judgment for the sum for which he was liable, his subsequent refusal to transfer, is no ground to file a bill to compel him to do so, in the absence of the allegation by the indorser, that he has paid the judgment so confessed; as the payment of the money, and not the form of confession, is the essence of the contract.
2. The discharge by the holder of a note, of slaves of the maker sufficient to pay the debt, seized under an attachment at his suit, does not operate in law or in equity to relieve the indorser.

Caller v. Vivian, et al.

Writ of Error to the Court of Chancery for the first District.

The case made by the bill is this:

In November, 1836, the complainant purchased from Flavel Vivian, who was the defendant's intestate, three slaves, at the price of $3,100, and in payment therefor indorsed to said Vivian, a note made by one Bullock, for $4,280, which was at maturity, on the 11th April, 1837. It was agreed between the parties, that when this note should be collected by Vivian, he would pay to the complainant the difference between the sum collected and the price of the slaves. When the note became due, it remaining unpaid, Vivian commenced a suit against Bullock, in the Circuit Court of Mobile county, and recovered judgment in his own name. Whilst this suit was pending, it was understood Bullock was in failing circumstances, and intended to remove his slaves out of the United States, information of which the complainant caused to be communicated to Vivian's attorney, who thereupon procured an attachment against the property of Bullock, which was levied on several slaves belonging to him of value more than sufficient to satisfy the debt due by said note. Soon after this levy, the attorney of Vivian caused it to be discharged, without the knowledge or consent of the complainant, and the slaves being returned to Bullock, he has since removed with them to Texas, by which the complainant has wholly lost his debt.

After it was ascertained that Bullock would not pay the note in any reasonable time, if ever, and the complainant being indorser of the note, and liable to Vivian for the price of the slaves, paid in cash a portion of the debt, and afterwards confessed a judgment in his favor for about $1,800. This payment was made and judgment confessed upon the express agreement that the one against Bullock should be tranferred to the complainant, and placed entirely under his control. Vivian died in 1839, and the defendants were soon afterwards appointed his administrators. The complainant applied to Thacker Vivian, one of the defendants, and the active manager of the estate, to transfer the judgment against Bullock, which he refused to do. The defendants attempting to coerce the judgment, confessed by the complainant, he files the present bill, praying that it may be set aside, and that the money paid by him to the intestate in his life-time, may be refunded, and for general relief.

The defendants answered the bill, and evidence was taken by the complainant, but it is unnecessary to set out the answer, or the testimony, as the bill was not heard on these matters, having been dismissed for want of equity. The dismissing the bill is assigned as error.

PHILLIPS, for the plaintiff in error, insisted—

1. That Caller was entitled to be considered as a surety for Bullock, and the attachment of the slaves as a security for his benefit, the release of which operated as a discharge of the liability. [Hayes v. Ward, 4 Johns. Ch. 130; 3 Stew. 9; Ib. 160; 1 Stewart, 11.]

2. The agreement upon which Caller confessed the judgment was, that Vivian should assign the judgment previously obtained against Bullock.

LESESNE, for the defendants in error.

GOLDTHWAITE, J.—1. The equity supposed to arise out of the agreement between Caller and Vivian, previous to the confession of the judgment by the former, is not of that description which gives jurisdiction to a court of chancery. If the agreement was based on a sufficient consideration, the party has a clear legal remedy for its breach, and under ordinary circumstances, a court of equity will not interfere to compel the specific execution of a contract affecting personal chattels only. But if the power to grant relief was conceded in a case like this, the bill ought not to be sustained without an allegation that Caller had paid the debt, for which his liability, in this view of the case, is admitted, independent of the judgment. The payment of the money, and not the mere form of confessing the judgment, is the essence of the contract, to transfer that obtained against Bullock, and without this, it would be inequitable to ask the transfer.

2. The other point however, is the one here chiefly relied on; but although it is conceded, every indorser, is quasi a surety, yet we think the bill has no equity. The rule is, that if the holder of a security by a valid contract, gives the principal day of payment, then the surety is discharged. [Chitty on Bills, 447; Inge v. Bank, 8 Porter, 108; Pyke v. Searcy, 4 Ib. 61.] There is no obligation to active diligence, and the creditor may forbear

the employment of coercive measures as long as he chooses. [Inge v. Bank, before cited.] It is true there are some decisions which hold, that the release of the principal's property from execution, will enure to release the surety, but we do not well see why the creditor should be bound to follow up proceedings when commenced, which he was in no manner required to commence in the first instance. Some of these cases are quoted by us, Carpenter v. Devon, 6 Ala. Rep. 718, but we do not understand that case as going further than the recognition that the condition of a surety continues, although the debt is reduced to a judgment; and that even then a valid contract, giving day of payment to the principal, is good cause to enjoin a judgment against the surety. The recognition of a rule, such as is contended for by the plaintiff in error, would deprive the holder of securities of a great portion of that discretion in the management of suits, which is so important to be exercised, and throw on him the necessity of pursuing his debtor with the utmost severity, at the risk of losing his recourse on those who are collaterally bound. We are unable to ascertain any principle upon which such a rule can be based, for it seems clear, that the release of a levy in no way impairs the rights of a surety; if he pays the debt he has the entire control of the security, when he stands as indorser; or if otherwise, can at once proceed against his principal. It is certainly true that the discharge of a regular levy might be productive of injury to the surety, and so in most cases would be the dismissal of a suit, or the neglect to commence one. There is indeed no other principle than the one we have previously stated, and the facts of this case not being within it, the bill was properly dismissed.

This conclusion renders it unnecessary to consider the effect of the conduct of the complainant, in confessing the judgment when all the circumstances were known to him.

Decree affirmed.

MORRIS v. BOOTH AND WIFE.

1. A wife may join in a suit with her husband, upon a promise made to her whilst sole, or when she is the meritorious cause of action, and an express promise is made to her after marriage, because the action in these cases will survive to her. When the promise is made to her, it is proof that she is the meritorious cause.
2. When husband and wife join in action, upon a promise made to the wife, neither a debt due by the wife after marriage, a debt due by the husband alone, or a debt due by husband and wife jointly, can be pleaded as a set off.

Writ of Error to the Circuit Court of Barbour.

ASSUMPSIT by the defendants in error, on a promissory note made to the wife, by the plaintiff in error.

To a declaration in the usual form, in which the note is declared on as a note made to the wife, the defendant demurred, which being overruled, he pleaded the general issue. 2. A set off of a debt due by the wife after marriage. 3. A set off of a debt due by the husband. 4. A set off of a debt due by husband and wife jointly. These pleas of set off were demurred to, and the Court sustained the demurrers, and gave judgment for the plaintiffs. The assignments of error are, the overruling the demurrers to the declaration, and sustaining the demurrers to the pleas.

SHORTER, for plaintiff in error, cited Reeves Dom. Rel. 133, 163-4; Saund. P. & E. 2 vol. 789; 1 Term Rep. 621; Chitty on Con. 330; Chitty on Bills, 8.

BUFORD, contra, cited 2 M. & S. 393.

ORMOND, J.—As to the right of the wife to join her husband in the suit, the general rule is, that she may join when the cause of action would survive to her; as where the suit is upon a promise made to her whilst sole, or where she is the meritorious cause of the action, and there is an express promise made to her. In Philliskick v. Pluckwell, 2 M. & S. 393, it was held, that where a

promissory note was made to a married woman, she might be joined with her husband in an action upon it. The note itself being evidence of a consideration, and being made to her, was proof that she was the meritorious cause. This disposes of the demurrer to the declaration.

The question arising upon the pleas is one of more difficulty.

The first of these pleas, presents as a set off a legal impossibility —a debt secured by a contract, made by the wife, after her marriage. By the coverture, her legal existence is merged, and she can do no act which can operate as a contract to charge either her or her husband, unless in the latter case, when she is presumed to act as his agent.

The second plea is equally untenable. The reason why the husband may join his wife with him in the action, is, that if he dies before judgment, the right of action will survive to her, and this right might be defeated, if a set off against the husband alone could be pleaded. He might, if he had so elected, have brought the suit in his own name, and if he had done so, a set off against him would have been good, but a set off against his wife when sole, could not have been received, because, by bringing the suit in his own name, he had elected to treat it as his separate property, and therefore a set off not due in the same right, would be inadmissible. [Burrough v. Moss, 10 B. & C. 558.]

The principles here announced are decisive against the third plea. It is difficult to conceive of a joint debt, due from husband and wife, which could be enforced at common law. A joint promise by them, would in any conceivable case be void at law, as it regards the wife, and would in effect be the promise of the husband, which would be the same fact as is presented by the second plea, which we have seen would be inadmissible as a set off. The demurrers to all the pleas were therefore properly sustained, and the judgment must be affirmed.

DOE EX DEM. KENNEDY v. BEBEE, ET AL.

1. A concession for a tract of land south of latitude of thirty-one, west of the Perdido, and east of Pearl river, was made in 1806, and confirmed by an act of Congress passed in 1832, which contained a *proviso*, declaring that the act should "not be held to interfere with any part of said tract which may have been disposed of by the United States previous to its passage:" *And providing further*, that it "shall be held to be no more than a relinquishment of whatever title the United States may now have to such tract of land:" *Held*, that if the United States had no interest in the premises when the act was passed, in consequence of a previous disposition or other cause, it was wholly inoperative, either to grant or confirm a title; that as the land was situated below high-water when Alabama was admitted into the Union, if the federal government was ever entitled to the right of soil, its title was disposed of previous to 1832.

Writ of Error to the Circuit Court of Mobile.

This was an action of ejectment, at the suit of the plaintiff in error. The usual consent rule being entered into, the cause was tried on the plea of *not guilty*. From a bill of exceptions, sealed at the instance of the plaintiff, it appears, that to make out his case, he introduced a Spanish concession to William McVoy, dated in November, 1806, which had been laid before the commissioner appointed under the act of Congress of the 25th April, 1812, whose report was adverse to its allowance. This claim was again presented to the Register and Receiver of the Land Office at St. Stephens, pursuant to the provisions of an act of Congress of the 3d March, 1827; these officers made a favorable report, and the claim was specially confirmed by an act of Congress of the 5th of May, 1832. Plaintiff also adduced a deed, dated in 1814, by which McVoy conveyed the land embraced by his claim, to Joshua and William Kennedy, with covenants of special warranty.

The defendants, in resisting a recovery, relied upon the act of Congress of 1818, by which the President of the United States was authorized to cause the site of Fort Charlotte in the city of

Mobile, to be laid off in lots and sold—the survey and map thereof made by Silas Dinsmoor, a surveyor of the United States. They proved the sale of the lots in 1820, or 1821, and their purchase by an association of individuals, who received patents therefor; a subdivision by this company, a resale, &c. and a regular chain of title to the defendants.

The line of the Fort lots were extended east, below high water mark, but since their sale, Water street has been laid off east of them, and the land reclaimed by art; and between this street and the channel of the river, and in front of the lot of which the defendants are proprietors, the land in controversy is located.

The plaintiff prayed the court to charge the jury—1. That he was entitled to all the land lying between the eastern survey of Dinsmoor and the river, according to the evidence adduced. 2. That he was entitled to the land embraced by the patent from the United States to his lessor, which was not contained in the grant to the lot company; and that the limits of these lots could not be extended by improvements made as riparian proprietors. 3. That if they found the land in controversy to be within the limits of the Spanish grant, and not embraced by the patents, nor in Dinsmoor's survey, then the plaintiff was entitled to recover. These several prayers for instructions were denied, and the court charged the jury, that the case of Abbot's Ex'r v. Doe ex dem. Kennedy, 5 Ala. Rep. 393, was a decisive authority against the plaintiff's right to recover. A verdict was returned for the defendants, and judgment rendered accordingly.

This cause, with several others depending upon the same title, were argued by G. N. Stewart and J. A. Campbell, for the plaintiff in error; and E. S. Dargan and J. F. Adams, for the defendants.

For the plaintiff, it was insisted, that the purchasers of the lots laid off upon the site of Fort Charlotte, acquired no riparian rights; that the eastern lots were not bounded by the river, but extended to fixed metes and bounds below high water mark; at the *terminus* of these lots, and west of the channel, it was expected that a street would be laid off corresponding with the plan of the city, and the ground so filled up and elevated as to make it fit for use—this expectation has been realized. They cited 9 Por. Rep. 587; 16 Pet. Rep. 251; 2 How. Rep. 592; Schultses'

Aq. Rights, 46, 117, 118; 14 Pet. Rep. 353; 10 Pet. Rep. 717; 16 Pet. Rep. 54; 5 N. Hamp. Rep. 520; 1 Taylor's Rep. 136; 4 Munf. Rep. 63; 4 Dev. Rep. 180; 20 Wend. Rep. 149, 156; 14 Mass. Rep. 151; 17 Id. 207; 5 Cow. Rep. 371; 6 Id. 706; Grotius, 94, 137.

It was admitted, that the concession to McVoy would be inoperative if it were not for the confirmatory act of 1832, and insisted that the survey which accompanies and makes part of it may be referred to for the purpose of supplying the defects of the patent and identifying the land. [7 Missouri Rep. 503; 7 Ala. Rep. 543, 882; 2 How. Rep. 344, 318, 588; Land Laws, Op. & Ins. 23, 878, 887, 1043.] They contended that the premises had not been expressly or impliedly dedicated to the public use; that there was nothing in the manner of surveying the fort lots, upon which such an argument could be rested. [20 Wend. Rep. 115.]

It was contended for the defendant, that the case at bar was identical with Abbot's Ex'r v. Doe ex dem. Kennedy, *supra*, which fully sustained the judgment of the Circuit Court. It was conceded that if the Fort Charlotte lots had been bounded by the river, that the defendants would have had riparian rights, and their counsel insisted that an extension of their lines below high water mark, could not make a different rule of law applicable.

A confirmation was necessary to impart validity to the grant to McVoy, but this could not be done after the sale of the lots, so as to take from their proprietors a water front. The act of 1832, shows in the reservation it contains, that no such purpose was contemplated; and the patent issued under its authority, must be limited by the terms employed in the act. But be this as it may, the concession to McVoy did not convey the shore, or give to its assignee the benefit of accretions. They cited 8 Porter's Rep. 24; 9 Id. 587; 12 Wheat. Rep. 601; 2 How. Rep. 603; 14 Pet. Rep. 368; 10 Id. 100; 16 Id. 251; White's Span. Laws, ed. 1828, p. 62; Ang. on Tide Waters, 124; 2 Hall's L. Journal, 295-8; 3 Am. State Pap. (Pub. Lands,) 12.

COLLIER, C. J.—We do not propose to inquire, whether the defendants, as the proprietors of the eastern lots upon the site of Fort Charlotte, are entitled to the soil that may be formed upon the contiguous shore in their front, either by natural causes or art.

What we said on this subject in the Mayor, &c. of Mobile v. Eslava, 9 Porter's Rep. 587, though it may be correct as a legal proposition, we should be inclined to treat as a mere *obiter dictum*, rather than an authoritative decision of a point which influenced the judgment of the court. In Abbot's Ex'r v. Doe ex dem Kennedy, 5 Ala. Rep. 393, the record may have presented the question, so as to have made it a turning point in the cause, yet as the attention of the court was not called to the supposed distinction between a boundary by the shore, and by fixed metes and bounds, below high water mark, perhaps the case should not be considered a decisive authority in favor of the defendants.

The first question which invites our consideration is this, has the plaintiff shown such a title as authorizes him to recover the premises in question? By the act of Congress, approved on the 5th May, 1832, it is enacted as follows, viz: "Section 1. That Joshua Kennedy, of the city and county of Mobile, in the State of Alabama, be and he is hereby confirmed in his claim to a tract of land, containing twenty and twenty-eight hundredth arpens, situate in the south part of the city of Mobile, which said claim is designated as claim number ten, in abstract A, number two, of the reports made to the Secretary of the Treasury on the 29th of February, 1828, by the commissioners appointed under the act of Congress of the 3d March, 1827, entitled 'an act supplementary to the several acts providing for the adjustment of land claims in the State of Alabama.' Section 2. That the Commissioner of the General Land office be, and he is hereby authorized and required, on a survey of the above mentioned tract of land by the surveyor of the lands of the United States in the State of Alabama, to issue a patent for the same to the said Joshua Kennedy, or his legal representatives, or to any person legally claiming under him or them. *Provided however*, that the confirmation of this claim, and the patent provided to be issued, shall not be held to interfere with any part of said tract, which may have been disposed of by the United States, previous to the passage of this act; and this act shall be held to be no more than a relinquishment of whatever title the United States may now have to such tract." [8 vol. U. S. Laws, 554.]

We will not stop to inquire whether the claim described in the report, so far identifies the land, as to enable one to say from an inspection of the concession to McVoy, and the survey, &c.

accompanying it, that the act above cited was intended to embrace this concession; for if the confirmation, without reference to its application to the premises sought to be recovered, be inoperative, then the plaintiff will have failed to make out his case. This conclusion results from the inability of the Spanish authorities to grant the lands within the present limits of this State south of latitude thirty-one, after the cession of Spain to France by the treaty of St. Ildefonso. Such grants, whether inchoate or perfect, were null and void, unless they were embraced by the stipulations of the treaty of February, 1819, between Spain and the United States, or received vitality from the legislation of Congress. [See Abbot's Ex'r v. Doe ex dem. Kennedy, *supra*, and cases there cited.]

The extent of the confirmation we are considering is declared in most unequivocal terms by the *proviso* to the second section of the act, viz: that it "shall not be held to interfere with any part of said tract, which may have been disposed of by the United States previous to the passage of this act; and this act shall be held to be no more than a relinquishment of whatever title the United States may now have to such tract of land." If then, the United States had no interest in the premises in question, when the confirmatory act was passed, in consequence of a previous disposition of it, or any other cause, that act does not impart a title to the assignee of the McVoy claim. This is a proposition which seems to us to be a consequence resulting so obviously from the language of the *proviso*, as to be sufficiently illustrated by its statement.

In Pollard's Lesse v. Hogan, et al. 3 How. Rep. 212, the power of Congress to grant the shore of the navigable waters in this State, was presented for adjudication, and elaborately discussed and decided. It was there held that the stipulation contained in the act of Congress of 1819, for the admission of Alabama into the Union, which provides, "that all navigable waters within the said State, shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost or toll therefor, imposed by said State," conveys no more power over the navigable waters of Alabama, to the government of the United States, than it possesses over the navigable waters of other States, under the provisions of the constitution. It leaves to the State the same right which the original States possess over

the navigable waters within their respective limits. *Again*, say the court, the shores of the navigable waters and the soil over which the tide flows, were not granted by the constitution to the United States, but were reserved to the States respectively; and the rights, sovereignty and jurisdiction of the new States over this subject, is co-extensive with that enjoyed by the original members of the confederacy. And as a sequence from these and other propositions, which were maintained by the court, it was determined, that the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant land in this State, which was below high water mark when Alabama was admitted into the Union.

Is it not perfectly clear from the case last cited, that the United States, *if they were ever entitled to the right of soil in the shores of our navigable waters*, in the language of the *proviso*, "*disposed*" of it long previous to 1832? To permit the act of Congress to operate as a confirmation, would be to tolerate an interference with the admitted rights of this State, and instead of being a relinquishment of the title which the United States then had, it would be a divestiture of interest which they had yielded up to the local government; and this too, while the act most explicitly disavows any such purpose. The act then, cannot be regarded as either a primary or secondary grant, or conveyance, so as to pass, or confirm a title; for the reason, as we have seen, that the grantor, or relessor, had nothing to grant or release.

This view is not opposed to Hallett and Walker, et al. v. Doe ex dem. Hunt, et al. 7 Ala. Rep. 882; for there the grant in question was *recognized* as valid, independent of the legislation of Congress, although it extended below high water mark. Whether unqualified confirmations of invalid grants of the shore, can be permitted to operate consistently with the case cited from 3d Howard, is a question which we need not consider. It is difficult to educe a harmonious system, even from the decisions of the federal judiciary, in respect to private land claims in the States acquired from France and Spain. The only safe course is to consider no question as concluded merely because it was directly presented by the record, unless it was considered by the Court. In our own adjudications, in cases of this character, we have followed precedent where it could be found; where this has been si-

lent, we have been guided by legal analogies, assisted by such powers of reasoning as we could command. This anomalous litigation, under the influence of the statute of limitations, and other causes, must be drawing to a close, and we think the security of individual rights renders it proper that we should do homage to the maxim *stare decisis*, even at the expense of some inconsistency in decision, rather than unsettle the law to any great extent, with the intention of establishing more uniformity.

We have but to declare the result to be, an affirmance of the judgment of the Circuit Court.

SKINNER v. FRIERSON AND CROW.

1. When an administrator resigns pending a suit against him, the plaintiff is not compelled to make the succeeding administrator a party in his stead, though he has the privilege to do so; but may proceed with the suit, in order to charge the resigning administrator and his sureties, unless the resigning administrator also shows a due administration, or a transfer of all the assets to the succeeding admlnistrator.
2. When the resignation is suggested with the consent of the plaintiff, he may make the succeeding administrator a party, but if the suggestion is not assented to, the administrator is put to his plea, which must show not only the resignation, but the other matters essential to a full discharge.
3. After a resignation, the administrator no longer represents the estate, and a judgment afterwards recovered, will have no effect to charge a succeeding administrator.
4. Upon the confession of the plea of *plene administravit*, the judgment is to recover the sum due, to be levied of the goods, &c. which *hereafter* shall come to the hands of the administrator. A general judgment, to be levied *de bonis intestatis*, upon such a confession, is irregular, and usually amendable as a clerical misprision, but when directed by the Court is error, for which the judgment will be reversed.

Writ of Error to the Circuit Court of Tuskaloosa.

Skinner v. Frierson and Crow.

Assumpsit, by Frierson and Crow, against Skinner, as the administrator of W. W. Capers.

The defendant pleaded *non assumpsit*, statute of *non claim*, and *plene administravit*. The plaintiff took issue upon the first plea, replied to the second, and as to the third, claimed judgment *quando accederunt*. After the cause was called for trial, and when the parties had announced themselves ready for trial, the defendant suggested to the Court that he had settled his accounts as administrator with the Orphans' Court, resigned, and been removed from the office of administrator; that another person had been appointed in his stead, who had represented the estate insolvent, and that it was so declared by the Orphans' Court. To sustain this suggestion, the records of the Orphans' Court were then present in Court, ready to be produced, and the defendant requested the Court so to order, that in the event of a judgment, no execution should issue thereon, but that the same should be certified to the Orphans' Court, for the plaintiffs to receive the proper dividend of the estate. The Court decided the suggestion not to be proper. The plaintiffs then produced and proved their account, and its presentation, and rested. The defendant then offered to produce and prove the decree of the Orphans' Court upon his settlement of accounts with the estate, his discharge by the Court, and removal from office, and also offered to prove that Frierson, one of the plaintiffs, attended when the settlement was made, and claimed the allowance of the same account, which is the foundation of this suit; all which was objected to by the plaintiff, and the objection sustained.

The defendant then asked the Court to instruct the jury, or so to order that no execution should issue upon the judgment to be rendered, unless it was shown that assets had come to the administrator; which the Court refused.

The defendant then requested the Court to instruct the jury, or so to order, that no general judgment *de bonis testatoris*, should be rendered, unless the plaintiff proved to the jury that the defendant had assets in his hands. This was also refused, and the defendant excepted to the several rulings of the Court.

The jury returned a verdict for the plaintiff, upon which judgment was entered, to be levied of the goods, &c. of the intestate *now* in the hands of the defendant remaining to be administered.

The errors assigned open the questions reserved at the trial,

and also point out the irregularity in the judgment, which it is insisted should have been *quando accederunt*, instead of general.

W. Cochran, for plaintiff in error, cited 2 Lomax on Executors, 442, 3, 4.

Peck, for the defendant, insisted, that none of the exceptions at the trial were available, because the evidence offered was not relevant to any of the issues formed. The party had no right to interrupt the progress of the cause before the jury to ask instructions as to the future action of the clerk. If the judgment was improperly entered, the motion should have been to correct it.

GOLDTHWAITE, J.—1. The questions involved in this cause, require us to ascertain what effect is produced on a pending suit against an administrator by his resignation of the trust; as well as the mode by which the fact of resignation shall be made known to the Court and adverse party. The object of a suit against an administrator is to obtain satisfaction, and the general effect of it is to charge the assets of the estate; but beyond this the judgment has the effect also to charge the administrator personally, as well as his sureties, unless the assets are administered in due course of law. As the administrator can be made responsible only because of a debt due from his intestate, it is necessary to ascertain that fact by a suit against him as the representative of the estate, before he can be made personally liable. [Thompson v. Searcy, 6 Porter, 393.] One of our statutes permits the resignation of an administrator; [Clay's Dig. 222, § 9,] and another provides, that any suit commenced by or against a personal representative of any testator or intestate, may be prosecuted by or against any one who may succeed to the administration; [Ib. 227, § 30,] but if the effect of these enactments is to discharge the resigning administrator, without shewing what disposition he has made of the assets received during the continuance of his trust, the creditor might be turned from one to another without end by the mere fact of resignation. This, however, is provided against by the statute which permits the resignation, and the administrator and his sureties is by that declared bound for all the assets and effects which shall not have been duly administered or applied; or shall not be delivered to the suc-

cessor in the administration. [Ib. 222, § 9.] From what has been said in connection with these statutes, it is evident a plaintiff is not compelled to make the succeeding administrator a party to a suit already commenced, though he has the privilege to do so if he chooses. It is also evident that he may proceed with his suit although the resignation is suggested and shown, unless the resigning administrator is also able to show one of the two alternatives of the statute, in his discharge; that is, either a due administration, or a transfer of all the assets to the succeeding administrator.

2. From these principles may be deduced the form of the plea appropriate to a resigning administrator. At common law, although an administrator had administered all the assets in his hands, yet the creditor, upon confessing the plea of *plene administravit*, was entitled to a judgment *quando accederunt;* but if the fact was so found on the trial of the issue, the action was discharged. [2 Lomax on Ex. 446, § 11.] In this particular our statutes seem to work no change; but, inasmuch, as they provide, in effect, for the discharge of a resigning administrator when he has complied with what is required, it follows, that his plea must be so modified as to produce that discharge as a consequence of his compliance with all that the law requires. As the creditor is entitled to charge the administrator and his sureties, when the assets have not been applied in due course of administration, or have not been transferred to the succeeding administrator, it also follows, that he is entitled to controvert these facts, as well as the fact of resignation. The consequence is, that although the suggestion of the resignation, when that is made with the assent of the plaintiff, may have the effect to discharge the resigning administrator from the suit, and authorise the admission of a new party, yet, when not assented to, is of no effect whatever, [Winslett v. McLemore, 6 Ala. Rep. 416,] and the party is driven to his plea, which to be sufficient to discharge the action, must show not only the resignation, but the other matters essential to a full discharge.

3. It now sufficiently appears, that the attempt of the defendant to discharge himself from the suit by the suggestion of his resignation when the cause was called for trial, was not the proper mode; but it is equally apparent, that if the facts were as suggested by him, he had no further concern with the cause. His

connection with the estate had ceased, and not being in fact or in law, the administrator, a judgment obtained against him in that character, could have no effect to charge a succeeding administrator. If the plaintiff's object was to charge the assets of the estate in the hands of the succeeding representative, the suggestion should have been confessed, and a *sci. fa.* taken to make the necessary party. It will be borne in mind, that the defendant, previous to making this suggestion, had pleaded the plea of *plene administravit,* which was confessed, and a judgment *quando accederunt* prayed for. This confession of full administration has relation certainly to the time of pleading the plea, even if it be not referred to the rendition of the judgment on it; [2 Saund. 219, note 2; Moore v. Quinn, 6 Term, 14,] from which it is evident that nothing is involved here but the costs of this Court, because, if the administrator, at that time had resigned, it is impossible that any assets could come to his hands afterwards as administrator. Although, to the parties, this decision is of no importance, we deemed it proper, on questions so important in general practice, to pursue conceded analogies rather than let in a loose and unprecise mode of practice. It is scarcely necessary to add, that the evidence offered, was applicable to none of the issues, and therefore was correctly rejected.

4. The judgment as entered, however, is entirely irregular. On the confession of the plea of *plene administravit,* the proper course would have been to enter an interlocutory order to stay the final judgment until the issues were determined. [2 Lomax on Ex. 446, § 10.] After the verdict, finding these issues for the plaintiff, the entry should have been for the plaintiff to recover the amount ascertained, to be levied of the goods, &c. of the intestate, which thereafter should come to the hands of the administrator to be administered; [Ib. § 14,] but instead of this, the judgment is a general one, *de bonis intestatis,* the effect of which might be to charge the administrator personally, after a *fi. fa.* returned *nulla bona.* According to our general course of practice, under ordinary circumstances, this would be considered a mere clerical misprision of the clerk; but here the Court was asked to direct that no general judgment should be entered. The refusal of the Court to give this direction, shows sufficiently, that the error is attributable to the Court; and though the letter of the statute directs a reversal only when an amendment of the judgment has

been refused in the Court below, [Digest, 322, § 55,] yet a refusal to direct the proper judgment, seems equally within the spirit of the act.

For this error the judgment must be reversed, and here rendered *quando accederunt.*

ANDREWS & BROTHERS v. McCOY.

1. A bill which states the cause of action in the alternative, is insufficient, if one of the alternatives shows that he has no right to a recovery, as the bill must be construed most strongly against the pleader; but if the objection is not taken in the Court below, it cannot be raised for the first time in this Court.
2. Commercial paper, received as an indemnity for existing liabilities, is not transferred in the usual course of trade between merchants, so as to exempt it from a latent equity existing between the original parties.
3. To enable the holder to rely on the rules of the law merchant, as to the transfer of negotiable securities, the legal title to the paper must be vested in him by an indorsement.
4. Where a vendor sells land, and conveys it by a deed, containing the words "grant, bargain, sell," and also a covenant of general warranty, which is at the time incumbered by a mortgage, executed by the vendor, the covenant implied by the statute, from the use of the words "grant, bargain, sell," is broken as soon as the covenant is made, and the express warranty, when the vendee is evicted by the mortgagee.
5. A counter bond, taken by the vendee, from the vendor, with surety to indemnify him against the mortgage, will not be considered a compensation, or satisfaction for a breach of the warranty; and if the vendor, and securities in such bond of indemnity, become insolvent, and there is an eviction under the mortgage, equity will relieve the vendee from the payment of the purchase money *pro tanto*, against the vendor or his assignee.
6. The equity which attaches upon the assignment of a *chose in action*, is one which inheres in, or grows out of the subject matter of the contract. As when there was a warranty against incumbrances, upon a sale of land, an inchoate, or latent equity, would attach to the notes executed for the purchase money, and would be enforced against an assignee of the vendor,

when the equity became perfect, by a breach of the warranty, and the insolvency of the vendor.

7. A vendor of land, took several negotiable notes for the payment of the purchase money, one of which was negotiated in the usual course of trade, the others were not. Held, that although the holder of the note so negotiated, was not subject to an equity existing against the vendor, such equity could be enforced against the holders of the other notes, and that the vendor could not be required to apportion the loss.

Error to the Chancery Court of Mobile.

THE bill was filed by the defendant in error, and alledges, that on the 1st February, 1837, the complainant purchased from one Solomon Andrews, a lot, or parcel of land, for $40,000, and for the payment thereof, executed four promissory notes, falling due annually, for four successive years, and received from Andrews a deed of conveyance, with covenants of warranty. That some time in the spring of 1837, Andrews became wholly insolvent, and absconded from the city of Mobile. That on the 23d April, 1837, he gave notice of the facts, and warned all persons from purchasing, or trading for the notes, and on the 24th of the same month, gave a special notice to the Bank of Mobile. That about this time the Bank of Mobile became possessed of the first of these notes, Fontaine & Freeman of the second, and Andrews & Bro. of the two last, with notice as he charges of his equity.

That Solomon Andrews, previous to his sale and conveyance to the complainant, had executed to one St. John a mortgage on a portion of the premises, (which is described,) to secure the payment of $24,000—that St. John filed a bill to foreclose his mortgage, and obtained a decree and order of sale, and that on the 6th May, 1839, the premises were sold, and conveyed to the purchaser, and complainat evicted therefrom—that the portion thus sold embraced the house and out buildings, and rendered the residue comparatively valueless.

The bill charges, that none of the notes were transferred in the usual course of trade—that if the persons holding the notes had any title at all to them, "it was as collateral security for, or in payment of pre-existing debts." The prayer of the bill, is, for an injunction against proceedings on the notes—that it be referred to the Master, to ascertain how much of the purchase money should be abated, on account of the eviction, and that on his pay-

ment of that sum, the notes be delivered up to be cancelled. The Bank of Mobile, Fontaine & Freeman, and Andrews & Brothers, are made defendants, and specially interrogated.

The Bank of Mobile, by its answer, insists, that the complainant had notice of the incumbrance on the property, and for the purpose of protecting himself, required a bond of indemnity, with good security, which was executed by B. B. Fontaine and John W. Freeman, and bears date on the first February, 1837. That the note on complainant was received by the Bank in payment, and discharge of debts due from Andrews to the Bank, and the evidences of his indebtedness were then delivered up to him, and that at the time the officers of the Bank had no knowledge of any objection to the note.

Fontaine & Freeman answer the bill, and admit the receipt of the second note from S. Andrews, under the following circumstances: They were indorsers on bills of S. Andrews for his accommodation, to the amount of abut $100,000, which were held by one Richardson—that Andrews failed to pay these bills at maturity—that they proposed to convey to Richardson a plantation and slaves, in this State, to pay these bills, and that Andrews agreed, that if such payment were made, he would reimburse them by delivering good notes. That the sale was accordingly made to Richardson, and this with other notes was delivered to them by S. Andrews, in pursuance of his agreement, at which time they had no knowledge of the equity of the complainant.

The complainant filed a supplemental bill, in which, after repeating the allegations of the original bill, he alledges that at the time of his purchase from S. Andrews, as a cumulative security, he took from Andrews a bond of indemnity, executed by Andrews as principal, and B. B. Fontaine and John W. Freeman as his sureties. That at the time of the proceedings of St. John to foreclose his mortgage, and at the filing of the original bill, Andrews and Fontaine & Freeman were, and remain entirely insolvent, so that the bond has become worthless as a security. That Fontaine & Freeman, or one of them, have negotiated the note they received to one John Freeman, but not in the usual course of trade, or for any consideration which could prevail against complainant; that he was proceeding at law to collect it, &c. and prayed an injunction.

John Fontaine answers, and states that the note on complain-

ant was delivered to him in the usual course of trade, and for a valuable consideration, without notice of the complainant's equity.

Andrews & Brothers also answer, and admit that they are holders of the two notes mentioned in the bill, which they received under the following circumstances: That they had accepted and indorsed bills for the accommodation of S. Andrews to the amount of $125,000, which bills, in the due course of business, had come to the possession of the Bank of Mobile, and that S. Andrews was besides indebted to them in the sum of $50,000. That becoming alarmed at the state of commercial affairs, and doubting the ability of S. Andrews to meet his engagements, they applied to him for indemnity against the payment of the same, and received the two notes for that purpose. That they have since in good faith, paid to the Bank of Mobile upwards of $125,000, on their indorsements and acceptances for S. Andrews, and relied upon the notes as available means, but the indemnity they received, will not reimburse them. They also rely on the indemnity taken by the complainant, which they make an exhibit, and insist that until he has exhausted his remedy against the sureties on that bond, he cannot proceed against them.

The Chancellor, at the hearing, dismissed the bill as to the Bank of Mobile, but considered that the equity of the complainant, was superior to that of the defendants, Fontaine, and Andrews & Brothers, and directed an account, to ascertain the injury sustained by the complainant by the eviction.

From this decree, Andrews & Brothers prosecute this writ.

Hopkins, for plaintiffs in error—

The bill charges, that the notes were received by Andrews & Brothers, either in payment of precedent debts, or as collateral security. This is an admission by the complainant, that the defendants are entitled to recover the amount of the notes. The defendants are entitled to the benefit of either alternative, as the allegation must be taken most strongly against the statement of the pleader, and one of the alternatives shows, a title to the notes in the defendants. The objection may be taken either on demurrer, on motion to dismiss for want of equity, or at the final hearing. [3 Porter, 473; 10 Wheaton, 189; 1 M. & S. 201; 3 Vesey, 402, and note.]

The penal bond, with surety, was a good and sufficient consideration for all the notes made by McCoy. [1 Greenl. R. 355; 7 Mass. 14; 15 Id. 171; 3 Ala. Rep. 302.]

It is conceded, that negotiable paper taken in payment of a pre-existing debt is protected from latent equities, and the same reason applies to such a case as this. [16 Peters, 1; 1 Starkie's Rep. 1; 1 Bing. N. C. 469; 4 Bing. R. 496.] The cases of Smith v. DeWit, and De La Chaumette v. The Bank of England were mere dicta.

There could be no recovery under the implied covenant in the deed, arising under the statute, from the terms, "grant, bargain, sell," under the statute, because, the bond of indemnity executed contemporaneously with the deed, prevented these covenants from having any effect. As both parties knew, that this covenant was broken when it was made, in a court of law, the taking of the bond would prevent a breach of the covenant, and in a court of equity, it must be considered as a compensation agreed on by the parties.

Before the last note to St. John would be payable, two of the notes made by McCoy would become due, and if before this period, and before eviction, Andrews and his sureties had become insolvent, equity could not have relieved against the payment of the two first notes made by McCoy. Nor would it have been a good defence at law, to either of the four notes. [4 Ala. 21; 1 Greenl. 358.] The only ground of equity would be the insolvency of the sureties in the bond of indemnity, before the notes were indorsed by S. Andrews. An equity arising from the subsequent insolvency of these sureties, would not be availing against the indorsees. To this point, the case of Sherrod v. Rhodes at the present term is a full authority.

The contest here is for the money still due from McCoy, for the purchase money of the land. The Bank it is admitted, is entitled to be paid in full, and as to Fontaine, who has not appealed from the decree, and is no party to this writ of error, the decree is admitted by him to be correct. [3 Porter, 475.] The contest then, is between the Bank and the plaintiffs in error, and as their title accrued at the same time, the equities are equal, and there must be a *pro rata* division of the fund. The rule would be the same, if instead of commercial paper, it was a bond, or an

account; in either case the insolvency must exist at the time of the transfer, if that constitutes the equity.

The fact that McCoy executed a mortgage on the land to S. Andrews, to secure the payment of these notes, cannot, in the present aspect of the case, be considered by the court. It is not put in issue by the bill, and although appended to the answer of the plaintiffs in error, cannot be considered as evidence in the cause. As McCoy has no equity against the Bank, he cannot be permitted to retain a fund for the payment of the debt to the Bank, to which the plaintiffs in error are entitled. But if the Bank had a right to this fund, it could only be enforced upon the application of the Bank.

CAMPBELL, contra.

ORMOND, J.—It is objected by the counsel for the plaintiffs in error, that it appears from the bill itself, that the notes held by the plaintiffs in error, are not subject to the latent equity now set up against them.

The allegation of the bill here referred to, is, that the notes were not received by the plaintiffs in error in the usual course of trade, but that if they had any title to them, "it was as collateral security for, or in payment of pre-existing debts." This allegation is undoubtedly too uncertain. A bill which does not alledge a cause of action, cannot be entertained, and there is no sensible distinction between the absence of the necessary allegations, showing a cause of action, and an alternative admission, that no cause of action exists, as the bill must be construed most strongly against the pleader. Such is the case here, as appears from the decision in the Bank of Mobile v. Hale, 6 Ala. Rep. 639, where it was held that a commercial instrument received before it was due, in payment and discharge of a pre-existing debt, was taken in the usual course of trade, and not subject to a latent equity of which the transferee had no notice.

But this objection cannot be taken advantage of here, in the mode now proposed. If the bill had been demurred to for this cause, and the objection distinctly presented, it could have been obviated by an amendment. Instead of pursuing this course, the plaintiffs in error submitted to answer the bill, set up their title, and litigate their rights, without objection, and it would be gross-

ly unjust to the complainant, to permit them now, after the cause has been heard on its merits, to raise an objection, which, by their previous conduct they had waived in the primary tribunal. Such has been the constant course of decision in this Court, for some years past.

As to the right of the plaintiffs in error to hold these notes discharged from the equities existing between the original parties to them, it seems to us now, as it did at the argument of the cause, that the case of the Bank of Mobile v. Hale, and of Hull & Leavens v. The Planters' and Merchants' Bank of Mobile, 6 Ala. 761, are decisive against the pretension here set up. The defendants in their answer, in stating their title to the notes, proceed to state their liabilities for S. Andrews, as acceptors and indorsers for his house, to a very large amount. They also claim a balance as due from him upon an unsettled account, which, without "pretending to accuracy," they set down at $50,000, and proceed to state, that doubting the ability of S. Andrews to meet the bills for which they were liable, "they applied to him for *indemnity* against the payment of the same, and received from him for this purpose, on the date aforesaid, the two notes herein set forth." They further state, "that they relied on the indemnity so received from said Solomon, as so much available means, from which the said indorsements and acceptances would be satisfied—that said Solomon received a credit for said notes."

From these statements of the plaintiffs in error of their own title, this case is brought fully within the principle settled by this Court, in the Bank of Mobile v. Hale, already cited, that "commercial paper received as an indemnity against possible future loss," is not taken in the usual course of trade. The answer places this mattter beyond doubt. S. Andrews was applied to for an *indemnity*, from an apprehension, that he would not be able to meet his engagements; the notes were received for that purpose, and relied upon as so much available means to discharge the debts of S. Andrews, for which the plaintiffs in error were also bound. It cannot be pretended, that these notes were received in payment of the debt, which it is alledged in the answer was due from S. Andrews to the plaintiffs in error; not only because that is not the statement of the answer, but also because it appears that no ascertained debt existed. It seems there was a floating balance between the house of which S. Andrews was a

member, and that of the plaintiffs in error. That this debt was never liquidated between the parties, is evident from the conjectural estimate of the amount, which is put down as a conjecture, at $50,000. In the Bank of Mobile v. Hale, we held that a note absolutely and unconditionally received in payment of a pre-existing debt, and the security thus paid off, relinquished, was taken in the usual course of trade, between merchants, as much so as if purchased with money. Such could not have been the fact here, because it does not appear that S. Andrews admitted any debt to be due, and could not therefore have transferred these notes in its discharge; and also because, it is expressly stated in the answer, that the notes were looked to, and held as available means, to discharge the outstanding endorsements and acceptances.

In addition, it may be stated, that from the title, as deduced by the plaintiffs in error to these notes, it appears, that the title was never transferred to them by an indorsement, without which the legal title, according to the law merchant, is not vested. It is true, by that law, a note payable to bearer, may be transferred by delivery merely, but that rule has been changed in this State, by statute, so as to require an endorsement in all cases to vest the legal title, and in this case it appears the paper was payable to order. Without such legal title, the holder of commercial paper has no other, or greater rights, than that of a chose in action at common law, or of an assignee under our statute. [Hall & Leavens v. The P. & M. Bank, 6th Ala. Rep. 761; Hopkirk v. Page, 2 Brock. 41; Story on Bills, 222.] The language of the answer, does not authorize us to infer, that the notes were endorsed to the plaintiffs in error. The allegation of the bill is, that the plaintiffs in error, in some way, became possessed of these notes, and they in deducing their title to them, say they "received" them from S. Andrews. As against the complainant, asserting an equity against the payee of the notes, it devolved on the plaintiffs in error to bring themselves within the rule of the law merchant, so as to exempt the notes in their hands from its operation and effect, as against them.

These notes, then, not having been transferred so as to vest the title according to the law merchant, and not having been received in the usual course of trade, are open in the hands of the plaintiffs in error, to all the equities existing between the original

parties, and this brings us to the consideration of the question, what that equity was, at the time they became possessed of the notes.

The notes were executed with two others, upon the purchase of a tract of land, which was conveyed by deed of bargain and sale, containing the words "grant, bargain, sell," and also a general warranty. Under the statute of this State, the words "grant, bargain, sell," are an implied covenant against all acts done or suffered by the grantor. [Roebuck v. Dupuy, 2 Ala. 535.] The general covenant of warranty is, in this State, equivalent to a covenant for quiet enjoyment. [Caldwell v. Kirkpatrick, 6 Ala. 60.] As the mortgage upon the land in favor of St. John, existed when this sale and conveyance was made, the statute covenant was broken, when the deed was made, and the general covenant of warranty, by the eviction under the sale, to discharge the debt due St. John. It is therefore clear, that the complainant was entitled to be relieved *pro tanto*, against the notes in the hands of Andrews, the vendor, he being insolvent, as was held by this Court in the case of Cullum v. The Branch Bank of Mobile, 4th Ala. 21.

It is however insisted, that this case is varied by the fact, that the complainant took from the vendor, an indemnity, or security, against this breach of the covenant, which in equity must be considered as a compensation.

We think it perfectly clear, that the taking of this security, or indemnity, against the incumbrance upon the land, cannot be considered a satisfaction, or compensation for the breach. It may be that if the sureties of the vendor were solvent, and able to respond in damages for the breach of the warranty, a Court of Equity would refuse to interfere, and enjoin the collection of the purchase money, and leave the party to the remedy he had himself selected. Here it appears, that the sureties, as well as the vendor, are wholly insolvent, and it cannot admit of doubt, that in such a case, equity would relieve the purchaser, as against the vendor, from the payment of the purchase money, and such must be the relief in this case, as the plaintiffs in error are clothed with his rights, and subject to his disabilities.

It is also supposed that the rights of the parties are to be admeasured by the facts as they existed at the time the notes came to the possession of the plaintiffs in error and if the sureties were

not then insolvent, no such equity then existed in favor of the vendee.

The equity which attaches upon the assignment of a chose in action, is one which inheres in, and springs out of the subject matter of the contract. When these notes were delivered, the vendor being then insolvent, they were burthened with the latent equity arising from the covenant against incumbrances. As soon as there was a breach of that warranty, and the sureties also became insolvent, the inchoate right became perfect, Such was the decision of this Court in Smith v. Pettus, (1 Stewart, 107,) which in principle is precisely the same as this case. [See also Murray & Winter v. Lylburn and others, 2 Johns. Ch. 441; Livingston v. Dean, Id. 479; Coles v. Jones, 2 Vernon, 692; Newton v. Rose, 2 Wash. 234.]

The decision in Sherrod v. Rhodes, at the last term, turned upon a different principle. There a surety, who had been compelled to pay the debt for his principal, obtained a set-off in equity against a claim transferred by the Rail Road Co., his principal, to Sherrod. The principle which governed that case, was, that the Rail Road was insolvent when the demand against Rhodes was assigned to Sherrod; and that therefore in equity he had a right to the set-off against the Company, at the time they assigned the claim to Sherrod. It may be conceded, that at the time these notes were delivered to the plaintiffs in error, the equity of the complainant was not perfect, nor was it necessary that it should be; it is sufficient that it existed in an inchoate, or latent state. No principle is better settled, as shown by the authorities cited than that the assignee of a *chose in action*, which is the predicament of the parties here, takes it subject to all the equity existing between the original parties, and it is unimportant whether it is inchoate or perfect. In the case of an equitable set-off, as already observed, the rule is different. There, the right must exist at the time of the assignment, though it be not available at law.

The plaintiffs counsel also contend, that the loss must be visited equally upon all the notes, and that only a *pro rata* amount should be deducted from the notes held by them, although the Bank of Mobile, as the holder of one of the notes, is not subject to the complainant's equity.

It appears that the notes executed by the complainant, on the

purchase of the land, were mercantile instruments, and if they had all been negotiated in the usual course of trade, without notice of the complainant's equity, he would have been without redress. One of them it appears, was duly negotiated to the Bank of Mobile, which the Chancellor decreed to be paid; but we can not perceive that this circumstance impairs the right of the complainant to enforce his equity against the holders of the other notes, who have not obtained them under such circumstances as to protect them against such a scrutiny. His right would certainly be perfect against the vendor, if he had negotiated one, and retained the rest, and these defendants, except the Bank, are in no better condition than he would be, if the transfer had never been made. If all the holders of these notes stood in *equali jure*, there would be great reason, and propriety in apportioning the loss between them. Such is not the case, and as the complainant has a clear right to arrest the payment of so much of the purchase money, as he has lost by the incumbrance on the land, it must be borne by those, who by their own acts, have subjected themselves to all the equities existing against the vendor. This leads us to the conclusion that the decree of the Chancellor must be affirmed.

DOE EX DEM. POLLARD'S HEIRS v. GREIT, ET AL.

1. The lessors of the plaintiff claimed under a Spanish permit, dated 11th December, 1809, for an unknown quantity of land, situate in Mobile, which the commission for the examination of land titles reported was forfeited under the Spanish law, for want of inhabitation and cultivation. The title under which the defendant claimed commenced in 1803, and was confirmed by an act of Congress of 1822, and embraced a lot for one hundred and forty-nine 4-12 feet on Water street, known under the Spanish government as a water lot, and situated between Church and North boundary streets; immediately front of this lot, and between Water street and the channel of the river, improvements were made prior to May, 1824, by those under whom the defendants deduced title; In May, 1824, an act of Congress was

passed, by which the United States relinquished their right to the lots of ground, east of Water street, and between Church and North Boundary streets, then known as water lots, and situated between the channel of the river, and the front of the lots, known under the Spanish government as water lots in Mobile, whereon improvements have been made, and vested the same in the proprietors of the latter lots; except in cases where the proprietor had alienated his right to the then water lot, or the Spanish government made a new grant, or order of survey for the same, while they had the power to grant the same; in such case the right of the United States was vested in the person to whom such alienation, grant, or order of survey was made, or his legal representatives: Provided, that the act shall not affect the claim of any person, &c. In 1836, the claim of the plaintiff was confirmed by an act of Congress, which declares that it shall only operate as a relinquishment of the right of the United States, without in any manner affecting the claims of third persons: *Held*, that the plaintiffs had no right to the premises claimed by them, which could in any manner impair the confirmation of 1822, and the subsequent enactment of 1824; that the former act invested the defendants with all the title of the United States to the lot west of Water street, and the latter, in virtue of improvements made on the water lot, relinquished the same to the proprietor of the western lot: consequently the title to the lots claimed by the defendants, both east and west of Water street, having passed out of the United States previous to 1836, and vested in individuals, the act passed in that year was inoperative as against the defendants.

2. Where the plaintiff claimed under a Spanish permit, dated in 1809, which had been unfavorably reported on, a part of the shore of Mobile bay which had not been reclaimed from the water when Alabama was admitted into the Union, in 1819; an act of Congress passed subsequently to the latter period, relinquishing to the plaintiff so much of the shore as is embraced by the permit, provided the rights of other persons are not thereby affected, is inoperative.
3. *Quere?* Whether, in a controversy in respect to the location and title to lands, under the instruction of the Court, the jury by their verdict affirmed that the premises of which the defendant was in possession, was not embraced within the defendant's lines, the judgment should be reversed, where the Court, upon some other point in respect to the title, may have charged the jury incorrectly.
4. If a patent issued under an act of Congress describes the land by other metes and bounds than the act designates, it is void, both in law and equity, as to the excess which it professes to convey.

Writ of Error to the Circuit Court of Mobile.

This was an action of ejectment, at the suit of the plaintiff in error. Greit being the tenant in possession, came into Court and admitted that he was in possesion of that part of the land "in the plaintiff's declaration mentioned, commencing on Government street, seventy-seven feet from the intersection of Water and Government streets, at the south-east corner of said intersection, and from that point on Government street, measuring west on said street, 25 6-12 feet, and running back at right angles, so as to form an oblong from Government street to the southern line, in the plaintiff's declaration mentioned." In respect to the residue of the lands sought to be recovered, the tenant disclaimed all title, or possession; and as to the above, confessed lease, entry, and ouster, and insisting upon the title, pleaded "not guilty." Thereupon the tenant, together with his landlords, Solomon Mordecai, and John. J. Wanroy, were admitted to defend jointly; the cause was submitted to a jury, who returned a verdict of "not guilty," and judgment was rendered accordingly.

On the trial, the plaintiff excepted to the ruling of the Court. It is shown by the bill of exceptions, that the plaintiff read to the jury, from the American State Papers in respect to Public Lands (see vol. 3, pp. 17, 18,) a report to show that a claim numbered 45, was presented by the ancestor of the lessors, to the commissioners appointed to examine into the title to lands in Mobile and thereabouts. He further read an act of Congress, passed the 26th day of May, 1824, entitled "an act granting certain lots of ground to the corporation of the city of Mobile, and certain individuals of said city;" and then adduced an act of Congress, approved the 2d day of July, 1836, entitled "an act for the relief of Wm. Pollard's heirs," confirmatory of the claim above mentioned. The plaintiff also gave in evidence a patent from the United States for the premises, issued in pursuance of the last mentioned act, and proved by the chain carriers who aided in repairing the King's wharf, in 1818 or 1819, the correct location of the lands embraced by the patent.

There was also offered as evidence, a map, which was proved by Delage, the deputy surveyor of the United States, who made it, to be a "correct diagram of a portion of the premises claimed by both parties, and showed the relative situation thereof; and more particularly, that the premises claimed by the plaintiff were within the lines of the patent." The plaintiff also adduced a map

showing a true diagram of the premises, as they are set forth in the patent, made by another deputy surveyor of the United States, and proved that it correctly represented the *locus in quo* as connected with other objects around it. The extract from the State papers, and the two maps are appended to the bill of exceptions, and made a part of it.

The defendants, to maintain the issue on their part, relied on the act of Congress of 1824, which the plaintiff read to the jury as conferring a right to the premises in question, because they lay in front of a lot of which the defendants were the proprietors, and between it "and the river Mobile." They then offered to lay before the jury, the transcript from the land office at St. Stephens, the official survey, and patent certificate issued to the heirs of Espejo, for a lot on the west side of Water street, and at or near the south-west corner of Government and Water streets, in the city of Mobile; and proposed to adduce evidence that this lot had been used, improved, and occupied during Spanish times, by Antonio Espijo, and after his death by his children and widow: That partition was made between the heirs in 1821, and the lot here referred to was assigned to Gertrude Tankersly, a daughter of Antonio, for whom Mordecai and Wanroy held the same in trust. That in the deed of allotment and partition, the lot is bounded east by the river Mobile as it then flowed.

It was further proposed to show, "that in Spanish times this lot was on the river bank, and run westwardly for quantity; that in 1818, Sylvanus Montusa, and Richard Tankersly rebuilt a wharf on the posts of the old King's wharf, which was blown down in 1811. Montusa married the widow of Espejo, and Tankersley was the husband of Gertrude. The defendants offered to prove, that Tankersly built a much larger wharf in front of the lot, which was occupied by him and his tenants till the conveyance to the trustees of his wife—the Montusa wharf as it was designated, was carried away by a gale in 1820 or 1821. The land between Water street and the river was made by filling up the marsh by Tankersly or those claiming under him; some of the low ground was reclaimed in 1822, and much more since that time.

The defendants also adduced a map made in 1824, accredited by the city, in order to make it appear that Church st. was south of Government, and that north of Government street, six or seven streets

were laid out, running in a similar direction to the river—on that map, Commerce, which lies between Water street and the river, appears to have been opened, and the Tankersly wharf designated as west of Water street, north of Church, and south of Government streets. They also proposed to introduce many witnesses to prove that the line of the King's wharf lay north of the land in front of the lot of the defendant, on the west side of water street, and that the defendants have not encroached upon the claim of the plaintiffs, which is confined to the King's wharf as their south boundary; and for the purpose of fixing the line of the King's wharf, interrogated them as to their recollection of the same, of the marks, and memorials, &c., by which its position could be identified. *Further*, that the courses and distances laid down in the patent of the lessors of the plaintiff infringed on the lands to which the defendants were entitled. Extracts from the maps referred to, or the maps themselves it is agreed may be considered as embodied by the bill of exceptions. To all the above testimony as offered the plaintiff objected, but his objections were overruled, and the evidence was permitted to go to the jury.

The court, in its charge to the jury instructed them, that the only question they had to decide was, whether the King's wharf lay above or north of Government street, and if, from the evidence they believed that it was thus located, they should find for the defendants.

Thereupon the plaintiff's counsel prayed the court to charge the jury as follows: 1. That so far as the defendants claimed to derive title under the act of 1824, it was competent for Congress, by a subsequent enactment, to grant the land claimed by the defendants, to the lessors of the plaintiff, and prescribe the boundary and limits of the same, as has been done by the act of 1836. 2. That so far as the defendants claimed to hold or derive a title under the act of 1824, they were concluded by the patent of the lessors of the plaintiff, and the government survey therein set forth. Both these prayers for instructions were denied.

"The court also instructed the jury, that if the King's wharf lay south of government street, the plaintiff was entitled to recover to it, as his title in case of conflict was superior."

J. Test and P. Phillips, for the plaintiff in error, made the following points: 1. It may be questioned whether the defendants

have shown a title to the lot west of Water street; if they have, their title to the eastern lot can only be deduced from the act of May, 1824. This statute confers a bounty, and is limited in its operation by an *exception*, of the application of which the federal government may judge; the government has adjudged that the lessors of the plaintiff come within the exception and has located their claim accordingly.

2. There is no discrepancy between the patent to the lessors and the act of Congress under which it was issued, and if there was, it would not be allowable for the defendants, who must be regarded as trespassers to defeat the patent, or introduce evidence to show that it improvidently issued.

3. The act of 1836 directs that a patent shall issue, and in order that the land might be more particularly described, it was necessary that an examination and survey should be made as provided by the act of 1822. There can be no ground for the distinction attempted to be drawn as to the effect of patents here and in England. The King's patents frequently issue, not only for lands of which the crown is the exclusive proprietor, but also for that which the King holds as a trustee for the public. By requiring a patent to issue, the act of 1836, impliedly directed the preliminary steps to be taken to ascertain the locality and dimensions of the land, and the patent is as much the act of Congress as if it had been so declared.

4. Until the patent issues, the title remains in the United States, [13 Pet. Rep. 436, 448, 498; 8 Lou. Rep. N. S. 400.]

5. The Spanish concession to Pollard, confirmed by the act of 1836, clearly embraces the *locus in quo*, and the patent is coextensive with that enactment.

6. It was not admissible to show that the patent of the lessors was improperly located, viz: that the King's wharf was in Government street, and not 14 feet south of it.

7. The title to all lands is presumed to have been originally in the United States, and that Congress have unlimited power of legislation over the subject. [3 Story on Cons. 198; 8 Wheat. Rep. 595.] And cannot be controlled by State authority. [13 Pet. Rep. 450-1, 517.]

8. Inchoate titles emanating from Spain, &c. are mere nullities, until confirmed by Congress, except where the land has been inhabited or cultivated prior to the treaty of St. Ildefonso, 1

Land Laws, 509; but an act of Congress may operate as the grant of the soil, 2 How. Rep. 345, 372. A patent however is the supreme evidence of title, and cannot be defeated by evidence other than a patent by an elder date. [13 Pet. Rep. 448, 450, 515 to 518.] And a claim, when confirmed, relates back to the incipiency of the title. [1 Pet. Rep. 664; 6 Id. 713-14.]

9. A survey is necessary to the appropriation of the soil, and a survey made by a surveyor of the United States cannot be contradicted by parol, but must be taken to be true. [7 Por. Rep. 434.] To show the conclusiveness of the patent, and the survey recited in it, they cited 3 Pet. Rep. 96-7, 338, 341-2-4; 6 Id. 342-3-5-6, 367 to 371; 5 Wend. Rep. 146; 8 Id. 190; 14 Id. 695-7; 1 T. Rep. 701; 11 East's Rep. 312; 19 Johns. Rep. 100; 1 Caine's Rep. 358, 363; 2 Binn. Rep. 109; 4 Sergt. & R. Rep. 461; 2 Mass. Rep. 380; 5 Greenl. Rep. 503; 2 Dev. Rep. 415; 4 Wheat. Rep. 144; 4 H. & Munf. Rep. 130.]

10. The defendants have no title under the act of 1824, in virtue of improvements. [2 How. Rep.] Having no title, they must be regarded as mere intruders. [4 Johns. Rep. 202.]

J. A. Campbell, for the defendant in error, said there was nothing to connect the proceedings in the land office which were reported to the Secretary of the Treasury, as shown by the State Papers, and relied on by the plaintiff at the trial, with the subsequent legislation of Congress in 1824 and 1836. And these were the only evidence of title produced by the plaintiff, save only the patent which professes to have issued pursuant to the latter enactment.

The defendant's title is proved by a Spanish concession to Antonio Espejo, dated in 1803, for a parcel of land on the river below the King's wharf and near it—a confirmation to his heirs in 1822—a survey and patent certificate. This lot was improved in Spanish times, was occupied by the family of Espejo, after his death, and is located at the south-west corner of Water and Government streets.

Every thing that is necessary to confer a title under the second section of the act of 1824, was proved by the defendants, viz: those under whom they claim had a lot west of Water street, which was a Spanish water lot, prior to 1813; they improved the ground in front of them to the east of Water street prior to

the 26th of May, 1824, and were in possession of the same on that day; and this property is between Church and North Boundary street. These facts entitle the defendants to the front property, (which is that now in controversy,) unless an opposing grant from the Spanish government is produced.

The act of Congress of 1836 makes no reference to any Spanish grant, nor to the claim in favor of Pollard, which is specified in the report; they cannot then be connected with each other. The report merely proves the fact that it was made, but does not establish the genuineness or contents of a paper of which it is only an abstract—to do this, it is essential that the proper proof should have been given of the loss of the original. [1 Ala. Rep. N. S. 660.]

By the act of 1836, the rights of third persons are carefully preserved. The defendants were previously invested by the government with land in front of their ground, and east of Water street, while the title of the lessors of the plaintiff were confirmed to the King's wharf. If the King's wharf had been in front of Espejo's claim, and a Spanish grant had been produced to Wm. Pollard, then the decision in the case of Pollard's heirs v. Kibbe, and Pollard's heirs v. Files, in the Supreme Court of the United States would be favorable to the plaintiff. But in this aspect, the plaintiff should have shown—1. A Spanish grant. 2. The location of the King's wharf.

A reference to the ruling of the Circuit Court, will show that the non-production of a Spanish grant was overlooked—its existence and validity were assumed, and the jury were informed, "that if the King's wharf was south of Government street, the plaintiff was entitled to recover to it as his title in case of conflict was superior." The Court further charged, that the location in the patent was not conclusive, and that the location of the King's wharf was a question of fact for the jury; the jury have decided that it is not south of Government street, but that the property in question is bounded by this street.

The location by an agent of the government may be conclusive between the United States and the claimant, but as between third persons and the claimant it can have no effect, unless the former claim under the government subsequent to the location. The act of 1824, does not provide for surveys and locations, but

transfers the right of the United States, leaving the parties interested to adjust them. [Mayor, &c. of Mobile v. Farmer's heirs, 6 Ala. Rep. 738; 7 Missouri Rep. 98; 2 How. Rep. 344; Id. 581.] If the patent on which the plaintiff relies, goes beyond the act of Congress under which it issued, the latter will restrain and control it.

No patent was necessary to consummate the title of the defendants under the act of 1824; they showed a legal title when they proved the facts necessary to confer it, according to the requirements of that enactment. This point was expresly ruled in The Mayor, &c. of Mobile v. Eslava, 16 Pet. Rep. 254; see also, 12 Pet. Rep. 410; 9 Cranch's Rep. 43; 2 Wheat. Rep. 196; 3 Dall. Rep. 425; 2 How. Rep. (U. S.) 344; 6 Missouri Rep. 330; 7 Id. 98.]

Upon the titles shown, the inquiry then was, the locality of the King's wharf. If this wharf had been found to be south of government and in front of the lot which the defendants claim through Espejo, the defendants' title would have been the oldest, inasmuch as the plaintiff produced no Spanish grant—in fact no title of an earlier date than 1836. The error then, if there be any, is in favor of the defendant—and the jury have found that the King's wharf is above the south line of Government street; consequently the defendants have not encroached on the plaintiff's property, and the location of the United States surveyor is not correct.

The Montusa wharf, was upon the site of the King's wharf in 1818, and is shown by the map of Dinsmore to have been above the line of the Montusa buildings, as there laid down. This map is the most unsatisfactory evidence. True the larger wharf which was subsequently erected by Tankersly, was in a different position; this seems to have confused some of the witnesses, but the verdict of the jury was satisfactory to the Circuit Court.

COLLIER, C. J.—The report of the commissioner for the examination of land claims east of Pearl river, merely states that Wm. Pollard claimed as the original claimant a Spanish permit dated 11th December, 1809, for an unknown quantity of land, situate in Mobile, issued by Cayetano Perez, but of which there had been no survey, inhabitation, nor cultivation. In respect to which the commissioner remarked that the claim was forfeited

under the Spanish law for the want of inhabitation and cultivation.

Thus stood the title of the lessors of the plaintiff, (assuming that they are the heirs of Wm. Pollard, the claimant,) when the act of 26th May, 1824, was passed. The second section of that act which is alone pertinent to the case before us, enacts, "that all the right and claim of the United States to so many of the lots of ground east of Water street, and between Church street and North Boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots known under the Spanish government as water lots in said city of Mobile, whereon improvements have been made, be, and the same are hereby vested in the several proprietors and occupants of each of the lots heretofore fronting on the river Mobile, except in cases where such proprietor or occupant has alienated his right to any such lot now designated as a water lot, or the Spanish government has made a new grant or order of survey for the same, during the time at which they had the power to grant the same; in which case, the right and claim of the United States shall be, and is hereby vested in the person to whom such alienation, grant, or order of survey was made, or in his legal representative: *Provided*, that nothing in this act contained shall be construed to affect the claim, or claims if any such there be, of any individual, or individuals, or of any body politic or corporate." [Land Laws, ed. 1838, part 1.] This section relinquishes to the proprietors of what were known as water lots under the Spanish government, all the right and claim of the United States to so many of the lots of ground east of water street, within certain limits, and known as water lots in 1824, whereon improvements were then made, as are situated between the channel of the river and the front of those that were water lots in Spanish times, &c. It does not appear from the record that the lessors or their ancestor were the proprietors in 1824, of a lot lying on the west side of Water street, or elsewhere in the city of Mobile; so that they can only claim under the statute of 1824, in virtue of the retrospective effect of the act of 1836.

Let us briefly consider what was the predicament of the defendant's title at this latter period, and what influence the act of 1836 has upon it, even if it relates to the same property. That statute enacts, "that there shall be, and is hereby confirmed unto

the heirs of William Pollard, deceased, a certain lot of ground situated in the city of Mobile, and bounded as follows, to wit: on the north by what was formerly known as John Forbes and company's canal; on the west by Water street; on the south by the King's wharf; and on the east by the channel of the river; and that a patent shall issue in the usual form for the same: *Provided*, That this act shall only operate as a relinquishment on the part of the United States, of all their rights and claim to the above described lot of ground, and shall not interfere with or affect the claim or claims of third persons." [Laws U. S. 531.]

If Pollard had a claim to the lot confirmed to him, the confirmation would relate back to the time when the incipient title attached, if the fee was in the United States. But it is not competent for Congress, by a mere enactment to confer upon its grantee, a title which had already vested in a third person; and in the present case, such a purpose is expressly disavowed. The *proviso* to the act we are considering, declares that it shall only operate as a relinquishment on the part of the United States of all their right and claim, and shall not interfere with, or affect the claims of third persons. This is quite sufficient to show, that if the title to the lot described in the act, had passed out of the federal government, the act was itself inoperative.

The title under which the defendants claim, commenced in 1803, and was confirmed by an act of Congress of the 8th May, 1822, entitled "An act confirming claims to lots in the town of Mobile, and to land in the former province of West Florida, which claims have been reported favorably on by the commissioners appointed by the United States." [Land Laws, ed. 1838, part 1, p. 348; see also, Id. pp. 208-316.] This claim was founded on a "Spanish permit" to Anthony Espejo, of which the commissioner reported no survey had been made; consequently, under the eleventh section of the act of 1819, it was surveyed, and its boundaries ascertained. By a patent certificate issued by the register and receiver of the land office at St. Stephens, the lot in virtue of which the defendants claim the premises in question, is described "as a lot of ground within the city of Mobile, begining at the south west corner of Government and Water streets, and running thence with Government street, S. 76, W. 149 4-12 feet to a stake, thence S. 11, E. 64 feet to a post, thence N. 76, E. 149 4-12 feet to Water street, thence along said street N. 11, W,

64 feet to the begining, containing nine thousand five hundred and fifty-seven feet, English measure."

The location of this lot shows a front on Water street of one hundred and forty-nine 4-12 feet; and the proof very fully establishes that it was known under the Spanish government as a water lot; that it is situated between Church street and North Boundary street; that improvements were made on the lot in front of it between Water street and the channel of the river, prior to May, 1824, by those under whom the defendants deduce title. This being the case, what title remained in the United States to relinquish by the act of 1836 to the lessors of the plaintiff? Did not the confirmation of Espejo's claim in 1822, and the act of 1824 invest his heirs not only with the land embraced by the Spanish permit, but also with the reclaimed land lying east of Water street and west of the channel of the river? Does not the act of 1824 operate as a grant in favor of the persons coming within the categories it prescribes, and thus estop Congress from making a valid disposition of the same property, by a subsequent enactment intended to operate either as a primary or secondary conveyance; more especially if the second act be not sustained by a legal obligation resting on the Federal Government? And if it be a grant where is the necessity for issuing a patent in order to consummate the grantee's title? [See Hallett & Walker, et al. v. Doe, ex dem. Hunt, et al., 7 Ala. Rep. 882.]

But if these questions should all receive an answer unfavorable to the defendants, it might then be asked, whether, as the shore of the Mobile river was vested in the State, in trust for the public, previous to reclamations made east of Water street, Congress could enact any law which would impair the right of the State by granting the soil of what was the shore when the State became the fiduciary proprietor? We think a negative response is furnished by the decision of the Supreme Court of the United States in Pollard's lessee v. Hagan, et al. 3 How. Rep. 212. See also Doe, ex dem. Kennedy v. Bebee, *ante* 909.

If all these objections to the plaintiff's title be untenable, then we would say, that there is no error in the charge to the jury prejudicial to his rights. It referred the location of the King's wharf to the ascertainment of the jury, remarking that as this was the south boundary of the plaintiff's confirmation, if they found it to be north of Government street, the defendants were not shown

to be in possession of any part of it, and they should return a verdict for the plaintiffs. But if the King's wharf lay south of Government street, the plaintiff was entitled to recover the land extending as far south as the wharf; because his title, in case of conflict, was superior to the defendants. This, it seems to us, conceded to the plaintiff quite as much as he could have asked.

What has been said of the effect of the acts of 1824 and 1836 almost covers the entire ground of the charges prayed and refused. If it is incompetent for Congress by a legislative enactment to grant to one person land which it has already granted to another, it is difficult to conceive why a patent issuing in virtue of such inoperative grant, should itself be conclusive in a court of law, of the title of the patentee. We have not thought it necessary to scan with particularity the descriptive terms of the patent adduced by the plaintiff. If it describes the land by other metes and bounds than the act of 1836 designates, as to the excess it professes to convey it must be merely void not only in equity, but at law. This point was so ruled in Doe, ex dem. Pollard's heirs v. Files, [3 Ala. Rep. 47.] This decision now receives our entire approbation; and is fully sustained by Stoddard, et al. v. Chambers, [2 How. Rep. (U. S.) 284.]

The consequence is, that the judgment of the Circuit Court is affirmed.

SHEHAN v. HAMPTON.

1. In a plea under the statute discharging a surety, when the creditor, after notice in writing, omits to proceed on the security, it is not necessary to aver that the surety apprehends that his principal is about to become insolvent, or that he was about to migrate from the State without paying the debt; nor is it necessary his apprehension of these facts, or either of them, should be set out in the notice.
2. A notice which omits to point the creditor directly to the principal, whom he is required to proceed against, or to the security, on which he is required to proceed, is of no effect, either under the statute or at common law.

3. The discharge of a surety, by means of the statutory notice, must be pleaded specially.
4. When a demurrer is improperly sustained to a plea, but the party defendant has the benefit of his defence before the jury on another plea, or the record shows he is entitled to no defence under the plea overruled, the judgment will not be reversed.

Writ of Error to the Circuit Court of St. Clair.

Assumpsit by Hampton, upon a note payable to him as executor of the estate of Joel Chandler, and made by Shehan, and also by Joel Chandler and one McCoy, neither of whom were sued in this action. The note is dated 16th September, 1840, payable one year after date.

With the general issue, the defendant pleaded a plea to this effect, viz:

"The said defendant saith *actio non*, because he says he is the surety of Joel Chandler, one of the makers of the note sued on, and that he as such surety, at, to-wit, in the county aforesaid, on the 18th day of September, 1841, gave to the said plaintiff notice in writing, according to the statute in such case made and provided, requiring the said plaintiff to sue on said note as soon as the law would permit: and the defendant in fact saith, that the said plaintiff did not, in a reasonable time thereafter, and after the same became due, commence an action on said note, and proceed with due diligence by the ordinary course of law to recover judgment for, and by execution to make the amount due by the said note; and this the defendant is ready to verify. Wherefore, &c."

The plaintiff demurred to this plea, and his demurrer was sustained.

At the trial the defendant proved the note sued on was given for the purchase of land, sold as the property of Joel Chandler, deceased, and that he was the surety for Joel Chandler, one of the makers of the note. He then proved the service of the following notice on the plaintiff, on the 18th September, 1841, viz:

To the executrix and executors of Joel Chandler, sen. deceased. You and each of you are hereby notified to collect all monies due to the estate of Joel Chandler, dec'd, for which I stand as surety, as well for the lands as for the personal property of the said deceased, as soon as the law will permit, or I shall no longer stand

as surety—in which you can use your own pleasure, but at your own risk.

Your's, respectfully, JOHN SHEHAN.

September 17, 1841.

This the defendant offered to read, under the plea of *non assumpsit*, as a written statutory notice, under the 6th section of an act found in Clay's Digest, 532; the Court refused, because there was no special plea under which it could be given in evidence; but permitted it to go to the jury as a verbal notice to sue. The defendant excepted to the refusal of the Court to allow it to go to the jury as a statutory notice.

The overruling of the plea and the refusal of the Court to allow the notice to go to the jury as a statutory notice, is now assigned as error.

B. POPE, for the plaintiff in error, insisted,

1. That the statute (Digest, 532, § 6,) never contemplated the notice should set out the surety's grounds for apprehending loss, or a technical description of the notes, &c. which were the objects of notice. Such a construction will defeat the intention of the law-makers, as not one in ten could pursue the terms of the act. The plea is substantially in the terms of the statute, and the time alledged shows the notice was given after the maturity of the note.

2. The proof of discharge was, however, admissible under the general issue, and should have been allowed as a statutory notice.

S. F. RICE, contra, argued,

1. The statute must be construed according to its terms. This privilege is given to the surety only when he shall apprehend the insolvency of his principal, or that he is about to migrate from the State without making payment. In *every such case* the right is given, but not beyond it. The plea therefore must show the existence of the facts which authorise the notice.

2. The plea should have set out the notice actually given, so that the Court might judge if the statute was pursued. It is not sufficient to aver that the notice was given according to the statute. This is a legal conclusion, and facts are required upon which to found it. [Frazer v. Thomas, 6 Ala. Rep. 169.]

3. The notice given in the present case is clearly defective as

a statutary notice, as it does not show for whom Shehan was surety. It conveys no information to the party that he is required to sue Joel Chandler the principal. But if good, it is *no discharge* unless specially pleaded. A statutory discharge must always be pleaded. [Brown v. Hemphill, 9 Porter, 206.]

4. As a notice to sue, it was allowed to go to the jury, but such a notice only involves the enquiry into the actual injury occasioned by the omission, and here the verdict ascertains that none has been cuased.

GOLDTHWAITE, J.—1. To a full understanding of the questions on the demurrer to the plea, it is necessary to recite the statute on which it is founded. So much as is necessary for this purpose, is in these words: "When any person shall become bound as security, by bond, bill or note, for the payment of money or any other article, and shall apprehend that his principal is likely to become insolvent, or to migrate from this State, without previousiy discharging such bond, bill, or note, it shall be lawful for such security, in any such case, (provided an order shall have accrued on such bond, bill or note,) to require, in writing, of his creditor, forthwith to put the bond, bill or note, by which he may be bound as security as aforesaid, in suit, and unless the creditor so required to put such bond, bill or note in suit, shall in a reasonable time commence an action on such bond, bill or note, and proceed with due diligence in the ordinary course of law, to recover judgment for, and by execution to make the amount due by said bond, bill or note, the creditor so failing to comply with the requisition of such security shall thereby forfeit the right which he otherwise would have had to demand and receive of such security the amount of such bond, bill or note."

It will be perceived, the omission to sue after the statutory notice is given, involves the entire forfeiture of the debt, so far as the surety is connected with it, wholly independent of any question of injury growing out of the delay to sue. In Bruce v. Edwards, 1 Stewart, 11, this statute was considered as cumulative merely, and did not abridge the right of the surety, by the common law, to give notice to the creditor in any other mode. It was also held, that by the common law, the omission to sue involved the discharge of the surety, if after the notice the principal became insolvent. It results therefore from this decision,

which has been recognized ever since as a correct exposition of the law, that a general notice to sue the principal is different from the notice under the statute. In the one case the surety is discharged only if he is injured by the delay, but in the other absolutely. It seems to me this calls for the strictest construction of the statute, and by its terms the discharge is allowed in two cases only, viz: when the surety apprehends his principal is likely to become insolvent, or that he is about to migrate from the State without previously paying the debt, that the surety ought to be held to express this apprehension in his notice to the creditor. If this is not required, how is the creditor to understand whether the notice is under the common law or under the statute. The majority of the Court, however, entertain a different opinion, and consider the apprehensions of the surety as matter which cannot be put in issue, and therefore need not be stated either in the notice or plea. We all concur that the plea is unexceptionable in other respects, as it substantially pursues the statute. The plea being sufficiently pleaded, in the opinion of the majority of the Court, the demurrer was improperly sustained.

2. The question upon the admission of the notice to the jury, involves two points: first, whether it is good as a statutory notice; and second, if it is, whether it was admissible under the general issue.

Independent of my own opinion, that the notice is defective under the statute, for the reason stated in connection with the plea demurred to, we all consider it bad, alike under the statute and at common law, in not setting out that the party giving the notice is, in point of fact, the surety for Joel Chandler. Conceding that the notice in other respects, may be general, or at least with regard to the sum, date, and description of the instrument by which the surety is bound, yet, in this instance, the notice or writing gives no intimation to the creditor, that he is required to proceed by suit upon any note in which Joel Chandler is the principal debtor. The notice is too general and indeterminate in this particular, to warrant any presumption that the defendant demanded, this particular note should be put in suit. When a statute requires an individual to be designated to another, there must be sufficient information given to enable the person to be ascertained with certainty. [Chichester v. Pembroke, 2 N. H. 530.]

3. If the attempt was to relieve the surety in consequence of the omission to proceed against the principal after notice, under the common law rule, the evidence would certainly be admissible under the general issue, because that is a defence by the common law, and shows that *ex equo et bono*, the plaintiff is not entitled to his action. [Manchester Co. v. Sweeting, 10 Wend. 162.] But when the defence is under the statute, the omission to sue is a discharge, independent of all equitable considerations. In this respect, it does not seem to differ from a discharge produced by the insolvent or bankrupt statutes, which must be pleaded specially. [1 Chitty's Plead. 474.] We therefore incline to the opinion that when this statutory notice is interposed as a bar, it can only be done by a special plea.

4. It is true a technical error was committed in sustaining the demurrer to the special plea; but the defendant shows this error is wholly immaterial, for he produces the notice which he gave, and had all the advantage of it, as a common law notice, under the general issue, and that too, when in point of law, the notice was insufficient to let in the defence. The jury, in effect, here declared, he has sustained no injury from the plaintiff's omission. In McKenzie v. Jackson, 4 Ala. Rep. 230, and Rakes v. Pope, 7 Ib. 162, we held there was no sufficient error to reverse the judgment, although a demurrer to pleas had been improperly sustained, if the same defence was admitted, and admissible under other pleas. In the present case the party has had all the benefit from his defence, which under the most favorable circumstances he would be entitled to; and it seems to us a strained presumption, to suppose he may have another written notice, which, in the event of another trial, will fit his plea. We think the principle of the cases just cited, extend to govern this.

Judgment affirmed.

AGEE v. STEELE.

1. S, having a judgment against A, verbally agreed with him that he would bid off the land of A, subject to an agreement to be afterwards entered into between them. Shortly afterwards they met, and ascertained the amount due from A to S, including the note here sued upon, and it was then agreed in writing, that A should have two years to pay the debt, by four equal instalments, and that upon the payment of the debt, S would convey the land to A. A failed to pay the instalments, and by consent of A, S sold the land—Held that the verbal agreement was void under the statute of frauds, and the written agreement void for want of consideration. That it was a mere gratuitous promise, which S might have disregarded, and brought suit immediately for the recovery of the debt, and therefore did not exonerate the surety.

Error to the Circuit Court of Monroe.

Assumpsit on a promissory note for $200 made by one John Peebles and the plaintiff in error.

From a bill of exceptions, it appeared in evidence that Peebles was the principal, and Agee the surety in the note sued on. That in May, 1840, certain real property belonging to Peebles, was about being sold by the sheriff under execution, and a verbal agreement was entered into, between him and Steele, that the latter should bid off the land, subject to an agreement to be thereafter entered into between the parties, which he accordingly did, at $750, and took the sheriff's deed therefor. It was proved that the property at the time of the sale was worth $3000.

Shortly after, Peebles and Steele ascertained the amount the latter owed the former, which, including the price bid for the land, and the note here sued on, amounted to $1566 65, and thereupon, Steele executed to Peebles, the following instrument of writing:

"Whereas, I am by purchase at sheriff's sale, the owner of the lands and tenements upon which are situate the saw mill and improvements now possessed by John Peebles, to wit: &c. (describing the lands;) and the said John Peebles being now indebted to me in the sum of $1566 65, being the amount I bid and

paid for his land, and the amount which he owes me in addition thereto. Now if the said John Peebles, will pay the said sum of $1566 65, with interest thereon as follows, to wit: one fourth part with the interest thereon in six months—one fourth part with the interest thereon in twelve months—one fourth part with the interest thereon in eighteen months—and one fourth part with interest in twenty-four months from this date, then I obligate myself to convey to said Peebles, his heirs, &c. the above described land and premises. But it is distinctly understood, that upon the failure of the said Peebles to pay the first, or any subsequent instalment, then the said Steele may and shall forthwith enter into possession of said land and premises. 13 July, 1840.

STEPHEN STEELE.

Peebles never paid any of the instalments, and some eighteen months afterwards, Steele with the consent of Peebles, who had remained in possession, sold the land for $800.

The defendant's counsel moved the Court to charge, that by the agreement Peebles had the option, either to pay the instalments and take the lands, or to decline doing so, and if he did, that Steele had the full ownership of the lands, and Peebles was exonerated from the payment of the debt, which the Court refused. Further, that if the surety was not privy to, and consenting to the delay given upon the payment of the debt, that he was discharged, which the Court also refused, and the defendant excepted. This is now assigned as error.

PECK & CLARK, for plaintiff in error, did not insist on the first point, but argued that the surety was discharged by the agreement entered into for delay. That although the verbal agreement was not obligatory, yet it constituted a moral obligation, which was a sufficient consideration to sustain the written contract afterwards entered into, and which might be enforced in Chancery. That it was in effect a mortgage. They cited 2 Porter, 414; 2 Metcalfe, 176; 3 Id. 255.

BLOUNT, contra. There is no consideration to support the agreement. It was neither beneficial to Steele, or injurious to Peebles, and was a mere kindness, or gratuity, not binding in law, and did not restrain Steele from suing at any time he pleas-

ed on this contract. Mere delay in suing, will not absolve the surety. He cited 6 Ala. 533.

ORMOND, J.—A contract between the creditor and the principal debtor, which prolongs the time of payment of the debt, without the consent of the surety, absolves him from liability for the debt. A contract to produce this result, must be one which is obligatory on, and may be enforced by the parties to it, and the single question is, what is the nature of the contract relied on in this case, for the discharge of the surety.

The verbal agreement about the purchase of the land, was clearly invalid under the statute of frauds, and was so admitted to be in the argument, and the written contract is equally destitute of validity, for want of consideration. It was a mere gratuitous promise, to wait with the debtor for two years, to enable him to pay by instalments, the debt which he owed, and the money which was advanced upon the sale of the land, and created no legal obligation whatever upon Steele, who might have disregarded it, and brought suit immediately for the debt. It did not therefore abridge any right of the surety, who might either have paid the debt himself, or required Steele to bring suit for its recovery.

It is urged that the verbal agreement created a moral obligation, which will support the written contract afterwards made. A moral obligation to do an act, may support an express promise to perform it, as a promise to pay a debt barred by the statute of limitations, or created during infancy. In these and other cases of imperfect moral obligation, which might be supposed, the party is in morals, and conscience, bound to do the act, although by law he cannot be enforced to do it. Nothing of that kind exists here. A mere naked promise, though, it may create an honorary, does not constitute a moral obligation, in the proper legal sense of that term, though in ethicks a man may be said to be morally bound, to perform every promise he voluntarily makes. The common law takes no cognizance of such promises, and their being in writing adds nothing to their validity.

There is not a little of refinement and subtlety, in this doctrine of the discharge of sureties by contracts between the creditor and principal debtor, to which they have not in form assented, but which in reality are for their benefit. A modern English Chan-

cellor has declared, that "it was a refinement of the Court of Chancery, and he would not refine upon it," and although we must enforce the law upon this subject as we find it, we certainly shall not extend its boundaries, or stretch its limits, beyond its present dimensions.

In our opinion the law was correctly expounded by the Circuit Court, and its judgment must be affirmed.

THE STATE v. KREPS.

1. The 11th section of the 8th chapter of the Penal Code which authorizes a *nolle prosequi* to be entered and another indictment to be preferred, where, in the progress of a criminal trial, there shall appear such a variance between the proof adduced and the indictment, as will require the acquittal of the accused, unless he will assent to an amendment, is not unconstitutional.
2. Where an indictment charges a larceny of a bank note and other articles, and there is a variance between the indictment and the proof in respect to the bank note only; the Court cannot, under the 11th section of the 8th chapter of the Penal Code, permit a *nolle prosequi* to be entered, that another indictment may be preferred, because the accused will not consent to an amendment of the indictment so as correctly to describe ths bank note.

Upon points referred from the Circuit Court of Randolph.

THE defendant was indicted in the Circuit Court of Talladega, for breaking and entering the storehouse of Alfred Wood and Nelson Wood, and stealing therein "one gold watch of the value of two hundred dollars, ten silver watches of the value of fifty dollars each, one bank bill of the denomination of fifty dollars, issued by the Bank of Mobile, of the value of fifty dollars, all of the the proper goods and chattels of the said Alfred Wood and Nelson Wood." Upon the application of the accused the venue was

changed to Randolph, where he was tried, found guilty and sentenced to four years imprisonment in the penitentiary.

Upon the trial, certain legal questions were reserved, and which are referred to this Court as novel and difficult. These questions may be thus stated: 1. Nelson Wood testified that in addition to the gold watch and ten silver watches, there were stolen from his house "a bank bill of the denomination of fifty dollars, issued by the Branch of the Bank of the State of Alabama at Mobile, worth something near fifty dollars, and other bills of various denominations, amounting in all to eighty-three dollars." The defendant's counsel moved to exclude this evidence from the jury, because it described a bank bill variant from the one described in the indictment; the motion was overruled and the defendant excepted.

2. The solicitor moved, under the 11th section of the 8th chapter of the Penal Code, that the defendant be asked to assent to the amendment of the indictment, so as to correspond with the proof, or in case he refused to do so, that then the solicitor be permitted to enter a *nolle prosequi*, and prefer another indictment. Thereupon, the Court being of opinion that the variance between the indictment and the proof was so material as to authorize the acquittal of the defendant, determined, that unless the defendant assented to the proposed amendment, the motion of the solicitor be granted. The defendant objected to the amendment, and to being put to his election to submit to it, or the alternative, and demanded that the trial should proceed without alteration of the indictment. These objections were overruled, and the defendant, under the decision of the Court, assented to the proposed amendment, that the words "Bank of Mobile," be stricken out, and the words "the Branch of the Bank of the State of Alabama at Mobile," be inserted in their stead; which was accordingly done.

The proof tended to show that all the property was stolen at one time; the watches were subsequently found in a cellar, and the money was found and reclaimed under the following circumstances, viz: on the second day after the larceny was committed, the defendant was imprisoned; some time afterwards he was taken out of prison and went in company with two persons, who were sworn as witnesses on the trial, and drew from under the sill of an unoccupied house, a purse, which he handed to them, re-

marking, here is the money. The witnesses opened the purse, and found it to contain $78, viz: a bill of fifty dollars on the Branch of the Bank of the State of Alabama at Mobile, and other money, which they handed to Nelson Wood. One of the witnesses testified that N. Wood had previously described the fifty dollar note to him as he found it in the purse, and the latter testified, that from his previous knowledge and examination of the fifty dollar note that had been stolen, he felt confident that the note thus given up to him was the same. The defendant had been arrested originally on the discovery of the watches, and before the money was discovered. It was the opinion of the Court, that independent of the testimony in respect to the discovery and reclamation of the money, there was not sufficient evidence to authorize the conviction of the defendant.

The jury having returned their verdict, the defendant moved in arrest of judgment—1. The indictment does not describe the property charged to have been stolen with sufficient accuracy. 2. There are defects apparent upon the face of the indictment. This motion was overruled, and the questions thereupon arising, were referred to this Court as novel and difficult.

S. F. Rice and A. White, for the defendant, made the following points: 1. The 11th section of the 8th chapter of the Penal Code is irreconcilable with the 5th and 6th amendments of the constitution of the United States, and the 10, 11, 12 sections of the declaration of rights of the Alabama constitution; it is consequently unconstitutional; and this conclusion may be deduced from the previous decisions of this Court. [Clay's Dig. 439; 5 Porter's Rep. 484; 2 Ala. Rep. 102; 4 Id. 603; 10 N. Hamp. Rep. 558.] If the Court may force a defendant to assent to an amendment, or upon his refusal direct a *nolle prosequi*, there can be no limitation as to the character of the amendment; for if the power of the Court be conceded to any extent, it may be exercised, even so as to charge an offence entirely different. Yet no one it is apprehended would contend that it should be carried thus far.

The evidence in respect to the discovery and reclamation of the money could have been considered by the jury without an amendment of the indictment, and applied to the charge of stealing the watches. There was then no necessity for amending, so

as to authorize the conviction of the defendant for stealing the watches; and consequently not such a variance between the allegations and proof as would *for that cause* have authorized an acquittal.

Now conceding that there may have been a conviction for the watches without the amendment, and still the prisoner has been prejudiced by the remark of the judge in their hearing, that "independent of the evidence in relation to the money," the testimony was not sufficient to "authorize a conviction." This was tantamount to a declaration to the jury, that they should convict the defendant if the amendment was made.

There is no such bank, as the "Bank of Mobile." [Clay's Dig. 128, § 16.] The stealing of a bill issued by the *Bank of Mobile*, is not indictable. That which is called an amendment, is the introduction of a new offence into the indictment.

The indictment as amended, is for stealing a "bank bill." This does not follow the statute, or show what description of bill was stolen; and is consequently defective. [1 Binn. Rep. 201; 13 Peters' Rep. 176; 1 Nott & McC. Rep. 9; 2 Har. & G. Rep. 407; 3 Binn. Rep. 533; Clay's Dig. 425, § 57.] The indictment does not aver that the bank bill was issued by an incorporated institution, or that the plaintiff in error knew it to be of value; nor does it aver that the bill was lawful. [4 Ohio Rep. 386.]

Attorney General, for the State. The 11th section of the 8th chapter of the Penal Code, confers no power upon the Circuit Judge, except at the defendant's election, which he did not possess previous to its passage, and this election thus accorded to him, cannot render the statute unconstitutional.

If the indictment had embraced the charge of stealing a bill of the Bank of Mobile only, then it would have been competent for the Court to have recognized the prisoner upon the failure of proof to answer for a larceny of a bill of the Branch of the Bank of the State of Alabama, at Mobile. Sooner than submit to this, the defendant agreed to the amendment, and certainly has no right to complain.

There could be no case to which the section of the code which is objected to is more applicable.

The indictment is sufficiently definite in the description of the

property stolen. This Court cannot know whether the jury intended by their verdict to affirm the larceny of *all, or of what article* mentioned in the indictment. But if the indictment was for the larceny of the bank bill alone, it is sufficient. [Clay's Dig. 425, § 56; Arch. Cr. L. 46, and precedents under the English statutes.]

COLLIER, C. J.—It is enacted by the 11th section of the 8th chapter of the Penal Code, that "whenever, in the progress of a criminal trial, it shall be found, that there is such a material variance between the allegations of the indictment, and the proof adduced, as will for that cause authorize the acquittal of the accused, and he shall not assent to the amendment of the indictment, so as to correspond with the proof, it shall be lawful for the solicitor, with the leave of the Court to enter a *nolle prosequi* at any time before the jury shall retire, and prefer another indictment at the same or any subsequent term of the Court," &c. [Clay's Dig. 439.] Of the constitutionality of this enactment, we think there can be no well grounded doubt. If the discrepancy "between the allegations of the indictment and the proof adduced," be such as will authorize the acquittal of the accused, a verdict of *not guilty* cannot be pleaded in bar of another indictment adapted to the admission of the evidence. What objection then can there be to the defendant in such case waiving a verdict in his favor, and consenting to an amendment of the indictment? By this course of procedure, the administration of justice may be expedited; for if the defendant is acquitted in consequence of the inappropriateness of the indictment, when the proof shows his more than probable guilt of an offence against the criminal law, the Court should certainly commit, or recognize him to answer to another indictment. It is frequently a matter of consequence, not only to the innocent, but to the guilty, that they should have a speedy trial—to the former that they may be acquitted—to the latter that the dreaded punishment be not long suspended; the more especially where the accused is compelled to submit to imprisonment, either before or after conviction.

If the defendant in the case at bar had been indicted merely for the larceny of the fifty dollar bank note, there could have been no objection to allowing the amendment. But the indictment embraces not only the bank note, it charges also the stealing of

one gold and ten silver watches. Now in respect to the latter, it is not pretended that there was any variance in the proof, whatever opinion may have been entertained as to its sufficiency; and a *nolle prosequi* could not be entered, consistently with the rights of the accused in all criminal prosecutions.

When an indictment for a felony has been submitted to a jury upon the plea of not guilty, it is not allowable for the Court to permit a *nolle prosequi* to be entered, (without the consent of the accused,) that he may be again indicted for the same offence. It is the office of his triors to make "true deliverance" between the State and himself, and it is beyond the competency of the judge to arrest the due course of law by withdrawing the cause from the jury. This principle has been recognized for a period of time "beyond which the memory of man runneth not to the contrary." Its antiquity and stability make it a fundamental doctrine in criminal jurisprudence. See The State v. Williams, 3 Stew. Rep. 476 to 479, and cases there cited; Ned v. The State, 7 Porter's Rep. 187.

The amendment, it must be observed, was not willingly assented to by the defendant, but his consent was given to prevent the withdrawal of the issue from the jury, and his trial upon a second indictment. It is sufficiently apparent from what has been said, that the Court had not the power in respect to the watches, to compel the defendant to elect between such alternatives; and the bank bill being embraced in the same indictment as one of the objects of the larceny, the case does not come within the provision of the Penal Code which has been cited. We express no opinion upon the sufficiency of the evidence to convict for stealing the watches, without the amendment of the indictment; nor will we undertake to determine to what extent amendments are allowable under that enactment.

This view is decisive of the case, and we will not consider the questions raised as to the sufficiency of the indictment. The judgment of the Circuit Court is reversed, and the cause remanded, that it may be proceeded in according to law. [See The State v. Williams, *supra;* Ned v. The State, *supra;* The State v. Hughes, 2 Ala. Rep. 102.] And the prisoner will remain in custody until he be legally discharged.

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3. C. borrowed the bills of an unchartered banking company, from one L. assuming to act as its President, and gave his notes for the same amount, payable at a future day, with M. as his surety. The bills received, were the bills of the company, and made payable to S. Jones, or bearer, but not assigned. The note given was payable ninety days after date, to L. or order. After the note became due, C. procured other bills of the company, and went to the place where it transacted business, but found no one there to receive payment, or give up the note. The company was composed of L. and S. chiefly, and if of others, they are unknown. L. and S. both absconded from the State soon after, and are entirely insolvent. Afterwards, suit was commenced in the name of the administrator of L., for the use of one Miller, against C. and M., who being unable to succeed in making any defence at law, a judgment was recovered. Afterwards an execution upon it was levied on the property of M., in common with other executions, and his property sold. A case was made between the several plaintiffs in execution, and the sheriff selling the property, to determine the priority of the executions, and such proceedings had, that the administrator of L. recovered a judgment for the use of Miller, against the sheriff and his sureties. C. filed his bill, setting out these facts, insisting that the company was contrived and set on foot to defraud the public,—that the death of L. was merely simulated, to enable the other parties to carry their fraudulent plans into effect; that the note yet remained the property of the company, and that in equity, he was entitled to set off the notes held by him, and to enjoin the collection of the judgment against the sheriff, as C. would have to reimburse M. if that was paid. The defendants demurred to the bill for want of equity, and this demurrer being overruled, admitted all the facts stated to be true, if they were well pleaded. *Held*—

1. That suit being in the name of the administrator of L., the notes held by C. against the company were not legal off sets, and that on this ground there was relief in equity.
2. That the circumstance that the notes were held by C. when the judgment was obtained, or suit brought against C. and M. did not take away the equity, as M. was a surety only.
3. That C. being entitled to his relief against the parties to the judgment at law, it extended also to defeat the recovery against the sheriff, as without this, the relief would be of no avail.
4. If the original transaction between C. and the company was illegal, it does not defeat C.'s right to set off the other bills afterwards procured by him.
5. [*Upon the petition for re-hearing.*] That although C. might have defeated the suit at law, by pleading that L. was yet alive, or by showing that the suit was collusive, and that the interest in the note sued on then belonged

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FORCIBLE ENTRY AND DETAINER, &c.

1. In the complaint before a justice of the peace, it was alledged, that the plaintiff "has the peaceable possession of the north-east quarter of section five, township eight, range eleven, east, in the Coosa land district, in the west part of said quarter, being and lying in the State and county aforesaid, dwelling house and other buildings, and fifty acres of land cleared, more or less," and after alledging the forcible entry and detainer of the premises, the complaint proceeds thus, viz: "detaining and holding the same by such words, circumstances, or acting, as had a material tendency to excite fear or apprehension of danger." *Held*—1. That the description of the premises was sufficiently specific. 2. That the allegation of force was as direct and full as the statute requires. *Huffaker v. Boring*.....87
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GRANTS BY ACTS OF CONGRESS.

1. A concession for a tract of land south of latitude of thirty-one, west of the Perdido, and east of Pearl river, was made in 1806, and confirmed by an act of Congress passed in 1832, which contained a *proviso*, declaring that the act should "not be held to interfere with any part of said tract which may have been disposed of by the United States previous to its passage:" *And providing further*, that it "shall be held to be no more than a relinquishment of whatever title the United States may now have to such tract of land:" *Held*, that if the United States had no interest in the premises when the act was passed, in consequence of a previous disposition or other cause, it was wholly inoperative, either to grant or confirm a title; that as the land was situated below high-water when Alabama was admitted into the Union, if the federal government was ever entitled to the right of soil, its title was disposed of previous to 1832. *Doe ex dem. Kennedy v. Bebee*, 909
2. The lessors of the plaintiff claimed under a Spanish permit, dated 11th December, 1809, for an unknown quantity of land, situate in Mobile, which the commission for the examination of land titles reported was forfeited, under the Spanish law, for want of inhabitation and cultivation. The title under which the defendant claimed commenced in 1803, and was confirmed by an act of Congress of 1822, and embraced a lot for one hundred and forty-nine 4-12 feet on Water street, known under the Spanish government as a water lot, and situated between Church and North boundary streets; immediately front of this lot, and between Water street and the channel of the river, improvements were made prior to May, 1824, by those under whom the defendants deduced title; In May, 1824, an act of Congress was passed, by which the United States relinquished their right to the lots of ground, east of Water street, and between Church and North Boundary streets, then known as water lots, and situated between the channel of the river, and the front of the lots, known under the Spanish government as water lots in Mobile, whereon improvements have been made, and vested the same in the proprietors of the latter lots; except in cases where the proprietor had alienated his right to the then water lot, or the Spanish government made a new grant, or order of survey for the same, while they had the power to grant the same; in such case the right of the United States was vested in the person to whom such alienation, grant, or order of survey was made, or his legal representatives: Provided, that the act shall not affect the claim of any person, &c. In 1836, the claim of the plaintiff

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