REPORTS

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

FROM SAVANNAH TERM, TO MILLEDGEVILLE TERM, 1849,

INCLUSIVE.

THOS. R. R. COBB, REPORTER.

VOL. VI.

ATHENS, GA.
CHRISTY & LAMPKIN.
PRINTED AT THE NEW JOB OFFICE.
1849.

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Southwestern District,	Hon. LOTT WARREN, Albany.

Howell, [illegible] 423
Jackson [illegible] 509
Johnson [illegible] 390
[illegible] Williams *vs.* 365
[illegible] Central Bank, ...257
[illegible] Robinson and Wood *vs.* 539

L.

Leak *vs.* McDowell, ...264
Lewis, Hargraves *et al. vs.* 207
Love *vs.* Hackett, Adm'r, and others, ... 486
Lyon and Rutherford, Trustees, Schly *vs.* 530

M.

Maltbie and another, Ezzell *vs.* 495
Mapp and another, Thompson *vs.* ..260
Martin, Adm'r, *vs.* Broach and Broach, Ex'rs.....21
March and Briers, Russell and another *vs.* 491
McBride, Hammock *vs.* 178
McDowell, Leak *vs.* 264
McGehee *vs.* Cherry, ...550
McLendon *et al.* Newson *et al. vs.* ..392
Meredith and another, Crawford, Gov. *vs.* 552
Merritt and others *vs.* Scott and another, Adm'r, &c. 563
Milling, Ex'r, Garland *vs.* 310
Mitchell, Smith and Shorter *vs.* 458
Moore *et al.* The Bank of Charleston *vs.* 416
Mumford and Tyson, The Bank of St. Marys *vs* 44
Myrick, Deloach and Wilcoxson *vs.* 410

N.

Napier *vs.* Napier, ...404
Napier, Napier *vs.* 404
Neal, Haygood *vs.* 452
Nelson *vs.* Biggers, ...205
Newson *et al. vs.* McLendon *et al.* ..392

O.

Odam *et al. vs.* Caruthers, Adm'r, ...39
Oliver *vs.* Pace and Biggers, ...185

P.

Pace and Biggers, Oliver *vs.* 185
Perkins *et al. vs.* Dyer, ...401
Perry and Peck *vs.* Higgs, ...43
Perryman, for the use, &c. Guerry *vs.* 119
Pinckard *vs.* Ponder, ...253
Pitts *vs.* Hendricks, ...452
Ponder, Pinckard *vs.* 253
Potts *et al. vs.* House, ...324

Quin, Starnes and Paine *vs.* 84

R.

Ray, Adm'r *et al. vs.* The Justices, &c. 303
Rhodes, Rushing *vs.* 228
Robinson *vs.* Schly and Cooper, ..515
Robinson and Wood *vs.* King, ...539
Robson, Adm'r, *vs.* Harwell and wife..... 589
Rushing *vs.* Rhodes, ...228
Russell and another *vs.* March and Briers, ... 491

S.

Schley *vs.* Lyon and Rutherford, Trustees, ... 530
Schly and Cooper, Robinson *vs.* .. 515
Scott and another, Adm'rs, Merritt and others *vs.* 563
Scranton *et al. vs.* Demere *et al.* 92
Selman and others, The Justices, &c. *vs.* 432
Simmons *et al.* Fall, Adm'r, *vs.* 265
Smead and Savage *vs.* Doe ex dem. Williams, Adm'r, ...158
Smith and Shorter *vs.* Mitchell, ..458
Stamper, Booth and Raines *vs.* 172
Starnes and Paine *vs.* Quin, ...84
Stiles, Chapman *vs.* 113

T.

The Bank of Charleston *vs.* M. Moore *et al.* 416
The Bank of Charleston, Dearing *vs.* 581
The Bank of St. Marys *vs.* Mumford and Tyson, ...44
The Bank of Tennessee *vs.* Cloudis, 481
The Central Bank, King *vs.* 257
The Flint River Steamboat Co. Cuthbertson *vs.* 177
The Justices, &c. *vs.* Bivins, ...575
The Justices, &c. Ray *vs.* 303
" " " *vs.* Selman, Sparks and others, ...432
The Justices, &c. *vs.* Barrington *et al.* 578
The Mayor, &c. Savannah, Green *vs.* 1
The Mayor, &c. Columbus *vs.* Howard, ... 213
The State, Denny *vs.* 491
" " Giles *vs.* 276
" " Alfred, a slave, *vs.* 483
" " Gentry *vs.* 503
Thompson *vs.* Mapp and another, ..260
Towns, Gov. &c. *vs.* Hicks and Webb, ... 235
Townsend, Fleming, Guardian, *vs.* 103
Trippe, Duke, Adm'r, *vs.* 317
Tucker *vs.* Butts *et al.* 580

W. Y.

Wall, Dye *vs.* 584
Weathers *et al. vs.* Doster, ...227
Wells and wife, Arnold, Adm'r, *vs.* 380
Williams *vs.* Kelsey and Halsted, ..365
Winter *vs.* Bullock, ...230
Womack *vs.* Greenwood, Ex'r, &c. 299
Young and another *vs.* Harrison, ..130

TABLE OF CASES

Arranged in the order of their decision, with points of Law considered.

AT SAVANNAH—*January Term*, 1849.

1. Thomas Green *vs.* The Mayor, &c. Savannah. *Constitutional Law. Corporate powers over nuisances*.....
2. Jos. Connerat *vs.* Sam'l Goldsmith. *Husband's liability for wife's contract*.....
3. E. Martin, Adm'x, *vs.* Broach & Broach, Ex'rs. *Constitutional Law. Statute of Limitations. Pleading new promise. Construction of Statutes*..... 21
4. Harrell & Harrell *vs.* B. Hamilton, Ex'r. *Recording of Wills*..... 37
5. Odam *et al. vs.* Caruthers, Adm'r. *Distribution of Estates*..... 39
6. D. Perry and J. Peck *vs.* A. Higgs. *Practice Supreme Court*..... 43
7. The Bank of St. Marys *vs.* Mumford & Tyson. *Notice by surety to sue. Void process. Parol evidence*..... 44
8. E. Starnes and W. W. Paine *vs.* C. Quin. *Trover by tenant in common for separate share*..... 84
9. Doe, *ex dem.* Cumming *et al. vs.* Jas. M. Butler. *Pleading in Ejectment*..... 88
10. A. Scranton and another, Trustees, &c. *vs.* R. Demere and others. *Appeal. Administration on estates of free persons of color. Legacies*..... 92
11. Geo. G. Fleming, Guardian, *vs.* E. Townsend. *Voluntary conveyance of Personalty. Bona fide purchasers. Notice*..... 103
12. Charles Chapman *vs.* Benj. Stiles. *Practice Supreme Court*..... 113

AT TALBOTTON—*January Term*, 1849.

13. L. A. Goneke *et al. vs.* R. Garrett. *Practice*..... 119
14. Jas. P. Guerry *vs.* T. J. Perryman, for the use, &c. *Assignees of notes not negotiable. Practice*..... 119
15. U. B. Holder and Wife *vs.* D. Harrell. *Statute of Distribution*..... 125
16. Ed. B. Young *vs.* Jas. and S. Harrison. *Ferries. Dissolution of Corporations. Repeal of Charter*..... 130
17. Smead and Savage *vs.* Doe, *ex dem.* Williams, Adm'r. *Adverse Possession*..... 158
18. Elijah Butts and others *vs.* R. Cuthbertson. *Statutory Lien. Pleading*..... 159

OF CASES.

ertson *et al.* *Lien. Promissory Agent* 166

another *vs.* M. W. Stamper. *New Courts. Judgments* 172

nt River Steamboat Company. *Practice Court* 177

ock *vs.* W. J. and J. McBride. *Judgments. Evidence* 178

er *vs.* Pace and Biggers. *New Trials* 185

dem. Vaughn *vs.* Biggers. *Lost Papers. Secondary Evidence. Presumptions of Law* 188

. W. Crawford, Gov. &c. *vs.* D. Foster *et al.* *Escrow. Conditional signature by Sureties* 202

26. A. Nelson *vs.* L. M. Biggers. *Warranty* 205

27. Geo. Hargraves and others *vs.* F. Lewis. *Practice. Parties* 207

28. The Mayor, &c. Columbus *vs.* E. Howard. *Pleading. Evidence. Bailment. Contract of hire* 213

29. Jehu Clark and others *vs.* Chas. Cleghorn. *Injunction.* 220

30. Daniel Weathers and others *vs.* James Doster. *Bill of Exceptions. Practice* 227

31. W. Rushing *vs.* D. B. Rhodes. *Usury. Statute of Limitations* 228

32. John G. Winter *vs.* J. K. Bullock. *Promissory Notes. Injunction* 230

AT MACON—*February Term*, 1849.

33. G. W. Towns, Gov. &c. *vs.* E. Hicks and E. Webb. *Pleading. Practice. Sheriff and his sureties* 235

34. G. W. Crawford, Gov. &c. *vs.* T. Andrews *et al.* *Escape on mesne process. Sheriff's Bond* 244

35. John Pinckard *vs.* Daniel Ponder. *Usury* 253

36. A. M. D. King *vs.* The Central Bank. *Bankrupt Law.* 257

37. John F. Thompson *vs.* W. F. Mapp and another. *Forthcoming Bond. Discovery under the Statute. Parol Evidence* 260

38. Jer. Leak *vs.* C. McDowell. *Practice* 264

39. John S. Fall *vs.* Adam Q. Simmons and others. *Practice. Administrators' Commissions. Interest* 265

40. D. Giles *vs.* The State. *Libel. Reasonable Doubts. New Trial* 276

41. Charles Foster *vs.* W. W. Brooks, Adm'r, &c. *Evidence. Verdict and damages in Trover. Misconduct of Juryman.* 287

42. S. R. Womack *vs.* Thomas B. Greenwood, Ex'r, &c. *Executors and Administrators* 299

43. G. Ray, Adm'r, and others *vs.* The Justices, &c. Macon County. *Suit on Guardian's Bond. Breach* 303

44. H. Garland *vs.* T. D. Milling, Ex'r, &c. *Statute of Limitations* 310

45. Robert Duke, Adm'r, *vs.* Wm. W
46. William E. Potts and others *v*
Wills. Evidence. Non Compos.
47. S. Williams, Sen'r, *vs.* C. and G. H.
Evidence. Witness. Claims. Fra
48. Thomas Arnold, Ad'mr, *vs.* E. Wells a
49. H. Harris *vs.* L. S. Camron and another.
How and by whom avoided.....
50. Richard Henderson *vs.* N. B. Johnson. *Statute*
51. Newson *et al. vs.* McLendon, *et al. Satisfaction*
ment. Equity.....
52. J. C. Perkins *et al. vs.* N. Dyer. *Powers of Natu*
Guardians. Mortgage.....
53. Leroy Napier *vs.* William T. W. Napier. *Trust and*
Trustee..... 404
54. Deloach and Wilcoxson *vs.* M. Myrick. *Claim. Evidence. Burthen of Proof. Satisfaction of Judgment*..... 410
55. The Bank of Charleston *vs.* M. Moore *et al. Scire facias against security on Appeal*..... 416

AT CASSVILLE—*March Term*, 1849.

56. W. K. Briers *vs.* R. P. Hackney and wife and others. *Guardian's Returns. Settlement with Ward. Accounts.* 419
57. John D. Field *vs.* A Howell. *Injunction. Lease*..... 423
58. Justices, &c. for the use of Selman *vs.* Selman, Sparks and others. *Retraxit. Sureties on Guardians' Bonds—how discharged*..... 432
59. Thomas Echols and wife *et al.* James W. Barrett, Adm'r, &c. *Qualification and Rights of Administrators. Evidence. Statute of Limitations*..... 443
60. G. B. Haygood, Adm'r, *vs.* O. Neal. *Practice*..... 452
61. C. Pitts *vs.* E. Hendricks. *Levy and sale by Sheriff*.... 452
62. W. Smith and A. Shorter *vs.* D. R. Mitchell. *Equity Practice. Fraud. Rescinding of Contracts*..... 458
63. R. R. Cloudis *vs.* The Bank of Tennessee. *Practice*... 481
64. Alfred, a slave, *vs.* The State of Georgia. *Trial of Slaves*..... 483
65. T. C. Hackett, Adm'r, &c. *vs.* James Love. *Statute of Limitations*..... 486
66. B. D. Cooper *vs.* B. Cloud and others. *Practice*..... 490
67. Russell and another *vs.* March and Briers. *Practice*... 491
68. E. Denny *vs.* The State. *Demand for Trial*..... 491
69. John Ezzell *vs.* Maltbie and Winn, Ex'rs, &c. *Effect of former recovery. Evidence*..... 495
70. John Gentry *vs.* The State. *Criminal Law*..... 503

AT MILLEDGEVILLE—*May Term*, 1849.

71. S. R. Crenshaw *vs.* M. F. Jackson. *Set-off. Agency. Practice*..... 509

OF CASES.

, &c. *vs.* John Schly, de'ft and *Transfer of fi. fa. Testamenta- of price. Rights of claimant*... 515
on and Rutherford, Trustees, &c. *Damages in Trover. Evidence*..... 530
another, propounders, *vs.* C. King. *mission. Parol Testimony*..... 539
ehee *vs.* F. A. Cherry. *Lien of Judgments ory Notes*..... 550
wford, Gov. &c. *vs.* W. Meredith and another. *'s Bond*..... 552
ason *vs.* T. Cheely. *Statute of Frauds*..... 554
Merritt and others *vs.* W. H. Scott and another, Adm'rs. *Marriage Articles. Volunteers. Effect of partial execution*..... 563

79. The Justices, &c. *vs.* W. R. Bivins. *Costs on Attachment against Sheriff*..... 575
80. The Justices, &c. *vs.* Barrington and others. *Practice*.. 578
81. H. Tucker *vs.* F. Butts *et al. Liability of an Attorney to garnishment*..... 580
82. W. Dearing *vs.* The Bank of Charleston. *Amendment to bill in Equity*..... 581
83. Geo. W. Dye *vs.* W. Wall. *Deceit. Evidence*..... 584
84. E. Brewer and another *vs.* C. Brewer. *Practice. Statute of Limitations*..... 587
85. John Robson *vs.* L. T. P. Harwell and wife. *Parol Declarations of a trust. Pleading in Equity. Fraud. Part performance*..... 589

CASES

ARGUED AND DETERMI

IN THE

SUPREME COURT OF THE STATE OF GEO

AT SAVANNAH,

JANUARY TERM, 1849.

No. 1.—THOMAS GREEN, plaintiff in error, *vs.* The MAYOR and ALDERMEN of Savannah, defendants.

[1.] The City Council of Savannah, by an Ordinance, passed on the 26th January, 1826, under the authority of the General Assembly for that purpose, prohibited the cultivation of rice within the corporate limits; and on the 29th May, 1848, passed another Ordinance, declaring that the cultivation of rice, within the corporate limits of the City, was injurious to the health of the citizens, and providing for the removal and destruction of the growing crops of rice, within the corporate limits of the City, as a nuisance: *Held*, that the Ordinances of 1826, and 1848, were good and valid, and binding upon the inhabitants of the City, as *police* regulations; and that the Mayor and Aldermen of the City, under the authority of the Acts of the General Assembly, passed in 1825, 1831 and 1833, had the power and authority to judge of and declare, the planting and growing rice within the corporate limits of the City, to be injurious to the health of the City, and a public nuisance, and to abate the same.

Certiorari. Decided by Judge FLEMING, at Chambers, June, 1848.

On the 29th day of April, in the year 1817, the following contract was entered into between William Mein, and the Mayor and Aldermen of the city of Savannah:

STATE OF GEORGIA, CITY OF SAVANNAH—

This Indenture, made the 29th day of April, in the year of our

URT OF GEORGIA.

and Aldermen of Savannah.

liam Mein, of said City of Savan-
he Mayor and Aldermen of the said
other part: *Witnesseth*, that whereas, at
tants of the said City, duly assembled and
day of March last, certain resolutions were
recommended to the Council for adoption; and
rly, the completion of certain propositions made to
of low-lands, generally called rice-lands, in the vicin-
vannah, for the alteration of the culture of the said lands,
a wet and water-flowing culture, to a dry one, as being
more salubrious and beneficial to the health of the City. And it
was at the said meeting, also, recommended to Council that a
certain sum of money, not exceeding forty dollars per acre, be
allowed to the owners of said land, as an inducement for a change
of culture, and continuance forever hereafter, of a dry one, and
keeping the fields agreed upon, in a proper state for such cultiva-
tion, as to attain the object recommended to Council aforesaid.
And whereas, in conformity to the further recommendation of said
meeting, the Mayor and Aldermen of the City of Savannah, in Coun-
cil assembled, have passed an Ordinance to obtain a loan of mon-
ey for the payment contemplated by these resolutions, and for the
purpose connected with the same object, and to the acceptation of
which the said William Mein, owner of low or rice lands, in the
vicinity of Savannah, hath agreed; now, therefore, this inden-
ture witnesseth, that the said William Mein, for himself, his heirs,
executors, administrators and assigns, hath covenanted and agreed,
and by these presents doth covenant and agree, to and with the
Mayor and Aldermen of the City of Savannah, and their successors
in office, as follows, to-wit: That from and after the sealing and de-
livery of these presents, the tract of rice land owned by the said
William Mein, being all that tract or parcel of land situated, ly-
ing and being on Hutchinson's Island, and the lower point thereof,
bounded on the west by lands belonging to the estate of Ward,
on the north by the Savannah back river, and on the south by a
branch of the Savannah river, which divides it from the City of
Savannah and Fig Island, containing six hundred acres, be the
same more or less, shall forever hereafter be cultivated, worked,
used and employed in dry culture only, or be kept in a dry
state, and free from the ebbing and flowing of the tide within the
banks, (accidents excepted,) but at such times and in such man-

ner as hereinafter provided for. And
of the said tract of land, in the manner
ted by these presents, the said William
himself, his heirs, executors, administrato
further, the said William Mein, for himself,
administrators and assigns, doth covenant and
the said Mayor and Aldermen, and their successor
the said tract of land, and every part thereof, shall
subject and liable, held, pledged and mortgaged, for the
of dry culture, and of this agreement, and that the same shall
held, and shall remain so bound and pledged in the hand, possession or occupation of any subsequent holder, owner, heir or purchaser of the whole tract or any part thereof. And the said William Mein, for himself, his heirs, executors, administrators and assigns, doth further covenant and agree, to and with the said Mayor and Aldermen, and their successors in office, that he will not sell or dispose of the said tract of land, or any part thereof, without previously obtaining from the purchaser or purchasers thereof, covenants similar to these presents, for continuation of the dry culture, contemplated by this agreement. And further, also, that the heirs and devisees of the said William Mein, shall always hold possession or enjoy said estate, and every part thereof, expressly subject to the terms mentioned in this agreement, and on no other terms or condition whatsoever. And the said William Mein, for himself, his heirs, executors, administrators and assigns, doth further covenant and agree, to and with the Mayor and Aldermen of the said City of Savannah, and their successors in office, that the said ditches, drains and dams, necessary for the draining and cultivation of said land, in dry culture, or keeping it in a state equally dry, shall at all and every time of the year hereafter, (accidents excepted,) be in good order and fit to resist the usual flowing of the tide, and in such a condition as to keep the said land dry, as intended by this agreement, and prevent the deposite and remaining of water thereon. And the said William Mein, for himself, his heirs, executors, administrators and assigns, and for all the future purchasers or holders of the said land, doth further covenant and agree, to and with the said Mayor and Aldermen of the city of Savannah, and their successors in office, that all damages recoverable at law for any breach or infraction of this agreement, shall bear and hold at all

said land, and bind the same in prefe-
r demands whatsoever; and the said
rgeable and subject to this condition, lien
ed that in the event of the said land be-
held by different proprietors, that the said
eir said portions of the land respectively held
e so held and considered liable only in proportion
ll the covenants and agreements contained in this
provided, nevertheless, and it is hereby fully understood
greed by the said Mayor and Aldermen, for themselves and
their successors in office, that this agreement, and every clause and part thereof, is accepted and entered into, subject to the following conditions and terms—that is to say, that the said William Mein, his heirs, executors, administrators and assigns, shall be at full liberty to make use of water, and in all manner whatsoever, to overflow the said land, and every part thereof, prior to the first day of March, in each and every year hereafter, and from and after the first day of March, of each and every year hereafter, to cultivate in dry culture or keep the land dry until the next succeeding first day of December, without the let, suit, trouble or hinderance of the said Mayor and Aldermen, or their successors in office, or any person or persons acting under their authority; and also, upon the further proviso and condition, that the said William Mein, his heirs, executors, administrators and assigns, shall be allowed, at all times, if necessary, the use of the tide water, for the purpose of aiding in and bringing up the seed of dry culture plants. And in case of a drought between the first day of March and December, the further use thereof to overflow said land, provided that the said land does not remain under water, after such overflowing, more than a single tide, and provided, also, that the said flowing thus permitted, shall be considered as a termination of the drought, as it relates to the said land so overflowed; and provided, also, that the said William Mein, for himself, his heirs, executors, administrators and assigns, may, from time to time, as thought useful or necessary to his or their interests, make and cut canals through the said land, from Savannah river to back river, without let, hinderance or molestation; and the said Mayor and Aldermen of the City of Savannah, as certified by the signature of the Hon. Thos. U. P. Charlton, Mayor of the said City, and authorized under the seal of their incorporation, do, for themselves and their

successors in office, in consideration of th
ed into, on the part of the said William
delivery of these presents, engage and agree
paid, to the said William Mein, the sum of th
of said land, now fit and prepared for the dry c
to the sum of twelve thousand dollars, for four
now fit and prepared for the dry culture contempl
agreement, and the further sum of six thousand doll
thirty dollars per acre, for two hundred acres of the said tra
yet fit and prepared for the culture aforesaid; and the said May
and Aldermen of the City of Savannah, for themselves and their successors in office, further engage and agree, that on the first day of March next, the further sums of ten dollars shall be paid for each and every acre of the said land, to the said William Mein, his heirs, executors, administrators and assigns, deducting, nevertheless, from the said ten dollars per acre, when paid, the amount of interest, at seven per cent. on the advance made of the last mentioned sum of six thousand dollars, from the day of payment to the day the said land shall be certified to be fit and prepared for dry culture; and it is hereby further agreed by all the contracting parties hereto, that whenever the said William Mein, his heirs, executors, administrators or assigns, shall notify, by giving a written notice to the said Mayor and Aldermen, or the Board created for carrying the object of this agreement into execution, that said last mentioned acres of land, that is to say, the said last mentioned two hundred acres of land, are fit and prepared for the cultivation of dry culture, that then the parties interested shall each appoint one respectable person to examine and report the state of the said land, and if the balance of the money ought to be paid; and in case of disagreement between the said two persons, they shall choose a third, and the report of any two shall be received and acted upon; and it is further understood and agreed by the contracting parties, that a sufficient margin shall be left outside of the dams, as shall be judged necessary and safe, by the said William Mein, his heirs, executors, administrators and assigns, as well for the protection of said banks, as for procuring earth and materials for the repair and keeping the said dams in order, from time to time.

In witness whereof, the said Thomas U. P. Charlton, Mayor of the said City, hath hereunto set his hand and the seal of the said

m Mein hath also set his hand and seal, ove mentioned.

THOMAS U. P. CHARLTON, Mayor.

WILLIAM MEIN. [L. S.]

red in presence of

S.

. Bond, N. P.

, the Legislature of Georgia passed an Act entitled "An amend and consolidate the several Acts which have been sed in relation to the powers and privileges of the corporation of the City of Savannah, and the hamlets thereof, and for the purposes herein mentioned," by the 1st section of which it was enacted, that "the jurisdictional limits of the City of Savannah, and the hamlets thereof, shall be extended to one mile beyond the present boundary, so as to enable the Mayor and Aldermen, for the time being, to pass an Ordinance or Ordinances, prohibiting the cultivation of rice within the aforesaid extended limits; and if any person, so prohibited in the cultivation of rice, within the limits of the said City, shall feel himself aggrieved by the said prohibition, he shall have the privilege of appeal to a special Jury, before the Superior Court of Chatham County, and the point at issue shall be, Is the cultivation of rice in the place prohibited, injurious to the health of any portion of the citizens or inhabitants of Savannah? And if it shall be determined that the said cultivation, in said prohibited place, be not injurious to the health of said citizens or inhabitants of said City, then, and in that event, the said prohibition shall be null and void, otherwise to remain in full force and vigor—*Provided, nevertheless,* that nothing herein contained shall authorize the said Mayor and Aldermen to impose any tax upon persons or property in the aforesaid extended limits."

In 1831, the Legislature passed an Act amendatory of the foregoing, by the 1st section of which it was enacted, that "it shall and may be lawful for the Mayor and Aldermen of the City of Savannah, and hamlets thereof, to pass such Laws and Ordinances as they may consider fit and proper for the purposes of carrying fully into effect the plan and system for reducing to, and keeping in a state of dry culture, the low or swamp lands situate around and lying about the City of Savannah and hamlets thereof; and also to remove such nuisances, or causes of disease, which may affect the citizens thereof, or in any wise injure their health—*Pro-*

vided, the said Laws and Ordinances so p
contrary to, or in violation of, the Con
States, or of this State."

In January, 1826, the Mayor and Aldermen
vannah passed an Ordinance, by which, after re
1825, it was ordained that the cultivation of rice w
limits be prohibited. By the 2nd section, it was provi
any person who shall plant, rear, or cultivate rice, or cau
planted, reared or cultivated, in contravention of the provisio
this Ordinance, shall be subject, and is hereby made subject, to
penalty of one hundred dollars, for each and every day that he,
she or they shall so plant, rear, cultivate, &c."

The 4th section provided for the collection of those fines by warrant of distress.

On the 29th day of May, 1848, the Mayor and Aldermen of the City of Savannah passed an Ordinance, which, after referring to the power conferred by the Act of 1831, ordained "that it shall be the duty of the Mayor, whenever he shall receive information that rice is planted or cultivated upon any of the lands around the City, subject to dry culture contracts, to serve a notice upon the owner, tenant or cultivator of the said land, or any person having charge of the same, or his, her or their agents, requiring the said persons to desist from the said culture, and to destroy the said rice, if growing; or to appear before Council, at a time and place in said notice to be specified, not exceeding ten days from the date thereof, and to show cause, if any they have, why the said rice should not be removed and destroyed as a nuisance."

Sect. 2. "If the said owner, &c. shall not, upon said notice, comply with the terms of the same, or shall fail to appear before Council, or if having appeared, no sufficient cause should be shown why the said rice should not be removed, and its culture abandoned; in such case, the said Mayor and Aldermen may direct the City Marshal, forthwith, to remove the said rice, and to destroy the same effectually, wherever it may be growing or planted on the said dry culture contract."

On the 31st May, 1848, a notice was served upon Thomas Green, (an owner of a portion of the tract of land included in the foregoing contract of William Mein,) signed by the Mayor of the City of Savannah, requiring said Green to desist from the cultivation of rice upon the lands included in said contract, and to destroy

re Council on Thursday, 1st of June, e afternoon, and show cause why the said not be removed and destroyed as a nuisance. and showed cause, by introducing testimony, rice was not a nuisance: Whereupon, upon hear- pon the law and testimony, the Council overruled the d ordered the growing rice to be destroyed. To cision, Green, by his counsel, excepted, and obtained the Hon. William B. Fleming, Judge of the Eastern District, a *rule nisi*, requiring the said Mayor and Aldermen to show cause before him, on 12th June, 1848, at ten o'clock, A. M. at the Court House in the City of Savannah, why a writ of certiorari should not be granted.

Upon said hearing, Judge Fleming refused to grant a certiorari, and decided, among other things, that the Act of 1825, extending the jurisdictional limits of the City of Savannah, one mile, and authorizing the Mayor and Aldermen of the City of Savannah to pass an Ordinance, or Ordinances, prohibiting the cultivation of rice within said limits, is constitutional, so far as it embraces lands which are subject to the dry culture contracts; that said law does not impair the obligation of contracts, nor violate vested rights; that the Act of 1831, and the Ordinance of the City thereon, are constitutional; that said contract binds Mein, his heirs, executors, administrators and assigns, not to cultivate rice upon lands covered by said contract; that rice was not a dry culture plant, in contemplation of said contract; that neither the said Mein, nor his assigns, can deny that the planting of rice, and the crop therefrom, is a nuisance, which can be abated under the Law of 1831; that, as a nuisance, it can be abated under the Act of 1831, by the Mayor and Aldermen.

To which decision, Green, by his counsel, excepted, and has assigned the same as erroneous.

H. R. Jackson, for plaintiff in error.

Bartow & Law, for defendants.

By the Court.—Warner, J. delivering the opinion.

The two main questions presented for our consideration, on

the argument of this cause, were—First, [illegible] contract entered into on the 29th of April, [illegible] liam Mein and the Mayor and Aldermen of th[illegible] and, Second, whether the Mayor and Alderm[illegible] the right, under the Constitution of the United [illegible] stitution of the State of Georgia, and the Laws th[illegible] the Ordinances of 26th January, 1826, and 29th Ma[illegible] pursuance of which, the growing crop of rice of the p[illegible] error was cut down and destroyed.

Not being unanimous in our opinions as to the construction [illegible] be given to the contract, in regard to the *absolute prohibition* of the cultivation of *rice* on the lands embraced therein, by the dry culture system, we place our judgment entirely on the other ground, independent of the contract.

[1.] Had the Mayor and Aldermen of the City of Savannah the power and authority, under the Constitution and Laws of the State, to enact the Ordinances of the 26th of January, 1826, and the 29th of May, 1848, and to direct the destruction of the growing crop of rice of the plaintiff in error, in the manner stated in the record? By the 1st section of the Act of the 24th of December, 1825, the jurisdictional limits of the City were extended one mile beyond the then present boundary, so as to enable the Mayor and Aldermen, for the time being, to pass an Ordinance, or Ordinances, prohibiting the cultivation of rice within the aforesaid extended limits. By the 6th section of said Act, the Mayor and Aldermen have full power to remove *all nuisances* within the limits of the Corporation. *Dawson's Compilation*, 464. By the Act of 1831, which is amendatory of the Act of 1825, the Mayor and Aldermen of the City of Savannah are empowered to pass such Laws and Ordinances as they may consider fit and proper, for the purposes of keeping in a state of dry culture the low or swamp lands, situated around and about the City and the hamlets thereof; and also, to remove such *nuisances* or *causes of disease*, which may affect the citizens thereof, or *in any wise injure their health:* Provided, the said Laws and Ordinances shall not violate the Constitution of the United States or of this State. By the 24th section of the 10th division of the Penal Code, it is provided that any *nuisance*, which tends to the immediate annoyance of the citizens in general, or is manifestly injurious to the *public health* and safety, or tends greatly to corrupt the manners

[illegible] ple, which may exist in a town or city, [illegible] of a mayor, intendant, aldermen, wardens [illegible] missioners, such nuisance, by and with the [illegible] men, wardens, or council, or commissioners, [illegible] and removed by order of said mayor, or intend- [illegible] missioners, which order shall be directed to, and [illegible] by the marshal of said town, or city, or his deputy; and [illegible] notice shall, in every case, be given to the parties in- [illegible] ed, of the time and place of meeting of such mayor, inten- [illegible] and aldermen, wardens or council, or commissioners. It is also provided, that if the nuisance complained of, shall be a grist or saw mill, or other valuable water machinery, then, the manner of proceeding, to abate the nuisance, is different. *Prince's Dig.* 648. The Ordinance of the City, passed in January, 1826, under the authority of the Act of the Legislature of 1825, prohibited the rearing or cultivating rice within the limits of the City, or within one mile beyond the then present boundary of the same. The plaintiff in error, in the spring of 1848, violated the Ordinance of 1826, by planting rice on Hutchinson's Island, within the corporate limits of the City, as declared by the Act of 1825. The rice was planted and growing in open violation of a public law of the City, which the plaintiff in error was bound to know; and this law of the City was as binding upon him (if constitutional) as any law enacted by the General Assembly of the State. By the 22d section of the 1st article of the Constitution, the General Assembly have power to make all Laws and Ordinances which they shall deem necessary and proper, for the good of the State, which shall not be repugnant to the Constitution. *Prince*, 905.

The General Assembly, by the Act of 1825, delegated the authority to the Mayor and Aldermen of the City of Savannah, to enact the Ordinance of 1826, prohibiting the cultivation of rice within the prescribed limits.

But it is said that the Acts of the General Assembly of 1825 and 1831, and the City Ordinances of 1826 and 1848, made under the authority of those Acts, are unconstitutional; because they violate the contract between the government and its citizen, under which the latter is entitled to the full and uninterrupted enjoyment of his rights of property. The Mayor and Aldermen derive their authority to make the Ordinances in question, from the General Assembly, and if the General Assembly have not the power

and authority to enact such laws and re[illegible] the private property of the citizen, under [illegible] Constitutions, then, the Mayor and Aldermen [illegible] vannah cannot do so. The proposition that th[illegible] to the full, absolute and uninterrupted enjoyment [illegible] property, under *all circumstances*, cannot, for a m[illegible] mitted. This vested right to his property, is not, un[illegible] cumstances, absolute and illimitable, so as to authorise him [illegible] it in any manner, when and where he pleases, regardless [illegible] rights of others. The citizen may have a vested right to mak[illegible] gunpowder, and have a vested right to the same when made; but he has not a vested right to deposit his gunpowder in the heart of a populous City, in such manner as to endanger the safety and lives of the inhabitants of the City. The plaintiff in error has a vested right to his land, on Hutchinson's Island; but he has not a vested right to use it, or cultivate it, in such manner as to injure the health of the inhabitants of the City. No one can have a vested right to create or continue a *public nuisance*, by the use of his property; the fundamental principles of the social compact forbid it. But the plaintiff in error contends, that it has not been established, that the cultivation of rice by him on Hutchinson's Island, did endanger the health of the inhabitants of the City. We have already shown, that the authority was conferred on the Mayor and Aldermen, to pass such Laws and Ordinances as *they might consider fit and proper*, to remove such nuisances, or causes of disease, which might affect the citizens of the City of Savannah, or in *any wise injure their health*. The Mayor and Aldermen have already adjudged, that the cultivation of rice, within the corporate limits of the City, was injurious to the *health of the City*, by the enactment of the Ordinances of 1826 and 1848. In *Martin vs. Mott*, (12 *Wheat.* 19,) it was held, whenever a Statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the Statute constitutes him the *sole and exclusive judge of the existence of those facts.*

The principle settled in *Martin vs. Mott*, applies with much greater force to the *law-making power itself*, than to a single officer of the Government. Legislative bodies judge of the exigency upon which their laws are founded; and when they speak, their judgment is implied in the law itself. *Stuyvesant vs. The*

k, 7 *Cowen*, 607. In the case before us, Ordinance is not the only evidence disclosed the growing rice within the corporate limits, he health of the City, and therefore a *nuisance*. error, was notified to appear before the City show cause why his growing crop of rice should not as a nuisance. He appeared, and showed cause by in- ng testimony: Whereupon, hearing argument upon the nd the testimony, to show the cultivation of the rice was not a nuisance, the City Council overruled the showing, and ordered the growing rice to be destroyed. The judgment of the City Council, upon the question of the existence of a nuisance, within the corporate limits of the City, was, in our opinion, conclusive evidence of that fact. It is also insisted, that the Ordinance of 1848, altered and changed the remedy prescribed by the Ordinance of 1826, to prevent the growing rice within the corporate limits of the City; that when the plaintiff in error planted his rice, the only penalty which he incurred, was, that he should be liable to pay one hundred dollars, for each and every day he should plant, rear or cultivate rice; whereas, by the Ordinance of 1848, the growing crop of rice is directed to be removed, and destroyed as a nuisance. This latter remedy, it is said, interfered with the *vested* rights of property of the plaintiff, to the rice planted by him, and destroyed by order of the City Council, and is void, as being repugnant to the fundamental law of the land. The plaintiff's rice, as we have already shown, was planted by him in open violation of the Ordinance of 1826. Can the plaintiff have a vested right to his growing crop of rice, which was planted, and growing, in open violation of a public law of the City? Can he be said to have a vested right in that which is *unlawful*, and prohibited by competent authority? The additional, and more efficient remedy, prescribed by the Ordinance of 1848, did not divest any right of the plaintiff, previously acquired, to the growing crop of rice, for the reason that it was planted and growing, in open violation of a public law, of which he was bound to take notice. The Ordinance of 1848, it is said, is unconstitutional, because it destroys the property of the citizen, for the benefit of the public, without compensation. In *Young vs. McKenzie, et al.* (4 *Kelly*, 31,) we held, that private property could not be taken and appropriated for the *permanent use* of the public, without just compensation being made;

but there is a wide and marked distinction
tween an appropriation of the private prope
the *permanent use* of the public; and a *police*
bing the *manner* in which the citizen shall use h
ty, so as not to injure others. In the one case, the
ken by the public, and appropriated to its use; the
prived of it—evicted from it. In the other, the citizen
prived of his property; the police law merely regulates th
ner in which he shall use it, for the good of the public.
plaintiff in error here, is not deprived of his land, for the use of the public; he has not been evicted from it; he is only restrained from using it in a particular manner, because such particular use operates as a nuisance, and is destructive of the public health. The sovereign power, in a community, therefore, may, and ought to prescribe the manner of exercising rights over property. It is for the better protection and enjoyment of that absolute dominion, which the individual claims. The power rests on the implied right and duty of the supreme power, to protect all, by statutory regulations; so, that, on the whole, the benefit of all is promoted. Every public regulation, in a City, may, and does, in some sense, limit and restrict the absolute right that existed previously; but this is not considered as an injury; so far from it, the individual, as well as others, is supposed to be benefited. *Vanderbilt vs. Adams*, 7 *Cowen*, 351. If it should be held, that the corporate authorities of the City of Savannah have not the right to *regulate the use of private property* in the City, so as to prevent its proving pernicious to the health and morals of the citizens, generally, it would strike at the very foundation of all police regulations. Every right, from an absolute ownership in property, down to a mere easement, is purchased and holden, subject to the restriction, that it shall be so exercised as not to injure others. *Stuyvesant vs. The Mayor, &c. of New York*, 7 *Cowen*, 605. *Baker vs. The City of Boston*, 12 *Pickering*, 193, '4. The Ordinance of 1848, being a mere *police* regulation for the protection of the health of the City, does not, in any way, violate the 10th sect. of the 1st art. of the Constitution of the United States, which prohibits the States from passing *ex post facto* laws, or laws impairing the obligation of contracts. In *Gibbons vs. Ogden*, (9 *Wheaton*, 1,) it was held that Inspection Laws, Quarantine Laws, and *Health Laws*, of every description, form a portion of that

lation, which embraces every thing within States, not surrendered to the General Gov- hich can be most advantageously exercised by elves. Our judgment then, is, that the Ordinan- ty Council of Savannah, passed in January, 1826, 1848, are good and valid, and binding upon the plain- or, as *police* regulations of the City; and that the Mayor dermen of the City, under the authority of the Acts of the eral Assembly, passed in the years 1825, 1831 and 1833, had the power and authority to judge of and declare, the planting and growing of rice, within the corporate limits of the City, to be injurious to the health of the City, and a public nuisance, and to abate the same.

Let the judgment of the Court below be affirmed.

No. 2. JOSEPH V. CONNERAT, plaintiff in error, *vs.* SAMUEL GOLDSMITH, defendant.

[1.] Cohabitation and joint use of goods purchased by the wife during coverture, is strong presumptive evidence of the assent of the husband, and of the agency of the wife in the purchase; which, however, may be repelled, by proof that the credit was in fact given to the wife.

[2.] A sells goods to the wife of B, and takes her note for the amount, she having a separate estate, and gives her a receipt for the bill. The husband and wife are living together, and the goods go into their joint use and occupation. *Held* that the credit was given to the wife, and that the husband is not liable, in a suit by the creditor, for the price of the goods.

[3.] In such a case, a parol promise by the husband to pay the debt, is void under the Statute of Frauds, because it is a promise to answer for the debt of another, and ought to be in writing.

Certiorari to Court of Common Pleas of Savannah. Decided by Judge FLEMING.

Mrs. Goldsmith, the wife of the defendant, had a considerable estate settled on her, to her sole and separate use. On the 14th of October, 1845, she purchased of the plaintiff in error sundry articles of household furniture, amounting to the sum of $200; for which amount she gave her individual note, at twelve months, and took the following receipt:

"Received, Savannah, Oct. 14th, 1845, smith, her note for two hundred dollars, at tw in full for one sofa, one centre-table, cloth, and mahogany chairs, one mahogany rocking-chair, dining-table, one set mantel-piece lamps and one car

$200 (Signed,) J. V. CONNE

This suit was instituted by Connerat against Goldsm husband, upon an open account for the same articles. The fendant pleaded the general issue, and that the articles were bought by and for his wife; were in no way necessary for the family; that the credit was given to the wife; and that her note had been given and received in full payment thereof. Upon the trial, in the Court of Common Pleas, evidence was given in of a promise, on the part of Goldsmith, to pay the note in a short time.

Other evidence was introduced to show that the goods went into the joint occupancy of the husband and wife, and also evidence on the part of the defendant, to show that they were not necessary.

Judgment was given, in the Court of Common Pleas, for the plaintiff, to which a writ of certiorari was prayed to the Superior Court; and, upon hearing the same, the judgment of the Common Pleas was reversed, and a new trial ordered.

To this decision of Judge Fleming, exceptions were filed, and error has been assigned thereon.

S. Cohen, for plaintiff in error.

To sustain the first ground, I shall rely upon the following authorities: *Prescott vs. Hubbell, McC.* 94. *Goodman vs. Parish*, 2 *McC.* 259. *Chastain vs. Johnson*, 2 *Bailey*, 574. *Tobey vs. Barber*, 5 *John.* 72, 73. *Costello vs. Cave & Bradley*, 2 *Hill*, *S. C.* 528, 531. *Fleming, Ross & Co. vs. Lawhorn*, 2 *Dudley*, *S. C.* 360–362. My idea is, that taking the wife's note is not, *under the circumstances*, a discharge of the husband. His use of the furniture, his implied assent from cohabitation, and *his subsequent promise*, all unite to fix his liability. *Petty vs. Anderson*, 3 *Bingham*, 170. *Hornbuckle vs Hornberry*, 2 *Starkie*, 177. 2 *Starkie on Evidence*, *Ed.* 1830, 692. *Waithman vs. Wakefield*, 1 *Camp.* 120. *Railton vs. Hodgson*, 4 *Taunton*, 576 *n. note.* Merely contracting with a married woman is not, *per se*, evidence that the contract was made

separate estate. *Jones vs. Harris*, 9 *Ves.* 485 not all of the cases, where the wife is regarded rence to her separate estate, it will be found that nd wife were living apart, or that the articles were luxuries beyond the means of the husband; and no be produced, where the principle is applied to the pur- *necessary articles* of furniture, which the husband receives, and promises to pay for. The case in 9 *Car. & Payne*, so much relied upon, has no bearing on this case. There, the purchase was of "singing birds," not necessaries, to an amount far beyond the husband's ability to pay, and no ratification of the act, *by a promise to pay.*

In addition, I shall refer to, and rely upon ***Seaton vs. Benedict*, 2 *Smith's Leading Cases*, 279, *and the notes appended thereto. Clifford vs. Laton*, 3 *Car. & Payne*, 15, *reported in* 14 *Eng. Com. Law Rep.* 188. *Rennick vs. Fickling*, 5 *B. Munroe*, 166. *Graham on New Trials*, 362. *Walter vs. Smith*, 4 *Dall.* 389. *Lane vs. Ironmonger*, 13 *Meeson & Welsby*, 368. 2 *Smith's Leading Cases*, 365.**

LLOYD & OWENS, for defendant.

1. Where any individual sells goods to a *feme covert*, and gives the credit to her, her husband will not be liable to pay for such goods, even though he see her in possession of them, and though it be not proved for defendant that such goods were not necessaries. 5 *Taunton*, 355. 3 *Camp.* 22. 1 *Carr. & P.* 16, *et nota.* 2 *Hill, S. C. R. p.* 335. 9 *Carr. & P.* 643.

2. The acts of the wife bind the husband alone upon the ground of agency. Where the husband is bound by the acts of the wife, the law must infer an agency, before they can bind him. *Fitz. N. B.* 277. 2 *Smith's &c.* 304, 11, 12. 34 *Eng. C. L. R. p.* 435, 508, 505. 28 *Eng. C. L. R.* 271.

3. Where a married woman, having separate property, gives her individual note, the law presumes an intention, on her part, to charge her separate estate, and the parties are presumed to have contracted with regard thereto. 2 *Vesey, Sr.* 193. 1 *Vesey, Jr.* 46. 1 *Brown*, 16. 17 *Vesey*, 365. 17 *John.* 548. 1 *Kelly*, 389. 2 *Story Eq. Jur.* §1401.

A promise to pay the debt of another, for which that other remains liable, must be in writing, to satisfy the Statute of Frauds. *Salkeld*, 27.

And further, the furniture purchased, wa
she might have disposed of it as she pleased,
promise of Goldsmith was *nudum pactum*. 1 P

Where the wife acts as the agent of the husband,
other agent for a principal; and if the person with
deals, elects to give the credit to her, he cannot change
and charge the husband. 1 *C. & P.* 16, *et nota.*

If Goldsmith was the principal in the transaction, then the
of Mrs. Goldsmith, a third person, taken at the time, without Gol
smith's indorsement, and a receipt in full given, was payment.—
11 *John.* 409. 15 *John.* 241.

By the Court—NISBET, J. delivering the opinion.

A married woman has no authority, by virtue of the marriage, to bind her husband by her contracts. She may bind him for necessaries, and her power to do so, rests upon the idea, that her contracts for them are made with his assent, expressed or implied—so far as she can bind him, she is regarded as his agent. And when her contracts are for necessaries, suitable to her degree and condition, and she is living with her husband, she is his agent, possessed of a general and presumed authority, arising from his duty and liability to provide for her and his children. Such contracts are his, not her's. With respect to other contracts, she is not his agent, unless his authority be expressly proven. For these general principles, see *Emmet vs. Norton*, 8 *C. & P.* 506. *Manly vs. Scott*, 1 *Mod. R.* 125. *Montague vs. Benedict*, 3 *B. & C.* 631.—5 *D. & R.* 532, *S. C.* *Ethering vs. Panott*, 2 *Ld. Raym.* 1006. *Chitty on Contracts*, 160, 161.

[1.] Cohabitation is strong presumptive evidence of the husband's assent to agreements made by her, for the supply of goods for herself and her husband's household, during their cohabitation. In this case, the husband and wife were living together—the furniture was put to their joint use—it was brought to the house by his assent, so far as is apparent, and certainly with his knowledge. Subsequently, he signified his assent to the bringing of the furniture to the house, and to the family use of it, by a verbal promise to pay for it. From these facts, it is assumed by the plaintiff in error, that he is liable to pay for the furniture. I apprehend the error into which counsel for the plaintiff has fallen, consists in the

abitation, knowledge of the purchase, and the niture, is *conclusive* of the husband's liability. he insists that the husband's assent is necessarily that the wife acting in the purchase as his agent, lly bound. Now, although the wife may bind her or necessaries; *yet, she does not bind him, when the credit n to her.* And although cohabitation, joint use, &c. are g presumptions, going to show his assent, yet they are only presumptions which may be rebutted by proof *that the credit was given to the wife, and not to the husband.* And just here, upon this question, whether the credit was given to the wife or not, this case turns. In the absence of all proof that the credit was given to the wife, I concede that where a husband is living in the same house with his wife, he is liable, without more, for the goods which he permits her to receive there and use. She is considered his agent, and the law implies a promise, on his part, to pay for them. If, however, it is clear that the credit was given to the wife, the presumption of assent, from these facts, goes for nothing; the husband is not liable, and the creditor must look to the wife as he may. In *Montague vs. Bennett*, *Bayley*, J. said—"Cohabitation is *presumptive* evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband, duly authorized." 3 *Barn. & Cress.* 631.

"But even cohabitation, (says Mr. Chitty,) and a knowledge, on the part of the husband, that his wife has contracted for goods, are only presumptive, not conclusive of his assent, and consequent liability. The presumption may be repelled by circumstances, evincing that the tradesman gave credit *solely* to the wife; and if the Jury find that to be the fact, he is not liable." *Chitty on Contracts*, 163. In *Metcalf vs. Shaw*, the defendant and his wife were living together; there was no evidence that he had any knowledge of the dealings of his wife with the plaintiff; the goods in question, were ordered by the wife alone, *and she gave her own note* to the plaintiff, for the amount of the purchase. The action was brought by the creditor against the husband, for the price of the goods. *Ld. Ellenborough* held, that "the action, clearly, cannot be maintained on the note, as the wife had no authority, general or special, from her husband, as his agent, to make it; and I think he is not liable for any part of the goods, on this plain

ground, that they were not supplied on his cr
tiff looked to the wife, alone, for payment. Th
to the wife, and not to the husband." 3 *Camp.*
not only proves the general proposition I have st
that when a note is given by the wife, that fact is conclus
credit was given to the wife. In this particular, it is th
this bar. In *Bently vs. Griffin*, the action was brought agai
husband, for articles of dress bought by his wife, of plain
They had debited the wife, in their books, for the amount. Husband and wife lived together. Plaintiff had been paid for part of their bill, by bills drawn on the husband, and accepted by his wife, she signing her initials. The husband had seen his wife wear a part of the articles bought. The bills which the wife had accepted, in part payment, were paid by her. *Heath, J.* said—"At the time of the trial, I told the Jury, that there was strong evidence to show that the plaintiff gave credit to the wife, and not to the husband, in the three bills being accepted and paid by the wife, and in the wife telling the servant to carry away the dresses, when brought home. I was much dissatisfied with the verdict." *Chambers, J.* said—"It is clear, that the verdict is grossly wrong," &c.

Dallas, J. said—"The question is, whether the general liability of the husband, is not repelled by the circumstances, which show that the credit was given to the wife. I think, most clearly, that the credit was given to the wife, and that the husband is liable for no part of these charges." 5 *Taunt.* 357, 358. Here, again, accepting a bill by the wife, is recognised as strong evidence, to show that the credit was given to the wife.

In *Holt vs. Brien*, *Holroyd, J.* said—"If a husband supplies his wife with money, sufficient for the purchase of necessaries, he is not liable for any debt contracted by her, for necessaries, to a party who has notice of the allowance. Here, the plaintiff had express notice of that fact, and trusted the wife, on her own promise to pay, out of her quarterly allowance; and although that was not binding, in point of law, on her, still, it shows that the credit was given expressly to the wife; in which case, the husband is not liable," &c. 4 *Barn. & Ald.* 253. See, also, *Taylor vs. Brittain*, 1 *C. & P.* 16, *note*. *Legitt vs. Reed, idem*, and *Atkins vs. Carwood*, 7 *C. & P.* 760.

The case of *Moses vs. Fogartie*, is, in its facts, like this—a note

wife, for the debt, husband and wife living to- J. said—"I think it evident, from the circum- tiff taking Mrs. Fogartie's note, that he furnished her credit, and not on her husband's. In *Bently vs. Taunt*. 356, the plaintiff furnished articles of dress, to e, and charged them to her, on his books. He drew some of exchange on her husband, which were accepted, and part- paid by the wife. The Jury, having found for the plaintiff, a new trial was granted, on the ground, that the articles were not furnished on the credit of the husband. The case of *Metcalf vs. Shaw*, is almost exactly in point to the present. From the circumstance of plaintiff's having taken the wife's note, *Lord Ellenborough* held it conclusive, that the goods were not furnished on the husband's credit, but that the plaintiff looked to the wife alone." 2 *Hill's S. C. R.* 335, 336.

[2.] In the case before us, the plaintiff gave to the wife a *receipt for the bill of furniture, and took her note for it; and farther she had a very considerable separate estate.* From the authorities referred to, we think it clear, that the credit was given to the wife, and that the husband is not originally liable.

The idea of agency is precluded in this case, on another ground. The wife had a separate estate, and the contract was made with her. It was competent for her to contract, so as to bind her separate estate. She did so contract. We have a right to infer, that the plaintiff contracted with her, as a *feme covert*, having a separate estate, and as to that estate, a *feme sole*. She was, therefore, the principal in the contract, and *ex vi termini*, nobody's agent. The doctrine, therefore, of ratification, has no application to this case.

[3.] If the husband made a promise to pay this debt, it being a promise to answer for the debt of another, and not being in writing, it is void, under the 4th section of the Statute of Frauds. The plaintiff is not remediless—by taking the proper steps, he may recover the note out of the separate estate of the wife.

Let the judgment be affirmed.

No. 3.—ELIZA J. MARTIN, plaintiff in error, BROACH, executor, and RACHEL BROACH, exe Broach, deceased, defendants.

[1.] The 17th section of the 1st art. of the State Constitution, inhib passage of any law, by the Legislature, containing any matter dif from what is expressed in the title, does not require that the title should forth a synopsis of the entire Act.

[2.] Where the title specifies some of the objects for which the Statute was passed, and contains this general clause—"And for other purposes therein contained," portions of the Act not specially indicated in the title, are, nevertheless, good, under this general clause.

[3.] Where letters testamentary, have been revoked under the Act of 1834, on account of the birth of a posthumous child, and an intestacy declared, neither by the Common nor Statute Law of England, nor the Acts of our own Legislature, can the newly appointed administrator be made a party defendant to a suit pending against the removed executor.

[4.] An acknowledgment, or promise, to take a case out of the Statute of Limitations, must specify, or plainly refer to the particular debt, or demand, or cause of action, which is sought to be revived.

[5.] Where there is any dispute, as to the facts which go to prove the making of a new promise, then, whether a sufficient acknowledgment, or promise, has been made, to take the case out of the Statute, is a mixed question of Law and fact, to be passed upon by the Jury; but where the facts are undisputed, it is for the Court to determine whether they take the case out of the Statute or not.

[6.] A promise to pay a debt, barred by the Statute, constitutes a new cause of action which, a party seeking to avail himself of, must declare upon, in the words in which it was made, or according to its legal effect. The old debt is regarded as the consideration, which supports the promise; and in declaring, must be set out as the inducement to it.

Assumpsit, &c. in Pulaski Superior Court. Tried before Judge SCARBOROUGH, October Term, 1848.

John Martin died testate, and his will was duly proven, and George Walker qualified as executor under the same. Suit was brought against him, as such. The birth of a posthumous child, revoked the said will, which was so declared by the proper Court, and the letters testamentary to Walker, annulled. Eliza Martin, having qualified as administratrix, a *scire facias* issued, to make her a party defendant to the said suit; to which she pleaded, that she should not be made a party to the said suit in Pulaski Coun-

e says that there is no privity in Law, between ulker, as executor of said will, and herself, as ad- And because, said John Martin died in Bibb County, letters were granted, and where she resided at the time rvice of said *scire facias*, and still resides." At the Sep- er Term, 1848, of said Court, the Court overruled the sev- l pleas, and ordered the said administratrix to be made a party.

The case was called in its order, and the parties proceeded to trial, upon the three pleas of—Non-Assumpsit, Payment and the Statute of Limitations.

The following is the account sued upon:

Mr. John Martin, Dr.

To George Broach.

1833.	Nov. 1.	To 1 two-horse wagon,	$70 00
"	"	To purchase price of negro, Mary,	150 00
1835.	May 10.	To ten bales cotton, (say 3500 lbs. at 16 cts. per lb.	560 00
1836.	Feb. 9.	To proceeds James C. Averey's note,	485 00
"	Dec. 2.	To cash received for sale of negro man, Peter,	1700 00
"	"	To 1 beef cow,	20 00
"	"	To 20 bushels corn, $1 per bushel,	20 00
1837.	May 10.	Cash received of Robert Martin, on sale of my cotton,	500 00
1838.	April 16.	Cash received from Benjamin Lettle, on sale lot of my cotton,	118 46
1839.		Cash advanced per contract,	1500 00
"		Cash collected on a note in my favor, of Mathis D. Cannon,	30 00
"	Dec. 27.	50 bushels corn, at $1 per bushel,	50 00
			$5203 46

The plaintiff proposed to prove, by one Hardy Morris, a subsequent promise, by the intestate of the defendant, to pay the amount sued for, after the bar of the Statute of Limitations had attached; to which defendant, by her counsel, objected, because the declaration in the case contained no count upon any new promise or acknowledgment, by Martin, nor averment of any kind, in the pleadings, so as to authorize the introduction of the testimony; which objection was overruled by the Court, and the testimony admitted.

Morris testified, that he "met Martin on Cotton Avenue, Ma-

con, in February before he died, who had busin[illegible] of Ordinary, Jones County, and asked witness [illegible] Court of Ordinary sat—said he wanted to go over to J[illegible] March thereafter, and wanted to settle up the busi[illegible] George Broach; witness remarked to Martin, he ought to [illegible] and pay him the money—for old man Broach was in need of [illegible] ney. Martin said he would do so, for he promised his sister to go over and do so. Knew of no other matters between the parties, except those involved in this suit."

The plaintiff offered, in evidence, a receipt of John Martin, dated the 3d of February, 1836, for James C. Averey's note, dated 9th February, 1836. Also, a receipt, dated 16th April, 1838, for $118 46, of Benj. [illegible]ettle, on account of George Broach's cotton. Also, $500 of Robert Martin, on account of cotton; to which defendant's counsel objected, because they were barred by the Statute of Limitations, before the commencement of the suit; which objection the Court overruled.

The testimony being closed, the counsel for defendant requested the Court to charge the Jury—

1. That there is no evidence, or testimony, in this case, going to show, that either the plaintiff's testator, or John Martin, defendant's intestate, were merchants, or persons engaged in the trade of merchandize, or factors, or servants; all the items of the account, are therefore not taken out of the Statute of Limitations, by the proof of one on which the Statute had not attached.

2. That after an account, or demand, has been barred by the Statute of Limitations, that any acknowledgment to remove the bar, or take the case out of the Statute, should contain a direct and unqualified admission of a previous subsisting debt, due to George Broach, which he was liable and willing to pay.

3. That a promise to pay, in order to take the case out of the Statute of Limitations, must be proved, in a clear and explicit manner, and the promise must be, in its terms, unequivocal and determinate.

The Court charged the Jury, among other things, that "The Statute of Limitations does not constitute an absolute or total bar to the action. It only suspends the remedy, after the lapse of the statutory time, until the justness of the original demand is acknowledged, or a new promise to pay is made, which revives the remedy.

law to be this: that a debt, barred by the Statute , may be revived by a new promise; that such pro- ess or implied; that an implied promise is created ear, *positive* and unqualified admission of the justness of the r demand sued for." "The acknowledgment which is suffi- nt to take the case out of the Statute of Limitations, is a clear, pos- ive, unequivocal and determinate admission of the original justness of the particular debt, or demand sued for, and that the same is still due, or has not been paid. When such an acknowledgment is proved, to the satisfaction of the Jury, then, a new promise is implied, springing out of, and supported by, the original consideration, and the remedy revived."

The Jury found a verdict for the plaintiff; whereupon, counsel for the defendant moved the Court for a new trial.

1. For, that the verdict is contrary to law.

2. For, that it is contrary to evidence, and without sufficient evidence.

3. Because, the Jury have found, contrary to the charge of the Court, and in disregard of its instruction, as to what was sufficient to constitute a sufficient acknowledgment and promise, to take a demand without the operation of the Statute, where it had attached.

4. Because the Court erred in allowing plaintiff to introduce evidence of a new promise, by Martin, to take the case out of the Statute of Limitations, when there was no count or allegation in plaintiff's declaration, under which said evidence could be received.

5. Because the Court erred in charging the Jury, that they might find for the plaintiff, if they believed, from the evidence, that Martin had made a clear, positive, unequivocal and determinate admission of the original justness of the particular debt, or demand sued for; and that the same is still due, and had not been paid, when there was no evidence from which the Jury could draw such a conclusion, or inference, or ought to have been permitted to draw one.

Which motion for a new trial, was refused by the Court.

All of which rulings and decisions of the Court, were severally assigned to be erroneous.

I. L. Harris and C. B. Cole, for plaintiff in error.

POWERS, BAILEY & BLAKE, for defendants.

I. L. HARRIS, for plaintiff in error, submitted the follo points and authorities:

No privity at Common Law, between administratrix and executor. 1 *Kelly, Hardwick's case.* 2 *Kelly, Broach vs. Walker.*

For definition of privity, see *Greenleaf's Ev.* 220. 1 *Taunt.* 141. *Tomlin's Law Dic.* It consists in the transmission of same duties and powers.

The Acts of 1810 and 1821, do not change the common principle. This is a *casus omissus*, which the Court *cannot* supply. 1 *Term R.* 52. *Dwarris on Statutes*, 70.

Incompetency of Morris.

Error in admission of testimony, as to *new* promise, without a count in declaration, to support it. *Aycourt vs. Cross*, 3 *Bing.* 329, 365. 11 *Eng. Common Law.* Also, *Miller vs. McIntire*, 6 *Peters*, 64.

Error in not giving instructions prayed. *Law vs. Morrel*, 6 *Wend.* 268. *Powers vs. McFerron*, 2 *Serg. & Rawle*, 44. 7 *Cranch*, 506. *Elling vs. Bank U. S.* 11 *Wheat.* 75. *Graham on New Trials*, 270. *Bradstreet vs. Huntington*, 5 *Peters*, 402.

It is error to leave matter of law to the Jury, as matters of fact. 2 *Serg. & Rawle*, 415.

So, also, to submit a mixed question of law and fact to the Jury. *Graham on New Trials*, 270. *Clarke vs. Dutcher*, 9 *Cowen*, 674, 530.

So, also, to declare a question of law, to be a question of fact. *U. S. vs. Carlton*, 1 *Gall.* 400.

So, also, when there is no evidence to prove a particular fact, for the Court not so to instruct the Jury, when required. *Greenleaf vs. Birth*, 9 *Peters*, 292.

Examine the words relied on, to establish a promise—the word settle does not mean to pay, in any one of its senses.

No promise is made, to pay any fixed or determinate debt, or sum of money. This is essential, according to *Stafford vs. Bryan*, 3 *Wend.* *Bell vs. Morrison*, 1 *Peters.* *Moore vs. Bank of Columbia*, 2 *Peters.*

The case of *Bell & Morrison*, (1 *Peters*,) if law, and it is be-

shows that the Court, throughout its charge, erred, submitted questions to the Jury, which should have cided by it.

S. T. Bailey, for defendant, contended—

1st. That under a fair and equitable construction of the Acts of 1810 and 1821, the plaintiff in error was properly made a party, and cited—*Dwarris*, 618, 704, 718, to 721. 6 *B. & C.* 178. 8 *Ib.* 104. 15 *Serg. & Rawle*, 39.

2d. That the promise proved, is sufficient to take the case out of the Statute of Limitations, and cited 4 *Pick.* 110. 3 *McCord*, 552. 4 *Ib.* 215. 2 *Nott & McC.* 60. 3 *Conn.* 370. 6 *N. H. R.* 367. 1 *Esp. Ca.* 435. 32 *E. Com. Law*, 366. 4 *Mason*, 457. 4 *Porter*, 223. 1 *Har. & Gill*, 204. 2 *Green. Ev.* §441. 5 *C. Law*, 245.

Whether the promise removes the bar, is a question for the Jury. 8 *Eng. Com. Law*, 318, 501. 32 *Ib.* 366. 11 *Ib.* 59. 2 *T. R.* 760. 3 *N. H. R.* 467. *Chit. Cont.* 818. 2 *Greenleaf's Ev.* §442.

3d. A new promise need not be pleaded. 3 *Conn. R.* 131. 1 *Har. & Gill*, 204. 4 *Wash. C. C.* 149. 3 *Ib.* 404. *Chit. Cont.* 821, *note.*

C. B. Cole, in conclusion, for plaintiff in error, contended—

1st. That the suit abated, and the Acts of 1810 and 1821, construed according to the meaning of their words, which are plain and unambiguous, do not authorize the plaintiff in error to be made a party, and cited—1 *Term*, 52. 6 *Barn. & Cress.* 475, 712. 7 *Ib.* 560. 4 *Nev. & Man.* 460. 8 *B. & C.* 104, 160. 10 *Ib.* 520. 17 *Wend.* 304. 21 *Ib.* 211. 7 *Cranch*, 52. *Dwarris*, 44. 6 *Mod.* 143. 1 *Wash. C. C. R.* 463.

2d. A *casus omissus* cannot be supplied by construction. *Dwarris*, 53. 1 *Term*, 52. 6 *East*, 514.

3d. The new promise was no where alleged, and the acknowledgment proved, was not sufficient, and cited—1 *Peters*, 362. 6 *Ib.* 151. 12 *Ib.* 332. 2 *Saund.* 127, *and note c.* 2 *Greenl. Ev.* 354. 3 *Wend.* 532. 9 *Ib.* 293. 2 *Paige Ch.* 45.

One item within the Statute, will not draw to it, items barred.

8 *Pick.* 187. 6 *Ib.* 362. 5 *Cranch*, 15. 7 *Ib.* 350. 505. 1 *Hill's S. C. R.* 202. 2 *Greenl. Ev.* 360.

By the Court.—LUMPKIN, J. delivering the opinion.

The first question to be considered, is, was Mrs. Martin, as the administratrix generally, of the estate of John Martin, deceased, such a successor to George Walker, who qualified as executor upon the will of said deceased, but whose letters testamentary were revoked, and the will set aside, on account of the birth of a posthumous child, as that she could be made a party to the suit, pending against Walker, as executor, at the instance of the estate of George Broach, deceased?

It is clear, that this could not be done at Common Law, or under the Statutes of 17 *Car. II, or*, 1 *Jac. II*, for want of privity of representation. Do the Acts of 1810 or 1821, either or both of them, make provision for this case?

[1.] It is suggested, by counsel for the plaintiff in error, that these Acts contravene the 17th section of the 1st article of the Constitution of the State, which inhibits the passage of any law, or ordinance, containing any matter different from what is expressed in the title thereof. *Prince*, 904. The origin and history of this singular provision, are given in the case of *The Mayor and Aldermen of the City of Savannah, and others, vs. The State of Georgia, &c.* 4 *Georgia R.* 26. This clause does not require that the title should contain a synopsis of the Law, but that the Act [2.] should contain no matter *variant* from the title. Now, the titles to each of these Statutes, after enumerating certain objects for which they were passed, adds, "*And for other purposes therein mentioned.*" This was sufficient to prevent surprise—to induce the members, either to call for the reading of the *whole* of the bill, or to look into it, during its progress through the Legislature.

Having disposed of this preliminary objection, we will proceed to an examination of the Statutes.

[3.] The Act of 1810, declares that "the Court of Ordinary shall have power and authority, upon complaint made, and cause shown, by any security of any administrator or guardian, that his principal is mismanaging his estate, upon which he is the administrator or guardian, to pass an order requiring such administrator or guardian, to show cause, if any they have, at the next term,

security should not be discharged from his securityship, administrator or guardian, compelled to give new security, or their administration or guardianship be revoked, as to the said Court shall seem expedient; and upon the revocation of such administration, *or upon the revocation of any letters testamentary, as provided by law*, and granting administration, *de bonis non*, suits brought by, or against, the former administrator, shall not, for this cause, be abated; but the removal of such administrator or executor, being suggested on record, a *scire facias* may issue, to make such administrator, *de bonis non*, a party, at any time after the granting of such letters, ***de bonis non***. *Prince*, 241.

The Act of 1821, is declaratory of the Act of 1810, doubts having arisen as to its proper construction. It says—" That from and after the passage of this Act, when the Court of Ordinary shall know, or be informed that any such guardian, executor or administrator, shall waste, or in any manner mismanage the estate of such orphan, or deceased person, or does not take due care of the education and maintenance of such orphan, or ***deceased person (!!!)*** according to his, her or their circumstances; or where such guardian, executor or administrator, or his, her or their securities, are likely to become insolvent; or where such executor, administrator or guardian, shall fail to make returns within the terms prescribed by law—particularly, where no inventory or appraisement shall have been made and returned, in terms of the law—said Court are hereby required to order a rule to be served on such guardian, executor or administrator, so in default, returnable to the next regular term of said Court after the passing the same; and upon return of said rule being served, the Court shall proceed to investigate all the actings and doings of said guardian, executor or administrator, (as the case may be,) and may, and are hereby authorised and empowered to revoke the trust confided to him, her or them, or pass such other, or further order, as said Court may think expedient and fit for the better managing and securing such estate, and educating and maintaining such orphan; and upon the revocation of such letters testamentary, letters of administratorship, or guardianship, writs, by or against either, shall not, for this cause, abate; but the removal being suggested of record, a *scire facias* may issue, to make the successor of such removed person a party, at any time after the appointment and qualification." *Prince*, 245, '6.

It will be discovered that the Act of 1810 makes provision for the appointment of a successor, "upon the revocation of any letters testamentary, as provided by law." And this clause would, of itself, be sufficiently broad to embrace this case; for here, the letters testamentary of Walker were revoked, as provided for by law, viz: under the Statute of 1834, requiring the Court of Ordinary to declare an intestacy, in certain cases. *Prince*, 454. Yet the whole Statute must be taken together. And the fatal defect is, that in conclusion, as will be seen by its careful perusal, it restricts the appointment of a successor *to an administrator, de bonis non.* And Mrs. Martin, who was made a party defendant, by order of the Court, is neither in form, according to her letters, nor in fact, an administratrix, *de bonis non*, of her deceased husband. On the contrary, she is, to all intents and purposes, an *original* administratrix, *generally*, on this *now* intestate estate, between whom and Walker, the late executor, there is no privity.

When this cause was up before, the query was propounded by the Judge, who delivered the opinion of the Court, whether the Act of 1821 would not reach the present case? 2 *Kelly*, 439. We are now satisfied that it does not. For, while it authorizes the *successor* of a removed executor to be made a party by *scire facias*, and might, therefore, in terms, apply to Mrs. Martin; yet, it is qualified and restrained, by referring to the successors of *defaulting* executors and administrators, and such as were removed for some breach of trust, or official misconduct; whereas, Walker's letters were recalled for no delinquency on his part, but the will itself was set aside, and an intestacy declared, there being an after-born child, for which no provision was made.

It is no doubt the policy of the law, to prevent delay and expense in the administration of justice. And to secure this most desirable end, we might feel disposed to put a liberal construction upon the Statutes which have been invoked in this discussion, and to hold that, although the Act of 1810 mentions suits only, "brought by, or against, the former *administrator*," yet it shall apply to *executors* likewise. But we entertain great doubt, whether, upon principle, the administratrix in this case, should be made a party to the suit hitherto pending against the executor. Suffice it to say, however, that there is no authority of law to warrant it.

[4.] Was the case properly submitted to the Jury, by the pre-

ing Judge? There must be a clear and unequivocal acknowledgment of the debt, to take the case out of the Statute of Limitations. No set form of words are required for the purpose. It may be inferred from facts, without words; as, for instance, the payment of a part of the debt, or giving security for the whole, or a part thereof, within the period limited by the Statute. But whatever acknowledgment is relied on, in order to create an implied promise, it should show that the party considered himself *liable to pay*, at the time of making it. Was, then, the conversation between John Martin and Hardy Morris, the witness, sufficient to take the case out of the Statute? What was that conversation, as testified to? Martin expressed a desire to settle with Broach; Morris replied, that he ought, and to pay the money, for that Broach was needy; Martin declared that he would, having promised his sister, (Broach's wife,) to do so.

It will be borne in mind, that the account sued, consists of a great variety of items, beginning in 1833, and continuing down to December, 1839; and in their character, wholly disconnected; as, for the sale of property and produce, cash advanced, money collected, &c. amounting, altogether, to $5,203 46. Did the promise to *settle*, apply to the whole, or a part only, of this indebtedness? And if the latter, to which particular items? To take the case out of the Statute, the acknowledgment must clearly refer to the very debt in question between the parties.

Says Mr. Justice Sutherland, in delivering the opinion of the Court, in *Stafford vs. Bryan, (3 Wend. 535,)* "It will be observed that neither of the witnesses pretend that the note in question, or any note, was mentioned by the defendant, or expressly alluded to, by him. He only admitted, in general terms, that he owed the plaintiff a large sum of money, without specifying how. The evidence shows that there was, at the time, an unliquidated account, of long standing, and to a considerable amount, between the parties, to which the defendant may have referred, if indeed, he made the declaration imputed to him. An acknowledgment which is to have the effect of taking a stale demand out of the operation of the Statute of Limitations, ought to be clear and explicit, in relation to the subject, or demand, to which it refers."

And to the same effect, in *Lockhart vs. Eaves, (Dudley's S. C. R.* 321,) Judge *Butler* said—"From the whole complexion of this case, it is not one which deserves the countenance and fa-

vor of the Court. It is founded on a stale demand. The acknowledgment and promises made by the intestate, in 1833, were not sufficient to obviate the operation of the Statute, and to impose a new obligation, without specifying some particular demand, or cause of action, intended to be renewed, or created by them. This may be done, as well by satisfactory reference, as by explicit terms. In neither of these ways did the intestate indicate the particular demand, which, it was said, he assumed to pay. The acknowledgment imposing the obligation, should also have showed the demand upon which it was founded, so that the Court might have pronounced upon its effect and validity."

We are of the opinion, that the acknowledgment in the present case, was not sufficient to obviate the Statute of Limitations, inasmuch as it failed to specify, or plainly to refer to any particular demand, or cause of action, to be renewed or created by it.

[5.] What, then, was the duty of the Court, under the circumstances? The rule we take to be this—where there is any dispute, as to the facts which go to prove the making of a new promise, then, whether a sufficient acknowledgment, or promise, has been made, to take the case out of the Statute, is a mixed question of law and fact, to be passed upon by the Jury. But when the facts are undisputed, it is for the Court to determine whether they take the case out of the Statute, or not. *Graham on New Trials*, 271. 9 *Cowen*, 674. 15 *Vermont*, 563.

Here, it is not denied that Martin made the statement relied upon as evidence of the acknowledgment of the debt. Whether, therefore, it amounted to a sufficient acknowledgment, or not, was an unmixed question of law, and should not have been referred to the Jury, to be determined by them.

[6.] But in the third, and last place, we are called on to consider, and settle, one of the most vexed questions in the books, and one of great importance to the profession and the country—viz: is the old debt, or the new promise, the cause of action? Were I disposed to be laconic, I might content myself, by suggesting that this Court considers and adjudges, that the Statute of Limitations *is an Act of the Legislature*, and *as such*, ought to be carried fully into effect. It will be expected, however, that we should submit, more at large, the reasons which have conducted us to the conclusion that the suit and recovery must be on the *new* promise, and not on the *old* debt.

In the first place, it is abundantly sustained by the most respectable authority.

Chief Justice *Marshall*, in *Wetzell vs. Bussard*, (11 *Wheat.* 314,) remarks that, "some of the American cases proceed on the idea of a new promise, for which the ancient debt is a sufficient consideration; and this is a distinction of great importance, where the acknowledgment is connected with any thing required of the defendant."

Mr. Justice *McLean*, in *Ames & Ames vs. Le Rue*, (2 *McLean's R.* 216,) says—"The Statute of Michigan does bar all the remedy upon the special contract. Since the breach of the contract, and before the commencement of this suit, the limitation of the Statute has run, and consequently, the bar is complete. . . . . The special contract, in regard to the sale of the machine, is properly shown as the consideration of the express promise. . . . And we think the plaintiffs have a right to recover, on the express assumpsit, since which, the Statute has not run, and that the whole circumstances of the case may be gone into, to show the amount due."

I would observe, that the opinion, that the Statute of *Michigan* "does bar all remedies upon the special contract"—that is, the *original liability*—is not founded upon the peculiar phraseology of the Statute of that State, but upon general principles, as will appear by reference to the Act itself. It simply declares that, "all actions of debt, founded on contracts not under seal; and all actions of assumpsit, or on the case, founded on any contract or liability, express or implied, shall be commenced in two years next after the cause of action shall accrue, and not afterwards. *Ang. on Limit. 2 Ed. Appendix, CXXVII.*

Spencer, J. in delivering the opinion of the Supreme Court, in *Sands vs. Gelston*, (15 *Johns.* 519,) says—"The Statute of Limitations is the law of the land; and, as has been frequently observed, was intended as a shield against stale and dormant demands, under the benign supposition that the party may have lost the evidence necessary to his defence, by the lapse of time. I could never see the difference, as regards the revival of a debt, between one barred by the Statute of Limitations, and one from which the debtor has been discharged, under the Bankrupt, or Insolvent Laws. The remedy is equally gone, in both cases. The Statute of Limitations requires all actions, on contract, to be com-

menced within six years next after the cause of such action accrued, and not after. The remedy being suspended after six years, there yet exists a moral duty, on the part of the debtor, to pay the debt; and, accordingly, a promise to pay a debt not extinguished, but to which the remedy is lost, is a valid promise, and may be enforced, on the ground of the pre-existing moral duty. There is, then, no substantial difference between a debt barred by the Statute of Limitations, and a debt from the payment of which the debtor is exonerated, by a discharge under a Bankrupt or Insolvent Act. Both of them rest on the same principle.

Since the argument of this case, I have had the good fortune to find a decision, from the Court of Appeals of our next-door neighbor, so full and so satisfactory, that I shall gladly avail myself of it, to save much useless labor. And I do this the more willingly, as the opinion of the Court was delivered by that eminent jurist, and most excellent man, Judge *O'Neall*, of whom it may be justly said, that his official worth would be more highly appreciated, were it not, in some degree, obscured by his private virtues.

"In deciding upon the Statute," say the Court, "no mere rule can be more universal, than that it is the duty of the Courts to expound it as it is, and not as we might think it should be. The Statute of Limitations has been, for a long series of years, the subject of eulogy or blame, by the different persons who have been called on to discuss it, as fancy or the circumstances of the case dictated. Generally, however, in all modern cases, it has been regarded by the ablest judges and soundest lawyers, as founded on a wise policy, *and to be sustained and enforced, according to its letter, and not frittered away by distinctions unauthorized by its provisions.* It is a little remarkable, that in the variety of decisions on the Statute of Limitations, in relation to the actions of debt, on simple contract and assumpsit, until very recently, how completely its provisions have been overlooked. Any thing which admitted that a debt ever had an existence, was held to be enough to take a case out of the Statute of Limitations. This capricious, and I might say, dangerous current of decisions, has at length been arrested, and the Judges of the Courts of the United States, of this State, New York, Pennsylvania and England, have, about the same time, abandoned the rules of previous decisions, and have returned to the Statute, to ascertain on what cases it shall, or shall not, operate as a bar."

"The Statute (*P. L.* 102) directs that the action of debt, on simple contract and assumpsit, shall be brought "within four years next after the cause of said action or suit, and not after." The words of the Statute are of plain and obvious meaning, and to give it effect, only two questions need be asked. When did the cause of action accrue? Is the suit brought within four years from the accrual of the cause of action? In all cases where there has been no intervening disability, the answers to these questions would enable us, at once, to say whether the bar of the Statute precluded the plaintiff's recovery, or not. When did the cause of action accrue? is always to be answered by ascertaining when could suit have been brought upon it. In assumpsit and debt, upon simple contract, this is ascertained from the time the debt fell due; consequently, upon that is the right to demand payment, and of course to sue, (if not paid.) If more than four years intervenes between the time at which the party, by his contract, has the right to demand the payment, and the institution of the suit, the bar of the Statute is complete and effectual, and the cause of action is gone. But the old debt, as a past consideration, will support a new promise, for notwithstanding it cannot be legally enforced as a cause of action, yet, if it has not been paid, the party who contracted it, is in honesty, which is but another name for one branch of good morals, bound to pay it. This obligation of honesty and morality, is a good consideration, and the new promise founded upon it, will be enforced; but it is a new cause of action, not as the revival of the old one; for if not regarded as a new cause of action, the words of the Statute would prevent it from enabling the party to recover. Regard it as a new contract—a new cause of action, and the case is not affected by either the intent or the words of the Statute. This plain, but I think, obviously correct exposition of the Statute, makes it easily understood, and easily to be applied to all future cases."

"The only reason which can be assigned, why it was ever supposed that the old debt, and not the new promise, was the cause of action, is, that in counts in *indebitatus assumpsit*, or on a note or bill of exchange, the precedent indebtedness in the first, the making of the note, the drawing, accepting or indorsing the bill in the second, and the consequent liability to pay, is stated as the consideration of the legal assumpsit laid. In it, the true time is wholly immaterial, and of course, every promise between the

suing out of the original writ, can be given in evidence, as between the parties to the contract; hence, the new promise being received, in actions of this kind, as corresponding with the *allegata*, it was easy to suppose and conclude, that the old debt was revived, and was the cause of action. This view, too, was much encouraged by many loose expressions of that kind, to be found in the opinions of some of the most learned Judges." *Reigne, assignee, &c. vs. Ex'r of Desportes, Dudley's S. C. R.* 118.

The Judge then enters upon the review of many cases, English and American, from which it appears, and such is his own conviction, that the recent decisions of the English Courts of King's Bench and Common Pleas, whatever may have been the previous adjudications, settle the rule, that the new promise, and not the old debt, is the cause of action; and that the cases in this country conclusively establish the same proposition.

Mr. *Angell*, after reviewing the decisions and judicial reasoning, upon new promises and acknowledgments, in the cases adjudicated in the Supreme Court of the United States, of Pennsylvania, New York, Massachusetts, Maine, Connecticut, New Hampshire, Vermont, Virginia, Maryland, Delaware, North Carolina, South Carolina, Kentucky, Tennessee, Illinois, Missouri and Alabama, thus sums up the result, as being fully established, both in England and in this country—1st. That a debt, barred by the Statute of Limitations, may be revived by a new promise. 2d. That such new promise may either be an express promise or an implied one. 3d. That the latter is created by a clear and unqualified acknowledgment of the debt. 4th. That if the acknowledgment be accompanied by such qualifying expressions or circumstances, as repel the idea of an intention or contract to pay, no implied promise is created. The point to be resolved, in all cases, is whether the acknowledgment, or promise, is a mere continuation of the original promise, grounded upon presumption of payment, or whether it is a *new* contract, springing out of, and supported by, the original consideration. *It clearly appears, both upon principle and authority, that it is the latter;* and the decisions of all the Courts throughout the country, are remarkably uniform in so establishing it. *Ang. on Lim.* 245.

So much for authority. How stands the case upon principle and policy? The Judiciary Act of 1799, requires the plaintiff, "plainly, fully and distinctly," to set out in his declaration his

cause of action. Does the plaintiff, who sues on a contract barred on its face, and who expects to recover on an entirely new and distinct agreement, comply with this salutary enactment? Does he exhibit a plain view to his adversary of what he expects to prove on the trial? So far from conveying correct information on the subject by the action, or precise knowledge of the plaintiff's demand, it does not really give the slightest hint of the true ground of the suit. As well might the writ be as it originally was, in French or Latin, or any other strange and unknown tongue. It has been well and truly said, "that whenever the parties fight each other by trick, on the record in the first instance, fencing to evade telling their grounds of contention, they renew the fight afterwards, by perjury, in the Court."

Everything intended to be proved, should be stated in the pleadings, and then the parties, knowing the evidence on which the respective statements must be established, would have an opportunity of examining into the character of the testimony, and of procuring the best evidence to elucidate the issue, and to rebut the proof of their adversary. Judge *Blackstone* closes his account of special pleading, with an eloquent panegyric upon "the *care* and *circumspection* of the law, in providing, that no man's right shall be affected by any legal proceeding, *without giving him previous notice.*" 3 *Com.* 423.

But, in conclusion, I would ask, is not the very language of the Statute obligatory upon the Courts, as to this point? It declares, "that all actions founded upon open account, shall be commenced within four years from the time such account accrued, (*fell due,*) *and not afterwards.*" *Prince,* 578. By what authority, I would most respectfully ask, shall this, or any other Court, undertake to decide, in utter defiance of this Act, that suit may be commenced and recovered, on an open account, more than four years after the cause of action has accrued thereon?

I trust that the period is passed for judicial legislation, under the pretext of *construction.* It is the monster mischief of the law, the prolific source of that uncertainty with which it has been so long and so deservedly reproached. If the Legislature has seen fit to declare that suits shall be brought on a certain class of contracts, within a specified time after the right to do so accrues, and *not thereafter,* the pathway of duty for the Courts is plain, and

should be straightforwardly pursued; and that is, obedience to the behest of the sovereign power.

If, then, four years elapse after the cause of action accrues, on an open account, there can be no recovery thereon; still, the debt is not *extinguished*; it remains due in *conscience*, and the moral obligation to pay, is a good consideration for the new promise. It remains, in some respects, due *in law*, too; for if the defendant omits or declines to plead the Act of Assembly, he is to be considered as having waived the benefit of it, and the plaintiff may recover against him.

On these principles, I rest my opinion that the plaintiff in error is entitled to a reversal—and such is the opinion of the Court.

Judgment for the plaintiff.

No. 4.—WRIGHT W. HARRELL and LOVELL W. HARRELL, plaintiffs in error, *vs.* BENJAMIN B. HAMILTON, executor, defendant.

[1.] The 3d section of the Act of 1755, which requires all wills and testaments to be recorded within three months from the death of the testator, is not of force in this State.

Caveat to Will. On Appeal, in Pulaski Superior Court. Tried before Judge SCARBOROUGH, October Term, 1848.

On the 26th day of July, 1846, William Hamilton died, having previously made and published his last will and testament. On the 3d day of November, 1846, the said will was offered for probate, by Benjamin B. Hamilton, the executor, to which a caveat was filed by Wright W. Harrell and Lovell W. Harrell, on the ground, that under the Act of 1755, all wills are required to be recorded within *three* months after the death of the testator.

The Superior Court of Pulaski County, upon appeal from the Court of Ordinary, charged the Jury, that "the Act of 1755 is inoperative, and in conflict with the 2d and 7th sections of the Act of 1810, if not the Act of 1821, and other Acts."

This decision is excepted to, and is now assigned as error.

L. L. HARRIS, for plaintiff in error.

C. B. Cole, for defendant.

By the Court.—Warner, J. delivering the opinion.

[1.] The only question made by the record in this case, is, whether the 3d section of the Act of 1755, which requires that all wills and testaments shall be registered, in the Register of Records' Office, within three months from the death of the testator, and on failure to be so registered, shall be deemed void and of no effect, is of force in this State.

The Court below ruled the Act of 1755 is inoperative, and in conflict with the 2d and 3d sections of the Act of 1810, and other Acts. The Act purports to be "An Act, to prevent fraudulent *deeds* of conveyance." *Prince*, 158. We concur in opinion with the Court below, that the Act of 1755, requiring wills to be recorded within three months from the death of the testator, is inoperative, and inconsistent with the provisions of subsequent Acts of the Legislature. By the Act of 1799, the jurisdiction and authority to hear and determine all causes, matters, suits and controversies, testamentary, touching the *proof of wills*, and granting the *probate* thereof, is vested in the Court of Ordinary. *Prince*, 231. By the Act of 1805, an appeal is allowed from the Court of Ordinary to the Superior Court, and the 3d section of the Act of 1805, repeals all Acts theretofore passed, militating against that Act.

By the Act of 1810, the Inferior Court is required to meet on the first Monday in January, and on the first Monday in every other month thereafter. *Prince*, 240. The Superior Courts, by the Judiciary Act of 1799, are required to be held in each County twice in every year. *Prince*, 419. The will of a testator is offered for probate in the Court of Ordinary, and is contested. The Court of Ordinary decide it is not the will of the testator, and refuse to permit it to be recorded as such. The propounder of the will enters an appeal to the Superior Court, and the will is there established and ordered to be admitted to record, as the last will and testament of the testator; but if more than three months have elapsed from the death of the testator, before the will is recorded, then it is void and of no effect, if the Act of 1755 is of force. The will cannot be admitted to record, until it is *proved to be the will of the testator;* and the Court of Ordinary have original jurisdiction, to

take the *proof* of wills and grant *probate* thereof, under the Act of 1799; and in cases of appeal from the Court of Ordinary to the Superior Court, when the decision of the Court of Ordinary is against the will, more than three months, in most cases, would necessarily elapse before the will could be *proved* in the Superior Court, and ordered to be entered of record in the Court of Ordinary.

Let the judgment of the Court below be affirmed.

No. 5.—JAMES M. ODAM, *et al.* plaintiffs in error, *vs.* JOSEPH CARUTHERS, administrator, defendant.

[1.] A dies intestate, leaving a wife and no children, but grand-children, whose fathers died before the intestate. *Held*, that the grand-children, by our Statute of Distribution, take *per stirpes*, and not *per capita*.

In Equity, in Pulaski Superior Court. Tried, October Term, 1848, before Judge SCARBOROUGH.

The following facts were agreed upon in the Court below:

Archibald Odam, of Pulaski County, died in the year 18—, intestate, leaving his wife, Elizabeth Odam, one of the defendants, him surviving, but leaving no child living. Prior to his death, he had two sons, James Odam and Archibald Odam, who had married and had issue, viz: James Odam had the two defendants, William W. C. Odam and Martha Townsend. Archibald's children were the said plaintiffs—James M. Odam, A. H. Odam, Susan Donaldson, Penelope Shannon, Hannah Hodges, Douglas W. Odam and Sarah Larkin. Both of the said sons of said Archibald Odam, Sr. departed this life intestate, prior to the death of said Archibald. Said Archibald Odam, Sr. left a considerable estate to be divided between his widow and grand-children, having made considerable advancements to his grand-children, or some of them.

The points made by the pleadings were submitted to the Court under this agreed statement of facts:

Whereupon, the Court held and decided—

1st. That upon these facts, the distribution of Archibald Odam, Sr's. property should be *per stirpes*—the grand-children standing

in the place and stead of their respective deceased fathers, and taking the portion that their fathers would have taken, if in life, and no more.

2d. That the property advanced by Archibald Odam, Sr. in his lifetime, to his two sons and his grand-children, should be brought back into *hotch-pot* by the grand-children of the said Archibald, at the value at the time such advancement was made; and that the widow of the intestate was not entitled to any portion of such advancement so brought back.

The complainants, by their counsel, excepted to the first position in the said decision, and allege the same to be erroneous.

I. L. Harris and C. B. Cole, for plaintiffs in error, cited and commented on the following authorities:

4 *Burns' Ecclesiastical Law*, 365. 1 *Mad. Ch.* 637. 1 *Bl. Com.* 518. 2 *Ves.* 213, '14. 4 *Kent*, 375, 389, 378, 411. 1 *Atk.* 454. *Fonb. Eq. book* 4, *part* 2, 573. 1 *P. Wms.* 25, 594. 2 *Ib.* 283, 393. *Reeves on Dec.* 26. 2 *Peters*, 1. *Brockenborough*, 388.

S. T. Bailey, for defendant, cited and commented on—

2 *Wms. Ex'rs.* 907. 2 *Kent*, 425. *Prince*, 233, 247.

By the Court.—Nisbet, J. delivering the opinion.

[1.] The English Statute of Distributions, relative to the question made in this case, is different in one important particular from ours. The *wife* of the intestate, by the *Stat.* 22 and 23, *Charles II.* takes first from the estate one third, as a separate and independent provision. This she is entitled to, irrespective of the number of distributees besides herself.

If an intestate die, leaving a wife and one dozen children, she takes one third of the estate before the children are entitled to distribution at all. And if an intestate die, leaving a wife and only one child, she takes no more than one third, and the remaining two thirds go to the child. The wife seems to be regarded as in a degree prior to the children, and not of the same degree. Or rather, the law first carves out of the estate one third part, and sets that aside and makes distribution only of the residue. The section of

the English Statute, or so much of it as it is material here to recite, is in these words:

"That all Ordinaries, and every other person, who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates, in manner and form following: that is to say, *one third part of the said surplusage to the wife of the intestate,* and all the *residue,* by equal portions to, and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of said children be then dead," &c.

What I wish thus far to be understood, is, that by the English Statute, the wife and the children, or the representatives of such children, if the children be dead, are not in equal degree; and in determining whether the distributees in any contingency, take *per stirpes* or *per capita,* the wife is not taken into the account, she being considered as occupying a prior degree, and to be provided for independently of the children or their representatives. The importance of this proposition, as applicable to this case, will in due time appear. For the Statute, see *Williams on Executors,* 2 *Am. edit.* 2 *vol. page,* 1058. Also, *Ibid.* 1068. *Toller ex'rs.* 374. *Brown vs. Farndell, Carth.* 52. *Bac. Abr. tit. Ex'rs.* 1, 5.

Now, according to our Statute, the *wife* occupies the *same degree* with the children. She is not entitled to any portion of the estate independent of the children, and before distribution to them, but is made to draw an *equal share* with them. She is a distributee with them, entitled to an equal share of the personalty, if she takes her dower, and of the whole estate, if she elects to take a child's part of the realty. So that her share depends upon the number of the children. If there is but one, she is entitled to half; if eleven, to one twelfth. The Statute is as follows: "The said estate, real and personal, shall be considered as altogether of the same nature and upon the same footing; so that in case of there being a widow and child or children, they shall draw equal shares thereof, unless the widow shall prefer her dower, in which event, she shall have nothing farther out of the real estate than such dower, but shall, nevertheless, receive a child's part or share out of the personal estate; and in case any of the children shall die before the intestate, their lineal descendants shall stand in their place and stead," &c. *Prince,* 233.

In this case the intestate left a wife and no child, but nine grand-

children—the children of two sons, who died previous to the death of the intestate.

The question is, whether these grand-children take *per stirpes*, as the legal representatives of their respective fathers, or *per capita*, in their own right as next of kin to the intestate. The Court below, as we think correctly, decided that they take *per stirpes*, as the representatives of their fathers, respectively.

The construction in England of the Statute of Distribution, is that where all the distributees stand in *equal degree*, as for example, three brothers, three grand-children, three nephews, &c. they take *per capita*, or each an equal share. But if the claimants stand in *unequal degrees*, as for example, a child and three grand-children, they take *per stirpes*, representation being necessary to prevent the exclusion of those in a remoter degree, and to fulfil the equity of the Statute, which contemplates an equal distribution. *Walsh vs. Walsh, Prec. in Ch.* 54. *Davers vs. Dews*, 3 *P. Williams*, 50. *Stent vs. McLeod*, 2 *McCord, Ch. R.* 354. *Hallet vs. Hare*, 5 *Paige*, 316. 2 *Kent Comm.* 425.

We adopt this rule of construction, and apply it to our own Statute. In England, there is no question but that these grand-children would take *per capita*, because there the wife, (who being provided for before children,) not coming at all into the distribution, they would stand in *equal degree*. But not so here, because by our Statute, the wife comes into the distribution as a child. She being in life, she and the grand-children stand in *unequal degrees*, and consequently, by the rule, the grand-children must take by representation. Just as it would be in England, if an intestate should leave one child and nine grand-children, the representatives of two deceased children.

If in this case, the grand-children should be held to take *per capita*, as next of kin, each would be entitled to one tenth part of the estate, and the wife to no more than one tenth part. Whereas, by the Statute, she is put upon the footing of a child, and is entitled to a child's part, that is in this case to one third; and thus the provision of the Statute in her behalf would be evaded. It is not a sufficient answer to this view of our Statute to say, that the wife in this case must take one third, and the remainder must go to the grand-children *per capita*, as in England. Our Statute will not bear this construction. It expressly puts her upon the same footing with children—it declares that she and the children shall draw

equal shares of the estate. As her condition is no worse than that of the children, so it is no better. And if the children be dead, leaving representatives, she draws an equal share with the representatives of such deceased children. She is in no worse condition and in no better condition than such representatives. If these grand-children could take at all *per capita*, it would be as next of kin to the decedent, and in that character, would each come in to a participation of the whole estate, which, as we have seen, would operate to the exclusion of the wife.

Let the judgment be affirmed.

No. 6.—Dicen Perry and Ira Peck, plaintiffs in error, *vs.* Anna Higgs, defendant.

[1.] If the bill of exceptions bears date previous to the trial of the cause, and there is nothing in the record, by which it may be amended, and the true date arrived at, the writ of error must be dismissed.

[2.] Where thirty-five days intervened between the signing of the bill of exceptions, and the suing out and serving the writ of error, citation and notice, the writ of error will be dismissed.

Motion to dismiss writ of error.

C. B. Cole, for the motion.

W. S. Rockwell, contra.

A motion was made to dismiss this writ of error, upon the following grounds:

1st. Because it appears from the transcript, that the bill of exceptions was signed and allowed, before the case was tried in the Court below.

2d. That the bill of exceptions was signed and certified, on the 10th day of October, 1848, and the writ of error and citation, were not sued out and served, till the 15th day of November, 1848.

3d. Notice of the allowing and filing of the bill of exceptions, was not given the defendant, till the 16th day of November, 1848.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The certificate of the Circuit Judge, it is evident, bears an erroneous date; and yet the record furnishes nothing by which to correct this mistake. If it did, it would be amendable, according to the truth of the case. The Act of 1845 required the bill of exceptions to be drawn up and submitted to the Judge before whom the cause was tried, within four days after the trial thereof. This provision was so far altered by the Act of 1847, as to allow the bill of exceptions to be drawn up and submitted, for the signature and certification of the Circuit Judge, within thirty days after the close of the term in which said cause was heard. As before remarked, the signature and certification being dated a day previous to the trial, and the record affording no data by which to relieve the difficulty, and fix the true date, the defect would seem to be incurable.

[2.] The other objection is equally fatal, viz: That, according to the record, thirty-five days elapsed between the signing and certifying of the bill of exceptions, and the issuing and serving of the citation and writ of error, and thirty-six days between the signature and certification of the bill of exceptions, and notice of the filing thereof.

The writ of error must be dismissed.

No. 7.—THE BANK OF ST. MARYS, plaintiff in error, *vs.* MUMFORD & TYSON, defendants.

[1.] Where notice to sue the principal maker of a note, by the security, under the provisions of the Act of 1831, was directed to the Cashier of the Bank of St. Marys, the holder of the note: *Held*, that it was sufficient notice to the Bank, especially as it appeared the Bank *acted* upon such notice.

[2.] Process taken out more than twenty days before the next ensuing term of the Court, to which it is made returnable, and not returned to such next ensuing term of the Court, but is altered, and made returnable to another term of the Court, to be held after the one to which it was first made returnable, is void, under the provisions of the Judiciary Act of 1799.

[3.] Where a chartered Bank is the *holder* of a promissory note, it is embraced within the provisions of the Act of 1831, authorising the security or indorser to notify the *holder* of such note, to sue the principal maker within three months.

[4.] Parol evidence is admissible in a suit by the plaintiff against the defendants, as joint and several promisors of a note, to show that one was security only, to the paper, such fact not being apparent on the face of the note itself.

By NISBET, J. dissenting.

[5.] Where a note is made by A & B, and they say, *I promise to pay* to the order of B, it is a joint and several note. Suit being brought upon this note, by the holder, against B, as maker: *Held*, that B is an original promisor, and that evidence, by parol, offered to prove that B signed the note as surety to A, and thereby, to let him into the benefit of the 2d sect. of the Act of 1826, authorising sureties to give notice to holders of notes, and other instruments, to proceed to collect, &c. is inadmissible.

Assumpsit, in Wayne Superior Court, and motion for a new trial. Argued before Judge FLEMING, at Chambers.

Suit was instituted by the plaintiff, against the defendants, on a note, of which the following is a copy:

1953\frac{94}{100}$ MONTICELLO, 10th May, 1838.

Ninety days after date, I promise to pay to the order of Mumford & Tyson, at the Bank of St. Marys, one thousand nine hundred and fifty-three dollars and four cents, for value received, in renewal of note, for $1914.

(Signed,) THOMAS BUTLER KING.
MUMFORD & TYSON.

Indorsed, "MUMFORD & TYSON."

The defendants pleaded general issue, and a special plea that they were securities only, and had given notice to the holder, to sue the principal, under the Acts of 1826 and 1831, and that the plaintiff had granted the principal unreasonable indulgence, until he became insolvent.

The defendant introduced the evidence of A. J. Bessant, the Cashier of the Bank, who swore, that on the 19th Sept. 1840, he received a letter from Messrs. Mumford & Tyson, of which the following is an extract:

"We wish you at once to proceed to the collection of our note against Mr. Thos. Butler King; as we will not hold ourselves responsible for our indorsement, unless suit shall have been instituted in the time prescribed by law. This notice we should have

given you twelve months ago, but did not know that it was necessary."

That in consequence of this notice, on the 24th Sept. 1840, he notified Mr. King of the fact, adding, " I am directed to say, if it is inconvenient for you to pay it at this time, with another indorser, our Bank will renew for 90 days."

That, about 29th Oct. 1840, he commenced suit against Mr. King, in Glynn Superior Court, in time for the November term thereof, and forwarded the papers to the Clerk of said County, to be placed in the hands of the Sheriff, for service, which he was informed the Sheriff failed to do. The papers were afterwards returned to him, when he altered them, and made them returnable to the Spring term of the Court.

The defendant also introduced an exemplification of the proceedings in the suit of *The Bank vs. T. B. King*, by which it appeared, that suit was commenced to the April Term, 1841. The process was dated 29th Oct. 1840.

The plaintiff introduced the original papers, showing that the process was originally returnable to the Nov. Term, 1840, and was changed to April Term, 1841.

The defendant also introduced the depositions of Edmund Atkinson, who swore, " I have some knowledge of said promissory note; to the best of my knowledge and belief, the practice of the Bank was to require notes to be signed by indorsers, on the inside, under the name of the drawer, as well as on the back, as I have uniformly done in my own case, in indorsing notes to the said Bank; and with regard to the note in dispute, in the present case, I know that the indorsers, Mumford & Tyson, signed as indorsers on the inside, under the drawer, because I informed them that the practice of the Bank required that it should be so signed; and I know that said Mumford & Tyson signed simply as indorsers. I was a Director in the said Bank, but for what length of time I do not recollect. So far as I know, said Bank never did regard said notes in any other light than indorsed; and I was in one instance served with notice of protest of one of said notes, as indorser."

Several letters were also in evidence, from the Cashier to Mr. T. Butler King, and also to Mumford & Tyson—in all of which the note is spoken of as the note of Mr. King, *indorsed* by Mumford & Tyson.

It was in evidence that the money, upon the negotiation of said note, was paid to Mumford & Tyson.

The Jury found for the plaintiff, and an appeal being entered, a verdict was rendered for the defendant. A motion was made for a new trial, which was granted by Hon. Charles S. Henry; and on the 19th Nov. 1847, a verdict was taken, by consent, for the defendant, without prejudice or benefit to either party, and an order entered on the minutes, allowing plaintiff's counsel to move for a new trial, before His Honor, Judge Fleming, at Chambers.

Under which order, a motion was made for a new trial, upon the following grounds:

1st. Because the defendants are joint and several makers of the note sued upon, and cannot be regarded as securities, under the evidence; and therefore, do not come within the provisions of the Acts of the Legislature, passed on 26th Dec. 1826, and the Amendatory Act, passed 26th Dec. 1831, defining the liability of indorsers.

2nd. Because the Court erred in admitting any testimony to explain the character of the note, or the obligations of the parties thereto.

3d. Because, if the defendants are regarded as indorsers or securities, they are not entitled to the benefit of said Acts, as they have failed to give the necessary and proper notice to the plaintiff.

4th. Because, if any notice was given, the plaintiff did comply with the requirements of said Acts, as proved by defendant's own witness.

5th. Because the Court erred in permitting testimony to be introduced by defendants, contradicting their own witness.

6th. That the defendants are not entitled to the benefit of the Acts of the Legislature, mentioned in the first ground.

The Court overruled the motion on all the grounds, and this decision is alleged to be erroneous.

S. Cohen, for plaintiff in error, urged—

1st. That the defendants are joint and several makers of the note sued upon, and cannot be regarded as securities, under the evidence, and therefore do not come within the provisions of the

Act of the Legislature, passed 26th December, 1826, and the amendatory Act, passed 26th Dec. 1831, defining the liabilities of indorsers. *Chitty on Bills*, 433. *Hunt vs. Adams*, 5 *Mass.* 358. *Hemmingway vs. Stone*, 7 *Mass.* 58. *Story on Prom. Notes, sec.* 57, 58. *Prince*, 461, 462, 470, 471.

2d. That the Court erred in admitting any testimony, to explain the character of the note, or the obligations of the parties thereto. *Bank of the U. S. vs. Dunn*, 6 *Peters*, 51, 59. *Collins vs. Everett*, 4 *Ga. Rep.* 266. *Stubbs vs. Goodall*, 4 *Ga.Rep.* 106.

3d. That if defendants are regarded as indorsers or securities, they are not entitled to the benefit of said Acts, as they failed to give the necessary and proper notice to the plaintiff. *Prince*, 473.

4th. That if any notice was given, plaintiff did comply with the requirements of said Acts, as proved by defendant's own witness. *Peake's Ev.* 259. *Gould's Pl.* 173, *note* 1. *Burdick vs. Green*, 18 *John.* 14, 20. *Hogan vs. Cuyler*, 8 *Cowen*, 203, 205. *Hotchkiss*, 547, 548. *Bunker vs. Shed*, 8 *Metcalf*, 150. *Gardner vs. Webber*, 17 *Pick.* 407, 412.

5th. That the Court erred in permitting testimony to be introduced by defendant, contradicting their own witness.

6th. That defendants are not entitled to the benefit of the Acts mentioned in the first point. *Prince*, 461, 462, 470, 471.

Levi S. DeLyon and Wm. Law, for defendants in error, contended—

1st. Parol evidence was admissible, to show that the defendants, though joint makers, were in fact sureties.

The English authorities are conflicting, but the weight is with this position. 5 *Taunt.* 192. 10 *B. & C.* 578. 1 *Wheat. Selw.* 326. 8 *Taunt.* 737. *Holt*, 84. 1 *Mood. & Rob.* 58.

2d. In America, the weight of authority is with this position.

Cited and commented on—1 *Gall.* 33. 7 *John.* 337. 1 *McC. Ch.* 461. 3 *Ohio*, 33. 4 *N. H.* 221. 5 *Ala.* 451. 10 *Peters*, 257.

3d. The Statute authorizes the Court to exercise a kind of equitable jurisdiction in these cases. *Prince*, 447.

As to the notice, they contended—

1st. Notice to the agent, is notice to the principal. Cited, 1 *Peters*, 309. *Ang. and Ames on Corp.* 176.

2d. The Cashier is the proper officer to be notified. Cited, 3 *Mason*, 506. 3 *Wheat.* 360, '1. 12 *Sergt. & Rawle*, 265.

3d. The Bank had actual notice. The process was null and void. *Prince*, 420. 2 *Wilson*, 382, '3, '6. 1 *Wend.* 210. 5 *Ib.* 276. 9 *Ib.* 338. 10 *Ib.* 420. 13 *Ib.* 46, 404. 1 *Conn.* 44. 8 *Mass.* 79. 10 *Mass.* 353.

A Bank is embraced within the provisions of the Act. Cited, *Cowper*, 79. 15 *John.* 382. 1 *Cow.* 513. 1 *Wash.* 364. *Ang. and Ames on Corp.* 142, 147, 257. 2 *Inst.* 697, 703. 6 *Howard*, 258.

By the Court.—WARNER, J. delivering the opinion.

On the argument of this cause, the counsel for the plaintiff in error, insisted on the following grounds of error, to the decision of the Court below:

1st. Because the Court erred in allowing the defendants to show, by parol evidence, that they were *securities only*, to the note, there being no evidence on the face of the note that they subscribed their names thereto, as *securities*.

2d. Because the Court erred in deciding that the notice to the plaintiff, to institute suit on the note, was sufficient.

3d. Because the Court erred in deciding that suit was not commenced within three months from the time of the notice.

4th. Because the Court erred in deciding that a Bank comes within the provisions of the Act of 26th Dec. 1826, and the amendatory Act of Dec. 1831.

The other assignments of error, made in the record, are substantially embraced within the foregoing exceptions. We will first consider the second, third and fourth exceptions, made to the judgment of the Court below.

[1.] Was the notice to the plaintiff, to institute suit against King, the alleged principal, sufficient? The objection is, that it was directed to the Cashier of the Bank, and not to its President. We take it to be well established, both in Law and Equity, that notice to an agent, in relation to the business for which he is employed, is notice to the principal. The same rule applies equally to a corporation, as to a natural person. *Lawrence vs. Tucker*, 7 *Green.* 195. *Bank vs. Whitehead*, 10 *Watts*, 397. The Cashier of a Bank is held out to the world as its general agent, for the management of its notes, and other securities. But in this case, it appears from the record the Bank *acted* upon the notice ad-

dressed to the Cashier. The notice bears date 19th Sept. 1840. On the 24th Sept. 1840, the Cashier of the Bank of St. Marys addressed the following letter to Thos. B. King, the drawer of the note: "Dear Sir—I beg herewith to annex an extract from the letter of Mumford & Tyson, dated the 19th inst. in reference to your note, indorsed by them, and discounted at this Bank, by which you will perceive they require the Bank to place it in suit immediately. I am *directed to say*, if it is inconvenient for you to pay it at this time, with another indorser, our Bank will renew for ninety days." D. L. Clinch testifies—"While President of the Bank, he recollects a conversation had between the Cashier and himself, relative to a communication received from Messrs. Mumford & Tyson, *desiring the Bank to proceed against Mr. King.*" The record not only shows notice to the *agent* of the Bank, but that it was brought to the knowledge of the President, and acted on by the Bank, which was, in our judgment, altogether sufficient evidence of notice to the plaintiff.

[2.] Was the suit against King commenced within three months from the date of the notice? The writ and process was made out by the plaintiff's attorney, and dated 29th October, 1840, returnable to the then next November Term of Glynn Superior Court, which, by law, was held on the 30th day of November, 1840. The process was dated more than twenty days before the next Term of the Court, to which it was made returnable, but did not reach the Clerk of the Court in time to be placed in the hands of the Sheriff, to be served and returned to the November Term. There is *no evidence* that the writ and process was ever in the hands of the Clerk of the Court, before the sitting of the Court in November. The writ was afterwards returned to the plaintiff's attorney, who altered the process, and made it returnable to the next April Term of the Court, without altering the date of the process. The Judiciary Act of 1799, declares that the *Clerk shall annex a process* to the petition of the plaintiff, which shall be signed by such Clerk. *Prince*, 420. We understand that it is the practice, in the Eastern Circuit, for the Clerk to sign his name in blank, and for the plaintiff's attorney to make out and date the process, which will explain the alteration made by the plaintiff's attorney in this case, without its ever having been filed in the Clerk's office. The writ and process, in this case, was made out and dated by the plaintiff's attorney, more than twenty days before the term of the Court to

which it was made returnable, but was not filed in the Clerk's Office in time for that Court. The process was then altered by the plaintiff's attorney, and made returnable to the next April Term of Glynn Superior Court; and the question is, whether this can be considered as the commencement of a suit, as provided by the Judiciary Act of 1799. That Act contemplates, that all process sued out twenty days before the sitting of the next term of the Court, shall be returnable to the first term of the Court thereafter. The Act provides that, "If any original civil process shall be taken out, *within* twenty days of the next Court, the same shall be made returnable to the next Court, to be held after the expiration of the said twenty days, and *not otherwise.* And all process issued, and returned in any other manner, than that hereinbefore directed shall be, and the same is hereby declared to be *null and void.*" *Prince,* 421. This process was not taken out *within* twenty days of the next Superior Court of Glynn County, which was held on the 30th day of November, 1840, but was taken out more than twenty days *before* that term of the Court; and consequently, could not have been made returnable to the next April Term of the Court; and being taken out and returned, in a manner not authorized by the Statute, it is, in the imperative language of the Act, null and void.

[3.] Is a chartered Bank embraced within the provisions of the Act of 1826, and the amendatory Act of 1831? The terms of the Act, in our judgment, are sufficiently broad to embrace *artificial* as well as *natural* persons. The Act of 1831 declares, "That in every case which may hereafter arise, where the security or indorser of any promissory note, or other instrument, after the same has or shall become due, has required or shall hereafter require the *holder* thereof, to proceed to collect the same, and the said *holder* has not proceeded or shall not proceed to do so, within three months after such notice or requisition, the indorser or security shall be no longer liable." *Prince,* 471. The Bank of St. Marys being the *holder* of the paper, is necessarily embraced within the terms of the Act. Upon all the foregoing exceptions, our judgment is unanimous, in affirming the judgment of the Court below.

[4.] In regard to the admissibility of the parol evidence, at the trial, to show that the defendants were *securities* only, to the note, we are not unanimous in our opinions; consequently, I shall

proceed to give my individual reasons, for affirming the judgment below, upon that ground of error assigned in the record.

It is insisted, for the plaintiff in error, that this case comes within the principle of the cases of *Stubbs vs. Goodall*, and *Collins vs. Everett*, 4 *Ga. R.* 106, 266. The rejection of the parol evidence, in both those cases, was based upon the general doctrine of the Law Merchant, wholly independent of our State legislation. But in the view which I take of the questions settled, in the cases of *Stubbs vs. Goodall* and *Collins vs. Everett*, with regard to the admissibility of parol evidence, upon the general principles of the Law Merchant, they do not stand in my way in this case.

The parol evidence offered in *Stubbs vs. Goodall*, was for the purpose of showing that a note, not payable on its face to a chartered Bank, was *intended* by the contracting parties, to be negotiated at a chartered Bank, and thereby discharge the defendant as indorser, for want of demand and notice. The evidence offered, went to change the legal character of the contract, and the legal liability of the defendant under it, in its inception—to change his *absolute* liability on the face of the paper, into a *conditional* one. In *Collins vs. Everett*, we ruled, that according to the Law Merchant, Collins was liable, on the paper, as second indorser, and that parol evidence was inadmissible, to alter or change his legal liability under the contract, as it appeared on the face of the paper. In that case, we said—" The legal import of this instrument, is to make Collins a second indorser, with secondary liability, according to the Common Law, upon presentment for payment and notice, and with the right of going upon a previous indorser, if any, in the event of his having the note to pay. The effect of the parol testimony, is to change altogether this *import*, and to make Collins primarily liable, as an original promisor—to substitute a *new contract*, in short. The writing is the evidence of the contract. If that is plain—if from that the meaning of the parties is fairly deducible, it must stand; the law will not make for them a new contract." In both cases, the parol evidence was rejected, because it went to alter and change the *original character* and *legal obligation* of the contract; in other words, to *substitute a new contract.* Does the parol evidence offered in this case, to show the defendants were *securities*, alter or change the *original character of the contract*, or the obligations of the parties to it? By the terms of the contract, as it appears on the face of the pa-

per, the defendants are joint and several promisors to the plaintiff. When it is established by the evidence that the defendants are securities, are they not still joint and several promisors with the principal maker, and in all respects liable to the plaintiff as such? Being *securities* for the principal maker, does not, in any manner, alter or change their *legal liability or obligation to the plaintiff, on the original contract, as joint promisors with the principal maker.* The parol evidence offered, does not substitute any *new contract* for the written one, nor alter or change the *legal liabilities* of the contracting parties thereto. The parties are still bound by the contract, as they *originally contracted to be bound*, and hence, in my judgment, this case is clearly distinguishable from the cases of *Stubbs vs. Goodall* and *Collins vs. Everett.* In Alabama and New Hampshire, it is held that a maker of a note, who signs as *security*, although such fact does not appear on the face of the paper, may show, by *extrinsic* evidence, that he is security. *Grafton Bank vs. Kent*, 4 *N. H. R.* 221. *Pollard vs. Stanton*, 5 *Ala. R.* 451. But suppose I am mistaken with regard to the admissibility of the parol evidence, to show that a defendant is security to a note, upon the general principles of the Law Merchant, as ruled in *Stubbs vs. Goodall*, and *Collins vs. Everett*, yet, when I take into consideration our own legislative enactments, on the subject of securities, I can entertain no doubt that the evidence is admissible. The Act of 20th December, 1826, was enacted for the purpose of *protecting* the securities on bond, note or other contract. The 4th section of the Act provides—"When any person or persons hath heretofore, or shall hereafter, become bail on recognizance, or security on bond, note or other contract, and shall be sued thereon, it shall and may be lawful for such bail or security, on the trial of such case, to make *special defence;* and in case it should appear to the Court, that one or more of the defendants is or are securities only, and not interested in the consideration of the contract sued on, then, and in such case, verdict and judgment shall be entered accordingly, and further proceedings had, and privileges exercised, as hereinbefore prescribed, in behalf of the other securities; provided, the plaintiff shall not be delayed, by any dispute which may arise between the defendants," &c. The 6th section of the Act provides, that when any security to any note, bond or obligation, shall subscribe himself as *security* thereto, it shall be good evidence of his being

such, and the plaintiff shall sue out process against him, accordingly. *Prince*, 461. During the same session of the Legislature, another Act was passed, for the *protection* of securities, which was amended by the Act of 1831, requiring the holder of the note to collect the same, within three months after notice to that effect, by the security. *Prince*, 462. But it is said, that the Act of 20th December, 1826, only authorized the security to make special defence, and show he was security, so as to enable him to control the judgment against his principal. Whether the Legislature intended to *limit* the introduction of the parol evidence to that *special* object, I will not pretend to say. It is sufficient for my purpose, that it is an *express declaration of the legislative will*, in favor of the admission of *parol testimony*, to show that a defendant is *security* only, when sued upon a note or other contract. The *admissibility of the parol evidence* is the question—not the *objects* to be accomplished by its admission. The object of the Act of 20th December, 1826, as well as the Act of 26th December, 1826, and the amendatory Act of 1831, was for the benefit and *protection* of securities. Take all the Acts together, and construe them as one Act, for the purpose of giving effect to the declared intention of the Legislature, and can it be doubted that when a security is sued upon a promissory note, and desires to avail himself of the protection afforded by the Act of 26th December, 1826, and the amendatory Act of 1831, against the laches or negligence of the holder, he could make *special defence*, and show by parol evidence, that he was *security*, so as to enable him to receive the benefit and protection, as such security, which the Acts of the General Assembly secure to him? I cannot for a moment believe that the Legislature intended that a security who had required the holder of the note to proceed to collect it out of the principal maker, but who had failed to do so, until after three months had expired, should be driven into a Court of Equity, to obtain the *protection* given him by the Statute. When the Act of 26th December, 1826, and the amendatory Act of 1831 were passed, requiring suit to be instituted within three months from the date of the requisition by the security, the Legislature must have been aware of the provision made in the Act of 20th December, 1826, allowing the security to make *special defence*, and to show upon the trial, he was *security only* to the contract. The object of the Legislature was not exclusively to protect the secu-

rity against his principal, but to protect him also against the *laches* of the holder of the note; and by construing all the Acts together, as one Act, for the relief and *protection* of securities, I am clearly of opinion, the parol evidence was admissible, to show the defendants were securities, they having specially pleaded that fact in their answer. In addition to the Acts already cited, we have another Statute, passed in 1831, which authorizes the securities, even when they have failed to make special defence at the trial, as provided by the Act of 20th December, 1826, and judgment has been rendered against them as *principals*, to show by parol, that they were securities only, to the original contract, so as to enable them to control the judgment against their principal. *Prince*, 470. We are told, however, that when the defendants signed the note, their names appeared on the face of it as *principals*, and that the effect of the parol evidence, is to defeat the plaintiff's right to recover, inasmuch as it lays the foundation to make the defendant's notice to sue available. It is true, the evidence that the defendants were securities to the note, in connection with other facts proved at the trial, does destroy the plaintiff's *remedy* to recover on it, as against them. The plaintiff who contracted with the defendants, *knew* they were securities, and he must be presumed to know, that if he did not sue the principal maker, within three months after notice to do so, by the securities, they would be discharged. Both parties must be presumed to have entered into the contract, with reference to the law governing it. The defence set up by the defendants, does not, in any manner, affect the *construction*, or *original obligation* of the contract; it only affects the plaintiff's *remedy* to enforce that contract. The plaintiff has lost his remedy on the contract, by his own negligence. He has omitted to do what the law required him to do, when notified to sue the principal maker of the note, and which duty the law obliged him to perform, to secure his remedy, when the contract was made. The law declared to him, when the defendants signed the notes, (he knowing they were securities,) that when the note became due, they had the right to notify him to sue the principal maker; and if he omitted to do so within three months, his remedy against them would be gone. The contract itself, is not in any degree, impaired by the parol evidence, as I have before endeavored to establish; and the plaintiff's *remedy* against the defendants, as securities, was perfect, until the expiration of the

three months after the notice, when, by his own laches, he lost it, as he knew he would do under the law, when he made the contract; as much so as if he had lost his remedy by the Statute of Limitations, in not suing within six years from the time the note became due. The evidence, then, does not impair or defeat any of the plaintiff's rights, as growing out of the contract itself; but it establishes a fact which was well known to the plaintiff, at the time the contract was made, and which, taken in connection with the other fact, that he neglected to sue within the time prescribed by law, after notice to do so, defeats his *remedy* against the defendants. It is conceded that the parol evidence would be admissible in a Court of Equity, if the defendants were seeking relief in that Court. But why compel securities to go into that Court, when the same relief can be had in a Court of Law, the more especially as the Legislature have taken some pains to provide for the *relief* and *protection* of securities, in our Common Law Courts?

In *Beall vs. The Ex'rs of Fox*, (4 *Ga. R.* 404,) we held that the Superior Courts in this State, are empowered to exercise general Equity jurisdiction, in *all cases* where a *Common Law remedy is not adequate*, and that the Equity jurisdiction was not limited to certain specified objects, as insisted on in that case. The General Assembly, in the year 1820, after reciting the 53d section of the Judiciary Act of 1799, which declares that the Superior Courts, in the several Counties, shall exercise the powers of a Court of Equity in *all cases where a Common Law remedy is not adequate*, &c. enacted, "That from and after the passing of this Act, whenever any of the cases *enumerated* in the before recited section, a plaintiff or complainant shall conceive that he, she or they can establish his, her or their claim, without resorting to the *conscience* of the defendant, it shall and may be lawful for every such plaintiff or complainant to institute his, her or their action upon the Common Law side of the Court, and shall not be held to proceed, with the *forms of Equity*, any law or usage to the contrary, notwithstanding." *Prince*, 447. If the remedy, for the protection of the defendants, as securities, was *not adequate* in the Common Law Court, then, their case is embraced by the Act of 1820, provided they were plaintiffs or complainants; for *cases in which a Common Law remedy is not adequate*, are enumerated in the 53d section of the Judiciary Act of 1799. There are doubtless many cases which may be presented, in which a Common

Law Court could not afford an adequate remedy—as where *terms* are to be imposed on the parties, by the *special decree* of the Court. There is not, however, any such difficulty in this case; a Court of Law is as competent to afford relief and *protection* to the securities, as a Court of Equity, and the only reason urged for compelling the defendants to resort to a Court of Equity, is to enable them to obtain the *parol evidence* that they were *securities only*. I have cited the Act of 1820, for the purpose of strengthening the evidence, which I think is *indelibly stamped* on the face of our legislative enactments, that securities on bonds, notes or other contracts, may have the relief and *protection* expressly given to them by Statute, in the Common Law Court, in as full and ample manner as they could in a Court of Equity, and that it is not necessary for them to resort to the latter Court, to enable them to show, by *parol evidence*, that they were *securities*. The whole drift and policy of our State legislation, looks the other way, and I will add, the reason of it too. Let the judgment of the Court below be affirmed.

LUMPKIN, J. concurring.

As there is no labor I perform so grudgingly, as writing out a dissenting opinion, I shall be as brief as a sense of duty will permit, restricting myself entirely to the single point respecting which the Court disagree.

The Bank of St. Marys brought an action of assumpsit in the Superior Court of Wayne County, against Mumford & Tyson, on the following note: "Ninety days after date, I promise to pay to the order of Mumford & Tyson, at the Bank of St. Marys, one thousand nine hundred and fourteen dollars and four cents, value received, in renewal of note for $1,914.

Signed, THOS. BUTLER KING.
MUMFORD & TYSON.

The defendants pleaded the general issue, and specially, that they had given notice to plaintiffs, to proceed against King, the principal; that they failed to do so in terms of the Statute; and on the contrary, had granted an unreasonable indulgence to the maker of the note, until he became insolvent; that they signed the note as securities only, &c.

[4.] The question is, can the defendants, in a Court of Law,

prove by parol testimony, that although joint makers, in point of fact they were sureties only?

It occurs to me, that there is a preliminary point to be settled first, and that upon the decision of that, this question turns—viz: whether the defendants, admitting that they are sureties only, come within the provisions of the Act of the Legislature, passed 26th December, 1826, and the amendatory Act of 26th December, 1831, defining the liability of indorsers and securities to promissory notes, and other instruments? The first of these Acts declares, that "*Any* security or indorser, may, whenever he thinks proper, after the note or instrument becomes due, require the holder to proceed to collect the same; and if he should fail to do so within three months, the indorser or security shall be no longer liable." *Prince*, 462. The other provides, "That in *every* case which may hereafter arise, where the security or indorser of *any* promissory note, or other instrument, after the same has or shall become due, has required, or shall hereafter require, the holder thereof to proceed to collect the same, and the said holder has not proceeded, or shall not proceed to do so, within three months after such notice or requisition, the indorser or security shall be no longer liable." *Prince*, 471.

I ask, what *securities* are embraced in these remedial Statutes? Is it *all* who are so *in fact*, or only such as appear to be securities, from *the form* of the contract? If the former, then the testimony was admissible. If the latter, it should have been excluded. But can it be supposed for a moment, that the Legislature intended to limit the provisions of these most salutary enactments, in behalf of a highly favored class of persons, to those *only* who, from the *form* of the contract, *the law* made securities? Such a construction would be to emasculate these Acts of three-fourths or more, of their efficacy. Besides, it is to disregard the plain and obvious language of the law itself. It declares that *any* security, in *every* case which may arise, shall be entitled to this relief. By what right shall we undertake to circumscribe its beneficent provisions to a particular class or description of securities?

But to show that no narrow-minded policy of this sort influenced the mind of the Legislature, look to analogous Statutes, passed at the same time, and upon the same subject-matter, to-wit: the protection and relief of indorsers and securities. They declare, that when *any* security to any *note*, bond or obli-

gation, shall subscribe himself as such, such statement appended to his name, shall be held and taken as good evidence of his being security, and the plaintiff shall sue out original and mesne process against him accordingly. That when it does not appear upon the face of the paper itself, nevertheless, special defence may be made at the trial, to that effect, and the fact established. And further still; that where securities fail to avail themselves of this defence, and judgment has been rendered against them, and they have been compelled to pay off the execution, they may yet get the control of the *fi. fa.* in order to remunerate themselves out of the principal, provided it shall be made satisfactorily to appear, that they were *bona fide* securities only, upon the original contract, which was the foundation of the suit.

Shall it be said that these Acts relate to controversies between securities and principals, and not between securities and holders? I might concede this, and how stands the argument then? Why, that the Legislature has allowed securities, of every sort, without regard to the form of the contract—*all* who are such *in fact*, whether the evidence of it be upon the face of the paper or not at any time, to establish the true relation they sustain to the contract, with a view to indemnify themselves against the principal; and that parol proof is competent in a proceeding at Law, for this purpose; but as between the security and creditor, or holder of the note, no such relief was contemplated. It does seem to me, with the most profound respect for the advocates of this doctrine, that the mere statement of it carries its refutation.

But how stands this question, independent of our Statute? Judge *Story* says—" That if a creditor does any act, injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety—in all such cases, the latter will be discharged, and he may set up such conduct, as a defence to any suit brought against him—*if not at Law, at all events, in Equity.*" *Story's Eq. Jur.* §325. And in a note to the text, he remarks—" The proposition is thus qualified, because, in a variety of cases, it is certainly very questionable, whether the defence can be asserted at Law, though there is no doubt that it can be asserted in all cases in Equity. It has, indeed, been said by a learned Court, that there is nothing in the nature of a defence by a surety, to make it peculiarly a subject of

Equity jurisdiction; and that whatever would exonerate a surety in one Court, ought to exonerate him in the other." Citing, *The People vs. Janssen*, 7 *Johns.* 332. *S. P.* 2 *Johns. Ch.* 554, 557. "But the doctrine," continues the learned commentator, "does not seem to be universally adopted; and certainly, it has not been acted upon in England, to the extent which its terms seem to import." Citing, *Theobald on Principal and Surety, p.* 117 *to* 138.

Concede then, that in England the doctrine is doubtful, as to the admissibility of this defence and proof *at Law*, the weight of American authority is decidedly in its favor.

In *Smith vs. Bing*, (3 *Ohio*, 33,) the Court say, "That the true relation of the parties to the paper, *where the obligation itself imports a joint debt*, is universally recognized by Courts of Justice, and parol proof admitted to establish its existence." Indeed, in this case, the principle involved in the point before us, was not denied; counsel insisted merely, that if the fact of the securityship did not appear upon the obligation itself, it ought to be brought to the knowledge of the party by some other means, as the creditor is supposed to rely upon the legal liability of the joint undertakers, apparent upon the face and character of the instrument.

In *Smith vs. Truro and another*, (1 *McCord Ch.* 451,) *Johnson, J.* in delivering the opinion of the Court, says—"It is a matter of common notoriety, that contracts of this nature do not usually distinguish between the principal and the surety; and that it may and must be proved by parol, is a conclusion which necessarily arises out of the numerous cases growing out of them, and by the numerous rules of law which regulate their respective rights. *And I take the principle to be, that the relationship which subsists between the joint obligors, is a matter wholly extrinsic of the written contract, and may therefore be proved by parol, without any violation of the rule which prohibits the introduction of parol evidence, to contradict or vary a written agreement.*"

Grafton Bank vs. Thomas Kent, (4 *N. H. R.* 221,) was an action of assumpsit, upon the following promissory note: "For value received, we jointly and severally promise the President, Directors and Company of the Grafton Bank, to pay them, or order, five hundred dollars, on demand, with interest, after sixty days. (Signed,) AARON HALE.
THOMAS KENT."

The defence set up on the trial was, that Kent signed the note as surety only, and that he had been discharged by day of payment given to the principal, without his consent or knowledge. To the admissibility of the evidence, to support this plea, the plaintiff objected, because it went to contradict the note; the exact case at bar, in every feature. And the whole Court were of the opinion, that where the maker of a note does not appear on the face of the paper, to be a surety, he is to be treated and considered as a principal, with respect to all those who have no notice of his real character; *but that wherever it is material, a defendant may show, by extrinsic evidence, that he made the note as a surety only, and that it was known to the plaintiff that he was only surety.*

Suppose that in England and in the States, where some contrariety of opinion exists, as to this question, there had been, as in Georgia, an express Common Law remedy given, for the relief of securities, against the holders of promissory notes; would it have been doubted for a moment, that the evidence was competent at Law, as well as in Chancery? There they may be driven into Equity, because it is perhaps the only power which can grant relief; but here the Statute itself gives specific and ample redress. And wherever this is the case, there can be no reason why the same rules of evidence, as to written contracts, should not be used in the Courts of Common Law, as in Chancery; for I repeat, that it is for want of proper remedies that parties are driven into Chancery.

And what principle is violated, by showing the true character of one of the makers, with a view to his exoneration? Can you not prove the defendant an infant—a *feme covert*, or a bankrupt, in order to discharge him or her, and that too, while others remain bound? Why not also prove him a security? The evidence does not go to affect the original contract in any respect, and in this particular, is widely distinguished from *Stubbs vs. Goodall*, 4 *Ga. R.* 106, and *Everett vs. Collins*, *Ib.* 266. At any rate, if this case is irreconcilable with *Goodall and Stubbs* there is some consolation in knowing that the Supreme Court of New Hampshire, one of the ablest judicial tribunals in this or any other country, is in the like transgression. For that opinion, as this, is sustained by authority, directly in point from that State, as will be seen by referring to it.

But suppose this question were *doubtful*, what direction ought to be given to it by a Georgia Court, where it is the manifest de-

sign of the Legislature to break down the wall of separation between Law and Equity, and to suffuse the two jurisdictions? Why were the Superior Courts in this State clothed with Chancery powers? The Act of 1799 sufficiently answers this inquiry. There were cases where a Common Law remedy was not adequate. *Prince*, 1*st ed.* 218. And it was to meet this mischief that Equity jurisdiction was bestowed. Is it not unreasonable, therefore, to send a security to a worse and more expensive tribunal, to make a Common Law right available?

All power, whether judicial, political or ecclesiastical, is aggressive and accumulative. *Crescit eundo*, is its motto. Courts are not exempt from this master principle of the universe, as their history abundantly demonstrates. The jurisdiction of the Court of King's Bench, was originally confined to pleas of the Crown; but now, all actions are admissible within its walls, through the medium of a legal fiction, adopted for the purpose of enlarging its authority, that every person sued, is in the custody of the Marshal of the Court, and may therefore be proceeded against for any personal cause of action. The Exchequer has adopted a similar course; it was confined, originally, to the trial of revenue cases; it has, however, by means of another fiction, the supposition that every body sued is debtor to the Crown, and further, that he cannot pay his debt, because the other party will not pay him, opened its door to every suitor.

So, too, it has been with Equity. It had its origin in the *rigidity* of the rules and remedies provided by the Common Law. The grant of Chancery jurisdiction, in 1799, to the Superior Courts, by the Legislature, had its origin in the same cause. And what do we hear in 1820? Why, a complaint, by the Legislature, that under the construction of this grant, the Equity side of the Court had drawn to itself, exclusively, all cognizance of the cases in said section enumerated, even where said cases depend upon *aliunde proof*, to the manifest embarrassment of justice in many cases, and to the injury of the good citizens of this State. *Prince*, 447. Parties are thereafter authorized to sue, in all cases, upon the *Common Law* side of the Court, whenever they can establish their claim, without resorting to the conscience of their adversary. And to encourage suitors in this *forum*, it is further provided, that after the commencement of the action at Common Law, the party may, at any time during the progress

of the suit, file a bill for discovery, in aid of the action at Law. And not content with this, by the Act of 1847, (*Pamphlet Laws, p.* 197,) plaintiffs or defendants, in any action at Common Law, may compel discovery, in answer to interrogatories merely.

As for others, let them do whatever a sense of duty to themselves and the country shall dictate. For myself, I shall not be found fighting to the water's edge, to uphold the tottering fabrics of superannuated systems. I believe that the Legislature is only keeping pace with the spirit of improvement, which so signally characterizes the age. Conservatism in law, as in politics, may be carried too far; it may dam up the current of wholesome and necessary reform, until it shall sweep over all barriers and restraints, and desolate, by its sudden and irresistible flood, much that is valuable.

The useful arts must retire before those which are more useful. Old dispensations must give place to those which are new and better. As well may the forest, which answered its day, by refreshing the hunter in the toilsome chase, complain that it is cut down to make room for the corn and the fruit-tree, as that Equity should insist that the suitor should enter her gates alone, for relief, where there is a Common Law right given, and a Common Law Court can do complete justice to the parties.

I concur, fully, in affirming the judgment of the Court below, in admitting the parol testimony, to show that the defendants, although *in form*, joint makers, were in point of fact, securities; and as such, upon proper proof being made, entitled *at Law*, to the relief furnished by the Acts of 1826 and 1831.

NISBET, J. dissenting.

[5.] I concur in the judgment of the Court, upon all the points made in this case, except as to the admissibility of the parol evidence. The defendants pleaded in the Court below, that they signed this note as sureties for *Mr. King*—that under the Act of 1826, they notified the plaintiffs to sue—that they failed to bring suit within three months, and they (defendants) are thereby discharged. The parol evidence was offered to support this plea, and by the presiding Judge, admitted, my associates think, rightfully—I am constrained to believe, wrongfully. I assume that on the face of this note the defendants *are not* sureties, and that parol evidence

cannot be admitted, either upon Common Law principles, or by virtue of our own Statutes, to show that they are, and thus let them in to the benefits of the 2d section of the Act of 26th December, 1826; *because* the effect of such testimony would be to add to and vary the written contract between the parties.

I shall not enter at large into the consideration of the vexed question of the admissibility of parol evidence, where there is a written contract, but shall endeavor, briefly, to apply the general rule to the case before me. That general rule is—"Parol evidence is not admissible to add to, vary, or contradict a written instrument." I have had occasion to say before, that the application of the rule to negotiable paper, ought, in my poor judgment, to be more stringent, than to instruments of almost any other character; for reasons founded in commercial policy. "The liability of parties to a bill of exchange or promissory note, says *Mr. Justice McLean*, in *Bank of the United States vs. Dunn*, has been fixed on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from." 6 *Peters*, 58. 4 *Ga. Rep.* 273. It is the interest of every citizen, whether merchant, agriculturist, artisan, or retired capitalist, that the principles of the Law Merchant remain settled. The rule above stated, is founded on the presumption that when the parties to a contract have reduced it to writing, all previous negotiations and contemporaneous propositions are merged in the *writing*. They have with solemnity declared it. The instrument is, with all seriousness, made the *evidence* of what are their respective rights and obligations. They send it out into the commercial world to perform its functions, according to the character which the law, sitting in judgment upon the evidence which *they* have furnished, gives to it; and according to no other evidence. They have agreed that the *writing* shall be proof of their act and intention—that it shall be valid and compulsory on them. They thus notify all who may become interested in it, that they are bound by no stipulations beyond its written terms. The policy of the rule is avouched in those inconveniences, which grow out of the various conceptions which different minds may have of the same subject—of the liability of all persons to forgetfulness—of passion—prejudice and perjury. Unwritten contracts are uncertain; whereas, *litera scripta manet.*

My first proposition is, that parties to written contracts are to be held as contracting in reference to the general law of the land. Thus, where one makes a promissory note, he is to be held as making it, subject to that kind of liability which the law casts upon makers; and the payee receives it, vested with all the rights which the law gives to payees.

My second proposition is, that where parties have clearly expressed their meaning in writing, and the law gives to such writing a fixed and determinate character, that is to say, fixes the rights and liabilities of the parties on the face of their own instrument, it is a contract which can in no respect be added to, varied, or contradicted by parol evidence. The exposition which the law gives to the writing, is the contract; and that exposition is the rule and measure of the liabilities and rights of the parties. In all such cases, the holder can have nothing, and the maker be bound to nothing, which, according to settled principles, are not deducible from the written instrument, and the application of these settled principles to the instrument, belongs to the Courts.

I apply these propositions to the note in this case. It is in the following words and figures:

1953\frac{04}{100}$ MONTICELLO, 10th May, 1838.

Ninety days after date, I promise to pay to the order of Mumford & Tyson, at the Bank of St. Marys, one thousand nine hundred and fifty-three dollars and four cents, for value received, in renewal of note, for $1914.

(Signed,) THOMAS BUTLER KING.
MUMFORD & TYSON.

Indorsed, "MUMFORD & TYSON."

The suit was brought by the Bank of St. Marys against Mumford & Tyson, not as indorsers, but as makers of this note. The plaintiff sought to hold them liable, as original, unconditional undertakers to pay—the plea and the evidence by parol, to support it, sought to make them sureties for Mr. King, and by the Act of 1826, conditionally liable—that is to say, not liable at all, if upon notice to do so, the plaintiff failed to sue Mr. King within three months.

Now, what is the legal effect of this paper? There is nothing peculiar in it—nothing unknown to the Commercial Law. It varies from the usual mode of making notes, in this, that the parties, being more than one, in its body say *I promise* to pay, instead of

me. Admitting that this is not according to the usual phraseology, *yet it is no* anomaly in the law. The law is quite familiar with such notes. The use of the singular *I* instead of the plural *we*, creates no ambiguity. The judgments of the Courts have given a construction to just such a peculiarity—which judgments are as familiar to the profession, and I have a right to presume, to mercantile men, as any other rule of Commercial Law. Nor is it a thing to be thought strange by lawyers or merchants, that this note is payable to the order of one of the makers, Mumford & Tyson. Such things are of every-day occurrence. This is a joint and several negotiable promissory note. *Smith's Mercantile Law*, 216. *Clark vs. Blackstock, Holt*, 474. *March vs. Ward, Peake*, 130. *Lord Galway vs. Mathew*, 1 *Camp.* 403. 10 *East.* 264. *Butler vs. Maloney*, 1 *Stra.* 76. 2 *Stra.* 819. *Comp.* 832. *Chitty on Bills*, 529. 5 *Mass.* 358. 1 *Hill, N. Y. R.* 256.

It is the several promise of Thomas Butler King to pay; it is also the several promise of Mumford & Tyson to pay. It is farther, the joint promise of Thomas Butler King and Mumford & Tyson, that *they* will pay.

The legal effect of the note is to make Mumford & Tyson original and *unconditional* undertakers to pay to their own order, or to whomsoever might become the legal holder, the sum of money specified in it. Having, by indorsement, ordered its payment to the Bank of St. Marys, they are unconditionally liable to that Bank, as makers.. Just as much liable as if Thomas Butler King's name was not on the note. This is the position which they have elected to take—the position which the law assigns them, and to which it will hold them. It can give to them no appellation but that of makers, with just that kind of liability which the Law Merchant, construing this note, fixes upon them. That liability—the liability of the maker of a note—is not contingent or conditional; it is subject to no limitation—it is *immediate* and *direct*.

The meaning of the parties upon the face of the note is clear; it can mean nothing else than that Mumford & Tyson undertook, as makers, to pay the holder so much money. No distortion or
f its terms can give to it any other signification. The
rincipal and surety is not suggested, or even shadow-
ny word or phrase in it; nor can it be implied by the
f any rule or doctrine of the law.
roposition is, such being the contract, that evidence

that they were in fact sureties, and thereby giving to them the benefits of the Act of 1826, *varies* that contract. The contract, we have seen, according to the note, is, that they will pay unconditionally, to the holder, the sum of money stipulated to be paid. Let us see what the contract will be, with the addition of the parol evidence. I remark just here, that I do not now consider whether sureties in fact (yet who are not so by the written contract) are embraced in the Act of 1826. I shall look to that hereafter. I am now considering whether, at Common Law, parol evidence is admissible to add to, vary, or contradict this note. To determine this question, it is material to note, that evidence that these parties were in fact sureties, would be, by itself, in the case made, harmless; and that it derives its inadmissible quality from the fact, that by it alone, they are admitted to the benefits of that Act. The Act of 1826 empowers indorsers and sureties to notify holders to sue their principals, and if, being notified, they fail to sue within three months, the sureties are discharged. Conceding, then, that if this evidence is admitted, it would show such a contract as would make the Act of 1826 applicable to it; I say the effect of that evidence is to *vary* the written contract, and is, therefore, inadmissible. What would the contract be, as amended by the parol evidence? It would be to this effect—"We, Mumford & Tyson, are liable to you, the St. Marys Bank, it is true, *as joint and several promisors with Mr. King; yet, inasmuch as we are his sureties, if upon our notice to you to sue him within three months, you fail to bring suit within that time, we are not liable at all*"—a contract of liability, *upon condition*, that being notified so to do, the holder of the note shall within three months sue the principal. Is not this adding new terms to the contract as we find it in writing? Whereas, by the writing, they are unconditionally liable; now, by parol, they are in a certain event, not to be liable at all. Whereas, by the writing, they are not entitled to the privilege of giving the notice and requiring the holder to sue, at the peril of their discharge; now, by parol, they are admitted to the benefits of such a privilege. It does not weaken the principle to say that the discharge is not a necessary result—that it depends upon the diligence of the holder. If the discharge *may* result, it is a variation of the written contract. The advantage to them, although a contingent one, is what they are not entitled to by the written contract.

Again, how does the new contract, as set up by parol, affect the holder? It prescribes to him a law of limitation as to his right of suit against King, the principal, to which, in a Court of Law, he was not subject by the written contract. By the writing, there is no time within which he is bound to sue King. By the parol contract, he is compelled to sue within three months after notice, at the peril of losing all recourse upon the sureties. It is no answer to say, that if he loses his recourse against the sureties, it is the result of his own laches. The contract, by parol, imposes upon him a burden which does not rest upon him by his written contract, for which the sureties did not stipulate, and against which he, in all probability, would have stipulated; indeed, against which, as we shall see, he did in this case stipulate.

The Legislature, I know, may act upon remedies, but it cannot, even through remedies, impair any of the obligations of a contract. And if it be said that setting up this new contract by parol, only affects the holder's *remedy* upon his written contract, I reply that it so affects it, as to vary, fundamentally, as I have endeavored to show, the written contract itself. It may be said that the right of the holder to sue all the parties to this note, in case of notice, is perfect up to the expiration of the three months; and, therefore, the evidence does not affect the written contract in its first formation. If at *any time* it affects it, the impression on it goes back to its origin, and goes forward to its final extinction. How does it vary the principle, that plaintiff's disability, and defendant's additional privilege, is *developed* subsequently to the date of the note? That disability and that privilege is claimed *alone* upon the ground that the contract, *in the beginning*, was what they seek to make it by parol. But there is a very simple view of this matter, which, to my mind, is conclusive. If this evidence does not vary the written contract, why is it tendered? What is there to be proven, but that which does not there appear? If it does not vary it, why not rest upon the writing? No—it is palpable that the defence goes upon the assumption, that the defendant's rights must be adjudicated according—not to the written contract—but the parol contract.

Now, it is true that the authorities touching the admission of parol evidence, in such a case as this, are conflicting. A case sustaining fully the judgment of this Court, was read from 4 *N. H. Reps.* the doctrine of which case, seems to have received some ap-

proval in New York. Other cases were also relied upon in the argument, as directly or indirectly warranting the admission of the evidence. On the contrary, it will be seen that there are cases and Jurists of great authority in our States, denying its admissibility. I think, however, that I may with safety say, that the weight of authority in England denies it. The Common Law is binding upon this Court. The decisions of the States are only so far binding, as they are founded in sound reason and professional learning. Again, I think I may with safety say, that this Court, in several decisions, has adjudicated this very question. That is to say, has clearly settled the principles which control it. The authority of this Court, I shall undertake to show, is against the admission of the evidence. I concede that in a Court of Equity, this defence is available, and that there the evidence may be admitted. Strenuously did the learned counsel insist, that if admissible in a Court of Equity, it ought to be admitted here—urging, that it is unreasonable to drive a party into Chancery, when a Court of Law is competent to give relief. Were I disposed to admit the policy of this view, I would not dare to do what no Judge can do, without usurping the powers of the Legislature—break down the barriers which separate the jurisdiction of the Courts of Law and Equity. I shall await the action of the Legislature.

Mr. Chitty lays down the rule applicable to this case, in the following words: "It seems now settled, that *verbal evidence* is not admissible to *contradict* or *vary* an *absolute* engagement to pay money on the face of a bill or note; although, as between the original parties, evidence may be adduced to establish a defence on the ground of a *total want* of consideration, *failure of it* or *illegality*." *Chitty on Bills*, 141.

The invariably conceded rule of the Common Law is here stated. It is, that you cannot contradict or vary an *absolute* engagement to pay money on the face of a bill or note. The exceptions are stated, to wit: want of consideration, total failure and illegality. There are some other exceptions—one for example, mentioned by *Lord Ellenborough* in *Hoare vs. Graham*, 3 *Camp.* 57, to wit: that the note was indorsed to plaintiff as a trust. All the exceptions, however, go to the consideration, the illegality, the delivery of the note, or to frauds between the parties. So run the English decisions. Before adverting to them, I submit whether there is not, upon the face of this note, an absolute engagement to

pay money, and whether any one of the exceptions covers this case. The engagement is absolute, and the defence here is not pretended to rest on any one of the exceptions indicated in the rule. This defence is planted upon an engagement different from, and contemporaneous with, the written absolute engagement to be established by *verbal evidence.* Let us see how similar defences have been repudiated by the ablest men of the British Bench. The case of *Hoare vs. Graham,* decided by *Lord Ellenborough,* is a leading authority. There the defendant's indorsers sought to prove by parol, that the *condition* upon which they indorsed, was that the note at maturity should be renewed.

Lord Ellenborough said—"I do not think I can admit evidence of this sort. What is to become of bills of exchange and promissory notes, if they are to be cut down by a secret agreement that they are not to be put in suit. The parol *condition* is quite inconsistent with the written instrument. . . . . There may, after the bill is drawn, be a binding promise, for a valuable consideration, to renew it when due, but if the promise is *contemporaneous* with the drawing of the bill, the law will not enforce it. This would be incorporating with a written contract an incongruous *parol condition.*" 3 *Camp.* 57.

In *Free and another vs. Hawkins,* it was proposed to prove by parol, that it was the understanding between the parties, that the defendant, who was sued as indorser, indorsed upon condition, that he should not be liable until after the estates of the maker were sold. The evidence was rejected. *Dallas, J.* said—"One thing is to be observed; if such were meant to be the understanding, it ought to have been expressed on the instrument; but it is not expressed. . . . . The effect of the evidence tendered is to vary the note in question, and to control its legal operation; and such evidence I think is inadmissible."

Park, J. said—"It has been observed in favor of the plaintiffs, that they sought not, by the evidence tendered at the trial, to *contradict* the note, or *limit* the written contract; but if I issue a promissory note, payable at two months, and enter into a parol agreement that the note shall not be put in suit till the end of five years, or till the uncertain period of the sale of an estate, can it be contended that such a parol agreement does not *contradict* and *limit* the written contract into which I have entered?"

Burrough, J. said—"It would be of the most dangerous import,

if evidence of this sort might be let in to cut down written instruments." 8 *Taunton*, 92.

In *Woodbridge vs. Spooner*, the action was brought against the representative of the *maker* of a promissory note. At the trial, the defendant offered to prove that the note, which was on its face payable *on demand*, was agreed, at the time of making it, to be payable *only at the decease of the maker*. The Court rejected the evidence.

Abbott, C. J. said—"The object of the testimony was to show that a promissory note, which in terms appeared to be payable on demand, was agreed not to be payable till after the decease of the maker. Now, it is contrary to the rules of law to admit extrinsic evidence to show that the intention of a party executing a written instrument is different from that apparent on the face of the instrument itself." 3 *Bar. & Ald.* 233.

The object of the defendants in the cause before this Court, was to show that their intention was different from that apparent on the face of the note. The intention apparent on the note is to pay absolutely; the intention to be shown by parol, is to pay as sureties, that is, to pay upon condition.

In *Rawson vs. Walker*, *Lord Ellenborough*, in an action by the payee against the maker of a note, refused to admit evidence of an agreement between plaintiff and defendant, that the defendant should not be called on until after a final dividend should be made of a bankrupt's estate. 1 *Starkie's Rep.* 301. See also, *Campbell vs. Hodgson*, 1 *Gow. R.* 74. *Bowerbank vs. Monterio*, 4 *Taunt.* 846. *Hogg vs. Smith*, 1 *Taunt.* 347. *Skin.* 54. *Phil. Evid.* 2 *edit.* 433. *Stark. on Evid. part* 2, 279. *Ridout vs. Briston*, 1 *Tyrw.* 84. 1 *Cro. & J.* 231. *Chitty, Jr.* 1518. *Mosely vs. Hanford*, 10 *B. & C.* 729.

These decisions appear to me to be conclusive as to the rule of the Common Law; and the principle settled by them, seems to be conclusive as to this case. The great principle settled is, that an engagement to pay money absolutely, on note or bill, cannot be superseded, modified or limited by parol evidence. It is proper to say, that the two leading cases of *Hoare vs. Graham* and *Free vs. Hawkins*, are not even so strong as the case I am now reviewing. The actions in those cases were against *indorsers*—here the suit is against *makers;* and this case is not open to the application of a doctrine which has found its way into a few American books, but

not sanctioned in England, that an indorsement is an inchoate contract, and therefore, subject to explanation by parol.

Pitman on Principal and Surety, meets the proposition I am laboring to establish, in the following explicit terms—terms which contemplate the case made upon this record. "In order, however, that the surety may avail himself of a defence *at Law*, it must appear upon the face of the instrument that he is such surety; *for if he is bound as principal, he cannot at Law aver, by pleading, that he is bound as surety*, though in Equity, parol evidence is admissible to show who is principal and who surety. Thus, if two persons are jointly or jointly and severally bound to the creditor, the one as principal and the other as surety, and both appear on the instrument as principals, such surety obligor, when time has been given to the principal debtor, or to the representatives of such principal debtor, may have relief in a Court of Equity, though he could not at Law." *Pitman on Principal and Surety*, 125, 126.

This very direct and unequivocal elementary authority is supported by a series of decisions. In *Rees vs. Benington, Lord Loughborough* declares the rule thus: "Where a man is surety *at Law* for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the surety. *When they are bound jointly and severally, the surety cannot aver by pleading, that he is bound as surety.* But *if he could establish that* at Law, the principle at Law is, that he has an interest in the condition, and if the period is extended, that totally defeats the condition, and the consequence is, the surety is released from his engagement." 2 *Vesey, Jr.* 542. His Lordship had previously said, that it was *the form of the* security which forces these cases into Equity. True, if by *the paper*, a party is surety, he has relief at Law; if by the form of the paper, he is not a surety, although surety in fact, he must go into Equity. That is the doctrine settled by *Lord Loughborough*, and which I am now trying to establish.

The case of paramount control on this question, however, is that of *Fentum vs. Pocock*, tried in 1813, before *Mansfield, C. J. Heath* and *Chambre, Justices*. It is paramount, not only because it meets the question here, but because in it, *Mansfield, C. J.* reviews and overrules the two cases of *Laxton vs. Peat* and *Collott vs. Haigh*, decided by *Lord Ellenborough* at *Nisi Prius*, which are the starting points of the contrary doctrine. In *Kerrison vs. Cook*, (3 *Camp.* 362,) *Gibbs, J.* also expressed strong doubts of the

doctrine ruled in *Laxton vs. Peat.* In *Fentum vs. Pocock*, the question was, whether an acceptor of a bill for accommodation was discharged by an arrangement with the drawer, by the holder, for payment by instalments. The defence was put upon the ground that the acceptance, being for accommodation, the acceptor was surety to the drawer. The defence was rejected, *Mansfield, C. J.* saying, "*He who accepts a bill, whether for value or to serve a friend, makes himself, in all events, liable as acceptor, and nothing can discharge him but payment or release.*" The proof was, that the acceptance was for accommodation. The decision went upon the ground, that on the instrument the acceptor was liable, at all events, as principal. That was the legal import of the written evidence. *Mansfield, C. J.* speaking of the case of *Laxton vs. Peat*, remarks, "When I first saw the case in *Campbell*, I was in the same state with *Mr. Justice Gibbs*, and doubted a great deal whether it could be law.

"The case of *Collott vs. Haigh* must be considered as not a separate decision, but as resting on the authority of the former. It is utterly impossible for any Judge, whatever his learning and ability may be, to decide at once rightly upon any point that comes before him at *Nisi Prius*, and whoever looks through *Campbell's Reports*, will be greatly surprised to see, among such an immense number of questions, many of them of the most important kind, which came before that noble and learned Judge; not that there are mistakes, but that he is, in by far the most of the causes, so wonderfully right, beyond the proportion of any other Judges. But in this case we think we are bound to differ from him, and to hold that it is impossible for us to consider the acceptor of an accommodation bill in the light of a surety for the payment by the drawer," &c. 5 *Taunt.* 195, 196. Thus *Laxton vs. Peat* and *Collott vs. Haigh* were overruled.

The case of *Price vs. Edmunds*, in its facts is very analagous to this case. The payee of a joint and several note brought suit against one of the makers, and the defendant proved that he was a mere surety, and that plaintiff had agreed with the principal to indulge by payment in instalments. He claimed, that thereby he was discharged. Counsel for the defendant, whilst relying upon the cases of *Laxton vs. Peat, &c.* was interrupted by *Bayley, J.* with this significant interrogatory: "Does not a party, by signing a note as joint maker, render himself subject to all the liabili-

ties of joint maker?" By *Parke, J.* as follows: "Can a contract between the payee and maker of a note be shown by extrinsic evidence, to be different from what it purports to be on the face of the note itself? Here, on the face of the note, the contract purports to be an absolute contract by the defendant for the payment of a sum of money. The effect of the parol evidence was to show that it was conditional." These queries sufficiently indicate the mind of the Court. It did not find it necessary to determine the question, whether the extrinsic evidence was or not admissible, the judgment turning upon another point. However, *Parke, J.* in giving his opinion, said, "As to the other point, I think that the decision in *Fentum vs. Pocock*, where it was held, that the acceptor of an accommodation bill was not discharged by giving time to the drawer, *was good sense and good law.*" 10 *Barn. & Cress.* 578.

The next case which I refer to, is that of *Dary vs. Prendergrass.* It was there decided, that in an action on a bond against a surety, it is no defence, that time has been given by parol agreement to the principal. *Abbot, C. J.* said, "The ground of my opinion in this case is that general rule of the Common Law, which requires that the obligation created by an instrument under seal, shall be discharged by force of an instrument of equal validity. The operation of that rule is indeed sometimes such, as to make it imperative upon a Court of Equity to interpose and grant relief, but it by no means follows that the rule of Law is to be broken down, because a Court, having jurisdiction of another kind, will interpose where there is a particular case, in which the rule of Law will operate harshly. There is a great objection to a Court of Law taking upon itself to act as a Court of Equity, because they have not the means of doing that full and ample justice which the particular case may require. We ought not, therefore, to interpose in a matter which seems peculiarly to belong to the jurisdiction of a Court of Equity. If a parol agreement is entered into to give time to the parties, supposing it not to be the case of a surety, but simply the case of a common bond, conditioned for the payment of money at a certain day, it will not prevent the party from proceeding at Law immediately, whatever the consideration of the delay may be." 5 *Barn. & Ald.* 187.

In *Brittain & Wilson vs. Webb, Bayley, J.* holds the following language: "Besides, the plaintiffs are not at liberty to set up a

parol contract inconsistent with a written contract, and that would be the effect of enabling them to recover on this declaration against the defendant. For it appears by the bill of exchange, which was in writing, that the defendant was entitled to have the contents of the bill paid to him, whereas, the effect of the agreement to be set up, is to show that it never was intended to be paid to him, &c." 1 *Barn. & Cress.* 483. To the same effect is *Lewis vs. Jones*, 4 *B. & C.* 506.

The last case that I shall refer to from the English books, is *Ashbee vs. Pidduck*, in which it is decided, that where three persons entered into a joint bond, and it did not appear, either on the bond or condition, that two of them were sureties for the other, a release given by the obligee to the representatives of one of the deceased obligors, was no answer in behalf of the surviving obligor. *Lord Abinger, C. B.* said, "How does it appear that these defendants are sureties? It does not appear from the condition of the bond that they were so; and you cannot, as against the obligee, show that they were." 1 *Mees. & Wels.* 568.

The American authorities very generally sustain the foregoing rules of the Common Law. I refer to a few of them:

"Where a note is signed, says *Mr. Story*, by two persons, written thus: *We promise*, and signed A B *principal*, and C D *surety*, it is still the joint note of both. And if it were written *I promise*, and signed in the same manner, it would be the joint and several note of both. For the language designating the principal and surety *does not change the rights of the payee or subsequent holder, but merely ascertains the relation of the makers to each other, and operates as notice of that relation to the other parties thereto.*" *Story on Prom. Notes, sects.* 57, 58.

Mr. Story, in his Treatise on Bills, speaks more directly to the point, as follows: "So it seems that where several persons are jointly and severally liable upon a contract, the giving of time to one, or proceeding in a suit against one, even to judgment, but without satisfaction, will be no discharge to the other. Indeed it has been thought that it will make no difference in such a case at Law, whatever might be the case in Equity—upon which some doubt may be entertained—that one of the joint parties to a bill is in fact a surety for the other; at all events, if he is not stated to be so on the face of the bill. For under such circumstances, as to the holder, he may and should be treated as a joint principal, with-

out any reference to his relation to the other joint contractor," &c. *Story on Bills, sects.* 430, 432.

The case of *Hunt vs. Adams* decides the principle extracted above from *Judge Story's* text. In that case, the note was signed by A, and C wrote underneath—"I acknowledge myself holden as surety for the payment of the demand of the above note, witness my hand;" signed C. In an action on this note, A and C were held to be joint promisors, and not only joint promisors, but original promisors. Such was ruled to be the legal effect, not only of that note, but also of a note written *I promise to pay*, and signed by A *principal*, and C *surety*. *Parsons, C. J.* said: "The defendant is an original party to the contract as well as *Chaplin*. The contract, in its legal construction, is a promise made, as well by the defendant as *Chaplin*, for value received, to pay fifteen hundred dollars to the plaintiff's intestate. To this promise, *Chaplin* has signed as principal, and defendant as surety. This mode of signing is an accommodation between the promisors, by which the defendant is entitled, if he pay the note, to indemnity from *Chaplin*, but as to the intestate, they must be considered as joint and several promisors. The legal effect of a note in this form is not different from a note in the form of "for value received, I promise," &c. and signed by one with the word *principal* annexed to his name, and by another with the word *surety* thus annexed; or if the form of the note had been, "for value received, I, A B, as principal, and I, C D, as surety, promise to pay," &c. This last form is not uncommon, and the promise has always been holden to be made by each as *original promisor*." *5 Mass.* 360, 361.

This case determines the *legal effect* of the note upon which the action was brought. Subsequently, the same case in principle, but upon another of the notes between the same parties, came before the Supreme Court of Massachusetts. In the latter case, the defendant, who was the surety on a note described in the reference to the case in *5 Mass.* offered to prove by parol, an agreement between the principal and the payee, that he, the defendant, was to be holden to pay, only on condition that the principal could not pay. The Court, recognizing the construction as to the legal effect of the note, which had been previously put upon it, and which I have above stated, rejected the evidence, because it was "incompetent to control the legal effect of a written contract."

Sewell, J. delivering the judgment of the Court, said, among

other things—" When a contract has been stated in a writing, assented to and signed by the parties concerned, and that continues in being, and under the control of the party relying upon it, evidence of other parol agreements to explain or vary the written contract, would be a rejection of that evidence, which is necessarily the best.

" In the case at bar, if the motion for the defendant should prevail, a conditional and collateral contract might be sustained, by a parol stipulation for a contract in writing, which is absolute, and by which the defendant engages as surety for *Chaplin*. The construction to be given of this note, as written, has been settled by the former decision of this Court, to be the same as if the note had expressed a joint and several promise of *Chaplin* and the defendant. The defendant became responsible to Bennett, immediately and directly, by the legal operation of the written words which he had subscribed." 7 *Mass.* 518, '19, '20.

How nearly in its facts, and how closely in principle, does not this case approach to the one at this bar? A surety having engaged in writing to pay, absolutely, was not permitted to interfere with the legal effect of his own written contract, by proving a conditional contract.

In the *Bank of the United States vs. Dunn*, an indorser proposed to prove that the payment of the note had been guarantied by the maker, by certain securities, and that the indorsement was matter of form, and therefore he was not liable. The Supreme Court rejected the evidence, because it varied the legal effect of the contract of indorsement. 6 *Peters*, 51. *Also*, 9 *Wheat.* 587. 3 *Dall.* 415.

In *Spring vs. Lovett*, in an action by the payee against the maker, on a promissory note, the defendant was not permitted to prove a parol agreement, that upon his executing a deed of real estate to the plaintiff, the note was to be given up. 11 *Pick.* 417.

So in *Farham vs. Ingham*, evidence that a note, absolute on its face, was payable on condition, was refused. 5 *Ver. R.* 114. See *Low vs. Treadwell*, 3 *Fairf.* 441. 5 *Ver. R.* 152. 1 *Minor Ala. R.* 357. 6 *Mass.* 519. *Palmer vs. Grant*, 4 *Conn. R.* 389. *Rawston vs. Parr*, 3 *Russ. R.* 424. *Baker vs. Briggs*, 8 *Pick.* 122. 19 *Ib.* 260. 24 *Ibid* 64. *Foster vs. Jolly*, 1 *Cromp. Mee. & R.* 703. *Thompson vs. Ketchum*, 8 *Johns. R.* 146. 5 *Porter*, 505.

The majority of the cases which I have referred to, go upon

the ground of a parol *agreement*. It is not pretended in this case, that there was any agreement between the defendants and *The Bank of St. Marys*, that they should be held and bound as sureties; all that is pretended, is that the Bank had notice at the time of making the note, of the relation between them and Mr. King, of principal and sureties. Thus, at best, amounting only to an equitable defence. So far from *agreeing* to be held bound by the obligations which, through the Act of 1826, might grow out of that relation, it is expressly proven, that it was the usage of the Bank to require indorsers to sign *as makers*, and that the defendants were notified of that usage. The Bank thus stipulated against the very defence set up. The defendants contracted with knowledge of that usage, and are bound by it. The usage was proven to be to require *indorsers* to sign *as makers*, as well as indorsers. The object of this usage, I must infer, was to secure all the legal advantages which such signature would give. For example, the advantage of liability, without demand and notice—primary and original liability, as makers, irrespective of the relation of principal and sureties. As *indorsers*, the Bank knew (such is the legal inference) that they would be entitled to the benefits of the Act of 1826. To shut out those benefits, it required them to become makers on the note. The fact that they were required to sign as makers, rebuts the inference, that it consented to become bound by the legal consequences that might result to it from the relation of principal and sureties.

The rule of the Common Law, as to the admissibility of parol evidence, has been adopted by this Court, and has been applied in more than one case, strikingly analogous to this. It seems to me, that if any one principle has been more firmly settled by this Court than another, it is that for which I am now contending. As early as the first term, held at Cassville, after our organization, this doctrine underwent the review of this Court, in *Rogers vs. Atkinson, et al.*

Lumpkin, J. in that case, said—" The burden of the argument of counsel for the defendant in error, has been to establish the rule, that parol evidence cannot be received, to add to, contradict or materially vary a written agreement; and *that the instrument itself must be considered as containing the true understanding between the parties, and as furnishing better evidence thereof, than any which can be supplied by parol. We subscribe to the doctrine in all*

its amplitude—and a series of adjudications in England and in this country, in the State and National Courts, have firmly and uniformly upheld the principle, and placed it beyond the reach of successful attack." 1 *Kelly*, 18. The Judge then proceeds to discuss the rule, and to enumerate exceptions, in its application to different forms of written contracts. No exception which he recognizes, embraces this case.

The case of *Stubbs vs. Goodall*, adjudicates the very principle upon which I insist. That was an action by the indorsee against the indorser of a note, which was *not payable* at a chartered Bank, but simply to the order of the indorser. The defendant offered to prove at the trial, that it was the intention and agreement of the parties, that the note should be negotiated at a chartered Bank. This Court held the evidence inadmissible. The ground upon which the Court went, is developed in the following words of *Lumpkin*, J. who delivered the judgment. Commenting upon an extract from the text of *Mr. Story*, on promissory notes, the Judge says—" We believe it to be a departure from that rule of Law, which precludes the admission of parol evidence, to contradict or substantially vary the *legal import* of a written agreement, than which none is better settled or more salutary in its application to contracts." Again, the Judge quotes from the decision of a case in 3 *N. H. R.* the following proposition, to-wit: " But it seems also to be well settled, that parol evidence cannot be received, to vary or control the settled *legal import* of a *commercial* instrument," (the very doctrine for which I contend,) and gives to it a very emphatic indorsement, in the following words: " We entirely concur in this firm and manly adherence to a rule of Law, which has done more to prevent frauds and perjuries, than the Statute passed professedly for that object. Better, by far, to rest upon broad principles, capable of being comprehended by the humblest capacity, and especially when they have proved so beneficent in their results, than to be forever frittering them away by nice and attenuated distinctions, which elude even the most subtle." 4 *Ga. R.* 106. The case of *Stubbs and Goodall* is distinguishable from the present case, in one particular; and that particular makes *this* a stronger case than *that*. It is that in *that* case, the defendant was an indorser; in this, the defendants are *makers*. In *that* case, the admissibility of the evidence, in the argument, was put upon the ground that a blank indorsement is

an inchoate contract, and is therefore susceptible of explanation by parol; which principle, if it were a sound one, has no relevancy to makers. A brief explanation will show that the principles involved in *Stubbs and Goodall*, are the same with those involved in this case. By the Act of 26th Dec. 1826, (*Prince*, 462,) indorsers upon notes and other instruments are not entitled to demand and notice, unless given for the purpose of negotiation, or intended to be negotiated at any chartered Bank, or unless deposited at any chartered Bank for collection. The note in that case, not appearing on its face, to be payable at a chartered Bank, or appearing to have been intended to be negotiated at a chartered Bank, or to have been deposited there for collection, the defendant, Goodall, *was not*, upon the face of the note, entitled to notice. By the legal import of his contract, he was not entitled to notice. His engagement to pay as indorser, was by the law of Georgia, an absolute engagement *without notice*. The payee had stipulated on the note, that he should be liable without notice—he had bound himself, by indorsing a note not payable at Bank, or otherwise appearing to be intended to be negotiated at Bank, to be liable without notice. Now, to let himself into the benefits secured by the proviso of the Act of 1826, that is to say, to place himself in the position of an indorser, entitled to notice by that Act, he offered to prove by parol, that it was the intent and agreement of the parties, that the note should be discounted at Bank. The effect of this evidence was to set up a conditional liability in place of an absolute liability. The legal import of his indorsement was to charge him without notice. By that indorsement his liability did not depend upon notice. By the parol agreement he was to be liable *upon condition* that he had notice. And how did Goodall seek to change his contract? By invoking, through the means of a different contract, to be set up by parol, the *benefits of the proviso of the Act of* 1826 *in his favor*; to make thus, that which was absolute, conditional; to secure thus, a right or privilege denied to him by the legal import of his written contract; to impose thus, upon the holder of the note, a burden which did not rest upon him, by the written contract, to-wit: the burden of giving notice; to cast upon him a disability, against which, in the note, he had stipulated. Well, in this case, the defendants are seeking to do the same things. By parol, they seek to *invoke the aid of the Act of* 1826 in favor of sureties;

To secure to themselves privileges or rights, to which, by their written contract, they are not entitled; To cast a burden, to-wit: the burden of suing the maker within three months, upon the holder, under which he did not rest, and against which he had stipulated, both in the written contract, and by the usage of the Bank. In short, to vary the legal import of their written contract, by making what was an absolute engagement to pay money, a conditional engagement to pay money. If there is a difference in the principles of the two cases, I am unable to see it. Upon similar principles, and upon the decision in *Stubbs vs. Goodall*, was determined the case of *Collins vs. Everett*, (4 *Ga. R.* 266,) and a later case, not yet reported, argued at Decatur in August, 1848.

My learned associates, however, place the judgment of this Court, in part, upon the Acts of 1826, in favor of sureties. If I could agree with them, which I cannot do, in their construction of those Acts, still my dissent must needs be made, because they rest their judgment, not upon the Statutes alone, but upon general principles also. What remains to me, is to show, if I can, that this question is in no way dependent upon the Acts, or either of them, of 1826.

There are two Statutes which are claimed to have some relevancy to this case. One passed on the 20th Dec. 1826, and the other on the 26th of Dec. 1826. Both of these Acts relate to sureties. The former is entitled, "An Act to define the liability of securities on appeal, on stay of execution, and for the protection of bail on recognizance, bond, note or other contract." The whole of its enactments have a single, definite and unmistakeable object, and that is to afford to sureties *a summary mode at Law, of remuneration out of their principal.* The rights of the payees of notes, or other holders, are not intended to be affected by it. So far from this being the case, the object of the Act is *expressed*, and that is, in every class of the cases enumerated, to enable *sureties to control judgments against their principals for reimbursement.* By the 5th section of the Act of 20th Dec. 1826, sureties on bonds, notes or other contracts, are authorized on the trial, to make special defence; and in case it shall appear to the Court, that one or more of the defendants are sureties only, and not interested in the consideration of the contract sued on, verdict and judgment shall be entered accordingly; and the surety is clothed

with such privileges as, in a previous section, are conferred upon other sureties. The privilege referred to is, "the use and control of the execution, for the purpose of proceeding against his principal." The *defence* in this section given to the surety, is not against the plaintiff in the action, but against the *principal*, who may be sued with the surety. This is *demonstrated* by the proviso to this section, which is in these words: "Provided the plaintiff shall *in no case be delayed* by any dispute which may arise between the defendants, but the Court shall decide the issues, and the verdict which may have been finally rendered on the issues between the defendants, shall relate back to the time of the verdict and judgment in favor of the plaintiff." The litigation, the issues made, are between the defendants; *the plaintiff is not to be delayed.* His rights remain not only intact, but are expressly protected in this Act. Then what relation has it, can it have, to a contest between the holder of the note and the maker? Surely none, not even the most remote.

The Act of 26th Dec. 1826, has two sections. The first relates to the liability of indorsers on notes, &c. and is not pretended to have any application to the point in discussion. The second section is mainly relied upon as controlling it, and is as follows: "Any security or indorser may, whenever he thinks proper, after the note or instrument becomes due, require the holder to proceed to collect the same, and if he shall not proceed to do so within three months, the indorser or surety shall be no longer liable." *Prince*, 461, 462. The position is, that inasmuch as this Act authorizes *any* surety to give notice, and upon failure of the holder to proceed to collect within three months, discharges him, that any surety who is so *in fact*, although not a surety on the written contract, may in a Court of Law, plead his suretyship and his notice, and prove it by parol. Now, I am not prepared to say, that any party to a note, who is *in fact* a surety, is not entitled to the benefit of this Act, whether he appear to be so or not, on the face of the written contract. What I assert is, that unless it appear on the written contract, that he is a surety, he is not entitled to the benefit of the Act in a *Court of Law.* He may go into Equity and be there relieved, because the rules of proceeding and the law, as settled, governing that jurisdiction, will permit him to have relief there. He cannot come here for relief, because he cannot get it until the rule of ev-

idence, which I hope I have shown is so well established, is abrogated by the Legislature. The Legislature, in granting to him the privilege, without prescribing the manner of his remedy, must be, according to the established rules of statutory construction, considered as remitting him to that forum where the remedy is competent, and not to that where, by existing laws, it is *not competent.* If it is apparent on a written contract, by the signature or by recital, that a party is a surety, then this Act is available to him, in a Court of Law, because there the establishment of his right would not be dependent upon parol evidence, and the exercise of it would not be precluded by any rule of Law. I am not at liberty to *infer*, from the fact that the Legislature has authorized any surety to discharge himself by notice, that it intended to annul, so far as applicable to all instruments to which there might be parties holding to others the relation of sureties, a rule of evidence founded in the clearest reason, and the most manifestly sound policy. If indeed the surety had not a remedy in Equity, I should, in that event, be more inclined to give him one here. I should be disposed to imply a repeal of the rules of evidence which stand in his way, rather than make the Act of the Legislature nugatory. But sitting, as we now sit, in a Court of Law, and construing this Act in the light of Law rules, I must believe that it applies to such sureties on notes and bills, as are so on their face. And as in this case the defendants are not on this note sureties, but unconditional promisors, it does not admit them to the defence set up, or authorize the admission of the evidence.

When I say that these defendants would be entitled to relief in a Court of Equity, I mean to say that there, their defence might be set up and proven; but I do not mean to say, that in this case, it would be successful; that would depend upon the case made on the trial. The facts being ascertained, Chancery would no doubt relieve, if the facts would authorize relief. The whole difficulty here is, that the facts which would authorize relief, do not appear upon the contract which the parties have made, and cannot in a Court of Law be ascertained.

No. 8.—E. STARNES and W. W. PAINE, plaintiffs in error, *vs.* CALVIN QUIN, defendant.

[1.] One of several tenants in common, may sue separately in trover, and the defendant may plead the non-joinder in abatement; but if he fail so to plead, he cannot take advantage of it on the trial, nor by motion in arrest, but will be confined to giving in evidence the interest of the other tenants in common, in mitigation of damages. And the plaintiff may proceed to recover his proportion, or aliquot interest, in the common property.

[2.] In such a case, the other tenants in common, may afterwards sue severally, for their interest, and the defendant cannot plead the non-joinder of their co-tenants, in abatement.

[3.] One tenant in common, cannot bring trover against his co-tenant, unless in case of the destruction or sale of the property.

[4.] One of several tenants in common, sells the whole property to A: *Held*, that trover will lie for their interest in it, against the purchaser, in favor of the other tenants; that such sale is void, as to them, and does not make him a tenant in common with them.

Trover, in Telfair Superior Court. Tried before Judge SCARBOROUGH.

The plaintiffs, as attorneys at law, entered into an agreement with one W. Rogers, attorney in fact for Samuel Brinson, to sue for certain negroes, in the possession of one James Chaney, of Montgomery County, in consideration that they should receive one half of the recovery. Rogers, in settlement of the case, received of Chaney, three negroes—Harriet and two children—and sold them to the defendant, Calvin Quin. The plaintiffs brought trover against Quin, to recover the negroes; and upon these facts, the Court charged the Jury, on the trial—"That if they believed the facts proved, plaintiffs had shown title to said property, to themselves and Brinson, or defendant, as tenants in common, and they could not recover, because Brinson was not made a party plaintiff. If defendant was a tenant in common, one tenant in common could not maintain an action at Law, against his co-tenant." Which decision plaintiffs allege to be erroneous.

ROCKWELL, for plaintiff in error.

COLE, for defendant in error, cited—

Leonard vs. Scarborough, 2 *Kelly*, 73. *Hall vs. Page*, 4 *Georgia R.* 428. 1 *Pick.* 415. 3 *Cow.* 624. 2 *Kent*, 466. 4 *Lit.* 412. 4 *Pet.* 410. 5 *John. Ch.* 327. 7 *Bing.* 369. 21 *Wend.* 98. *Smith on Cont.* 67. 1 *Ham.* 132. 5 *Monr.* 416. 14 *Mass.* 322. 3 *Wheat.* 204. 15 *Vesey, Jr.* 139. 1 *Toml. Law Dic. title Champerty.* 2 *Mart. Lou. R.* 281. 3 *Louisiana R.* 160. 2 *Aiken*, 115. 4 *J. J. Marsh.* 16. 5 *B. & A.* 140. 17 *Sergt. & Rawle*, 99. *Brown on Actions*, 309. 6 *East*, 614. 4 *Camp.* 237. 13 *East*, 522. 2 *M. & Sel.* 397. 5 *Taunt.* 617.

By the Court.—NISBET, J. delivering the opinion.

The presiding Judge in this case, instructed the Jury, that if they believed that the evidence showed a tenancy in common, between the plaintiffs and another, that they should find for the defendant. Meaning to say, no doubt, that one of two or more tenants in common, could not maintain trover against a stranger, for the common property. He also instructed the Jury, that if they believed that the evidence showed a tenancy in common, between the plaintiffs and the defendant, that they should find for defendant. Meaning, no doubt, that one tenant in common, cannot sue his co-tenant in trover, for the common property. These decisions are excepted to. In this case, there was no plea in abatement, for non-joinder of plaintiffs. The questions were made on the trial, upon the instructions of the Court to the Jury.

Tenants in common, are not seized *per my and per tout*, but *per my* only. Their interest in the common property is several. Hence, in ejectment they must sue severally; also, in all actions which savor of the realty. *Littleton, s.* 311, 312, 313. 1 *Chitty's Pl.* 44. 4 *Kent*, 368. *Mr. Chitty* says: "In personal actions, as for a trespass or nuisance to their lands, they *may* join, because in these actions, though their estates are several, yet the damages survive to all; and it would be unreasonable, when the damages are thus entire, to bring several actions for a single trespass. A tenant in common may, however, in general, sue separately, as in ejectment, for his undivided share, or in trespass, for the mesne profits, or in debt, for the double value, against a per-

son who has held over, after the expiration of his tenancy." 1 *Chitty's Pl.* 44. *Bac. Ab. tit. Joint Tenants*, 72. 2 *Black.* 1077. 5 *T. R.* 246. *Yelv.* 161. *Cro. Jac.* 231. 2 *H. Black.* 386. 5 *Mod.* 151. The language of the English authorities is, in personal actions, tenants in common *may* sue jointly, which seems to imply that they may sue *severally*. Indeed, *Mr. Chitty* says, that in general, they may sue separately. The American authorities assert, very generally, that they *must* join in personal actions. At least, so says *Mr. J. Bronson*, in *Hill vs. Gibbs*, 5 *Hill's N. Y. R.* 58. I believe, however, that no controversy can grow out of *may and must*. The English and American authorities mean the same thing.

[1.] They both mean to say, that they may join in trover and trespass, and that there is no objection whatever to the joinder; and that they may sue severally, for their aliquot shares or proportions of interest in chattels; subject, however, to be defeated in the latter case, by a plea in abatement, for the non-joinder of their co-tenants. And if, in the latter case, the defendant fails to plead in abatement, he cannot give the non-joinder in evidence, on the general issue, or plead it in bar, or move in arrest, even though the matter be found specially, or appear upon the face of the plaintiff's pleadings. If the plaintiff sues separately, and the defendant fails to plead, the plaintiff may proceed and have his recovery for his aliquot interest in the property, and the defendant is confined to giving in evidence the joint interest of others, in mitigation of damages. In our State, the plaintiff thus recovering a verdict in trover for damages, upon payment by the defendant of the verdict, he would become a tenant in common of the property, with the person jointly interested with the plaintiff. Chancellor *Kent* thus briefly states the whole doctrine in *Wheelright vs. Depeyster*—"It appears to be settled in the books, that in actions of trover and trespass, the plaintiff may sue separately for his aliquot share or proportion of interest in a chattel, and that the defendant may give the joint interest of others in evidence, in mitigation of damages, but that he cannot avail himself of the omission of the plaintiff, to unite the other tenants in common with him in the suit, otherwise than by pleading it in abatement. He cannot take advantage of it on trial." 1 *John.* 486. This is the doctrine which we hold, and which governs the first exception in this case. 2 *Vin.* 59. *pl.* 21, 25, 26, 27. *Cro. Eliz.* 554.

Latch, 152, 153. 1 *Mod.* 102. 1 *Show*, 29. 2 *Lev.* 113. *Skin.* 640. 1 *Salk.* 32. 2 *Stra.* 820. 5 *Bac. Abr.* 260, 261. 6 *T. R.* 766. 1 *Saund.* 29. *G.* 7 *T. R.* 280. 5 *East*, 420. 1 *Bos. & Pull.* 70 *to* 75. 6 *Johns.* 108. 8 *John.* 151. 11 *Mass.* 419. 1 *Phil. Ev.* 210. 1 *Wend.* 380, 386. 4 *C. & P.* 152.

[2.] And if in a several action, by one of two or more tenants in common, there is no plea in abatement, the other tenants may afterwards sue alone; and in the latter suit, the defendant cannot plead the non-joinder in abatement. *Sedgworth vs. Overend*, 7 *T. R.* 279.

In the case at bar, as there was no plea in abatement, the defendant was not entitled to avail himself of the non-joinder, upon the trial, and the Court erred in instructing the Jury, that if they believed from the evidence that the plaintiffs were tenants in common with another, they should find for the defendant.

[3.] Upon the second point. It is true, generally, that an action of trover does not lie in favor of one tenant in common against his co-tenant, because the possession of one is the possession of all; yet, it will lie, in case of the destruction or sale of the property. This has been decided several times by this Court. See *Hall vs. Page*, 4 *Georgia R.* 434, '5.

[4.] According to this doctrine, trover would lie in favor of these plaintiffs, against their co-tenant, for the sale of the negroes, which they owned in common, to the defendant. The suit is not, however, against him, but against the purchaser from him, who was in possession of the negroes. Now, if there was, by that sale, a tenancy in common created between the plaintiffs and the defendant, the plaintiffs had no right to bring trover against him. There is no evidence, in that event, that the case comes within the exceptions to the rule, that one tenant in common cannot sue another in trover. The suit here, is brought against a stranger to the original tenancy in common—a purchaser of the *whole property* from one of the co-tenants. One of the tenants in common may sell his *interest*, and thus the purchaser and the remaining tenant become tenants in common, or it may be sold under execution, and the same result will follow. But one tenant in common cannot sell a *distinct portion* of the common property, much less the whole, and convey a title to the purchaser. They are not like partners. They each hold an *undivided several interest*. Each has title to that undivided interest, and neither can convey

it to the prejudice of the other. The grantor may himself be estopped, perhaps, by such a sale, but it does not affect the rights of his co-tenant. The defendant claims a title here, in himself alone. That he could not acquire, but by a purchase from all the tenants in common. His title, as against the plaintiffs' title, is a nullity—nor does he stand in the relation, to them, of a tenant in common. Such we hold to be the law, arising on the facts of this case; and the Court, therefore, erred in charging the Jury, that according to the law of the case, they might consider of the question, whether the plaintiffs were tenants in common with the defendant, for such we consider to be the effect of the charge. See *Hall vs. Page*, 4 *Ga. R.* 434, '5. *Leonard vs. Scarborough and wife*, 2 *Kelly*, 73. 4 *Kent*, 368. 12 *Mass.* 348. 24 *Pick.* 329. 4 *Conn.* 495. 5 *Conn.* 363. 3 *Yerg.* 492.

Several interesting questions were made in the argument of this cause, which were not made or determined below. The points now decided, are the only ones made on the record. Justice to the Court below, requires us to abstain from the decision of questions, upon which the presiding Judge gave no opinion, and the determination of which is not necessary to the case made by the record.

Let the judgment below be reversed.

No. 9.—JOHN DOE, *ex dem.* WM. CUMMING and others, plaintiffs in error, *vs.* ROE, C. E. and JAMES M. BUTLER, tenant in possession.

[1.] There can be no special pleading in ejectment, for the *consent rule*, which admits lease, entry and ouster, compels the defendant to plead only "not guilty," or the Statute of Limitations.

[2.] The general issue in ejectment denies the defendant's possession, as well as the plaintiff's title.

Ejectment, in Bryan Superior Court. Motion to dismiss defendant's plea, decided by Judge FLEMING, at Chambers, Dec. 22d, 1848.

An action of ejectment was commenced in Bryan Superior

Court, returnable to April Term, 1848, for a certain tract of land, known as Sandy Hill.

At the first term, James M. Butler, the alleged tenant, filed the following pleas:

"And now, at this term, comes the defendant, James M. Butler, in his proper person, the force and injury when, &c. and says that he is not guilty of the said trespasses in ejectment, as above laid to his charge, and of this he puts himself upon the country.

"And for further plea in this behalf, the said James M. Butler says, that at the time of the commencement of the aforesaid action in this behalf, against him, he was not in possession of the said premises, in the said plaintiff's declaration mentioned, or any part thereof, nor did he then or now claim any right, title, interest, property or possession of, in or to the said premises, but that the said premises are the property of, and claimed and held, by one John Bailey, of the County of McIntosh, in the State of Georgia; and further, that the said James M. Butler disclaims all right, title, interest, possession, property, claim or demand of, in or to the said within mentioned premises, or any part thereof; and of these several matters, he puts himself upon the country.

(Signed,) JAMES M. BUTLER,
in proper person."

At the trial term of said cause, the plaintiff, by his counsel, moved to dismiss and set aside the said pretended pleas, and to enter a judgment by default, against the casual ejector—

1st. Because, that part of it purporting to be the general issue, did not confess lease, entry and ouster.

2nd. Because the second part of said paper is wholly inconsistent with the general issue, and ought not to be allowed to stand.

3d. Because the latter part of said pretended plea, being special in its character, could only have been filed by leave of the Court; and being dilatory in its character, even although it had been put in by leave of the Court, it should have been passed upon and disposed of by said Court, at the first term.

4th. That the whole of said paper was contrary to the rules of pleading, and illegal; and if special circumstances authorized its admission, the existence of such special circumstances should have been shown at the first term.

Plaintiff's counsel farther moved the Court, if the latter part of

the plea was ruled illegal, that said Butler should be ruled to trial on the general issue.

The presiding Judge overruled the motion, and decided that said Butler should have his option to go to trial on the first part of his plea, as the general issue, or on the latter part of said paper, if verified by affidavit.

The defendant's counsel struck out the first part of the plea, and went to trial upon the latter part, (verified by the affidavit of defendant,) upon the question of possession alone, the Court confining the testimony to that question.

The Jury failing to return a verdict, a mis-trial was ordered, and by consent, it was ordered that plaintiff's motion to dismiss the plea and take judgment by default, should be re-argued before Judge Fleming, at Chambers.

Upon which hearing, the motion was overruled.

The Court deciding that said Butler was properly before the Court on the plea denying his possession, and that said plaintiff was properly ruled to trial, on said plea—which decisions are excepted to.

HARDEN & LAWTON, for plaintiff in error, were stopped by the Court.

DE LYON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Lord Coke deemed special pleading so delightful a science, that its very name was derived, according to him, from its pleasurable nature. "*Quia bene placitare omnibus placet.*" My brethren, who were engaged in the management of this case, in the Circuit Court, will pardon me for suggesting, that they seem intent on restoring this exquisite recreation to its pristine state.

Had a motion been made to dismiss this writ of error, as having been prematurely brought, it must have been sustained. No final judgment has been rendered in the cause, below. There being a *mis-trial*, all the issues of law and of fact, are still pending, and the presumption is, they will be correctly adjudicated.

The origin and growth of the action of ejectment, will be found fully stated by Mr. Sergeant Adams, in the opening chapter of

his Treatise on Ejectment. It is an action in which a tenant, for a term of years, claims damages for a forcible ejection or ouster from the land demised. It was invented in the reign of Edward II. or Edward III. to enable suitors to escape from the thousand niceties in which real actions were embarrassed; and which, moreover, were cognizable in the Courts of Common Pleas only. Real actions having been abolished, ejectment is the regular mode of proceeding, for the trial of possessory titles. Anciently, *damages* only were recoverable—subsequently, the *land* itself. It is needless to add, that this form of action is entirely fictitious. It is thus described and illustrated by *Lord Mansfield:*

"An ejectment is an ingenious fiction, for the trial of titles to the possession of land. In *form*, it is a trick between two, to dispossess a third, by a sham suit and judgment. The artifice would be criminal, unless the *Court* converted it into a fair trial between the proper parties. The great advantage of this fictitious mode of proceeding is, that being under the control of the Court, it may be so modelled as to answer in the best manner, every end of justice and convenience. The control which the Courts have over the casual ejector, enables them to put any terms upon the plaintiff which are just. He was soon ordered to give notice to the tenant in possession. When the tenant in possession asked to be admitted defendant, the Court was enabled to impose conditions; and therefore, obliged him to allow the fiction, and go to trial upon the real merits, without being entangled in the niceties of pleading on either side. *Fairclaim vs. Shamtitle*, 3 *Burr.* 1294.

[1.] Four things are necessary to enable a person to support an ejectment, viz: title, lease, entry and ouster. And as the three latter are only feigned in the modern practice, the plaintiff would be non-suited at the trial, if he were obliged to prove them. The Courts, therefore, compel the defendant to enter into what is called the *consent rule*, by which he undertakes that at the trial he will confess the lease, entry and ouster to have been regularly made, and rely solely upon the merits of his title. In England, at present, the *consent rule* admits *possession* also. The *consent rule* is presumed to be taken in every case, and being at best but a useless form, its observance is dispensed with in point of fact; and this dispenses with all special pleading in ejectment. The defendant can plead only "not guilty," and the Statute of Limitations.

[2.] With us in Georgia, as in most of the States, the general issue in ejectment denies the defendant's possession, as well as the plaintiff's title. *Stevens vs. Griffith*, 3 *Ver. R.* 448.

It was not necessary, therefore, in this case, that the defendant should have pleaded specially, that he was not in the possession of the premises in dispute, at the time suit was commenced. And yet it was not competent for the plaintiff, on the other hand, to demur to this plea. At most, it was but an act of supererogation. The defendant did more than duty required of him. The Court was wrong in compelling the defendant to elect between these pleas, and in sending him to the Jury, upon the question of possession *alone*. The Court might very properly, for the symmetry of its records, have directed this supernumerary plea to have been stricken out as surplusage.

It is true, that if the verdict had been for the defendant, it would have ended the case; but if the finding had been for the plaintiff, upon this issue of *possession*, still he would have to show title in himself, before he could have recovered. Under our system of appeals, therefore, this mode of procedure might have involved *four* trials instead of *two;* and for this reason, if no other, the practice should be discountenanced.

Let the cause be remanded, and further proceedings be had, in conformity with this opinion.

No. 10.—ALEXANDER SCRANTON, *et al.* plaintiffs in error, *vs.* ROSE DEMERE and JOHN DEMERE, by *prochein ami*, defendants.

[1.] Where a warrant of attorney was executed under the rule of Court, to confirm an appeal entered by the agent of the party to the suit, in which it was recited, that "I do hereby ratify and confirm all that my said attorney has done, or may hereafter do in my name, in the premises, without incurring cost to me:" *Held*, that the authority of the agent to enter the appeal, was ratified by his principal, and that he would be bound for all costs necessarily incident to the entering such appeal, notwithstanding the qualification in the warrant of attorney.

[2.] Where a free person of color is a party to a suit, in the Courts of this State, and dies, the suit abates; and administration should be taken out on the estate of such free person of color.

[3.] Where a decree was obtained in favor of legatees, against the executors of the testator's will, for their legacies under it, and the executors have admitted assets in their hands, sufficient to pay them: *Held*, that property which had been distributed to another legatee, under the will, with the assent of the executors, could not be first seized and sold in satisfaction of such decree, against the executors alone, when it did not appear there was any deficiency of assets to pay all the legacies, and the legatee whose property was taken, was *no party* to the decree; notwithstanding it was declared by the decree that it should be a lien upon, and bind the whole estate of the testator. The estate of the testator, in the hands of the executors, is *first* liable for the satisfaction of the decree, before such portion of it as had been distributed to legatees who were not parties to the decree, and who had been in possession of it for several years, with the assent of the executors.

Levy and claim, in Glynn Superior Court. Decided by Judge FLEMING.

In 1828, Raymond Demere made his will, the third item of which was as follows:

"Whereas, from the fidelity of my negro man Joy, and my negro woman Rose, who not only saved and protected a great part of my property during the time the British occupied St. Simons, but actually buried and saved a large sum of money, with which they might have absconded and obtained their freedom; it is therefore my will, and I direct my executors to petition the Legislature to pass an Act for the manumission of my said negroes, and their two children, Jim and John, and any other children Rose may have, setting forth their meritorious behavior and faithful conduct during a period of invasion, when nearly all the negroes on St. Simons deserted and joined the British."

"It is also my will, and I direct if the said Joy, Rose and her children are freed by law, and remain in Georgia, that the said Joy, Rose and her son Jim, shall each receive two cows and calves from my stock on St. Simons."

After making a devise of land to said negroes, testator further provides: "And also, that said Joy, Rose and her children, shall receive from my estate, one year's provision, from the time they take possession of their land; and also, that my executors shall pay from my estate, or have the payment of the same secured, viz: to my negro woman Rose, during her lifetime, an annuity of seventy-five dollars; and also, the further sum of seventy-five dollars, for the support of her son John, until he arrives at the age of twenty-one years; and then, my executors are direct-

ed to pay unto the said John, from my estate, the sum of $1000 lawful money."

After making provision for the education of John, and the protection of their rights, the testator divides his estate, real and personal—one half to Joseph Demere, his son, and one half to certain grandsons.

The Legislature of Georgia manumitted the said slaves, as desired in the will. The executors failed to pay the legacies and annuities to Joy, Rose and her children, but distributed the whole estate to the residuary legatees. In 1843, (Joy and Jim being dead,) Rose Demere and John Demere, by their next friend, Alexander Mitchell, filed their bill against the executors, praying an account of their annuities and legacies; and such proceedings were had, that at April Term, 1845, a decree was rendered in favor of the complainant, for and in behalf of Rose Demere, "the sum of $3,000, the amount due her 31st December, 1842, $150 for her annuity for 1843, and $75 for every year as long as she lives;" and for and in behalf of John Demere, "the sum of $1024." "And we further decree, that this decree shall be a lien upon, and bind the whole estate of the said Raymond Demere."

Execution issued thereon, and the grandsons, residuary legatees of one half the estate, paid thereon, one half of the same.

On the 13th March, 1846, the execution was levied on thirteen negroes, viz: Charles, Harrington, Flora, Adam, Eve, Cupid, Judy, Paul, Rhina, Sam, Mary and Flora, to which negroes a claim was regularly interposed by Alexander Scranton and Edwin M. Moore, trustees.

At November Term, 1847, a verdict was rendered by the Petit Jury, in favor of the claimants. Upon said verdict being rendered, Solomon Cohen, Esq. not being the attorney at law of the plaintiffs in *fi. fa.* moved the Court at said term, for leave to file a warrant of attorney from the plaintiff, within sixty days to appeal, and did on that day enter an appeal, and thirty days thereafter, under said order, filed the following warrant of attorney:

"Rose Demere, &c. plaintiffs in *fi. fa.* *vs.* John Cooper, *et al.* defendants, Moore & Scranton, trustees, claimants.	Glynn Superior Court, Claim, &c.

Know all men by these presents, that I, Alexander Mitchell,

prochein ami of Rose and John Demere, do hereby make, constitute and appoint Solomon Cohen my attorney, to enter an appeal in the above stated case, from the verdict of the Petit Jury, rendered at the November Term of the Glynn Superior Court, in the year 1847, hereby ratifying and confirming all that my said attorney has done, or may hereafter do, in my name, in the premises, *without incurring costs to me.*

Witness my hand and seal, at Darien, this 20th Dec. 1847.

ALEXANDER MITCHELL, *Pro. Am.* [L. S.]

Witness, SAMUEL PALMER, J. I. M. C.

Before the appeal or verdict of the Petit Jury, Rose Demere died.

At the April Term, 1848, a motion was made to dismiss the appeal, on the following grounds:

1st. That the appeal was not entered in conformity to law.

2nd. That no power of attorney, authorizing said appeal to be entered, has been filed.

3d. That there were no legal parties capable of entering an appeal.

By consent, the above motion, and the law and facts of the case, were agreed to be argued before Judge Fleming, at Chambers, and his decision upon the law and testimony to be entered as the judgment of the Court, and a verdict was taken accordingly.

It was proven before Judge Fleming, that Joseph Demere married, and in 1833 made an assignment of his property to pay his debts, and the residue settled in certain trusts, for himself and wife, and next of kin. In 1839, Joseph Demere died, and his widow having intermarried with one James Moore, made an agreement with the next of kin, by which the property was divided, and thirty-four negroes were conveyed, with the assent of the executors, to the claimants, as trustees for her. The negroes levied on were a portion of these.

It was proven by the depositions of one James Mayo, that "five of the above named negroes, (the negroes levied on,) were purchased with funds of the estate of Raymond Demere, Sr. which went to Joseph Demere, as his part of his share of said estate, with the assent of the executors. The five negroes are named Harrington, Flora, Charles, Cupid and Judy."

Upon hearing argument upon the motion to dismiss the appeal,

and also upon the merits of the cause, the Court below overruled the motion to dismiss the appeal, and also decided that the suit did not abate by the death of Rose Demere, and that the negroes levied on were subject to the execution; to which decision of the Court the counsel for the claimants excepted, and now assign the same for error here.

HENRY & WARD and LLOYD & OWENS, for plaintiffs in error.

We respectfully submit to the Court the following propositions, on the part of the plaintiffs in error:

1st. Where a claim case is pending, under the provisions of our Statute, and the person for whose use the same is pending dies, the said suit abates until his legal representatives are made parties. 3 *Kelly*, 159.

2nd. By the death of an infant, suing by his guardian, the suit is abated. 41 *Law Lib.* 51.

3d. Letters of administration may and ought to be granted upon the estate of deceased free persons of color, who die intestate, for although they have no political, they have personal rights. 4 *Ga. R.* 72.

4th. One of those rights is in the right of inheritance as heirs, legatees and distributees. *Prince*, 799. *Act of* 1830, *p.* 187. 2 *Kent*, 258, *note.*

5th. Even if the right to inherit as heirs, legatees and distributees, does not exist, the property, at the death of the ward, passes out of the guardian, and vests immediately in the people of this State; and if letters of administration be necessary to reduce the same into possession, the escheator is bound, by his oath of office, to take out such letters. *Prince*, 789. *Hotch.* 488, 489.

6th. But if we are in error on the foregoing propositions, the appeal ought to have been dismissed by the Court below, the same not having been entered in compliance with our Statute, in such cases made and provided. Under our Statute, there are but two modes of entering an appeal; one by giving bond, the other by filing an affidavit. In this case, the former mode has been adopted. The party, therefore, appealing, must be bound for the costs. This can only be done by himself, or by an agent duly authorized for that purpose. It is not pretended that he is bound

by his own act, but by the act of his agent, Solomon Cohen, Esq. duly authorized for that purpose.

7th. An agent, constituted for a particular purpose, under a limited power, cannot bind his principal, if he exceed that power. 2 *Kent's Com.* 620. *Story on Contracts*, 201, 202. 28 *Law Lib. top page*, 78.

In the discussion of the merits of this case, two questions present themselves for the consideration of the Court: 1st. What were the rights of these claimants, (or plaintiffs in error,) independent of the decree of 22d April, 1845? 2nd. How have those rights been affected by that decree?

1st. What are the rights of the plaintiffs in error, independent of the above decree?

Upon the death of a party, the whole interest in the personal property vests in the executor, and his disposition of it is binding against creditors, distributees and legatees, so long as he remains solvent. 4 *Term R.* 625. 1 *Kelly*, 388.

By the assent of the executor to the legacy, the whole legal interest vests in the legatees, and they may bring trover or ejectment against the executor, in their own name. *Toller on Ex'rs*, 311. 6 *Carr & Payne*, 126. 3 *East*, 120. 1 *Story's Eq.* 554. 1 *Kelly*, 645.

The executors having assented to the legacy, and the legal estate having passed out of them, there remains no legal interest in them, which can be levied on by execution. *Dudley*, 99. *Harper's Law R.* 20. 2 *Hill*, 522. 1 *Minor*, 95.

Not only the legal but the equitable interest in the estate passes out of the executor, by his assent to the legacy, and vests in the legatee. We assert the above principle—

First. Because the legacy having been delivered over by the executor, the law will presume that he has retained in his hands assets of the estate, sufficient to pay all the remaining legacies, and all debts, and if solvent, the Court will compel him to do so. 2 *Vesey, Sr.* 194. 25 *Law Lib.* 243. 2 *Comyn's Dig.* 498, 499.

Second. Because, even if there should be a deficiency of assets, unless that deficiency existed at the time the legacy was paid, a legatee who has failed to secure his legacy, cannot, even by bill, claim contribution. *Toller on Ex'rs*, 341. 1 *Peere Williams*, 495. 1 *Story's Eq.* 110.

There is nothing in the wording of this will, which exempts

the legacies to Rose Demere and John Demere, from the ordinary rule. 18 *Law Lib.* 192. 25 *Ib.* 235, 236. *Fonblanque, top page,* 563. 3 *Atk.* 693. 2 *Johns. Ch.* 620.

2d. How are the rights of these plaintiffs in error, affected by the decree of 22d April, 1845?

The latter clause of this decree, by which our property is sought to be subjected to the execution issuing thereon, can only be applied to that portion of the estate of Raymond Demere, Sr. in the hands of the executors, properly applicable to the payment of these legacies. *Bailey's Eq.* 163.

First. Then, independent of the above decree, the plaintiffs in execution, under the facts of this case, can have no claim against the property levied on, either at Law or in Equity.

Second. By that decree, our rights have not been in any manner affected.

S. Cohen and Harden & Lawton, for defendants in error.

The counsel for the defendants in error submit the following statement of points and authorities:

1st. The suit has not abated, and therefore there is no necessity to make new parties. *Cooper & Worsham vs. City Council,* 4 *Ga. R.* 68. *Prince's Dig.* 789, 802, 808, 797, 799, 225, 233. *Constitution of Georgia,* §1, *Art.* 8. 1 *Story's Eq. Pl. sec.* 354.

2nd. The escheator cannot be made a party. *Hotch.* 489, 490. *Charlton's (T. U. P.) Rep.* 313. 2 *Bailey,* 387.

3d. The appeal was properly entered, and the power of attorney is full and complete. *Prince's Dig.* 789, §56. 1 *Kelly,* 275. 2 *Ib.* 236.

4th. Legacies are not barred by the Statute of Limitations, and the property of the testator, in the hands of a distributee, is liable to an annuitant. *Irby vs. McRae,* 4 *Dess.* 422, 432. *Glenn vs. Fisher,* 6 *Johns. Ch. R.* 33. *Luffton vs. Luffton,* 2 *Johns. Ch. R.* 614. *Maxwell vs. Maxwell, R. M. Charlton's R.* 462, 465, *et seq. Davies vs. Wattier,* 1 *Sim. & Stewart,* 463. *Cairnes vs. Iverson,* 3 *Kelly,* 132, 135. *Grigg vs. Summerville,* 1 *Russ. & Mylne,* 338. *March vs. Russell,* 3 *Mylne & Craig,* 32, 41. 1 *Story's Eq. Jur. sec.* 92, *and note.*

By the Court.—Warner, J. delivering the opinion.

Three questions are made by the record, for our consideration and judgment, in this case.

[1.] 1st. Whether the motion to dismiss the appeal, entered under the authority of the warrant of attorney, was properly overruled by the Court below.

2d. Whether the suit abated, by the death of Rose Demere; and—

3d. Were the negroes levied upon, in the possession of one of the legatees under the will, with the assent of the executors, subject to be first taken, in satisfaction of the decree made against the executors, as stated in the record?

The motion to dismiss the appeal was, in our judgment, properly overruled by the Court below. The appeal was entered before the warrant of attorney was procured from Mitchell, authorizing Mr. Cohen to act in the premises. Time was given by the Court, in accordance with the third Common Law rule of practice, to file the warrant of attorney, which was done within the time allowed. In the warrant of attorney, Mr. Cohen is expressly authorized to *enter an appeal in the case*, from the verdict rendered by the Petit Jury, and the principal expressly ratifies and confirms all that his said attorney *has done*, or may hereafter do in his name in the premises, *without incurring costs to him.* It is objected that the qualification as to the *costs*, in the warrant of attorney executed by Mitchell, renders the appeal entered by his attorney, Mr. Cohen, before the execution of the warrant by him, void, inasmuch as the appeal could not be entered, without the payment of costs. The appeal, however, had been already entered, when the warrant of attorney was executed, and by its express language, Mitchell *ratifies* and *confirms* what his attorney *has done* in his name, *in the premises.* One of the legal consequences which attach, on the entering an appeal, is the payment of costs. We cannot suppose, by any fair construction of this warrant of attorney, that it was the intention of Mitchell to authorize his attorney to do an act, and annex a condition in the authority given him, which would defeat its accomplishment. The construction which we give to the warrant of attorney is, that Mitchell intended to confirm and ratify the appeal entered in the case, by Mr. Cohen, his attorney, without incurring any other or greater amount of costs, than such as was *legally incident* to entering the appeal. Whatever may have been his intention,

we think that inasmuch as the payment of costs is a necessary and legal incident to the entering the appeal, and having *expressly ratified* and *confirmed* the act of his attorney, in entering it, he would in law be bound for the *legal costs of the appeal*, notwithstanding the qualification in the warrant of attorney.

[2.] Did the suit abate in the Court below, by the death of Rose Demere? In *Barker vs. Bethune*, (3 *Kelly*, 159,) we held, that on the death of the usee of the plaintiff in execution in a claim case, the suit abated. But it is said that the decedent in this case, being a free person of color, does not come within the principle of the decision in *Barker vs. Bethune*, for the reason, no administration can be granted on her estate. So far as we know, this is a new question in the Courts of this State. In the case of *Cooper and Worsham vs. The Mayor and Aldermen of Savannah*, (4 *Ga. R.* 72,) we held that free persons of color were not citizens, as contemplated by our Constitution and Laws; that they had no *political* rights, and had always been regarded as our wards. By the Act of 22d December, 1819, free persons of color are authorized to hold property, and their *descendants* to inherit it after their death. *Prince*, 799. By the Act of 1829, they may sue and be sued in our Courts, by their next friend or guardian. *Prince*, 802. It is said, if administration may be granted on their estates, then, the rules of granting administration under our laws, must be extended to them; and the next of kindred of the decedent would be entitled to it, and thus they would exercise *political* rights, by holding the office of administrator. Viewing this class of our population as wards, and entitled to our protection, we think administration may be granted on their estates, without doing violence to our laws and institutions, or the declared policy thereof. We place them on the same footing with infants, with regard to administration. If an infant be the next of kindred to the deceased intestate, and thus entitled to the administration, it will be granted to his guardian, *durante minore ætate*. 1 *Williams' Ex'rs*, 295. So, upon the death of a free person of color owning property, his guardian would be entitled to administration on his estate, and not the next of kindred, as the argument supposes, for the reason that a free person of color has not the *legal capacity* to be an administrator in this State. The right of administration on their estate, would seem to follow as a necessary legal consequence, from the right

of their descendants to inherit their property after their death. In case of a contest for the administration, the guardian of the next of kindred to the deceased, would be entitled to it; if no guardian, then, such discreet white citizen whom the Court of Ordinary might think proper to appoint. By granting administration on their estates, the rights of this class of our population will be much better protected, as well as the rights of their creditors, and no injury result to the community. Their estates will be in the hands of the responsible officers of the law, who will be bound to make a just and equal distribution thereof, after the payment of debts, to the next of kindred, who may be entitled to it as their descendants. We are therefore of the opinion that the suit in the Court below abated on the death of Rose Demere, and that administration should be taken out on her estate.

[3.] Is the property in the possession of the legatee, subject to the execution, according to the facts exhibited by the record? The negroes had been distributed to Joseph Demere, the legatee, by the executors of Raymond Demere, and had been in his possession, and those claiming under him, for several years, with the assent of the executors. The decree had against the executors, it is declared, shall be a lien upon, and bind the whole estate of the testator, Raymond Demere. The legatee, whose property is now sought to be sold, in satisfaction of the decree, was *no party* to the suit in which it was rendered. The decree is against the executors alone. It is insisted by the plaintiff in execution, that inasmuch as the decree is a lien upon, and binds the whole estate of the testator, that the negroes in the hands of the legatee, distributed to him as a part of the testator's estate, are subject to be seized and sold, in satisfaction thereof.

The question made by the record before us, is not solely as to whether the decree binds the whole estate of the testator, for the payment of the complainants' legacies, but it is as to what *portion* of that estate shall *first* be applied to the payment of that decree. The complainants in the decree are not *creditors*, but they are *voluntary legatees*, under the will of the testator. It was the duty of the executors to have retained in their hands a sufficient portion of the assets of the estate of their testator, to satisfy the legacies of the complainants in the decree, when they made distribution to the other legatees, and in the absence of all proof to the contrary, we are bound to presume they did so retain. The

bill on which the decree was rendered, was filed by the complainants, against the executors of the testator, for an account and payment of their legacies, out of the *assets* of the testator, in *their hands*. The executors have not insisted upon the plea of *plene administravit*, in their answers, and a general decree having been rendered against them, on a bill to account and admit assets, must be considered as establishing the fact that they had, at the time of the rendition of the decree, a sufficiency of the assets of the testator in their hands, to satisfy and pay it. *Erving vs. Peters*, 3 *Term R.* 685. *Ramsden vs. Jackson*, 1 *Atkyns R.* 294.

The decree against the executors being an admission that they have in their hands a *sufficiency* of the assets of the testator, to satisfy and pay it, shall the execution be levied upon the property of the testator, in the hands of the legatee, or shall it be satisfied out of the testator's estate, remaining in the hands of the executors, which has not been distributed? It is our judgment that the execution issued, to enforce the decree made against the executors alone, should be satisfied out of the assets of the testator, in the hands of the executors, and not out of that portion of the testator's estate, distributed to the legatee, the more especially when such legatee was *no party* to that decree. We do not desire to be understood as intimating an opinion that the legatee would be a *necessary party* to a bill, like the one upon which this decree is founded, it being simply a bill on behalf of the complainants, against the executors, to enforce the payment of their legacies, out of the *assets* of the testator, in *their hands*. But when there is a *deficiency* of assets, to pay all the legatees, and there is to be an *abatement* of the several legacies under the will, in favor of a particular legatee, who claims not to have received his due proportion of the assets, and those to whom distribution has been made by the executors, are required to refund a portion of their legacies, such legatees as are required to refund, ought to be made parties, because their interest is affected by the decree. *Story's Eq. Pl.* 184, *sec.* 203. *Egberts vs. Wood*, 3 *Paige's Ch. R.* 520. In *Luffton vs. Luffton*, (2 *Johns. Ch. R.* 614,) it was held, that if an executor pays one legatee, and there is afterwards a *deficiency* of assets to pay the others, the legatee so paid, must refund a proportionable part. But if the deficiency of assets has been occasioned by the *waste* of the executor, the legatee who is paid may retain the advantage he has gained by his le-

gal diligence, as against his co-legatees, but not against a *creditor.* In the case before us, there is no evidence of *waste* by the executors; but so far as the record shows, the executors have now in their hands assets of the testator sufficient to pay the decree rendered in favor of the complainants, who are co-legatees with Joseph Demere, under the will. It does not even appear there is any *deficiency* in the assets, to pay *all* the legatees. On what principle then, can the property of the legatee be seized and sold, in satisfaction of a decree, obtained by one co-legatee for his legacy, against the executors alone, who admit they have in their hands sufficient assets of the testator to pay it? The decree undoubtedly binds the whole estate of the testator, but what portion of that estate shall *first* be appropriated to its payment, is the question? We are of the opinion, that as there is no *deficiency* of assets apparent on the face of the record, for the payment of *all* the legacies, and that Joseph Demere having received his distributive share, as a legatee under the will, with the assent of the executors, such distributive share is not liable to be seized and sold, in satisfaction of a decree rendered against the executors, in a suit in which the legatee was not a party, when it is admitted by the executors they have in their hands sufficient assets to pay it. The assets of the testator, in the hands of his executors, are *first* liable for the payment of the decree. Let the judgment of the Court below be reversed.

No. 11.—George G. Fleming, guardian, &c. plaintiff in error, *vs.* Elijah Townsend, defendant.

[1.] Possession retained by the vendor, after an absolute sale of real or personal property, is *prima facie* evidence of fraud, which may be explained, and after the possession is proven, the burthen of explaining it rests upon those who claim under the sale; and the rule is applicable to voluntary conveyances, and to sales for valuable consideration.

[2.] *Purchasers* are not embraced in the terms of the *Stat.* 13 *Elizabeth*; nor is *personal property* embraced in the terms of the *Stat.* 27 *Elizabeth*; but purchasers fall within the spirit of the 13 *Elizabeth*, and *personal property* within the spirit of 27 *Elizabeth.*

[3.] Upon Common Law principles, a voluntary conveyance is void, against a subsequent *bona fide* purchaser for value, without notice.

[4.] *Held*, that to sustain a voluntary conveyance against a subsequent *bona fide* purchaser, for valuable consideration, notice to the purchaser must be *actual;* and that the registration of the conveyance is not such notice as will deprive him of the benefit of the *Stat.* 27 *Elizabeth.*

Trover, in McIntosh Superior Court. Tried before Judge Fleming, November Term, 1848.

This was an action of trover, for the recovery of two negro slaves, Joe and Elsy. Upon the trial it appeared, that on the 4th day of May, 1835, John L. Taylor, by bill of sale, conveyed the said negroes, with one other, together with certain stock—cattle, hogs and horses—to said George G. Fleming, for a consideration expressed on its face, of $1400; and that on the 7th May, 1835, said Fleming, for the same expressed consideration, conveyed the said negroes to the children of John L. Taylor. Both bills of sale were recorded on the 19th of October, 1835. The negroes remained in the possession of John L. Taylor. His children were minors, and had no other guardian, and lived with him. The witness, who drew the bills of sale, stated that five or ten dollars were paid in cash by Fleming to Taylor, and that he had an indistinct recollection of a note having been given.

On the 1st January, 1842, for the consideration of $800, the said John L. Taylor, by bill of sale, conveyed Joe and Elsy to the defendant, Elijah Townsend, the negroes being then under levy of executions against John L. Taylor, and in his possession.

A verdict was rendered for the defendant. Subsequently, a motion was made for a new trial, on the following grounds:

1st. Because the verdict is contrary to law.

2nd. Because the verdict is contrary to evidence.

3d. Because his Honor charged the Jury that the retention of possession by a vendor or donor of personal property, after an absolute conveyance, directly or indirectly, to his children, is *prima facie* evidence of fraud.

4th. Because his Honor charged the Jury that by the Common Law and the English Statutes, the retention of possession of personal property, by the vendor, even after a sale to his children, is *prima facie* evidence of fraud, as against subsequent purchasers, as well as creditors, although the deed of conveyance should be duly recorded, according to the laws of the State of Georgia.

5th. Because the verdict is contrary to law and evidence.

Which motion was overruled by the Court, and this decision is here alleged to be erroneous.

THOMAS T. LONG and HARDEN & LAWTON, for plaintiff in error.

DELYON & LLOYD, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] The first proposition of the presiding Judge, to which the plaintiff in error excepts, is this: "The retention of possession by the vendor of personal property, after an absolute sale, is *prima facie* evidence of fraud, and if unexplained, becomes conclusive." This point has been so often before this Court, that I do not consider it an open question. Few, if any Courts, have ventured to question that the retaining of possession, was *a badge of fraud.* The question has been, whether it was not, *per se*, a fraud, not susceptible of explanation, and which, of itself, would annul the sale. It has also been a question, as to what amount of explanation would remove the presumption of fraud from possession; and whether the Courts should not lay their hand upon the matter, and adjudge, as a question of law, when the presumption was rebutted, rather than that the whole question of explanation should be left in the hands of the Jury. That possession is a *mark* of fraud, has not been doubted—certainly, not since *Twyne's* case, in which it was resolved to be one. This Court has adopted the rule, equally applicable to real and personal estate, to sales for valuable consideration, and to voluntary deeds, *that possession in the vendor, in case of an absolute sale, is prima facie evidence of fraud; that it may be explained; that the onus of explanation, after possession is proven, is upon the grantee, and that the question of fraud or not is submitted to the Jury. Peck vs. Land*, 2 *Kelly*, 12. Those who are curious to explore this question, will find it critically and ably discussed in the notes of the American editors, to Twyne's case. 1 *Smith's Leading Cases*, 29 *to* 60. Whether this transaction be viewed in the light of a sale from Taylor to Fleming, or taking the deed from Taylor to Fleming, and from Fleming to Taylor's children together, as a voluntary conveyance, by indirection, from Taylor to his chil-

dren, the rule was correctly applied to it by the Circuit Judge. Considering this point as settled by this Court, I enter into no discussion, but leave it as a standing decision.

[2.] The rule thus established by this Court, has received its application, in cases of contests between *creditors of the grantor* and the grantee, or those claiming under him. The Statute of 13 *Elizabeth*, it is conceded, covers such cases, because that Statute makes void all fraudulent conveyances of *lands* or *goods*, made to defraud *creditors*. *Purchasers* are not embraced in its provisions, except by a saving of its operation against purchasers, for value, without notice of the fraud. It is argued that this cause presents a contest between a subsequent *purchaser* and the grantee under the first conveyance, and therefore does not fall within the terms of the 13 *Elizabeth*, that Act applying alone to *creditors*. That I concede. It is farther contended, that the rule laid down by this Court, does not apply, under the Statute 27 *Elizabeth*, because that Statute relates to *lands* alone. This being a conveyance of *personal property*, it is claimed that it cannot be void by that Statute; and farther, that the rule of presumption as to fraud, growing out of the retaining of possession, does not apply to it. The Circuit Judge held that the Statute 27 *Elizabeth*, applied to personalty as well as to realty, and that the possession in the vendor was, under that Statute, and also by the principles of the Common Law, independent of it, *prima facie* evidence of fraud. This decision is also excepted to.

The facts in this case, we think with the Circuit Judge, show a voluntary conveyance by Taylor, indirectly, to his children. We infer from the evidence, that it was an attempt circuitously to settle the property, by Taylor, upon his children. That he was entitled to do, directly or indirectly, if not done with a view to defraud creditors or purchasers. *Voluntary* conveyances of *lands* are within the Statute 27 *Elizabeth*, and may be set aside in favor of *bona fide* subsequent purchasers, for fraud. I state this proposition, irrespective of the question of *notice*, which I shall consider hereafter. *Atherly on Marriage Settlements*, 187 *to* 206. *Goodright vs. Moses*, 1 *Bl. R.* 1019. *Evelyn vs. Templar*, 1 *Bro. R.* 148. *Doe vs. Manning*, 9 *East*, 59. *Cormick vs. Trapaud*, 8 *Dow.* 60. 1 *Smith's Notes*, 39.

Is any conveyance of *personal property* within the 27*th Elizabeth?* By its terms, conveyances of personal property are ex-

cluded. That is to say, they are not, by its terms, embraced in the Act. By the 13 *Elizabeth*, creditors are protected against fraudulent conveyances of *lands* and *goods*—not only existing creditors, but subsequent creditors. Such is the construction of that Act in England. Now it is difficult to conceive why a subsequent creditor should be protected against a fraudulent conveyance of personal property, and not a purchaser, who without notice, has paid his money *bona fide*. His equity is as strong as the creditor's. The Acts of 13 *and* 27 *Elizabeth*, are *in pari materia*, and construed together. It is no forced construction of both, to hold purchasers of personal property, within the provisions of the consolidated Act. The spirit of the Act of 13 *Elizabeth*, would let in purchasers as well as creditors, and the spirit of 27 *Elizabeth*, would let in personal property, as well as real. There doubtless were reasons in England, growing out of the paramount value of real estate, as late as the reign of *Elizabeth*, why the Legislature should throw around the purchaser of lands, stronger protection than the purchaser of personalty. Those reasons do not exist here. In Georgia, personal property, by which I mean slaves more particularly, is relatively more valuable than real property. Socially, politically, and as property, they are the most important of all values. Frauds are more easily perpetrated in the sale of slaves than of lands. It is clearly the policy of our State, to extend the provisions of the Statute of *Elizabeth* to personal property.

[3.] Whether it be true or not, as stated by *Lord Mansfield* in *Cadogan vs. Kennett*, that the Common Law would have accomplished all the ends proposed by the Statutes of *Elizabeth*, without those Statutes, I am satisfied that upon Common Law principles, a voluntary conveyance is void against subsequent *bona fide* purchasers, for a valuable consideration, without notice. The Statute simply declares conveyances to defraud purchasers, void. It goes upon the idea of fraud. It however does not declare in what the fraud shall consist, or how it shall be established. It does not, for example, make a conveyance void, simply because it is voluntary. It leaves the question of fraud to be determined, by reference to principles and rules, recognized at, and established by the Common Law. Whence, for example, are those indicia of fraud, resolved in *Twyne's* case, derived if [illegible] the Common Law? Certainly not from the Statute—that is silent, as to

what shall be badges of fraud. And is it an idea new to the Common Law, that a conveyance *intended to defraud*, is void? Fraud vitiates all transactions into which it enters.

No principle of Equity is better settled, than that Equity will refuse its aid to enforce or sustain a fraudulent contract, to the prejudice of third persons. Once establish the fact of fraud, and the conveyance fails. In contests between the original grantee, under a voluntary conveyance, and the subsequent purchaser, the interest of the former is left out of the reckoning. It is a question of fraud or not, upon the rights of the purchaser, perpetrated by the grantor. Now, in case of a voluntary conveyance, how is it that the Courts arrive at the conviction that it is void? By inferring from direct evidence, or from circumstances, that it was *intended* to be a fraud. By many adjudicated cases in England, the Courts inferred the fraud, from the fact of a subsequent conveyance, and held that the conveyance was void, even with notice; making the fraud to relate back from the subsequent sale, to the primary conveyance. This inference was not the creature of the Statute—it resulted from the application to the case, of a Common Law principle. So also, when the Courts came to hold that a voluntary conveyance was void against a purchaser for value, only where he had no notice, how was it that they arrived at that conclusion? By inferring, as they did in the former cases, a fraud, and by invoking in behalf of its victim, a principle of Equity, to-wit: that he who honestly buys and pays for property, ignorant of a prior settlement, is better entitled to it than he who is the mere beneficiary of the grantor. After all, fraud, in fact, is the ground upon which the Statute goes; whether a fraud or not, is to be determined upon principles derived from the Common Law. When, therefore, the Statute enacts that a conveyance of lands is void, when made to defraud purchasers, it is declaratory of the Common Law. Concede then, that it does not embrace conveyances of personalty, where do they stand? As they stood at Common Law. I mean therefore to say, that to make a conveyance of personalty void against purchasers, it is not indispensable to make it fall within the Statute of 27 *Elizabeth*.

Perhaps a yet stronger illustration of the fact, that the enforcement of these Statutes depends upon the rules of the Common Law, and that they therefore declare only the results of those

rules, is found in the case of an absolute sale of personal property. We hold, with many of the Courts of this Union, that the retention of possession by the vendor, is *prima facie* evidence of fraud, which may be explained, and if not explained, becomes conclusive. And we hold farther, that the Jury shall determine the sufficiency of the explanation. Now, in a case where the possession is proven, the grantee is of course entitled to rebut, and a direct issue is formed. That issue is wholly independent of the Statute—it must be tried by the rules of evidence known to the Common Law. And when tried and found against the first purchaser, in favor of a creditor, the Statute 13 *Elizabeth* comes in and declares the sale void. I know that the idea of *Lord Mansfield*, that all the objects of these Statutes are attainable at Common Law, has been disavowed by eminent men in England; among them, *Mr. Smith*, a brilliant light, extinguished but too soon. Nor will we say that *all* their objects are attainable there; yet we are prepared to say, that by the long settled rules of the Common Law, a voluntary conveyance, made to defraud purchasers for valuable consideration without notice, is void. And farther, we believe that although purchasers are not embraced in the terms of the Act of 13 *Elizabeth*, nor personal property, in the terms of 27 *Elizabeth*, yet both are embraced in the spirit of those Acts respectively. So that we sustain the Circuit Court, as to these questions. See an able opinion by *Nott, J.* in *Hudnall vs. Wilson*, on these points, 4 *McCord*, 297. 1 *Am. Lead. Cas.* 63. *Cadogan vs. Kennett, Cowp.* 434. 5 *Peters*, 267. *Twyne's Case, Smith's Lead. Cas.* 29. *George vs. Kemball*, 24 *Pick.* 234. *Thompson vs. Lee*, 3 *Watts & Serg.* 479. *Neal vs. Williams*, 18 *Maine*, 391. 1 *Halst.* 155.

The presiding Judge farther held that, viewing this transaction as a voluntary conveyance by Taylor to his children, the retention of the possession was *prima facie* evidence of fraud, in favor of subsequent purchasers, notwithstanding the record of the deeds. In other words, the Court held that in case of a voluntary conveyance to children, the grantor remaining in possession, a subsequent purchaser will be protected, unless he has notice of such conveyance, and that the record of the deed is not notice to the purchaser. *Judge Fleming* decided that notice, to prevent the operation of the Statute in favor of the purchaser, must *be positive*; that the notice *implied* by the record, is *not sufficient.*

To this ruling the plaintiff excepted. Does the fact that the conveyance is to the *grantor's children*, vary the rule? I think not. A man may commit a fraud, as well by using his children as instruments, as a stranger. It is true, that there does arise a presumption of fairness, from the fact that the conveyance is in favor of those who have the strongest claim upon his bounty, and whom it is his duty to provide for. But that fact is by no means conclusive. It is to be considered, it is true, in determining the question of fraud. It may be sufficient to sustain the conveyance, in the absence of such proofs as go to establish a fraud, and it may be overborne and silenced by them. To this extent *Judge Fleming* gave effect to this fact; but he held, and we think correctly, that the presumption of fraud in this case, arising from possession, from the subsequent sale and other circumstances, was not rebutted by it; particularly, as the purchaser was without notice. *Atherly on Marriage Settlements*, 199, 200. *Chapman vs. Emmory, Cowp.* 278. *Oxly vs. Lee, Prec. in. Ch.* 15. *Lavender vs. Blackstone*, 2 *Lev.* 146. *Goodright vs. Moses, Black.* 1019. *Evelyn vs. Templar*, 3 *Bro. C. C.* 147. *Doe vs. Hopkins, cited* 9 *East, T. R.* 70.

[4.] *As to notice.* It is not to be denied but that very many decisions in England, of the highest authority, go the extent that a voluntary conveyance is void, against a subsequent purchaser for value, *even with notice.* The reasons upon which these decisions are founded, are thus stated by *Ch. J. Marshall*, in *Cathcart, et al. vs. Robinson*, 5 *Peters*, 279. "Their decisions do not maintain that a transaction, valid at the time, is rendered invalid by the subsequent act of the party. They do not maintain that the character of the transaction is changed, but that testimony afterwards furnished, may prove its real character. The subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent, to deceive a subsequent purchaser." The fraud was made to depend alone upon the evidence furnished by the subsequent sale. That was held conclusive, even with notice, and could not be rebutted in some of the cases. 1 *Mad. Ch.* 271. 18 *Vesey*, 110. 2 *Taunt.* 523. 5 *R.* 60, *b.* *Ambl.* 285. 1 *Black.* 1019. 1 *Bro. R.* 148. 9 *East*, 59. 8 *Dow.* 60.

Contrary to this rule, and in support of a voluntary conveyance against a purchaser, *with notice*—see *Cro. Jac.* 158. 2 *Lev.*

105. 1 *Eq. Ca. Ab.* 354. *Cowp.* 712. 1 *Cas. in Ch.* 287. *Prec. in Ch.* 14. 1 *Atk.* 624. 1 *Sid.* 133. *Atherly*, 197.

According to the opinion of *Ch. J. Marshall*, the construction of the *Statute of Elizabeth* was very unsettled in England, at the era of the American Revolution. The decisions, however, unquestionably went so far as to make a subsequent sale to a purchaser without notice, presumptive evidence of fraud, against one who had made a settlement, not on a valuable consideration, which threw on the person claiming under such settlement, the burthen of proving that it was made *bona fide*. This is the rule of the Supreme Court of the United States, and of most of the Courts of this country. It seems consonant with reason and equity, and we adopt it as the rule of this Court.

Our judgment is, that a subsequent purchaser is not protected, unless he buys *without notice*. See authorities last cited, and 4 *Kent*, 463, 464. 18 *Vesey*, 110. *Ibid*, 88, 89. 4 *McCord*, 294. 4 *Cow.* 603, 604. 14 *Mass.* 139. 5 *Peters*, 280.

What shall be notice to him, is the only remaining question. We believe that the notice must be *actual*, in order to make the conveyance good against him; that is, there must be brought home to him, knowledge of the prior conveyance, at the time of his purchase. How this shall be done, must depend upon the circumstances which attend each case. Whether in a given case, the purchaser had this knowledge, must depend upon the proofs adduced to establish it. *Constructive* notice will not do alone; and therefore, the registry of a prior deed will not do. However, for many purposes, the record of a deed is notice, we hold that it is not such notice as will make a voluntary conveyance good against a subsequent purchaser, for value. The principle upon which a purchaser is not protected, who has notice, is this: Knowing of the existence of a prior deed, he is presumed to be guilty of a fraud upon the rights of the prior grantee. Now, it is unreasonable to presume a fraudulent intention, from knowledge of a fact, that is itself (the knowledge) a matter of presumption; a matter of mere legal construction. It will be observed that the question of *fraud* which arises here, is not one of legal fraud, but it is a question of fraud, actual. The actual fraud of a subsequent purchaser cannot, it seems to me, be established upon the basis of an abstract legal inference, to-wit: the inference which the law draws, that when a deed is recorded, the whole world, and

therefore, the purchaser in question, has knowledge of it. This is a basis altogether too unsubstantial, upon which to rest the property rights of men. Fraud must be in all cases *proven;* it may be proven by circumstances; it may be presumed from them; but still, it is a general rule that it must be proven. A fraud, in fact, cannot be demonstrated by construction. The case, therefore, before me, differs from those where ordinarily, the record of a deed is held to be notice. This is a case where, not the title of the subsequent purchaser is concerned merely, but where his *conscience* is to be affected. The operation of the Registry Acts may and do, in many instances, bind the former; but actual notice can only bind the latter. If the purchaser is postponed, it is upon the ground that he is *particeps criminis* with the fraudulent grantor. The act of buying property, with knowledge that another has a legal or equitable title thereto, is *dolus malus.* Now, it may be well put, how can one's conscience be affected by construction? Or how can an act be *dolus malus,* without a criminal intent? And how can there be a fraudulent intent, without knowledge of the existence of any rights to be defrauded? In England, the doctrine is well settled, "that a mere registration of a conveyance shall not be deemed constructive notice to subsequent purchasers, but that actual notice must be brought home to the party, amounting to fraud." 1 *Story's Eq.* 391, *sec.* 402. 2 *Sch. & Lefr.* 66. 1 *Ibid,* 137. 2 *John. Ch. R.* 182. 2 *B. & Beatt.* 75. 2 *Eq. Ca. Abr.* 615. 1 *Conn. R.* 182. 1 *Y. & Jerv.* 117. *Atherly on Mar. Set.* 197, (1.) *Charlton's R.* 285. In the United States, the rule is pretty well established differently. 1 *John. Ch. R.* 394. *Story's Eq. sect.* 403. Scarcely any Court, under the facts of this case, would hold the subsequent purchaser bound by the constructive notice, derived from the registration. There was nothing to warn him of another title—no clue to direct his search after one; but on the contrary, everything seemed to be calculated to quiet the suspicions of a wary man. Taylor never parted with possession at any time—he exercised acts of ownership over the property for years after the first conveyance—he sold the property openly, as his own.

Let the judgment of the Court below be affirmed.

No. 12.—CHARLES CHAPMAN, plaintiff in error, *vs.* BENJAMIN STILES, defendant.

[1.] When the bill of exceptions is signed and certified only *eight* days before the session of the Supreme Court for that Judicial District, the writ of error should be made returnable to the *next succeeding* term for that District—such being the *first term* within the meaning of the amended Constitution.

Motion to withdraw this cause and make it returnable to Hawkinsville Term, next.

BARTOW, for the motion.

GAULDEN, contra.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The bill of exceptions in this case was certified and signed on the first day of January, 1849, and made returnable to the Savannah Term of the Supreme Court, which sat eight days thereafter. A motion is now made, by counsel for the plaintiff in error, to withdraw the cause from this docket, and make it returnable to the next June Term, at Hawkinsville.

This is not the *first term*, within the meaning of the amended Constitution, at which this case is required to be determined. Thirty days are allowed after the close of the term in which the cause was heard in the Court below, for drawing up and submitting the bill of exceptions for the signature and certification of the presiding Judge. After this is done, notice must be given within ten days to the adverse party, or his counsel, of the signing of the bill of exceptions, which notice shall be filed in the Clerk's office with the bill of exceptions; and it shall then be the duty of the Clerk to certify and send up to the Supreme Court, a complete transcript of the entire record of the cause below, and also the bill of exceptions, within ten days after he shall have received the original notice, with the return of service thereon. So that fifty days may elapse, from the close of the Court at which the cause was tried, to the time when the Clerk is required to send up the record.

The *first term* of the Court, therefore, at which the cause must be determined, means the first term after the expiration of the fifty days allowed by law for bringing up a cause. It *may*, by consent of parties, be made returnable to a term within that period. It must be so returned, provided the notice of the signing of the bill of exceptions is filed ten days previous thereto.

The application to transfer this cause must, therefore, be granted.

SUPREME COURT OF GEORGIA,

TALBOTTON, JANUARY TERM, 1849.

MONDAY, JANUARY 29.

The death of Major JAMES M. KELLY, the Reporter of this Court, having been announced to the Court,

On motion of Grigsby E. Thomas, Esq.

Resolved, That a Committee be appointed of three members of the Bar of this Court, to draft a suitable memorial on the death of our worthy brother, and report on the opening of the Court, tomorrow morning.

Whereupon, the Court appointed Messrs. G. E. Thomas, Hines Holt and Marshall J. Wellborn, that Committee.

TUESDAY, JANUARY 30.

G. E. Thomas, Esq. from the Committee appointed yesterday, made the following report, which was unanimously adopted and ordered to be entered on the minutes:

The melancholy tidings of the death of our brother, JAMES M. KELLY, and late Reporter of the decisions of this Court, having reached us, we delay not to make a suitable expression of our grief, and to tender to his memory that tribute of respect, so justly due. By his bland and obliging manners, his amiable and discreet deportment, he not only endeared himself to this Court, and to his professional brethren, but to all who knew him. In the private walks of life, he was the man of integrity and honor, of sympathy and kindness. He was remarkably accurate, systematic and neat in the execution of his business, and is a striking example of how much punctuality and method may accomplish. He struggled manfully and successfully against poverty, and overcame, by studious application, those impediments which the want of early advantages entailed upon him. He has left behind him some evidences that he was both a patriot and statesman;

and his recent work of *Reporter*, is sufficient to hand him down to posterity as a Jurist.

Therefore, Resolved, That we truly deplore the death of our much esteemed brother, JAMES M. KELLY, late Reporter of the decisions of this Court, and we regard the event, not only as a loss to this Court, but to the community.

Resolved, That we sincerely condole with the afflicted and bereaved family of our deceased brother.

Resolved, That as a token of respect for him, we will wear the usual badge of mourning for thirty days.

Resolved, That this memorial and these resolutions be entered on the minutes of this Court, and that a copy of them be forwarded to the family of the deceased, by the Clerk of this Court, and that he likewise furnish a copy to the Editors of the Federal Union, and Messenger and Journal, for publication.

Upon the reading of these resolutions, Judge LUMPKIN, in behalf of the Court, responded as follows:

The present term of this Court is overshadowed with gloom. We are called on for the first time, since its organization, to deplore the loss of one of its official members. We have met to-day, not to listen to forensic discussion—to have our minds charmed and our attention chained by "fancy's flash and reason's ray," but to contemplate the mansions of the dead—to sit sorrowfully beneath the shades of the cypress and the willow.

Of what momentous importance did life—big with promise and buoyant with hope—appear to us yesterday! To-day, how sunk in value!—"worthless as the weeds which rot on Lethe's wharf!"

It was my misfortune not to know Major KELLY until his election to the office of Reporter, which he so worthily filled from the first constitution of the Court till his death. His industry and zeal at the bar and in the halls of legislation, will long be remembered by his associates and contemporaries. He has added another to the countless number of examples, in this free and happy country, to show that *merit* is the sure road to fame and fortune.

But however short our acquaintance, it gave rise to an attachment of no ordinary character. It is well known, that when the Court Bill was passed in 1845, a large majority of the people were decidedly hostile to it. To secure its enactment, by accommodating its provisions to the wishes of all, it contained inherent

defects, well calculated to insure its miscarriage. To obtain the services of suitable men, under these circumstances, to fill the offices, to steer the ship through a crowded sea of contrary winds, was a task of no ordinary difficulty. Who was willing to risk what little reputation he might have acquired by a lifetime of toil, to be crushed, perhaps forever, beneath the superincumbent ruins of a fallen fabric? To construct and put in operation a machine is the Herculean task—to guide its subsequent movements, is comparatively an easy matter. The appointing power, under the law creating the Court, felt greatly encouraged, therefore, when one of such responsibility and worth as our departed associate, consented to serve as Reporter.

How often, after days and nights of labor, which knew no intermission, has our little household assembled in anxious consultation about the fate of the frail bark in which we were afloat. We shared a community of hopes and fears. And none but the passengers in the Mayflower in quest of a new world, with no friendly star, auguring success, to guide through a trackless and hitherto untried sea, can realize our situation. By unrelaxing exertion, and by unity and concord, such as have rarely distinguished the counsels of any body of men, the dangers of the ocean have been weathered, and the vessel has been safely anchored in port. Whatever may become of the early voyagers, the enterprize itself is beyond peril. A landing has been effected on the *rock* of Plymouth! No cause less powerful than death itself, can dissolve a friendship thus formed!

We always found in the deceased an ardent and devoted auxiliary. Having no offspring on which to lavish his parental fondness, "*Kelly's Reports*" became the *Benjamin*—the pet of his old age. And it is matter of congratulation, that he lived to witness the full triumph of this experiment—the new organization of the Judiciary—to see one session of the Legislature intervene, without any attempt to disturb the Court, and one of the Judges, whose term had expired, re-elected to a full tenure of office.

Did the occasion justify it, we would delight to dwell on the public and private virtues of our companion. His patriotic bosom was always warm with love to his country, and bright hopes for her happiness and prosperity. In common with many others, we have shared his generous hospitality—marked his amiability in domestic life—his uniform courtesy and urbanity at the bar

and in the social circle. But we forbear. The language of grief is not sufficiently clear and discriminating to attempt the accurate delineation of character. The heart must be assuaged before such a portrait is undertaken.

In this sudden bereavement, we freely mingle our sympathy with that of the profession, his disconsolate widow, and a large circle of attached friends. We dare not arraign the dispensations of Providence. Heaven alone can pour balm into the severe wound which has been inflicted—it alone can soothe the suffering survivor and comfort the mourner—it alone can heal the broken-hearted!

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT TALBOTTON,

JANUARY TERM, 1849.

No. 13.—LEWIS A. GONEKE, *et al.* plaintiffs in error, *vs.* RILEY GARRETT, defendant.

This cause having been called in its order, and no assignment of errors having been filed—

It was Ordered, That the writ of error be dismissed.

No. 14.—JAMES P. GUERRY, plaintiff in error, *vs.* THOMAS J. PERRYMAN, for the use of JOHN DENNARD, defendant.

[1.] The assignee of a chose in action, *not negotiable*, takes it subject to all the equities which existed between the assignor and the maker thereof, at the time of the assignment; and all such equities as may attach in favor of the maker, *before notice* of such assignment, by the assignee to the maker.

[2.] When, by a decree of a Court of Equity, a specific sum of money was decreed to be due to the maker of an *unnegotiable* promissory note, by the payee thereof: *Held*, that such decree could not be impeached by *extrinsic* evidence, so as to impair or defeat the equitable right of such maker to set off such decree for the *full amount* thereof, against such note, in the hands of

an assignee, for a valuable consideration, but who had never given any *notice* to the maker of the note of such assignment.

[3.] On the trial of an Equity cause in the Superior Courts, and evidence introduced by each party, the counsel for the complainant in the bill, is entitled to open and conclude the argument to the Jury.

In Equity; Sumpter Superior Court. Tried before Judge WARREN, November Term, 1848.

Thomas J. Perryman, for the use of John Dennard, brought suit against James P. Guerry, on three promissory notes, not negotiable, and payable to Thomas J. Perryman, as administrator of James R. Lowry, deceased. Guerry filed his bill, setting out that the above notes were given by him for the purchase of property sold at the sale of James R. Lowry's estate; that he married the daughter of said deceased, and was a distributee of said estate; that he had filed a bill against Perryman, the administrator, for his distributive share, and recovered a decree for $2048 64, which was still due and unpaid; that Perryman had fled to parts unknown, leaving no visible property or means of payment; that Dennard was confederating with Perryman, and was a mere agent of his in the collection of these notes, which he charges, at the time they were given, were agreed to be received in payment of his distributive share, and that he had no notice of their assignment. The bill prayed an injunction of the pending suit, and that the notes should be given up to be cancelled, and entered as a credit on said decree.

Dennard, in his answer, denied that he was holding the notes for Perryman, but that he gave a full and valuable consideration therefor, without notice of the original consideration of the same; having purchased them of Hardy Durham, who was the security of Perryman on his administration bond. The answer admitted the decree against Perryman, but denied that that amount was due to Guerry, but insisted that suit had been brought against Durham, the security, and judgment recovered for all that was really due on said administration, which judgment had been paid off.

Complainant filed a replication, denying specifically, the facts alleged in the answer, with reference to the decree against Perryman.

At the November Term, 1848, the Court ordered both causes to be submitted to a Special Jury together.

Much testimony was offered and admitted by the Court, to show that the decree against Perryman was for too large a sum. To the introduction of which testimony, the plaintiff in error excepted, on the ground that the decree was conclusive against Perryman and his assignee.

The testimony being closed on both sides, the Court ordered the defendant's counsel, in the Common Law action, to open the argument, and the plaintiff's (Dennard's) counsel to conclude. To which decision, Guerry, by his counsel, excepted.

The Court charged the Jury, that the possession of a chose in action, not negotiable, the holder having paid a valuable consideration for it, is *prima facie* evidence of equitable ownership, and constitutes an equitable right in the possession.

Complainant's counsel requested the Court to charge, that if such holder had purchased said paper from the payee, for a valuable consideration, yet, in order to recover on said notes, divested of the equities between the maker and payee, it must appear that such equities arose after such purchase and after notice of such purchase to the maker; which charge the Court refused to give, but charged that such purchaser will take the paper subject to all the equities between the maker and payee, and that the doctrine of notice does not obtain, unless Guerry had paid Perryman the amount of the notes.

The Court farther charged, that it made no difference whether Durham purchased the notes before or after the decree against Perryman, nor whether Guerry had notice before or after the decree; that the date of the decree has nothing to do with the case; such decree, though conclusive against Perryman, is not conclusive against Durham or Dennard; and that the original indebtedness of Perryman to Guerry, independent of the decree, is the equity that attaches to said notes.

The Court farther charged, that if the Jury shall believe from the evidence, that Durham got the notes from Perryman, for his indemnity as security on Perryman's bond, then it makes no difference when Durham got said notes; for when Durham settled with the heirs of Lowry, on the judgment against him, then he had an equity in the notes, to reimburse himself, and only subject to the equity arising from the original indebtedness of Per-

ryman to Guerry, of which the decree of Guerry against Perryman, is *prima facie* evidence.

To all of which charge, counsel for Guerry excepted, and now alleges the same as error.

SULLIVAN and B. HILL, for plaintiff in error, cited the following authorities, in support of the several grounds of error alleged:

1 *Green. Ev.* 542, '3, 567. 1 *Phil. Ev.* 324. 17 *Sergt. & Rawle*, 324. 5 *Gill & J.* 58. 9 *John. R.* 64. 1 *Smith's Lead. Cas.* (18 *Law Lib. top page*, 447, 450.) 17 *John. R.* 287. 1 *Mass.* 119. 2 *Ib.* 96. 5 *Cow.* 376. 13 *Mass.* 307. 3 *Green. R.* 464.

E. R. BROWN, for defendant, cited:

Best on Pres. 87. *Meghan vs. Mills*, 9 *John.* 64. *Briggs vs. Dorr*, 19 *Ib.* 96. 2 *Smith's Lead. Cases*, 438. *Howard vs. Mitchell*, 14 *Mass.* 241. 1 *Phil. on Ev.* 322. 3 *Ala. R.* 568. *Denton vs. Livingston*, 9 *John.* 97. *Ingalls vs. Lord*, 1 *Cow.* 140. *Blake vs. Irwin*, 3 *Kelly*, 345. *The Ins. Co. vs. Power*, 3 *Paige*, 365.

By the Court.—WARNER, J. delivering the opinion.

Three grounds of error are assigned upon the record in this case, to the judgment of the Court below:

1st. Because the Court erred in admitting evidence going to show that the decree against Perryman was for too large an amount.

2d. Because the Court erred in not charging the Jury as requested by complainant's counsel, and charging them as stated in the record.

3d. Because the Court erred in deciding that the defendant's counsel in the Common Law action, and counsel for the complainant in the bill, should open the argument to the Jury; and that the counsel for the plaintiff in the Common Law action and counsel for the defendant in the Equity cause, should conclude the argument.

There are several *specifications* of error made on the record,

but they are all embraced in the three foregoing grounds of exception taken to the decision of the Court below.

[1.] When this cause was before us on a former writ of error, we held that the decree against Perryman was *conclusive against him;* that it was *conclusive evidence of his indebtedness to Guerry, the amount specified in that decree.* 2 *Kelly*, 65. Suppose the suit on the notes had been instituted by Perryman, the payee, against Guerry, the maker, instead of Dennard, the assignee of Perryman, could this deeree in Guerry's favor, against Perryman, have been allowed as a set-off against the notes? Most certainly—and why? Because the decree furnishes *conclusive evidence* that Perryman is indebted to Guerry the sum of money specified in the decree; nor would it be competent, in a suit on the notes by Perryman against Guerry, for Perryman to introduce evidence to impeach the decree, when offered in evidence by Guerry as a set-off, or to show that it was rendered for too large an amount. Dennard, who derives his title from Durham, and Durham from Perryman, to these *unnegotiable* notes, can no more impeach this decree, or show that it was rendered for too much, for the purpose of defeating Guerry's equity, arising under that decree, than Perryman, their assignor, could do. In relation to the equities which existed between Perryman and Guerry, at the time the decree was rendered, the same attach now in favor of Guerry, against the notes in the hands of Perryman's assignees. The record does not show that Perryman's assignees, either Durham or Dennard, ever gave *notice* to Guerry, the maker of the notes, that they were the assignees thereof, or that they had any other equity growing out of such assignment, than what existed between their assignor and the maker. The rule, with regard to the assignment of choses in action, *not negotiable*, we understand to be, that every person who takes an instrument, *not assignable by the terms of it*, must take it principally on the credit of him from whom he receives it, for it is always liable to be defeated by equitable circumstances subsisting between the *original contracting parties*, being taken legally subject to *all the equities of the original debtor. Willis vs. Trambly*, 13 *Mass. R.* 206. *Chamberlain vs. Gorham*, 18 *John.* 144. *Hatch vs. Greene*, 12 *Mass. R.* 201. *Murray vs. Lylburn*, 2 *Johns. Ch. R.* 441. In *Brashear vs. West, et al.* (7 *Peters*, 609,) the Court settled this principle, in regard to the assignment of choses in action in Equity. If subsequent to the assignment being

made, and before *notice* of it, any counter claims be acquired by the *debtor*, these claims may unquestionably be sustained; but if they be acquired *after notice*, Equity will not sustain them.

[2.] So far from the equitable right of Guerry to have the decree against Perryman set off against the notes, having been acquired by him *after notice* of the assignment of the notes to Durham or Dennard, by Perryman, there is no evidence whatever, that they, or either of them, ever gave him *any notice* of such assignment. The counsel for the complainant requested the Court to charge the Jury, that if Dennard, the holder of the notes, had purchased them for a valuable consideration from the payee, yet, in order to recover on said notes, *divested of the equities between the maker and the payee*, it should appear that such equities arose after such purchase, and *after notice of such purchase to the maker;* which charge the Court refused to give, but on the contrary, charged the Jury, among other things, to the effect that the doctrine of notice, as requested by the complainant's counsel, was not applicable to the facts of this case.

For the reasons already stated, we think the Court ought to have charged the Jury as requested; and that it was error in refusing so to charge; and that the charge, as given, was erroneous in point of law. These notes *not being negotiable*, although Dennard may have paid a valuable consideration for them, without notice of the existing equity between Perryman and Guerry, at the time of the assignment of the notes; yet he holds them subject to *that equity*. *Chamberlain vs. Day*, 3 *Cowen's R.* 353. The law which governs and must control this case is, that the decree in favor of Guerry against Perryman, is *conclusive evidence* of Perryman's indebtedness to Guerry, the amount of money specified in the decree. Guerry had the equitable right to set off the amount due him by the decree from Perryman, in a suit on the notes by Perryman against him. Dennard having derived his title to the notes from Durham, and Durham from Perryman, they, as the assignees of Perryman, stand in his shoes, and the same equities attach to the notes in their hands in favor of Guerry, as would have attached to them in the hands of Perryman, had the suit been instituted on the notes by Perryman. There being *no notice* to Guerry, of the assignment of the notes by Perryman, to the assignees, or either of them, *prior* to the rendition of the decree against Perryman, in favor of Guerry, or at any other time,

Guerry is entitled to have the *full amount* of the decree rendered against Perryman, in his favor, set off against the notes now in suit, in the name of Dennard as the holder thereof; and *extrinsic* evidence is not admissible to impeach or reduce the amount of that decree.

[3.] Some confusion appears to have been produced in the trial, in consequence of both suits having been submitted to the Jury at the same time. As the Court of Chancery had acquired jurisdiction of the cause, it would, in our judgment, have been more regular for that Court to have proceeded, and to have made a final decree in the cause, definitely settling the rights of the parties, without blending the Common Law suit and the suit in Equity, together; for it is nothing more or less than a suit in Chancery, to enforce the equities of Guerry against the notes in the hands of Dennard.

It was a distinct and independent suit on the Chancery side of the Court, and we have not been able to perceive any reason why it should not have been treated so at the trial, or why the trial should have been embarrassed with the Common Law suit which had been *enjoined* by the interlocutory order of the Chancellor. Viewing the suit as a proceeding in Chancery exclusively, the solicitor for the complainant in the bill was entitled to open and conclude the argument to the Jury, and not the counsel for the plaintiff in the Common Law action which had been enjoined. Let the judgment of the Court below be reversed.

No. 15.—URIAH B. HOLDER and Wife, plaintiffs in error, *vs.* DAVID HARRELL, defendant in error.

[1.] *Held*, that the words *last* or *only child*, in the Statute of Distributions of 1804, as amended by the Acts of 1841 and 1843, refer to the only *surviving* child of the mother.

[2.] A dies intestate, leaving a widow who gave birth to a posthumous child within the ordinary period of gestation, and married the second time, and gave birth to a child by the second husband. The estate of A was distributed equally to his child and his widow. Afterwards, and after the birth of the child by the second husband, A's child died intestate and without issue. *Held*, that the estate of A's child descended to the child by the second marriage, to the exclusion of the mother.

In Equity, in Stewart Superior Court. Decided by Judge ALEXANDER, October Term, 1848.

This was a bill filed for the direction of the Court upon the following facts:

Henry T. Harrell died in 1845 intestate, leaving a widow, to whom, within the period of gestation, was born a posthumous child—William H. Harrell. For this child, the defendant became guardian, and the estate of Henry T. Harrell was distributed in equal moities to the wife, (who, in the meantime, had intermarried with Uriah B. Holder,) and to the defendant, as guardian of William H. Harrell.

After said distribution had been made, Mary A. E. Holder was born to Uriah Holder and wife, and two days after her birth, William H. Harrell died intestate.

The Court below, upon these facts, decided that said estate of William H. Harrell should be distributed in equal moities to Uriah B. Holder and wife, and to Mary A. E. Holder, the sister of the half-blood of the intestate, in the maternal line.

To which decision, Holder and wife, by their counsel, excepted, and that decision comes before this Court to be reviewed.

H. HOLT, for plaintiff in error.

JAMES CLARK, for defendant.

By the Court.—NISBET, J. delivering the opinion.

The question made on this record involves a construction of our Act of Distribution. But little can be said on it. The question neither admits nor requires amplification. Here the father (Harrell) dies intestate, leaving a widow, who, within the term of gestation, gave birth to a posthumous child. The widow intermarried with a man by the name of Holder, and the estate of Harrell was distributed to his child and Mrs. Holder in equal parts. Subsequently Mrs. Holder gave birth to another child by her second husband. After this, Harrell's child died intestate. A question arose in the Court below, as to who was entitled to the estate of the deceased child. The presiding Judge distributed it equally

between Mrs. Holder, the mother, and her child by her second husband, being the half-sister in the maternal line to the decedent. To this decision, counsel for Mrs. Holder excepted, claiming that she was entitled to the whole estate, to the exclusion of the half sister. Our judgment is, that the presiding Judge and the plaintiff's counsel are both in error, and that the half-sister is entitled to the whole estate. Let us see first what is the Statute, or rather that part of it which relates to this question: The Act of 1804 declares, "if the father or mother be alive, and a child dies intestate and without issue, such father or mother, in case the father be dead, and not otherwise, shall come in on the same footing as a brother or sister would do; *provided* that such mother, after having intermarried, shall not be entitled to any part or proportion of the estate of a child who shall die intestate and without issue; but the estate of such child shall go to and be vested in the next of kin on the side of the father. *And provided also*, that on the death of the *the last child*, intestate and without issue, the mother shall take no part of his or her estate, but the same shall go to and be vested in like manner, in the next of kin on the father's side. And in case of a person dying without issue, having brothers or sisters of the whole and half blood, then the brothers and sisters of the whole and half blood in the paternal line only, shall inherit equally; but if there shall be no brother or sister, or issue of brother or sister of the whole or half blood in the paternal line, then those of the half blood and their issue, in the maternal line, shall inherit." *Prince*, 237.

This is the old law. The first proviso excludes altogether the mother, if she marry again. A provision rather in restraint of marriage, and of doubtful equity. The Act of 1843 repeals this proviso and substitutes the following proviso for it: "Provided, that such mother, after having intermarried, shall not be entitled to any part or portion of the estate of such child, who shall die intestate and without issue, unless it shall be *the last* or *only child*." The second proviso, which excludes the mother, in any event, from all participation in the distribution of the estate of *the last child* dying intestate and without issue, was repealed by the Act of 1841. Upon what reason this last proviso was founded, or upon what consideration of policy, I am wholly at a loss to determine. However, the Law of Distribution, as thus amended, reads thus: "If the father or mother be alive, and the child dies intes-

tate and without issue, such father or mother, in case the father be dead, and not otherwise, shall come in on the same footing as a brother or sister would do; provided, that such mother, after having intermarried, shall not be entitled to any part or portion of the estate of such child, who shall die intestate and without issue, *unless it shall be the last or only child.* And in case a person dying without issue, leaving brothers or sisters of the whole and half blood, then the brothers and sisters of the whole and half blood in the paternal line only, shall inherit equally; but if there shall be no brothers or sisters, or issue of brother or sister of the whole or half blood, in the paternal line, then those of the half blood, and their issue, in the maternal line, shall inherit." *Hotch.* 466.

It is curious to remark how completely the amendments to the Act of 1804 have altered it. By that Act, a second marriage defeated altogether the right of the wife to distribution, and without a second marriage, cut her out of any share in the distribution of the estate of the *last child* dying intestate and without issue. By the amendments, if she does not marry a second time, she shares in the distribution of *any* child dying intestate and without issue, with brothers and sisters. And in the event of a second marriage, she is thereby excluded, except in the case of the death of the *last or only* child. The view of this subject, taken by the Legislature in 1841 and 1843, when the amendments were passed, are curiously diverse from that of the Legislature of 1804. For the proviso of 1843, I can see some reason; for those of 1804, which it supersedes, no very satisfactory reasons occur to me.

[1.] Having married, by the Statute there is but one contingency upon which the mother can come in at all, and that is upon the death of the *last or only child.* What is meant by *last or only child?* Does it mean the *latest* child born, or does it mean, the last surviving child, the *only child?* I must believe that the Legislature intended the latter. If the former be intended, I can perceive no reason for it; if the latter, there is some reason for the enactment. If the mother was intended, by the *proviso,* to inherit upon the death of the latest child born intestate and without issue, then she may inherit equally, whether that child be the only child or not. And why not inherit also upon the death of any other child as well as the last? There is no reason why she would not be as much entitled in the one case as the other; and in the absence of any good reason why her right to inheritance should

be limited to the latest born child, we adopt the other view, and say that the Legislature meant that she should inherit only upon the death, intestate and without issue, of the *only child*—that is, the only and sole surviving child. This idea is favored by the words used in the *proviso*, to wit: *last* or *only* child. It is true, that the phrase being in the alternative, it is susceptible of a meaning which would enable her to come in upon the death of *the last*, that is, latest born child, and also upon the death of *the only*, that is, sole surviving child. But we think that the latter member of the phrase, *or only child*, was intended to define more accurately the meaning of the first, and to limit it to *the only child living*. I say there is some reason for this construction. The reason is, that where a child dies without issue, being the sole surviving or only child, leaving, of course, no brothers nor sisters, the mother is the nearest of kin, and ought to have the inheritance to the exclusion of more distant relations. But if the decedent has brothers and sisters living, there is some reason for postponing the mother to them, particularly in case of marriage the second time. For the Statute looks upon the second marriage as a provision for the mother. Upon this construction, upon the death of the last or only child, leaving no issue and no representatives of brothers or sisters, the mother would be entitled to the whole estate; and if there were representatives of brothers or sisters, she would share the estate with them, since she is entitled to share only as a *brother or sister would do*. The inquiry also arises, whether the Statute has reference to the last or only child of the deceased *father*, or the last or only child of the *mother*. We think it contemplates the last or only child of the mother. The words of the Act are as susceptible of this meaning as of the other; indeed, more so. It is manifestly the true meaning, from these considerations. The estate to be distributed is an independent estate, belonging to the deceased child. It may or may not have been derived from the father. These clauses of the Statute have no necessary connection with those which precede. The child dying is, as it were, the *Propositus*. From him springs the relationship which controls the inheritance. The words *last or only* child, are found in that clause which relates alone to the rights of the mother. From these considerations, we think that it means the last or only child of the mother of the decedent.

[2.] The decedent in this case was not the last born child, nor

was he the only or sole surviving child; for at his death he had a younger half sister, in the maternal line, living. This being so, and the mother having married a second time, she does not fall within the *proviso* of the Statute, and is excluded. The decedent having no brother or sister, or issue of brother or sister of the whole blood, and none of the half blood in the paternal line, his half sister in the maternal line is, by express provision in the Statute, entitled to the whole estate.

Let the judgment be reversed.

No. 16.—EDWARD B. YOUNG and JOHN A. CALHOUN, Intendant of the Town of Eufaula, Alabama, plaintiffs in error, *vs.* JAMES HARRISON and SAMUEL HARRISON, administrators of William Oliver, deceased, defendants.

[1.] The right to receive toll for the transportation of travelers and others, across a river on a public highway is, at Common Law, a franchise of the Crown. In this State, it belongs to the people collectively.

[2.] The owner of land on the banks of a river, has not, as a matter of right, and merely because he is owner, the privilege of keeping a public ferry. His right to do so can only arise by grant, actual or implied.

[3.] The State has a right to erect bridges, whenever and wherever the Legislature may deem them necessary for the convenience of the public.

[4.] The right of eminent domain, by which the State is authorized to take private property for public use, when the necessities of the country require it, is an inherent right of this, as of every other government.

[5.] The State may construct public works, such as roads and bridges, by taxation, or the personal labor of its citizens, or through the instrumentality of individuals or corporations.

[6.] A bridge may be established and a keeper be appointed, without any regard to the ownership of the soil, should the Legislature so direct. The franchise or right to keep ferries and bridges, should, if practicable and consistent with the public welfare, be conferred on the owners of the soil, rather than on strangers.

[7.] Corporations may be dissolved for a breach of trust. A public corporation which exists only for public purposes, may be dissolved, modified, enlarged or restrained, at the will of the Legislature.

[8.] A private corporation is a contract between the government and the corporators; and the Legislature cannot repeal, impair or alter the rights

and privileges conferred by the charter, against the consent and without the default of the corporation, judicially ascertained and declared in a proceeding instituted by the government, directly for that purpose. A forfeiture for non-user or mis-user, must be by the judgment of a Court of Law, the Corporation being first called upon to answer. No advantage can be taken of any non-user or mis-user, on the part of the corporation, by any defendant in any collateral action.

In Equity, in Randolph Superior Court. Motion to dismiss the bill and dissolve the injunction, before Judge WARREN.

James Harrison and Samuel Harrison, as the administrators of William Oliver, deceased, filed their bill in Equity in the Superior Court of Randolph County, returnable to the October Term, 1848, in which they charged:

That in the year 1835, James Harrison and Wm. Oliver, then in life, purchased of K. McKenzie, fractions Nos. 350, 354, 355, 356 and 381, and lots Nos. 316 and 324, in the 8th district of said County, containing 1007 acres, more or less, for the sum of $25,410; and that deeds have been made to the complainants in the bill. That at the time of the purchase, there was a ferry on the land in operation, across the Chattahoochee, which was very valuable, and likely to become more so, being immediately opposite the City of Eufaula, in the State of Alabama.

That in the year 1837, the Legislature passed an Act "to incorporate the Irwinton Bridge Company," for the purpose of erecting a bridge across the Chattahoochee river, opposite the Town of Irwinton, (Eufaula,) commencing upon the lands of the complainants. By the terms of said Act, it was provided that the said Company might appropriate, for the erection of said bridge, the land necessary for the same; and in case of disagreement between themselves and the land-holder, with reference to the value of the land, "it shall be lawful for the Board of Directors to appoint one disinterested freeholder, and for the owner or owners to appoint another disinterested freeholder, as appraisers, and the Inferior Court of Randolph County to appoint another disinterested freeholder; but if such owner or owners shall decline to appoint an appraiser, then two appraisers shall be appointed by the Inferior Court;" their award "shall be taken as a judgment for the amount against the Corporation, and shall be enforced by an execution from the said Inferior Court."

The Act farther provided, that "the said Corporation shall commence the work in one year, and complete the same in three years from the passage of the Act."

The bill charged, that soon after the passage of the Act, the said Company did erect their bridge, without complying at all with the provisions of the Act; that at the February Term, 1841, of the Superior Court of said County, the complainants filed a bill praying an injunction against the said Company, and also a decree for the damage done by the erection of said bridge, and also, for the value of the land; that at the October Term, 1846, a final decree was rendered in favor of the complainants, for the sum of $1500, "for their damages sustained by reason of the trespass on their said premises," entered upon a verdict, generally, "for the sum of $1500, with costs of suit;" which decree stands unpaid and unreversed. That at the October Term, 1845, of said Court, the complainants commenced their action of ejectment against one Edward B. Young, for their said tract of land, the said Young claiming to be the assignee of the Company, and the sole owner of the bridge; that at the October Term, 1846, a verdict was rendered in their favor, with the sum of $1683, mesne profits; that pending the appeal upon said action, said Young, at the April Term, 1847, filed his bill in said Court, charging that he was the assignee of all the rights and privileges of said Company; that the said Company had applied and obtained the appointment of appraisers; that by some clerical mistake or otherwise, the order of the Court appears upon its face, to have been granted by the Inferior Court, sitting as a Court of Ordinary; that though these proceedings were irregular, the Company had attempted to comply with the provisions of its charter in good faith; and prayed an injunction against the action of ejectment, and to compel the complainants to receive the compensation provided by the charter. Upon a hearing before his Honor, *Judge Warren*, the injunction prayed for was refused; which decision was excepted to, and upon a hearing before the Supreme Court, reversed, (3 *Kelly*, 31,) and the writ of injunction granted, so as to give the said Young "a reasonable time to comply with the provisions of the charter incorporating the Irwinton Bridge Company, in acquiring the title to the use and enjoyment of the land on which the eastern abutment of the Irwinton bridge is located; when such compliance

is made, then said injunction to be dissolved, reserving to the defendants in the Equity cause, the right to prosecute their action of ejectment, for the recovery of the mesne profits only of their land, used, enjoyed and occupied by the said Company, from the time of such user and occupation by said Company or their assignee, up to the time the title of said Company or their assignee, shall be perfected, as required by the said Act of incorporation."

The bill farther charged, that said Young has had the full benefit of the *reasonable time* allowed him in the decision of the Supreme Court, within which to comply, some twelve months having expired since said decision, and that he has not yet complied with the requisitions of the charter, or procured the appointment of appraisers.

The bill farther charged, that some time in the year 184–, said bridge fell in near the western bank, and that ever since, the complainants have had their ferry in operation, having incurred considerable expense in the building of a flat, the purchase of rope, and the preparation of the road to and from the ferry, from which ferry they are receiving annually, a nett income of $1000.

That since the decision of the Supreme Court, the said Young has assigned all his interest in said bridge to the Town Council of Eufaula, Alabama; and that said Young, or said Council, or both, are about finishing the repairs of said bridge; and that their purpose and object is to re-build the same, and again trespass upon the lands of complainants, without complying with the decision of the Supreme Court, or the provisions of the charter; and that if let alone, as soon as the timbers can be put together, they will again appropriate to themselves the lands of the complainants.

The bill further charged, that said Irwinton Bridge Company has been dissolved, and is insolvent; that they could never recover anything out of the Town Council of Eufaula or Young, who is charged to be in failing circumstances; and that to sue for the daily trespass, would give rise to an endless multiplicity of suits.

The bill further charged, that at the January Term, 1848, of the Inferior Court of said County, application was made by Young, for the appointment of appraisers to assess the damages; that said Court decided that said Young did not show such title in himself as to authorize his application, and refused to appoint the appraisers; that said Young applied to Judge Warren for a

mandamus, to compel the said Court to appoint appraisers, and a mandamus nisi was granted; that said Court have filed their return, and that said mandamus is still pending in said Superior Court.

The bill prayed that said Young and Town Council should be enjoined from re-building said bridge or putting the same into use and employment, until they have complied with the provisions of the Act of incorporation within the time granted by the Supreme Court, and have paid the complainants for the use of their land and the injury to their ferry.

Edward B. Young, by his answer, admitted the title in complainants, or one of them; that at the time of the purchase, there was a ferry-landing on some part of said land, although he insisted it was there neither by grant or prescription, by which alone it could be established, so as to enter as an element of value in said land; he admitted the charter of the Company and the erection of the bridge, insisting that said Company, *bona fide*, attempted to comply with the provisions of its charter. The answer urged that during the time the said bridge was being erected, no effort was made by the complainants to arrest its progress; it admitted the filing of the bill in 1841, and the decree thereon, and prayed that the same might be held as pleaded, as a judgment of former recovery. Young admitted the assignment by the Company to him, and insisted that the same was *bona fide*, and for a valuable consideration; he admitted the suit in ejectment, the injunction prayed by him, and the decision of the Supreme Court thereon.

He admitted that he had not procured the appointment of appraisers, but insisted that it was from no laches of his; on the contrary, that on application to the complainants, and failure to agree with them, and on their refusal to appoint an appraiser, he applied to the Inferior Court, in accordance with the decision of the Supreme Court; that complainants, by their counsel, appeared and objected to the same, and that said Inferior Court refused to appoint appraisers, on the ground that the deed from the Irwinton Bridge Company to said Young, was not sufficiently proved.

The answer farther stated, that on their refusal to appoint the appraisers, said Young applied to and procured from the Judge of the Superior Court, a mandamus nisi, directed to said Infe-

rior Court, requiring them to proceed to appoint the appraisers, or show cause why a mandamus absolute should not issue; that at the next term of said Court, the Inferior Court failed to make any return until the close of the Court, when they filed an unsatisfactory and insufficient answer, too late to be excepted to; and that said mandamus stands continued, and remains undecided.

The answer farther admits, that in the year 1847, a portion of said bridge fell in, and that complainants did put their ferry again in operation, to which said Young insists they had no right whatever. He admits the profits from the same are large.

The answer further admits, that since the decision of the Supreme Court, he has made an arrangement with the Council of Eufaula, by which they engaged to make the necessary repairs, and at the end of the litigation, if it ever should end, they agree to pay him for the bridge, the sum of $4000.

The answer states, that more than twelve months before the filing of said bill, the said Council proceeded to repair said bridge, within the knowledge of said complainants, "and that said repairs had been prosecuted within a very few days of completion, when the said complainants interposed their present injunction," "thus making this valuable and expensive public improvement (cost about $30,000) valueless to the complainants, the defendant and the public." The answer "admits that it was and has been the object and purpose of himself and the City authorities of Eufaula, to rebuild said bridge, and to use it, but denies any intention to trespass upon the lands of complainants;" and "admits, that if let alone, as charged by the complainants, the timbers of said bridge would have been put together, and the bridge appropriated to the use of the public for the usual tolls; and says, that the putting of the timbers together, "at a point near the middle of the Chattahoochee river, was about all that remained to be done," when the bill was filed.

The answer admits the insolvency of the Irwinton Bridge Company, but denies the insolvency of the Town Council of Eufaula. The answer admits the embarrassed circumstances of the defendant Young, but urges that ample security was given by him on the appeal in the action of ejectment, and on the injunction bond, given on his application for the injunction to said action of ejectment. The Irwinton Bridge Company, it was admitted, had ceased to elect officers or use its charter in any way.

The answer farther sets out at length, certain equitable propositions made by the defendant Young, to the complainants, for the opening of the bridge and securing the tolls, to be paid to whomsoever should hereafter be determined to be entitled to them.

The defendant insisted that he was not *about to take* land, which he had been in possession of since 1839, and urged many facts to show that the whole object of the complainants had been to vex, harrass and defeat the defendant in the execution of his lawful undertaking; and that there was no equitable circumstance in the facts or the acts of complainants, to entitle them to this injunction. The answer of John A. Calhoun, Intendant of the Town of Eufaula, denied all knowledge of the various matters in controversy—admitted the contract between the Town Council and Young, as set out in Young's answer, and denied any intention to interfere with the legal rights of complainants.

Defendants, by their counsel, demurred to the bill for want of equity; and upon filing the answers, moved to dissolve the injunction, or so to modify it as to allow the public the use of the bridge.

The Court below overruled the demurrer and the motion to dissolve the injunction, which decisions are now alleged to be erroneous.

H. Holt, for plaintiff in error, submitted a brief, relying upon the following positions, among others:

1st. The bill contains no grounds for equitable interference, the remedy at Law being ample.

2d. That the ferry-landing is, in no sense of the term, property.

3d. That it is upon a *navigable stream*, the right and title to which remains in the State, and did not pass, by grant, to the land situate on its banks.

4th. That the bill shows the ferry to exist, without grant, prescription or license of any kind; and if it did exist by grant, the Legislature had the right to authorize the construction of the bridge, which, if it injures the proprietors of the ferry, is "*Damnum absque injuria.*"

5th. That the complainants are entitled to no relief, while they have a *subsisting judgment unreversed*, for the damages they have sustained by the building of the bridge.

6th. That a party cannot proceed, both at Law and in Equity, for the same cause of action, and at the same time.

7th. That the plaintiffs in error having been in possession since 1839, all claim of the complainants is barred by the lapse of time, the complainants having failed to make objection until large sums of money were expended, the bridge erected, and tolls actually received.

8th. That the plaintiff in error, if he has failed to comply with the provisions of the charter, has nevertheless acted in good faith, and has been hindered and delayed at every step, by the complainants below.

9th. That the Irwinton Bridge is a public work, and the use of such an one will never be enjoined.

10th. Cross injunctions, operating to the waste and destruction of property, are never favored and will never be allowed.

11th. Injunctions are never favored, to the prejudice of the public, or even of individuals, especially after large expenditure of money.

In support of these positions, he cited and commented on the following authorities:

Prince's Dig. title, Roads, Bridges and Ferries, 733 *to* 742. *Ib. title, Chattahoochee River,* 720, '3, '6, '7, '9. 8 *Cow. Lansing vs. Smith et al. Sup. Ct.* 146. 4 *Wendell, Same Case, Ct. of Er.* 9. 6 *Cowen, ex parte Jennings, Sup. Ct. N. Y.* 518. 5 *Wend. Same Case, Ct. of Er.* 423. 7 *Cow. Vanderbilt vs. Adams,* 349. 2 *Pet. Wilson et al. vs. Black Bird Marsh Co.* 245. 20 *John. R. Hooker vs. Cummins,* 90. 20 *John. R. Bradshaw vs. Rogers,* 103, 735. 3 *Caines' R. Palmer et al. vs. Mulligan et al.* 307. 14 *Ser. & R. Shunck vs. Schuylkill Nav. Co.* 71. 14 *Wend. Bloodgood vs. Mohawk and Hudson Rail Road Co.* 51. 9 *John. R. Livingston and Fulton vs. Van Ingree et al.* 507. 3 *Paige's Ch. R. Beckman vs. Saratoga & Sch. R. Co.* 45. 5 *John. Ch. R. Newburgh & Cocheton Turnpike Road vs. Miller et al.* 101. 2 *Stewart's R. Gates vs. McDaniel et al.* 211. 2 *Porter's R. Dyer vs. Tuscaloosa Bridge Co.* 296. *Charles River Bridge vs. Warren Bridge,* 6 *Pick.* 376. 7 *Ib.* 344. 11 *Pet.* 420. 10 *Ala. R. N. S. May. & Council of City of Columbus vs. Rogers et al.* 37. 1 *John. Ch. R. Hoffman vs. Livingston,* 211. 1 *Story's Eq. Jur.* §94, 109, 120, 388. 2 *Ib.* §885, 889. 4 *Wend. Wheelock vs. Young et al.*

647. *Eden on Injun.* 112, 113. *Drury on Injun.* 190, 260. 18 *Vesey, Birmingham Canal Co. vs. Lloyd,* 515. 13 *Ib. Gray vs. Duke of Northumberland,* 236. 7 *John. Ch. Jerome vs. Ross,* 315.

JONES, BENNING & JONES, for defendants.

H. L. BENNING submitted, among other points:

1st. Every riparian proprietor above the ebb and flow of tide water, is entitled to the land covered by the water, to the middle thread of the river. 3 *Peters' Dig.* 482. 3 *Kent,* 411, '12, '17, '27, '8, '9, 432, '3, '4, '7. 4 *Ga. R.* 255, '6, '7, 265. On the Chattahoochee this extends to the boundary of the State, "on" the western Bank. *Prince,* 151, 906.

2d. "Young's" entry was a trespass, and is not protected by the former judgment, for that was for damages for "injuries," and the Company is insolvent and the recovery unpaid. 3 *Kelly,* 40, 45.

3d. He has no title from the State, because the provisions of the charter were not complied with; and in 1844, the Irwinton Bridge Company, by a voluntary dissolution, lost its ability to comply; and in 1847, it was dissolved by Act of Legislature. *Pam.* 265. 3 *Kelly,* 39.

4th. The Legislature had the right to pass this Act, and re-absorb this franchise; and if compensation is to be made, the State must make it. 3 *Kelly,* 39, 40.

5th. The conditions of the charter not having been complied with, the Legislature had the power to repeal it.

6th. It was not necessary that this failure to comply should have been judicially ascertained; and if necessary, it had been in fact ascertained. 2 *Kelly,* 143. 3 *Kelly,* 40, 46.

7th. The deed to Young was made before the Company acquired the interest they purported to convey. *Pam.* 1837, *p.* 141. 1 *Kelly,* 524.

8th. The plaintiff in error has not availed himself of the *reasonable time* allowed by the decision of this Court, to comply with the provisions of the charter. The action of the Inferior Court is no excuse—

First. Because that decision was right; and,

Second. If wrong, the time has expired within which it

might be corrected, and *mandamus* is not the proper writ by which to correct it.

9th. Young's entry being then a trespass, an injunction was the rightful remedy, because it was impossible to tell how many persons would cross at a ferry, and so to measure the loss which, when ascertained, could not be recovered of parties insolvent and beyond the jurisdiction of the Court. 1 *Kelly*, 10, 11. 2 *Story's Eq.* §959 *b*. *Prince*, 447. *Hotch.* 681. *Beall vs. Fox's Adm'rs*, 4 *Ga. R.* 404.

By the Court.—LUMPKIN, J. delivering the opinion.

The complainants in the bill charge that they, for a long time, have been, and now are, the proprietors of a ferry across the Chattahoochee river; that the defendants, under and by virtue of an Act of incorporation, granted by the Legislature of this State, in 1837, are about completing a toll bridge across the said river, near their ferry, which, if finished and put in operation, will very materially injure, if not entirely destroy, the value of their ferry. They further state, that they are the owners of the land on the east or Georgia side of the river, upon which the defendants have placed one of the abutments of their bridge. They further contend, that the Act of the Legislature is an unauthorized violation of their private rights; that the same has been repealed by that body, and they pray an injunction against the defendants, prohibiting them from finishing said bridge, and from the use and enjoyment thereof, and also restraining them from trespassing on their land.

The injunction was granted by the Chancellor. To this bill the defendants filed their answer, wherein they rely upon their grant from the State to erect this bridge, upon the building and repairs of which they have already expended about $30,000. They further show, that they have used due diligence in endeavoring, in good faith, to comply with the conditions of their charter, which they allege they have hitherto been prevented from doing, by the obstinate refusal of the complainants to accept compensation for the use of their property, and the failure of the Inferior Court of Randolph County, where the land is situated, to appoint commissioners to assess the damages due for the land of complainants, used in the construction of the bridge, as provided

for by the Act. They state also, that a *mandamus* is now pending, to compel the Court to appoint appraisers; wherefore, they ask that the injunction may be dissolved, and they permitted to complete the repairs necessary to the opening of the bridge for the public use.

Upon a motion made for that purpose, the Court below refused to dissolve the injunction; and to this decree this writ of error is prosecuted.

I need hardly remark, that this cause involves principles of immense magnitude in its results, both as it regards the interests of individuals and the rights of the public. I have not pretended to recapitulate all the facts presented by the record, nor shall I attempt to discuss, in detail, the numerous questions involved in this litigation. Mine shall be the task of performing, as best I may, the less ambitious, though perhaps not less acceptable service of discussing a few of the more prominent features of this case. Our judgment upon these, must have a controlling influence upon the rights of the parties, as well as the means of redress allowed them by law.

1st. What, then, are the rights of the Messrs. Harrisons in the ferry, which it is alleged, have been infringed by the charter granted to the Irwinton Bridge Company? They set up none in their bill, by grant from the State or otherwise. It is claimed by counsel in the argument, as an incident to their ownership of the land on this Bank of the Chattahoochee river, and for which they hold a deed of conveyance from the State. It is insisted, that inasmuch as they purchased from the State, they had a right to believe that this privilege was appurtenant to their deed, and that they would be protected without molestation or disturbance, in its enjoyment; that it is inseparable from their title to the property; or, to state the proposition with more technical precision, and with greater force for the complainants, that inasmuch as the sovereign, as the owner of the land, possesses the power of transporting persons, his grant in such cases will communicate the whole franchise. They insist, moreover, that it is the height of injustice and tyranny, for the Legislature to pass an Act in direct opposition to their own deed, and which so depreciates the value of their ferry, that it is not worth continuing.

Are these claims well founded? It is not necessary to go extensively into the doctrine of riparian rights. Rivers are of three

kinds: 1st. Such as are wholly and absolutely private property. 2d. Such as are private property, subject to the servitude of the public interest, by a passage upon them. The distinguishing test between these two is, whether they are susceptible or not of use for a common passage. 3d. Rivers where the tide ebbs and flows, which are called arms of the sea. *People vs. Platt*, 17 *Johns.* 211. *Hooker vs. Cummins*, 20 *Johns.* 90. 4 *Burr*, 2164, *per Ld. Mansfield.* It is not pretended that the Chattahoochee is at this point a navigable river, where the tide ebbs and flows; such is notoriously not the fact; it belongs to the second class or division in the foregoing enumeration. Now, it is well settled in England, and the doctrine is pretty uniform in this country, that the proprietor of the land on the margin, owns the bed over which the river passes; and though it be nominally and in terms, bounded on the margin, it extends, by construction of law, to the middle of the stream. In this case, it reaches to the opposite bank, that being the western boundary of the State. The public right is one of passage, and nothing more, as in a common highway; it is called in the books an *easement*, and the proprietor of the adjoining land has the right to use the land and water of the river, in any way not inconsistent with this easement.

[1.] Has the riparian proprietor the right of ferry? This point is thus clearly stated by *Sir Matthew Hale*, in his treatise *De Jure Maris*: "The King, by ancient right of prerogative, hath had a certain interest in many fresh rivers, even where the sea doth not flow or re-flow, as well as in the salt or arms of the sea; and these are those which follow: 1st. A right of *franchise* or *privilege*, that no man may set up a common ferry, for all passengers, without a prescription, time out of mind, or a charter from the King. He *(the owner)* may make a ferry for his own use, or the use of his family, but not for the common use of all the King's subjects, passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest or use, and every man, for his passage, pays a toll which is a common charge, and every ferry ought to be under a public regulation; that is, that it give attendance at due time, keep a boat in due order and take but reasonable toll; for if he *(the ferryman)* fail in these, he is finable. Hence it is, that if a common bridge be broken, whereby there is no passage, but by a boat or ferry, it hath been anciently practised in the Exchequer, to compel that

ferryman that ferries over people for profit, without charter from the King, or a lawful prescription, to account for the benefit above, his reasonable pains and charge."

I need not repeat here the extravagant eulogium pronounced by Mr. Wirt, on this great Judge, on the trial of Burr: that, "with a mind beaming with the effulgence of noonday, he sat on the bench, like a descended god!" But I will say, what is well known to jurists, that in England, this work, from which the above principle is extracted, is considered as conclusive upon any question relating to the rights of Sovereign or subject, either in the sea, arms of the sea, or public or private streams of water; and that its authority has been repeatedly recognized in this country. 2 *N. H. R.* 369, 371. 1 *Randolph*, 417, 420. 1 *Halsted*, 1, 74. 2 *Conn. R. N. S.* 481, '3, '4. 3 *Cain. R.* 307, 315, 318.

This, then, is the Common Law principle, and it is obligatory upon us, unless contrary to the constitution, laws or form of government established in this State.

Before proceeding to the examination of our own legislation respecting ferries, it may be well to advert, for a moment, to the views entertained by some of our sister States upon this subject.

In *Lansing vs. Smith*, (4 *Wend.* 21,) *Chancellor Walworth*, as the mouth-piece of the Court of Errors of New York, held this language: "So long as the constituted authorities of the State did not think proper to interfere, persons navigating the river might come to the wharf, subject to the payment of such wharfage as the State allowed the owner to take. But even the taking of a common wharfage or toll at a ferry, is a franchise subject to the control and regulation of the Legislature, *and cannot be lawfully exercised without their permission.*" Citing, *Hale, De Jure Maris, Morgan's Case, de portibus Maris*, 51. 4 *Com. Dig. tit. Piscary, B. Vanderbilt vs. Adams*, 7 *Cowen*, 349. *Wilson vs. The Black Bird Creek Marsh Co.* 2 *Peters*, 245.

In *Allen vs. Farnsworth*, (5 *Yerg.* 190,) the Supreme Court of Tennessee say: "There is no doubt but that the State has the right to establish ferries, whenever the Legislature may deem them necessary for the easement of its citizens. This right of eminent domain, by which the State is authorized to take private property for public use, whenever the necessity of the country requires it, is necessarily inherent in every government. It would follow, from the existence of this right, that a ferry might be es-

tablished, and a keeper, who is a servant of the public, might be appointed, without any regard to his ownership of the land, should the Legislature so direct."

In *Dyer vs. The Tuscaloosa Bridge Co.* (2 *Porter*, 296,) the Supreme Court of Alabama went far beyond the doctrine contended for by counsel for the defendants below, and maintained that the keeper of a ferry opposite a town, *under license from the County Court, keeps it subject to the public convenience; and the erection of a toll bridge near such ferry, by a Company, under charter from the Legislature, is not a violation of the vested rights of such ferryman*; and that the principle that private property cannot be subjected to public use, without adequate compensation, does not apply to alleged losses sustained by the owner of the ferry, over a public water course opposite a town, *and who holds the same under grant from the County Court*, by reason of the erection near it of a toll bridge, under a charter granted by the Legislature.

Mr. Justice Hitchcock, in delivering the opinion of the Court, said: "The Court has not, in the view which it takes of complainant's rights in this case, found anything in the law complained of, which authorizes its interference. The laying off, regulating and keeping in repair, roads, highways, bridges and ferries, for the public use and convenience of the citizens, is an exercise of the supreme authority of the State, coeval with the institution of civil society, and indispensible to the free exercise of social and commercial intercourse; and as soon as men cease to roam abroad as savages, and lands become appropriated to private use, the reservation for public accommodation, of a sufficiency for these purposes, is necessarily implied, and the mode of regulating its use, is necessarily vested in the State. It is a part of the eminent domain, and as such, is treated by all writers on public law." Citing, *Vattel, liber* 1, *ch.* 20, §249. *Bynkershock, lib.* 2, *ch.* 15. *Domat, lib.* 1, *tit.* 8, §1. He adds: "It is upon this principle that roads are laid out, and that the citizens are compelled to contribute, either in money or labor, to keep them in repair."

So much for the adjudication of other Courts, respecting this franchise. We will now advert to our own legislation; and it will be found that the people, through the General Assembly, have always claimed the right to control the exercise of this privilege.

The Legislature, in 1805, passed an Act authorizing the Inferior Courts in each County within this State, to establish ferries and bridges, and such rates for crossing thereat, as to them should seem reasonable; *retaining nevertheless, the power, at all times, of making such alterations in the establishments made by the Justices of the Inferior Courts, as to them may seem proper.* *Prince*, 734.

The decisions show that they have this right, without this reservation; that the grant of a ferry over a public water-course, is a license merely for the convenience of the community, and not such a contract as cannot be interfered with; that whenever the public require greater facilities, they should be afforded; and that if the profits of former establishments are thereby lessened, they have no legal cause of complaint.

And if this be true, how much more have they the power, when it has been expressly retained by Statute? Even had the Harrisons started this ferry under authority of law, and they claim none such, still they would have exercised the privilege, subject to the general law, and must abide the consequences. Surely, by erecting a *pourpresture*, in the old language of the law, attempting to make that private which ought to be public, they cannot relieve themselves from the reservation in the Statute, to which they would have been amenable had they proceeded lawfully.

In 1818, the same law was re-enacted in substance, with the additional provision, that wherever a ferry was established, it was made the duty of the Inferior Court, to cause every ferry owner to give bond and sufficient security, in such sum as they may think proper, conditioned for their keeping in repair, a good and sufficient flat, and attendance. *Prince*, 740.

To prove conclusively that the people, collectively, have retained this prerogative, and claimed, at all times, to control its exercise in the hands of the citizen, the Legislature, in 1820, passed a law to regulate the toll on Jersey wagons, in certain cases, throughout the State. *Prince*, 741. And again, in 1825, considering ferrymen as public servants, they exempted them, by law, from performing militia duty in time of peace. *Ib.* 741.

The right, then, to receive compensation from travelers and others, for their transportation across a river, on a public highway is, both at Common Law and by Statute, a public franchise; and from its nature it ought so to be; for no greater evil could well be imagined than the unrestrained power, on the part of in-

dividuals, to exact from the traveler, who cannot brook delay, nor stipulate for terms, whatever cupidity might exact.

[2.] Our conclusion, therefore, is, that upon the ground of individual right, and without grant from the public, the complainants had no vested right to keep a ferry or transport persons or effects for pay over the Chattahoochee river; and that even had this ferry been established by authority of law, unless it was founded on valuable consideration, and necessarily exclusive in its nature, the individual right in this, as in all similar cases, would be held subject to the supreme and paramount right of the community.

Before dismissing this subject, I avail myself gladly of the occasion, to return my sincere thanks to the able counsel for the plaintiff in error, for the very thorough and satisfactory argument which he submitted upon this branch of the case.

[3.] 2d. It is contended that the Legislature have not only wrongfully destroyed the value of complainants' ferry, but that they have also wrongfully authorized the taking of their land for the eastern abutment of the bridge.

By the 6th section of the Act of Incorporation, it is provided, "That the Board of Directors shall have power to select and take, or receive as a donation, such parcel or parcels of lands as they may deem necessary for the construction, convenience and protection of the said bridge and its abutments, piers, pillars or any thing in any wise belonging to or necessarily connected with the construction and protection of the said bridge; and in case of disagreement between the owner or owners of said land, and the said Board of Directors, in regard to the damages or price of any part of such land, it may and shall be lawful for such Board of Directors to appoint one disinterested freeholder, and for the owner or owners to appoint another disinterested freeholder, as appraisers, and the Justices of the Inferior Court of Randolph County, shall appoint another disinterested freeholder; but if such owner or owners shall decline to appoint an appraiser, then two appraisers shall be appointed by the said Inferior Court; all of whom shall be sworn by an officer authorized to administer an oath, to make and return to said Court a just and impartial valuation of the damages or value of the land thus required by the said corporation, and their *demand*, (meaning, I apprehend, *award*,) shall be in writing and signed at least by a majority of

said appraisers, which shall be held and taken as a judgment for the amount against the said corporation, and shall be enforced by an execution from the said Inferior Court; and the plat of the said land, with the award, shall be recorded in the said County of Randolph, in the same manner that deeds are, and shall vest the right of the fee simple to the said piece or parcel of land in the said corporation, so soon as the valuation thereof shall be made as aforesaid, and paid for, or when the money may have been tendered and refused: *Provided*, if either party shall think proper, he, she or they may appeal to the Superior Court of said County, and have the damages ascertained by the verdict of a Special Jury, and their decision shall be final." *Laws of Georgia*, 1837, *p.* 141.

[4.] It is conceded that by the Common Law, as well as by the Constitution of the United States, private property cannot be taken for public use, without just compensation. We see nothing in this Act which conflicts with this principle. Here, as much ground as may be necessary for the bridge, is condemned and authorized to be seized for that purpose; but before it can be taken and permanently appropriated, a Jury, if demanded, are to assess the damages, which must be paid before the ground can be used.

We might content ourselves here, by suggesting that when this Court was organized, the question, as to the power of the Legislature to condemn so much land as was necessary for the construction of bridges, ferries, canals, rail roads and other public highways, by making or tendering adequate compensation to the party aggrieved, was no longer open; it was *res adjudicata* all over the civilized world; it was settled by the Courts of Great Britain, of the Federal and State Governments throughout the American Union, and irreversibly fixed by four or five hundred miles of rail road spanning our State in every direction, and conferring incalculable benefits upon our people.

But I am not willing to ensconce myself behind my predecessors, the pioneer generation in these great enterprizes.

To listen to the fervid and impassioned eloquence of counsel, one would conclude, that instead of its being a legitimate exercise of power, it was a gross and palpable usurpation by the Courts and the Legislature; one too, calculated to rob the people of their liberties, to plunder their property, to break down all

the barriers around their rights; in short, to make them vassals to power and slaves to wealth!

It would seem to be strange and unaccountable, that a despotism so desolating, a power so monstrous and revolting, should not have encountered a more formidable opposition. The people must be miserably tame or stupid, or else (what we suspect to be true,) this picture is overwrought, too highly colored. Any other conclusion would be a libel on the past history and patriotism of the country.

No one, I believe, denies to the State the right to construct a public road any where and in any way that it may think proper. It has been exercised repeatedly and time immemorially, and without complaint. This, at least, is one of the cases, I believe, where all agree that individual right must yield to the public good. It is decided in 2 *Bay's S. C. R.* 38, that the Legislature of the country is vested with the power to pass laws for laying off roads and highways in any part of the State, and to appoint commissioners to see them kept in repair, whenever they may think convenient and proper, *without any compensation to the owners of the land through which they run.* This, the Court say, is a part of the *lex terræ*, a condition attached to all freeholders, and which existed before *Magna Charta.*

And it seems to have been overlooked, that we have a law in Georgia, passed 50 years since, and universally acquiesced in, and which asserts the identical principle which is now so strenuously resisted, viz: that although a citizen may hold a grant in his pocket to his land, yet a public road may be laid out through it, and if the owner feels aggrieved, he shall submit to the arbitrament and award of a Jury of his country, the question of injury. *Prince, 1st ed. p.* 399. Every public highway and bridge in the State has been constructed, and for thirty-five years from 1799, to the date of the Act, incorporating the first rail road without complaint, upon this principle.

[5.] Shall it be said that these were public roads, and laid out for the general welfare? I ask, who is to be the judge of what is or is not for the public use, but the people themselves, speaking through their representatives, simply because it is inconvenient, if not impracticable, for them to assemble in mass and decide these matters? To make a thing of public use, it need not, I apprehend, be used as a public common; nor must it be in the

continued occupancy of the agents of the Government. Suppose all Georgia were congregated together, and it should be determined that the public good made it expedient and highly advantageous, to erect every public work which now exists, and which gives us such a proud pre-eminence among our Southern sisters, who doubts the power of the people to construct these rail roads, canals and bridges, and to seize and appropriate private property for that purpose, allowing to the owner, if his injury exceeded his share of the common advantage, to be compensated by a Jury? If the State could do this directly, what is there to prevent it being done by contract? Would it be constitutional to call out the people, with their slaves, axes, mattocks and shovels, to build a rail road, or to tax them, as has been done in this State and every other, at the rate of $15,000 to $20,000 a mile for that object, and take and appropriate the citizens' land for its use? If so, why is it unconstitutional to grant a charter to a Company to have this done at such an immense saving of burdens, personal and pecuniary? Suppose it were submitted to a popular vote, to determine whether our Western & Atlantic Rail Road, now in a course of completion, should have been built by a private Company, charging moderate fare and freights, as were the Georgia, Central, and Macon & Western Rail Roads, or by taxes or personal labor? Would they hesitate to choose the corporation system? To doubt it, would be a gross reflection upon their intelligence.

If the people may lawfully exercise the right, they may transfer it. A few years since, our people were taxed to buy negroes to work on the public roads, and agents were employed and paid to superintend them. Nobody questioned this exercise of power. The community are entitled to the best roads. If it is cheaper to get others to construct them, than to do it themselves, where is the mischief? It is only employing the best instrumentality, for accomplishing the great system of internal improvement demanded by the age, and still more by the inexhaustible resources teeming in every portion of our State, and which need only the proper encouragement for their development; resources, in comparison with which, all the gold of California is but dross; and which lay buried in the bowels of the earth, or rotting on its surface for half a century, for want of the necessary facilities to make them available!

Civilization must advance; the improvements of society, diffusing plenty and prosperity, knowledge and refinement and morality all around, must not, cannot be restrained; public opinion has willed it, decreed it, and there is no higher power to which to appeal—*Vox populi, vox Dei.*

I cannot forego the pleasure of transcribing here, the eloquent and appropriate remarks of the late *Chief Justice Lipscomb*, upon this subject: "Within the last three or four years, numerous charters, containing provisions for condemning private property, have been granted to Rail Road and Canal Companies; and although it is not contended that error sanctions error, we should be well convinced that those States have erred, before we are at liberty to discard the force of the argument, deduced from the fact, that such power has been exercised by those intelligent and patriotic Legislative bodies, and that this power has never been judicially impugned. Reference to the time when these charters were granted, gives additional weight to the argument; for if there ever was a time when the powers of Government were diligently and critically investigated, it is the period of the enactment of those charters. It is a truth that will not be controverted, that the whole history of the past ages, presents no period of time when the powers of Government have been subjected to as jealous and severe scrutiny, as the age in which we live. The people know and justly appreciate, not only their rights, but their own power, and they are too vigilant to permit them to be abridged by their rulers. Virginia, the mother of Washington, Henry, Pendleton, Wythe and Jefferson, and a host of other departed apostles of liberty, over whose names and memory, 'time shall achieve no conquest'—Virginia, always on the watchtower and ready to cry aloud and give the alarm, at the slightest encroachment on personal liberty and private right—she, too, has, within the last two years, (1832,) granted several charters to Rail Road Companies, containing precisely the same provisions. And is Alabama alone to be arrested from indulging the public spirit of her citizens, and marching hand in hand with her sister States, in the great work of internal improvement, by a conscientious jealousy of Federal interference, on the one hand, and an inability to give efficiency to the efforts of public-spirited individuals in the cause, on the other? The grant to the corporation was intended to be a public benefit. The prosperity of the stockholders is insepara-

ble from that of the community. By adding to the convenience, wealth and general prosperity of the people alone, can the stock be made profitable. It only remains for me to inquire, if a sufficient provision has been made to secure to the owner a just compensation for his property, to be ascertained according to the due course of law." 2 *Stewart's R.* 213.

When this case was up before, the Court admitted that the Company had the right to enter upon the land of the complainants, and to make the necessary surveys, and to take all other preliminary steps for locating the eastern abutment of the bridge; but denied to them the right to appropriate the private property of the complainants to their permanent and exclusive use, until just compensation had been made or tendered, in terms of the charter. 3 *Kelly*, 45. The same doctrine is re-affirmed in *Morris vs. the Macon and Western R. R. Co. Ib.* 338. We are not disposed to go now beyond this. Where property is appropriated by the Government in time of war, for provisioning armies, supplying the means of transportation, destroying all the means of subsistence to arrest the progress of an invading foe; in these and all other cases of like necessity, private property is subjected to the public use, before compensation is or can be made. To require this as a condition precedent would render the right itself nugatory. Indeed, where the State is the debtor of the citizen, the public faith is the only guarantee which the owner needs or can ask. Nor can the Courts presume any thing to the contrary. But when the equivalent is to be made by a private person or corporation, compensation should be made or tendered before the party will be allowed to take exclusive occupancy of the property.

In this case, that has not been done, although, as we feel warranted from the evidence disclosed in the record before us, it has been attempted in good faith. We cannot, therefore, direct the injunction to be dissolved. We will, however, under the facts and circumstances, grant further time to enable the Company to comply with their charter, and in the meanwhile pass such order as will protect the property from decay, and give to the public the use and enjoyment, leaving the fund arising from the tolls, in the hands of the Chancellor, to be paid over to the rightful owner, whenever the conditions of the charter are performed.

3d. It is contended that the Irwinton Bridge Company has been

dissolved by the Legislature, and that, therefore, they have no rights to be protected in this or any other Court.

Two Acts were passed by the last Legislature in reference to this corporation. One bears date the 28th of December, 1847, and directs His Excellency, the Governor, to cause judicial proceedings to be instituted, in the Superior Court of the County of Randolph, for the purpose of forfeiting the charter granted to this Company in 1837. The other is dated on the 29th of the same month, one day thereafter, and declares the Act of 1837, incorporating the Company, to be repealed, upon the ground that certain conditions were therein prescribed, upon compliance with which depended the privileges therein granted; that ten years had already elapsed, and that the terms of the charter had not been performed, to the great injury of James and Samuel Harrison, upon whose land the eastern abutment of said bridge rests.

With the first of these Acts, the Court at present have nothing to do. It is merely directory in its character, and we are bound to suppose that the duty which it enjoins will be properly and legally discharged.

Is the Act of repeal valid and obligatory upon this Court? To investigate the constitutionality of an Act of the co-ordinate branches of the Government, is always a delicate and painful duty. But when the rights of individuals are concerned—rights recognized and secured, by a judgment of the highest judicatory of the State, and the question is thus distinctly presented—we cannot falter. Upon the faithful discharge of duty by the Judiciary depend, in no small degree, the integrity and duration of Government itself.

No Court in this Union has gone farther, I might in truth say, so far, as this tribunal, in maintaining the just constitutional rights of the law-making power. *See Flint River Steamboat Company vs. Foster, 5 Georgia Reports,* 194. If, however, it should be found that the law in question is not sustained by the Constitution, we are bound to pronounce it void. For myself, I can declare, with the utmost sincerity, that the Acts of the last Legislature, beyond any since 1799, command my most cordial and unqualified admiration. But the Act under consideration bears upon its face the evidence of haste and inconsideration. After having directed the Governor to cause proceedings to be instituted, with a view to forfeit the charter, why the very next day at-

tempt to forestall these proceedings by declaring the charter already forfeited?

Again, the Act assumes that ten years have already elapsed, and that the conditions of the charter have not been complied with, and for this reason, the privileges which it confers are recalled. And it is stated in the argument, that this assumption is based upon the former judgment of this Court in this case. If so, I regret to say that the whole tenor of that decision was altogether misconceived. It is certainly true, that it admits the fact that the terms of the charter have not been complied with. But what terms? Not that the bridge has not been built, the only purpose for which the charter was granted. This has been done long since. Why, the very *gravamen* of the Bill now under review, is to restrain the Company, or their assignees, from opening the bridge for the public use. The failure is, that the owners of the land have not yet been paid for their property; and the record and judgment of this Court so far acquit the Company from censure on this score, that it was considered equitable and right to allow further time for this purpose. Had the case been fully understood, it would have been seen, that the Court was convinced that the Company had manifested the utmost good faith in their efforts to comply with the requisitions of their charter in this particular, and were prevented from doing so by the persevering refusal of the other party to come to any agreement, and a mistake, clerical or otherwise, to have the appraisers appointed by the proper Court, to assess the value of the land on which the eastern abutment of the bridge stands. The Justices of the Inferior Court, sitting as they frequently do, for *Ordinary* and *County* purposes, on the same day, the application was recorded on the minutes of the *former* instead of the *latter;* and the owners of the land, *not the Company*, taking advantage of this mistake, rejected the compensation which was assessed and tendered. And this is the failure referred to in our former judgment. And now it is said, that it was upon this that the Act of dissolution was predicated!

[6.] Had the Act of repeal proceeded upon the idea, that the charter of 1837 was improvidently granted, the assumption would have met my hearty approval, whether its constitutionality could have been sustained or not. A bridge was needed, I have no doubt, at the point designated. A ferry transports persons and

effects with more delay and less safety. Public convenience, therefore, demanded this erection. But the Legislature was under no obligation to grant this franchise to the Irwinton Bridge Company. If made to any one, it should have been to the owners of the soil where the bridge was to be built. In the exercise of the right of *eminent domain*, regard should always be had to the interest of the citizen; and whenever the public good requires that he should relinquish his property for the common use, a preference should be given to him over a stranger, and he should, if he would, reap the profits. This would reconcile him to his loss or forced contribution to the convenience of the community. A grant to another, therefore, without good reason, is unjust to the proprietor of the freehold. It should never be arbitrarily or capriciously done. If the owner cannot or will not receive the franchise, pay him for his property and grant it to another. Usually he will gladly accept the privilege, for men are presumed to consult their interest. If, by reason of poverty or other cause, he cannot use it himself, he can dispose of the franchise to others. *I speak as a man;* if the charter of 1837 was conferred over the heads of the owners of the soil, or without notice to them, it was wrong, and their subsequent conduct is neither to be wondered at, nor stigmatized. The yare entitled to sympathy rather than censure. I would think it expedient to pass a general law, giving to the owners of land, over strangers, the preference in all such cases, so far as it was practicable.

But to the constitutional question. The doctrine is thus stated by *Angell & Ames:*—"By the theory of the British Constitution, Parliament is omnipotent; and hence, an Act of that body would undoubtedly be effectual to the dissolution of a corporation. It is to the honor of that nation, however, that this power, restrained by public opinion, rests mainly in theory; and, except in the instances of the suppression of the Order of Templars, in the time of Edward the Second, and of the religious houses in the time of Henry the Eighth, we know of no occasions on which Parliament have thought proper to dissolve, or confirm the arbitrary dissolution of corporate bodies. When, in 1783, a bill was introduced for the purpose of remodelling the charter of the East India Company, it was opposed by Mr. Pitt and Lord Thurlow, not only as a dangerous violation of the charter of the Company, but as a total subversion of the Law and Constitution of the country.

In the nervous language of the latter, it was 'an atrocious violation of private property, *which cut every Englishman to the bone.*' Corporate property and franchises, important as they usually are in amount and extent, and undefended by the same strong sympathies which guard individual rights, offer a more tempting and easier spoil to misguided power, whether it resides in the Prince or the people. It is a happy feature in the Constitution of our own Government, that the power of the Legislatures of the different States resembles, in this particular, the prerogative of the King of Great Britain, who may create, but cannot dissolve a corporation, or, without its consent, alter or amend its charter. In the tenth section of the first article of the Constitution, it is declared—'No State shall enter into any treaty, alliance or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or *law impairing the obligations of contracts*, or grant any title of nobility.' And in this clause it has been settled, that the charter of private corporations, whether civil or eleemosynary, is an executed contract between the Government and the corporators, and that the Legislature cannot *repeal*, impair or alter it, against the consent, or without the default of the corporation, *judicially ascertained and declared.*" *Angell and Ames on Corporations*, 502.

Chancellor *Kent* calls this a great principle of constitutional law, settled in the case of *Dartmouth College vs. Woodward*, and asserted and declared, by the Supreme Court of the United States, in numerous other cases antecedent to that decision. 2 *Kent's Com.* 306. 4 *Wheat.* 518. 6 *Cranch*, 88. 7 *Ib.* 164. 9 *Ib.* 43. *Ib.* 292. 8 *Wheat.* 1. 2 *Mass.* 143. 1 *Paige's Ch. Rep.* 107. 7 *Conn. Rep.* 53.

[7.] Anciently, it was doubted whether a corporation could be dissolved at all for a breach of trust. It is now well settled that it may; but then it must be first called upon to answer. 12 *Mod.* 271. 5 *Johns. Ch. Rep.* 380. 2 *Term Rep.* 515. *Canal Company vs. Rail Road Company*, 4 *Gill & Johnson*, 1. *Story J.* 9 *Cranch*, 51. *Lord Holt in London vs. Vanaire*, (12 *Modern*,) said: "All privileges are granted on condition that they shall be duly executed according to the grant, and if they neglect to perform the terms, the charter may be repealed by *scire facias.*"

The forfeiture of corporate franchises, by non-user or mis-user, was fully discussed in the case of *The King vs. Army*, 2 *Term Rep.* 515; and it was held, that although a corporation may be dissolved, and its franchises lost by non-user or mis-user, yet it was assumed as an undeniable proposition, that the default was to be judicially determined *in a suit instituted for the purpose.*

Mr. Justice Story, in delivering the decision of the Supreme Court in *Terrell and others vs. Taylor and others*, (9 *Cranch*, 51,) says: "A private corporation, created by the Legislature, may lose its franchises by a mis-user or a non-user of them, and they may be resumed by the Government, *under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture.*"

The same doctrine underwent a most thorough examination in the *Canal Company vs. the Rail Road Company*, 4 *Gill and Johnson's Rep.* 1—the case occupying 273 pages. It was there ruled, among other things, that the charter of the Potomac Company was a contract between the States of Maryland and Virginia and that Company, the obligation of which could not, without the assent of the corporation, be impaired by any Act of the Legislatures of either of those States, nor by the concurrent Acts of both, consistently with that section of the Constitution of the United States which declares that "no State shall pass any law impairing the obligation of contracts;" that in ordinary cases, the State may repeal or modify, at pleasure, any act of incorporation granted by it, before it is accepted, *and when no rights have been acquired under it*; that, until accepted, it is not a grant, nor the public faith pledged not to impair it; that a corporation may forfeit its charter by non-user or mis-user of its franchises; but, say the Court, *it is well known, that such forfeiture can only be enforced at the instance of the Government, and that no cause of forfeiture can be taken advantage of, collaterally or incidentally*, and that the proceedings for breach of the conditions should be by *scire facias* or *quo warranto.*

The doctrine intimated in this opinion, that a charter granted without consideration, and before its execution, so as to create any rights or duties, which, in contemplation of law, may be impaired, may be repealed by a subsequent Legislature, has often been maintained by the Courts of this country. *Trustees of the Bishop's Fund vs. Rider*, 13 *Day's R.* 87. *Fletcher vs. Peck*, 6 *Cranch*, 87. *New Jersey vs. Wilson*, 7 *Cranch*, 164. *Terrell vs.*

Taylor, 9 *Ib.* 43. *Sturges vs. Crowningshield*, 4 *Wheat. R.* 122. *Dartmouth College vs. Woodward*, 4 *Wheat. R.* 518. *Green vs. Biddle*, 8 *Wheat. R.* 1. *Atwater vs. Woodbridge*, 6 *Conn. R.* 223. *Osborne vs. Humphreys*, 7 *Conn. R.* 336. *The Derby Turnpike Co. vs. Parks*, 10 *Conn. R.* 522. *London vs. Litchfield*, 11 *Ib.* 251. *The People vs. Platt*, 17 *John. R.* 195.

In *Slee vs. Bloom*, 5 *John. Ch. R.* 381, *Chancellor Kent* held that the forfeiture of corporate rights must be judicially ascertained and declared; and that corporate power which may have been abused or abandoned, cannot be taken away *but by regular process.* He considers all the cases with his usual scrutiny and discrimination, and expresses a belief, that there is no instance of calling in question the rights of a corporation, or body, for the purpose of declaring its franchises forfeited and lost, *but at the instance and in behalf of the Government.* It is true that this decree was reversed in the Court of Errors, not, however, upon the ground that the Chancellor's position, so far as it related to the acts of non-user or mis-user, was incorrect. *Spencer, Ch. J.* who gave the unanimous opinion of the Court, said—" upon the authorities and for the reasons given by the Chancellor, mis-user or non-user cannot be relied on as a substantive and specific ground of dissolution." The reversal proceeded upon the fact, that the corporation in question had surrendered their franchise.

[8.] It would seem to be wholly useless to multiply precedents—there is no end to them. The doctrine at this day is well settled, that a private corporation is a contract between the Government and the corporators, and that the Legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent and without the default of the corporation, judicially ascertained and declared, in a proceeding instituted directly for that purpose, at the instance of the Government; and that no advantage can be taken of any non-user or mis-user on the part of a corporation, *by any defendant* in any collateral action.

For the reasons assigned, therefore, the judgment of the Circuit Court must be affirmed, and the cause remanded, with the following instructions: It is the opinion of the Court—

1. That the complainants in the bill have shown no right, by grant from the Legislature, or otherwise, to their ferry across the Chattahoochee river; and that, consequently, they have no pro-

perty therein, which would entitle them to enjoin the defendants, upon the ground of injury to or interference with said ferry.

2. That the Irwinton Bridge Company, or their assignee, had the right, under their charter, to enter on the land of the complainants, and make the necessary survey, and take all other preliminary steps for the purpose of locating the eastern abutment of their bridge, before compliance with the provisions of their charter; but that they have no authority to appropriate the private property of the complainants to their permanent and exclusive use, until adequate compensation is made or tendered in terms of their charter.

3. That the pleadings show, that the Company have built the bridge, and are in possession thereof, and that they have not yet complied with the requisitions of their charter; they are therefore trespassers upon the land on which the east end of the bridge stands, and the injunction restraining them from the use and enjoyment of said property must be retained.

4. That the record shows diligence on the part of the defendants, to comply with the conditions of their charter, and that farther time be allowed them for that purpose.

5. That *mandamus* is not the proper remedy to correct the errors of the Inferior Court; that the said Court, under the charter of 1837, are ministerial officers only; and that their decision upon the rights of Edward B. Young, for the appointment of commissioners to assess the value of complainant's land, is not conclusive, and the said Young is entitled to renew his application, and that a certified copy of this and the former judgment of this Court is conclusive evidence that he is entitled to have said appointment made.

6. That it is not competent for the Legislature to divest said assignee of the rights which he acquired by the judgment of this Court heretofore rendered.

7. That a receiver be appointed by the Chancellor below, who, after giving bond, with approved security, in a suitable sum, for the faithful performance of his duty, shall take possession of the bridge in controversy, complete the repairs thereto, and open the same for the public use; and that, after defraying the expenses of repairing and keeping in order said bridge, retaining just compensation, to be adjudged and allowed by the Chancellor, and every other necessary outlay, that he retain the balance of the toll

money in his hands, subject to the future order and decree of the Chancellor, as to the rightful ownership thereof.

8. That upon compliance by the Irwinton Bridge Company, or their assignees, with the provisions of their charter, that the cross injunctions now pending between the parties, be, by the Chancellor, both dissolved, and the bridge, with its appendages, be ordered to be delivered over to the defendants in the bill.

No. 17.—P. H. SMEAD and C. A. SAVAGE, tenants, plaintiffs in error, *vs.* DOE dem. WILLIAMS, administrator, &c., defendants.

[1.] The Statute of Limitations does not run in favor of a tenant in possession of land, while the title thereto is in the State.

[2.] By the Act of 1767, the plaintiff in ejectment has seven years within which to institute his action for the recovery of the possession of lands and tenements, from the time his title, or cause of action to the same accrues. *Held*, under that Statute, the plaintiff 's title, or cause of action, did not accrue until the land was granted to him by the State.

Ejectment, in Muscogee Superior Court. Tried before Judge ALEXANDER, November Term, 1848.

This was an action of ejectment in Muscogee Superior Court. The plaintiff showed a grant to his intestate, dated in 1843. The defendant showed a continuous possession in himself, and those under whom he claimed, for more than seven years, under color of title.

The Court charged the Jury, that notwithstanding said continuous possession of said land by the defendant and those under whom he claimed, yet the Statute of Limitations did not begin to run in favor of said defendant, until the grant from the State of Georgia issued; and that if seven years had not elapsed between the date of said grant and the commencement of the plaintiff's action, the plaintiff was entitled to recover.

To this decision defendant excepted, and alleges the same to be erroneous.

H. HOLT, for plaintiffs in error.

H. L. BENNING, representing BAILEY & COOPER, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question presented by the record in this case is, whether the Statute of Limitations commenced running in favor of the tenant in possession of the premises in dispute, until the grant issued from the State, in the year 1843.

In *Brinsfield vs. Carter*, (2 *Kelly*, 150,) we held, that the Statute did not run against the State. But it is contended, that inasmuch as the State is not the lessor of the plaintiff, a citizen claiming under the grant from the State, is not entitled to avail himself of the benefit of the decision made in *Brinsfield vs. Carter*. In that case, the lessor of the plaintiff claimed title under a grant from the State. The principle established in *Brinsfield vs. Carter* must control this case. The Statute did not run in favor of the defendant in possession of the premises, until the land was granted to the lessor of the plaintiff by the State.

[2.] By the Act of 1767, the lessor of the plaintiff had seven years within which to institute his actionof ejectment, to recover possession of the premises, after his title or cause of action accrued. *Prince*, 573. The title or cause of action did not accrue to the plaintiff until the grant issued from the State to him in 1843.

Let the judgment of the Court below be affirmed.

No. 18.—ELIJAH BUTTS and others, plaintiffs in error, *vs.* RALPH S. CUTHBERTSON, defendant.

[1.] In suing out proceedings under the Act of 1841, giving liens to boat-hands, captains, &c., it is not necessary for the petitioner to aver in his affidavit that the boat was in the act of traversing the river when the services were rendered; it will be sufficient to state generally that she was engaged in navigating the river.

[2.] He should aver or show by what he states, that his claim is prosecuted within twelve months from the time it fell due.

[3.] The affidavit should aver, that a demand has been made upon the owners of the boat or other water-craft, or their agent, personally, should name them—and aver refusal to pay.

[4.] The judgment should be entered up against the owners as well as the boat herself.

[5.] It is necessary that the affidavit state that the boat had arrived at the landing, port or place of destination to which she had been freighted.

[6.] It is not competent, after judgment upon such proceedings, to amend by substituting an entirely new affidavit and petition.

Motion to quash *fi. fa.* before Judge WARREN, at Chambers.

The plaintiffs and defendant were creditors who had sued out and foreclosed their liens upon the steamboat Magnolia, under the Act of 1841, giving to certain persons a lien on steamboats and other water-craft navigating certain specified rivers, for provisions and wood furnished and services rendered.

The provisions of this Statute are as follows:—

SEC. 1. From and immediately after the passage of this Act, all persons employed, either as captain, pilot, engineer, first or second mate, fireman, deck-hand, or in any other capacity whatsoever, on all steamboats and other water-craft engaged in the navigation of the Chattahoochee, Altamaha, and Ocmulgee rivers, for any debt, dues, wages or demands, that he, she or they may and shall have against the owner or owners of said steamboat, or other water-craft, for personal services done, rendered or performed on board the same, and for wood and provisions, shall have an exclusive lien on said steamboat or other water-craft, against the owner or owners thereof, superior in dignity to, and of higher claim than all other incumbrances, no matter of what nature or sort the same may be.

SEC. 2. Whenever any captain, pilot, engineer, first or second mate, fireman, deck-hand, or any other person employed on any steamboat or other water-craft, navigating and running on the Chattahoochee river, shall have any claim or demand against the owner or owners of said steamboat or water-craft, for services rendered on board the same, and shall be desirous of collecting the same, upon the said debt becoming due, and refusing to pay the same upon demand made, he, she or they may, upon application to any Judge of the Superior Court, or Justice of the Inferior Court in any County in which said steamboat or water-craft

may then lie, upon the same arriving at the landing, port or place of destination to which the same has been freighted, make affidavit before him of the amount due him, her or them, for any labor or services by him, her or them done and performed on board of any steamboat or other water-craft, and specify the name thereof; whereupon the said Judge or Justice of the Inferior Court shall grant an order to the Clerks of their respective Courts, as the case may be, requiring said Clerk to enter up judgment upon said affidavit in favor of said applicant for the amount sworn to be due; and it shall be the duty of said Clerk to issue, instanter, an execution therefor, against the owner or owners of said steamboat or other water-craft, and also against said steamboat or other water-craft, to be directed to the Sheriff of said County, whose duty it shall be forthwith to levy said execution upon said steamboat or other water-craft, and advertise and sell the same, under the same rules and regulations as govern Sheriff's sales in other cases."

The steamboat Magnolia was sold by the Sheriff for $3100, and, on a motion to distribute the money, an order was taken to hear all questions before Judge WARREN, at Chambers. On the hearing, the Steamboat Company, by their attorney, Henry Morgan, who was also attorney for one of the largest creditors, moved to quash the *fi. fa.* in favor of Ralph S. Cuthbertson, upon the following grounds:

1. It does not set forth the fact, by any positive averment, or by implication, that the services rendered, were rendered on board the said boat while she was engaged in the navigation of Flint river, or any other river in the State of Georgia.

2. That there is no averment that the amount claimed (one thousand six hundred and eighty-seven dollars and eighty-eight cents) has been due and payable within the twelve months last previous to the commencement of the said suit, or that it ever was due and payable.

3. That the affidavit does not show that any legal demand was made of the Flint River Steamboat Company.

4. That neither the affidavit, nor the process, show the names of the owners of the boat, nor any of them.

5. That the affidavit does not show that the boat had arrived at a landing, point or place of destination to which she was last freighted.

6. That the affidavit does not show that payment was refused by said Flint River Steamboat Company.

7. That the judgment is against the steamboat Magnolia, and not against the owners.

The affidavit is in the following terms:

"GEORGIA, BAKER COUNTY:

"Personally came before me, LOTT WARREN, Judge of the Superior Court, in and for the Southwestern Circuit, &c., Ralph S. Cuthbertson, who, after being duly sworn, deposeth and saith, that the owners of the steamboat Magnolia, a craft navigating Flint river in said State, are indebted to this deponent in the sum of $1,687 88, for services rendered on board said boat as principal engineer, as per bill and account stated, hereunto annexed; that said boat has discharged her freight and laid up at or near Rope Work Shoals, on said Flint river, in the said County of Baker; and that the amount aforesaid has been demanded from the owners of said boat, as well as her captain, Albert G. Butts, within the last twelve months.

"R. S. CUTHBERTSON.

"Sworn to and subscribed before me, this 5th July, 1848.

LOTT WARREN, Judge S. C. S. W. C."

To this affidavit was annexed an account current between R. S. Cuthbertson and the steamer Magnolia, made out by the captain, and certified by him to be correct, showing the amount stated in the affidavit to be due to said Cuthbertson.

The Court overruled the motion to quash the *fi. fa.*, to which decision Elijah Butts and said Company, by their counsel, excepted.

Upon motion, the Court granted leave to the counsel for R. S. Cuthbertson to amend the pleadings in the said cause, so as to meet the objections made by counsel.

To which order and decision the said counsel excepted.

H. MORGAN, for plaintiff in error, cited the following authorities: *Robinson vs. Steamer Lotus and others*, 1 *Kelly*, 317. *Drome vs. Stimpson*, 2 *Mass.* 441, 4. *Soper vs. Harvard College*, 1 *Pick.* 177. *Bath vs. Fresport*, 5 *Mass.* 325. *Williams vs. Hingham Turnpike*, 4 *Pick.* 341.

E. PLATT, for defendant.

By the Court.—NISBET, J. delivering the opinion.

The Act of 1841, which allows liens to certain persons employed on board steamboats and other water-craft, *engaged in* the navigation of certain rivers, is in derogation of common right, and must be construed strictly. So construed, those who institute proceedings under it, are to be held in the pleadings to bring themselves within all its conditions. All the exceptions taken in this case but one, depend upon this requirement. Our duty is, therefore, chiefly by a comparison of the affidavit of the petitioner for the lien, with the Act, to determine whether, in the particulars specified in the assignment, the defendant in error has brought himself within its provisions.

[1.] It is claimed as error in the Court below, that it was held that the affidavit of the defendant *did* sufficiently set forth that the services claimed to have been rendered, were rendered on board the *Magnolia, whilst engaged in navigating the Flint river.* The Act requires that the person suing out the lien, shall be employed on board the boat *navigating and running* on the river. The affidavit states, that the owners of the steamboat *Magnolia, a craft navigating Flint river*, are indebted to them, &c. We hold this sufficient. The construction of the plaintiff in error is, that the services must be rendered on board the boat whilst in the *act of traversing* the river. We do not think so, but believe that the language of the Act relates to boats, &c., engaged, as a business, (for a season for example,) in navigating the river, and applies to them, whether in motion, or at rest temporarily. And in this particular we sustain the Court below.

[2.] The 2d objection to the pleadings is, that it does not appear from them, that the claim was prosecuted within twelve months from the time it fell due. The presiding Judge overruled this objection, and thereon exception is taken.

The Statute requires the claim to be prosecuted within twelve months from the time it is due, and the affidavit is silent as to this matter, but refers to a bill of particulars, which it is said is to be taken as part and parcel of it, and from which, it is said, it appears that the proceedings were instituted within twelve months from the time the claim was due. We hold the account referred to as part of the pleadings, and if it showed the required fact, the

objection would be well answered. But it does not; that is, only in part. One of the divisions of the account current, it appears, bears date less than twelve months earlier than the date of the institution of the proceedings. That part of the account amounts to some six hundred dollars. As to that sum, so far as this exception is concerned, the proceedings comply with the Statute; as to the remainder of the claim, they are insufficient.

[3.] The 3d exception is taken upon the refusal of the Court below to sustain this objection to the affidavit, to wit: that it does not show that a legal demand was made upon the owners of the boat. The law requires that a demand should be made for the debt, upon the owners of the boat; and the affidavit states that demand was made upon the owners of the boat, and also upon her captain, *Albert G. Butts.* The objection goes upon the ground, that there ought to be a personal demand upon the owners or their agent, and that the affidavit ought to state that it was so made, and name the owners or the agent. We think the objection well taken.

The Statute is very stringent against owners. The proceeding is summary, and partakes very much of an *ex parte* character. The right of defence is limited. The owners are not served with process—are not notified to appear and defend. The only substitute for this is, the demand which is required as a preliminary step to taking out the proceedings. It ought, therefore, to be a personal demand upon the owners or their agent, and who they are, or who he is, ought to appear. The averment as to the demand, ought to be stated in such form, with such distinctness that an issue may be formed on it. We therefore sustain this exception.

In connection with this exception, I consider another, which is *founded* on the refusal of the Court below to sustain this objection to the affidavit, to wit: that it contains no averment that the owners *refused to pay* upon demand. The Statute makes the demand and *refusal* preliminary to the suing out the proceeding to recover the debt, and the affidavit says nothing about it. Demand alone is not enough. The Statute makes the right to the lien to depend upon a refusal, and that must be averred. For aught that is apparent from the pleadings, the owners of this boat were not only willing, but importunate, to pay, and that the proceed-

ing against them is merely vexatious. It is enough to say, however, that the Statute requires a demand and *refusal.*

[4.] The 5th exception is to the judgment of the Court, that it was not necessary for the judgment to be entered up against the owners as well as the boat. We think it is necessary, because the Act makes it necessary. After the judgment is taken, the Clerk is required to issue execution against the *owners* and also against the *boat.* Execution must be founded on a judgment.

[5.] The Court ruled the affidavit sufficient as to the averment that the boat had arrived at a *landing, port* or *place* of *destination* to which it was freighted, and that is excepted to. In relation to this matter, the affidavit sets forth, that the boat "had discharged her freight and laid up at or near Rope Work Shoals, on said Flint river, in the said county of Baker." The Act authorizes proceedings against the boat and her owners, "in any County in which said steamboat or water-craft may then lie, *upon the same arriving at the landing, port or place of destination to which the same has been freighted.*" The affidavit does not, in this particular, conform to the Statute. It should have stated that the place at which she had laid up, and where she had discharged her freight, was either the landing, the port, or the place of destination to which she had been freighted. There is a reason for this. The Legislature, no doubt, intended by this provision to prevent the stoppage of the boat in passing. A power in any boat-hand, captain, pilot, engineer, first or second mate, fireman, or any other person employed on a steamer, to arrest her in any County, whilst passing to her place of destination, would be not only oppressive to owners, but unjust to the owners of freight, and in restraint of navigation and commerce. The place at which this boat is stated to have laid up, may or may not have been her place of destination. She may have stopped and discharged her freight temporarily, from low water, or some other of the causes which are well known to hinder the navigation of our smaller streams. In this regard, we think the Court was in error.

[6.] A motion was made in the Court below to amend the pleadings in this case, and the Court said the petitioner could amend any and every defect, even to the extent of substituting an entire new affidavit, petition, &c. This was after judgment, and pending a motion to set it aside. I know of no proceeding in Law or

Equity where the doctrine of amendment can be carried to this extent. Let the judgment be reversed.

No. 19.—ELIJAH BUTTS, plaintiff in error, *vs.* RALPH S. CUTHBERTSON *et al.* defendants.

[1.] An inquiry can be made into the consideration of a note, whenever the proper administration of justice requires it.

[2.] Where a Statute gives a summary remedy for services rendered, the taking of a promissory note of the debtor does not waive the statutory lien.

[3.] A promissory note, given by an agent, will bind the corporation, provided he acted within the sphere of his powers, or the act was subsequently ratified. If A gives his note to B, in liquidation of the book-debt of C, it does not, of itself, destroy the account; nor is it, without other proof, such a payment that the original debt cannot be resorted to.

Motion to quash *Fi. Fa.* in Baker Superior Court. Decided by Judge WARREN, January, 1849.

The plaintiff and other creditors sued out and foreclosed their liens upon the steamboat Magnolia, under the Statute of 1841, giving to certain persons therein named, a lien upon steamboats and other water-craft, for provisions and wood furnished, and services rendered on board any steamboat or other water-craft, while engaged in the navigation of certain rivers therein named. (For the provisions of this Statute, see *preceding case.* See also, *Flint River Steamboat Co. vs. Foster*, 5 *Ga. R.* 197.)

The Sheriff levied the *fi. fas.* upon said steamboat, and sold the same for $3100. At the December Term, 1848, of Baker Superior Court, an order was taken, that all the claims upon the said fund, should be tried before his Honor, Judge *Warren*, at Chambers. Upon the hearing, on 3d January, 1849, Ralph Cuthbertson, another creditor, moved to quash the *fi. fa.* in favor of Elijah Butts; Butts objected to his being heard, 1st. Because Cuthbertson is no party to the record. 2d. That if this *fi. fa.* is fraudulently claiming this money, the remedy of the other creditors is in a Court of Equity. Which objections were overruled by the Court, to which decision Butts excepted,

Cuthbertson then moved to quash the *fi. fa.* :

1st. That the pleadings show that a promissory note is the foundation of the claim, being absolute on its face, for value received, without showing it was for any of the services mentioned in the Statute.

2d. A note cannot be varied or enlarged, so as to allow parol evidence to fix the lien in this case.

3d. The taking of the note is a waiver of the lien upon the boat, and may be enforced upon the Company, or James R. Butts, the agent, by whose name it is signed.

4th. Because the pleadings show that the plaintiff has received a note of a third person, to-wit: James R. Butts, agent, and his lien is thereby discharged.

Which motion was sustained by the Court, on the several grounds therein named; to which decision, counsel for Elijah Butts excepted.

H. Morgan, for plaintiff in error.

E. Platt, for defendant.

By the Court.—Lumpkin, J. delivering the opinion.

The Legislature, in 1841, passed an Act, which declares that "All persons employed either as captain, pilot, engineer, first or second mate, fireman, deck-hand or in any other capacity whatsoever, on all steamboats and other-water craft engaged in the navigation of the Chattahoochee, Altamaha and Ocmulgee rivers, for *any debt, dues,* wages or *demands,* which he, she or they may have against the owner or owners of said steamboat, or other water-craft, for personal services done, rendered or performed on board the same, and for wood and provisions, shall have an exclusive lien on said steamboat or other water-craft, against the owner or owners thereof, superior in dignity to, and of higher claim than all other incumbrances, no matter of what nature or sort the same may be: *Provided,* he she or they shall demand and prosecute the collection of the same, as hereinafter provided for, at any time within twelve months after the same shall become due and payable." *Hotchkiss,* 625.

The provisions of this Act was subsequently extended to Flint river. *Laws of Ga. pam. p.* 152.

Elijah Butts, seeking to avail himself of the benefit of this Act, applied to the Honorable *Lott Warren*, Judge of the Superior Court of Baker County, stating that the steamboat Magnolia, navigating the Flint river, was justly indebted to him the sum of $1407,57, for services rendered on board said boat, and provisions and materials furnished her, &c., with interest thereon, from the first day of January, 1848; and that James R. Butts, as the agent of the Flint River Steamboat Company, did, on the 3d of June, 1848, upon demand made on him for payment of said indebtedness, and in liquidation and acknowledgment thereof, execute and deliver to him, as the agent of said Company, a promissory note, whereby they undertook and agreed to pay the sum due, as aforesaid, with interest thereon; and that they had failed to do so.

An execution was awarded and issued, and duly levied on the boat, which was sold, and the proceeds brought into Court, to be distributed under its order to the conflicting claims against the Company. Various exceptions were taken by the creditors, to the *fi. fa.* of Elijah Butts, the plaintiff in error:

1st. That the pleadings show that a promissory note is the foundation of the plaintiff's demand; and being absolute on its face, and purporting to be for value received, it was not competent, by *parol evidence*, to show that it was for any of the considerations specified in the Act of 1841, so as to fix its lien.

2d. That the taking of the note was a waiver of the statutory lien.

3d. That the plaintiff having taken the note of James R. Butts, *agent*, that his lien was discharged.

The Circuit Court decided that the first ground must be sustained, unless a bill of particulars was filed, stating what services were performed, provisions furnished, &c. and the dates of these items of indebtedness specified.

[1.] Let us inquire whether the consideration of the note could be gone into, for the purpose of fixing the statutory lien. Why could it not? Suppose the vendor of land should attempt, after taking the note of the vendee for the purchase money, to assert his equitable lien to the proceeds, would any legal obstacle exist to prevent him from doing so? None occurs to us. What principle is violated by instituting an investigation as to the consideration of a note, whenever it is demanded for the proper adminis-

tration of justice? The Statutes of usury and gaming are every day set up as defences to actions on bills of exchange and negotiable notes, even in the hands of innocent holders. No plea is more common in our Courts, to actions even on bonds, than a failure of consideration.

But take another illustration: An infant gives a note for necessaries. To an action on the instrument infancy is pleaded; the plaintiff is allowed to reply and prove that the contract was for necessaries, and thus fix the liability of the defendant. Wherein does this case differ from the one under discussion?

Although, as it will be perceived, I have only introduced this proceeding by way of analogy, still it may be well enough to remark, that the decisions on the subject are somewhat contradictory. For myself, I am inclined to think, that a note given by an infant for necessaries, is valid. He cannot bind himself in a bond with a penalty, even for necessaries, (3 *Coke*, 172,) nor any other security where, by the rules of law, the consideration cannot be inquired into. *Reeves on Domestic Relations*, 230, '1. But a single bill for necessaries, without a penalty, would be good, and is said, in the case referred to in 3 *Coke*, to have been often so adjudged. *Aylliff vs. Archdale*, *Crok. Eliz.* 920. *Earle vs. Peale*, 1 *Salk.* 387. 3 *Bacon*, 594, '5. If the infant can bind himself by single bill, *a fortiori*, he may, by simple contract, for necessaries. *Adm'rs of Hane vs. Tarrant*, 2 *Hill S. C. R.* 400, '1. But whether this conclusion be correct or not, the example is sufficient for the purpose for which it has been adduced.

We hold, then, that it was competent to show that the consideration of the note was for services rendered, provisions and materials found on board the boat, by way of fixing the statutory lien; and that the giving of the promissory note by Butts, the agent of the owners, was a liquidation of the account, and made it unnecessary to file a bill of particulars. The Act itself gives the remedy for "*any debt, due* or *demand*," and we will not undertake to restrict it to open accounts, or to any other particular mode of indebtedness.

[2.] It is urged in the argument that it is against the policy of the law to extend these statutory liens; and that justice to creditors and purchasers demands that they should be enforced immediately. A satisfactory reply to this objection, is furnished by the Act itself, which requires that the debt, due or demand, no mat-

ter what be its nature, whether it exists in open account or note, "shall be prosecuted within twelve months after the same shall become due and payable."

2d. Was the acceptance of the Company's note a waiver of the lien? We think not. Much direct authority might be cited to this point. In *Thompson's Case*, (2 *Browne*, 297,) it was determined that the acceptance of a bond or warrant of attorney, is not an abandonment of a mechanic's lien. So in *Hinchman vs. Lybrand*, (14 *S. & R.* 32,) it was held, that a person who, on furnishing bricks for the erection of a building, agrees to be paid, part in cash and "the balance in lumber, at fair prices, whenever called for out of S's lumber yard," and accepts the guarantee of S for the performance of the contract, does not lose his lien upon the building, given by the Act of the Legislature. In *Kinsley vs. Buchanan*, (5 *Watts*, 118,) the identical point is adjudicated, made by this record, and no other. The Supreme Court of Pennsylvania there decide, that the acceptance of a note is not a relinquishment of the lien given by Statute to mechanics and others. And upon principle, I would ask, why should it be? Additional securities are, in their very nature, cumulative. It is not pretended, in the present case, that there was any express waiver or release of the lien; why should the mere taking of the Company's note be held an extinguishment by implication? Is there any inconsistency in the creditor's taking the note and retaining his lien? It is nothing new or strange to have two securities for the same debt, and the creditor may have his remedy on both, until he obtains satisfaction. The plaintiff asks only the payment of his debt, which is not disputed; and to that he would seem to be entitled.

Had Elijah Butts agreed, on his part, to look to the personal credit of his debtor, or *another*, for satisfaction of his demand, his lien would undoubtedly have been discharged; for it is well settled, that a special understanding to this effect, releases the lien. 2 *Kent's Com.* 500. 16 *Vesey*, 275. 1 *Mason*, 191. 4 *Wheat.* 255. 9 *Cowen*, 52. It is sufficient to say, that no such proof was pretended in this case.

The Act of 1834, (see *Hotchkiss*, 623,) giving masons and carpenters an incumbrance on houses erected by them, dispenses with the lien, where the mechanic *takes personal security for his debt*. And this is an express legislative recognition, as well

of the Common Law principle just stated, as of the propriety of the construction which we have given to the Act of 1841, passed in *pari materia.*

[3.] We are not sure that we rightly comprehend the remaining objection relied on for the defendant in error, viz: that "the pleadings show that the plaintiff has received a note of a third person, to-wit: James R. Butts, *agent,* and his lien is thereby discharged."

If it is intended to assert, as the argument indicates, the old doctrine, that a corporation can *contract* only under its corporate seal, it is only necessary to say, that it has long since been repudiated. 12 *Wheat.* 64. 7 *Cranch,* 299. 8 *Wheat.* 338. 1 *Har. & Gill.* 324. 7 *J. J. Marsh.* 85. 1 *Dev. & Bat.* 306. 3 *Rand.* 136. 1 *Cowen,* 513. Aggregate corporations at this day, usually contract through the intervention of agents duly authorized for this purpose. 10 *Mass. R.* 397. 1 *N. & M.* 231. 8 *Conn.* 191. A contract or promise, by a corporation, need not always be made or proved by express vote, but may be implied from corporate acts. 7 *Greenleaf,* 118. A contract or promise of a corporation, is implied by law, from the authorized acts of their agents. 3 *Halsted,* 182. 8 *Pick.* 178. If a person, assuming to act as agent, but without legal authority, make a contract, and the corporation receive the benefit of it, such acts will ratify the contract and render the corporation liable thereon. 1 *Pick.* 372. 19 *Johns.* 60.

The foregoing are now assumed as axiomatic propositions, and are conclusive upon this view of the subject. The note of James R. Butts, *agent,* was the note of the Flint River Steamboat Company. They have never contested their liability upon this note, nor do *they* now dispute it.

Even if this were the individual note of the maker, which he gave for the services rendered and the supplies furnished the steamboat Magnolia by the plaintiff, we should still hold that it was not a payment or extinguishment of the lien, unless the fact was averred and proved on the trial. *Schermerhorn vs. Laines,* 7 *Johns.* 311. *Porter vs. Talcott,* 1 *Cowen,* 359. *Ayres vs. Vanlieu,* 2 *Southard,* 765.

In this last case, David Hagar, the carpenter, had given his note to Ayres, the lumber-master, for lumber furnished Vanlieu; and the question was, what was the effect of this? Did it, of itself,

destroy the original debt against Vanlieu? The Court held that it did not; and that if the note was lost, or any difficulty arose respecting it, either from the insolvency of the maker, or other cause, that the creditor could still resort to the account for his protection.

The case in 1 *Cowen*, is still more in point; for among other things, the Supreme Court ruled that where the agent contracts for his principal and gives his own notes, they are considered, so far as the question whether they operate as payment is concerned, as the notes of the principal himself, and that notwithstanding the creditor agreed to take the notes of the agent and *his partner*, which were given accordingly, but not paid, that the principal was still liable, there being no agreement to receive the agent's notes, in payment and discharge of the principal's.

Upon the whole case made by the record, therefore, we are of the opinion that the plaintiff's execution ought to have been allowed.

No. 20.—JOHN T. BOOTH and another, plaintiffs in error, *vs.* MARTIN W. STAMPER, defendant.

[1.] The Inferior Courts in this State have not the power and authority, under the Constitution and Laws thereof, to grant new trials.

[2.] Courts of Equity have jurisdiction to order new trials in a Common Law Court, after judgment, on a proper case being made; but it is a jurisdiction which should be exercised with great caution and circumspection.

In Equity, in Talbot Superior Court. Tried before Judge ALEXANDER, September Term, 1848.

Plaintiffs in error filed their bill in Talbot Superior Court, charging that Martin W. Stamper brought an action of assumpsit in the Inferior Court of said County, December Term, 1842, against Booth, founded on a promissory note for $400, given to one John C. Waters, or bearer; that the consideration of said note was for money won at gaming; that Booth filed his plea, and summoned a witness by whom the fact could be proved; that some short time before the trial, Raines, as the agent of Booth,

proposed to George W. Towns, of the firm of Towns & Smith, attorneys for Stamper, and who, also, in connexion with Edmund H. Worrill, were attorneys in another cause pending in said Court against Booth, to place both of the causes on the appeal docket of the Superior Court, by consent; that Towns consented thereto, provided Worrill would consent; that subsequently Worrill consented; thereupon, Raines instructed the counsel of Booth to discharge the witness who was in attendance, and Raines left the Court under the belief that the cause would not be tried; that when the cause was called for trial, the counsel for Stamper denied that said agreement had any reference to this cause, and insisted upon going to trial; whereupon, their witness and client being absent, counsel for Booth were forced to confess judgment to the plaintiff.

The bill farther charged, that Booth was unable to give security, and thereby enter an appeal, but filed his affidavit, and prayed an appeal, under the Act of 1842, passed pending this suit; which appeal was subsequently dismissed, on the ground that the case was not within the provisions of the Statute; that a *fi. fa.* had been issued and levied on a negro boy, Peter, to which Raines had interposed his claim, which claim was still pending in Talbot Superior Court.

The bill prayed a new trial on the suit on the note, and an injunction on the *fi. fa.*

By an amendment, it was charged, that the inducement to make the agreement with said Towns was, that it was inconvenient for Booth and his agent to attend the Court, which fact was communicated to said Towns. At the trial, when the agreement was repudiated, said Booth's attorneys moved the Court for a continuance, which was refused; that Booth and Raines both lived some sixteen or seventeen miles from the Court House, and did not know of the cause being forced to trial until after the adjournment of the Court, so that they could not instruct their counsel to move for a new trial.

Upon the trial, the Jury found for the complainants, and upon the appeal, the counsel for defendant moved to dismiss the bill, on the ground that there was no equity therein, and that the complainants had a complete remedy at Common Law.

Which motion was sustained by the Court, and the bill was dismissed.

To which decision the complainants, by their counsel, excepted, and now allege the same to be erroneous.

B. HILL and M. J. WELLBORN, for plaintiffs in error, cited and commented on the following authorities:

1 *J. J. Marsh. R.* 458. *Norton vs. Woods*, 5 *Paige*, 250. 2 *Story Eq.* 182. 2 *Kelly*, 279. 3 *Ib.* 228. 4 *Georgia Rep.* 175.

H. L. BENNING, for defendant, cited—

2 *Story Eq.* §188, 894, '5. 2 *Kelly*, 279. 3 *Ib.* 78. 1 *Ib.* 136. 1 *Schoales and Lefroy*, 205. 1 *Turn. and Russ.* 319. *Mitf.* 131. 1 *John. Ch.* 320. 6 *Ib.* 479. 7 *Term R.* 269. 7 *Cranch*, 332. 2 *Tidd*, 905. *Prince Dig.* 909, 910.

By the Court.—WARNER, J. delivering the opinion.

The error assigned to the judgment of the Court below, is the dismissal of the complainants' bill at the trial term of the cause on the appeal, for want of equity.

[1.] It appears from the bill of exceptions, that the Court below predicated its judgment on the ground, that the defendant in the Inferior Court, could have moved for a new trial in that Court, and failing to do so, lost his remedy at Law, and had none in Equity. Have the Inferior Courts in this State, under the Constitution and laws thereof, the power and authority to grant new trials? By the first section of the third article of the Constitution, it is declared, "The Superior Court shall have *exclusive* jurisdiction in all criminal cases, (except as relates to people of color, &c., and which does not relate to the jurisdiction of the Inferior Courts,) which shall be tried in the County where the crime was committed: and in all cases respecting the titles to land, which shall be tried in the County where the land lies; and, also, concurrent jurisdiction in all other civil cases, and shall have power to correct errors in inferior judicatories, by writ of *certiorari*, and to grant *new trials in said Superior Courts*, on proper and *legal* grounds; and in all cases where a new trial shall be so allowed, *the Judge* allowing the same, shall enter on the minutes of said Court his reasons for the same; and the said Superior Courts

shall have appellate jurisdiction in such other cases as may be pointed out by law, in cases arising in inferior judicatories, which shall in no case tend to remove the cause from the County in which the action originated. The Inferior Courts shall also have concurrent jurisdiction in all civil cases, except in cases respecting the titles to lands, which shall be tried in the County wherein the defendant resides," &c. *Prince*, 909, '10. The first part of the clause of the Constitution above cited, it will be perceived, has reference to the *exclusive* jurisdiction of the Superior Court in all criminal cases, and in all cases respecting titles to land, to correct errors in inferior judicatories by writ of *certiorari*, and to grant new trials in said Superior Courts, on proper and *legal* grounds, and also *concurrent* jurisdiction in all *other civil cases*. The Inferior Courts also have concurrent jurisdiction in all civil cases, except in cases respecting the titles to lands, but *new trials* can only be granted in said *Superior Courts* on proper and *legal* grounds. The power to grant new trials is, by the Constitution, in our judgment, expressly restricted to the Superior Courts. The Superior Courts have *appellate* jurisdiction in cases arising in the *Inferior Courts*, and when the cause shall be finally tried in the appellate tribunal, that Court is clothed with the power to grant a new trial, on proper and legal grounds; and *the Judge* allowing the same, is required to enter on the minutes of *said Superior Court*, his reasons therefor. By the 58th section of the Judiciary Act of 1799, passed the next year after the adoption of the Constitution of 1798, it is declared—"All new trials shall be had by a Special Jury, to be taken from the Grand Jury list of the County." *Prince*, 432. This legislative enactment of 1799, affords strong evidence as to the construction given to the Constitution by the Legislature of that year, in favor of restricting the power to grant new trials to the Superior Courts.

[2.] Have Courts of Equity jurisdiction to grant new trials in the Courts of Common Law, after judgment rendered therein? That Courts of Equity have jurisdiction to order new trials in the Common Law Courts, on a proper case being made, we think is quite clear; but it is a jurisdiction which should always be exercised with *great caution* and circumspection. *Floyd vs. Jayne*, 6 *John. Ch. Rep.* 481. *Bateman vs. Willoe*, 1 *Schoales and Lefroy*, 201. In *Stroup vs. Sullivan & Black*, (2 *Kelly*, 275,) this Court stated the rule to be, that a Court of Equity will not grant

relief against a judgment at Law, on the ground of its being unconscientious, unless the defendant in the judgment was entirely ignorant of his defence pending the suit, or unless, without any default or neglect on his part, he was prevented, by *fraud* or accident, or the *act of the opposite party*, from availing himself of his defence, or by some unavoidable necessity.

What are the facts in this case, and are they sufficient to authorize a Court of Equity to grant a new trial? The suit was pending in the Inferior Court of Talbot County, to recover the amount of a promissory note, made by Booth, the defendant. The defence made by the defendant's plea was, that the note was given for a gaming consideration. At the trial term, it being inconvenient for the defendant and his agent, Raines, to attend the Court, a proposition was made to the plaintiff's attornies, to transfer the cause to the appeal docket of the Superior Court, by consent, which was agreed should be done; whereupon Raines, the agent of the defendant, instructed his counsel to discharge the witness who was in attendance upon the Court, and the defendant and his agent went home, a distance of about sixteen miles, under the full belief that the case would not be tried. When the cause was called in its order upon the docket for trial, the counsel of the plaintiff denied the agreement, and insisted upon a trial. The witness and client both being absent, the counsel for the defendant was forced to confess judgment to the plaintiff, for the amount of the note, with interest. Owing to the distance of the defendant's residence from the Court, he did not know that his cause had been forced to trial until after the adjournment of the Court; too late to instruct his counsel to have moved for a new trial, even had the Court the power to grant it. The affidavit of the witness who was discharged from his attendance upon the Court, in consequence of the agreement, is also attached to the complainant's bill, as an exhibit, in which he identifies the note, was present when it was executed, and states that the consideration for which the note was given, was money won of the defendant at the game of "faro."

It appears that the defendant had a good and valid defence to the note; that he was present at the Court, with his witness, to establish that defence; that confiding in the agreement made with the counsel of the plaintiff, to have the case transferred to the appeal docket of the Superior Court, by consent, he left the Court

and went home, as did the witness; that the counsel of the plaintiff repudiated the agreement and forced the cause to trial, and a judgment was rendered against him.

The defendant has evidently been entrapped by the course pursued by the plaintiff's counsel, and deprived of his defence, by the *act of his adversary*, without *fault* on his part, so far as the record discloses.

The conduct of the counsel for the plaintiff operated, to use the mildest term, as a *surprise* upon the defendant, and has enabled him to obtain an unconscientious advantage over him, which a Court of Equity will not permit him to retain. For the reasons already stated, the Common Law Court, in which the case was pending, could not afford the complainant adequate relief, and, in our judgment, the facts of this case afford *strong grounds* for the exercise of the equitable jurisdiction of a Court of Chancery, to grant a new trial, so as to place the parties back in the same position they were before the judgment was rendered against the defendant in the Inferior Court. Let the judgment of the Court below be reversed, and the cause reinstated.

No. 21.—Ralph S. Cuthbertson, plaintiff in error, *vs.* The Flint River Steamboat Company *et al.* defendants.

On motion of counsel for plaintiff in error, this writ of error was dismissed, the same points having been adjudicated by the Court at this term, in this record excepted to.

No. 22.—Hope H. Hammock, executor, plaintiff in error, *vs.* Wm. J. and John McBride, defendants.

[1.] On general principles, a judgment is binding and conclusive on parties and privies, until reversed or set aside by a legal proceeding; and it cannot be collaterally questioned by third persons, except on the ground of fraud and collusion, in the procurement of it. Creditors or *bona fide* purchasers may attack a judgment fraudulently obtained, whenever it interferes with their rights, either at Law or in Equity.

[2.] Depositions taken under the Statute, on account of the non-residence of the witness, cannot be read on the trial, provided the witness has notoriously resided within the County where the cause is pending for some time previously, and his attendance could be coerced by subpœna.

[3.] The words used by a witness are to be taken in their ordinary meaning, and when testifying to a fact necessarily within his knowledge, the evidence may go to the Jury, notwithstanding he fails to affirm positively that the thing is or is not so.

Assumpsit—Talbot Superior Court. Tried before Judge Alexander, September Term, 1848.

Wm. J. and John McBride commenced suit against Hope H. Hammock, as the executor, *de son tort*, of Caleb Adams, deceased, on a note made by said Adams, for the sum of $787 06, dated April, 1841, and due 25th December, 1841, payable to William Towns, or bearer. Plaintiff proved by Daniel Matthewson that, as Deputy Sheriff of Stewart County, on 1st Tuesday in February, 1844, he sold two negroes belonging to the estate of Caleb Adams—Noel, a boy, and Judy, a girl—and that said negroes were bid off by or for Elizabeth Adams, the widow of Caleb Adams. The executions under which they were sold, were in favor of Didema Adams *vs.* Caleb Adams, and had been assigned to Hope H. Hammock; said *fi. fas.* amounting to some $1600 or $1700, issued from a Justice's Court in Stewart County, and the levy was made and returned by a constable. Noel was sold for $765, and Judy for $677. No money was paid, but the amount was credited on the *fi. fas.* by defendant's direction.

Plaintiff then gave in evidence, the bill of sale made by the Sheriff.

Plaintiff then offered to read the interrogatories of Benjamin Powell and Didema Adams, to prove the said *fi. fas.* were frau-

dulent; to which, defendant below objected, which objection was overruled by the Court, and the testimony admitted.

By these witnesses, it was proven that the notes were given without consideration, and for the express purpose to defraud the creditors of Caleb Adams; that no consideration was given by Hammock to Didema Adams, for the transfer, except a promise to pay a note she held on Caleb Adams, for between $300 and $400; and that Hammock said his object in having the negroes sold, was to secure them for his sister, from the creditors of said Caleb Adams.

Plaintiff offered the interrogatories of John Childers, executed in Baldwin County, 11th March, 1847, Childers being then a convict in the Penitentiary, to which defendant below objected, on the ground, that since the taking of the said interrogatories, to-wit: in May, 1848, said witness had returned to the County of Talbot, and had resided, and still resides there, ever since. The Court overruled the objection, and ordered the interrogatories to be read.

Much other evidence was introduced. The defendant pleaded general issue, *ne unques* executor, usury and payment.

Defendant proved by William Towns, that the note sued on was given him in payment for the purchase of a certain tract of land.

The 6th interrogatory was: "Did you not renew said debt with said Adams? At the time of the renewal, was it not at 16 per cent.? And was, or not, said per cent. added into said note? If not at 16 per cent. at what per cent. was it? Was it not over the lawful rate of interest?"

Towns answered, "That he presumes the note was renewed at 16 per cent. per annum, but will not state positively; and that if renewed at all, it was added in the note."

Plaintiff's counsel objected to this answer, as too uncertain; which objection was sustained by the Court.

The Jury found a verdict for plaintiff. All of which decisions the defendant below excepted to, and alleges the same as error.

M. J. Wellborn and B. Hill, for plaintiff in error.

Worrell, for defendants, cited—

14 *Wend.* 62. 1 *Phil.* 290. 10 *Johns.* 530. 1 *Cow.* 81. 9 *Mass.* 227. 8 *Porter*, 343. 5 *Stewart & Porter*, 421.

By the Court.—LUMPKIN, J. delivering the opinion.

Wm. J. and John McBride brought their action of assumpsit in the Superior Court of Talbot County, to charge Hope H. Hammock, as executor in his own wrong, of Caleb Adams, deceased, with the payment of their debt. Testimony was offered, to prove a fraudulent combination between the defendant, Didema Adams, the sister of the decedent, and others, to defeat the creditors of Caleb Adams; and among other things, to show that sundry *fi. fas.* issuing from the Justice's Court, in favor of Didema Adams, against her brother, and under which two of the negroes of the estate were sold and bid in by Hammock, were fraudulent and void; and that Hammock was a party to the collusion. This evidence was objected to, on the ground that the Magistrate's Court executions could not be attacked in this collateral way; but the objection was overruled and the proof admitted; and this is the first error complained of in the bill of exceptions.

[1.] We concur fully in the judgment rendered upon this point in the Court below. A fraudulent judgment may be set aside by creditors or purchasers for a valuable consideration, either at Law or in Equity. Indeed, the Courts have gone the extent of deciding, that a fraudulent vendee gains no title to property by a judicial sale, or interest in it, notwithstanding an innocent creditor may, by that very sale, obtain a good title to the money. That it is a good sale as to the creditor, to entitle him to receive the proceeds, and yet, no sale as to the fraudulent vendee, to enable him to shelter the property against pursuit. *Strobel vs. Smith*, 8 *Watts*, 280.

And this is right. The law abhors fraud, and all the avenues which lead to its detection and defeat, should not only be thrown wide open, but be kept free from the interposition of bars and estoppels of every kind. A sale effected *by*, and affected *with* fraud, is no sale, and can produce no change whatever in the rights of innocent persons; it is just the same as if no such attempt to alien had been made; and it is the privilege and duty of any and every Court, so to declare; for I repeat, that *fraud* is cognizable

in a Court of Law, as well as in Equity. A fraudulent vendee has no equity to be protected in a Court of Equity.

[2.] The plaintiffs in the Court below, to maintain the issue on their part, tendered in evidence the interrogatories of John Childers—the reading of which was resisted, on the ground that the witness, at the time of the trial, and for some months before, resided in the County where the cause was pending. The presiding Judge allowed the depositions to be read, holding, that if the witness resided out of the County, when the commission to take his examination issued and was executed, it was immaterial where he lived since, or at the time of the trial.

It is the opinion of this Court, that interrogatories cannot be used on the trial of a cause, where the witness has resided within the County a sufficient time previous to the trial, for his personal attendance to be coerced by process of subpœna, provided it is made satisfactorily to appear, that the party seeking their introduction, had timely notice, actual or constructive, of such residence.

It is true, that where any witness resides out of the State, or out of any County in which his testimony may be required in any cause, his testimony may be taken by interrogatories, and the examination read at the trial, on motion of either party. *Prince*, 425. But this is an exception to the general law upon the subject. That declares that where the attendance of any person shall be required, as a witness, in any cause depending in any of the Courts of this State, that it shall be the duty of the Clerk, on application, to issue writs of subpœna, directed to the person whose attendance shall be required, *where such persons reside within the County in which such cause may be depending, and shall be served on such witnesses, at least five days before the Court to which it shall be returnable.* And further, it is provided, that attachments shall issue against defaulting witnesses, and they are made liable to a fine not exceeding three hundred dollars, for their non-attendance; and also, to an action for damages, at the instance of the person at whose suit they were summoned. *Prince*, 424, '5.

Why, I would respectfully inquire, should not the Statute include a residence of four months, as well as four years? Or can it be gravely insisted, that because the witness was once in the category contemplated by the Act, that it should legitimate his

depositions forever afterwards? Why should not the general law apply to *such* a witness as well as to any other?

There is one view of this subject which would seem to be conclusive. The Legislature, in 1806, authorized the testimony of witnesses going beyond seas or remaining without the jurisdiction of the State, and aged and infirm persons, to be taken by commission. The Act, however, declares, "That in case the person or persons, whose testimony shall have been so taken, *return or be able to attend the Court, that then and in that case, such written testimony shall not be received or read.*" *Clayton's Comp. of Laws*, 323, 324. Would it not be unreasonable to hold, that the removal of the disability, to-wit: the non-residence of the witness, should exclude the testimony previously taken by commission in the one case, and not in the other?

I have examined the case of *Phœnix vs. Baldwin*, (14 *Wend.* 62,) read from the Digest in the course of the argument, and the *marginal* reading certainly sustains, to the fullest extent, the judgment of the Court below. The Supreme Court of New York there, seem to hold that a defendant, who has procured the testimony of a witness residing abroad, to be taken under a commission, is not bound on the trial of the cause, upon the requisition of the adverse party, to call the witness, *who is then in Court*, and examine him *viva voce*, but may read his deposition as taken under the commission.

We cannot subscribe to this decision. Indeed, the Court, in its opinion, which is only five lines in length, do not advert at all to this point in the case, although it was fairly made in the record, and embodied in the head notes, by the Reporter. And what is still more singular, the case of *Fisher vs. Dale*, (17 *Johns. R.* 344,) is cited as authority in support of the principle, which is rather a precedent for the other side. There, the depositions of a witness residing abroad, were taken under commission, and read on the trial. There being no verdict, application was made to allow a second commission to issue; to which the Court said they saw no solid objection. "The examination of witnesses in a Court of Chancery," continues the Court, "is private; and the proceedings of that Court, in relation to the manner of taking testimony, is so different from that of Courts of Law, that the reasons on which the practice in Chancery is founded, do not apply here. Suppose a witness has not answered some of the interrogatories,

or has answered them in an obscure and unintelligible manner, it may be essential to the purposes of justice, to direct a second examination. *If the witness himself should come to this country before the trial, the Court could not refuse to permit his examination, although his depositions had been taken in the cause.*"

I would add, that the cases of *Doe ex dem. Sergeant vs. Adams*, (1 *Tyler*, 197,) and *Stiles vs. Bradford*, (4 *Rawle*, 374,) maintain directly, that a deposition cannot be read in evidence, when the deponent is in Court and capable of being examined. And many respectable authorities may be cited from other States, to show that where depositions are taken under a rule of Court, or Act of the Legislature, that they cannot be read, if the witness be within the jurisdiction of the Court, or reach of its process. *Tompkins vs. Wiley*, 6 *Rand.* 242. *Read vs. Bertrand*, 4 *Wash. C. C. R.* 558. *Rogers vs. Raborg*, 2 *Gill. & Johns.* 54. *Darnall vs. Goodwin*, 1 *Har. & J.* 282. *Ib.* 264.*

When it is recollected that depositions are admitted, only from the necessity of the case; that they are an unsatisfactory species of evidence not known to the Common Law, and in derogation of it; that it is but of a secondary character, and is therefore subject to the rule of law which forbids such evidence when better evidence exists, and is in the power of the parties; that the oral testimony of the witness, in the presence of the Court and Jury, is much better evidence than his deposition can be; we feel constrained to rule, that whenever it is in the power of the party, he is bound to resort to it, and that he will not be allowed to substitute a kind of proof inferior in its nature.

[3.] Among other defences to the action in the Circuit Court, the plea of usury was interposed, and the interrogatories of William Towns, the *payee* of the note on which the action was brought, were introduced, who swore, in a previous part of his examination, that the note had been renewed by him. When asked at what rate of interest the calculation was made, he answered, "*He presumed at* 16 *per cent. but would not state positively; and that if renewed at all, the interest was added in the note.*" This testimony was ruled out on the trial, for the reason that the witness did not speak with sufficient certainty. If the word *presume*, which was used by the witness, is to be construed etymo-

*Note.—See *Craft vs. Jackson, Adm'r*, 4 *Ga. R.* 360.—[Rep.]

logically, then the Court was right, for it means, according to the lexicons, to believe without examination; and in this sense, is a weaker term than *belief*, and even this is excluded, except in cases of *experts*, &c.; for *to believe*, is to put credit or confidence in the veracity of testimony; whereas, *to presume*, is to affirm a thing to be true, without proof.

Neither witnesses, however, nor the commissioners who take their testimony, are always *dictionary-makers*, and it will not do, therefore, to subject this testimony to so severe a test. Language must be construed in its ordinary import, and it will be found that persons usually employ the word *presume*, to admit or affirm, modestly or hesitatingly, a positive fact within their knowledge, and about which they are interrogated. Who ever answers yes to the question put to them, as to their candidature for office, their approaching nuptials or their participation in a usurious contract? The respondent, seeking a veil to conceal his confusion, falteringly *presumes* the thing is or may be so. Such, we have no doubt, was the meaning of this witness. The note was payable to himself, he had renewed it, and consequently knew positively whether it was or was not usurious. But unwilling to face the transaction without disguise, and to admit that he had broken the first law made for mankind, after the fall, which was, that in the sweat of *their own* face, they should eat their bread, *and not in the sweat of other people's;* and still more reluctant, perhaps, to testify to his own undoing, frankly to admit facts which would forfeit *all interest* on the original sum loaned; and yet, resolved not to testify falsely, the witness states that he "presumes the note was renewed at 16 per cent. per annum, but *will not* (he does not say *he cannot*) state positively; and that if renewed at all, (he had already sworn that it was,) "*it*," that is, the usurious interest, "was added in the note."

Our conviction is, that this testimony should have been submitted to the Jury. The judgment is therefore reversed, and the cause remanded for further proceedings.

No. 23.—JAMES OLIVER, plaintiff in error, *vs.* WM. PACE, Jr. and P. L. BIGGERS, defendants.

[1.] As a general rule, this Court will always more readily control the discretion of the Court below, in refusing a new trial, than in granting it, for the reason that the refusal to grant a new trial, operates as a final adjudication of the rights of the parties.

[2.] Where one of the defendants was a *bona fide* holder of a promissory note, and there was no evidence to impeach the consideration in his hands, the amount of which was not allowed by the Jury; *Held*, that the discretion of the Court below, in granting a new trial to the defendants, was properly exercised.

In Equity, in Muscogee Superior Court. Tried before Judge ALEXANDER, November Term, 1848.

Oliver filed his bill in the Court below, charging that, in January, 1837, P. L. Biggers and himself purchased a lot of land, for which Biggers paid $500 in cash, and they gave their joint note for $850, which note was subsequently taken up by Oliver; that the deed was made to Biggers, who gave Oliver a bond for titles to his proportionate share of the land, when the note was paid; the land was divided between them, and each party took possession of their part—no writings passing between them—and they have been in possession ever since, till the filing of the bill.

The bill farther charged, that in November, 1838, being somewhat embarrassed, he agreed with William Pace, Jr. of said County, to give him, Pace, his note for $492 59, and transfer to him Biggers' bond for titles to said land, as collateral security; in consideration of which, Pace agreed to pay Oliver's debts amounting to some $425, on which was calculated 16 per cent; that during the years 1839, 1840 and 1841, he paid Pace large amounts, more than sufficient to pay said notes; that in the month of January, 1842, Pace "exacted" of him a note for $735 85, which he alleges was without consideration.

The bill farther charged, that Biggers and Pace, confederating to defraud Oliver, said Biggers executed to Pace a deed to Oliver's part of said land, and Pace transferred to Biggers, Oliver's note for $735 85; and that subsequently, in March, 1842, Pace re-conveyed said premises to said Biggers; that at April Term,

1843, of Muscogee Superior Court, Biggers brought his action of ejectment against Oliver for said land.

The bill farther charges, that Biggers knew, when he received the said note of Oliver's, that it was void for want of consideration and the usurious contract.

The bill prayed an injunction of the suit in ejectment, and that the note for $735 85, might be given up and cancelled; and that Biggers might be decreed to make titles to Oliver for his portion of said tract of land.

The defendants, in their answer, admitted the facts stated, as to the purchase of the land, and the payment for the same, and the bond for titles; also, the division of the land, and the joint possession. They admitted that Pace assumed to pay debts amounting to between $400 and $500, and that Oliver gave his note for $492 59, and the note for $850, and the bond for titles of Biggers as collateral security. The answer did not admit the usury, but admitted that Oliver made payments in corn and other articles, during the years 1839, 1840 and 1841, but insisted that they were on other accounts than the note for $492 59, and attached a copy of the receipt of Oliver, acknowledging payment in full for the articles furnished up to the close of 1841, and that the note for $735 85, was subsequently given by Oliver to Pace, in January, 1842.

The answer utterly denied all combination between Pace and Biggers, but, on the contrary, says, that Biggers made the deed to Pace, with the knowledge and approbation of Oliver, and *in his presence* and *upon his request*, and that Pace, at the request of Oliver, delivered up to Biggers his bond and the note for $850. They admit that Pace did re-convey said land to Biggers and give up Oliver's note for $735, before it was due; but it was in part consideration and payment of a note due by Pace to Biggers, amounting to $950 or $1000. As a matter of favor to Oliver, they did agree that Oliver might have till 25th December next, thereafter, to take up the note and receive the deed for the land, which Biggers, in his answer, announced himself still willing to do. Biggers denied all knowledge of the consideration of the note.

Upon the trial, an agreement was in evidence between Biggers and Pace, by which Biggers bound himself "to take the place of said Pace with Oliver, and to stand to and abide by" the previous

contract between Pace and Oliver. Also, the agreement between Oliver and Pace, dated 6th January, 1842, reciting that Biggers had made a deed to Pace, and that "if Oliver pays Pace all just demands he had against him, by the 25th December, 1842, then Pace to make to Oliver a deed to the lands."

There was considerable evidence, but none of it contradictory of the answers.

Since the filing of the bill, Oliver had been ejected from the land.

The Jury decreed that Oliver recover possession of the land, and rent for four years at $100 a year.

Upon motion of defendant's counsel, the Court granted a new trial, on the ground that the verdict was contrary to the law and evidence.

Which decision of the Court is alleged to be erroneous.

H. Holt, for plaintiff in error.

H. L. Benning, for defendant.

By the Court.—Warner, J. delivering the opinion.

The error assigned upon this record is, that the Court below granted a new trial in the cause at the instance of the defendants.

[1.] This Court will always more readily interfere, to control the discretion of the Court below, in refusing a new trial, than in granting it, for the reason that the refusal of a new trial operates as a final adjudication of the rights of the parties.

[2.] In this case, however, we are of the opinion the discretion of the Court was very properly exercised in behalf of the defendants. One of the allegations in the complainant's bill is, that the note for $735 85, executed by Oliver to Pace, and transferred to Biggers, was without consideration, and that Biggers had notice of that fact.

The answer of Biggers states he received the note before it was due, and denies all knowledge of the consideration for which the note was given. There is no evidence in the record, which we can discover, going to impeach the consideration of the note of $735 85, in the hands of Biggers, and he being a *bona fide*

holder of the note, was entitled to have the amount of it allowed him on the trial.

Let the judgment of the Court below be affirmed.

No. 24.—Doe ex dem. Vaughn, administrator of Jenkins, plaintiff in error, *vs.* L. M. Biggers, defendant.

[1.] To admit secondary evidence of the contents of a paper, its existence must be proven, and its destruction or loss.

[2.] Where the loss of a paper is relied upon, the law does not require positive proof of loss, but proof sufficient to raise a reasonable presumption of loss.

[3.] It is the province of the Court to determine whether the loss is sufficiently proven to admit secondary evidence.

[4.] Before secondary evidence can be admitted, the party will be required to show that he has, in *good faith*, exhausted, in a *reasonable degree*, all the *sources of information and means of discovery*, which the *nature of the case suggests and which were accessible to him.*

[5.] When a paper is traced into the hands of a person, reasonable diligence must be used to procure the testimony of that person, before secondary evidence is admissible. When a paper is known to be in the possession of a person without the jurisdiction of the Court, whether, for that reason, secondary evidence may not be admitted? Quere.

[6.] When a Magistrate's execution is lost, and its contents proven, and also the levy on the land by a Constable, and a return of the same to the Sheriff, the Court will presume that there was also on it, the Constable's entry of "no personal property to be found," &c.

[7.] The general rule is, that when an officer is required to do an act, the omission to do which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it, unless the contrary is made to appear.

[8.] The rule as to the *degree* of secondary evidence is this—where there is no ground for the presumption that better secondary evidence exists, any proof is received which is admissible by the other rules of law, unless the objecting party can show that better evidence was previously known to the other party, and might have been produced.

[9.] Presumption of the loss of a paper may arise from lapse of time, which will be taken into account in determining the question of diligence in the search. A deed to land sold by the Sheriff, under a Justice's Court *fi. fa.* will be admitted in evidence, upon proof of the loss of the *fi. fa.*, the levy and sale

and upon proof, by presumption, that the entry of the Constable who made the levy, of "no personal property to be found," &c. was made on it. This case shown not to conflict with the case of *Hopkins vs. Burch*, 3 *Kelly*, 222.

[10.] When the answer of a witness is written without punctuation, the best rule is to read it so as to make sense of each and every part; to connect such parts as will be, when joined together, susceptible of an intelligible meaning; and if a proposition or statement becomes absurd by connection, to let it stand as an independent statement.

Ejectment, in Muscogee Superior Court. Tried before Judge ALEXANDER, November Term, 1848.

An action of ejectment was brought in Muscogee Superior Court, upon the demise of Jonathan D. Vaughn, as the administrator of Bartholomew Jenkins, deceased, against Lorenzo M. Biggers. The defendant set up title, under a Sheriff's deed, purporting to have been made after sale under *fi. fa.* against one Bartholomew Jenkins.

Pending the trial, the defendant offered in evidence the interrogatories of Lewis Wynn, who swore that, "while Sheriff of Harris County, Georgia, lot of land No. 276, (the premises in dispute,) was levied on by a Constable, and duly returned to witness, according to law, and he sold the same accordingly, and that, on examination, he finds the annexed a true copy of the deed executed by him, on the day and at the place therein specified. He sold said land to the highest bidder—one Waits becoming the purchaser—by virtue of a *fi. fa.* issued from a Justice's Court in Coweta County, in favor of William Daniel *vs.* Bartholomew Jenkins, and is now under the impression he handed over [said *fi. fa.* to said Daniel."

To this testimony plaintiff's counsel objected, but was overruled by the Court.

Plaintiff's counsel objected, also, to the reading of the deed from Lewis Wynn to Waites, without the production of the *fi. fa.* but was overruled by the Court.

The proof showed, that Daniel had removed from the State of Georgia, either to Texas or Louisiana; and Col. H. Holt testified that, as the counsel for Biggers, he had addressed several letters to different persons in Louisiana and Texas, in order to find out the residence of Daniel, without any success.

It was in evidence that Biggers had made search for the *fi. fa.*

and the judgment on which it was founded, in the district where it purported to have been issued, and also in the offices of the Clerks of the Inferior and Superior Courts, without success, and that he had applied to the Magistrates of that district without success.

To the last interrogatory to Robert S. Foster, he answered: "In relation to what will benefit the defendant, I will say, that from my knowledge of said Jenkins' business and affairs, I think said Jenkins made a contract with a certain William Daniel, when Jenkins and myself were in Bullsborough, in Coweta County, or at some other time; and further, that said Jenkins admitted of executions to issue against him in Coweta County, in favor of William Daniel, and, as I have been informed, the land which he drew in the land lottery of 1827, in Coweta, Muscogee and Carroll lottery, was sold by the Sheriff under said execution, and that said Jenkins received full remuneration in the overplus of said executions, in money, and, also, in a note of the sum of ninety-eight dollars, on William Daniel."

Plaintiff's counsel objected to this answer, and the Court admitted the following: "that said Jenkins admitted of executions to issue against him in Coweta County, in favor of said William Daniel."

The Court charged the Jury, "that in determining the question whether the execution levied on said land had, at the time of the levy, the necessary entries, they might and ought to take into consideration the lapse of time since the levy, the testimony of Mr. Wynn, the admission of Jenkins, as testified to by Foster, and all the other circumstances of the case."

The Jury returned a verdict for the defendant, and the plaintiff moved for a new trial.

1st. Because the Court erred in admitting the testimony of Lewis Wynn, as to the *fi. fa.* under which the land in dispute was sold; the existence, loss or destruction of the same not having been sufficiently established.

2nd. Because the Court erred in permitting the copy deed to be read in evidence, without the production of the *fi. fa.* under and by virtue of which the land was sold, or requiring other proof than that submitted to the Court, of the existence, loss or destruction of said *fi. fa.* and without further proof, also, that said *fi. fa.* had on it, at the time the same was levied, an entry made by a

proper officer, that there was no personal property of the defendant's to be found, whereon to levy the same.

3d. In admitting any part of the answer of Robert S. Foster to the last interrogatory.

4th. Because the Court erred in excluding that part of the testimony of the Messrs. Frys, wherein they say, that Jenkins told them that his wife and children were in Gwinnett County, and that he had given in for a citizen's draw in that County, and for a soldier's draw in Patterson's District, of Pike County—this conversation having occurred long before there was any litigation as to this land.

5th. Because the verdict was contrary to the evidence.

6th. Because the Court erred in charging the Jury that, in determining the question whether the execution levied on said land, had, at the time of the levy, the necessary entries, they might and ought to take into consideration the lapse of time since the levy, the testimony of Wynn and Foster, and all the other circumstances of the case.

There were other grounds taken in the motion, but not urged before this Court.

The Court below refused the motion for a new trial, and this refusal is now alleged to be erroneous.

WELLBORN, for plaintiff in error.

JONES, BENNING & JONES, and H. HOLT, for defendant.

WELLBORN, for the plaintiff in error, submitted :

1. That before the secondary evidence taken below, of the existence and entries of the *fi. fa.* that brought the land in dispute to sale, was received, it should have been shown that Daniel, in whose hands Wynn thinks he placed it, and especially the Constable who levied it, had been inquired of.

2. That there was no competent proof of the requisite entry of "no personal property," having been made on the *fi. fa.* Such entry should be satisfactorily proved. 3 *Kelly*, 222.

3. There was no competent proof of the execution of the lost deeds of Wynn to Waits, and of Waits to Hansell, of which copies were permitted to be sent to the Jury.

4. That part of the deposition of Foster, to the effect that "Jenkins admitted of executions to issue against him in favor of William Daniel, in Coweta County," is involved in the same category of incompetency with those portions of it that were rejected. This appears by an examination of the deposition as written.

5. Will not the effect of sustaining this verdict be to introduce into the law of real property, the principle substantially, that lapse of time, for a period less than that fixed by the Statute of Limitations, may create a presumption to the regular paper title? Where is the proof, competent and full, as required by law, in the absence of the statutory bar, to overcome the patent to the land given by the State to Jenkins.

6. But the admission of Jenkins, if made, that "executions issued against him in favor of Daniel, in Coweta County," could, at most, go to the Jury but as evidence of the probable existence of the *fi. fa.* that brought the land to sale; certainly not that it contained upon it the necessary entry of "no personal property," by the Constable in Harris, who levied it, as erroneously charged by the Court.

Again, there was no proof that the land was sold by Wynn within the usual hours of sale, either by the recital of the deed, or otherwise. Without this no title can be deemed to have passed by his sale of the land. 4 *Wheat.* 77. 3 *Kel.* 222. 4 *Georgia Rep.* 148.

H. L. Benning, for the defendant in error.

1. The existence of grants, &c. may be presumed from the adverse possession of the person claiming to be the grantee, or from equivalent circumstances. *Cowen & Hill's Notes, part* 1, 355, '6, '8, '9, 361, '3, '4, 370, '1. 4 *Georgia Rep. Crafts vs. Jackson*, 361, (6*th ground.*) 1 *Kelly*, 381.

2. This adverse possession may be sometimes greater, sometimes less, than the period fixed for a bar by Statutes of Limitation. *Hill & Cowen's notes*, 355, '6, *supra.*

3. In ejectment, if the title of one party comes from a Sheriff's sale, under a *fi. fa.* against the other, proving the *fi. fa.* will be sufficient, without proving the judgment, as the Court, in such

case, will *presume* there must have been a judgment, otherwise the *fi. fa.* would have been set aside. 2 *Greenl. Ev.* §316.

4. A new trial will not be granted, although there may have been exceptionable testimony, if there was sufficient legal evidence without it, and justice has been done. *Graham N. Trials*, 246, '7, '8, '9.

5. If justice has been done, the Court will not disturb a verdict upon the ground of a technical objection. *Ib.* 341, '4, '5, '6. 1 *Kelly*, 381.

6. When the Judge who tries the case is satisfied with the verdict, although one against the weight of evidence, the Court will seldom set it aside. *Graham*, 405, '6, '7, '8.

7. The Jury, and not the Court, is to determine the effect of evidence in raising a presumption. *Hill & Cowen's notes, part I*, 367.

By the Court.—NISBET, J. delivering the opinion.

[1.] The first question I propose to consider is, whether the Court erred in admitting the secondary evidence of the execution under which the land in question was brought to sale. It was a Justice's Court execution in favor of *Daniel*, against the plaintiff's intestate, *Jenkins*. The levy on the land was made by a Constable, and the execution was returned to *Wynn*, the Sheriff of the County where it lay, who sold it, and made a deed to the purchaser. The defendant below claimed title under this levy and sale. Parol evidence was admitted to prove the contents generally, (not, as we shall see, to prove the fact that there was on it the Constable's entry of "no personal property to be found,") of this execution. The plaintiff in error holds that, under the circumstances of this case, the secondary evidence ought not to have been admitted, because there was not sufficient diligence used in proving its existence, and its destruction or loss. This execution is not required by law to be recorded. Justices of the Peace are required to keep dockets, and are presumed to keep a record of judgments, and of the issuing of executions. An execution which, issuing from a Justice's Court, is levied upon lands or negroes, passes by law into the hands of the Sheriff to be executed. He is required to keep a docket, with entries of his actings and doings upon all executions which come to his hands, and when they have fulfilled their functions, to return them to the

Court from whence they issued. There they remain as papers on file. The place of deposit of an execution having performed its office, which issues from the *Superior* Court, is therefore the Clerk's office of that Court. So, if it issues from the *Inferior* Court, the Clerk's office of that Court is the place of its deposit and legal custody. Magistrate's Court executions ought to be returned to the Court from which they issue. This paper, therefore, is an office paper, which the law presumes to be on file.

Now, in order to let in secondary evidence of this paper, its existence must be proved, and its loss or destruction.

[2.] The destruction of the paper, its existence having been proven, (and slight evidence of its existence is sufficient, 1 *Greenleaf's Evid.* 623,) being established, secondary evidence will be admitted. This case does not turn upon the destruction of the paper. If lost, however, secondary evidence will also be admitted. What diligence in proving its loss is required, is not settled by any general rule, applicable to every case. This is impossible, for the requisite degree of diligence in the search must depend upon the circumstances of each case. The question of diligence, therefore, is left to the Court.

[3.] It is the province of the Court to determine whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents. 1 *Greenleaf's Evid.* 623, 624. *Page vs. Page*, 15 *Pick.* 368. There are, however, general principles settled which apply to most cases of this kind, by which the Courts are bound. The law does not require unquestionable proof of loss. The object of the proof is to establish a *reasonable presumption* of the loss of the instrument.

[4.] In general, the party is expected to show that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case suggests, and which were accessible to him. Good faith and reasonable diligence are the requisites, and the diligence must have reference to the nature of the case. 4 *M. & S.* 48. 6 *T. R.* 246. 1 *Starkie's Evid.* 336 *to* 340. 2 *South.* 501. 8 *Scott*, 85. 3 *Watts & Serg.* 291. 1 *Greenleaf's Evid.* 624. See, also, the numerous authorities cited by *Cowen & Hill, note to Phil. Evid.* 867, *and* 1 *Greenleaf's Evid.* §84, *note* 2. Now, in the case before me, did the party establish, by proof, a *reasonable presumption* of the loss of this execution? Did he, in good faith, in a

reasonable degree, exhaust all the sources of his information and his means of discovery, having reference to the nature of the case? According to the nature of this case, it was incumbent upon him to apply to the Magistrate's office of the District whence the execution issued, to ascertain if the original, or any record of it, was there. That he did. This execution might have been returned by the Sheriff who sold the land, to the office of the Clerk of the Superior or Inferior Court of the County where the land lay. It was reasonable to search there—and there he made search. It was reasonable that the Sheriff might have retained it, or could give information about it, and therefore he ought, in the exercise of reasonable diligence, to have applied to him; which he did. He also caused inquiry to be made of several of the owners of the land, who bought it prior to himself. The Sheriff, *Wynn*, testified that he was under the impression that, after the sale, he handed the execution to *Daniel*, the plaintiff, and the main point made by the plaintiff's counsel, rested upon the want of diligence in procuring the evidence of that person.

[5.] In relation to *Daniel*, the evidence is, that some twelve or fourteen years ago, he removed to *Cherokee* County, in this State, where he lived until about two years before the trial of the cause, and had removed to *New Orleans*. *Mr. Dougherty*, the witness, testified that he had told the defendant of this. At what time he told the defendant does not appear. Another witness testified, that while acting as agent for the defendant in procuring evidence, he had understood that *Daniel* had removed to *Texas*. It does not appear, from the evidence, that defendant knew that *Daniel* was in the State whilst he remained. Two years before the trial he had left the State. It is farther to be noted, that it is not proven, positively, that he ever had the execution; the witness *Wynn* only testifying that it was his impression that he handed it to him. To another witness, *Wynn* stated, it seems, in a letter to him, that his impression was that he had returned it to the Clerk's office of the Inferior Court of *Coweta County*. Now, this is not to be taken as a case where the paper is clearly traced to a person. That he ever had it, must have been with the defendant a matter of doubt. If it were clearly proven to be in his hands, and he resided out of the State, the authorities are in conflict, whether secondary evidence would not be admissible, upon the ground of his being without the jurisdiction, and not amenable to any pro-

cess of our Courts, either to produce the paper, or to testify. He might be examined by commission, but no Court in this State could compel him to testify. Nor are the Courts of Georgia judicially cognisant of the fact, that by the laws of the State where he resides, he could be compelled to testify in obedience to a commission from our Courts. This goes upon the same principle that has established the rule, that where a subscribing witness to a deed is without the jurisdiction, secondary evidence is admissible to prove its execution. See, in favor of the secondary evidence in such a case, *Prince vs. Blackman*, 2 *East*, 250. *Hodnet vs. Toman*, 1 *Starkie R.* 90. *Boone vs. Dykes, legatees*, 3 *Monroe*, 532. *Eaton vs. Campbell*, 7 *Pick.* 10. 6 *Peters*, 352. Contra, *Townsend vs. Atwater*, 5 *Day*, 298, 306. *Lewis vs. Beatty*, 8 *Mart. Lou. Rep. N. S.* 287, '8, '9. 9 *Cow.* 115. It is not necessary for me to express an opinion upon this point. I therefore express none. Whether *Daniel*, in fact, had this *fi. fa.* or not, is not clearly proven. The presumption, too, that he has it still, if he ever had it, may be rebutted. 15 *Pick.* 368. 1 *Hud. & Brooke R.* 748. The valueless character of this extinct paper to *Daniel*, and the great length of time which had transpired since the sale, might, in this case, rebut the presumption, to some extent, that it is still in his possession. At least, and so say the authorities, such circumstances will lessen the degree of diligence required in order to let in secondary evidence. Admitting, however, that diligence was required in this case, to procure the testimony of *Daniel*, it is not a case (inferrable from all the facts detailed) of that nature which required the highest degree of diligence. It appears that, after learning that he had removed either to *New Orleans* or *Texas*, letters were addressed by the defendant, through his counsel, to him, at both those places, and that no knowledge of his actual residence was obtained. All the effort made to procure the original paper in this case, raises a reasonable presumption of its loss. The party seems, in good faith, to have exhausted, in a reasonable degree, his sources of information and means of discovery. We think the secondary evidence, therefore, of the contents of this execution was properly admitted.

See farther, upon this point, 10 *John. R.* 374. *Harp. Eq. R.* 243. 2 *Verm. R.* 456. 2 *Blackf.* 228. 3 *McCord*, 322. 1 *Dow & Clark*, 190. 2 *Bay R.* 487. 1 *Wright R.* 305. 5 *Conn.* 108.

3 *Brod. & Bing.* 295. 6 *Verm.* 399. 9 *Wheat.* 581. 6 *Gill & John.* 386. 5 *Pick.* 436. 1 *Wright*, 440 *to* 450. 6 *C. & P.* 181. 3 *Mass.* 82. *Cow. & Hill's Notes*, 844.

[6.] The contents generally of the execution being proven, the Court admitted a copy of the Sheriff's deed to the purchaser of the land sold under it. The plaintiff objected to the deed going in evidence, because it was not proven, that the execution had upon it the Constable's entry of "no personal property to be found," at the time of the levy on the land. By the Act of 1811, it is declared that "no Constable shall be authorised to levy on any negro, or negroes, or real estate, unless there is no other personal estate to be found sufficient to pay the debt," &c. *Prince*, 506. In *Hopkins vs. Burch*, this Court determined, that to make the sale of lands or negroes, under Magistrate's Court executions valid, it must appear, by the Constable's entry on the execution, that there was no other personal property, or that the defendant being in possession, pointed out the land and negroes. 3 *Kelly*, 222. Such an entry, then, was necessary to the validity of this sale, and without it the deed ought to have been repelled. Under the decision of this Court it was argued, that the defendant claiming title under a sale by virtue of a Magistrate's execution, must show that the entry was on it. The question is not whether such an entry is necessary. We hold that it is, and that it constitutes a necessary part of the title. If the execution had been produced in this case, and there had been no such entry upon it, and the officer could not be had to amend his entry, or if had, could not so amend, the deed ought to have been, under our decision, repelled. The question now is, whether the existence of the execution having been proven, as well as its loss, and its contents having been proven by parol—that is to say, the execution and the levy on the land by the Constable, being before the Court, by parol, will not the Court presume from these facts, that the Constable made the entry of *no personal property to be found*, before levying on the land? It is a question of evidence from presumption. The witness who proves the execution and the levy, says nothing about this entry whatever. Were it proven not to have been on it, then the case would be as if the execution itself had been produced without the entry on it. The question is not, again, whether there was or was not personal property sufficient to pay the debt.

[7.] But it is whether the Constable made upon the lost execution the necessary entry. We think that the deed was well admitted, because we think that the presumption of the law is, that the Constable, a sworn officer, did his duty, and that there was such an entry on the original execution.

The presumption is that the entry was made, until the contrary is made to appear. The burden of proof, by the rule of presumption, is cast upon the other side. The general rule is, that when an officer is required to do an act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it, unless the contrary be shown. *Phil. Evid.* 151. 3 *East*, 182. 10 *East*, 216. *Peake's Evid.* 5. *Buller, N. P.* 298. 3 *Wils.* 362. 2 *Black. R.* 852. 11 *John. R.* 517. 19 *John. R.* 347.

The act required of the Constable in this case is one, the omission of which would make him guilty of the most serious neglect of duty—an act upon which the title of lands or negroes might, *does* in this case, depend. So serious is the required act, that a levy upon lands or negroes without it, would subject him to liability as a trespasser. It is not our business to inquire into the probabilities, as a mere question of fact, whether an ignorant Constable has done his duty. We look upon him as an officer of the law, and are to be governed by the same general rules, whether he be a wise man or a fool. In *Hartwell vs. Root*, a Sheriff was presumed to have made a levy. *Woodworth, J.* said, "The question in this case is, whether it is not to be presumed, that the defendant made a levy on the property of *Conkling*. The officer acted upon his oath of office. His duty required him to make a levy, and it does not appear that Conkling had any other property besides the horses to satisfy the execution. In such a case, in the absence of positive proof, and against a public officer, the circumstances offered a fair and reasonable presumption that a levy had been legally made." 19 *John. R.* 347. The rule of presumption in that case was applied in favor of the officer. In all cases it would seem to me, that it ought to be applied with greater liberality in favor of purchasers or others, who are affected by his acts. The case of *Jackson ex dem. Sternberg et al. vs. Shaffer*, is strongly to the point. In that case it was decided by the Supreme Court of New York, that where land is sold under a *fi. fa.* and a deed executed by the Sheriff, the Court would presume

that the execution had been levied. This, in favor of the purchaser. "Another point," said *Van Ness, J.* "was made in behalf of the defendant, which it is necessary briefly to notice, namely: that the sale under the judgment in favor of *Ehle*, which is the foundation of the plaintiff's title, is void, because it is not shown that there had been a previous levy by the Sheriff. It no where appears that there had not been a levy. And, if it were necessary, the Court would, under the circumstances of this case, presume it to have been made." 11 *John. R.* 517.

The two cases last referred to *presume a levy*—an act necessary to the validity of a sale. We do not, in this case, presume a levy, but a preliminary official act, which is also necessary to the validity of the sale, but not more necessary than a levy. I apprehend that the rule will be found general, that officers acting under oath, or in whom the Government reposes a trust, are presumed to have done their duty until the contrary appears. In favor of this general rule, see the following cases: *Hickman vs. Boffman, Hardin's R.* 348. *Beeler's Heirs vs. Bullitt's Heirs*, 3 *Marsh. K. R.* 280. *Tupper vs. Taylor*, 6 *Serg. & Rawle*, 173. 2 *Gall. R.* 15. *Marsh vs. Lawrence*, 4 *Cowen R.* 461. 6 *Ib* .276. 3 *Monroe*, 211. *Ib.* 271. 3 *J. J. Marsh.* 226. 3 *Gill. & John.* 350. 3 *N. Hamp. R.* 310. 5 *Litt. R.* 19.

The best evidence in this case clearly would be, under the decision in *Hopkins vs. Burch*, the execution with the entry thereon, that being lost, secondary evidence as to the entry is admissible. Now the *highest degree* of secondary evidence is not required.

[8.] The rule upon that point is this—when there is no ground for legal presumption that better secondary evidence exists, any proof is received which is not inadmissible by other rules of law, unless the objecting party can show that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud, which the law itself presumes, when primary evidence is withheld. Whether the highest secondary evidence ought not to be produced, it is true, has been a mooted question. But the weight of authority is in favor of the rule as I have stated it. *Coyle vs. Coyle*, 6 *C. & P.* 81. *Rex vs. Hunt et al.* 3 *B. & Ald.* 566. 6 *C. & P.* 206. 3 *Scott, N. R.* 577. *Doe d. Gillbert vs. Ross*, 8 *Dowl.* 389. 7 *M. & W.* 102, *S. C. Gilbert's Evid. by Lofft. p.* 5. 8 *C. & P.* 502. 2 *M. & Rob.* 138. 10 *Watts*, 63. 9 *Wheat.* 582 *to*

587. 2 *Halst.* 46 *to* 53. 2 *Mason*, 464. 1 *Greenl. Evid.* §84, *note* 2. As there was no better evidence of the fact to be proved, shown to exist, and within the knowledge of the defendant, it was proper to admit evidence by presumption. The rule of presumption would apply, however, irrespective of the peculiar circumstances of this case—they render its application free from doubt.

[9.] The Court instructed the Jury that, in determining the question whether the entry was on the *fi. fa.* they should take into consideration the lapse of time since the levy, the testimony of *Wynn*, the admissions of *Jenkins*, the plaintiff's intestate, and all the circumstances of the case; and this charge is excepted to. If it was right to admit secondary evidence of the *fi. fa.* at all, then it was proper for the Jury to consider of it. They were the judges of that evidence. *Jenkins'* admission went to prove the existence of the execution. *Wynn's* testimony to prove its contents generally, the levy, and sale, and the deed. Lapse of time is a circumstance from which its loss may be inferred. The presumption that an officer has performed his duty, is a legal presumption, drawn by the Court; yet, as in this case, it could not be drawn but upon the establishment of the loss of the execution, all the circumstances going to show the loss were properly submitted to the Jury. Presumption of loss of a paper may arise from lapse of time, which will be taken into account, in determining the question of diligence in the search. *Per Story, J. in Patterson vs. Wynn*, 5 *Peters R.* 242, '3. 1 *Greenl. Evid.* §20.

[10.] A motion was made to the Court to exclude the following answer of a witness, (*Foster*,) to wit: "In relation to what will benefit the defendant, I will say, that from my knowledge of said *Jenkins'* business and affairs, I think said *Jenkins* made a contract with a certain *William Daniel*, when *Jenkins* and myself were in *Bullsborough*, *Coweta County*, or at some other time; and farther, that said Jenkins admitted of executions to issue against him in favor of said *William Daniel*, and as I have been informed, the land which he drew in the land lottery of eighteen hundred and twenty-seven, in the *Coweta*, *Muscogee* and *Carroll* lottery, was sold by the Sheriff under said executions, and that said *Jenkins* received full remuneration in the overplus of said executions in money, and also in a note of the sum of ninety-eight dollars on *William Daniel*." The Court, upon this motion, excluded all of

this answer of the witness, except the following: "that said *Jenkins* admitted of executions to issue against him in *Coweta* County, in favor of said *William Daniel.*" The admission of this part of the answer is complained of as being erroneous. The argument in favor of its inadmissibility is, that it stands connected in the answer with the first members, to wit: "*From my knowledge of said Jenkins' business and affairs, I think said Jenkins made,*" &c. and being so connected, the admitted part is to be taken as a statement dependent upon witness' *knowledge of the business and affairs of Jenkins*, and not sworn to positively, but presented as the *thought* or opinion of the witness. This is the whole of the argument in favor of the exception. If the connection and dependence asserted do exist, it is clear that the testimony is illegal, and not otherwise. The answer of this witness is written without regard to punctuation—the words run continuously. We are, therefore, compelled to construe it, without aid from that quarter. In such a case, the best rule would seem to be to read it so as to make sense of each and every part—to connect such parts as will be, when joined together, susceptible of an intelligible meaning, and if a proposition or statement becomes absurd by connection, to let it stand as an independent statement. Apply this rule to the admitted evidence, and the preliminary statement, "from my knowledge of said Jenkins' business and affairs, I think said *Jenkins*," &c. and how will the union read? thus: "From my knowledge of said Jenkins' business and affairs, I think said *Jenkins* admitted of executions to issue against him in *Coweta* County in favor of said *William Daniel.*" The witness testifies as to *admissions*, that is, to verbal admissions made by *Jenkins*. Now, as united, he is made to state his *opinion* or *thought* as to verbal admissions made by a man, from his knowledge of his business and affairs. Now is it not very unreasonable to suppose that a witness, any witness, intended to testify as to verbal admissions of another, from his knowledge of his business and affairs? No person with the least possible amount of sense, could be presumed to intend to testify so absurdly. The preliminary part of the answer has its legitimate reference to other parts of the testimony; parts to which it may intelligibly apply—parts, too, which precede that portion which relates to admissions. To them the Court applied the preliminary statement, and considering that the witness intended to confine it to them, held the testimony as to the admis-

sions, as an independent statement. We think this the only reasonable construction to be given to this answer. It is one which gives an intelligible meaning to the whole of it, and which involves the witness in no absurdity. Viewed in this light, the testimony which was admitted, proves admissions of the plaintiff's intestate against his title, and was legitimate evidence.

One or two other points of error are made in the assignment, but which seemed to be abandoned in the argument, and upon which, therefore, I shall express no opinion, only remarking that, in the judgment of the Court, they were not such as would authorize us, if sustained, to send the case back.

Let the judgment below be affirmed.

No. 25.—GEORGE W. CRAWFORD, Governor, &c. plaintiff in error, *vs.* DAVID FOSTER and others, defendants.

[1.] A bond may be delivered as an *escrow*, by the sureties to the principal obligor.

[2.] If two of the sureties to a Sheriff's bond sign upon condition that the instrument is not to be considered as executed until the signatures of two others are obtained, and it is left with the knowledge and by the consent of the Justices of the Inferior Court, who were officiating in taking it, in the hands of the principal obligor for that purpose, it is no error to admit evidence of these facts, or to hold that the bond is void as to the defendants who subscribed it, provided the condition was not performed.

Debt on Bond, in Decatur Superior Court. Tried before Judge WARREN, December Term, 1848.

There were a number of errors assigned in this cause, but the judgment of the Circuit Court being affirmed upon one point, and the others not being considered by this Court, it is unnecessary to insert a statement of the facts.

For the facts referring to the point decided, the reader is referred to the opinion of the Court.

W. TAYLOR, for plaintiff in error.

SULLIVAN & BROWN, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

This is a writ of error to a judgment of the Circuit Court of Decatur County.

It was an action of debt, brought by the Governor of the State, for the use of Green Mitchell, as administrator of William Montgomery, deceased, against David Foster, Ira Sanborn and John Harrell, upon a bond executed by D. Foster, as principal, and the other defendants as his sureties, conditioned, that Foster, who had been elected Sheriff of Decatur County, should truly and faithfully discharge the duties of his office according to law, and should collect and pay over all moneys which might come into his hands.

The breach charged in the declaration, was, that Foster, during his continuance in office, had sold a large amount of property under execution, belonging to William Montgomery, deceased, and that after satisfying the *fi. fas.* in his hands, he had failed to pay over the surplus to the defendant in execution, or his administrator.

Foster, the principal in the suit, was not served, and Sanborn and Harrell pleaded *non est factum* to the bond; and to support the issue joined on this plea, these defendants offered the testimony of S. B. Lonam and William Peabody, two of the Justices of the Inferior Court, who officiated in taking the bond. Lonam swore that he was present at the execution of the instrument; that it was understood at the time, that Dempsey Harrell and William Martin were to sign as sureties. Foster promised to have this done, "and it was upon condition that he would do so, that the defendants subscribed their names. Witness did not consider the bond executed, without being signed by the other two sureties." William Peabody testified that the defendants would not consent to become sureties, unless the other two names were obtained. "And the instrument was placed in the hands of *Foster for that purpose.*"

[1.] Was the instrument, on which suit was instituted, delivered? This is the only point in the case which it is necessary to consider. The plaintiff below, and in error here, who drew this instrument from the Clerk's office of the Superior Court, (neither that officer nor any one else being able to tell how it came there,)

contends that it was delivered absolutely; the defendants, that it was delivered as an *escrow*.

[2.] The evidence of the attesting Justices of the Inferior Court, is full and complete and uncontradicted. They depose, that Sanborn and John Harrell signed the bond, expressly on condition that Dempsey Harrell and William Martin should also sign it; that it was left in the hands of David Foster, the principal obligor, for that purpose; and that witnesses, acting as the agents of the public, did not consider the instrument executed, until this was done. Could the Court refuse to instruct the Jury, that if they believed the from testimony that the bond was never delivered, but left inchoate, that they should find for the defendants? And could the Jury declare otherwise than they did by their verdict? We think not.

In the absence of positive proof to the contrary, the Jury might, perhaps, infer a delivery, from the fact that the bond was found among the papers in the Clerk's office. 3 *No. Ca. R.* 384. 4 *Ib.* 270. But this presumption is expressly negatived by the testimony of the acting Justices, who attested the instrument.

We might feel inclined to regret, with *Chief Justice Marshall*, (*Pawling vs. United States*, 4 *Cranch*, 222,) that *parol* evidence was ever admitted, to show that a bond, upon its face purporting to be delivered absolutely, was nevertheless delivered only as an *escrow*. No doubt that obligees would be much more secure against fraud. But with the Court in that case, we are very clear that the law is well settled otherwise, and is not to be disturbed by this Court.*

Let the judgment, on this ground then, be affirmed.

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*Note.—See 4 *Watts*, 21. 3 *Wendell*, 380. 2 *Leigh*, 157. *Minor*, (*Ala.*) *R.* 103. 7 *Blackf.* 355.—[Rep.]

No. 26.—ABEL NELSON, plaintiff in error, *vs.* LORENZO M. BIGGERS, defendant.

[1.] A warranty of a slave "to be healthy," does not extend to a warranty of soundness of mind, but of the body only.

Assumpsit, in Muscogee Superior Court. Tried before Judge ALEXANDER, November Term, 1848.

Suit was commenced in the Superior Court of Muscogee County, on a note made by Lorenzo M. Biggers and Joseph Biggers, for the sum of $908.

The defendants pleaded that said note was given for certain negroes, and among others, Betty; and that the consideration had partially failed in this, that said negro was imbecile in her mind, so as to be incapable of performing the ordinary duties and labors of a slave; and farther pleaded, that the said Nelson had, at the time of the purchase, warranted the said negro to be "healthy."

Upon the trial, the following bill of sale was given in evidence: GEORGIA, HARRIS COUNTY.

This, January 30th, 1844, received of L. M. Biggers five hundred dollars, for and in consideration of a certain negro woman, named Betty, and her child, Anonicat—the said woman about 27 years old, and the child about seventeen months old; which said negroes I warrant to be slaves and to be healthy, and the right and title or claim from myself and all other persons whatever. In testimony whereof, I hereunto set my hand and seal.

In presence of— ABEL NELSON, [L. S.]

Test, JAMES S. HAGINES.

Several questions arose, upon the admissibility of testimony offered, which not being decided by this Court, it is unnecessary to state.

The Court charged the Jury, "that by the terms of said bill of sale, that the plaintiff warranted the said negro woman, Betty, to be sound in body and mind; that the term healthy referred as much to the mind as to the body; and that if, from the evidence, they should believe that the said negro Betty, from imbecility of mind, was, as a slave, incapable of performing the ordinary work and labor, that they should deduct from said note,

The bill tendered the original loan of $3,000, with lawful interest thereon. The bill prayed a perpetual injunction against the suit against Wynn.

Hargraves answered the bill, admitting the usury and the renewals, but denied that he requested the change of the note from Lewis to his father and brother; or that since that time, he had looked to Felix Lewis as his debtor. He denied all collusion with Wynn. Wynn never answered the bill.

Before the return day of said bill, in vacation, *Judge Sturges*, the presiding Judge of said circuit, made the following order in said cause.

"In the above case, the sum of six thousand five hundred dollars having been tendered in satisfaction of the judgment of Hargraves *vs.* Wynn, and the said sum having been deposited in the hands of the Clerk, it is ordered that the same be paid to the attorney of George Hargraves, in full payment of said judgment, unless the Court should decide that the complainant is bound to pay an additional sum, as interest on interest."

Afterwards, on 6th day of September, 1844, in vacation, and before the return day of said bill, the said Judge passed an order, making the previous order final and conclusive.

Afterwards, during the return term of the bill, the said Judge passed an order making the injunction perpetual.

In 1848, a bill was filed in the names of Hargraves and Wynn, against Lewis, for review of the former bill for error on the face thereof, setting forth all of the foregoing facts.

At November Term, 1848, Wynn moved to have his name stricken out and he discharged from the said bill, because inserted and used without his knowledge and consent.

Upon a hearing the Court granted the motion, and that decision is now before this Court for review.

H. Holt and J. Johnson, for plaintiff in error.

M. J. Wellborn and H. L. Benning, for defendant.

Jas. Johnson, for plaintiff in error.

All persons interested, must be made parties to the bill. *Story's Equity Pleadings*, 72.

All parties to the original bill, must be made parties. 3 *Dan.* 1725. 8 *Peters*, 362. *Story's Pl.* 409.

The answer of Hargraves, as also the bill, shows that Wynn is in privity with and united with Hargraves, and therefore properly a party to the bill of review, being a continuation of the original bill. 1 *Daniel's Practice*, 349.

A bill of review is in the nature of a writ of error. *Story's Eq. Pl.* 403.

A writ of error must be prosecuted in the name of all the parties, though some be unwilling. 2 *Saunders*, 281. *Jacques vs. Ceasar*, 1 *Stewart & Porter*, 253. 2 *Ib.* 24. 11 *Mass.* 379.

The judgment should have been one of severance, allowing the plaintiff Hargraves to assign error on the hearing, and not striking his name.

By the Court.—NISBET, J. delivering the opinion.

[1.] The final order passed by the Circuit Judge, in the original bill, filed by Lewis against Hargraves and Wynn, came before this Court for review, and was affirmed. 3 *Kelly*, 162. A preliminary motion is made in this case, to dismiss the writ of error, upon the ground that it is apparent upon the record, that the Supreme Court has, in the previous case, decided upon the merits. of the decree now sought to be reviewed, and it will not now entertain a writ of error, founded on a bill to review that decree. We refuse that motion. The error complained of in this bill grows out of a decision, not upon the merits, not affecting the decree sought to be reviewed, but in relation to a preliminary question. A motion was made to dismiss one of the parties complainants (Wynn) from the record, at the first term of this bill of review, and of course before it was ripe for a hearing, because he was made a party without his consent and against his wishes. His name was, upon that motion, stricken. That is the decision excepted to now as erroneous. The plaintiff in error is entitled to the judgment of this Court upon that assignment. No question is made upon this record, as to the effect of the previous judgment of this Court. We therefore express no opinion, whatever, upon it. We leave the parties to their rights under that decision, in the Court below. It will be time enough to determine the effect of our previous judgment upon this bill, when it is regularly brought (if ever brought) before us.

[2.] The effect of the order to strike the name of Wynn from this bill, is to dismiss him as a party—it is not an order of severance. It removes him altogether from the record, and so removed, whatever decree may be finally rendered in this cause, would not be binding upon him. That he has a right to sever, we have no doubt. As in a writ of error, to which a bill of review bears some resemblance, one of two plaintiffs in error may sever and decline to assign error; so here, one of these complainants may sever and decline to litigate with the defendant. 8 *Johns. R.* 558. 2 *Sellon's Practice*, 404. 1 *Stew. & Port.* 253.

In a bill of review, all the parties to the decree must be made parties; and they must be made parties in the order in which they are parties to the decree sought to be reviewed. It is a general rule that one cannot complain against a decree rendered in his favor; nor can a party be made defendant to a bill of review, filed by one against whom, with himself, the decree was rendered. These propositions have relevancy to the point now before me. This record presents the question to be decided, in a novel aspect, and is not free from embarrassment. This cause illustrates the infinite variety of forms in which it becomes necessary for Courts of Justice to apply general principles; it is a case which must be decided without authority, as no case similar in its facts was read at the argument, and I have found none, after diligent search. It would seem, at first view, that in the judgment we render, one at least, of the rules of pleading above laid down, is contravened. But a careful legal view of the case, as presented by the record, will, I think, remove that impression. The facts detailed in this bill, are briefly these: Lewis filed his bill against Hargraves and Wynn, setting forth these facts, among others: That he was indebted to Hargraves for an usurious loan of money, by note; that being about to remove from the State, with Hargraves' consent, his note was taken up, and in place of it, Hargraves accepted a note made by his father and brother, with Wynn as indorser; that notwithstanding this substitution, he, Lewis, was the real debtor and the principal in the transaction; that after several renewals of this last note, at usurious interest, suit was instituted by Hargraves against Wynn, the indorser, by collusion between Hargraves and Wynn; the object of which collusion was for Hargraves to collect the usury out of Wynn, and then for Wynn, as surety, to go upon him, Lewis, as prin-

cipal, to be re-imbursed, and thus (is the inference) defeat his (Lewis') right of defence against the usury. The bill proceeds to charge, that in pursuance of this fraudulent combination between Hargraves and Wynn, the latter confessed a judgment to the former, for the whole amount of principal and usurious interest; judgment was entered and execution issued for that sum. A tender of the principal borrowed and lawful interest is made, and the prayer is for relief, discovery and perpetual injunction of the execution in favor of Hargraves against Wynn. The money tendered being brought into Court, the Chancellor ordered that it be received in full satisfaction of the judgment, and that the execution be perpetually enjoined. This is the order or decree which this bill seeks to review. To this bill Wynn is made a party complainant with Hargraves, and denying the authority of complainant's solicitor to bring it in his name, moves the Court to be dismissed therefrom. Upon that application he is dismissed, and thus the question is made.

[3.] In *Fain vs. Gathright*, (5 *Ga. R.* 7,) this Court held that, "Where it is apparent to the Court that the use of a person's name is important to the rights of a party, and such person is sufficiently indemnified, it is right and proper that he be made and retained a party." As in that case stated, a man has no right to make another a party to his litigation capriciously, but where it is necessary to the assertion of his rights in a Court of Justice, he may do so upon indemnifying him for costs. The indemnity for costs was tendered in this case. Such, then, is the general rule. According to that rule, it must be *necessary to the assertion of the party's rights*, or else he cannot use the name of another against his consent. The first inquiry, then, is this: is it necessary to the rights of Hargraves that Wynn should be joined with him as complainant in this bill of review? The decree which Hargraves wishes to review, is rendered in favor of Lewis, sole complainant against both Hargraves and Wynn, who were both defendants. The effect of that decree is to satisfy and forever enjoin an execution in favor of Hargraves against Wynn. Hargraves wishes a reversal of that decree, that when reversed he may proceed to collect his money on that execution. Upon the assumption now, that he is entitled to that reversal, (for we are compelled to go upon such an assumption,) can he get it without making Wynn a party? Wynn, as defendant in the execution,

stands protected by the injunction; the decree of satisfaction and injunction discharges him from liability upon it, for all the balance of the debt over and above the principal and legal interest. He is therefore, in fact, interested; and being interested upon general principles, must be made a party; if not a party, a decree of reversal would do Hargraves no good, for it would not bind Wynn; he would still stand protected by the original decree; he must there be made a party plaintiff or defendant, in order that Hargraves may get his rights. Again, it is an invariable rule, that in bills of review, all who are parties to the decree to be reviewed, must be brought before the Court as parties. Upon this rule, it is necessary to Hargraves that he be made a party; if he is not, the bill of review would be demurrable, and Hargraves would be defeated. If indispensable to Hargraves that Wynn be a party, could he make him in this suit, a party defendant? If this were not a bill of review, and Wynn could be supposed to hold the relation to the parties that he does, that is, if required to be made a party upon the score of interest, in a contest between Hargraves and Lewis, he certainly could and ought to be made a party defendant; but we are to rule this case according to the principles which govern bills of review, and apply them according to the position which these parties occupy upon the record. Outside of the record, it is true, that Wynn may be considered as benefited by the decree; it operates in his favor; it protects him whilst unreversed, from liability to pay the execution which it enjoins. But how stands this decree on the record? The bill of Lewis is filed against Hargraves and Wynn—they are co-defendants. It charges a fraudulent combination between them to the injury of the complainant; the issue is between him and them; the decree stands on the record in his favor *against them*; the record defines its character and demonstrates who are parties to it. Not only so, but it shows on which side of the decree they stand. The decree is illustrated by the bill upon which it is rendered; we can therefore only say, that the decree is in favor of Lewis against Hargraves and Wynn. If this be so, and if the rule is imperative, that in bills of review, all who are parties to the decree must be parties to the bill; and if it is as we hold it, a legal absurdity, that one can be a party defendant to a bill which seeks to review a decree which is against himself, then it follows that Hargraves cannot assert his legal rights by a bill of review, against a decree

against himself and Wynn, without making Wynn a party complainant. How else, by the rules of pleading, can Hargraves be heard in review of that decree? Without this, he is remediless. We are not disposed to deny him his day in Court. Wynn, according to the view we take of the decree, does not complain against a decree in his favor; it is against him. We will allow him to sever, but reverse the judgment dismissing him from the record.

No. 28.—THE MAYOR AND COUNCIL OF COLUMBUS, plaintiffs in error, *vs.* ELIZABETH HOWARD, administratrix, defendant.

[1.] A count in trover in the usual form is not demurrable; the Statute of 1847, prescribing a special form of declaration for the recovery of personal property being *permissive* only, and not compulsory.

[2.] Offers of compromise, with a view to settle or prevent litigation, are inadmissible; but an independent acknowledgement of a fact may be received, although made pending a treaty for the amicable adjustment of a controversy.

[3.] If the finding of the Jury is in conformity with the charge of the Court, and no complaint is made of the charge, the refusal to set aside the verdict and grant a new trial will not be reversed, although the law may not have been properly submitted, the corrective Court being satisfied with the verdict.

[4.] There is, on the part of the hirer, an implied obligation, not only to use the thing hired with due care and moderation, but also, not to apply it to any other use, or detain it beyond the time for which it was hired.

[5.] If the thing hired is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor.

[6.] The contract of hire being one of mutual benefit, the hirer is bound only for ordinary diligence, and of course is responsible only for ordinary negligence, or for that degree of care and diligence which the generality of mankind use in keeping their own goods of the same kind.

Trover, in Muscogee Superior Court. Tried before Judge ALEXANDER, November Term, 1848.

Elizabeth Howard brought suit against the City Council of

Columbus. The declaration contained two counts. The first, in trover, for a certain negro slave, Braden; the second, in case, setting out that she had hired a certain negro, Braden, to the City Council, for the year 1844, to be employed, specifically, in working the streets of said City, in cleaning and repairing the same; that the Council placed the said negro to do other work, to wit: "to work upon, by and under the precipitous bank at the mouth of the sewer or drain of said City," and that by the breaking and falling off of said bank the slave was killed.

Counsel for defendants below demurred to the first count in the declaration, which demurrer was overruled by the Court, and the defendants excepted.

Upon the trial, plaintiff offered Washington Toney as a witness, who swore that he was a member of the City Council in the year 1844; that he knew, officially, of the death of plaintiff's negro, Braden, who was hired by Council. After the negro was killed, Council took action upon the subject, and admitted that he was the property of Mrs. Howard, and was killed at the sewer, in their employment; that the action consisted in appointing a committee, of which he was chairman, to confer with the attorney of Council, Mr. Wiley Williams, upon the propriety and justice of paying for the boy.

To this testimony as to the admissions of Council, defendants' counsel objected, which objection was overruled by the Court, and defendants excepted.

Witness further testified, that he saw the negro soon after the injury, and just before his death, near the place; that the place where the injury was inflicted was pointed out to him, and the broken fragments which had fallen down; that the negro died soon and violently from the injury there incurred; that the bank resembled a platform projecting over, and the space through which it fell was some ten feet, more or less, and the portion that fell off would weigh about two thousand pounds; that the consistency of the soil, as he recollected, was of a fine, sandy and argillaceous loam, easily crumbled; he observed the traces of a trench, some twelve feet long and about four inches deep, at the line marking the slide, which appeared to be freshly dug; this trench was immediately above the pieces of the fallen bank, and was pointed out to him at the time.

Peterson Thweatt testified, that as agent of Mrs. Howard, he

hired the negro to the Council, to work on the streets; the negro was worth $600 or $650; that after the negro was killed, he as agent, applied for payment of his value from the City Council, who refused, on consultation with their attorney; some of them, however, being favorable to its payment.

For the defendants, John J. McKendree testified, that in 1844, he was a member of Council and hired the negro, Braden, from P. Thweatt; that he did not hire him to work on the streets exclusively; that the City work consisted in working on the streets, digging ditches, filling up holes, working on the abutments of the bridge, and doing every thing which Council ordered, conducive to the health, comfort and convenience of the City, and that he would not have hired the negro if it were not to do the work of the City generally; that previous to the death of this negro, so far as he knew, Council had never done any work on a sewer, or the abutments of the bridge, or in pulling down old walls left after fires, but had only worked on the streets and on one ditch.

John Quin testified, that he was a member of Council for the year 1844, and Chairman of the Committee on Streets; that the boy Braden was directed to work on the sewer by the City Council; that the sewer was in one of the streets, and that the City hands worked upon the river banks, and upon ditches, and upon water-drains, during that year; that Council never made any admissions, but to act upon the proposition to settle, made through Thweatt, so far as he knew.

E. C. Bandy and J. M. Hughes testified, that they were Marshal and Deputy Marshal for the year 1844, and were present when the boy Braden was killed; he and seven or eight others were at work on the sewer, grading the bank or ravine at the mouth of the sewer, which was about twenty feet deep and very large; that the earth there was stiff clay at the top, so much so that they had to drive in gluts to break it off to grade it; that while Braden and one other hand were throwing dirt out of the way, suddenly a piece broke loose from above, and in falling caught Braden while he was stooping down to scoop up the dirt with a spade; that when the mass broke loose it fell as quick as lightning.

The Court charged the Jury, that if the defendants had the negro in their employment as contemplated by the contract of hire, and if, while in such employment, said negro was killed

without any neglect on the part of said defendants, or their agents, that then the defendants were not liable, and if such was not the case, then the defendants were liable.

The Jury returned a verdict for the plaintiff for $800.

Whereupon, defendants moved for a new trial:

1st. Because the verdict is contrary to the evidence and the charge of the Court.

2d. Because the Court erred in admitting the evidence of witness Toney, as to the admissions of Council.

Which motion was overruled and defendants excepted.

And upon these several exceptions error has been assigned.

JOHNSON & WILLIAMS, for plaintiffs in error, cited and commented on the following authorities:

1 *Kelly*, 68, 257. 3 *Ib.* 80, 427. 4 *Georgia R.* 376, 170, 193, 360, 428. 1 *Greenl. on Ev.* 295, *and authorities cited. Story on Bailment*, 390, 404, *and authorities cited.* 9 *Cowen*, 530.

H. L. BENNING, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Circuit Court right in refusing to strike out the count in trover in the declaration?

The object of pleading is for both parties to state their cases—the claim of one and the defence of the other. The rules of pleading are founded, undoubtedly, in reason and good sense, and accuracy and justice were their object. They were intended, however, for a comparatively ignorant age, and like all things human, they are susceptible of improvement, and should, undoubtedly, be adapted to the advanced state of the age and of modern jurisprudence. Whatever of good sense they contained should be preserved; their subtlety and prolixity should be abandoned.

The first and great rule of pleading should be, to compel the litigant parties to disclose fully, plainly and distinctly, the real nature of their respective pretensions. And I feel constrained to admit, that the fiction in trover fails to convey any very definite idea or information upon the subject of the action. The very same words, as

might be readily shown, would apply equally to a dozen different causes of action. And yet the Legislature has not seen fit to administer the proper corrective.

Previous to 1847, they had had the subject matter of this proceeding directly under consideration, and made no change in the plan of declaring. In 1847, the Legislature prescribed a form of action for the recovery of personal property; still it was not made obligatory on parties plaintiff to adopt it. It was left to their option. They contented themselves with providing that no departure from the "*prescribed form*" should work a nonsuit, pro vided the plaintiff, in following the new form, should plainly and distinctly set forth his cause of action.

It is obvious, therefore, that no *Court* is at liberty to *compel* a party to abandon the old form, the Legislature itself having refrained from going so far.

[2.] Next, as to the competency of the admissions made by members of the City Council. Counsel for the defendants sought to exclude them, under the rule of evidence which protects overtures made between litigating parties, with a view to an amicable adjustment; but the acknowledgments here made and attempted to be proven, do not fall within that rule. The rule itself is founded in public policy. There should be no discouragement to compromising disputes, for fear that if not completed, the party making advances may be injured. Independent facts, however, admitted during the treaty for a compromise, may be given in evidence as confessions. This limitation or exception is laid down in *Starkie, Phillips* and *Greenleaf*, and has been recognized in reported cases. *Marsh vs. Gold*, 2 *Pick.* 285. *Sanborn vs. Wilson*, 4 *N. Hamp. R.* 508. *Hyde vs. Stone*, 7 *Wendall*, 354. *Hartford Bridge Co. vs. Granger*, 4 *Conn. R.* 142. *Fuller vs. Hampton*, 5 *Conn. R.* 417. *Delogny vs. Rentoul*, 2 *Martin's Loui. Rep.* 175. *Hamblett vs. Hamblett*, 6 *New Hamp. R.* 342, '43. 1 *Moody & Malk.* 466. *Per Lord Kenyon*, 1 *Esp.* 143. *Anthon's Rep.* 190. 4 *Cowen*, 635. In *Slack vs. Buchanan, Lord Kenyon* went so far as to hold, that he would receive evidence of all admissions, such as the party would be obliged to make in answer to a bill in Equity, rejecting none but such as are merely concessions for the sake of making peace and getting rid of a suit. *Peake's Cases*, 5, 6. It was ruled in the same case, that admissions made before an arbitrator are receivable in a subsequent

trial of the cause, the reference having proved ineffectual. See, also, *Gregory vs. Howard*, 3 *Esp.* 113.

It will be seen, by reference to the testimony, that the admissions were made merely because they were facts; that there was nothing confidential in them, and that they had no reference whatever to a compromise, there being no treaty proposed or pending for any such purpose.

[3.] A verdict having been rendered for the plaintiff, a motion was submitted for a new trial:

1st. Because the finding was contrary to evidence and the charge of the Court: and

2d. Because the Court erred in admitting the evidence of Washington Toney as to the admissions of the City Council.

The application being refused, defendants, by their counsel, excepted.

We have already disposed of the *second* ground, in the motion for a new trial. It only remains, therefore, to inquire whether the verdict was contrary to the evidence and the charge of the Court. The Court charged the Jury, that if the defendants had the negro in their employment, as contemplated by the contract of hire, and he was killed without any neglect on their part, that then they were not liable, otherwise they were.

It is not complained that the law of the case was not correctly stated. But assuming that to be true, a re-hearing is asked, because the verdict is contrary to the charge. Surely it will not be pretended that there was not *some proof* of negligence, and if so then the verdict was not contrary to the charge.

[4.] The law, we apprehend, is this: there is, on the part of the hirer of property, an implied obligation not only to use the thing, be it servant or horse, or any thing else, with due care and moderation, but also not to apply it to any other use than that for which it was hired. If a horse is hired as a saddle horse, the hirer has no right to use the horse in a cart, or to carry loads as a beast of burden. So, if a carriage and horses are hired for a journey to Boston, the hirer has no right to go with them on a journey to New York. So, if horses are hired for a week, the hirer has no right to use them for a month. So, if a negro is hired to work *on the streets* of the City of Columbus, the City Council have no right to employ him in blasting wells, pulling down old walls, or levelling dangerous and precipitous embank-

ments, although the work be *within* the limits of the streets, as delineated in the map of the town.

[5.] And it may be generally stated, that if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss occurs, although by inevitable casualty, he will generally be responsible therefor. Such misuse is deemed, at the Common Law, a conversion of the property, for which the hirer is generally held responsible to the letter, to the full extent of the loss. *Story on Bailments*, §413. 1 *Cow.* 322. *Jones on Bailments*, 68. 2 *Lord Raymond*, 915. 12 *Pick.* 136. 3 *Pick.* 492. 5 *Mass. R.* 104. 1 *Const. Rep. S. C.* 121.

[6.] The question has been much mooted, what degree of care or diligence is required of the hirer, while using the property for the purpose, and within the time for which it was hired. *Sir William Jones* considered that the contract being one of mutual benefit, the hirer was bound only for ordinary diligence, and of course was responsible only for such. *Jones on Bailments*, 86, 87, 120. And this opinion appears to be now settled, upon principle, to be the true exposition of the Common Law. 2 *Kent Com. Lect.* 40. 3 *Cowp. Rep.* 4. 13 *Johns.* 211. 2 *Brod. & Bing.* 359. 7 *Cowen R.* 497. *Gilpin*, 579, 585, 586. He ought, therefore, to use the thing, and to take the same care in the preservation of it, which a good and prudent father of a family would take of his own. Hence the hirer of a thing, being responsible only for that degree of diligence which all prudent men use, that is, which the generality of mankind use, in keeping their own goods of the same kind, it is very clear he can be liable only for such injuries as are shown to come from an omission of that diligence; or, in other words, for ordinary negligence. If a man hires a horse, he is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food; and if he does so, and the horse, in such reasonable use, is lamed or injured, he is not responsible for any damages. *Story on Bailments*, 391, 392. 4 *Barn. & Ald.* 21. 3 *Esp. R.* 79. 5 *Miller's Louisia. R.* 7, 9.

Now, test the verdict by either of these principles, and we are satisfied that it was warranted by the testimony. The Jury were authorized to find, that there was a special contract of hiring, and

that the death of the slave resulted from his being used for a different purpose from that intended by the parties, or else, that the loss ensued from gross negligence on the part of the Council. The want of discretion in our slave population is notorious. They need a higher degree of intelligence than their own, not only to direct their labor, but likewise to protect them from the consequences of their own improvidence. From the testimony of Toney, it is manifest that, considering the locality and nature of the soil, &c. the situation of the slave was one of imminent risk and exposure. We are, therefore, satisfied with the verdict.

Let the judgment be affirmed.

No. 29.—JEHU CLARK and others, plaintiffs in error, *vs.* CHARLES CLEGHORN, defendant.

[1.] Where a bill was filed to rescind a contract for the sale of land by the vendee, on the ground that the title is incumbered with a judgment lien, the vendee having a deed with covenants of warranty: *Held*, that the allegation that the vendor resided without the limits of the State, and had no property therein, was sufficient to retain the complainant's bill in Court.

[2.] Where the answer of the defendants plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based, as a general rule, the injunction will be dissolved.

In Equity, in Muscogee Superior Court; demurrer and motion to dissolve injunction. Decided by Judge ALEXANDER.

Charles Cleghorn filed his bill on the Equity side of the Superior Court of Muscogee County, charging that about the 12th of May, 1846, he bought from Jehu Clark, now of the State of Tennessee, a certain parcel or lot of land in the City of Columbus, commencing at the corner of Warren and Franklin streets, running along Franklin street forty-two feet, thence due south ninety feet, thence due west to Warren street, and thence to the beginning corner, for the sum of $3000, and received from said Clark a deed of conveyance and possession; that he had paid about $2000, leaving three notes still due, one for $192, payable 25th December, 1846, to Augustus Brown or bearer, one for $500, to

said Clark or bearer, and one for $400, payable to Thomas Morris or bearer. The bill states that although the two notes were not payable to Clark, nevertheless they were given to him and in payment for the land aforesaid, and that Brown and Morris knew this when they first became holders of them; that each of said payees have commenced suit on said notes severally, which suits are now pending, on appeal, in the Superior Court of said County.

The bill farther charges, that some years probably prior to 1840, the said premises were granted by the State to John Warren; that he is informed and believes that said Thomas Morris had a joint interest in the whole or a part of said lot; that afterwards one James Rousseau agreed to purchase the land from Warren and Morris, one or both, for a price unknown, and took from Warren a bond to make titles when the purchase money was paid; that afterwards Rousseau assigned the bond to one Nathaniel H. Woods as security for money borrowed by Rousseau of Woods; that Woods paid the money to Warren, which was subsequently repaid to him by Rousseau; and that Woods, as the agent of Rousseau, ordered Warren to make the title to Clark about 15th January, 1846, who paid Rousseau therefor at that time certain notes on one William Perry.

The bill farther charges, that some time in 1847, several *fi. fas.* amounting to a large amount on judgments, dated in 1842, levied on said land as the property of Rousseau, and others to a large amount were ready to be levied; that complainant has interposed his claim, but fears he shall lose the same.

The bill charges that the land is valuable to complainant only in a body, and that he would not have purchased had he not expected to get a good title to the whole, and that even if he could sustain his title to one half, the same would be rendered valueless without the remainder; that when he purchased from Clark, he had no notice that the land ever was owned by said Rousseau, or of the claim of Morris; and that Clark now resides out of the State, and has no property within the State.

The bill, as amended, farther charges, that Brown is the father-in-law of Rousseau, and never had any interest in the land, and was put forward merely to deceive Rousseau's creditors, and that the notes given by Clark to Brown went immediately to Rousseau.

The bill prayed an injunction of the suits in favor of Clark, Morris and Brown against complainant, until the judgments against Rousseau are paid off or annulled, or that said notes be delivered up to be cancelled, and Clark decreed to refund the money already paid, at which time the complainant would return the land to Clark.

Morris, in his separate answer, admits the sale from Clark to Cleghorn, (complainant,) the payment of the money, and that Warren had title, under grant from the State to himself, or himself and one H. S. Smith, and that defendant purchased the interest from Smith; that defendant, Warren, and Judge Thomas, who was also interested, sold to Rousseau about one half of said lot, on a credit, and gave a bond from defendant and Warren to Rousseau; that he has been informed, that by some arrangement between Woods and Rousseau, that Woods paid the purchase money; that in a division of the Warren street property between Warren, Thomas and Morris, the balance of this lot fell to the share of Morris, (defendant,) who subsequently sold it to Rousseau, who failing to pay for the same, the contract was rescinded, and on 14th January, 1846, he sold it to Jehu Clark for $650—$250 in cash, and his note for the balance, ($400,) payable 1st December, 1846; that Clark having purchased the balance of the lot, took a deed from Warren to the whole lot, Clark giving at the same time to this defendant a lien on the lot for the purchase money; that when Clark sold to Cleghorn, upon application of Clark, defendant gave up Clark's note for $400, and Cleghorn gave his note for the same, which note is the one now sued on. He admits that Brown, or some other person, sold a part of said lot to Clark for $1,900, to wit: the twenty feet in front on Warren street, but denies that transaction had any thing to do with the balance of the lot sold by defendant to Clark. He admits that Cleghorn had paid Clark $2000, and farther admits, that the land has been levied on as the property of Rousseau, and been claimed by Cleghorn.

The amended answer alleges, that when Cleghorn made the note to defendant, Morris, for $400, he was notified that it was in lieu of Clark's note for that amount, given for the purchase of said portion of said lot of land, which complainant knew had no connection with the balance of the lot. He admits the portion sold by him is not as valuable as the other, as the other bounds upon

the street, and is improved with tenements, whereas the part sold by defendant lies in the rear, and is unimproved.

The answer of Jehu Clark denied any trust, and confirmed that of Morris, where the facts came within the knowledge of each. He admits that Warren made him a deed to the whole lot, for one half of which he contracted with Morris, and for the other half he contracted with Augustus Brown, with the understanding and belief, at the time, that Morris was the rightful owner of one portion of said land, and Brown the rightful owner of the other. Morris made him a deed. He is not certain whether Brown did or not. He denies ever having any thing to do with Rousseau, nor did he then or now believe that Rousseau had any interest in the said lot; on the contrary, Morris informed him he had once sold his interest to Rousseau, but the contract had been rescinded, nor did he know that Rousseau had any interest in said land when he bought, or when he sold to Cleghorn, either an equitable or legal interest; and he insisted that he was an innocent purchaser for a valuable consideration without notice, and as such should be protected. He did purchase that portion of the land from Brown, and let him have the notes on William Perry, and the note for $192, as he recollects, was made payable to Brown, to lift a note of the same size, which respondent still owed Brown on said purchase. He denied concealing the defect in the title from Cleghorn, for if defective he did not know it himself, nor does he now believe it to be defective, nor did complainant ever complain of any defect until the filing of his bill, although he did complain of his bargain. He denies that the loss of a part of the lot would render the other valueless, and rather intimated that the complainant was colluding with others to defraud respondents and get the land at a less price.

The defendants demurred to said bill for want of equity, and upon the coming in of the answers, made separate motions to dissolve the injunction, which demurrer and motions to dissolve came on to be heard together, by consent.

The Court overruled the demurrer, and refused to dissolve the injunction, which decisions were excepted to and are here assigned as erroneous.

Jas. Johnson and G. E. Thomas, for plaintiffs in error.

There is no equity in the bill:

1. Because the complainant in the bill shows that he himself has title unincumbered, by putting in his claim.

2. Because he shows that he has not yet exhausted his legal *remedy*, and because he alleges his fears and apprehension, and not facts. *McGough & Crews vs. Insurance Bank et al.* 2 *Kelly*, 151.

3. Because the contract is executed, and complainant has provided for the contingency of a failure, by taking a deed of conveyance, with covenants, and because his remedy at Law is ample and complete. 2 *Sugden*, 421. 3 *Edwards*, 77, 37. 5 *Paige*, 307. 2 *Hilliard on Real Property*, 388. 4 *Alabama N. S.* 28.

4. Because Cleghorn must do equity before he asks equity, and restore, or offer to restore, the possession.

The injunction should have been dissolved, because the answer of Morris swears off the equity of the bill.

1. That it is shown that Roussean never had a bond for the twenty-two feet sold by Morris, and complainant knew that fact.

2. Because the consideration of the note held by Morris is not to secure the purchase money of land.

3. Because if it were so, Morris, before a rescission is had, should be placed in the condition in which complainant found him, and his note on Clark, or its value, restored.

The injunction should have been dissolved on Clark's answer:

1. Because he is an innocent purchaser, for a valuable consideration, without notice. 1 *Story Eq.* §409. 3 *Kelly*, 446.

2. Because the allegation of fraud and concealment is fully and distinctly denied by the answer.

H. L. Benning, for defendant.

I. As to the demurrer, this was well overruled, because—

1. The holder of a complete equitable title to land has such an interest in the land as is bound by a judgment against him. *Pitts vs. Bullard*, 3 *Kelly*, 5.

2. And to sell land so incumbered is a fraud upon the purchaser, particularly if the vendor conceals the incumbrance. 1 *Story's Eq.* §§208, 209. Such as will justify a rescission of the sale. 2 *Story's Eq.* §§694, 695, 695, *a.*

3. Moreover, if the purchaser of land cannot get a good title

to any material part of it, he may rescind the whole contract at his pleasure. 1 *Sug. Ven.* 361, '2, '3. 3 *Kelly*, 459, '60. Or he may, in many cases, elect to take the portion of the land to which he can get a good title, and rescind the contract as to the residue. *Ib.*

4. That there was a covenant of warranty does not alter the case, for—

First, a covenant of warranty is no more an equitable bar, than is a bond for titles, which this Court has decided to be none. 3 *Kelly*, 459, '60.

Secondly, Cleghorn not having been evicted, but only *fearing* it, cannot as yet plead a breach of the warranty against the suits and the notes for the purchase money, even assuming such a plea to be allowable under any circumstances; and to suffer judgments to go against him will be to incur irreparable loss, as Clark lives out of the State and has no property in it.

Thirdly, because a Court of Law cannot measure the damages for a breach of this warranty, seeing that a part of the land was incumbered and a part not, whereas the whole land was purchased as a single parcel and for a solid price.

Fourthly, because the Court will not compel a purchaser to take a defective or doubtful title. 2 *P. Wms.* 198. 1 *Br. Ch. Rep.* 74. 4 *Russ.* 1. 4 *Ib.* 374. 10 *Sim.* 444. 7 *Beav.* 546.

II. And as to the motion to dissolve the injunction, that was properly refused, because the answer did not "plainly and distinctly deny the facts and circumstances upon which the equity of the bill is based." 3 *Kelly*, 445. 1 *Ib.* 9.

By the Court.—WARNER, J. delivering the opinion.

Two grounds of error are assigned upon the record in this case, to the judgment of the Court below.

First, because the Court overruled the demurrer to the complainant's bill.

Second, because the Court refused to dissolve the injunction on the coming in of the answers of Morris and Clark.

[1.] With regard to the first ground of error, we are of the opinion the demurrer was properly overruled. The plaintiff in error insists that Cleghorn's remedy on the covenants of his deed affords him ample protection, and that a Court of Equity will not

interfere to grant relief. If the bill disclosed nothing more than that a title, with a covenant of warranty, had been made by the vendor to the vendee, in the absence of any fraud or other equitable circumstance, the argument would be entitled to consideration; but here, the complainant alleges that the vendor resides without the limits of the State, and has no property, to his knowledge, within the State. This is an equitable circumstance which, in our judgment, entitles the complainant to maintain his bill, when taken in connexion with the other allegations. The remedy on the covenant in the deed, against a *non-resident* who has no property in the State, would, to say the least, be very inadequate.

The main ground of the complainant's equity is, that the land purchased by him of Clark, the vendor, is subject to judgments obtained against Rousseau, who, it is alleged, paid the purchase money for the land, although he never had a title thereto in his own name, but that the same was held *in trust* for his benefit by those from whom Clark derived his title, and that the land has been levied on to satisfy judgments against Rousseau, and claimed by the complainant, which he fears will be sold for the payment of the judgments so obtained against Rousseau, of older date than his title from Clark. The object of the complainant's bill is, to be protected against the alleged incumbrance upon the property, and to enjoin the defendants from collecting the balance of the unpaid purchase money therefor.

[2.] In *Moore vs. Ferrell et al.* (1 *Kelly*, 7,) this Court held, where the answer plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based, the injunction will be dissolved. Now, here, the equity upon which the complainant's bill is based, is the alleged *trust* existing for the benefit of Rousseau, the judgment debtor, which it is feared by the complainant, will make the land subject to his debts. The answer of Clark, who conveyed to the complainant, not only alleges he was a purchaser of the land, without any notice of the trust, but denies the existence of any trust. The answer of Morris admits that he contracted at one time with Rousseau for one half the land, but denies that Rousseau ever paid any thing for it, and that the contract was rescinded before he sold it to Clark. We think the answers of Morris and Clark are full and satisfactory, and deny the existence of any *trust* in favor of Rousseau, which can operate as an incumbrance on the property purchased by

the complainant from Clark, and now in possession of the complainant, and that the Court below ought to have sustained the motion to dissolve the injunction.

Let the judgment of the Court below be reversed.

No. 30.—DANIEL WEATHERS and others, plaintiffs in error, *vs.* JAMES DOSTER, defendant.

[1.] The bill of exceptions must *specify* the errors complained of, and the decision excepted to.

In this cause issue was joined, with a protestation that the bill of exceptions did not specify any decision of the Court below, complained of or excepted to.

The issue in the Court below, was upon a claim to land, and the question was a fraud upon creditors of the grantor of the defendant in *fi. fa.* in the sale to him. The bill of exceptions, after giving a history of the case, stated the request of claimant's counsel to the Court to charge the Jury on the question of the privity of the defendant in *fi. fa.* to the fraud, in a particular manner. The Court declined so to charge, but gave in charge to the Jury the law as considered by the Court: "And forasmuch as the matters aforesaid do not appear of record in said cause, the said claimants have prayed his Honor to sign this bill of exceptions," &c.

B. HILL and WORRELL, for the motion.

H. L. BENNING and L. B. SMITH, *contra.*

PER CURIAM.

[1.] The law organizing this Court, requires that the bill of exceptions shall "*specify* the error, or errors, complained of in any decision or judgment," and the Rule XXXIII. of this Court, adopted with a view to carry into effect this provision of the law,

requires that the bill of exceptions should "*distinctly specify* the points of error in the judgment of the Court below, upon which the plaintiff in error expects to rely on the hearing." We do not think this bill of exceptions complies with the law or the rule. There is no decision excepted to or complained of in the body of the bill, and the concluding sentence, "this *bill of exceptions*," will apply as well to one decision as another. Justice to the Court below, and to ourselves, requires that the decision excepted to, and the errors complained of, should be *distinctly specified* in the bill of exceptions, so that nothing should be left to surmise or conjecture in this Court.

In *Wolverton vs. Hart & Co.* (7 *Sergt. & Rawle*, 277,) *Justice Gibson*, after some very pertinent remarks, says: "For reasons like these, I regret a practice too frequent in the Common Pleas, of stating the exception generally, without specifying the grounds on which it is urged. In such a case, as we cannot judicially know the precise point the Court was called on to decide, we are obliged to let in any objection that can be raised on the face of the record; and hence I have frequently been obliged to consent to reverse on points that I had every reason to believe were never made below. No Judge ought, in justice to his own reputation as a lawyer, or to the rights of suitors, to allow any bill of exceptions which does not contain the very point decided and nothing else."

Let the writ be dismissed.

No. 31.—WILLIAM RUSHING, plaintiff in error, *vs.* DANIEL B. RHODES, defendant.

[1.] The right to recover back money paid on a usurious contract, accrues from the *actual* payment, and not the agreement to pay.

Assumpsit, in Marion Superior Court. Tried before Judge ALEXANDER, November Term, 1848.

Daniel B. Rhodes brought suit in the Superior Court of Marion County, returnable to February Term, 1843, to recover back

usurious interest previously paid. The defendant pleaded the general issue and the Statute of Limitations.

The plaintiff proved the lending of the money, and the usurious contract.

The plaintiff introduced testimony to show that the note was settled in full, on the second Saturday in March, 1839. There was a credit on the note of $1,400, in January, 1849.

Defendant introduced testimony to show that a settlement, or agreement for a settlement, was made in the early part of January, 1839.

Defendant's counsel requested the Court to charge the Jury, "that if it was agreed, in January, 1839, between Rushing and Rhodes, that Rhodes should then deliver to Rushing a note for $1,400 on Phillis, and should agree to deliver other property, at a subsequent day, in full payment of the note, and if Rhodes did then deliver the $1,400 note to Rushing, and did deliver the other property as agreed, and if Rushing then received said $1,400 note, and the agreement to deliver the other property in full payment absolutely of the note he held, then the said note was thereby paid and extinguished, and the right of action, if any, in this case, arose to Rhodes directly thereafter." Which charge the Court refused to give, but charged the Jury, that the Statute of Limitations began to run only from the date of the actual payment, and not from the date of any previous agreement of the parties in respect to the payment of the usury.

To which charge of the Court, and refusal to charge, defendant, Rushing, by his counsel, excepted, and has assigned error thereon.

H. L. Benning, for plaintiff in error, cited—

2 *Greenl. on Ev.* §519. *Tarver vs. Rankin*, 3 *Kelly*, 210. *Story on Prom. Notes*, §§406, 408, 438.

B. Hill, for defendant in error, cited—

3 *Kelly*, 261. 1 *Swift's Dig.* 313. 3 *Durn. & East*, 537. *Brown vs. Cheney*, 1 *Kelly*, 409, '10, *and cases there cited.* 3 *Eng. Com. Law*, 332.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This was an action brought to recover back usurious interest, to which the plea of the Statute of Limitations was interposed; and the only question to be determined is, whether the right of action accrued from the time when the usury was agreed to be paid, or actually paid. We think, most clearly, from the *latter* date, and for this reason: that while the agreement to pay was *executory*, being *void* in law, it might be defeated. The payment of $1,400, made in January, lacked one hundred dollars of discharging the principal or original sum loaned. The holder retained possession of the note, and no part of the usury was paid till March thereafter, until the negro and other articles were delivered in pursuance of the contract made two months previously. Until this property was received, although in fulfilment of the engagement entered into in January, no unlawful interest was paid, and consequently no right of action accrued to the debtor to recover it back.

We think there is no error in the judgment. It is therefore affirmed.

No. 32.—JOHN G. WINTER, plaintiff in error, *vs.* JOSHUA K. BULLOCK, defendant.

[1.] The holder of a promissory note, who transfers it by delivery, for a valuable consideration, warrants by implication, unless otherwise agreed between the parties, that he is a lawful holder, and has a just and valid title to the instrument, and a right to transfer it by delivery. He also warrants, in like manner, that the instrument is genuine and not forged or fictitious, and that he has *no knowledge* of any facts which prove the instrument, if originally valid, to be worthless, either by the failure of the maker, or by its being already paid, or otherwise to have become void or defunct; and any *concealment* of these facts, on the part of the transferer of the note, operates as a *fraud* on the rights of the transferee, for which a Court of Equity will entertain jurisdiction, to compel a discovery, and grant relief.

In Equity, in Muscogee Superior Court. Tried before Judge ALEXANDER, November Term, 1846.

John G. Winter filed his bill in Muscogee Superior Court, charging, that in the year 1837, Joshua K. Bullock, then and now a citizen of North Carolina, sold to Morrison & Harrison, of the County of Richmond, State of Georgia, two race horses, Kite and Southerner, for the sum of $2900, and warranted the said horses to be sound; that Morrison & Harrison gave their note, due 1st October next thereafter, for the amount of said sale; that at the time of the sale, Southerner, one of said horses, was wholly unsound and worthless, which fact was known to Bullock; that subsequently, in 1839, said Winter discounted the said note for the said Bullock, giving him therefor a draft on Starke & Pearce, of Fayetteville, North Carolina, at three months, for $1400, and the balance in money.

The bill further charges, that suit was brought against Morrison & Harrison, on said note, to which a plea was filed, setting out that the consideration of the said note had partially failed, from the unsoundness of the said horse; that Bullock was notified of said plea, and promised to resist and defend the same; that on the final trial, said plea was sustained and a verdict rendered only for one half of said note.

The bill further charges, that suit is now pending against said Winter, at the instance of said Bullock, upon the said draft. The complainant also alleges, that he has no means of proving the fact that said draft was delivered by him to said Bullock, upon the consideration and in the manner as before stated, except by a discovery from said Bullock in Chancery, and that at the time of his discounting said note for said Bullock, he had *no knowledge* of the existence of the warranty of said horses.

The bill prayed that Bullock might be compelled to make a full discovery of the facts charged, and deliver up the said draft to be cancelled; and in the mean time, enjoined from negotiating the same, and from farther prosecuting his suit thereon.

To this bill a general demurrer was filed, which, upon a hearing, was sustained by the Court. To this decision complainant excepted, and now alleges the same to be erroneous.

H. L. Benning, for plaintiff in error, cited—

Story Pr. Notes, §§118, 119, *and note* 4, 389, 180, 187. *Bailey on Bills*, 405. *Chitty do.* 271. 2 *Danl. Ch. Pr.* 12. 1 *Story's Eq.* §§207, 208, 209, 215, 216, 217, 383.

H. HOLT, for defendant, cited—

Story Pr. Notes, §118, *et seq.* §187, *et seq.* *Buller's N. P.* 277. 1 *Dallas*, 252, 444. 1 *Esp. R.* 446. 1 *Caines' Rep.* 117. 10 *Ves.* 204. 15 *East*, 7, 13, *note.* 1 *John. R.* 409. 6 *Mass.* 321.

By the Court.—WARNER, J. delivering the opinion.

The error assigned upon the record to the decision of the Court below is, the sustaining the general demurrer to the complainant's bill.

The complainant discounted a promissory note given by Morrison & Harrison to the defendant, Bullock, for two race horses, Kite and Southerner, for the sum of $2,900, for the benefit of Bullock. The complainant gave the defendant, Bullock, in payment for the note, a draft on Starke & Pearce, of Fayetteville, North Carolina, for $1,400, at three months, and paid him the balance therefor in money. The defendant, Bullock, instituted suit on the draft against the complainant, Winter, in the Superior Court of Muscogee County, to recover the amount thereof: whereupon, the complainant filed his bill, praying for discovery and relief, and that the suit at law be enjoined. The complainant alleges, that at the time of the sale of the horses by Bullock to Morrison & Harrison, he *warranted* them to be sound, whereas one of them (Southerner) was wholly unsound and worthless, which fact was *known* to Bullock.

The complainant also alleges, that he instituted suit on the note purchased by him from Bullock, against the makers, Morrison & Harrison, who plead thereto a partial failure of consideration, in consequence of the unsoundness of the horse Southerner, and on the final trial of the cause, the plea was sustained and a verdict rendered in his favor for only one half of the amount of the note; and that he has no means of proving the fact that said draft was delivered by him to said Bullock, upon the consideration and in the manner before stated, except by a *discovery* from said Bullock in Chancery. The complainant also alleges, that at the time of his discounting the note of Morrison & Harrison, for the benefit of Bullock, he had *no knowledge of the existence of the warranty* of the soundness of the horses, made by Bullock to them.

[1.] The complainant's equity then is, that the defendant transferred to him, by delivery, the note of Morrison & Harrison, for a valuable consideration, and *concealed* from him the fact of his knowledge of the unsoundness of the horse Southerner, and also *concealed* from him another fact, within his own knowledge, that he had warranted the horse to be sound, by means whereof the makers of the note were enabled, successfully, to maintain their plea of partial failure of consideration to the action instituted by him thereon against them. Will the facts relied on by the complainant entitle him to the discovery and relief sought by his bill? We think they are sufficient for that purpose, and that the Court below erred in its judgment in sustaining the demurrer.

A party who transfers a promissory note by delivery, for a valuable consideration paid him therefor by the transferee, is not exempt from all obligations or responsibilities. In the first place, he warrants by implication, unless otherwise agreed, that he is a lawful holder, and has a just and valid title to the paper, and a right to transfer it by delivery. He impliedly warrants that the instrument is genuine, and not forged or fictitious. He also warrants, in the same manner, that he has *no knowledge of any facts* which prove the instrument, if originally valid, to be worthless, either by the failure of the maker, or by its being already paid, or otherwise to have become void or defunct; for any concealment of this nature would be a manifest fraud. *Story on Promissory Notes*, 123, §118. There can be no doubt that if a man assign a bill for any sufficient consideration, *knowing it to be of no value*, and the assignee be not aware of the fact, the former would, in all cases, be compellable to repay the money he had received. *Chitty on Bills, 6th edition*, 146. In *Fern vs. Harrison*, (3 *Term Rep.* 759,) *Lord Kenyon* held it to be extremely clear, that if the holder of a bill send it to market without indorsing his name upon it, neither the morality or the laws of the country will compel him to refund the money for which he has sold it, if he *did not know at the time that it was not a good bill.* If he *knew* the bill to be bad, it would be like sending out a counterfeit into circulation, to impose upon the world, instead of the current coin, and the party receiving the money, *with such knowledge*, would be obliged to refund it. See, also, *Young vs. Adams*, 6 *Mass. R.* 186. *Martin vs. Morgan*, 5 *English Com. Law Rep.* 87. The

defendant, Bullock, at the time he transferred the note to the complainant and received the consideration for it, *knew* that one of the horses for which the note was given was unsound and worthless; and he also *knew* that he had *warranted* both the horses to be sound, but *concealed* these facts from the complainant, who had *no knowledge* of them. At the time of the transfer of the note by the defendant to the complainant, he *knew* that only one half of the consideration for which said note was given was valid and recoverable in law, and that the other half of the consideration of the note was void and worthless, and not recoverable by the complainant, who discounted it after its maturity. Such *knowledge* and *concealment*, on the part of the defendant, was a manifest fraud upon the rights of the complainant. The parties did not deal on equal terms. The true definition of undue concealment, which amounts to a fraud, for which a Court of Equity will grant relief, is stated by *Mr. Justice Story* to be, "the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely in *foro conscientiæ*, but *juris et de jure*, to know." 1 *Story's Equity Jurisprudence*, 216, §207. In *Belcher vs. Belcher*, (10 *Yerger's Rep.* 121,) it was held, that fraud, in a Court of Equity, properly includes all acts, omissions, and concealments, which involve a breach of either legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. We have already shown, that the *concealment* of the unsoundness of one of the horses for which the note was given, and the warranty of soundness, by the defendant, when he transferred the note to the complainant, was a breach of his legal duty, and consequently gives to the Court of Equity jurisdiction of the cause.

Let the judgment of the Court below, sustaining the demurrer to the complainant's bill, be reversed.

SUPREME COURT OF GEORGIA,

MACON TERM, 1849.

At a meeting of the members of the Bar in the City of Macon, His Honor JOSEPH H. LUMPKIN was called to the chair, when A. H. Chappell, Esq. announced to the meeting the death of the Honorable EDWARD D. TRACY, and moved that a committee of six members of the Bar be appointed by the Chair, to report suitable resolutions upon the opening of the Court to-morrow morning. Whereupon, the Chair appointed Messrs. Chappell, Hines, Rutherford, Hardeman, Dougherty and Poe, that committee; who made to-day the following report:

Whereas, we have lost from our midst a brother, respected by us all, for the extent of his legal attainments, and the virtues of his private character; one who shed around the various relations of life the light of a kindly nature and of a cultivated intellect, and feeling it a duty and a solace to testify thus publicly our respect for his memory, and unfeigned regret at his loss—

Resolved, That the members of this Court and of the Bar, assembled at the Supreme Court in Macon, deeply feel the loss they have sustained in the death of their brother, Edward D. Tracy, and now record for him their appreciation as a lawyer of high attainment, a gentleman of warm heart and refined feelings, the chosen and tried representative of his constituency, the upright and profound Judge; whether in his private or public capacity, still the same true-hearted, energetic, honorable man.

Resolved, That to his friends and to us, his long associates, it is matter of mournful gratulation to reflect, that he passed away only in the maturity of a ripe age; known, beloved and respected throughout the limits of the proud State which he had made the home of his adoption and of his affection.

Resolved, That while all who knew, could but love and respect

him, only the brethren who belonged to the profession of which he was an honored member, can appreciate the unwearying kindness, the unfailing temper, rare sagacity, the strong intellect and generous heart which endeared him to them, and cause them to mourn over his departure.

Resolved, That we will attend the funeral of our deceased brother in a body, and wear the usual badge of mourning upon the left arm for 30 days.

Resolved, That the Clerk be requested to enter these resolutions on the minutes of this Court, to forward a copy to the family of our deceased brother, and that they be published in the public papers of the City of Macon.

The report and resolutions were unanimously adopted.

Whereupon, His Honor, Judge LUMPKIN, responded as follows:

It is an incontestible fact, that *every* man, not the poor and the ignorant, the feeble and the old *only*, but *every* man, at his *best estate*, the young and the healthy, the wise and great, is *altogether* vanity. The palace, as well as the cottage, is the habitation of death; the robes of royalty and the tattered garments of poverty, are alike preludes to the shroud. Twice within the last short month, the Bar of the Flint Circuit and this Court, have been called on to attest the fact, in no mistakeable form, that "All flesh is grass, and the goodliness thereof as the flower of the field." The funeral knell of Kelly has scarcely died away upon our ears, when we are again summoned to follow the remains of Tracy to the narrow house appointed for all the living. Human life is at most "a tale that is told." "Few and evil" is its sententious history. The men before the flood counted their years by *centuries*—we reckon ours by *scores* only.

About twenty-five years ago, I came over with a party from Milledgeville, while the Legislature were in session, to see the new Town of Macon. Baber was then here—Bullock and Wells and Wallace, Gillespie and Tracy. Where are they now? The same sun that shines to-day upon us, shone upon them; the houses that were built then, are still standing; but where are the heads that planned and the busy hands that constructed them? The very seat we occupy was once filled by our departed brother; his feet trod this Court room; these walls resounded with his voice; but alas! these places shall know Kelly and Tra-

cy no more forever. May these lessons of mor
us to number *our* days, as to apply our hearts to

Judge Tracy was no ordinary man. His att
ature were of a high order. As a philologist, he
no superior in the State. He was a thorough li
the ancient languages with facility, and spoke the
with fluency. His memory was wonderfull
seemed to be impossible for him to forget any tl
seen, heard or read. In many branches of his p
pecially in Commercial Law, he stood pre-emin
it was in private life, where the softer green of
that this adopted son of the South appeared to
vantage. He was remarkably fond of mirth, a
loved or helped more to "laugh an hour away."
least trait of a demagogue in his composition. Li
elevation of sentiment and soul, he sought that "
follows and not that which is run after." His
from envy and malice, and every bad passion.
man. Were I to sum up the character of the d
gle sentence, I would say, he was a man of
humor, sagacity, eccentricity, integrity and bene

But he has closed his career and finished his
left the world in the summer of life, after havi
on his adopted State, like many of our brightest
which she conferred on him.

That he did not realize such emoluments as his
is no uncommon occurrence with men of talents
life. "Bread is not always given to men of un
favor to men of skill, but time and chance happ
thing is certain, he never grew fat upon the fruit
never wrenched from the widow's hand the cu
from her orphan children the crust of bread.
he would share his last shilling with the indigent a
and if he had nothing else, "he gave to misery al
His hand and heart were open as charity itself,
woes of others.

For some time past, his nerves were shattere
broken, and he sunk into the icy embrace of de
sensibility. He died where all would wish to d
and family around, to cheer the expiring ray; a

for as a husband, father, master, friend and neighbor, Judge Tracy was a model worthy of the imitation of all.

Soon, the cold blasts of winter will be over, and the voice of the turtle will again be heard in the land; the forest will be clothed with verdure, and the primrose and the violet and the flowers of spring will deck the gay earth, but Kelly and Tracy will slumber on in their last long repose, till the archangel's trump shall announce the end of time, and earth give place to heaven! *Requiescant in pace!*

Let every one of us cultivate personally, that which we delight to eulogize in our deceased friend and brother, whose virtues were numerous, whose faults were few. And in conclusion, I solemnly charge you to regard in kindness his surviving family; assist them by your counsels; extend a fostering hand to his fatherless children, in aiding them in whatever vocation they may be called to pursue. I speak out of a full heart, when I declare that nothing would tend so much in prospect, to smooth the rugged descent to the tomb, as the consciousness that my family, when deprived of its head, would find in every lawyer a protector, guardian and guide.

Let the proceedings of to-day be entered on the records of the Court; as a perpetual testimony of our affectionate regard for the deceased.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT MACON,

FEBRUARY TERM, 1849.

No. 33.—GEORGE W. TOWNS, Governor, &c. for the use, &c. plaintiff in error, *vs.* ELIJAH HICKS and EWELL WEBB, defendants.

[1.] Where an action on a Sheriff's bond is brought for the purpose of recovering a sum of money, found to be due by an order absolute upon a rule against the Sheriff, to two jointly, it is no objection to the sufficiency of the breaches assigned, that the declaration does not state the amount of the interest of each in that sum.

[2.] An execution issued upon an order absolute against the Sheriff, is irregular and void, the proper remedy being an attachment. The sureties on his bond are not, however, discharged on that account, their liability being for the official default of their principal, which is established by the judgment on the rule.

[3.] A judgment against a Sheriff on a rule to pay over money, is not satisfaction, and no discharge of the sureties on his bond until it is paid.

Action on Sheriff's bond, in Crawford Superior Court. Tried before Judge SCARBOROUGH, August Term, 1848.

Suit was commenced in the Superior Court of Crawford County, in the name of George W. Towns, Governor, &c. for the use

of George Moore and Matthew H. Myrick, which petition showed, "that Elijah Hicks and Ewell Webb, both of said County, are indebted to your petitioners in the sum of twenty thousand dollars."

"For that," &c. setting out the official bond of the said Elijah Hicks as Sheriff of said County.

The breach alleged was as follows: "And your petitioner avers, that notwithstanding the said bond, the said Elijah Hicks hath not well and truly done and performed all and singular the duties required of him by virtue of his said office of Sheriff as aforesaid, according to law and the trust reposed in him; but, on the contrary, hath acted unfaithfully, illegally and improperly in his said office, in this, that the said George Moore prosecuted to judgment and *fi. fa.* on attachment, a certain claim of him, the said George Moore, against certain persons, to wit: Elkana Sawyer and Littleberry Boon, in the County of Crawford aforesaid, (the said Elijah Hicks then and there acting as Sheriff of said County,) which said claim, at the date of the judgment, to wit: the ——— day of November, in the year 1842, amounted to the sum of $928 98 principal, $68 03 interest, besides cost; and your petitioner showeth, that the said Matthew H. Myrick prosecuted in said County a certain claim of him, the said Matthew H. against the said Elkana Sawyer to judgment and *fi. fa.* (he, the said Hicks, being then and there Sheriff of said County,) which said judgment was on ——— day of November, in the year 1842, was for the sum of $747 41 principal, and $54 81 interest, besides cost—each of which judgments were obtained in the Inferior Court of said County, and each of which bound negro property, then in the hands of said Hicks, levied on as the property of said Boon and Sawyer.

And your petitioner farther showeth, that the said George Moore and the said Matthew H. Myrick, purchased and took by legal assignment to the said Matthew, for his and the said George's use, of and from one Littleberry Lucas, a certain *fi. fa.* against the said Elkana Sawyer and the said Littleberry Boon, (which also bound the negro property then levied on in the hands of said Hicks as Sheriff aforesaid,) obtained in the Superior Court of the County aforesaid, the amount of which, at the date of the judgment, viz: the ——— day of August, 1842, was $1278 principal, and $65 34 interest, besides cost; all which said *fi. fas.*

were in the hands of the said Hicks, as Sheriff aforesaid, who had in his possession, and levied on at the instance of the said Moore, Myrick, Lucas and others, some thirteen negro slaves, the property of the said Elkana Sawyer and Littleberry Boon, which said slaves were then and there subject to the payment of the debts of the said Boon and the said Sawyer, and which said slaves he, the said Hicks, as Sheriff aforesaid, sold for the sum of $3,600, or some other large sum, to your petitioner unknown; and your petitioner avers said *fi. fas.* are lost, so that they cannot be more fully set out here.

And your petitioner showeth that, after the said Elijah H. had sold said negroes, as Sheriff aforesaid, the said George Moore and Matthew H. Myrick demanded of said Hicks the amount due to them on account of the said *fi. fas.* aforesaid; and your petitioner avers, there was then and there due on said *fi. fas.* the sum of $1,025 06, besides interest, due 8th day of August, 1846; which payment being refused, the said Moore and Myrick, by their attornies at law, Amos W. Hammond and Thomas C. Howard, ruled the said Hicks for the same; on which said rule an issue was made up and tried, between the said Hicks, as Sheriff, and the said George Moore and Matthew H. Myrick, (and others,) in Crawford Superior Court, when the said Moore and Myrick recovered of said Hicks, as Sheriff, the sum of $1,024 06; and the said Hicks being then and there dissatisfied, by bill of exceptions and writ of error, removed said cause to the Supreme Court of this State, where the judgment last mentioned was affirmed; on which a *fi. fa.* was issued, on the 14th June, 1847, for the sum last above mentioned, with interest thereon from 8th August, 1846, which said *fi. fa.* was, on the 28th June, 1847, returned by the then Sheriff of Crawford County, where Hicks then resided, 'no property.' "

At the August Term, 1848, Judge *Scarborough* presiding, the defendant demurred to the declaration on several grounds—among others,

Because no sufficient breach, under the Act of 1847, or the Statute of 8th and 9th William III. was alleged, and the amount Moore and Myrick are severally entitled to is not shown.

Because a *fi. fa.* issued upon a rule absolute is void, if against a Sheriff; and

Because a *rule nisi* and absolute against a Sheriff is a discharge of the securities.

The Judge sustained the demurrer on these three several grounds, and this decision is alleged to be erroneous.

A. HAMMOND and G. R. HUNTER, for plaintiff in error, cited:

1 *Chit. Pl.* 236. 2 *Kelly*, 474, 257. 2 *Bailey S. C. Rep.* 214, 362. 5 *Binney*, 184. 6 *Cranch*, 253. 4 *McCord*, 458.

GREEN & CANSEY and S. HALL, for defendants in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] The breaches in this case are sufficient. In addition to the general breach assigned, the plaintiff assigns special breaches, with quite sufficient distinctness and particularity. They are issuable; that is, the defendant is clearly notified of what constitutes the ground of damage to the plaintiff. He is informed of what he is to defend against. The plaintiff avers that the usees were both judgment creditors of certain persons; states the amount of each judgment; that executions issued on them and were levied by the Sheriff on certain slaves; that a large amount of money was raised from the sale of the slaves, and went into the hands of the Sheriff. He also avers, that the usees, Moore and Myrick, were also the owners, by assignment to them, of another judgment against the same defendants, the amount of which is stated, which had also a lien upon the same fund. He states the aggregate amount due to them upon these three judgments; also, that a rule was moved against the Sheriff for the money; that an issue was formed thereon and sent to a Jury, and a verdict rendered against him for the amount due to them on all these judgments; that a judgment was entered in their favor for that sum, upon which execution issued, and upon which execution there was a return of *nulla bona*, and therefore, he says, they are damaged, &c. One of the arguments advanced against the sufficiency of the assignment of breaches is, that the declaration does not state the amount due upon these judgments severally, to each of the usees. That, we think, was not necessary. Each judgment, its amount, &c. is set forth—upon a rule against the Sheriff a judg-

ment for a specific sum is awarded in their favor jointly. By judgment of the Court, the Sheriff is in default to them that sum, and they sue jointly upon his bond to recover that sum. A recovery in this action would be a good bar to any subsequent several action on the bond brought by either of them.

[2.] The Court below held, that the execution which issued on the judgment on the rule against the Sheriff, was irregular and void, and therefore the action could not be sustained upon the bond against the Sheriff and his sureties. We agree with the Court, that the execution was irregular and void, but we deny the consequence deduced from that fact by the Court. It does not follow, that because the issuing of an execution upon the order absolute, or the judgment of the Court, was irregular, the plaintiffs have no right to proceed upon the bond for the default of the Sheriff. The proceeding against the Sheriff, by rule, is not a suit in which a judgment is rendered on a verdict, which may be enforced by process of *fieri facias*. It is a proceeding addressed to the Court. There may, or may not, be any issue of fact to be tried by a Jury. If there is none, the Court grants an order that the Sheriff pay over the money to the persons entitled to it; that is the judgment of the Court, that so much money is in the hands of its officer, and that he pay it. If there is an issue of fact sent to a Jury, (as in this case,) it is for the purpose of informing the mind of the Court—of instructing its conscience—for money rules against the Sheriff are in the nature of equitable proceedings before a Chancellor. When that is done, the Court will, as where there is no issue, award its judgment. In either case, the Sheriff refusing to comply, is in contempt, and the proper proceeding against him is an attachment for the contempt.

[3.] But what then? Is the party injured by the fault of the Sheriff, denied his remedy on the bond? By no means. The reasoning upon which the Court below went, must have been after this fashion, I suppose: a return of *nulla bona* upon a *fi. fa.* against the Sheriff is necessary to charge his sureties; there is a *fi. fa.* in this case against the Sheriff and a return of *nulla bona;* but the *fi. fa.* and the return are void; therefore the sureties are not liable on the bond. The vice of which reasoning is found in the assumption that a return of *nulla bona* is necessary to charge the sureties. Their undertaking is to make good the official defaults of their principal. That default is, in this case, established

by the *judgment* on the rule; *that* fixes their liability. Equally unfounded is the idea that a rule absolute against the Sheriff is a satisfaction, and therefore the sureties are not liable. As before stated, it ascertains, in the most solemn form, his default, to protect against which the bond is given, and their liability continues until that is paid.

Let the judgment be reversed on the three grounds taken in the assignment.

No. 34.—George W. Crawford, Gov. &c. for the use, &c. plaintiff in error, *vs.* Thomas Andrews and others, defendants.

[1.] In an action of debt against the Sheriff, on his official bond, for an escape on *mense process*, the insolvency of the original debtor may be given in evidence by the defendant in mitigation of damages; the injury actually sustained by the plaintiff, and not the specific amount of his debt, being the measure of damages.

[2.] The opinion of a witness may be given in evidence as to the insolvency of a party, provided it is accompanied by the facts upon which the opinion is founded.

Debt on official bond, in Crawford Superior Court. Tried before Judge Scarborough, August Term, 1848.

This was an action of debt on the official bond of Thomas Andrews, as Sheriff of Crawford County.

The breach alleged was, that Enos R. Flewellen, the usee of the plaintiff, had taken out a *bail process* against one Thomas Cochran, under which Cochran was arrested by the said Andrews, as Sheriff; that Cochran gave bail, who subsequently surrendered him to the Sheriff, who "suffered and permitted the said Cochran to escape and go at large;" that Flewellen had obtained judgment against Cochran, and a *fi. fa.* had issued and been returned "*nulla bona*," and a *ca. sa.* on which said Sheriff had returned "*non est inventus.*"

Upon the trial, at August Term, 1848, before Judge *Scarborough*, the defendants offered to prove the insolvency of said Cochran, which testimony was objected to by counsel for plaintiff—

1. Because in an action upon the Sheriff's bond, for a failure to perform his duty, he could not excuse such non-performance of duty, by showing the insolvency of the party. The debt, and not the ability to pay, is the measure of damages in such a case.

2. A *fi. fa.* having been given in evidence against said Cochran, with a return, properly indorsed, of "*nulla bona,*" the evidence of witnesses as to their opinions and belief of said Cochran's solvency should not be admitted.

Which objections were overruled by the Court and the testimony admitted. To which decision plaintiff excepted.

The Court charged the Jury, "if they should believe, from the evidence, that Cochran was wholly insolvent, they were to find only nominal damages for the plaintiff; but if, on the contrary, they believed he was able to pay the full amount of the execution, then they should find that for the plaintiff, or such sum as they believed, from the testimony, Cochran was able to pay, and no more, for that was the extent of the plaintiff's loss, and must be the measure of his damages."

To which charge of the Court the plaintiff excepted; and upon these several exceptions error has been assigned.

Poe & Nisbet and Saml. Hall, for plaintiff in error.

G. R. Hunter and G. J. Green, for defendants.

Summary of brief of Samuel Hall, for plaintiff in error.

1st. The Sheriff is a judicial and not a ministerial officer. The defence here set up would make him a judicial officer. 8 *Bac. Abr. tit. Sheriff,* (*M.*) 2 *Scott vs. Shaw,* 13 *J. R.* 378. 15 *Wend.* 377. 1 *Ib.* 16.

2d. It is only on *actions on the case* for an escape that the damages are left discretionary with the Jury. 1 *J. R.* 215. 1 *Wend.* 115. *Bonafous vs. Walker,* 2 *Term,* 126.

3d. That even in actions on the case, where the escape, charged is voluntary, the Jury must give the amount of the debt, unless the Sheriff will first make oath, in writing, that the escape was against his will. 8 *and* 9 *Wm. III. ch.* 27. *Schley's Dig.* 297.

4th. But in actions of debt for escape, the Jury must give the whole amount proven to be due, or nothing. This being the con-

struction placed by the English Courts upon 13 *Ed. I. Westm.* 2, *and* 1 *Rich. II. ch.* 12. *Schley*, 129. *Bonafous vs. Walker*, 2 *Term*, 126. *Wolverton vs. the Commonwealth*, 7 *S. & R.* 263. *Prince*, 431. 1 *Kelly*, 543. 15 *Mass.* 87. 14 *Pick.* 171.

5th. The Sheriff and his sureties in this action stand in the place of bail, and bail cannot give in evidence the circumstances of their principal to avoid liability on their part.

6th. This defence seeks to put the Sheriff in the defendant's place, and the defendant, under the circumstances of this case, could not have availed himself of the benefit of the Insolvent Laws.

7th. That it is impossible to substitute the Sheriff for the debtor, inasmuch as the benefit of the Insolvent Laws is a strictly personal right, which the law does not, and the debtor cannot, delegate to any other person. 2 *Co. Lit.* 267, 280. *Prince*, 286, 293.

8th. The opinion of the witness as to the insolvency of the defendant was inadmissible. *Chit. on Cont.* 81. *Doe ex dem. Gatehouse vs. Reese*, 4 *Bingham's N. C.* 384. *Shears vs. Rogers*, 23 *Eng. Com. Law R.* 99. *De Taste vs. La Tavernier*, 1 *Keen*, 161. *Kolb vs. Whitely*, 3 *Gill & J.* 188. 2 *Hill & Cowen's Notes to Phil. on Ev.* 586, *note* 445. 1 *Ph. on Ev.* 290, *note* 529. 2 *Ib.* 759. *Robertson vs. Beavers*, 3 *Porter's Rep.* 385.

HUNTER, for defendants, submitted a brief, contending—

1st. That if an action lies in this case at all, that case was the proper remedy, it being brought to recover for an escape on mesne and not on final process. *Neal vs. Haygood, admr. of Hendon*, 1 *Kelly*, 514. That debt is the proper remedy only for an escape on execution or final process. See 7 *J. R.* 164. 5 *Ib.* 89. After a voluntary escape under a writ of execution, Sheriff cannot retake the debtor; but if he were in custody upon *mesne* process, the Sheriff may retake him at any time before the return of the writ, and if the debtor is forthcoming, ready to answer to a *ca. sa.* if plaintiff thinks proper to charge him in execution, that is a good defence for the Sheriff when sued for an escape on *mesne* process. *Archib'ld Pr.* 84, '5. 10 *J. R.* 562. *Allen on Sheriffs*, 237. 6 *Cowen*, 732. 3 *Bacon*, 404.

2d. The Sheriff having the privilege, by law, of permitting his prisoner on *mesne* process to go at large, he has not been guilty

of any malfeasance or nonfeasance, for which he or his securities can be made liable in this action. To have made the Sheriff liable, plaintiff should have issued *ca. sa.* upon the final judgment as soon as the law would permit it to be done, and if the Sheriff failed to produce the body of Cochran, he and his securities would be liable.

3d. The Court below did not err in receiving evidence on the trial to show the insolvency of Cochran. *Van Slyck vs. Hogeboom*, 6 *J. R.* 270. 7 *J. R.* 188. 2 *Term R.* 126. 17 *Wendell R.* 543. *Allen on Sheriffs*, 227. 8 *Bacon Ab. new ed.* 721, '2. 6 *Pickering, Brooks vs. Hoyt*, 468.

By the Court.—LUMPKIN, J. delivering the opinion.

The very able brief of the learned Counsel for the plaintiff in error, has presented fairly, and discussed fully, the only two questions which arise on the record:

1st. Whether any testimony of Cochran's insolvency should have been received.

2ndly. Admitting the insolvency of the party to be a good defence, was it admissible to establish it by such testimony as was adduced on the trial?

It will be my aim to sustain the affirmative of both these propositions.

[1.] This action is brought against the Sheriff for an escape on *mesne* process. Now, we hold the law to be incontrovertibly settled, that for an escape on *mesne process*, no action lies unless some damage has been sustained, and that the plaintiff is only entitled to recover such damages as he can show he has sustained. If he has lost the whole debt, the Jury must give him damages to that extent, together with what he has lost in costs; if he can still recover his debt, the damages may be diminished accordingly. *Scott vs. Harley*, 1 *M. & Rob.* 227. *Morris vs. Robinson*, 3 *B. & C.* 206. *Bonafous vs. Walker*, 2 *T. R.* 126. *Gabel vs. Perchard*, 2 *Hust.* 532. For an escape on *mesne* process, (says *Allen on Sheriffs*, 227,) the only civil remedy against the Sheriff is by an action on the case; the plaintiff can recover damages only for what he has lost by the escape; and the Jury may find such damages as they think the plaintiff has sustained, under all the circumstances. 7 *Johns. Rep.* 189. This action on the case

is given to the plaintiff by way of indemnity for the actual injury which he sustains by reason of the escape. The Jury are not confined to the exact damage in the final judgment, or to the amount of the plaintiff's demand, but have a power and discretion to assess such damages as they shall suppose the plaintiff has sustained, under all the circumstances of the case. 5 *T. R.* 40. 2 *Wils. Rep.* 295. 6 *Johns. R.* 270. 2 *Mass. Rep.* 526. Thus the *insolvency* of the prisoner, or the payment of the demand by him, can always be given in evidence in mitigation of damages. And where the Jury in such case gave nominal damages only, the Court refused to set aside the verdict. 7 *Johns. Rep.* 189. And it would seem that in an action on the case against the Sheriff, even for a voluntary escape, the measure of damages is the actual loss or injury sustained by the plaintiff. 17 *Wend. Rep.* 543.

But the doctrine goes farther; and in an action *on the case* for an escape, even on *final* as well as on *mesne process*, the measure of damages is the actual injury received by the plaintiff; and it was to relieve creditors in this particular, that the *Statute of* 1 *Richard II. c.* 12, (*Schley*, 129,) was passed, giving an action of *debt*, wherein the measure of damages for the escape was neither more nor less than the debt. But the provisions of this Act are expressly restricted to "escapes of prisoners confined on *final* process," and, of course, has no application to the case under consideration.

I deem it unnecessary to refer to the *Statute of* 8 *and* 9 *William III. ch.* 27, (*Schley*, 297,) the sixth section of which forbids any special plea by the Sheriff, when sued for an escape, unless he will first make affidavit that the escape was without his consent. On the trial below, there was no demurrer to the plea, nor was this question, now urged for the first time in argument, ever made or adjudicated in the Superior Court. We cannot, therefore, take cognizance of it.

And this brings us to the examination of the Judiciary Act of 1799. The 49th section of this Act makes Sheriffs liable "to all suits, actions, penalties and disabilities whatever, which they, or either of them, may incur for or on account of the escape of any prisoners, in the same manner as they have heretofore been liable by laws in force in this State." *Prince*, 439. But by the laws before that time in force in this State, Sheriffs could only be made

liable for the *debt* of the plaintiff, in an action of *debt* for an escape, on *final* process.

The 46th section requires the Sheriff to give bond in the sum of $20,000, for the faithful performance of his official duty, by himself and deputy; and it farther provides, that this bond shall remain in the office of the Clerk of the Superior Court of the County for which the Sheriff is commissioned, and may be sued for, by order of said Court, for the satisfaction of the public, or persons aggrieved by the misconduct of the Sheriff or his deputy. *Prince*, 430.

Now, the argument is, that the plaintiff has his election to bring *debt* or *covenant*, for a breach of the bond; and that if he elects to bring *debt*, that he has the right, in analogy to the *Statute of Richard*, to recover the whole amount of his demand. We can not concur in this conclusion. Suppose the Sheriff levies on property worth $200 only, by virtue of an execution for $1000, and the property is lost, neither by the act of God or the public enemy, so as to charge the Sheriff and his securities on the bond with its value, would it be pretended that in an action of *debt* on the bond, the amount of the plaintiff's *demand* would be the measure of damages? And yet this result is inevitable if the recovery is to be regulated by the form of action or the *remedy*, instead of the character of the process upon which the party escaping is confined.

But the very language of the Act contravenes the plaintiff's position. It purports to give *satisfaction* to the injured party, not for his *debt*, but for the *misconduct* of the Sheriff. Whatever sum, therefore, will cover that default, is necessarily the measure of damages in every case.

But suppose the plaintiff bring *debt* upon the Sheriff's bond, he must assign breaches, and even then he is not entitled to recover damages on the breaches assigned, without proof of the extent of the loss sustained. The recovery upon penal bonds is in damages.

But the case of *Wolverton vs. the Commonwealth*, (7 *Serg. & Rawl.* 273,) is relied on in support of the plaintiff's case. The facts of that decision appear to have been misapprehended by the learned and indefatigable counsel in the preparation of his brief. He says, that it "was an action on the Sheriff's bond for an escape on *mesne process*, and that it was held that the insolven-

cy of the party escaping, afforded the Sheriff no defence, as this circumstance could not affect the damages in an action of *debt.*" *See p. 5, Brief.*

The facts of the Pennsylvania case were these: A *scire facias* was issued on a recognizance in the sum of $5000, entered into on the 16th of October, 1816, by Stephen Wolverton, Rufus S. Reed and Benjamin Wallace, to the Commonwealth of Pennsylvania, conditioned that Wolverton should perform the office of Sheriff for the County of Erie, for the next three years. The *scire facias* was for the use of Eli Hart and John Lay, trading under the firm of Hart & Co. and was returnable to December Term, 1817. It alleged generally a breach of the condition. The defendants pleaded generally, that Wolverton had well and truly performed all the duties of a Sheriff, faithfully executed all process, paid over all monies, &c. The plaintiffs replied, setting out a particular breach: That on the 1st of May, 1817, a certain Edwin Forbes was committed to the jail of the County, and in the custody of the said Sheriff, *by virtue of an execution issued by George Moore, a Justice of the Peace, at the suit of Hart & Co. for* $117 77, *on a judgment obtained by confession, pursuant to the Act of Assembly, and the Sheriff suffered Forbes to escape and go at large.* The defendants rejoined, denying that Forbes was in custody under the execution, but averring, that having applied for the benefit of the Acts of Insolvency, he had, at his examination, been committed under those Acts, *in a charge of fraud,* which the defendants insisted was a virtual discharge of his person, *under the execution.* The plaintiffs sur-rejoined, that Forbes was in custody under the execution, and on this issue was joined.

The remedy here was *scire facias* on the recognizance, and not *debt,* and the escape was upon *final* and not *mesne process.* The Court, under these circumstances, refused to admit evidence of the insolvency of Forbes—and we think rightfully—for while the Constitution of this State, and our Insolvent Acts passed in pursuance thereof, protect the person of the debtor from imprisonment, after he has *bona fide* delivered all his estate, real and personal, for the use of his creditors, yet if he be convicted of fraud or concealment, *he shall remain in custody.*

So far from this precedent being for the plaintiff in error, it is directly against him; for *Gibson,* Justice, in delivering the opinion of the Court, says: "The last point is the admissibility of evi-

dence to shew that Forbes was insolvent, which was offered to show the extent of the plaintiff's actual loss from the escape. *Such evidence would unquestionably be competent in an action for an escape on mesne process;* but imprisonment of the body on a commitment in execution, is in contemplation of the law full satisfaction of the debt, and a right of which the Sheriff cannot deprive the plaintiff without paying for it, not only its actual but its legal value. This right is the creditor's property, and cannot be taken from him at a less price than the law has set upon it. Such, in this respect, is the reasoning of the law, which, though artificial, is conclusive."

It is true, however, that cases are to be found in the Pennsylvania Reports, where the distinction here taken is recognized, viz: that the form of the remedy determines the measure of damages, and that where *debt* is brought on a Sheriff's official bond for the escape of a defendant, evidence of the insolvency of the debtor, at the time of the escape, is immaterial and inadmissible. *Snyder vs. the Commonwealth*, 1 *Pennsylvania Rep.* 94. 3 *Barr. Rep.* 269. But, to my mind, this doctrine is by no means satisfactory. By the English Law, in an action of *debt* against the Sheriff for an escape under execution, the amount of the debt was the measure of damages; but in *debt* on a penal bond, the actual injury sustained is always the measure of damages. The analogy growing, therefore, out of the *form* of the action, does not hold.

Upon this point, then, the case is clearly with the defendant in error, both upon principle and authority, as well in England as in this country. For an escape on *mesne process*, whatever remedy is pursued, the actual amount of the debt has never been held to be the measure of damages.

[2.] The second exception is, as to the character of the testimony by which the Sheriff proposed to prove the insolvency of Cochran, the original debtor. This point is thus stated in the record: "Because a *fi. fa.* having been given in evidence against said Cochran, with a return, properly indorsed, of "*nulla bona*," plaintiff objected to the evidence of witnesses as to their opinion and belief of said Cochran's solvency."

This objection comes, I would respectfully suggest, rather awkwardly from the plaintiff. He complains that secondary and inferior testimony was adduced of the insolvency of Cochran, after

he himself had offered to the Jury the highest and best evidence of that fact, namely: the execution in his favor against Cochran, with the return of "*nulla bona*" thereon! And so far from attempting to controvert this entry, he says it was "*properly*" indorsed there!

What then if we should overrule the opinion of the presiding Judge, as to the competency of the witnesses who were objected to; ought we, on that account, to remand the cause? We think not; for here was, to say the least of it, presumptive or *prima facie* proof of the defendant's insolvency, submitted to the Jury by the plaintiff himself, and uncontradicted or rebutted by him, and which fully authorized the verdict which they found.

On general principles, however, we hold that the testimony was legal. It is true that the witnesses testify as to their belief, but they give the reasons upon which their opinion is based.

In *the Commonwealth vs. Thompson et al.* (3 *Dana's Rep.* 301,) the question was as to the liability of the Sheriff for taking insufficient security upon a replevin bond. The counsel there, as here, objected to that portion of the testimony which contained, as he thought, no more than the opinion of the witness. But the Court say, "After the witness had stated the fact that the sureties owned property exceeding in value the amount of their liability, his '*considering*' them good, should be deemed to have been a deduction from the fact which he had thus affirmed, and as amounting only to this: that, having sufficient estate, he knew no reason why they were not good security; or, in other words, that he was unapprised of any indebtedness or other circumstance, which opposed the inference, from the fact that they owned sufficient estate." Chief Justice *Robertson* continues: "The testimony being competent, the Jury had a right to decide as to its just weight and influence. And although it was far from being conclusive, or even very persuasive, *against the deduction from the official return on the execution on the bond*, nevertheless it should, after a full and fair trial, be deemed sufficient to sustain the verdict for the defendants."

Much more will the testimony in this case, being competent and not *against*, but in corroboration of, the official return on the execution, of "*no property*," be deemed, after a full and fair trial, sufficient to sustain the verdict for the defendants.

The same question came up before Chief Justice *Parker*, in *Griffin vs. Brown*, (2 *Pick. Rep.* 303,) who said, "As to objections

to parts of the depositions which had been struck out by the Judge of the Court of Common Pleas, on the trial there, we think they were properly restored at the trial in this Court, not being opinions merely, but reasons given for a fact which the witness had sworn to, or mere explanations of his testimony. In one case, after the witness had stated that Herrick lived extravagantly and spent a good deal of money, he adds, from eight to ten hundred dollars, *as he verily believes.* This is necessarily a matter of conjecture, and the fact that he lived expensively could only be illustrated by stating a sum which the witness thought the debtor spent. At any rate, this is not a matter of sufficient importance to justify us in setting aside the verdict."

We consider it well settled, that in all cases a witness may give his opinion in evidence, in connection with the facts upon which it is founded, and as derived from them.

As it appears from the whole case, that the defendant is entitled to judgment, the judgment of the Circuit Court is affirmed.

No. 35.—JOHN PINCKARD, plaintiff in error, *vs.* DANIEL PONDER, defendant.

[1.] A note originally usurious, may be purged of the usury by the agreement of the parties, as where new notes were given for the principal sum loaned, with the lawful interest added to the principal, at the time of *each renewal: Held*, that an agreement to pay interest on interest, that was lawfully *past due*, did not constitute usury, and that each renewal of the note was a new contract.

Assumpsit, in Monroe Superior Court. Tried before Judge FLOYD, September Term, 1848.

Daniel Ponder brought suit in the Superior Court of Monroe County, against John Pinckard, on a note for $1232 38. The defendant pleaded the general issue, usury, and a special plea, setting forth that Ponder had agreed to indulge Pinckard on the note sued on, until he could purchase a certain tract of land of one Moses Harris, which he agreed to take in payment of the note.

At the September Term, 1848, when the cause was called for trial, Pinckard moved the Court to continue said cause, on the ground that a set of interrogatories for Moses Harris, in the State of Alabama, had not returned, by which he expected to prove that he had purchased the tract of land mentioned in the plea, and that plaintiff had refused to take said land for said note, after said purchase. Defendant acknowledged in his showing, that he had let Harris take back his land.

The Court overruled this motion, on the ground that, under the circumstances, it was not a good ground for defence; to which decision, counsel for Pinckard excepted.

On the trial, Daniel Ponder, the plaintiff, under the Act of 1842, was placed upon the stand as a witness, with reference to the usury. He swore, "that the original sum loaned, was $1150, some time in 1837, at 16 per cent. and that the same was renewed yearly, at the same rate, up to 1841 or 1842, and then the same was renewed at 12½ per cent. up to the time the note sued on was given; that during the time, there had been payments made; that about the time the note sued on was given, he went to the defendant to have said note purged of the usury; that defendant commenced making the calculation at simple interest, when he stopped him and told him he must have compound interest; that the calculation was made accordingly, by one Watson, calculating the interest at 8 per cent. and adding the interest to the principal yearly, and deducting the payments, and the present note sued on is the result of that calculation."

The Court charged the Jury—

1st. That a party might, upon a debt due or past due, demand the payment of principal and interest, and that it was not unlawful for him to renew his note, adding the lawful interest and the principal together, so as in the renewed note to make both principal; and that in this case the parties might make the calculation in this way, so as to allow the plaintiff simple and lawful interest, up to the time of the first renewal, then they might add the principal and interest together, and count interest thereon up to the next renewal, and so on, but not to allow interest on interest, unless from the time of a renewal.

2d. That one way to purge a note which had been compounded yearly on a usurious consideration, was to deduct off the usurious part of the interest taken for the last year the note was re-

newed, and from that amount the usurious part of the interest taken for the previous year, and so on, until it is purged of all the usury, up to the time of the original contract, and that in this way the Jury could ascertain whether the contract had been thoroughly purged.

To this charge of the Court counsel for Pinckard excepted. And on these several exceptions error has been assigned.

L. E. HARMON, for plaintiff in error, cited and relied upon the following authorities:

1 *Chitty on Bills*, 109. 4 *Randolph's R.* 406. *Blydenburgh on Usury*, 68, 186, 288. 11 *Eng. C. R.* 434. 2 *Taunton*, 1844. *Am. Law Magazine*, 54. *Prince*, 294.

R. TRIPPE, for defendant in error, cited the following authorities:

3 *Kelly*, 191, '2, *and cases there cited.* 6 *B. & C.* 327. 9 *D. & R.* 448. 1 *Cow.* 75. 1 *Kelly*, 392. 3 *Day*, 356. 2 *Taunt.* 184. 1 *Camp.* 165. 5 *Paige*, 98. 11 *Conn.* 487. 3 *Ham.* 18. 1 *Wend.* 221. 4 *T. R.* 613. 2 *Salk.* 449. 3 *Atk.* 330. 2 *Marsh.* 339.

By the Court.—WARNER, J. delivering the opinion.

The first ground of error assigned upon the record in this case is, that the Court refused to allow the defendant in the Court below, a continuance of his cause, upon the showing made therefor.

The discretion of the Court, in refusing the continuance, we think was properly exercised. It was admitted by the defendant, that the land which he had alleged in his plea had been purchased from Harris, and which the plaintiff had agreed to take, had been taken back by Harris, with his consent, as he acknowledged he had *let Harris take back the land;* consequently, conceding the contract for the sale of the land to the plaintiff was *not void* under the Statute of Frauds, the defendant had put it out of his power to comply with it, on his part.

[1.] The second ground of error is, to the charge of the Court to the Jury, with regard to purging the note of the usury.

The Court charged the Jury, in substance, that it was lawful for the parties to renew the note annually, and add the annual interest to the principal. The principal and interest of this debt was *past due.* The contract was originally usurious, and the object of the parties was to purge the demand held by the plaintiff of the *usurious* interest included in it. At the time the contract was made, the plaintiff was entitled by law, to receive 8 per cent. for the use of his money; that is to say, if A had loaned B one hundred dollars for one year, A would be entitled to receive from B one hundred and eight dollars, at the end of the year. Suppose B renews his note at the end of the year, and instead of paying the interest in money, it is added to the principal. The note is then given for one hundred and eight dollars. The lender is as much entitled to receive the lawful interest from the borrower, as he is the principal sum loaned. Upon the renewal of the note, the lawful interest due for the use of the principal, becomes a part of the principal, and may be loaned with it. Each renewal is a *new contract,* and the charge of the Court restricted the Jury in calculating the interest and adding it to the principal, to the *renewals* of the note expressly. The interest was *past due,* and the plaintiff below received no more when the calculation was made, than he would have been entitled to receive, had the lawful interest been added to the principal of the note, at the time of each renewal. He has received no *unlawful* usury for the use of his money. If the defendant had paid the plaintiff the lawful interest due for the use of the principal, at each renewal of the note, and the plaintiff had loaned such interest to some third person, at 8 per cent. he would have just the same amount of money as he now claims from the defendant, and no rule of the law violated. The result of the verdict shows that the Jury were governed, in making their calculation of interest, by the rule stated by the Court—that they calculated the interest up to the first renewal, and then added the principal and lawful interest together, and calculated the lawful interest on that amount, up to the time of the next renewal, and so on, deducting the payments from the interest. An agreement to pay interest on interest, which has *become due,* is not usurious. *Camp vs. Bates,* 11 *Conn. R.* 487. *Kellogg vs. Hickok,* 1 *Wend.* 521.

The defendant promised only to pay interest on interest, which was *lawfully past due,* which does not, in our judgment,

constitute usury; and there was no error in the first instruction given to the Jury, by the Court, as to the manner of making the calculation of interest, so as to purge the note of the usury.

The second instruction which the Court gave to the Jury, as to the manner in which they *might* make the calculation, so as to purge the note of the usury, we think erroneous and objectionable, but as the Jury have based their calculation upon the first instruction, as is apparent from their verdict, we will not disturb it on that account. The first instruction was right, and the verdict rendered in accordance therewith is right; therefore, let the judgment of the Court below be affirmed.

No. 36.—A. M. D. King, plaintiff in error, *vs.* The Central Bank, defendant.

[1.] In this case, the Court declines expressing any opinion on the validity of the Bankrupt Law of the United States, passed in 1842, because, whether pronounced valid or invalid, the decision could not benefit the plaintiff in error.

[2.] It is not a valid defence for an indorser, that the maker has been discharged under the Bankrupt Law.

Motion to have *fi. fa.* entered satisfied, in Monroe Superior Court. Decided by Judge Floyd, September Term, 1848.

The Central Bank obtained a judgment against A. M. D. King, as indorser, upon which a *fi. fa.* was issued.

At the September Term, 1848, of the Superior Court of Monroe County, the defendant, King, moved to have the *fi. fa.* against him entered satisfied and returned to office, upon the ground that the same was obtained against him as an indorser, upon a note made prior to the Act of Congress, known as the Bankrupt Law; and that after the judgment was obtained, from which said execution issued, one of the makers of the note had received his certificate of bankruptcy, and was discharged from all liability on said note, after due notice of the application given to plaintiff.

After argument heard, the Court refused the motion.

To which A. M. D. King excepted, and alleges the same as error.

A. M. D. King and S. T. Bailey, for plaintiff in error.

Powers & Whittle, for defendant.

By the Court.—Nisbet, J. delivering the opinion.

[1.] If I understand distinctly, the view taken of this case by the plaintiff in error, it is this: He being indorser upon a promissory note, made prior to the passage of the Bankrupt Law of the United States, and his principal being discharged by a certificate under that law, that discharge also discharges him. He holds that the law of Congress has not only discharged the principal, as to all liability to his creditor, but as to all liability over to him, the indorser, and therefore, by operation of law, he, as indorser, is also discharged of all liability to the creditor. He starts, must needs start, with the assumption, that the Bankrupt Law is valid, so far as it has taken effect upon his principal, for if it be not valid in its operation upon his principal, then his principal's liability over to him continues. He is not injured—his contract of suretyship continues unimpaired, and the reason for his release to the creditor ceases. The Bankrupt Law, whilst it provides for the discharge of the principal, expressly provides that the discharge of the principal shall not operate as a discharge of the indorser. This being so, it becomes indispensable to the conclusion at which the plaintiff in error arrives, and to which he would conduct us, to assert the invalidity of the Bankrupt Law, so far as it retains his liability as indorser, after it has discharged his principal. He therefore takes that ground, and his position is, that inasmuch as the note was made before the passage of the Bankrupt Law, his rights, as indorser, vested under his contract of suretyship, made with reference to the laws governing such contracts, at the time it was entered into—that the effect of the Bankrupt Law, in discharging his principal, and expressly holding him liable, divests those rights; and therefore, the Bankrupt Law, so far as it retains his liability, is a nullity.

Thus are we invited to the decision of questions as grave as any ever presented to an American Bench. If we were willing to meet them now, we would find presented in this case, for determination—

1st. Whether a certificate of bankruptcy to the principal debtor discharges his liability over to his indorser, who may afterwards pay the debt; and,

2d. Whether the grant of power in the Federal Constitution to the Congress of the United States, "to establish uniform laws on the subject of bankruptcy," clothes that body with power to pass an Act of Bankruptcy, which, in its operation, acts upon existing contracts, by annulling them, or by divesting any rights which had vested under them.

This Court is not in the habit of shrinking from the responsibility of any question made for its determination; and I might venture to say, without, I trust, exhibiting an air of presumption, that it is as willing to meet these questions, when the rights of parties require them to be met, as it is to encounter any, the most unimportant point of the Common Law; not because they would not feel them to be difficult and solemn, but because the sense of duty, in either case, would be equally strong, and with equal cheerfulness and alacrity responded to. The Bankrupt Law has, however, been repealed. Whether within the constitutional competency of Congress to have passed such a law or not, so far as that law is concerned, is a matter of very little consequence. If we did believe that the law was void, because interfering with vested rights, (and as to that, we wholly disclaim intimating an opinion,) it might be a question, whether, in reference alone to the expediency of the decision, it would do any good so to declare it; in other words, whether, in reference to the best interests of all concerned, it might not be expedient to suffer things to remain as they have been ordered under that Act. But the conclusive reason, that upon which we now act, why we decline to decide these questions, is this: Decide them as we may, the plaintiff in error can take no benefit under the decision. If the law be a valid law, he is not entitled to prevail in his motion to set aside or have the judgment against him entered satisfied; and if it be void, he is equally unentitled to prevail. It only remains for me to show this, which is briefly done as follows:

[2.] If the Bankrupt Law be valid, as between the creditor and the principal debtor, so as to discharge him, not only from his liability to the creditor, but also from his liability over to his indorser, it is also valid so far as it retains the liability of the indorser to the creditor. The same reasons which would sustain it

in the one provision, must sustain it in the other. We are free now to declare, that if the law be constitutional, as to the maker—as between him, I mean to say, and his creditor—it is also constitutional in that provision which enacts that the indorser shall not be discharged by the discharge of the principal. So that, if we should be of opinion that the law is constitutional, that opinion could not benefit the plaintiff in error, for by that opinion, his liability to the creditor, under the law, is declared.

Again, if the law be *unconstitutional*, then the judgment of the Federal Court, which discharged the principal, is a nullity. Every Court in the State having competent jurisdiction, would be compelled so to hold it. If it is, then the very ground upon which he seeks relief is removed—his principal is not discharged—he is still liable over to him—his contract of suretyship is unimpaired—he is divested of no rights which vested in him under the law, as it stood when the contract was made, and we ought not, and could not, set aside the judgment against him. So, also, if the law be unconstitutional, as to the principal debtor, it is also unconstitutional as to the indorser, and the plaintiff in error is deprived of no rights by that part of the Act which retains his liability.

It is therefore very manifest that, determine this question as we may, the plaintiff's liability, as the case now stands before us, continues. For these reasons, we decline expressing any opinion as to the validity of the Act of 1842, known as the Bankrupt Law, and affirm the judgment of the Court below.

No. 37.—John F. Thompson, plaintiff in error, *vs.* William F. Mapp and another, defendants.

[1.] In an action on a forthcoming bond, conditioned to deliver property to the Sheriff at the time and place of sale, *when required by him: Held*, that it was unnecessary to prove a *personal* demand of the property, the advertisement being a sufficient notice to the party,

[2.] Under the Act of 1847, to compel discovery at Common Law, the party to whom interrogatories are propounded, must make just such answers as he would be required to do to a bill of discovery.

[3.] Parol evidence is admissible to establish the *fact* of the sale of personal property, and the *time* when it was made, notwithstanding the contract was reduced to writing; but the document itself must be referred to if you would ascertain the *terms* of the agreement.

Action on forthcoming bond, in Monroe Superior Court. Tried before Judge FLOYD, December Term, 1848.

This was a suit commenced by John F. Thompson, in the Superior Court of Monroe County, against W. F. Mapp and Josiah G. Jordan, on a forthcoming bond, the condition of which recited, that "whereas, there has been a *fi. fa.* from Bibb Superior Court in favor of John F. Thompson *vs.* Elihu Price and Alexander Russell, levied by Thomas W. Chipman, Deputy Sheriff of Monroe County, on two negroes, one a boy about eight years of age, by the name of Fary, the other a girl, about six years old, by the name of Harriet, as the property of Alexander Russell, and which property has been claimed by said Wm. F. Mapp. Now, if the said William F. should have the property so levied on, at the place and time of sale, when required by the Sheriff for that purpose, in the event the same should be found subject to said execution, then the said bond to be void," &c.

The property was found subject, and the breach alleged is the failure to produce the negroes on the day of sale. The Sheriff advertised the negroes, which were not produced on the day of sale, nor at any other time.

The plaintiff tendered the interrogatories and answers of William F. Mapp, one of the defendants, taken under the Act of the Legislature of 1847, to which objection was made, on the ground that a portion of the answers was in reference to the contents of a bill of sale. Which portion of the answers the Court ruled to be inadmissible, to which decision counsel for plaintiff excepted.

The plaintiff having closed his case, the defendant's counsel moved the Court for a nonsuit, because the evidence submitted did not entitle him to recover. Which motion was sustained by the Court, upon the ground that by the bond the negroes were to be *required of Mapp*, and there was no evidence of any demand or notice to Mapp, other than the advertisement of the negroes for sale.

POWERS & WHITTLE, for plaintiff in error.

DOYAL, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The condition of our forthcoming bond is, that the claimant shall "well and truly deliver the property levied on, at the time and place of sale, provided it should be found subject to the execution." The bond sued on has this additional clause, "*when required by the Sheriff for that purpose.*" These words impose no additional duty on the Sheriff. The advertising of the negroes for sale, according to law, after the levy was dismissed, is the only requisition which the officer makes on the claimant. It would be against public policy to hold, that the Sheriff should hunt up the claimant to make a personal demand of the property, or to notify him to deliver it. It is the duty of the claimant, after the property is found subject, to take notice of the time and place of sale, and to have the property present; and the failure to deliver is a breach of the condition of the bond, and produces the forfeiture.

Besides, this bond is authorized by law. It is taken by the Sheriff for the benefit of the plaintiff. The claimant had no right to exact a condition not authorized by the Statute; and as against the plaintiff in the *fi. fa.* and the obligee in the bond, we should be inclined to declare it void.

The execution was levied the 12th of August, 1842. The bond was executed the 1st day of November thereafter. And Mapp, the claimant, swears that he had sold the negroes to Amos W. Hammond, about a month before that time. Did not this dispense with the necessity of a demand, even if the terms of the bond had required it? *Jones vs. Barkley, Douglas*, 684.

[2.] Interrogatories were taken out in this case for William F. Mapp, the claimant, under the Act of 1847, "to authorize parties to compel discoveries at Common Law." (*See Pamphlet, p.* 197.) The plaintiff in execution sought to procure the proof, from the claimant himself, that he had, pending the claim, *or before* and subsequent to the levy by the Sheriff, sold the negroes in dispute, and delivered them to the purchaser, and thereby relieved the officer from the necessity of making a demand. The answers were filed under a protest, and a portion of them ruled out on the trial.

The Statute under which this proceeding was had, is one among the many monuments of the wisdom of the General Assembly of 1847. It is worth, of itself, the entire expenditure of that session, ten times told. We are called on, for the first time, to give it a judicial interpretation. It needs none; it speaks for itself. Whatever the adverse party would be bound to answer upon a bill of discovery in a Court of Chancery, he is compelled to testify upon a commission under this Act. A Court of Equity will not force the defendant to make discovery when it would render him liable to a penalty or a forfeiture, or have a tendency thereto, or subject him to a criminal prosecution, or involve him in a breach of professional confidence as counsel, solicitor, attorney or arbitrator, &c. And the same objections, and none other, will apply to discovery when sought at Common Law. And, to prevent equivocation, it is enacted, that if the party to whom the interrogatories are propounded, shall fail to make answer, "*in manner aforesaid*," that is, as fully as he would be compelled to do in Chancery, or shall answer evasively, the Court may attach him and compel him to answer in open Court, or it may continue the cause, and require more direct and explicit answers; or if the party sought to be examined, be defendant in the action, the Court may set aside his plea and give judgment against him by default; or if the plaintiff, may order his suit to be dismissed with cost, as shall, in the discretion of the Court, be deemed most just and proper.

The Legislature could have done no more to expedite and cheapen litigation. It only remains for the Courts to co-operate cordially with the law-making power, in the accomplishment of these great objects, by giving to this Act a liberal construction.

[3.] By reference to the interrogatories, it will be seen, that the only facts material to be established by the answers of the claimant were, the sale by him, and the time when it took place; and for these purposes we think the testimony was entirely competent. It is the every day's practice of the Courts, nor does it violate any rule of evidence to show, by parol, that a sale of personal property has been made. If it be in writing, and you wish to ascertain the *terms* of the contract, the document itself must be referred to as the repository and highest evidence of the agreement. *Fiunt enim de his contractibus scripturæ, sit, quod actum est per eas facilius probari poterit.*

So not only the *factum* of the contract may be established by oral proof, but the *time* also of its execution. A bill of sale of personal property, or a deed to land, may bear date prior to the period of their execution. They take effect from their delivery. Parol evidence, therefore, is always admissible to prove when the conveyance was executed and delivered. And for the foregoing purposes, the plaintiff should have been allowed to read to the Jury the answers of Mapp, the claimant.

The judgment must consequently be reversed, and the cause remanded.

No. 38.—JEREMIAH LEAK, plaintiff in error, *vs.* CHARLES McDOWELL, defendant.

[1.] If the Clerk of the Circuit Court fail to send up a complete transcript of the record, within ten days from the filing of the original notice, with entry of service thereon, the writ of error will be dismissed.

Motion to dismiss the writ of error.

The defendant in error joined issue, with a protestation, and moved to dismiss the writ of error, because the Clerk of the Superior Court did not certify and send up a complete transcript of the record, within the time prescribed by the Act organizing the Supreme Court.

The facts were, the bill of exceptions was filed in the Clerk's office, on the 21st September, 1848, and the certificate of the Clerk attached to the transcript of the record, was dated on the 5th of October, 1848.

S. T. BAILEY, for the motion.

McDONALD, *contra.*

By the Court.—WARNER, J. delivering the opinion.

In this case, a motion is made to dismiss the writ of error,

on the ground that the Clerk of the Court below has not certified and sent up to this Court the transcript of the record and bill of exceptions, within ten days, as required by the 4th section of the Act organizing this Court.

[1.] The original bill of exceptions was filed in the Clerk's office, on the 21st September, 1848, and the Clerk's certificate to the transcript of the record, bears date on the 5th October, 1848, more than ten days after the filing of the original notice in his office, with the return of service thereon. This is not an open question. In *Beall & Scott vs. Powell*, (4 *Ga. R.* 525,) we held, that if the record was not certified and sent up by the Clerk, within the time prescribed by the Act, the writ of error must be dismissed. Let the writ of error be dismissed.

No. 39.—JOHN S. FALL, plaintiff in error, *vs.* ADAM Q. SIMMONS and others, defendants.

[1.] When a cause is submitted to the Jury on the bill and answer and replication, and the defendant introduces no evidence, the defendant is entitled to the conclusion in the argument.

[2.] An administrator who is guilty of gross neglect, in not making returns of the condition of the estate in his hands: *Held*, to be liable to a distributee for the balance in his hands, after allowing all disbursements, with interest from the time it fell due, for six years, to be compounded at the end of that term, and at the end of every subsequent term of six years.

[3.] *Held*, that an executor, administrator or guardian, who fails to make annual returns, according to law, forfeits all commissions for his trouble in managing the estate.

[4.] Charges in a bill, by a distributee against an administrator, that he had frequently called upon him to account and pay up: *Held*, to be immaterial, and when denied by the answer, not necessary to be proven under a replication.

In Equity, in DeKalb Superior Court. Tried before Judge HILL, September Term, 1848.

Adam Q. Simmons and others, as the distributees and heirs at law of William Trimble, deceased, filed their bill against John S. Fall, the administrator of said Trimble, returnable to the Supe-

rior Court of DeKalb County. Attached to their bill was an exemplification of the returns of said Fall, as administrator, showing his actings since 1825, as far as he had made returns. To the answer of Fall there was also attached an exemplification of the same and an additional return.

On the trial, the complainants offered in evidence to the Jury these two exemplifications, and closed their case. The defendant, having introduced no testimony, claimed the right to conclude the argument to the Jury, which motion the Court overruled.

A verdict having been rendered for complainants, defendant's counsel moved for a new trial, on the following grounds:

1. Because the Court refused the motion of defendant's counsel, and decided that they were not entitled to conclude the argument of the cause.

2. Because the Court erred in charging the Jury, that the general denial of the defendant in his answer to the general, formal charge made in complainants' bill, that they had again and again applied to the said defendant, and requested him to come to a full and fair settlement, and account to and pay over to them the sums of money due them respectively, was not such a material part of said bill as to make it necessary that the denial in said answer must be contradicted by evidence, to entitle the complainants to recover the full amount of interest and costs which may be due.

3. Because the Court erred in charging the Jury, that in computing interest in this case, the Court thinks it would be equitable, and they should make rests at the end of every six years from the time the notes for which the property sold were due and disbursements allowed, and compound the interest on the balance in the administrator's hands.

4. Because the Court erred in charging the Jury, that the defendant was not entitled to any commissions, notwithstanding commissions had been allowed by the Court of Ordinary, which decision had not been reversed by appeal or otherwise, the exemplification showing that he had not made regular and annual returns.

5. Because the Jury found contrary to the law and evidence.

The Court overruled the motion and the defendants excepted.

Ezzard, for plaintiff in error, referred to the following authorities:

Upon 1st ground—*Rules of Court, 15th Rule in Equity. Cooper's Eq. Pleading*, 328. *Story's Eq. Pleading*, 674, *and note.* 3rd ground—2 *Kent's Commentaries*, 188. 2 *Story's Eq.* §1277. *Atty. Genl. vs. Lolly*, 2 *Cond. Eng. Ch. R.* 528. *Dunscomb vs. Dunscomb*, 1 *Johns. Ch. R.* 508. *Phillips' Law Reporter, Sept. No.* 1848, 217. *Wright vs. Wright*, 2 *McCord's Ch. R.* 200. 4th ground—*Stell vs. Glass*, 1 *Kelly's Rep.* 486. *Prince's Digest*, 226. 2 *McCord's Ch. Rep.* 195. 2 *Ib.* 9. 1 *Hill's Ch. Rep.* 210. *Rice's Eq. Reps.* 2.

Clark, for defendant in error, relied on the following points and authorities:

Exhibits attached to defendant's answer, and referred to as part thereof, may be evidence or pleading. *Story's Eq. Pleadings*, 658, '9, 661, 674 *and* '5. 5, 15 *and* 17 *Equity Rules Sup. Court.*

The allegation that complainants have again and again requested defendant to come to a full and fair settlement with complainants, is formal and need not be answered. If answered, complainants not held to prove such charge. *Story's Equity Pleadings*, 220, '1, '2, 654.

Compound interest will be allowed in cases of gross delinquency, or when necessary to reach the interest made by trustees. *Hovenden on Frauds*, 433. 11 *Vesey's R.* 92. 13 *Ib.* 408. 1 *John. Ch. R.* 620. 2 *Story's Equity*, 518. 2 *Kent's Com.* 231. *Prince's Digest*, 223, '4, '6. *Acts of* 1847.

Executors or administrators are not entitled to commissions when they neglect to make annual returns. *Prince's Digest*, 226. 2 *McCord's Ch. R.* 204.

By the Court.—Nisbet, J. delivering the opinion.

[1.] We think that the Court below erred in deciding, in this case, that the complainants were entitled to conclude the argument before the Jury. It seems that there was a general replication filed to the answer, and the complainants opened the cause by reading their bill, and the record from the Court of Ordinary, appended thereto as an exhibit, and the answer of the defendant, stating that they would use also before the Jury, the record from

the Court of Ordinary, attached to the answer as an exhibit. The defendant making no objection, the complainants closed and the defendant introduced no evidence. It is argued that, according to the facts, the cause went to the Jury on the bill and answer, and therefore under the 15th Rule in Equity, the complainants were entitled to the conclusion. That rule declares, that when the parties go to the Jury on the bill and answer alone, the complainant shall have the conclusion. To settle this point, it would seem to be necessary only to determine what is going to the Jury on the bill and answer, for it is only when they do go thus to the Jury, that the complainant is entitled to conclude the argument. A hearing in the Chancery practice on the *bill and answer*, has a definite, legal meaning. It is when the complainant files no replication to the answer. In that case the complainant takes the risk of recovering upon his allegations and the defendant's answer; all the statements in the answer being taken as true, whether responsive to the bill or not.

If he does reply, the effect of the replication is to hold as admitted or confessed, every thing in the answer that is confessed; whilst it puts the defendant upon proving every thing not responsive to the bill and in avoidance. In the one case, the defendant has the advantage of having every thing conceded which he has set up in his answer—in the other case, all matters set up in avoidance, or not responsive to the bill, must be proven. Hence the 15th Rule of Practice. It is but reasonable, that when every thing is conceded to the defendant which, when replication is filed, he must prove, he should be in the same situation as to the argument, as he would be in case he (replication being filed) had been put upon proving his answer; and also, that the complainant should be in the same situation as to the argument, as he would occupy in case of a replication and the introduction of evidence by the defendant. In that case, complainant would have the conclusion. Here the replication was filed, and the parties did not go to the Jury on the bill and answer, and the case does not come under the 15th Rule, and defendant having introduced no evidence, he was entitled to the conclusion. 2 *Daniel's Ch. Prac.* 966, '7, '8, 1168, 1188, 1189. 7 *Johns. Ch. R.* 217. 2 *Cow.* 18. *Cooper's Equity Plead.* 328. 1 *Story's Eq. Plead.* 674, *note. Hotchkiss*, 955. It is farther insisted, that the exemplified record attached to the answer, was part of the pleadings, which the

complainants were entitled to read as such, and that reading it, or offering to use it before the Jury, was not putting it in evidence for themselves, and therefore, they were entitled to the conclusion. If I understand this idea, it is this: that inasmuch as the exhibit is a part of the defendant's pleadings, it stands upon the same footing as the answer itself under a replication; that is, if it, with the answer, contains admissions for complainants, it is to that extent evidence, as the answer is for them, and no farther; and so far as it is evidence for the defendant, it is offered as the evidence of the defendant, and being so offered, it is the same thing as if the defendant himself offered and read it; and *thereby* the defendant is made to introduce testimony and loses the conclusion. The reasoning is not at all satisfactory, and so far as it is, it is made to rest on a false foundation. Exhibits are not a part of the pleadings, and must be proven under a replication. It is certainly possible for the exhibit, or *an exhibit*, to be so identified with the admissions in the answer as to be a part of the record; but it is certainly true, that exhibits are not, as a general rule, a part of the pleadings. This exhibit is no part of this answer.

The complainants, with the consent of the defendant, made it evidence for themselves—they introduced it. I can see no difference between a proposition to use a paper as evidence, which is assented to, and a formal tender of that paper in evidence. The defendant in this case introduced no evidence; and under the rule, that a replication being filed, and the defendant introducing no evidence, he is entitled to the conclusion—it ought to have been awarded to him. Whilst we find it necessary thus to correct this, in our view, error, yet we will not send the cause back, because we think, on the merits, the ruling of the Court and the verdict of the Jury were according to law.

[2.] The Court below instructed the Jury, that in computing the interest against the administrator, it would be equitable to make rests at the end of every six years from the time the notes for which the property sold fell due, and the disbursements allowed, and compound the interest on the balance in his hands. From the manner in which the opinion of the Circuit Judge is expressed on the record, his meaning is not so clear as we could wish it. We understand him to say, that allowing the administrator his disbursements at the time they were made, they (the Ju-

ry) are to calculate interest on the balance of the notes for which the property sold, from the time they fell due, for six years, and at the end of each term of six years to compound. This opinion as to the manner of computing the interest is excepted to. The question of interest against a trustee is a very unsettled one in the English and American books. From them, I may safely assert, that no rule can be drawn by which every case can be determined. Indeed, Chancellors in both countries seem to concede that the rule of computation in each case, must depend very much upon its own facts. This Court are not called upon now, to establish general rules upon this subject, or to lay down principles for the guidance of our Courts in future. This is unnecessary, because the Legislature has established a uniform rule of liability. All cases occurring since the Act of 1847, will be subject to its provisions. The Act makes all guardians, executors and administrators, already appointed and qualified, chargeable with *seven per cent. interest* upon all trust funds in their hands, for six years after the 1*st of January*, 1848, without compounding, and after the expiration of that term, with *six per cent.* interest per annum, to be compounded at that rate annually; and all executors, administrators and guardians, to be appointed and qualified after the date of the Act, chargeable with *seven per cent. interest*, without compounding, for six years from the time of their qualification and appointment, and after that term with *six per cent.* interest per annum, to be compounded at that rate annually. *Acts of* 1847, *pamphlet, p.* 16. But for this Act, it would be the duty of this Court to endeavor to establish some rule or rules upon this subject, which might be of general application; and a more important duty than that would have been, has not yet devolved upon this Court. The Legislature having relieved it of that duty, it is necessary only for us to pass upon this case according to its facts.

We are asked now to say, whether the rule adopted by Judge *Hill*, in this case, be or not an equitable one. To do so, it is not necessary to review the numerous decisions upon the question of interest, as chargeable upon trustees. Certain general principles, however, may be stated, as at this day well settled. For many years, in England, trustees were not chargeable with any interest. This very unreasonable and unjust idea was exploded in the case of *Ratcliffe vs. Graves*, (1 *Vern.* 196,) in the face of forty prece-

dents. The great principle was there first settled, *that an executor cannot turn the money to his own account;* he shall make no profit on the trust fund; all the gain shall go to the *cestui que trust.* 1 *John. Ch.R.* 620, 624, 625. 2 *Fonbl. Eq. b.* 2, *ch.* 7, §6, *note. Jeremy on Eq. Jurisd. b.* 3, *pt.* 2, *ch.* 5, *p.* 543. 2 *Story's Com. on Eq.* §1277. Courts of Chancery will now see to it that trustees do their duty, and will place the *cestui que trust* in the same situation as if they had faithfully performed their duty. This is in accordance with public policy, for it secures fidelity, by removing temptation to speculate in the trust fund, and keeps alive a sense of responsibility and of personal interest. At the same time, it is obvious enough that the Courts have been careful not to push these doctrines too far, lest they should inspire dread of all trusts, and drive honest men from their acceptance. In this country, I am well satisfied, that it is unwise to hold trustees to too stringent a rule as to interest, because of the fluctuations in the value of property, the instability of securities, and the absence of such public stocks as are safe. The remarks of *Nott, J.* in *Wright vs. Wright,* upon this point, are worthy of special note. What is true in South Carolina is, for like reasons, more unquestionably true in our own State. He says, in commenting upon the English authorities, "I take it, therefore, that there is no such general rule as that an executor shall be required to pay compound interest on the balances that may be found in his hands. And if we had found such a rule more prevalent in England, where money may be always promptly vested in stock, or some other productive fund, yet it would be impracticable in this State, where people are not in the habit of dealing in stock, and indeed where it is only rarely to be purchased. Debts due estates are generally collected in slowly and in small amounts. Monies cannot always be let out promptly, much less safely, at interest, and simple interest is usually more than can be realized with the utmost diligence." 2 *Mc'Cord's Ch. R.* 203. It is, however, well settled here and in England, that if a trustee has made interest upon the trust funds, or ought to have invested them so as to yield interest, he shall be chargeable with interest. This general rule goes farther, and it may be said to be, indeed is, well settled, that in all cases where there is a fund in his hands, not needed for the purposes of the trust, it is his duty, as trustee, to invest it and to make it yield interest, whether the trust so specially direct or not. 1

John. Ch. R. 508. *Ib.* 527. *Ib.* 620. 2 *McCord's Ch. R.* 203. *Story's Com. on Eq.* 1277.

It is settled farther, I apprehend, that the interest is not as a matter of course to be compounded. Courts of Equity will direct annual, or more frequent rests to be made, and a compounding of interest for the benefit of the *cestui que trust*, at longer or shorter periods, dependant upon circumstances. Liability to pay simple interest is the rule—compounding is the exception. For example, if the trustee applies the fund to his own benefit in trade, or sells trust stocks and applies the proceeds to his own use, or refuses to follow the directions of the deed enacting the trust, as to investments, or conducts himself fraudulently in the management of the funds, and in all other instances depending upon like principles, Chancery will direct the compounding of the interest. What shall be the term of time at which it shall be compounded, must depend upon the circumstances of each case—it may be semi-annual, or annual, or at longer intervals. 11 *Vesey*, 91. 13 *Ib.* 407, 590. 5 *John. Ch. R.* 497. 12 *Vesey*, 127. 2 *Brow. Ch.* 616. 19 *Vesey*, 383. 1 *Madd.* 13. *Story's Com. Eq.* §1277. 2 *Kent*, 230, 231, *notes*. 18 *Vesey*, 246. 4 *Dow's P. C.* 209. 1 *Harr. & Gill.* 11. 3 *Ib.* 311. 1 *Pick.* 527. 18 *Pick.* 1. 2 *Dana, K. R.* 253. 2 *Dev. & Batt.* 566. *Case of Harland's Accounts*, 5 *Rawl. Reps.*

Now, I apprehend that gross delinquency in the management of the trust, upon the principles upon which all these exceptions go, will also subject an administrator to compound interest; and upon this account we sustain the rule of computation prescribed by Judge *Hill*.

The distributees in this case had a right to know, yearly, the condition of the estate; the state of its funds, principal and interest; what balances were in the administrator's hands, and when they accrued; what disbursements were made, and when they were made, &c. All these things are duties which the law devolves upon the administrator. His returns ought to have shown them, but they do not. How stand the returns? In December of the year his intestate died, (1827,) the appraisement was made—in February thereafter he returned it. In the same month he returns the sale, schedule of notes, &c. rent of lands, and the sale of one tract of land. In July, 1829, he makes a return of disbursements—more than two years after the date of the last return. In

December, 1834, more than five years afterwards, he makes another return of disbursements. The only other return, embracing large debits and credits, was not made until 1845, after suit was instituted against him—more than ten years after the preceding return. It is not pretended that Dr. Fall has acted dishonestly in the management of this estate—the facts and his character preclude any such pretence. The balance of principal remaining in his hands was small, and the verdict rendered is constituted mainly of interest; but it is certainly a case of gross neglect. The neglect consists in a clear failure to do his duty for long terms of years, in keeping the distributees informed, by returns to the Court of Ordinary, of the actual condition of the estate. Now they come into a Court of Chancery to be placed in the condition they would have been in had he done his duty faithfully. Now, is it inequitable that, under such circumstances, they should be allowed simple interest upon actual balances, after allowing all disbursements, for six years, and then to be compounded, and also to be compounded at every recurring term of six years? The legal presumption is, that the administrator would not permit debts due the estate to be barred by the Statute, (six years is the Statute of Limitations on notes, and a less term on accounts,) and that he did, in fact, collect in at the end of each six years' term, the principal and interest. We do not think that the Court erred on this point.

[3.] The decision of the Court below, that the administrator is not, in this case, entitled to any commissions, is also excepted to. The language and the policy of our Statute on this subject is perfectly plain. The Act of 1792 declares, "that every executor and administrator shall annually, whilst the estate shall remain in his or their care or custody, on the first day of January, or within ten days thereafter, render to the Register of Probates in the County in which they obtained probate of wills, or letters of administration, a just and true account, upon oath, of the receipts and expenditures of such estates the preceding year," &c. This provision of the Act of 1792, is re-enacted substantially by the Acts of 1799 and 1810. The last named Act requires all guardians, executors and administrators, annually to render "a full and correct account of the estate, and the condition of the estate in their hands," which account shall contain "a statement, on oath, of the transactions of the estate to the 1st of December preced-

ing such return, together with the necessary vouchers relating thereto." *Prince*, 226, 232, 240. The Legislature was careful to define the duty of executors, administrators and guardians, as these Acts demonstrate, with accuracy and minuteness. It is made their duty, in each and every year, to render a full and correct *account of the estate and the condition of the estate.* The Act of 1792 proceeds to declare, "if any executor or administrator shall neglect to render such *annual* accounts, he shall not be entitled to any commissions for his trouble in the management of the estate." The meaning is, if he shall neglect to render account, in the manner pointed out by law, in each and every year, he shall forfeit, not his commissions on the returns so neglected, which appertain to the neglected year, but all commissions for his trouble in the management of the estate. The requirement to make returns is mainly for the benefit of creditors, heirs, distributees and minors; and the forfeiture is in the nature of a penalty to secure the faithful performance of the duty. Such is the meaning and such the policy of the law. We are not at liberty to construe away its meaning, or defeat it by perverting its policy. We must give it its full effect. And as the administrator in this case did not make regular annual returns, we hold with the Court below, that he has forfeited all commissions for his trouble in managing the estate. It is true, that a precisely similar law in South Carolina has received a different construction. It has been there held, that an executor is entitled to commissions on the returns of those years which have been made, although he may have neglected other years. This construction has not met there with entire approbation, for Judge *Nott*, in *Wright vs. Wright*, says of it, "the correctness of that construction, however, is perhaps questionable." He farther says that it must be received with some qualification, and qualifies it thus: "If an executor shall omit to settle his accounts for several years, and then make a return for that whole period, he will only be entitled to commissions for the year in which his account is rendered, and the allowance must not be made to embrace those years in which no returns have been made; and unless his accounts are so made out, that the transactions of each year may be distinctly ascertained, no commissions ought to be allowed." 2 *McCord's Ch. R.* 200. We are not bound, however, by the decisions of the Carolina Courts, and dissent from them in this instance. It was

said in argument, that the Court of Ordinary having allowed commissions to the administrator, that allowance is a judgment of a Court of competent jurisdiction in his favor, and is conclusive. We have determined differently. See *Brown and others vs. Wright*, 5 *Geo. Rep.* 32, 33.

[4.] The last exception relates to the allegations in the bill, that the complainants had again and again applied to the defendant, and requested him to come to a settlement and account with them, &c. To these allegations the defendant, in his answer, made a special denial. The Court charged the Jury, that these allegations were merely formal, and that the denial in the answer did not make it necessary for plaintiffs to prove them. The defendant insisted that they were material, and that the denial in the answer put the complainants upon proof of these charges, and excepted. There is nothing in the exception. The question is this: Are these allegations material? If they are, being denied, they ought to have been proven. Is a demand upon an administrator necessary to entitle a distributee to recover either principal or interest? Certainly not. The right to sue grows out of the character of the defendant as administrator, and of the plaintiff as distributee of the estate which he represents. The liability to pay principal, depends upon the fact whether he has any in hand—to pay interest, upon the circumstances of his administration. A demand is not a precedent condition to the complainant's right to recover the one or the other. He is entitled to recover, if at all, wholly irrespective of any call upon the defendant. If these charges were stricken out of the bill, there is enough in it to warrant a decree.

It is usual to put in such charges. In some cases, no doubt, a demand must be specially charged and proved, if not admitted. This is not one of them. Putting in such charges does not make it necessary that plaintiff should prove them. He is bound to prove only the substance of his case—so much only of it as is necessary to entitle him to a decree. 2 *Daniel's Ch. Practice*, 996, 997. *Gresley Eq. Evid.* (*Amer. edit.*) 167 *to* 169. 1 *Russ.* 101.

Let the judgment below be affirmed.

No. 40.—David Giles, plaintiff in error, *vs.* The State of Georgia, defendant.

[1.] In an indictment for a libel, placed in a situation where it might have been seen and read, *Held*, that it is unnecessary either to aver or prove that it was seen or read.

[2.] If a libel import defamation on its face, of a particular person, it is unnecessary to insert inuendoes in the indictment.

[3.] It is libelous to charge a person with being a drunkard, a cuckold and a tory.

[4.] A person who appears to have written a libel, which is afterwards published, will be considered as the maker of it, unless he show another to be the author, or prove the act to be innocent in itself.

[5.] If a libel appears under a man's hand-writing, and no other author is known, it turns the proof upon him; and if he cannot produce the composer, he is presumed by law to be the man.

[6.] On the trial of criminal cases, moral, and not mathematical or metaphysical certainty, is all that the law requires, or that is attainable. The doubts of a Jury, to justify an acquittal, should be reasonable, and not a mere vague conjecture or possibility of the innocence of the accused.

[7.] Direct and irrefragable evidence cannot and need not be always produced in criminal cases; all that is necessary is, that the Jury, whether the proof be positive or presumptive, be satisfied of the defendant's guilt.

[8.] A verdict will not be set aside and a new trial granted, where the case has been fairly submitted on its merits, and no rule of law violated nor manifest injustice done, although there may appear to have been a *preponderance* of evidence against the verdict, especially if the Judge who tried the case is satisfied with the finding.

[9.] A new trial will not be granted on the ground of newly discovered evidence, unless it be competent and material to the issue, and would probably produce a different result if offered, especially where it is merely *cumulative*, and in corroboration of testimony presented on the former trial.

[10.] Where a party comes to the knowledge of newly discovered evidence, through the information of others, the affidavit of the informant should be produced.

Indictment for a libel, Houston Superior Court, October Term, 1848. Tried before Judge Floyd.

David Giles was put on his trial at the October Term of Houston Superior Court, upon an indictment for a libel:

"For that the said David Giles, on the 6th day of July, 1847, in said County, did maliciously and falsely utter and publish, that

is to say, did then and there write and fasten upon the side of a tree, in a public place, where it could be there read, the following malicious defamation in writing, of and concerning one William Thompson and others, that is to say—

"NOTICE.

"I am told that William Thompson, (meaning the said William Thompson,) is very smart, both him and A. M. Thomps (meaning A. M. Thompson,) they can make laws and make pople abid by them—like they did when they did—when they find Jessee Hunter for not working the road—M. M. Thompson, (meaning the son of the said William Thompson,) is ther Devil. He is all sap—for dill Sap yos (meaning used) to make old bill drunk and go to bed to old bill's (meaning the said William Thompson's) wife about the right time to git him—and too devils mixt together make one fool devil—too tories mixt together make one fool tory—old Sap was a tory so sed & old Thompson was hung up to the house by a bridle ranes for robing in of houses in the nose."

And the jurors aforesaid, upon their oaths aforesaid, do say that the aforesaid malicious defamation, so then and there uttered and published, then and there tended to blacken the reputation of the said William Thompson, who was then and there living, and thereby then and there tended to expose the said William Thompson to public hatred, contempt and ridicule. The aforesaid written malicious defamation being then and there utterly untrue and false—contrary to the laws of said State—the good order, peace and dignity thereof."

John Sanders testified that he had frequently seen the defendant write; that he was Bailiff in his district some four or five years, while the defendant acted as Justice of the Peace, and that he believed the libel to be in his hand-writing. Anthony Thompson sworn, said that he was acquainted with the hand-writing of the defendant, from having seen him write often. He had acted with him as associate Justice of the Peace, and he believed the libel to be in his hand-writing. He and William Thompson were Commissioners of the roads two or three years ago, and fined Jesse Hunter for not working on the road. He has a son named Americus Maxwell Thompson; a man by the name of Dill Sap lived in the near neighborhood of William Thompson many years ago, in Burke County. Joseph Davis stated on oath, that he found the libelous paper on the ground, in or near the side of the

road; there was turpentine on it, and a blaze on a pine tree just by; he read it and carried it to Thompson.

James Youman, Stephen Ham and ——— Smith, testified, each on the part of the accused, that they had seen the defendant write *several times*, and from the knowledge thus acquired, they did not believe the libelous publication to be in his hand-writing.

The defendant was found guilty; whereupon, a motion was made in arrest of judgment—

1. Because there is no sufficient charge of publication in said indictment, it not being alleged that it was seen or read by any one.

2. There is no inducement or other averment setting forth the facts necessary to explain the meaning of the supposed libel.

3. The libel is only alleged to have been published of and concerning William Thompson, (the words "and others" not being sufficient to designate any one else,) and it is not libelous as it respects him, without averment and proof of extrinsic facts connecting him with the libel and explaining its meaning, which averments are not contained in the indictment.

4. It is not libelous to charge a man with drunkenness, and there is no averment that "old Bill" meant William Thompson.

5. The inuendo after "M. M. Thompson" and "old Bill's wife," meaning the son and wife of said William Thompson, are insufficient, there being no averment that he had a son or wife, or that the libel was of and concerning the wife or son.

6. The offence is not set forth with sufficient certainty and precision.

7. The indictment does not set forth any offence, indictable and punishable under the Penal Code of the State.

Which motion was overruled by the Court, and defendant excepted.

Counsel for defendant then moved the Court for a new trial.

1. Because the Court erred in admitting the testimony of A. M. Thompson, in relation to the facts of himself and William Thompson having been Commissioners of roads, and had as such fined Jesse Hunter for not working on the road, there being no averment of these facts in the indictment; and parol evidence was inadmissible, there being higher evidence, which was not shown to have been lost or destroyed.

2. The Court erred in admitting proof that William Thomp-

son had a son by the name of Americus Maxwell Thompson, there being no averment of that fact, or that the libel was of and concerning him.

3. The Court erred in admitting testimony to prove that William Thompson had a wife; that a man by the name of Dill Sap once lived in the same neighborhood with the said William Thompson; that William Thompson was sometimes called "old Bill," there being no averment in the indictment to support the proof.

4. Because the Court erred in charging the Jury, that if they believed that the libel was in the hand-writing of the defendant, was afterwards found by the side of a public road and read, the presumption was, that it was published by him or by his authority; that if it was not so published, it was incumbent on the defendant to prove how it came out of his possession.

5. The Court erred in charging the Jury, that though the defendant was entitled to the benefit of any doubts they might have of his guilt, they must be reasonable doubts—not "a may be so" or "a might be so"—such charge being calculated to prejudice the Jury against the testimony of defendant.

6. Because the Jury found contrary to the evidence—the evidence on the part of the State to prove that defendant wrote the libel being overbalanced by the evidence introduced by defendant.

7. For newly discovered evidence.

The 7th ground was supported by the affidavit of Giles, that he had been informed since the trial, by James Youman, that Quepha Youman, now of Sumter County, would swear "that she was living in Houston, in the same neighborhood with prosecutor and defendant, at the time said alleged libel was found; that soon after, she was at the house of prosecutor, who showed her said paper; that about this time she received a scurrilous writing herself, from another individual than deponent, and from the great similarity in the hand-writing, and the abusiveness of the two papers, and the fact that the writer was at variance with the prosecutor, she would swear that the alleged libel was not written by Giles.

The Court overruled the motion and the defendant excepted.

JOHN M. GILES, for plaintiff in error.

Motion in arrest of judgment.

There is no sufficient charge of publication in the indictment. *Starkie on Slander*, 263. *Watts & Fraser et al.* 7 *A. & E.* 223. 34 *E. C. L. R.* 83. 3 *Ib.* 116, *note. Cooke on Def.* 135, (43 *Law Lib.*) 2 *Greenlf. Ev.* §414. *Clutterbuck vs. Chaffers*, 1 *Stark. R.* 471. 2 *E. C. L. R. Lyle vs. Clason*, 1 *Caine's R.* 581. *Fonville vs. McNease, Dudley's (S. C.) R.* 303. *Cooke on Def.* 14. 2 *Greenlf. Ev.* §414.

No latitude of intendment can include more than is alleged in the indictment. *Per Nisbet, J.* in *Locke vs. The State*, 3 *Kelly*, 540. *Per Warner, J.* in *McLane vs. The State*, 4 *Ga. R.* 341.

There is no inducement or other averment, setting forth the facts necessary to explain the meaning of the supposed libel. *Rex vs. Horne, Cowp. R.* 683. 3 *Chit. Cr. L.* 873. *Stark. Cr. P.* 144. *Archbold's Cr. P.* 525.

The charge of drunkenness is made against "old Bill"—it is not averred that old Bill meant William Thompson, nor is it alleged that he was ever known or designated by that name. *Miller vs. Maxwell*, 16 *Wend.* 14, 15, 16. *Tyler vs. Tillotmon*, 2 *Hill's N. Y. R.* 508.

The inuendo after M. M. Thompson, "meaning the son of the said William Thompson," is insufficient and improper, because the indictment does not allege the libel to be of and concerning a son of William Thompson; nor does the inuendo state what son was meant. The inuendo that old Bill's wife meant William Thompson's wife, is also insufficient and improper, as it is not alleged that the libel was of and concerning his wife, and the inuendo does not set forth her name. 1 *Saund. R.* 242, *n.* 3. *Rex vs. Horne, Cowp.* 683. *Taylor vs. The State*, 4 *Ga. R.* 20. 3 *Chit. Cr. L.* 875.

In support of the motion for a new trial, Mr. Giles cited—*Prince's Dig.* 740. 1 *Greenlf. Ev.* §44. *Best on Presumptions*, 44, *note.* 37 *Lit. L. Lib. Charge of Littledale, J. to the Jury, in Regina vs. Lovett*, 9 *C. & P.* 462. 38 *E. C. L. R.* 183. 4 *Sup. Ct. R.* 22. 1 *Kelly. Best on Presumptions*, §215. *Ib.* §170, *p.* 233.

Samuel Hall, for defendant in error.

1. The publication is sufficiently alleged and proven. *Starkie on Slander. Comyn's Dig. Libel. B.* 1. 1 *Russell on Crimes*, 235, *et seq.*

2. The averment that the libelous matter was of and concerning William Thompson "and others," taken in connection with the matter set out in the indictment, is sufficiently certain under the Statute of Georgia. *Prince*, 643, 644, 658, 659. It must be alleged that the libel was written of and concerning some person. 1 *Russell*, 233, 234. An attempt to excite ridicule, hatred or contempt, against a man's family, is a libel upon him. *The King vs. Bedingfield et al.* 2 *Burr.* 981. 1 *Russell*, 211.

3. The three first grounds taken on the motion for a new trial, cannot be sustained, because it does not appear from the bill of exceptions, that the admission of the testimony was objected to by the plaintiff in error.

4. The Court committed no error in charging the Jury that if they believed the libel was in the hand-writing of the defendant, and was afterwards found by the side of a public road and read, it was incumbent upon the defendant to show how it got out of his possession. The fact of his writing it being proven, the publication is presumed to be by him or his authority. 1 *Russell*, 234, 235.

5. The charge upon the question of doubt, was correct. The doubt must be reasonable to authorize the Jury to acquit. 1 *Starkie on Ev.* 514.

6. The motion for a new trial, upon the ground of newly discovered testimony, was properly overruled, fort he reasons that the testimony, if present, was inadmissible.

G. R. Hunter, in conclusion, for plaintiff in error, cited—

Price R. p. 10. 1 *Chit. Cr. L. pp.* 171, '2, 226, 30, 281, 660, 662. 2 *Kelly R.* 16. 4 *Georgia R.* 360. 4 *Ib.* 20, 22. 6 *Pickering R.* 114. 4 *Wendell R.* 579. *Dudley R. Irwin vs. Moul. P. Digest, title Libel.*

By the Court.—Lumpkin, J. delivering the opinion.

[1.] Did the indictment contain a sufficient averment of the *publication* of the libel? It charges that David Giles, the defendant, on the 6th day of July, 1847, did maliciously and falsely "utter and publish, that is to say, did then and there write, and fasten upon the side of a tree in a public place, where it could

be there read, the following malicious defamation, in writing, of and concerning one William Thompson (*the prosecutor*,) and others," &c. It is objected, that it should have been alleged that the libel *was read.* Was this necessary? If so, then the fact that it *was read* should have been proven also. We are of opinion that neither was requisite to constitute the offence.

Actual communication of the contents of a libel, as by singing or reading, is *one mode* of publication; but it is neither the only nor the usual mode. The common method is by the posting up of the paper, written or printed, or its delivery, and no question is ever asked as to whether it was read or not. We say of an author that he has *published* a book, when he has given its contents to the world; and we speak of the *publication* of a will, without meaning to denote that the contents of the instrument have been actually communicated. So it is with a libel. Publication, says *Best, J.* in *The King vs. Sir Francis Burdett*, is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone; he has shot his arrow and it does not depend upon him whether it hits the mark or not. There is an end of the *locus penitentiæ—his offence is complete*—all that depends upon him is consummated; and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act.

So then, the mere delivering over, or parting with the libel, is a publication. There need be no averment or proof of the actual communication of the contents of the paper. Lord *Coke* says, a libel may be *published, traditione*, by delivery, (5 *Reports*, 126, *a*;) and this definition is adopted by Chief Baron *Comyns*, in his *Digest, title, Publication, b.* 1. If a letter containing a libel is sent sealed to another, or to the party himself against whom it is made, or is addressed through the post office, it is a sufficient publication. 1 *Saund. Rep.* 132, *notes.*

If these propositions be tenable, and I doubt not they are law, then the case before us is free from doubt. I would only add, upon this branch of the case, that Chief Justice *DeGrey*, in delivering the opinion of the Court in *Baldwin vs. Elphinston*, (2 *Wm. Black. Rep.* 1037,) says, there are in *Rastall's Entr. tit. Action sur le Case*, 13 *a*, two instances of constructive publications,

by delivering letters to A and B, *and by fixing them on the door of St. Paul's Church.*

[2.] Many minute and ingenious exceptions are taken to the indictment, for want of proper inuendos to give certainty to the libel. To all of which our answer generally is, that the office of the inuendo is to point out and refer to matter already expressed; to explain the meaning of the publication, when it is obscure, and to designate the persons alleged to have been libelled, when they are alluded to in covert and ambiguous terms. But where the paper itself points out, with sufficient clearness, the persons of or concerning whom it is written, and likewise the purpose for which it was written, the office of the inuendo is superseded—no explanation is necessary. And such is the character of this publication. It is its own interpreter.

[3.] It is argued that it is not libelous to charge a person with being a drunkard. At Common Law any publication is a libel, the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred or ridicule; or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society; and by the Penal Code of this State, a libel is defined to be a malicious defamation, expressed either by printing or writing, or signs, pictures, and the like, tending to blacken the memory of one who is dead, or the honesty, virtue, integrity or reputation of one who is alive, and thereby expose him or her to public hatred, contempt or ridicule.

I ask, is not this publication well calculated to produce these results? I never yet saw the man who liked to be called or considered a sot or drunkard. Noah, the first drunken man, became thereby an object of *ridicule* to his own son. It was the third part of the then male world that manifested this mockery for this habit, and the other two-thirds did but conceal it. True, Ham, as a son, could not justify his unfilial conduct, and he and his descendants, to the present generation, have been deservedly punished for this contempt of his father. This historical fact serves, nevertheless, to illustrate the effect of this habit. But this paper did not stop with imputing excessive debauchery to old man Thompson; it alleges farther, that he was decoyed into his cups for the purpose of being made a cuckold! If this charge would not expose him to universal scorn and contempt, I know not what would, not only with the admirers of Byron—and their name is

legion—and such as would rather be the hero of Don Juan, than the author of the English Bards and Scotch Reviewers, but likewise with the most elevated and worthy of mankind. But the enormity of this libel stops not here. As if to involve its victim in the lowest depths of infamy and disgrace, he is accused, not only of being a tory in the war of the Revolution, but with having been punished in the most ignominious manner for the robberies which he then committed. When the name of Washington shall grow old and cold to the ear of the patriot; when it shall be synonymous with that of Arnold; when "the poles of the earth shall be swung round ninety degrees, to a coincidence with the equator," then, and not before, will it cease to be a libel to call a man a plundering tory of the Revolution!

[4.] The Court charged the Jury, that if they believed the libel was in the handwriting of the defendant—was afterwards found by the side of a public road, *and read*—the presumption was, that it was published by him, or by his authority; that if it was not so published, it was incumbent on the defendant to show how it came out of his possession; and to these instructions the defendant, by his counsel, excepted. Suffice it to say, that the presiding Judge has employed, in this portion of his charge, the very language almost of the books.

[5.] A person who appears once to have written a libel, which is afterwards published, will be considered as the maker of it, unless he rebut the presumption of law, by proving another to be the author, or show the act to be innocent in itself. 4 *Bac. Abr. Libel, b.* 1, *p.* 457. *Lamb's Case*, 9 *Coke*, 59. For if a libel appears under a man's handwriting, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. *Per Holt, C. J. in Rex vs. Beare*, 1 *Ld. Raym.* 417.

[6.] The defendant complains of the charge as to the degree of conviction which should rest on their minds, before they found the prisoner guilty. The Court stated, that while it was true that the defendant was entitled to the benefit of any doubts they might entertain of his guilt, they must be reasonable doubts, not "a may be so," or "a might be so."

I would remark, that the terms in which this doctrine is stated in *Macnally's Evidence*, is well calculated to mislead Juries.

They are there enjoined not to give their verdict against a prisoner, without plain, direct and manifest proof of his guilt; which implies, says Sir *Edward Coke*, that where there is *doubt*, the consequence should be acquittal of the party on trial. They are furthermore reminded, that their duty calls on them, before they pronounce a verdict of condemnation, to ask themselves whether they are satisfied, beyond the probability of doubt, that the prisoner is guilty of the charge alleged against him in the indictment. And *Chamberlain, J. B. R.* in his charge to the Jury on the trial of *Finny*, is there reported to have said that, "if there be a doubt, I take it to be a clear maxim, founded in humanity as well as law, that you must acquit the prisoner." *Ridgeway's Rep.* 147.

Now it is conceded, that in all criminal cases whatsoever, it is essential to a verdict of condemnation, that the guilt of the accused should be fully proved; and that neither a mere preponderance of evidence, nor any weight of preponderant evidence, in the language of *Mr. Starkie*, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt. Still, absolute, mathematical or metaphysical certainty is not essential; and besides, in judicial investigations, it is wholly unattainable. Moral certainty is all that can be required. The proof should be such as to control and decide the conduct of men in the highest and most important affairs of life, and not a mere vague conjecture, a fancy, a trivial supposition, a bare possibility of innocence. To acquit upon *such doubts*, is a virtual violation of the Juror's oath, and an offence of great magnitude against the interest of society, directly tending to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors. 1 *Starkie*, 514. We consider this to be the fair import of the language used by the Court.

I would add, that great Judges have held, that there is no difference between the rules of evidence in this particular in civil and criminal cases; that if the rules of evidence prescribe the best course to get at truth, they must be, and are, the same in all cases, and in all civilized countries; and *Lord Mansfield*, in the Douglas case, gives the reason for this: "As it seldom happens that absolute certainty can be attained in human affairs, therefore reason and public utility require that Judges, and all mankind, in

forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other."

[7.] While I am not prepared to subscribe to the principle here suggested, still I have deemed it my duty to intimate that it may be going quite too far to say, that even in criminal cases, the guilt of the accused must *always* be established by demonstrative and *irrefragable* evidence. It is enough that the evidence, whatever be its character, whether positive or presumptive, direct or circumstantial, satisfies the understanding and conscience of the Jury.

[8.] A new trial was moved for upon the grounds already considered, and for the farther reasons, that the verdict was contrary to evidence, and on account of newly discovered testimony; and the refusal of the Court to grant this application is excepted to as error.

1. This Court is frequently called on to review the question as to how far it will interfere to set aside a verdict and grant a new trial, where there has been a conflict of testimony, and the case has been fully submitted on its merits; and we have again and again ruled, as we now do, that the verdict of a Jury will not be set aside as against evidence, where there has been evidence on both sides, and no rule of law violated, nor manifest injustice done, although there may appear to have been a *preponderance* of evidence against the verdict; especially where, as in this case, the Judge who tries the cause expresses himself satisfied with the finding. Courts should rarely take it upon themselves to decide on the effect of evidence. Were they so to act, they might, with great justice, be charged with usurping the privileges of the Jury, and making a criminal trial not what it is by our law, a trial by Jury, but a trial by the Court.

[9.] 2. The other ground insisted upon for a new trial is, newly discovered evidence. Giles, the defendant, swears, that since the trial, he has been informed by James Youmans, that he was told, a short time previously, by Quepha Youmans, that she was at the house of the prosecutor when the libel was shown to her by him; that about that period she received a scurrilous paper from an individual living in the neighborhood, (not deponent,) and that from the great similarity in the style of the handwriting, and the abusiveness of the language of the two papers, and from

the fact that the author was at variance with the prosecutor, she would testify that the libel was not written by Giles.

[10.] One capital defect in this showing is, that the defendant swears that a third person informed him that he was told, &c. Why did he not produce the affidavit of James Youmans, his informant? Upon such a statement as this, no man ever would be hung, or imprisoned, or otherwise punished. Who could not get a friend to inform him (not under oath) what another would prove? The prisoner need not *procure* such a communication to be made—it would be voluntarily tendered.

But, aside from this, the newly discovered evidence is merely *cumulative*, or in corroboration of testimony to a point presented at the former trial, to wit: the handwriting of the defendant. Nor would it, if offered, likely produce a different result, consisting as it does, mainly in a comparison of handwriting, and, therefore, of doubtful competency.

On all the points made in the bill of exceptions, the judgment of the Court below is affirmed.

No. 41.—Charles Foster, plaintiff in error, *vs.* Wilson W. Brooks, administrator of G. M. Smith, defendant.

[1.] It is not competent to prove insanity by proof of the reputation or opinion of the neighborhood.

[2.] *Held*, that this Court will not interfere with the established practice of the Circuit Courts of Georgia, in relation to the alternative form of the verdict in trover.

[3.] In actions of trover, where there is conflicting evidence of the value of the property at the same time: *Held*, that the Jury may find the highest value proven, but are not compelled so to find; the *true value* derived from all the evidence being the criterion generally of the damages.

[4.] The speaking of a Juryman, after being charged with the case, with persons not members of the Jury about the evidence, and expressing his opinion to them as to the rights of one of the parties: *Held*, to be a serious indiscretion, worthy of judicial censure.

Trover, in Heard Superior Court. Tried before Judge Hill, October Term, 1848.

Wilson W. Brooks, administrator of George M. Smith, deceased, brought his action of trover in Heard Superior Court, against Charles Foster, to recover eighteen slaves, as the property of his intestate. Foster defended, under a bill of sale from Smith, which the plaintiff sought to avoid by proof that Smith was an idiot, incapable of contracting.

A verdict was rendered at the October Term, 1848, for the plaintiff, for the sum of $8,700, "which can be discharged by the delivery of the negroes mentioned in the declaration, and also $3,916 94 hire."

A motion was made for a new trial, which was overruled by the Court. The defendant thereupon filed his bill of exceptions, alleging as errors,

1. The Court erred in permitting plaintiff's counsel to give in evidence the public opinion and reputation of the neighborhood in relation to the idiocy or insanity of Smith, the intestate of plaintiff.

2. The Court erred in charging the Jury, if they should find for plaintiff, the form of their verdict should be in the alternative, finding so much money for the plaintiff, to be discharged by the delivery of the property in a certain time.

3. Because the verdict is contrary to law, being in the nature of a decree.

4. Because the Court erred in charging the Jury that, if they should find for the plaintiff, they should estimate the value of the property at the highest price proven, as it was usual to do in such cases, inasmuch as, under our practice, it might be discharged by a return of the property.

5. The Court erred in not granting a new trial on the above grounds, and on the additional ground of misconduct in one of the Jury, in having and holding conversations with other persons, not members of the Jury, respecting said case, and the title of defendant and the result of the case, to wit: "that he, defendant, could not hold said property; that he had exhibited a little piece of paper, about as big as a man's hand, as his title, and that he could never hold property under such a title as that."

This last ground was supported by affidavits.

On these exceptions error has been assigned.

O. Warner and D. Irwin, for plaintiff in error.

The counsel for the plaintiff in error, insist that testimony, as to the reputation of a person being an idiot or of unsound mind, is inadmissible.

1. It is a general rule, that such testimony cannot be admitted to prove particular facts. 1 *Stark. on Ev. part* 1, *s.* 34 *to* 43. 1 *Phil. Ev.* 190, 191. 3 *Dane's Abr. page* 390. 2 *Conden. R.* 496. 3 *Conden. R.* 465. 10 *Peters*, 412. 9 *Ala. R.* 36. 11 *Ib.* 720. 7 *John.* 95. 11 *Ib.* 437. 2 *Caines' R.* 107. 2 *Wash. R.* 146. 1 *Johns. Ch.* 140. 15 *Johns.* 493. 1 *Mass.* 71. 8 *Johns.* 99. 1 *Greenlf. Ev.* 489.

2. The verdict is void in law. It should have been for a sum certain only, and not in the alternative, to be discharged by a delivery of the property. Trover is an action for damages alone, for the conversion of personal chattels, and not for the chattel itself, and the plaintiff can recover nothing but damages. This is the rule at Common Law. *See* 3 *Bl. Com.* 152, 153. 1 *Chit. Pl.* 148.

The Common Law upon this subject, is of force in Georgia. *Hotch.* 93.

3. The rule of damages in actions of trover, is the value of the property at the time of conversion. 14 *Johns. R.* 128. 3 *Bacon's Abr. tit. Damages, letter D.* 10 *Ala. R.* 689. Where it was held that interest *may* be allowed on that value. *Sedgwick on Damages*, 496.

4. The conduct of the Jury was a sufficient ground for a new trial. *Graham on N. T.* 64, 101. 1 *Swift's Dig.* 775. 5 *Cowen*, 283. 2 *South.* 687, *cited in* 3 *U. S. Dig.* 630. 1 *Mass.* 543. 2 *Root's R.* 349. 2 *Dallas*, 56. 4 *Maule & Sel.* 192. 5 *Price R.* 173. 12 *East*, 229. 1 *Serg. & Rawle*, 169.

5. A Court will grant a new trial, where improper evidence has been admitted. 12 *Wend.* 64. 2 *McCord*, 157. 3 *Cowen*, 621. 16 *Johns.* 89. 1 *Hill's S. C. R.* 234. 2 *Nott & McCord*, 446. 1 *Mill's Const. R.* 6, 200. 2 *Dev.* 563. 4 *Ib.* 328. 2 *Dev. & Bat.* 196, 257. 5 *Mass.* 405. 6 *N. H.* 333, 80. 9 *Pick.* 176. 6 *Cow.* 445.

6. There is not sufficient evidence to support the verdict, independent of the illegal testimony. The legal proof admitted on the trial, did not establish that Smith, the intestate, had that derangement or imbecility of mind, which would render him incapable, according to the rules of law, of making a valid contract,

and this was the material point in the case. 4 *Cowen*, 207. 21 *Wend.* 142.

BURCH and W. DOUGHERTY, for defendant in error.

The following are the points submitted by defendant's counsel:

1. Any public and notorious fact may be proven by reputation. 1 *Starkie*, 28, 29.

2. The action of trover is a substitute for the action of detinue, and is now the only form of action for the recovery of personal property. 3 *Bacon's Ab.* 134. 3 *Bl. Com.* 122. And being substituted by the *Court*, it may be made answer the purposes of both forms of action, which has been, in fact, the practice of our Courts, and so recognized by Act of Legislature. *Prince*, 450. And so has been the practice of the English Courts. 2 *Wheat. N. P.* 1417. 3 *Bur.* 1364. 9 *Bacon's Abr.* 680. 7 *T. R.* 54. And if the verdict be informal, it does not result in the injury of the plaintiff in error, and may be disregarded by him. 1 *Nott & McCord*, 237. That part of the finding which authorizes the discharge of the value of the negroes, by delivering them, can at most be but surplusage, and may be stricken as such by this Court. *Act to organize S. C. sec.* 5.

3. Loose expressions of one or more Jurors, is not sufficient to set aside a verdict. 3 *Brevard*, 130. 2 *Dunlap's Practice*, 675. 2 *Tidd*, 988. The Courts will not receive affidavits of partiality and prejudice from the unsuccessful party. *Ib.* 908.

4. The Jury had the right to find for defendant in error the highest value proven. 1 *Nott & McCord*, 334. In this case, but one value was proven, and if the Court erred in charging the Jury to find the highest value, it was an unnecessary charge, and could not and did not lead the Jury into error.

5. If we admit the proof of idiocy, by reputation, be inadmissible, there was sufficient proof beside to authorize the finding. 1 *Kelly*, 556. *Ib.* 580. 1 *Selw. Practice*, 487. *Tidd*, 907. 3 *Johns.* 528. Weakness of mind, coupled with fraud and imposition, will vitiate a contract. 14 *Vesey*, 273.

His Honor, *Judge Warner*, having been of counsel in the Court below, did not preside in this cause in the Supreme Court.

By the Court.—NISBET, J. delivering the opinion.

[1.] The defendant in this case relied upon a bill of sale from the plaintiff's intestate. The plaintiff attacked that bill of sale upon two grounds, to-wit: the insanity of the maker, his intestate, and undue and improper influence exerted upon him, amounting to moral coercion, by Foster, the defendant. Upon the trial, Judge *Hill* permitted the plaintiff to prove the insanity of the intestate, by giving in evidence the public opinion and reputation of the neighborhood, in relation to his insanity. Such testimony, for example, as this: "he was esteemed an idiot in Oglethorpe County." Exception was taken to the admission of this evidence, at the trial. We think the Circuit Judge erred in admitting it.

Insanity may be proven, by the proof of facts and circumstances, which show the state and condition of the mind. "The state and condition of the mind (says Prof. *Greenleaf*) of the party, is proved like *other facts*, to the Jury." Insanity, a state or condition of the mind which renders a party incapable of contracting, and which, when proven, annuls a contract, is demonstrable by facts and circumstances, which show it to exist—such as his acts, his sayings, and his appearance. The best evidence of which the nature of the case is susceptible, must in all cases be adduced. The best evidence to prove insanity is proof of the facts and circumstances which demonstrate its existence. These facts and circumstances must be proven by the production of witnesses to testify to them. They are capable of proof, as are any other facts or circumstances, which are required to be proven, and upon which the rights of parties depend in a Court of justice. The highest and best evidence in this case, is the testimony of persons who, from their own knowledge, will swear to their existence.

Public opinion, as to a man's insanity, is hearsay evidence. One swearing to the existence of such opinion or reputation, swears only to what he has heard from others—from a whole community, if you please. He swears to no *facts* which show to the Jury the state or condition of the party's mind. He swears to what others have said. From such testimony, the Jury who are to try the question of sanity, derive nothing upon which to base a judgment of their own. If, upon such evidence, they were allowed to find a verdict, it would be predicated alone upon the opinion of other men, not expressed to them, not upon oath, not subject to cross examination, and communicated through one who may have erroneously conceived it, or presented it, or who may

himself be prejudiced by it. *He* is not guilty of perjury if the party be ever so sane. *He* is testifying only to the existence of a *public opinion*—a thing very difficult to define—which may be one thing to-day and another to-morrow—which may exist without reason, or facts, or knowledge, and may be changed in a week without reason or cause. And in addition to all this, the witness who is sworn, is the judge of what is public opinion or reputation, and that too, under circumstances which relieve him of much of that responsibility which ordinarily attaches to the delivery of testimony on oath.

"If," says *Buller*, "the first speech were without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a Court of Justice." *Buller, N. P.* 294. And that is all that can be said of it. Against all such testimony, the law sets its face as a flint. "Hearsay evidence is uniformly held incompetent to establish any specific fact, which in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge." 1 *Greenl. sec.* 99. Now, insanity, if not a *specific fact*, is a *state* or *condition* of the mind. And as men cannot see, touch, hear, and with omniscient ken, determine the state or condition of the mind—as intuition cannot establish it—they are left to ascertain it, by facts and circumstances. And when it becomes necessary for a Jury to determine it, they too are to judge through facts and circumstances; and the facts and circumstances upon which they are to place their judgment, must be presented to them by witnesses under oath. If *reputation* of *insanity* is competent, then *reputation* of *sanity* must be also. By this kind of evidence a fool may be proved a wise man, and a philosopher a fool. Public opinion declared *Copernicus* a fool, when he promulgated the planetary system; and *Columbus* a fool when he announced the sublime idea of a New World. Hazardous in the extreme would it be to the rights of parties under the law, if they were allowed to depend upon the opinion of a neighborhood of the sanity of individuals. Hearsay evidence is excluded, because a witness ought to be subjected to cross-examination—that being a test of truth. It ought to appear what were his powers of perception—his opportunities of observation—his attentiveness in observing—the strength of his recollection, and his disposition to speak the truth. It supposes

better evidence, which might be produced. Besides, it is intrinsically weak and incompetent to satisfy the mind.

There are, however, some exceptions to the rule, that hearsay evidence must be excluded. Proof of *pedigree* is one. Evidence by hearsay, to prove pedigree, is restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore, interested in the succession in question. 13 *Vesey*, 140, 147. *Cowp.* 591. 13 *Vesey*, 514. 2 *Bing.* 86. 2 *Russ. & My.* 147, 156. 1 *Crowp. Mees. & Ros. R.* 919, 928. 17 *Peters*, 213. 18 *Johns.* 37. 2 *Conn.* 347. 4 *N. Hamp.* 371.

It is admitted, upon the ground of the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connexions of the family. It is not pretended that this case is within this exception. Another exception is, where declarations are admitted as being part of the *res gestæ*. These are, however, according to Mr. *Greenleaf*, rather in the light of original evidence; and he enumerates some other apparent exceptions, which he regards in the same light. There are other exceptions—such, for example, as relate to matters of public and general interest—as a claim of highway, or a right to a ferry. Reputation, as to these matters, is admitted upon the ground of the interest which all have in its truth, and the consequent probability that it is true. 1 *Greenleaf*, 157.

In this case, there is no public matter involved. It is a question which affects only the parties litigant—it does not fall within this exception. Another exception relates to ancient possession, and ancient boundaries; another to the declarations and entries of deceased persons, against the interest of the persons making them; another, to dying declarations; another to the testimony of witnesses dead, absent or disqualified; not one of which embraces reputation as to insanity. This case is therefore subject to the general rules, and by them, in the judgment of this Court, the evidence was improperly admitted.

In the case of *Potts'* will, argued at this term of this Court, we held that *the opinion* of a witness, as to the sanity of the testator, was not admissible, unless he states the facts upon which his opinion is formed. If the opinion of a sworn witness in open Court is inadmissible, *a fortiori*, the opinions of men not being on oath, as testified to in Court, are inadmissible. *(Which case see post.)*

It was insisted by the counsel for the defendant in error, that if

we should believe that the Court erred in admitting this evidence, yet this case ought not to be remanded for a new trial, because, wholly independent of the illegal testimony, there was evidence enough before the Jury to authorise their verdict. We have looked into the record, and find that the evidence as to the sanity of the plaintiff's intestate, is conflicting. When the evidence is conflicting, the case must go back. Only where the evidence will *plainly* and *justly* authorise the finding, without the illegal evidence, will we decline to send the case back. It must be a case where we are free from all doubt, that the Jury would have found as they did, had the illegal evidence not been before them. This is not one of those cases. Upon the question of insanity, it is impossible for us to say that the illegal testimony had no effect upon the mind of the Jury. There is a good deal of evidence going to prove the sanity of the intestate of the plaintiff. Nor is it clear to our minds, that excluding altogether the issue of insanity, the Jury would have been *compelled* to find for the plaintiff below, upon the other issue of fraud by undue influence. Upon both issues taken together, it is still more doubtful whether the Jury would have been constrained to find as they did, without the illegal evidence. We think it may have had its effect on the Jury in reference to both issues. The question of mental vigor is involved in the question of fraud, since it is easier to influence unduly and fraudulently, a weak than a strong minded man. Were we the Jury, we might have found as the Jury did find. But that is not the question. The exception to the testimony, too, was taken on the trial. It is not, therefore, a question, how far we will control the discretion of the Court, in refusing or granting a new trial. The case must go back.

[2.] The other points made, grew out of a rule for a new trial. It is claimed that the Court erred in instructing the Jury, that if they found for the plaintiff, the form of their verdict should be in the alternative, finding so much money for the plaintiff, to be discharged by the delivery of the property within a certain time. The Jury found for the plaintiff a sum in damages, which might be discharged by the delivery of the negroes within a specified time. Thus, we are called upon to say, whether we will change the form of the verdict in trover, which has been used in our Courts, so far as I know, since the organization of the Government. Our Courts have held, not that the verdict should be, in all ca-

ses, in what is usually called the alternative, but that it is competent for the Jury to find in that form, or not, according to the circumstances of the case. The verdicts thus rendered, are not strictly in the alternative; they are verdicts, generally, for damages, with a condition in favor of the defendant, that he may, if he will, discharge them, by delivering the property sued for; they go upon an idea favorable to the defendant; they give him the privilege, if most convenient or most beneficial to him, of discharging the verdict by a surrender of the property. It is true, too, that such a form may be used to favor plaintiffs. There are cases where he wants the specific property, and would not feel compensated for its loss in any amount of damages. As for example, in case of a suit brought for an ancient piece of family plate, or for a peculiarly valuable and attached servant. In such case, this form enables the Court and Jury to coerce the delivery of the property, by finding against the defendant, excessive damages. And thus, *trover* is made to subserve the purposes of the obsolete action of *detinue*. There is no doubt but that in England the recovery in trover is generally in damages; the fluctuating value of personal property makes it necessary that it should be; the principles upon which the action is founded, require it; yet, in England, it has been ruled that, where trover is brought for a chattel of unchangeable value, the verdict may be discharged, by surrender into Court of the property. *Fisher vs. Price*, 3 *Burrow*, 1363, '64, '65. And perhaps this is the source from which sprang the idea, in Georgia, of permitting the damages to be discharged by a delivery of the property. We think the practice a good one. Our people and the profession are familiar with it, and we have reason to believe, satisfied with it. It has rested for many years under the eye of the Legislature, and they have not thought proper to change it, but in several instances have impliedly sanctioned it. We do not see that there is in it any principle violated, or rule of expediency infringed, and we shall not disturb it.

[3.] The plaintiff in error claims that the Court erred in charging the Jury, that if they should find for the plaintiff, they should estimate the value of the property at the highest price proven. The reason given by the presiding Judge for this instruction is, the discharge of the verdict by the return of the property.

In this case, the witnesses varied in their judgment of the value of the negroes—some proving a higher value than others. The

question made here, is not what is the criterion of damages, where the value fluctuates from the conversion to the trial. Whether the value, at the time of conversion, or at some intermediate time between the conversion and the trial, or at the trial, or an average value, derived from the different valuations, be the rule, we express no opinion. When the property is of an undeviating value, what is proven to be its worth when converted, seems to be the criterion of damages. What it is when the property is proven to be worth different prices at different times, I say, we express no opinion.* The proof in this case, all relates to the price of the negroes at the *same time;* and the instruction was, that the Jury find according to the highest price proven. Allowing, as we do, the alternative verdict, yet, we dissent from the opinion of the learned Court below. That there are cases, as before intimated, where the Court might instruct the Jury to find the highest price proven, we cannot doubt. Cases where, for reasons apparent from the whole case, the object of the plaintiff is to recover the specific property. This is not a case of that kind. Moreover, the Court has laid down a rule here, without any qualification and applicable equally to all cases—that is, that inasmuch as the damages may be discharged by a return of the property, therefore, the Jury must find the highest price proven. The criterion of damages, as a general rule, is the *true value* of the property—that is the rule of the law in trover. The Court below did not so instruct the Jury. His instruction was, that the rule of the law is this, to-wit: the criterion of damages is the *highest value proven.* The Jury are to find what is the true value from all the evidence; it is their province to judge of it, weigh it, reconcile conflicts, and thus arrive at the true value. They *may* find the highest price proven, because they may believe, from all the evidence, that that is the true value. But they may believe, from want of credibility in the witness, or a want of judgment, or of opportunities of forming a correct judgment, or on some other account, that the highest price proven is not the true value. They should not, therefore, be held bound by the highest price proven. Whilst they may find that price, *non constat* that they must. If the instruction of the Judge be considered as asserting no rule of law, but as an instruction merely upon the facts of this particular case—

*See *post. Schley vs. Trustees of Bedingfield.*—[Rep.]

as directory to the Jury on the testimony—still, it is erroneous. The Court may express an opinion on the facts, but it must accompany that opinion with a declaration that it is the province of the Jury to find the facts. A Judge has no right to *instruct* the Jury how they shall find on the facts. The language of the Court in this case, is that of *instruction*. The bill of exceptions represents him as charging the Jury, that they *should* find according to the highest price proven, without submitting to them, that it was, notwithstanding, their right to determine on the facts. *Anderson et al. vs. The State of Georgia*, 2 *Kelly*, 370. *Stell vs. Glass*, 1 *Kelly*, 475. *Holder vs. The State of Georgia*, 5 *Ga. R.* 441. *Beall vs. Mann*, 5 *Ga. R.* 471.

[4.] It is farther complained, that Judge *Hill* erred in refusing a new trial, on the ground of the misconduct of one of the Jury who tried the cause.. The juryman, it seems, after being charged with the case, departing from his fellows, (whether with or without leave to disperse, not appearing,) and before, as I infer from the record, they had retired to their box, made the following remarks in the hearing of several persons not being members of the Jury, to-wit: "That he (the defendant) could not hold the property—that he had exhibited a little piece of paper about as big as a man's hand as his title, and that he believed that Foster (the defendant) had never paid anything for the negroes any more than he had." We cannot say that in strictness, this is a good ground for a new trial. And as the granting or denying new trials is within the discretion, the sound legal discretion of the presiding Judge, we would not send this case back on this ground alone. Yet, we believe that the conduct of this juryman was an act of serious indiscretion, and justly meriting judicial censure. We cannot well be too strict in maintaining the purity of the trial by Jury. We would rejoice to be able to impress upon the mind of the country a proper sense of the delicacy and solemnity of that trust which the law delegates to jurymen—a trust, in the exercise of which is involved, in an eminent degree, the power of the Courts to administer general justice—in which is involved the peace of society, the life, liberty, property and character of every citizen in the republic. Juries should believe, that when acting as such, they are consecrated men, set apart for a peculiarly solemn duty. They should not only act right, but avoid the appearance of acting wrong. The conduct of jurymen should be such as to repel

all thought, on the part of every man, that they are at all approachable. Any conduct which tends to break down the public impression, that they are utterly above and beyond all attempts at external control, is wrong. Most assuredly, conduct which invites or which seems to invite such attempts, is reprehensible. It does not appear that the remarks of this juryman were preceded or followed by remarks from those whom he addressed; and yet, it is difficult to believe that they were not. If others had addressed him in relation to the case in his hands, I should hold it good cause for a new trial. A statement by a juryman, of a part of the evidence, and an expression of opinion as to the rights of one of the parties, (this case,) does not necessarily imply corruption—an honest, independent man might do all that. But to warrant a new trial, it is not necessary to show that the juryman acted corruptly. The law will guard the trial by Jury from the chances of being corrupted. The volunteer remarks of this juryman might be construed by the by-standers, into *an invitation to them* to express their opinions. The juryman laid himself open to the attempts of the world, upon his mind and his integrity. It might be the means which an honestly disposed but timid juryman would resort to, to ascertain the out-door sentiment, as to the cause, in order that he might act upon it. Or it might be resorted to by a shrewd and dishonest juryman, to learn the out-door opinion, that he might carry it into the jury-box, and thereby control the verdict of his fellows.

In every point of view, and many views might be taken of it, the conduct of the juryman in this case was highly censurable.

Let the judgment be reversed.

No. 42.—SHERWOOD R. WOMACK, plaintiff in error, *vs.* THOMAS B. GREENWOOD, executor, &c. and WILLIAM A. PULLEN, administrator, &c. defendants.

[1.] Where a testator, by his will, directs a sale of his real and personal estate, for the payment of his debts, and after payment thereof the residue of his estate to be equally divided between his wife and children, the children to receive their shares as they successively attained the age of twenty-one years: *Held*, that the legacies of the children vested in possession, on their arriving at the age of twenty-one years respectively; and that the executor was liable to account therefor, notwithstanding there was no allegation in the bill that the debts had been paid; as it was charged a sufficient time had elapsed for that purpose, and that the sales of the testator's property had not been accounted for by the executor.

[2.] An administrator may be made a party to an injunction bill, for the purpose of enjoining him from interfering with a legacy in the hands of an executor, to which his intestate had no title, before the expiration of twelve months from the date of his qualification, there being no claim made against him in the bill, for any *matter* or *cause of action against his intestate*, in his lifetime.

In Equity, in Troup Superior Court. Decision on demurrer, by Judge HILL, November Term, 1848.

Sherwood R. Womack filed his bill, returnable to the Superior Court of Troup County, alleging, that in the year 18—, Collin Rogers of said County, died intestate, leaving Thomas B. Greenwood and another, his executors, Greenwood alone qualifying; that by the 4th clause of his will, he provided, that "such provision be made for the support and comfort of my surviving wife and children, viz: Sarah L. Rogers, Henry A. Rogers and Lucretia Jane Rogers, as my executors shall deem necessary, and in conformity with their best interest, until all my just debts be paid; and after the payment of these debts, the residue of my property be divided into three equal portions, and appropriated to the use and benefit of the above named legatees, so soon as my children, Henry A. Rogers and Lucretia Jane Rogers, shall successively attain the age of majority."

That Greenwood took possession of said estate, amounting to $50,000, or other large sum, and has caused to be sold, all the real estate and personal property of the testator, except twenty-

six negroes, amounting in value to $25,000, and has received from the rents of the real estate and hire of the negroes, the sum of $5,000, or other large sum of money, and has made no returns thereof to any Court.

That on 5th Jan. 1848, Henry A. Rogers, being then of age, by deed, transferred and assigned to complainant his undivided interest in the following negroes, belonging to the estate of said Collin: George, Gift, Beverly, Peggy and her eight children, Elendor and her four children, Mariah and her two children, Nancy and her four children, and Enoch a boy, together with their future increase; that shortly thereafter, said Henry A. Rogers died, and William A. Pullen applied for and obtained letters of administration on his estate.

The bill charged that said Pullen was endeavoring to obtain possession from said Greenwood, of the said undivided interest; that as assignee he has frequently applied to said Greenwood and Pullen not to interfere or intermeddle, in any manner whatever, with said interest, and requested a settlement and division.

The bill prayed that Greenwood might be decreed to account for the said undivided interest, and to distribute and turn over to complainant, the share of said Henry A. Rogers, in said negroes, together with the increase and hire. Also, an injunction to restrain Pullen from proceeding to recover said interest in said negroes.

To this bill the defendants filed a general demurrer, for want of equity.

Upon the hearing of which, the Court sustained the demurrer, and dismissed the bill.

And this decision is assigned as error.

JOHN L. STEPHENS, for plaintiff in error.

O. A. BULL, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The error assigned to the judgment of the Court below is, the sustaining the demurrer to the complainant's bill, and dismissing it.

The testator, by the second clause of his will, directs that all

his real estate and perishable property, be sold, so soon as his executors shall deem prudent, for the payment of his debts.

By the third clause in his will, the testator provides, that his negro property be either hired out or sold, so far as may be sufficient for the payment of his debts, and the residue appropriated for the benefit of his family, according to the discretion of his executor.

The fourth clause of the will provides for the support of the testator's family, until all his just debts be paid, as his executors shall deem necessary, or in conformity to their best interest; and after the payment of his debts, the residue of his estate to be equally divided between his wife, Sarah L. Rogers, and his two children, Henry A. Rogers and Lucretia Jane Rogers—the distribution to be made to his children when they *successively* arrived at the age of majority—the distribution to be made to the testator's widow, whenever, in the opinion of his executors, the interest of his estate would justify it. The construction which we give to this will is, that the testator intended that his real estate and perishable property should first be sold for the payment of his debts, and if that was not sufficient, the hire of the negroes was to be appropriated for that purpose, or that a sufficient number of the negroes might be sold for the payment of his debts. After the payment of his debts, his property was to be equally divided between his wife and children—the latter to receive their respective shares, when they attained the age of twenty-one years.

The testator evidently contemplated that his executors would sell the property and pay the debts, within the usual time allowed by law for that purpose, or in any event, that the debts would be paid before either of his chiidren should attain the age of twenty-one years, for then he directs they shall receive their respective shares of his estate. He did not intend the vesting of the legacies to his children, in possession, should depend upon the action of his executors in paying the debts, for then their right to the possession of their respective shares, would depend on the *will of the executors*, rather than the will of the testator. From the allegations in the complainant's bill, the legal presumption is, that the executor has paid the debts, or has in his hands sufficient for that purpose, and of which he has made no proper account.

The complainant charges, that the executor has sold all the real

estate and personal property of the testator, except twenty-six negroes, amounting in value to the sum of twenty-five thousand dollars, of which he has made no proper return to any Court; and has also received from the hire of the negroes and the rents of the real estate, the sum of five thousand dollars. By the Act of 1792, executors are allowed twelve months, from the probate of the will, to ascertain the debts due to and from their testator. *Prince*, 229. By the 4th section of the Act of 1810, executors are required to render a full and correct account of the condition of the estate in their hands, to the Court of Ordinary, once in each and every year, on oath. *Prince*, 240. According to the case made by the complainant's bill, more than two years and a half have elapsed since the probate of the will and qualification of the executor, and no returns have been made by the executor of the appropriation of the proceeds of the sale of the testator's property, and he is charged to have the same in his hands. One of the legatees, Henry A. Rogers, it is alleged, arrived at the age of twenty-one years, and assigned his interest to the complainant in the testator's estate, and afterwards died intestate. William A. Pullen took out administration on his estate, and as the complainant charges, is endeavoring to reduce into his possession the legacy of Henry A. Rogers, now in the hands of the executor, and which was assigned to the complainant by said Henry A. Rogers, in his life-time.

[2.] The prayer of the bill is, that Pullen, as the administrator of Henry A. Rogers, may be enjoined from recovering said legacy from the executor, and he is made a party to the bill for that purpose only. As twelve months had not expired, from the time of the qualification of Pullen, as administrator, to the time of filing the complainant's bill, it is objected that he cannot be made a party until after the expiration of twelve months from the date of his qualification as such administrator. By the 12th section of the Judiciary Act of 1799, it is declared—"No suit or action shall be issued against any executor or administrator, for any *matter* or *cause* against the *testator* or *intestate* of such executor or administrator, in any of the said Courts, until the expiration of twelve months after probate of the will of such testator, or letters of administration granted on the estate of such intestate." *Prince*, 422. The complainant's bill is not filed against Pullen for any *matter* or *cause of action* which existed against his intestate in his

life-time. It does not seek to recover anything from him, as the representative of his intestate, but simply to enjoin him from interfering with that which it is apparent from the complainant's bill and exhibits thereto attached, he has *no title* in right of his intestate. He is not sued for any *debt, demand, matter* or *cause of action* which existed against his *intestate* in his life-time, and in our judgment, was properly made a party to the bill. For the reasons already stated, we are of the opinion that the complainant has stated upon the record a *prima facie* case, which entitles him to a discovery and relief from the executor, as the assignee of Henry A. Rogers, one of the legatees under the will of Collin Rogers, the testator, for his share of the legacy, and that the demurrer ought not to have been sustained.

Let the judgment of the Court below be reversed.

No. 43.—George Ray, administrator, and others, plaintiffs in error, *vs.* The Justices of the Inferior Court of Macon County, defendants.

[1.] A witness who is liable to an action by the party for whom he is called, in case that party should not recover, is incompetent to testify, without a release.

[2.] In an action by the present guardian, against the administrator of the former guardian, and his securities on the bond, the plaintiff must show, *affirmatively*, some act of waste or mal-administration by his predecessor during his life; and the bare *reception* of money for his wards, without further proof of default, is not, *per se*, a breach of the bond.

[3.] The Act of 1820, authorising securities to be joined with the principal, in suits upon executor's, administrator's and guardian's bonds, considered.

[4.] In an action by the present guardian against the administrator of a deceased guardian and his securities, upon their bond, in which the breach alleged, is the receipt of three several sums of money by the former guardian, which he had appropriated to his own use, the measure of damages is the aggregate of principal and accruing interest.

[5.] The Act of 1814, requiring the amount of principal and interest to be stated, separately, in judgments, applies to suits on promissory notes, and other special contracts bearing interest, and not to cases where the recovery is in damages.

Debt on Bond, in Houston Superior Court. Tried before Judge FLOYD, October Term, 1848.

Suit was commenced in the Superior Court of Houston County, by the Justices of the Inferior Court of said County, for the use of Jesse M. Pinkston, guardian of the minor heirs of Green B. Pinkston, deceased, upon the bond of Joshua Taylor, a former guardian, now deceased. The suit was instituted against George Ray, as administrator of said Taylor, and George Ray and Lawson Henderson, as sureties. The breach alleged was, that the said guardian "did not take good and lawful care of the property of the said orphans, his said wards, according to the laws of this State; nor did he, annually, make a just and true return of all or any of his actings and doings in the premises, unto the said Court of Ordinary, but on the contrary thereof, your petitioners say that the said Joshua Taylor, as such guardian, did receive from the legal representatives of Green B. Pinkston, deceased, (their father,) a large sum of money belonging to his said wards, as heirs at law of said Green B. to wit: the sum of seven hundred and ninety dollars, which sum of money the said Joshua Taylor wasted, converted and disposed of to his own use," &c.

At the October Term, 1848, upon the trial, the plaintiffs gave in evidence the bond, and then offered to prove certain receipts and the payment of the money therein specified, by Nathan G. Lewis, the administrator of Green B. Pinkston. The defendant's counsel objected to his testifying, on the ground that he was interested in relieving himself from responsibility, which objection was overruled, and defendants excepted. The receipts were then given in evidence, showing the receipt by the guardian, of $747, from the administrator of G. B. Pinkston.

Plaintiffs here closed their case, whereupon defendant's counsel moved for a nonsuit—

1. Because there was no evidence of a demand from the guardian or his administrator, to account for the fund, nor of their refusal to pay.

2. Because the plaintiffs showed no settlement of the guardian's accounts, either by the guardian or by the decree or judgment of a Court of competent jurisdiction, and that there is no breach of the bond until such accounting has been had.

3. Because there is no evidence of the breach of the bond sued on.

Which motion was overruled by the Court, and defendant excepted.

The Court charged the Jury, that they must find for the plaintiffs; that they should ascertain the amount of interest on the payments shown, and adding the interest to the principal, find the aggregate amount as damages.

To which charge defendants excepted; and on these exceptions error has been assigned.

JOHN M. GILES, for plaintiffs in error.

E. WARREN, for defendants.

JOHN M. GILES, for plaintiffs in error, submitted the following brief:

1. Lewis, the administrator, was incompetent to prove the payment, by himself, of the trust fund to the guardian. In all cases when the testimony of the witness adduced by the plaintiff, would discharge the witness from the plaintiff's demand, by establishing it against the defendant, he is incompetent. 1 *Greenl. Ev.* §396, *note. Emerton vs. Andrews*, 4 *Mass.* 653. *Hodson et al. vs. Marshall*, 7 *Carr. & P.* 16, (32 *Eng. C. L. R.* 421.) *Nisbet vs. Lawson*, 1 *Kelly's R.* 282, '3.

2. A demand of the guardian to account, made by some one authorized to receive the fund, and a failure or refusal to account by the guardian, should have been shown. There was no attempt to show a waste by the guardian in his life-time; but the proof relied on was merely the evidence of the reception of the fund by him, and it was sought, by this evidence, to cast the *onus* upon his administrator and securities to show what had become of the fund. This is no evidence of a breach—the plaintiffs below should have shown affirmatively a breach of the bond. *Justices of the Inferior Court vs. Woods & Vason*, 1 *Kelly's R.* 88. *Bryant, guardian, and others vs. Owen and Wife*, 1 *Kelly's R.* 374.

3. There was no decree or judgment obtained against the guar-

dian, settling his accounts and ascertaining the amount due to the wards, and until such judgment or decree, no writ can be maintained or recovery had against the securities for the failure of the guardian to account; their liability being *ultimate*, not *primary*. *Stilwell vs. Mills*, 19 *Johns. R.* 304. *Anderson vs. Maddox and others*, 3 *McCord's R.* 237. *Salisbury vs. Van Hoesen*, 3 *Hill's N. Y. R.* 77. *Wallace ads. James*, 4 *McCord's R.* 121. The Statute, (*Prince's Digest*, 445,) is relied on to show that this is not now the rule on this subject in this State; but that Statute does not expressly, nor by any just construction, have any effect upon the rule here contended for. See *Cameron et al. vs. Inferior Court*, (1 *Kelly's R.* 37,) where *Warner, J.* cites and approves of the following cases: *James vs. Anderson*, 4 *McCord's R.* 113. *Braxton vs. Winslow*, 1 *Washington's Va. R.* 31. If the securities of an administrator are only ultimately and not primarily liable, so are the securities of a guardian.

4. There was no breach of the bond shown. *See authorities cited to the second point.*

5. The charge of the Court, directing the Jury to add principal and interest together, and find the aggregate sum as damages, was contrary to our Statute regulating interest on judgments. *Prince's Digest*, 294, '5.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was Nathan G. Lewis a competent witness to prove the payment of $747, by himself, as administrator of Green B. Pinkston, deceased, to Joshua Taylor, the former guardian of the minor children of his intestate? To allow it would be to permit the witness to discharge himself of his liability to the heirs of the estate which he represents—for if he has not paid over this money, he is still responsible to them for it. This principle we consider was settled in *Nisbet vs. Lawson*, 1 *Kelly*, 275. The doctrine there ruled was, that a witness who is liable to an action by the party for whom he is called, in case that party should not recover, is incompetent without a release.

[2.] This was an action by the present guardian against the administrator of the former guardian and his securities, upon their bond; and the only evidence adduced to support it, was the receipt of certain sums of money by the deceased guardian. Is this, *per se*, a breach of the bond?

This point has been several times discussed before this Court. In the *Justices of the Inferior Court vs. Woods & Vason*, (1 *Kelly*, 84,) it was distinctly held, "that the *reception* of money by the guardian is no *breach* of his bond; it is his *duty* to receive it;" "that the burden of proof is on the plaintiff to show *affirmatively* some act of waste or mal-administration on the part of the guardian;" and that "the reception of the money by the guardian would not be sufficient to sustain a suit on the bond, without farther proof to establish a forfeiture." And in *Bryant, guardian, &c.* and *Beall, executor of Pye, vs. Owen and Wife*, (1 *Kelly*, 355,) this Court say, "The law makes it the duty of the guardian to inquire into and take charge of the estate of his ward; to *receive* and *keep* his effects. If the guardian is not appointed for this purpose, then the appointment of a guardian at all, is an act of redeemless folly. Moreover, the Statute of 12 *Char. II.* makes it the duty of guardians to take the *custody, tuition, and management of the goods, chattels and personal estate* of children committed to their care. This Statute is of force in Georgia. *Schley's Digest*, 243. We think then, it is established by these views, and the authorities which sustain them, that it is the duty of the guardian to *receive* the effects of the ward, and if he fails to collect and *receive* them, he commits waste. If these things are so, can the *receipt* of the effects be evidence of waste at the same time? The thing is not only unreasonable but absurd."

Thus it will be perceived, that the question under consideration is most fully covered by the previous adjudications of this Court. In this case, Joshua Taylor, the former guardian, *received* the money and died. He alone was entitled to its custody, to the time of his death. It does not appear but that it came into the hands of his administrator, and if so, he and his securities, and not the securities of Taylor, are liable for it.

It may be enough for the present disposition of this point to stop here, but I feel it due to myself to *intimate*, that if necessary, I should be prepared to maintain that, ordinarily at least, suit cannot be brought on an administrator's or guardian's bond against the sureties, until the principal has been first called to account, either before the Ordinary or some other Court of competent jurisdiction.

[3.] I am aware that the Act of 1820, is supposed to control this matter. I once entertained that opinion myself—I now think differently. That Statute was passed to authorize suits to be instituted against securities to executor's, administrator's and guardian's bonds, in the same action with the principal thereto. The preamble recites, that it had been decided by the Superior Courts of this State, that suit cannot be instituted against any security or securities to any executor's, administrator's or guardian's bond, until the principal or principals to such bond shall have been sued to insolvency, whereby great injury to the interest of heirs, distributees and others may accrue. For remedy whereof it is provided, that securities to all such bonds shall be considered as joint, or joint and several obligors (as the case may be) with the principals in said bond, so as to authorize any heirs or others concerned, to sue principal and security in the same action. It is farther provided, that the principal, if within the State, shall be first sued, or shall be joined with the security, and if the latter be distinguished as principal, that the execution shall issue against the parties accordingly, and be first levied on the property of the principal, and if that is insufficient to satisfy it, it may then be collected out of the security, who is to have the use and control thereof, for the purposes of remuneration. *Prince*, 445.

What was the mischief which the Legislature intended to correct? The Courts in this State, it seems, had decided, according to what I take to be sound law, that you had first to get a judgment against the executor, administrator or guardian, *as such*, and upon a return of *nulla bona* to that, the heir, distributee, creditor or other person concerned, had next to proceed against the representative and prove that he had wasted the assets, before the party would be entitled to an action against the sureties. The first judgment was *de bonis testatoris*—the second, *de bonis propriis*. *Lining vs. Giles*, 2 *Const. R. Tread.* 720. *Braxton vs. Spotsylvania*, 1 *Wash. Va. R.* 31. *Call vs. Ruffin*, 1 *Call. R.* 333, *and Gordon's Administrators vs. Justices of Frederick*, 1 *Munf.* 1. *Lyles vs. Caldwell*, 3 *McCord*, 225. *Ordinary vs. Maddox*, *Ib.* 237. *Cureton vs. Shettor*, *Ib.* 412. *Magwood vs. Butler*, *Harper's C. R.* 264. *Glenn vs. Conner*, *Ib.* 267. *Wallace vs. James*, 4 *McCord*, 121.

The Act of 1820, then, intended to save one suit, and to allow the securities to be joined with the principal, not in the *first* in-

stance, when he is proceeded against *representatively*, but in the *next* action, when he is charged *personally* with the *devastavit*. And we take this to be its true intent and meaning.

But I will not pursue this subject farther. In *Cameron vs. the Justices of the Inferior Court of Richmond County*, (1 *Kelly*, 36,) the same views were strongly intimated by this Court. I will not say that a case might not be made, either in Equity or at Common Law, where this order of proceeding would not be dispensed with. And of one thing I am pretty clear, namely: that the trustee might be summoned before the Court of Ordinary, whose peculiar province it is to take cognizance of such matters, and such proceedings be there had, as would stand in lieu of a formal suit against the party, and lay the ground work for the subsequent action on the bond.

[4.] The Court charged the Jury, that in making up their verdict, they should calculate the interest that had accrued on the several sums paid the former guardian, add this to the principal, and that the aggregate amount would be the measure of damages; and this instruction is complained of.

Nisbet and Lawson, already cited, is a precedent to control this exception. This Court there held, and we think rightly, that in an action of assumpsit by the principal against his attorney, for money had and received, that the measure of damages was the amount of money collected, with the interest thereon from the time it was received.

[5.] It is assumed in the argument, that this rule would contravene the second section of the Act of 1814, to establish a uniform mode of calculating interest in this State, and to prevent the collection of compound interest, and which declares that, "in all cases where judgments may hereafter be obtained, all such judgments shall be entered up for the principal sum due, with the interest, but no part of such judgment shall bear interest, except the principal which may be due on the *original debt*, any law, usage, custom or practice to the contrary notwithstanding." *Prince*, 294, 295.

It is quite manifest that this clause of the Statute refers to judgments which are obtained on promissory notes and other liquidated demands bearing interest. It speaks of the "*original debt*." It never could have been intended to apply to actions on penal bonds or assumpsit, where the recovery is in damages. Suppose

trover were brought for a note which had been converted by the defendant? It will not be contended, I apprehend, that the judgment should be for so much principal and so much interest. As in debt on a penal bond and assumpsit, the finding would be for a gross amount as damages. We approve, therefore, of the directions given to the Jury by the presiding Judge, as to the measure of damages; but differing as we do from the judgment rendered at the Circuit on the other two points, it must be reversed and the cause remanded.

No. 44.—HENRY GARLAND, plaintiff in error, *vs.* THOMAS D. MILLING, executor of David T. Milling, deceased, defendant.

[1.] When the Court below fairly submits the facts in the case, to the consideration of the Jury, and there is no error in law in the charge of the Court, this Court will not disturb the verdict of the Jury.

[2.] The Statute of Limitations does not commence to run against the estate of a deceased testator, until probate of the will and *qualification* of the legal representative of such estate.

Trover, in Upson Superior Court. Tried before Judge FLOYD, October Term, 1848.

On the 6th day of December, 1826, David T. Milling made his last will and testament, which was admitted to probate in the Court of Ordinary of the County of Upson, on the 7th day of September, 1829.

In said will there is this clause: "It is my will and desire, that if my wife should marry another husband, that he shall give security for the performance of this my will."

The testator appointed his wife, Mariah Milling, his executrix, and his sons, John and Thomas Milling, were to join in the executorship, on their arrival at the age of sixteen.

At the September Term, 1829, of the Court of Ordinary of Upson County, Mariah Milling was qualified, and letters testamentary granted her by the Court.

At the November Term of said Court of Ordinary, 1830, it

was ordered by the Court—" That in compliance with the will of David T. Milling, that Daniel Walker, who had intermarried with Mariah Milling, should give bond in the sum of $8,000, with security, for the execution of the will of the said Milling."

At the September Term of the Court of Ordinary, 1835, the Court granted an order to Daniel Walker, to sell certain tracts of land belonging to the estate of his testator, the said David T. and took a bond, with security, for a true account of the sale of the same, and to pay over the proceeds of the same, to the minors of David T. Milling.

At the May Term, 1843, of the Court of Ordinary of Upson County, the Court passed a *rule nisi*, calling upon Daniel Walker to show cause, at the next term of the Court, why his letters of administration, with the will annexed, on the estate of David T. Milling should not be revoked. 1st. Because his bond could neither be found of record or otherwise. 2d. Because he had made no returns, either of inventory, appraisement or of sale, and that he had wasted and mismanaged the estate.

At the September Term, 1843, of said Court, Walker having made no showing to the *rule nisi*, it was, on motion, ordered that his letters, if any he had, be revoked. On the 3d October, 1843, the Court appointed John J. Cary, administrator *de bonis non*, with the will annexed, of the said David T. Milling. At a subsequent term of the Court, John J. Cary was dismissed and his letters revoked.

At an adjourned term of the Court of Ordinary, held on the 9th February, 1846, Thomas D. Milling, one of the sons mentioned in the appointing clause of the will, was qualified as executor of the will, and letters testamentary granted him by the Court.

The said Thomas D. Milling, as the executor of David T. Milling, deceased, on the 28th July, 1846, commenced an action of trover in Upson Superior Court, against Henry Garland, for the recovery of a negro boy Frank. The defendant filed the general issue, and the Statute of Limitations. At the October Term of Upson Superior Court, 1848, the cause came on to be tried on the appeal, when the plaintiff offered in evidence an exemplification from the Court of Ordinary of said County, containing the will of David T. Milling, deceased, and the actings and doings of the Court of Ordinary of Upson County, as above set forth; also, the letters testamentary granted to the defendant in error; also,

a bill of sale from Robert Pudgen to the plaintiff's testator, for the boy Frank, dated the 24th January, 1826. The defendant admitted that the boy Frank was in the testator's possession when he died, and plaintiff closed his case.

The defendant offered in evidence two bills of sale to the boy Frank—one, dated the 23d February, 1831, from D. Walker, as executor of the estate of D. T. Milling, in right of his wife, to Jonathan Bonner; the other, dated the 3d day of March, 1835, from Jonathan Bonner to the defendant, Henry Garland.

The plaintiff admitted the delivery of the boy Frank, by Walker, to Bonner, and by the latter to Garland, on the 3d of March, 1835, and that he had been in possession of Frank ever since.

The Court charged the Jury on the Statute of Limitations, that Daniel Walker could not be considered the executor of the estate of Milling, until he had given bond in compliance with the provisions of the will, and if the Jury should determine, from the testimony, that he had not given said bond before he sold the negro, that then and in that event the holding of Jonathan Bonner and Henry Garland was not adverse, there being no person in being entitled to sue; and that the Statute of Limitations could not run in favor of said purchasers, unless the Jury should be of opinion that four years had elapsed, from the grant of letters of administration to Cary. And that if the Jury were of opinion, from the evidence, that Daniel Walker had not given the bond provided for by the will, then and in that event, if the Jury should find that four years had not elapsed from the appointment of Cary, as administrator "*de bonis non cum testamento annexo*," to the commencement of said action of trover, that then the Statute of Limitations had not run, and the plaintiff must recover. To both of which said instructions, the defendant, by counsel, excepted, and assigned errors thereon.

Poe & Nisbet, for plaintiff in error.

An executor, unlike an administrator, derives all his power over the estate from the will. 3 *Bac. Ab. Ex'r and Adm'r, E.* 9 *Wendell*, 302, '3, *Valentine vs. Jackson.* 2 *Hill's N. Y. R.* 181, *Babcock vs. Booth.*

An executor may, *before probate*, do almost every thing which he can do afterwards. 3 *Bac. Ab. Ex'r and Adm'r, E. Toller*, 46. 1 *Salk.* 306. 1 *Kelly*, 343.

And he may sue for property of the testator in his own name, which has been taken from him tortiously, without describing himself as executor. 4 *Hill's N. Y. R.* 57. *Patchen vs. Wilson*, 9 *Wend.* 303. For this is an act beneficial to the estate.

And he may *sell* and do many other acts before probate. 1 *Kelly*, 343. *Harper's Const. R.* 6. *Ibid*, 116. 5 *Cranch*, 358, 361.

And in the Supreme Court of Appeals of Virginia, and that too, under an express Statute, requiring executors, in all cases, to give bond and security, it was held that an executor, before probate, may sue to prevent the Statute of Limitations from running. *Monroe vs. James*, 4 *Munford's R.* 199, *and supra.*

And if before probate, *a fortiori* before giving bond.

2. If the Court should doubt whether Walker could be considered as receiving his appointment of executor from the will, we then refer to the plaintiff in the action, Thomas D. Milling, who was expressly named executor, at the age of 16 years.

Before the Statute of 31st Geo. III. an executor at 17, might take probate and maintain an action as executor. *Toller*, 443, 445.

This Statute of Geo. III. not being of force in Georgia, the law in this State remains as it was before the enactment of that Statute. And as it appears from the testimony, that Thomas D. Milling had arrived at the age of 17, more than four years before the institution of his suit, he is therefore barred by the Statute of Limitations.

But the Court of Ordinary had recognized said Walker as executor, and held him out to the world as such; and in the year 1835, (*eleven years before the institution of this suit,*) the said Court received from said Walker a bond conditioned, (among other things,) for the faithful discharge of his duty *as executor* of said estate.

And by the doctrine of relation, (even though there should have been no bond given by Walker, before he sold the negro,) this bond will be held to refer back to that period, and cure the omission, should it be considered in that light, and either perfect the title to Bonner and Garland, or constitute their possession as adverse. 4 *Munford*, 196. 2 *Johns. R.* 510. 3 *Cowen*, 75. 3 *Pr. Wms.* 350.

GIBSON & CAREY, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

The error assigned in this case is to the charge of the Court to the Jury, with regard to the Statute of Limitations, relied on by the defendant. For the plaintiff in error, who was the defendant below, it is insisted, that the records of the Court of Ordinary of Upson County, show *conclusively*, that Daniel Walker, after his intermarriage with the executrix of David T. Milling, was duly qualified as such executor, and that he gave bond and security, as required by the will and the Act of 22d December, 1828, the will of the testator not having effect until his death, which occurred subsequent to the passage of that Act; and also, as it appears from the same record, that Thomas D. Milling, one of the executors named in the will, was qualified on the 9th February, 1846, then being, as the record recites, twenty-one years old; that he must have been seventeen years of age more than four years anterior to the commencement of the present suit, and could, as such executor, have instituted an action for the recovery of the negro; that the estate of David T. Milling, the testator, was represented, either by Walker, who intermarried with the executrix, or by Thomas D. Milling, more than four years before the commencement of the present action. For the defendant in error, it is insisted that, by the terms of the will, and the provisions of the Act of 1828, which operated upon the will, as it did not take effect until after the passage of that Act, the letters testamentary granted to the widow and executrix of the testator, abated, and that there was no legal representative of the estate of David T. Milling, against whom the Statute of Limitations could run, until the appointment of Cary, as administrator, with the will annexed; and from that time to the commencement of the suit, four years had not elapsed. In *Doe ex dem. Conyers vs. Kennon*, (1 *Kelly*, 379,) this Court held, that the Statute of Limitations did not commence to run until administration had been granted on the estate of the intestate. *Doe ex dem. Cofer vs. Flanagan*, (1 *Kelly*, 538,) to the same point.

David T. Milling, the testator, died, and his widow qualified as executrix, subsequent to the passage of the Act of 1828. The

second section of that Act declares, "If any widow or *feme sole*, after obtaining letters testamentary of administration, or of guardianship, shall marry, the letters so granted shall abate, during the coverture; but the husband may be entitled to such letters, upon his giving bond and security, and taking the oath required by law; or the Court of Ordinary may, in their discretion, grant the same to any other person entitled thereto, according to the laws of this State." *Prince*, 252.

When Walker intermarried with the widow and executrix of the testator, her letters testamentary abated; and to constitute Walker the representative of the testator's estate, it was necessary for him to give bond and security, and take the oath required by law to execute the will. Did Walker ever take the oath, as required by law, and give bond and security? The argument for the plaintiff in error is, that the records from the Court of Ordinary afford conclusive evidence that he did, and that he was recognized and treated as executor by that Court. Whether he did qualify and give bond and security, were questions of *fact* for the consideration of the Jury, and we think, were very properly submitted by the Court to them.

[1.] Although the records do show very strong *presumptive* evidence that Walker was the executor, and was recognized as such by the Court of Ordinary of Upson County, and if we had been the Jury instructed to find the facts, we might have been of the opinion that bond and security had been given, which had been lost or mislaid; and if the Jury in this case, under the charge of the Court, had found by their verdict, that Walker had been duly qualified as executor, and given bond and security, we should have been entirely satisfied with their verdict, and felt no inclination to disturb it, as being against evidence; but it was the exclusive province of the Jury to find the truth of the facts submitted to them by the Court, according to their judgment and view of the evidence; and having so found, we will not disturb their verdict, although we might have been equally as well satisfied with it, had they found in favor of the defendant in the Court below. The Court violated no principle of law, in submitting the *facts* to the consideration of the Jury.

[2.] Did the Statute run against Thomas D. Milling, on his arrival at the age of seventeen years, and before his qualification as executor? The argument for the plaintiff in error is, that it did, be-

cause he could have instituted suit before probate of the will. It is true that an executor can do many things before probate of the will by the Common Law, for the *benefit* of the estate. He may *commence* actions in right of the testator, but he cannot *declare*, before probate of the will, for the reason to enable him to assert his claim, in right of his testator, in a Court of Justice, he must produce a certified copy of the will, under the seal of the Probate Court, or the letters testamentary. *Toller's Ex'rs*, 46.

Under our practice, an executor might, we think, institute an action before probate of the will, for the protection of the estate, provided the will is admitted to probate, by the first term of the Court to which the suit is brought, so as to enable him to make *profert* of his letters testamentary, at that Court; and when profert thereof shall be so made, such letters testamentary will have relation back to the time of suing out the writ. *Toller*, 47. But while we admit an executor *may* institute a suit for the *protection* of the estate of his testator, we are not willing to hold that he *must* do so, or his right of action be *barred* by the Statute of Limitations until probate of the will, and the qualification of the executor.

By the 5th section of the Act of 1792, every executor or administrator, with the will annexed, *at the time* of proving the will or granting administration, shall take an oath to well and truly execute the same. *Prince*, 227. In our judgment, the safest and best rule to adopt and establish, in relation to the time when the estate of the testator shall be considered as represented, so as to allow the Statute of Limitations to commence running against it, is from the time of the probate of the will and the *qualification* of the executor or administrator. When the executor qualifies to execute the will, it is an acceptance of the trust devolved upon him by the testator, and he is then clothed with official authority to represent the same, and the Statute will commence to run, from the time of such qualification.

Let the judgment of the Court below be affirmed.

No. 45.—ROBERT DUKE, administrator, &c. plaintiff in error, *vs.* WM. W. TRIPPE, defendant in error.

[1.] Writ of error dismissed—

1st. Because notice of the signing and certifying of the bill of exceptions was not filed in the Clerk's office of the Court below.

2d. Because the Clerk of the Court below did not certify and send up to the Supreme Court, a transcript of the record and the bill of exceptions, within the time prescribed by law and by the 31st Rule of the Court.

[2.] A construction given to the 6th section of the law organizing the Supreme Court.

Motion to dismiss the writ of error.

HALL for the motion.

McDONALD, contra.

By the Court.—NISBET, J. delivering the opinion.

The parties joined issue in this case, with a protestation on the part of the defendant in error, and he moved to dismiss the writ upon several grounds.

[1.] The writ was dismissed—

1. Because notice of the signing of the bill of exceptions was not filed in the Clerk's office of the Court below.

2. Because the Clerk of the Court below did not certify and send up to this Court, a transcript of the record and the bill of exceptions, within the time prescribed by law and by the 31st Rule of this Court.

Both of these questions have been before this Court more than once, and we had hoped were known to the bar as no longer open. Having been asked by the counsel for the plaintiff in error, to reconsider our previous ruling of them, upon argument had, we find no reason to vary from what has been the practice of this Court heretofore. That there may be no controversy about these points in the future, and from respect to the counsel for the plaintiff in error, we now record the reasons upon which these questions are settled. The Statute organizing the Supreme Court determines them. The language of the Act is too plain to

admit of two constructions. It is as follows: "When such bill of exceptions shall have been signed and certified by the Judge of the Superior Court, and such bond, with security, shall have been given, or recognizance with security entered into, and cost paid, notice of the signing of such bill of exceptions shall be given, if in a criminal cause, to the Attorney or Solicitor General, and in civil causes in Law or Equity, to the adverse party or his counsel, within ten days after the same shall have been done, and *shall be filed in the Clerk's office where such bond or recognizance has been given, immediately thereafter*, and a copy of such notice being served by a Sheriff, Constable or Attorney of the Superior Court, and filed in the Clerk's office, with the bill of exceptions, it shall be the duty of the Clerk of the Superior Court below, to certify and send up to the Supreme Court, a complete transcript of the entire record of the cause below, duly certified under his hand and seal of office, and also the bill of exceptions, *within ten days after he shall have received the original notice* with the return of service thereon." *Act of December*, 1845, *5th sect.* 1 *Kelly*, 7. An analysis of this clause will show the following results: It requires that *notice of the signing of the bill of exceptions* shall be given to the Attorney or Solicitor General in criminal causes, and in civil causes at Law or in Equity to the adverse party or his counsel, within ten days after the same shall have been done, that is, after the bill shall have been signed. It also requires *that such notice shall be filed in the Clerk's office below where the recognizance or bond has been given.* The Statute contemplates *written notice*, for none other could be filed in office. And by enacting that it shall be filed, it unquestionably meant that the *written notice* should constitute an original part or parcel of the record, and should be transmitted with the transcript to the Court above. Whether with reason or without reason, the notice is required to be filed. This is yet more manifest from the fact, that the Clerk is required to certify and send up the transcript and bill, within ten days after he shall have received the *original notice*, with the return of service thereon. The working of this part of the Act is not difficult of comprehension. The business of the plaintiff in error is, within ten days from the signing of his bill, to make out a notice to the adverse party, and to serve him with a copy, by his attorney, the Sheriff or Constable, and to enter such service, and its date, on the original, and hand it to the Clerk, to remain of file

in his office. When that is done, and not before, the Clerk becomes bound to transmit the record and bill within ten days. In relation to the service of the notice, we have held that an acknowledgement of service or waiver will be a compliance, because to be served is a personal privilege. But such waiver or acknowledgment has never been held to dispense with the filing of the notice. It is made, I repeat, by law, a part of the record, an indispensable part of the pleadings in the case. It might, indeed, be a serious question, whether to a process of *mandamus*, or to an action on his bond for default in the duties prescribed by this Act, it would not be a sufficient reply for the Clerk, that this notice was not filed. I express no opinion, however, on that point. The single point just now is, whether the filing of the notice is necessary. The law is so written, and we hold it obligatory upon us.

The other ground upon which this writ was dismissed is, that the Clerk did not certify and send up the record and the bill within the time prescribed by law. *The fifth section of the Act of* 1845, requires the Clerk to send up, duly certified under his hand and seal, the record and the bill of exceptions, "within ten days after he shall have received the original notice with the return of service thereon." The date of the Clerk's certificate, in this case, is not within the time. The mandate of the law is very explicit. It prescribes a specific duty. It defines the time within which he shall certify and send up the record and bill. After that time he cannot legally certify and send them up. The Clerk's certificate must show the time when the official transmission is made. His certificate is the official transmission. The manual tradition may be made at any time before the term. If his certificate is without date, or if it shows a date (as here) beyond the ten days, it is irregular. The Clerk has no discretion about it, nor have we. Declaratory of the Act, and in accordance with it, is the 31st Rule of this Court. In reply to these views, it is not contended but that the law is written as I have stated it to be, but it is insisted that this Court ought so to accommodate the law upon these points to its practice, as to prevent the dismissal of causes for clerical defaults—to put such a construction upon the law as will exclude no party from a hearing before it. The enormous injustice of turning a party away unheard from our door, has again and again been presented *as argument* to relax the law. We

shall listen to no such appeals. Our sympathies are not the rules of our judicial action. It is our duty and it is our pride to abide the law. If it is wrong, let the Legislature amend it. That is their prerogative—it belongs not to us. We repudiate judicial legislation. We shall endeavor, whilst we sit here, to avoid the errors into which the Judiciary in England and elsewhere has fallen, of engrafting upon important yet simple Statutes, a vast body of unwritten law, to the delay of justice, the multiplication of suits, and sometimes to the confounding of lawyers and Judges. Our organic law is simple, our rules of practice are few, and we shall try to keep them so. The requirements of the Act and of the rules are easy of compliance. A little attention to the details of our practice, will ensure a hearing before this Court; when it is denied, it is the fault of those whose duty it is to see to it that the law is complied with. We shall endeavor to do our duty, and we shall also endeavor to see to it that the law is complied with by all those who have duties to perform under it. The chief excellency of the Supreme Court organization, consists in its insuring certain and early hearings, and in the simplicity of its machinery. That the administration of justice here should be certain and speedy, and attended with little complexity in pleading, and small cost to parties, were objects anxiously desired and carefully provided for by the Legislature. It has been our good fortune thus far, to have obeyed the great mandate of the Constitution, to try every cause at the first term, unless it is continued for Providential cause. No class of men know, with a juster appreciation of its value, than do the learned members of the legal profession, the importance of the idea of *fixed general rules*. Rules to be useful must be general and they must be permanent. They cannot be relaxed to avoid hard cases. A fluctuating rule of law or of practice would injure ten, where a strict enforcement of a steadfast rule would injure one. When known to be invariable, all parties will conform, and when known to be fluctuating, many will take the chances of escape from the consequences of carelessness or neglect. The vigilant party is the losing party under laws or a practice which is unsteady. Rules have no prescription unless uniform. The citizen knows not how to regulate his conduct, nor the lawyer his pleadings or his counsel, unless the Courts will abstain from springing upon them new rules or new laws under the guise of construction.

[2.] It is also insisted, that errors in the pleadings, growing out of the acts of the Clerk, for example, the very defect protested against in this case, to wit: a failure to certify and send up the record and bill within time, are subject to correction under the 6th section of the Act. Let us examine it for a moment. It provides, that if any Judge of the Superior Court shall refuse to certify a bill of exceptions, when properly tendered, *or if any Clerk shall fail or refuse to send up a transcript of the whole record in any cause, according to the provisions of this Act*, or he or any Sheriff shall refuse or neglect to perform any duties imposed upon him by this Act, the Supreme Court, while in session in any district in this State, may issue a writ of mandamus to such officer, and enforce obedience thereto by attachment; and in all such cases the party applying for such writ shall not lose his remedy, but may proceed as if the time limited in the Act had not expired. 1 *Kelly*, 8. It was obviously necessary that this Court should be clothed with power to compel the Judges of the Circuit Courts, and the Clerks and Sheriffs, to do what the law requires them to do. Accordingly, the Legislature has made them amenable to it by mandamus and attachment. But in what cases are they so amenable? Only when they refuse, or for any cause fail to act. If they act at all, however erroneously, they are not, according to our construction of the sixth section, liable to the process of mandamus. The law contemplates contumacy, resistance to the law and the authority of this Court. And if, in point of fact, there is no contumacy, yet where there is no action, we will presume contumacy. If, for example, from absolute physical inability to transcribe and send up the record, growing out of the amount and pressure of business, (a case that has occurred,) the record is not sent up and no attempt made to send it up, we will grant a mandamus. The law does not recognize any such inability—the law declares his duty, and *he must do it*. He must do his duty—he must send up the entire record, *according to the provisions of this Act*. The latter clause, it is said, is a key to this whole section, and it is insisted, that if he does send up a record, but sends up an imperfect one, or sends it up after the time limited, he does not do his duty according to the provisions of the Act, and that in such case the plaintiff in error shall not lose his remedy; but that the case may be delayed until, by writ of mandamus, the defective return may be corrected. So far as an imperfect record

is concerned, our rules provide for its correction by certiorari. 18*th Rule of Court.* It is true, that the Clerk is required to send up the record according to the provisions of the Act; still he is liable to mandamus only when he is contumacious in relation to any duty required *by the provisions of the Act.* This provision does not relate to the manner of doing his duty, but extends his liability to all duties devolved upon him by the Act. To be more definite, he is required, by the provisions of the Act, to send up the entire record, under his hand and seal, with the bill of exceptions, and he is required to do this within a limited time; now, if in relation to any one of these requirements, he is contumacious, he is liable to the writ of mandamus. This is unquestionably the meaning of this section, and this meaning is manifest from several considerations. If there is imperfection in the manner of sending up the record, when it is attempted, this Court cannot infer contumacy or resistance to the law, and such imperfections, derelictions or omissions, must be put upon the footing of errors in the pleadings. Now, suppose that it were true, that the Legislature had directed that these things might be amended by the writ of mandamus, what a curious thing would not that be in the science of jurisprudence! It would be something new under the sun—something grotesquely unique. The ten thousand errors to which pleadings are heir, corrected by mandamus! Throughout all the range of jurisprudence, pleadings are as much subject to law as rights. Remedies, the manner of asserting rights, are subject to rule, or to law. It is a thing universally conceded, that parties must seek these remedies according to law—the regularity of the pleadings is to be tested by general rules—by them they stand or fall, and if a record comes to us illegally certified, the case falls *by the mandate of the law.* Is there any novelty, any thing strange, in this? All over the civilized world, parties are turned out of Court because of errors of this kind. The requirements of the law, as to the manner of bringing cases into this, into all, Courts, protect the rights of both parties. But again, if this construction be allowed—if all such defects are amendable by mandamus—the result would be interminable delays and remediless confusion. There might be a defect in every case—many defects in each case. A writ in each instance of irregularity, a return, an issue, a judgment, and then, perhaps, an attachment to enforce it. This Court would stagger and fall and

sink under such pressure. It would incur, and it would deserve, a forfeiture of public confidence. But the most conclusive argument against this construction, is this: such a construction would make the law repugnant to the Constitution. Such a construction could not be enforced without delaying the trial of causes beyond the first term. Such defects as I am considering, cannot be brought regularly to the knowledge of this Court until the term to which the case is returnable; and in the nature of the case, a mandamus could not then issue and be determined without delaying the case at least one term. Now, the Constitution requires the Supreme Court, "at each session in each district, to dispose of and finally determine each and every case on the docket of such Court, at the first term after such writ of error brought; and in case the plaintiff in error in any such case, shall not be prepared at such first term of such Court after error brought, to prosecute the same, unless precluded by some Providential cause from such prosecution, it shall be stricken from the docket, and the judgment below shall stand affirmed." *Prince*, 909. Our construction of the 6th section is in conformity with the Constitution, and both the law and the Constitution may stand under it; the other construction is in conflict with it, and if it were the true one, we should be compelled to force the law to yield to the Constitution. Nor is a dismissed party remediless, for the officers and their sureties are liable to them.

To carry into effect the 6th section of the Act, as we understand it, our 32d Rule was adopted. This rule neither enlarges nor restricts the 6th section of the law. It prescribes the *manner* in which the privileges of that section may be enjoyed. It makes no new law—it repeals no existing law. That rule, and all our rules, are the law of this Court, as all rules adopted by Courts of Justice are, when not in conflict with, and which add nothing to, the laws of the land. Parties are bound by them. It is incident to every Court of record, to adopt rules of practice which do not contravene the laws of the land. 1 *Peters*, 604. 3 *Binn.* 277. 4 *Yeates*, 361. 3 *S. & R.* 253. 3 *Binn.* 417. 8 *S. & R.* 336. 2 *Mis.* 98. However, our organic law expressly empowers this Court to establish rules of practice. 1 *Kelly*, 10.

Let the writ be dismissed.

No. 46.—WILLIAM E. POTTS and others, caveators, plaintiffs in error, *vs.* ALONZO P. HOUSE, executor, defendant.

[1.] On appeal from an order of the Court of Ordinary, establishing a will, the burden of proof, as to the capacity of the testator, rests upon the party claiming under the will, and the propounder must go forward on the trial, and is entitled to open and close the argument.

[2.] The opinions of physicians, in relation to the sanity of the testator, are admissible, whether founded on the symptoms and circumstances, as coming within their own observation, or as testified to by others.

[3.] The opinions of the subscribing witnesses to a will, as to the sanity of the testator, are admissible, without stating the facts upon which they are founded.

[4.] The *mere* opinions of witnesses, other than physicians and the attesting witnesses, are not admissible, unless accompanied with the facts on which they are founded; but having stated the appearance, conduct, conversation or other particular facts, from which the state of the testator's mind may be inferred, they are at liberty to express their belief or opinion, as the result of those facts.

[5.] The Court, in its charge to the Jury, should never assume that certain facts are or are not proven; and should the Court feel it to be its duty to intimate its opinion, that there is or is not sufficient evidence to establish a certain matter, it should at the same time instruct the Jury to consider the evidence, and to decide as they shall find the truth to be.

[6.] If a negro interpreter, incapable by law of being sworn, is the only channel of communication between the testator and scrivener who writes the will, and there is no other evidence of the testator's knowledge of its contents, or his assent thereto, than that which is derived through this medium, the will cannot be executed.

[7.] But if the will be written in the presence of the testator, and in a language which he understands, and it is read over to him, and his dictation and approval of the instrument are interpreted by a negro in his hearing, and in the hearing of others interested in its contents, and he signifies no dissent thereto, by signs or otherwise, but on the contrary, is understood to express himself satisfied, the will may be established—especially if it appears to have been made in conformity to the previously declared intentions of the testator, as to the disposition of his property.

[8.] While, as a general proposition, it is true that *affirmative* testimony should outweigh that which is *negative*, yet this rule of evidence does not apply where some of the witnesses swear that the testator could measure corn, calculate interest and attend to his ordinary business, and others that he could not. The testimony, in both cases, is of the same character.

[9.] It is error in the Court to discredit the testimony of *relatives* as such, relationship being a circumstance only, from which the Jury may infer a bias.

[10.] It is error in the Court, in its charge to the Jury, to intimate doubts as to the competency of legal testimony, which has been submitted to them on the trial, it being calculated to weaken its force in their estimation.

[11.] Neither *eccentricity* nor *imbecility* of mind, nor *extreme old age*, nor being *deaf* and *dumb*, whether from birth, or the calamity be superinduced, nor *incapacity to make contracts* for the purchase and sale of property, are sufficient to invalidate a will.

[12.] The words "*non compos*," of unsound mind, are legal terms, and import a total deprivation of understanding. If a testator be *non compos*, his will is a nullity, however just and prudent its provisions.

[13.] If the testator be partially deranged, either as to the legatee or subject-matter of his will, he will be considered as wanting sound and disposing mind and memory, as it respects *this particular will*, however unimpeachable his character and capacity in other respects.

[14.] If the testator has capacity to recollect, discern and feel the relations, connections and obligations of family and kindred, his will shall stand, however capricious or unreasonable its provisions.

[15.] Influence in procuring a will to be made, *to be undue*, must amount to moral coercion; it must destroy the free agency of the testator and constrain him to do what is against his will, but what he is unable to refuse; and it is immaterial whether this undue influence be exercised by a negro or a free white person.

[16.] A verdict manifestly in accordance with the weight of the evidence and the justice of the case, will not be disturbed on account of the misdirection of the Judge; but where material testimony has been excluded, erroneous instructions given by the Court to the Jury, and the proof misstated in summing up the evidence, the verdict will be set aside and a new trial granted.

Caveat on appeal, in Troup Superior Court. Tried before Judge HILL, November Term, 1848.

The issue in this case arose upon a caveat to the will of James Potts, senior, propounded for record. The grounds of caveat relied on were—1st. Incapacity to make a will. 2d. Undue influence exerted over him by a negro woman Charity. 3d. That at the time of making the will, he was unable to articulate any sentence so distinctly as to be understood by the person who wrote said writing, and that said negro woman, Charity, pretended to interpret for him, and directed the items of said paper purporting to be a will.

On the trial of the cause on appeal, in the Superior Court of Troup County, November Term, 1848, the Court ruled that the propounder in the will, was the plaintiff in the cause; to which ruling, counsel for caveators excepted.

The paper propounded, was witnessed by John R. Anderson, Blount C. Ferrell and Thomas T. House. By the first item the negro Charity and her two children were bequeathed to the propounder, Alonzo P. House; and by the second item, Lucy, the mother of Charity, was manumitted or set free, as far as the laws of the State would permit. The other clauses of the will disposed of the balance of the testator's property, among his children and grand-children.

Ferrell, the subscribing witness, testified, among other things, that he wrote the will, and that he could not understand the testator distinctly, and relied entirely on the interpretation of the negro woman Charity and James Potts, jr. who alternately interpreted for him. After it was written, he read it over to the testator, and he assented to it.

Anderson, another witness, agreed with Ferrell, as to the indistinctness of the articulation of the testator.

House, the remaining witness to the will, testified that his articulation was plain enough to be understood. All of the witnesses to the will agreed, as to the capacity of the testator, to make a will.

The counsel for caveators, offered in evidence the testimony of several witnesses, taken by commission, to prove the unsoundness of the mind of the alleged testator; to which counsel for propounders objected, on the ground that they were not experts, and that none but experts, or the witnesses to the will, could testify as to the character and soundness of deceased's mind, and his capacity to make a will and attend to the ordinary affairs of life.

The Court sustained the objection, and counsel for caveators excepted.

The caveators offered in evidence the testimony of a physician of the Botanic practice, and also, Wm. Dougherty, Esq. an attorney of considerable and long practice, to the same point, which was excluded by the Court, on the same ground, and counsel for caveators excepted.

The Court also ruled out the testimony of sundry witnesses, to prove that the negroes of deceased, and especially Lucy and Charity, had, for many years, exercised influence over him. To which ruling caveators excepted.

The Court charged the Jury, "that to make a will valid, three facts must appear—

1st. That the instrument propounded, contained really the wishes and acts of the testator.

2d. That he had capacity to make a will; and,

3d. That he did it freely and voluntarily.

The law and practice of the Courts have laid down the oaths or affidavits to be taken by the witnesses to a will, to ascertain the existence of these facts. In this case, these affidavits have been taken by the witnesses showing these facts, and which must always be done before the paper can be declared the last will and testament of the deceased, and admitted to record as such. It is contended, on the part of the caveators here, that it has not been shown that the paper writing propounded in this case, is the dictation of James Potts, senior, the testator, but that so far as appears, it is the dictation of a negro woman named Charity, and of others who interpreted for the scrivener. On this point, it is the peculiar province of the Jury to determine, but it is the opinion of the Court, and I so charge you, that it is not necessary that the testator should convey to the scrivener his wishes in words, but that he may do so by motions and signs, provided they be not misunderstood, or even through an interpreter, for a man is not debarred the privilege of making his will, because he has lost his speech. If he makes himself intelligible to the scrivener, it matters not *how*; and who the interpreter is, is matter of no consequence. If the witnesses attesting the will are not, (in the opinion of the Jury,) mistaken in the expressed wishes of the testator, and the Jury also believe, from the consistency of the instrument with common sense and with previously expressed determinations of the testator, founded on sensible reasons for his conduct, such instrument may be set up as a will, without the oath of the interpreter.

To apply these principles to the case before us: Mr. Ferrell, one of the witnesses, and also the scrivener, testifies that he could, with difficulty, have understood some of the words the testator said, but he preferred to rely on the interpretation of the negro woman Charity, and James Potts, junior. Another witness, Mr. Anderson, testifies, I believe, that he did not understand anything the testator said.

But Mr. House testifies that he could understand *all* he said. If you believe that old man Potts conveyed his wishes by signs and motions, and through this negro woman and others who understood him, honestly interpreting to the scrivener, then, in

the opinion of the Court, it is sufficient evidence that it is the act of the testator. To illustrate what I mean, I will analogize this case to that of a foreigner. I will suppose a German in our place, who cannot speak English, and who wishes to make a will. Now, we have a citizen who speaks both languages, (Mr. Kener,) and it would be perfectly competent for this foreign gentleman to convey his wishes to the scrivener, and the witnesses to the will, through the medium of Mr. Kener, as interpreter, though Mr. Kener himself should not become a witness to the will, nor be called to testify on admitting it to probate. If then, in this case, you believe that these interpreters understood the testator, and interpreted honestly, (keeping in mind the testimony of House,) it was competent for the witnesses to receive his wishes, and this portion of the case would be sufficiently made out, (provided you be of opinion there was no misapprehension,) This is either the will of deceased, or of the negro, or of the negro and James Potts together, which you will judge. You will next determine the question of capacity.

The law does not recognise degrees in mind—does not look at its vigor, activity or strength, in the absence of any charge of foul play, but at its regularity. Whether weak by nature or reduced by disease or age, to any degree of feebleness, still, if it be regular, does not amount to disorder or derangement, it may make a will. The mind may be reduced, I cannot say how low, yet, if it peers at all above idiocy, disorder or derangement, and is capable of prompting and dictating, it is of sufficient capacity to make a will, in the absence of fraud or coercion. It may seem to be stupid, torpid and inactive at times, yet, if it does not amount to absolute fatuity and disorder in its action, but is still regular and retains the power of volition and dictation, it does not disqualify a man from making a will.

In this case, if there is any evidence that the mind of James Potts, senior, was at any time insane, it has escaped the ear of the Court, and the Court feels bound to charge the Jury, that it was incumbent on the caveators to establish incapacity, to a reasonable certainty, as the law presumes sanity."

On the question of influence the Court charged, that any person, negro or other person, could persuade another to make a will in their favor, by any fair and honest means, which did not amount to moral coercion—and this coercion must be produced

by force, moral or physical, menaces, deceit or fraud, of some kind. The influence and persuasion, to vitiate a will, must so completely and fraudulently overpower the mind, as to prevent it from acting otherwise; must destroy its volition or substitute the volition of another. This influence must be established by the caveators, to a reasonable certainty, before the propounder can be required to repel the charge of its existence. In all the cases read by counsel for caveators, the influence alleged proceeded from the principal legatee in the will. In the case before us, there is no evidence that House ever exerted any influence over the testator; that alleged to have been employed by the negro, does not remedy the defect, and the cases are not strictly parallel. It is all-important, in all cases, that the first suggestings and promptings for drafting a will, should come from the testator, which was not true in the Shankey case. In this case, if the interpreter was instructed by the testator, and the interpreter gave it honestly to the scrivener, the testator, so far as the law presumes, is the first mover in the case.

The Court further charged the Jury, that it was a rule, in considering testimony of witnesses, that a witness who swore affirmatively to a fact, was to be believed before many who swore negatively; as in the case before us, those witnesses who testify that the testator could measure corn, take good care of his property, count interest and attend to his business, were to be believed in preference to those who testified that he could not do these things. The Court charged the Jury, as a further rule, that regard should be had to the relation of a witness to the parties, and the manner of testifying; and that the testimony of witnesses, of only equal credibility, nearly related or connected with the parties in interest, should not have the same weight with the Jury, as the testimony of those who were not so related or connected, and who could have no reasonable bias, and then instanced the case of Mrs. Slaughter in this case, who was shown to be closely related to those who resist the will; and further stated that he admitted her testimony, with great doubt as to whether it was admissible or not. The Court also charged the Jury, that in this case the witness, Mr. House, if the Jury believe him equally credible, who swears that he understood what Mr. Potts said, is to be believed with due deference to Mr. Ferrell and Mr. Anderson, in preference to them as to the factum or execution of the will by the testator. The

Court charged the Jury, that a will obtained by fair persuasion merely, without practising fraud, deception or moral coercion, was good, no matter by whom persuaded—whether negro, white person or any body else.

In each and all of the several charges of the Court aforesaid, on all the questions aforesaid, to the Jury, the caveators, by their counsel, allege error, and excepted to the same.

The caveators, by their counsel, farther excepted to the judgment and opinion of the Court, in ruling out testimony.

And upon these exceptions error has been assigned.

B. H. Hill, for plaintiffs in error.

1. The caveators tender the issue, are the plaintiffs in the case, and entitled to open and conclude.

2. The opinions of witnesses, other than those to the will, as to the capacity of the testator, are admissible in evidence, when accompanied by the facts upon which they are founded. *Rambler vs. Tryon*, 7 *S. & R.* 90. *U. S. D.* 683, *et passim.* 1 *Stark.* 127. 3 *Ib.* 1707, *note* 2. 13 *Ala. R.* 68 *and* 202. 2 *Iredell*, 78. 3 *Hagg.* 574.

3. If a party cross-interrogate a witness, and receive an answer which does not suit him, he cannot then ask the Court to withhold it from the Jury, on the ground that the question was illegal.

4. The Court has no right to tell the Jury that a certain fact is established by the testimony, when that fact is part of the controversy between the parties, and one of the very points involved in the issue, to be determined by the Jury. The Court then erred in telling the Jury that the facts necessary, in law, to make a will valid, had been shown to exist, by the testimony of the witnesses to the will, in this case. The Court also erred, in charging the Jury that Mr. House testified that he could understand all the testator said.

In a case of suspicions of fraud, incapacity, and undue influence, a mere negative knowledge on the part of the witnesses to the will, is not sufficient to establish capacity, volition, &c. *Ingram vs. Wyatt*, 3 *Eccl. R.* 172 *and* 4. 1 *Bailey*, 482 *and* 235. 1 *Const. R.* 200.

5. The Court erred in telling the Jury that he admitted the

testimony of Mrs. Slaughter, with great doubt as to its admissibility, on the ground of her relationship to the parties. Relationship does not affect the competency of a witness. 1 *Greenlf.* §386. 1 *Stark.* 84. *Monroe vs. The State*, 5 *Georgia R.* 85.

6. Witnesses who testified that the testator could not take good care of his property, do not come within the rule of negative testimony, and the Court below erred in placing them within that rule. 4 *Ga. R.* 295.

7. Interpreters should be produced, or accounted for, on offering for probate a will made by interpretation, especially when the correctness of the interpretation is impeached by the issue. Negro slaves are incompetent in law, to testify in any issue between white persons; nor can their acts and sayings be received indirectly, or through a white person. The Jury can consider no evidence for which a slave is relied on as authority. A will made by the interpretation of a slave is void. *Law of Slavery*, 194.

8. A will made by interrogatories, is viewed with jealousy by the Courts. 1 *Eccl. R.* 34. *Swinburn, part* 2, *sec.* 5. How much greater should that jealousy be, when made by interrogatories *through an interpreter!*

9. The law does recognize degrees in mind. Proof of the *execution* of a will by a person of perfect mind, is sufficient to admit it to record. So, a will made by a person of weak, indolent and imbecile mind, may be admitted to record; but in such case, proof of the factum, spontaneity and volition, must be clear and unquestionable. *Ingram vs. Wyatt*, 3 *Eccl. R.* 172 *to* 178. And when the mental debility of a testator is the consequence of age, there is less presumption of the sanity of the testator at the time of the execution of the will, than when the mental malady is ordinary lunacy. 3 *Starkie*, 1702, *note.*

A testable capacity must be such as will enable the testator to dispose of his property with understanding and reason. 3 *Stark.* 1703, '4, '5. 4 *Eccl. R.* 51, *Marsh vs. Tyrrell.*

A party incapable, from imbecility, of managing his own affairs, cannot make a will. *Ib.*

O. A. Bull, for defendant in error.

1. The propounder of a will, is necessarily the pro-movant; occupies the relation of plaintiff in the cause, and therefore, is en-

titled to open and conclude. This is demonstrable from the following considerations:

He is the *actor* in bringing the case into Court.

He may dismiss it at any stage of the proceeding, which the caveators cannot do.

The burden of proof rests upon him.

In the English Ecclesiastical causes, he is always named as plaintiff. *Buckminster vs. Perry*, 4 *Mass. R.* 593.

2. Except the subscribing witnesses to a will, none but experts are competent to testify, as to their opinion of the capacity of a testator. 1 *Phil. Ev.* 290. 3 *Mass.* 330. *Swinburn*, 72. 4 *Conn. R.* 203. They must state the circumstances and symptoms. 1 *Phil. Ev.* 290. 9 *Mass. R.* 225.

The Court should first ascertain whether the witness be an expert, either by examining him or others. 2 *Phil. Ev.* 761. *Wright's Case*, 2 *Russ. & Ry.* 456.

Answers to cross-interrogatories, which are asked in consequence of the direct interrogatories, and made dependent on them, are not admissible, if the answers to the direct interrogatories be rejected. 2 *U. S. Dig.* 215. 1 *Sumner's R.* 451.

When complete justice is done, a new trial will not be granted, either for the rejection of legal, or the admission of illegal testimony. *Garish vs. Beane*, 9 *Mass. R.* 193. *Graham on New Trials*, 6, 7, 8, 9.

In this case, the testimony rejected is of no importance.

On questions of capacity, the Court will rely little on mere opinion, but form its own judgment from the facts and the conduct of the parties. 2 *Eng. Eccl. R.* 99, 100.

3. The rule requiring the interpreter of a witness speaking a foreign language, to be sworn, does not apply to a case like the one at bar. The testator is not a witness, and the only question to be determined is, whether the will was dictated by him, and whether he knew its contents.

The circumstances attending the *factum*, exclude the idea of any foreign dictation.

There is no authority for rejecting the will of one who cannot articulate intelligibly.

"Such as be speechless only, and not void of hearing, if they cannot write, may make their testaments by signs, so that the same signs be sufficiently known to such as be present." *Swin-*

burn, part 2, *sec.* 10. *Godolphin, part* 1, *ch.* 11. 7 *Eng. Eccl. R.* 576, '7.

4. Weakness of mind or partial decay of intellect, does not disqualify from making a will, nor does loss of memory from old age. 3 *Johns. Ch. R.* 158. 3 *Peters' Dig.* 704.

There is no proof of influence in this case, and the charge of the Court on this subject, is therefore immaterial.

"The influence to vitiate a will must amount to moral force and coercion, destroying free agency, and not the influence of affection or attachment, or the desire of gratifying the wishes of another." 3 *Eng. Eccl. R.* 254, 260, 261.

Incapacity is never presumed; it is incumbent on the party asserting it, to establish it by the clearest and most satisfactory proofs. 1 *Wms. on Ex'rs*, 17.

5. Several witnesses testified that he did attend to ordinary business transactions.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an issue of *devisavit vel non*, originating in the Court of Ordinary of Troup County, to try the validity of an instrument purporting to be the last will and testament of James Potts, senior, deceased. That Court having decided in favor of the will, an appeal was entered, and the final trial had in the Superior Court of that County, before Judge *Hill*, in November, 1848. The Jury returned a verdict affirming the judgment of the Court of Ordinary, and declaring that the paper propounded, was the last will and testament of James Potts, senior, deceased.

The issue having been thus found against the appellant, after a long and laborious trial, his counsel has caused the record below to be removed to this Court, and now submits for its consideration and decision, numerous questions arising in the proceedings during the trial, all of which we propose to discuss, though not exactly in the order in which they have been presented in the pleadings and the argument.

It is alleged that the Court below erred—

1st. In holding that, on an appeal from an order of the Court of Ordinary, establishing a will, the burden of proof rests upon the executor, who is therefore entitled to go forward on the trial and open and close the argument.

2nd. In excluding the opinion or belief of numerous witnesses in behalf of the caveators, and among the rest a *physician* and a *lawyer*, notwithstanding it appeared that they had opportunities of knowing and observing the state and condition of the testator's mind, and their opinion or belief was accompanied by particular facts, to which they severally deposed, as the reason or foundation thereof.

After the testimony and argument had closed, the presiding Judge delivered a long and lucid charge to the Jury, in which the law relative to the capacity to make a will, and the employment of fraud and undue influence in obtaining it, were fully discussed, and various items of which are excepted to by counsel for the objectors.

It is contended that the Court erred—

1st. In *assuming* that the subscribing witnesses to the will *had proven* the three facts necessary to its validity, namely: capacity, execution and volition.

2d. In *misstating* to the Jury, that Thomas T. House, one of the subscribing witnesses to the will, testified, that he understood *all* that the testator said, and that, therefore, he was to be believed in preference to John R. Anderson and Blount C. Ferrell, the other subscribing witnesses, as to the execution of the paper; no such fact as the one here assumed appearing by the evidence.

3d. In instructing the Jury that a will, made through the medium of an interpreter, might be established without the oath of the interpreter.

4th. In applying the rule which discriminates in favor of *affirmative* over *negative* testimony, to the facts of this case.

5th. In affixing a legal discredit on the evidence of *relatives*, as such.

6th. In expressing great doubt as to the competency of certain testimony which had been admitted before the Jury.

I have endeavored, in this analysis of the case, to condense and simplify it as much as possible.

[1.] The real question to be decided in both Courts in this case was, whether there was a valid will? The executor and those who claim under it, hold the affirmative. They must not only prove, therefore, that the instrument purporting to be a testamentary paper, was formally executed, but, also, that the testator was of sound and disposing mind and memory. The necessity for

this proof imposes the burthen on the propounder, to begin and close; and when the case is carried up to the Superior Court by appeal, it is to be proceeded with in the same manner as though it had been brought there directly, without having been before any inferior tribunal. The executor and those who claim under the will, are as much bound to establish it in the Superior Court, after the appeal, as they were before the appeal, in the Court of Ordinary. In both they take the affirmative. The *onus probandi* consequently rests upon them, and they are to go forward in discharging that burden. *Hodges vs. Holder*, 3 *Camph.* 366. *Jackson vs. Hesketh*, 2 *Stark. Rep.* 518. *Phelps et al. vs. Hartwell et al.* 1 *Mass. R.* 71. *Buckminster et al. vs. Perry*, 4 *Mass. R.* 593. *Brooks vs. Barret*, 7 *Pick.* 94. 8 *Greenl. Rep.* 42. And this was the rule of the Roman law—*ei incumbit probatio, qui dicit, non qui negat.*

[2.] Whether the ruling of the Court was correct in refusing to permit the witnesses, other than the subscribing witnesses to the will, to give their opinion as to the sanity of the testator, is a question involving considerations and consequences of much delicacy and importance. I have looked with much anxiety into all of the adjudicated cases within my reach upon this point, and the result of this examination is not very satisfactory. It seems to be settled, that physicians are allowed to give their opinion *merely* as to the sanity of the testator, from the symptoms and circumstances which come within their own observation, or as testified to by others. *Hathorn et al. appellants, vs. King, executor*, 8 *Mass. Rep.* 371. *Lessee of Hodge vs. Fisher et al.* 1 *Peters' C. C. Rep.* 163. "If the physician who saw him, and who has given testimony respecting his situation, had had an opportunity to examine his case and to form a deliberate opinion upon it, that opinion, pronounced by a man of his acknowledged professional talents, would have been almost conclusive upon this point." By Judge *Washington*. Again, "*mere* opinions," says Judge *Washington*, "of witnesses as to mental capacity, are entitled to little or no regard, unless supported by good reasons, founded on facts which warrant them. To this, as a general rule, the opinions of medical men may be considered as an exception." 3 *Wash. C. C. Rep.* 587.

[3.] The subscribing witnesses to the will may likewise testify as to the opinion they formed of the testator's mind at the time

of executing the will, the law placing them around the testator to try, judge and determine whether he is *compos* to execute it. *Hayward vs. Hagard*, 1 *Bay*, 335. *Powell on Devises*, 69, 71. *Pool et al. vs. Richardson*, 2 *Mass. Rep.* 330.

[4.] But the opinions of witnesses, other than physicians and the subscribing witnesses to the will, considered *merely* as opinions, are not evidence. *Doe vs. Reagan*, 5 *Blackf.* 217. *Clark vs. The State*, 12 *Ohio*, 483. *Needham vs. Ide*, 5 *Pick. Rep.* 510. This latter proposition, although sustained by the current of authorities, has not commanded universal acquiescence; and the distinction between subscribing witnesses and any others who may happen to be present, is certainly not very obvious. The latter are more likely to be free from bias, which naturally will influence the former to support their attestation. It would seem, therefore, *cæteris paribus*, that the testimony of other witnesses should have more weight on account of their being more indifferent. *Vide Dickinson vs. Barber*, 9 *Mass. Rep.* 227. *McKee vs. Nelson*, 4 *Conn.* 355. 1 *Phil.* 275.

This subject has been frequently before the Courts, but no where perhaps so thoroughly, ably and philosophically handled, as by the late Judge *Gaston*, in *Clary vs. Clary*, (2 *Iredell's Law Rep.* 78.) "The first opinion in the Court below," says the Judge, "to which exception has been taken, is the rejection as evidence of the last clause of the deposition of John Beard, wherein the deponent stated, 'that he was impressed with the belief that, as to her mental faculties, Mary Clary was in the state called childish.' To understand the import of this part of the deposition, it must be taken in connection with what precedes it. The substance of the entire deposition is, that the witness had no acquaintance with Mary Clary, other than such as resulted from one occurrence; that about the year 1826, eleven years before the execution of the deed in dispute, he visited her at Daniel Clary's house, in consequence of a message from said Daniel, and for the purpose of writing her will; that he received her directions with respect to the disposition of her property, and wrote the will according to these directions; that he did not attest the will, but left it to be attested by others; that at this time she appeared to him to be in good health, but he thought her intellect in the state they usually term childish. The objection to

the rejected part of the deposition was, that it gives the *opinion* of the witness upon the state of Mary Clary's mind.

"It is certainly the general rule, that witnesses shall be examined as to facts whereof they have personal knowledge, and not as to those in regard to which they have no personal knowledge, but have only formed an opinion or belief. But this rule necessarily admits of exceptions. There are facts which, from their nature, exclude all positive proof, because they are imperceptible to the senses, and of these no proof can be had except such as is mediate or direct. No man can testify, as of a fact within his knowledge, of the sanity or insanity of another. Such a question, when it arises, must be determined by other than direct proof. The precise inquiry then is, must the evidence be restricted to the proof of other facts, coming within the knowledge of the witnesses, and from which the Jury may draw an inference of sanity or insanity, or may the judgment and belief of the witnesses, founded on opportunities of personal observation, be also laid before the Jury to aid them in forming a correct conclusion? We are not aware of any direct and authoritative decision which supersedes the necessity of recurring to general principles and legal analogies to ascertain what is right.

"In the first place, it seems to us that the restriction of the evidence to a simple narration of facts having, or supposed to have, a bearing on the question of capacity, would, if practicable, shut out the ordinary means of obtaining truth, and if freed from this objection, cannot, in practice, be effectually enforced. The sanity or insanity of an individual may be matter notorious and without doubt in a neighborhood, yet few, if any, of the neighbors may be able to lay before the Jury, *distinct facts* that would enable them to pronounce a decision thereon with reasonable assurance of its truth. If the witness may be permitted to state that he has known the individual for many years; has repeatedly conversed with him, and heard others converse with him; that the witness had noticed that in these conversations he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that in his conduct he was wild, irrational, extravagant and crazy; what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in conversation; what reasonable cause of pleasure or resentment; and what the indicia of sound or disor-

dered intellect? If he may not testify, but must give the supposed silly or incoherent language—state the degrees and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts regarded as irrational—and this without the least intimation of any opinion which he has formed of their character—where are such witnesses to be found? Can it be supposed that those not having a special interest in the subject, shall have so charged their memories with those matters, as distinct, independent facts, as to be able to present them in their entirety and simplicity to the Jury? Or if such a witness be found, can he conceal from the Jury the *impression* which has been made on his own mind? And when this is collected, can it be doubted but that his judgment has been influenced by many, very many circumstances which he has not communicated, which he cannot communicate, and of which he is himself not aware?

"We also think that there is an analogy in the investigation of questions of this kind, and in the investigation of other questions wherein positive and direct evidence is unattainable, and in which the rule of evidence is well established. Of this kind are questions of personal identity and handwriting. Mere opinions, as such, are not admissible; but where it is shown that the witness has had an opportunity of observing the *character* of the person, or the handwriting which is sought to be identified, then his judgment or belief, *framed upon such observation*, is evidence for the consideration of the Jury; and it is for them to give to this evidence that weight which the intelligence of the witness, his means of observation, and all the other circumstances attending his testimony, may, in their judgment, deserve. And why is this, but because it is impossible for the witness to specify and detail to the Jury, all the minute circumstances by which his own judgment was determined, so as to enable them, by inference from these, to form their judgment thereon. And so it is in regard to questions respecting the *temper* in which words have been spoken or acts done. Were they said or done kindly or rudely, in good humor or in anger, in jest or in earnest? What answer can be given to these inquiries, if the observer is not permitted to state his impression or belief? Must a *fac simile* be attempted, so as to bring before the Jury the very tone, look, gesture and manner, and let them collect thereupon the disposition of the speaker or agent?

"In the Ecclesiastical Courts, where questions of sanity and insanity in cases of wills are of frequent occurrence, the practice is to interpose allegations, and admit these allegations to proof, that the general appearance, manners, conduct and deportment of the testator denoted unsound intellect; that he was treated and regarded by his friends and acquaintances as one not in his right senses; and, on the other hand, to receive pleas, and consequently proofs, that he was regarded by his friends and acquaintances as sane; that he was engaged in acts of business, which he conducted without suspicion of unsoundness, and that his general deportment was rational and proper. See *Wheeler vs. Bestford & Alderson*, 3 *Haggard*, 574. In this case it was stated by Sir *John Nicholl*, in pronouncing his judgment, 'there is a *cloud* of witnesses who gave unhesitating *opinions* that the deceased was mad.' He declared, indeed, upon a consideration of all the circumstances of the case, 'their *opinions* are of little weight,' but he did not reject them as inadmissible, nor remark upon them as contrary to the course of the Court. See also the testimony received in the case of *Engleton & Coventry vs. Hingston*, 8 *Ves.* 449.

"It is a well-known exception to the general rule requiring witnesses to testify facts and not opinions, that in matters involving questions of science, art, trade or the like, persons of skill may speak not only to facts, but give their opinions in evidence. It is insisted that, by the terms of this exception, persons not claiming to possess peculiar skill, and all persons upon matters not requiring peculiar skill, are excluded from giving opinions. Certainly the testimony rejected in this case cannot claim to be admitted under this exception, and as we understand the exception, it does exclude *mere opinion* in all cases other than those which are embraced within it. Professional men are permitted to testify to the principles and rules of the science, art or employment, in which they are especially skilled, as general practical truths or *facts* ascertained by long study and experience, and also may pronounce their opinion as to the application of these general facts, to the special circumstances of the matter under investigation, whether these circumstances have fallen under their own observation, or have been given in evidence by others.

"The Jury being drawn from the body of their fellow-citizens, are presumed to have the intelligence which belongs to men of good sense, but are not supposed to possess professional skill, and

therefore, in matters requiring the exercise of this skill, are permitted to obtain what is needed from those who have it, and who are sworn to communicate it fairly. Thus, shipmasters have been allowed to state their opinions on the seaworthiness of a ship, from a survey which has been taken by others; physicians to pronounce upon the effect of a wound, which they have not seen; and painters and statuaries to give their opinion whether a painting or statue be an original or copy, although they have no knowledge by whom it was made. This is mere opinion, although the opinion of skilful men. This none but professional men are allowed to give, in matters involving peculiar skill, and none whatever are allowed to give in matters not involving skill; because, with this exception, the Jury are equally competent to form an opinion as the witnesses, and with this exception, their judgment ought to be founded on their own unbiassed opinion. But judgment founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features or handwriting of others, is more than *mere opinion*. It approaches to *knowledge*, and is *knowledge*, so far as the imperfection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the Jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observations of others.

"It has also been insisted, that there is a difference between the attesting witnesses to an instrument and other witnesses, as to their competency to express an opinion upon the capacity of the maker. Wherever such a difference has been *intimated*, it seems confined to cases of wills, in which it is said, 'the testator is entrusted to the care of the subscribing witnesses; that it is their business to inspect and judge of the testator's sanity before they attest; that in other cases, witnesses are passive, here they are active and principal parties to the transaction.' Now, we can readily conceive why, *prima facie*, it shall be presumed, that witnesses thus engaged, are more observant than others on whom the duty of observation has not been thrown, and also the propriety of the rule which obtains on the trial of an issue of *devisavit vel non*, that all the attesting witnesses, if to be had, shall be produced and examined before the Jury. But we do not see, (and without sufficient reason or clear authority for such a distinction, we cannot

admit it,) why the judgment of any witness, actually founded upon such observation, shall not be received in evidence. It is conceded that the attesting witnesses may express an opinion upon the testator's capacity, because as the law has made it their duty to inspect the testator's capacity, the law presumes that they did observe and judge of it. If observation presumed, be a sufficient ground for receiving in evidence the judgment of witnesses supposed to be thereupon formed, it is not readily conceivable that actual observation is an insufficient ground to warrant respect for the judgment of a witness in fact, formed upon it.

"It has been also objected, that the witness whose belief or opinion of mental capacity was in this case rejected, had not the means of forming such a judgment thereon as was proper to be submitted to the Jury. Unquestionably before a witness can be received to testify as to the fact of capacity, it must appear that he had an adequate opportunity of observing and judging of capacity. But so different are the powers and habits of observation in different persons, that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than that it has in fact enabled the observer to form a belief or judgment thereupon. So it is in the analogous case of handwritings. If the witness declares that he has seen the party write, whether it has been only once or a thousand times, this is enough to introduce the inquiry whether he believes the papers produced to be the party's handwriting? His belief is evidence, the weight of which must depend upon a consideration of all the circumstances under which it was formed. It may be that the judgment of the witness in this case, founded solely upon the occurrences in a single interview, and of which, notwithstanding the general impressions thereby created, he remembers no distinct, marked act of childishness or folly, would have weighed little with the Jury in determining the matter in controversy. But if belief of capacity, founded on personal observation, be evidence, and we think it is, it is admissible, whether the opportunity for observation has been frequent or rare. Whatever might be the weight of the rejected testimony, we hold that the plaintiffs had a right to insist on its being placed in the scales of evidence, and that there was error in the opinion which rejected it."

This extract, we are sensible, has been extended to an unusual length, but it is a just tribute to its intrinsic worth, as well as to

the high standing of its author, who though dead, still speaks and will long continue to speak to the legal world, *as one having authority*. Besides, we feel unusually solicitous perhaps, to assign reasons for our judgment upon all the interesting questions involved in this issue, which will give satisfaction to the parties and to the profession, in a cause, in many of its features, at least, until now, new in this Court.

In *Morse vs. Crawford*, (17 *Vermt. Rep.* 499,) Judge *Bennett* says, "the law is well settled, and especially in this State, that a witness who is not a professional man, may give his opinion in evidence, in connection with the facts upon which it is founded, and as derived from them, though he could not be allowed to give his opinion, founded upon facts proved by other witnesses."

So also in *Lester vs. the Town of Pittsford*, (7 *Vermt. Rep.* 158,) the Supreme Court of Vermont say, "Testimony of opinion may be given, where from the general and indefinite nature of the inquiry, it is not susceptible of direct proof. Thus, upon a question of insanity, witnesses not professional men, may be permitted to give their opinion in connexion with the facts observed by them. But this evidence is always confined to those who have observed the facts, and is never permitted where the opinion of the witness is derived from the representation of others. Upon a question of insanity, for instance, witnesses who have observed the conduct of the patient, and been acquainted with his conversation, may testify to his acts and sayings, and give the result of the observation."

In *Rambler and another vs. Tryon and others*, (7 *Serg. & Rawl.* 90,) the will of Michael Rambler was impeached on the ground of imbecility of mind of the testator, from his childhood to the hour of his death. The execution of the will was duly proved by the subscribing witnesses, who likewise attested the capacity of the testator—that he was of sound and disposing mind and memory. Witnesses were offered to prove certain facts tending to show an extraordinary dulness of understanding, followed up by the opinion of the witnesses, as founded on the facts, who had known Rambler intimately from his childhood to his grave, that he was incapable, from defect of understanding, to make a will. All this evidence was objected to, and the objections overruled and the evidence admitted. "I am at a loss," says Judge *Duncan*, "to perceive any plausible reason to support this objection. I

know not how, otherwise, the alleged imbecility of mind could be proved, than by the evidence of those who grew up with him, who marked his conduct in infancy, in the prime of life and in his decline. The opinion of witnesses, without stating the ground of such opinion, ought not to be received; but when they state facts indicative of want of common intellect, their opinion is always received. The weight it ought to have will depend on the solidity of the reasons assigned for the opinion, and the intelligence of the witness. To confine the proof to the subscribing witnesses to the will, in such a case, would be absurd. The friends who visit him, the physician who attends him, have equal, if not superior, means of information, to the witnesses who may be called on to attest the publication. The will of any man would depend too much on the subscribing witnesses, if no others were deemed competent to testify as to the sanity of the testator. The most spurious instrument would be imposed upon the heir, or the devisee might be deprived of the estate devised, by a conspiracy of the subscribing witnesses. Such conspiracy is not without a precedent in law. *Lovel vs. Jolliffe*, 1 *W. Bl.* 365. Five subscribing witnesses to a will and a codicil, and a dozen of servants of the testator, unanimously swore him to be incapable of making a will. To encounter this evidence, several of his friends, who had frequently conversed with him during a period of four years, deposed to his entire sanity and more than ordinary intellectual vigor. The will was established and the testamentary witnesses convicted of perjury. This evidence was properly received."

In *Gibson vs. Gibson*, (9 *Yerg.* 329,) the Supreme Court of Tennessee emphatically ask, "How can a witness describe the dissociated and flighty conversation of a lunatic, the fear, the horror, the frenzy of his eye? How communicate the influences which mind practises upon mind, if he must not speak of inferences, impressions or conclusions?"

There is good reason, perhaps, why *mere opinions* should not generally be relied on as testimony. For even where witnesses are upright and honest, their belief is apt to be more or less warped by their partiality or prejudice, for or against the parties. It is easy to reason ourselves into a belief of the existence of that which we desire to be true; whereas, the facts testified to, and from which the witness deduces his conclusions, might produce a very different impression on the minds of others. But the wit-

nesses having stated the appearance, conduct, conversation and other particular facts from which the state of the testator's mind may be inferred, they are always at liberty to state their inference, conclusion or opinion, as the result of these facts.

Had the Court admitted the testimony, at the same time instructing the Jury that the facts and circumstances, and not the opinions of the witnesses as to the soundness of Potts' mind, or his capacity to make a will, was the *primary* evidence upon which they must rely in making up their verdict, there might not have been just cause of complaint. But the witnesses on the part of the caveators were not permitted to testify at all as to their opinion or belief. I have scrutinized closely the voluminous testimony adduced on the trial, and find, that in *every* instance, the *facts only* testified to by the witnesses, were allowed to go before the Jury, while the *inferences* derived from these facts were carefully excluded. It is not my business to say what weight this portion of the evidence ought to have; it is sufficient at present to say, it ought to have been received. Mutilated as it was, its force and effect must have been greatly weakened.

In addition to the general objection to the charge as to *capacity* and *undue influence*, the consideration of which we shall reserve to the close of this opinion, several specific grounds of error are assigned, i. e. that the Court erred—

1st. In assuming that not only the *execution* of the will was shown by the subscribing witnesses, but likewise the *capacity* of the testator and the *freedom* of his volition.

[5.] A Judge in the faithful discharge of his duty may, at any stage of the trial, comment upon the evidence, taking care that, in so doing, he does not encroach upon the province of the Jury, in the decision of the facts as they may think proper, in view of the evidence which *they* are to weigh. The duty of a *nisi prius* Judge, in this as in many other respects, is most harrassing and laborious, and the manner in which it is performed, in mere matters of discretion, should not be subjected to the same critical revision as dry questions of law usually are. Still, if the Judge feels it to be his duty to intimate his opinion, that a certain fact is or is not sufficiently proven, it would be better always to instruct the Jury, at the same time, to consider the evidence and to decide as they shall find the truth to be. In *Solarte vs. Melville*, (7 *Barn. & Cress.* 430,) the Court, it is true, refused to grant a new trial

on account of misdirection; yet, Lord *Tenterden*, C. J. said, "We are all, however, agreed, that notwithstanding I did intimate to the Jury my opinion upon the subject, *yet, as I left it to them to exercise their own discretion and to draw their own conclusion from the evidence*, we ought not to disturb the verdict." So, in *Gardner vs. Picket*, (19 *Wend. R.* 186,) *Cowen*, Justice, said, "The Judge's charge that there was not sufficient proof to show any assignment of the judgment to Wood, was a mere expression of opinion, *which he still left to the Jury*. He had a right to give such an opinion, *especially with such a qualification*." When we look to the charge which was objected to, we find that the presiding Judge expressly submitted the question to the Jury, about which he expressed his opinion, and *instructed them to consider the whole evidence in relation to it and decide as they should find.*

The Legislature of North Carolina have passed a Statute which requires the Judge "to state, in a full and correct manner, the facts given in evidence, and to declare and explain the law arising thereon," at the same time forbidding him "to give an opinion whether a fact is fully or sufficiently proved—such matter being the true office and province of the Jury."

It is not my purpose to discuss the wisdom and expediency of such a law. It is based upon the presumption that the declaration of the Judge's opinion on the proof of facts, *in every case*, encroaches on the proper functions of the Jury, and that in *every case* it imparts a bias to the judgment of the Jury, which they are disposed to receive with confidence and seldom make an effort to resist. I would take the liberty of suggesting, however, that the general diffusion of knowledge and education among the people of this country, much better fits them for weighing and comparing the evidence, than in any other nation or age since the institution of trial by Jury.

2d. It is complained that the Court misstated to the Jury, that Thomas T. House, one of the subscribing witnesses to the will, "testified that he understood all the testator said," and that, therefore, he was to be believed in preference to John R. Anderson and Blount C. Ferrell, the other two subscribing witnesses, as to the execution of the paper. It is possible that this witness did so testify, inasmuch as the fact is twice stated by the presiding Judge. If it be so, however, then the record before us does not contain a true narrative of what transpired on the trial. Strictly,

perhaps, no misstatement of the Court on a matter of fact, unless the comment of the Judge involved an opinion or direction in matter of law, would of itself constitute a sufficient ground for a new trial. It may, however, when connected with other irregularities in the proceedings below, be relied on in the bill of exceptions.

[6.] 3d. Another objection is, that the Court instructed the Jury, that a will made through the medium of an interpreter, might be established without the oath of the interpreter. After scanning the charge carefully, I am constrained to infer, that such was the direction given. The presiding Judge offered the following illustration: "I will analogize this case to that of a foreigner. I will suppose a German in our place, who cannot speak English and who wishes to make a will. We have a citizen, Mr. Kener, who speaks both languages. It would be perfectly competent for this foreigner to convey his wishes to the scrivener and the witnesses to the will, through the medium of Mr. Kener as interpreter, although Mr. Kener himself should not become a witness to the will, nor be called to testify, on admitting it to probate."

I am compelled in candor to confess, that so far as my investigation has gone, there is a great dearth of authority upon this particular point; and I am the more astonished that it should be so, as the case must have been one of frequent occurrence. Reason would seem, however, to dictate that where there is no other medium of communication between the writer of a will and the testator, except the interpreter, that either at the time, or subsequently, he must be sworn, before the will could be established. I find this *dictum* in *Bacon's Abridgement*: "So if he that writes the will cannot hear the party speak, and another that doth stand by the sick man tells him what he says, in this case, if there be none others present to prove that he repeated the very words of the sick man, this will be no good will of the land." *Vol.* 7, *p.* 307, *letter D.* In *Gongales et al. vs. Gongales*, (13 *Louis. Reps.* 104,) the Supreme Court of Louisiana held, that a will dictated in *Spanish*, the native tongue of the testator, and a memorandum thereof taken down in the *French* language by the Notary, which was read to the testator and approved by him, as expressing his intentions, and afterwards drawn up in the *English* language, of which the testator is ignorant, but signed by him, the Notary and

witnesses, is *null* under the 1571st article of the code of that State, which requires that the will should be written by the Notary as dictated. Judge *Eustis*, in delivering the opinion of the Court, said, "By the laws of France, notarial acts are required to be in the French language, and in cases in which the Notary and witnesses do not understand the testator, *a sworn interpreter may be called in, in order to translate.*" Vide *Dictionnaire du Notariat, Verbis Interprête et Langue des Actes.* And in case of *Herbert's Heirs vs. Herbert's Legatees*, (11 *Lousa. Rep.* 361,) the same Court held, that a witness to a will who does not understand the language in which the will was written, is incompetent to attest it, for the reason that it is impossible that he could compare what was written by the Notary with that which was spoken by the testator. And Judge *Carleton*, in delivering the opinion of the Court, said, "It is sufficiently proved that Leport, (*the attesting witness*,) did not understand the English language, and, therefore, could not know whether the will contained the disposition intended by the testator. It is impossible he could have compared what was written by the Notary with what was spoken by the testator. He could not, therefore, testify to the faithful execution of the will, and, for all legal purposes, might as well have been absent in a distant place. The Legislature have manifested great solicitude on the subject of last wills and testaments, and endeavored, by every possible safeguard, to insure their faithful execution. But this wise precaution would be vain and nugatory, if witnesses were incompetent to the trust they were called to fulfil. Language is the vehicle of thought, and if the witnesses could not understand that in which the will was written, it is plain they would be in no better situation than the deaf, who are expressly declared to be incompetent."

It is readily conceded that the exact point decided in these cases, is not that which is embraced in this record. The principle enunciated from the authorities is the same, namely: that the paper propounded for probate must be sufficiently and satisfactorily shown to be the last will and testament of the *testator;* and the familiar maxim is, *eadem est ratio, eadem est lex.*

While it is certainly true, as suggested in the charge, that a man does not forfeit the right to make his will, because he has lost the power of speech, still, wills and testaments, whether or not they be the mere creatures of municipal law, as maintained by

Blackstone and Paley, "high legal and ethical authority," but denied by the Court of Errors of New York, in the late great case of Lispenard's will, all agree are controlled and modified by positive regulations. Each country has the undoubted right to prescribe the ceremonies and requisites which are necessary to make a will or testament completely valid; and as they derive their force and effect from the provisions of the law, they must strictly conform to its requirements. Each formality, say the Supreme Court of Louisiana, in *Knight vs. Smith*, (3 *Martin's R.* 156,) "is *sacramental* and must be rigidly complied with."

While it does not matter, then, on what material or stuff, whether on paper or parchment, nor in what language, whether in *Latin*, *French* or *Dutch*, or any other tongue, or in what hand or letters, whether in secretary hand, Roman hand, or Court hand, (which I understand means an *illegible* hand,) or in any other hand, a will may be written, still it must appear to be *the will of the testator*, and on failure to make that proof, it cannot be executed.

We hold, therefore, that if a negro interpreter, incapable by law of being sworn, is the *only* channel of communication between the testator and writer of the will, and there be no other evidence of the testator's knowledge of its contents or his assent thereto, than that which is derived through this medium, the will cannot be executed.

[7.] But if the will be written in the presence of the testator, and in a language which he understands, it is read over to him, and his dictation and approval of the instrument are interpreted by a negro in his hearing, and in the hearing of others interested in its contents, and he signifies no dissent thereto, by signs or otherwise, but on the contrary, is understood to express himself satisfied, the will may be established; especially if it appears to have been made in conformity to the previously declared intentions of the testator, as to the disposition of his property.

[8.] 4th. Another objection is, that the Court applied the rule which discriminates in favor of affirmative over negative testimony, to the facts of this case. No one doubts the general rule referred to in this exception. Indeed, the exception itself assumes the existence of it. And it may be true, that in an issue like this, where some of the witnesses testify to facts, showing understanding, this evidence will outweigh very many witnesses,

who state only that they never saw or heard these proofs of sanity. Nay more: it may, perhaps, be granted, that affirmative facts, establishing the existence of mind, may preponderate over those which prove only its defects or weakness. Here, the matter in dispute was, whether or not the testator could measure corn, compute interest, and attend to the ordinary affairs of life? Some of the witnesses swore that he could, and others that he could not. We can see no difference in the character of these statements. Two persons are present when the holder undertakes to calculate interest on a promissory note, or measure a bushel of corn; one affirms that he did it correctly, the other denies it, and points out the inaccuracy or blunder—is there any difference in the nature or quality of this proof? None that we can perceive, and hence our conclusion that this was a misapplication of a right rule.

[9.] 5th. Another objection is, that the Court affixed a legal discredit upon the testimony of *relatives*, as such. We shall make but a solitary remark upon this point. A child is a competent witness for a parent, and a parent for a child; nor does consanguinity, or any other domestic or social relation, *necessarily* attach a stain to this species of proof. It *may* (not *must*) go to its credibility.

[10.] 6th. The last special objection is, that the Court expressed great doubt as to the *competency* of certain testimony which had been admitted before the Jury. In *Monroe vs. the State of Georgia*, (5 *Georgia Reps.* 85,) this Court held, that it was error in the Circuit Court in its charge to the Jury, to intimate *doubts* as to the *competency* of legal testimony which had been submitted to them, it being calculated to paralyze its influence in their estimation. We see no reason to change that opinion.

We will now, in conclusion, examine some of the general doctrines involved in the charge respecting wills; and I must say, His Honor, Judge *Hill*, discharged this portion of his arduous functions with equal skill and perspicuity, and we are not prepared to say that he underrated the degree of testamentary capacity necessary to make a will, in maintaining that *imbecility* of mind did not disqualify, provided it stopped short of *idiocy* or *lunacy*. Before investigating this case, I had supposed that more capacity was required to make a will than I now find warranted by the authorities; and in remanding this cause to the Circuit

for a new trial, with instructions, I am inclined to think, that we rather overrated the amount of mind which the law exacts of the testator. At any rate, I have myself more clear and definite views respecting this subject than I have hitherto entertained. Still, I find no acknowledged standard of "weights and measures" by which to regulate this as well as all similar investigations. We apprehend that this thing, from its very nature, is incapable of being fixed and determined. All attempts to draw the line between capacity and incapacity have ended where they began, namely: *in nothing*. All agree that there must be a sound and disposing mind and memory, but to define the precise quantum, *hoc opus, hic labor est.*

[11.] One thing is certain—that *eccentricity*, however great, is not sufficient, of itself, to invalidate a will. 4 *McCord's R.* 183. Mason Lee, the testator in this case, supposed himself to be continually haunted by witches, devils and evil spirits, which he fancied, were always worrying him. He believed that *all women are witches.* (In this, perhaps, he was not so *singular!*) He lived in the strangest manner—wore an extraordinary dress, and slept in a hollow log. He imagined that the Wiggins' relatives, whom he desired to disinherit, were in his teeth; and to dislodge them, he had fourteen sound teeth extracted, evincing no suffering from the operation. He had the quarters of his shoes cut off, saying, that if the devil got into his feet, he could drive him out the easier. His constant dress was an osnaburg shirt, a negro cloth short coat, breeches and leggings. His wearing apparel, at his death, was appraised at one dollar. He always shaved his head close, as he said that in the contests with the witches, they might not get hold of his hair, and also, to make his wits glib. He had innumerable swords, of all sizes and shapes, to enable him to fight the devil and witches successfully; they were made by a neighboring blacksmith. In the day-time, neglecting his business, he dozed in a hollow gum-log, for a bed, in his miserable hovel; and at night, kept awake fighting with his imaginary unearthly foes. He fancied, at one time, that he had the devil nailed up in a fireplace, at one end of his house, and had a mark made across his room, over which he never would pass, nor suffer it to be swept. He would sometimes send for all his negroes to throw dirt upon the roof of his house, to drive off ghosts. He had no chair, or table, or plate in his house. He used a forked stick. His meat

was boar and bull beef and dumplings, served up in the same pot in which it was boiled, and placed on a chest, which answered him for both table and chair. He made his own clothes; they had no buttons; his pantaloons were as wide as petticoats, without a waistband, and fastened round him with a rope. His saddle was a piece of hollow gum-log, covered with leather, and of his own make. His kennel, on which he eat, slept and dozed away his time, was three feet wide, five feet long, and four feet high. He suffered no bull or boar, on his plantation, to be castrated. He cut off all the tails of his hogs and cattle, close to the roots; he said the cows made themselves poor, by fighting the flies with their tails, but cut them off, and they would get as fat as squabs. He once brought a horse from home, cut off its ears, and mounted it instantly while bleeding. He mutilated, in the same manner, all of his horses and mules. He hoed his corn after frost, saying it would come out green again. His bargains were peculiar, and generally losing. He gave long credits, without interest. He sold one place for $7,000, to be paid in 17 years, without interest, and if the purchaser did not like the bargain at the end of that time, he was at liberty to give it up, without paying rent. He said that the land, at the expiration of the time, would be worth ten times as much as when he sold it. He purchased a large body of poor flat pine land, without seeing it, and put his negroes there, without a hut to live in. They cleared and girdled the trees of 2000 acres, for the purpose, he said, of planting it in pinders, (ground nuts,) by which, he said, he should make a fortune. He never went to church, nor voted, nor was required to do patrol or militia duty. He had a sulky made; his directions were, to have the shafts exactly nine feet long, and the chair and seat to be square—the sticks of which were to be worked with a drawing knife—not turned—and the cross-bars were to be square. But enough of these *whimsicalities*. The will was established; and upon the appeal, the supervisory tribunal, through its organ, Judge *Nott*, declared that "the evidence, (a part of which only I have quoted,) seemed very well to have authorized the verdict which the Jury rendered."

If the maxim be sound, that what is against reason, cannot be law, one might, I think, well doubt the principle of this case, without being branded as a skeptic. I subscribe, however, to the doctrine, that it is not every man of a frantic appearance and

behavior, who is to be considered *non compos mentis*, either as it regards contracts, obligations or crimes; and that one may be addicted occasionally or habitually to the strangest peculiarities, and yet possess a testable capacity.

Not only is the greatest *singularity* insufficient to set aside a will, but it would seem that a mere *glimmering* of *reason* would be sufficient to sustain a will. *Stewart's executor, Appellant, and Lispenard and others, respondents*, 26 *Wendell*, 255. Alice Lispenard, the testatrix, was all her life, as it appears from the testimony, incapable of taking care of herself; and for the most part of it, had to be washed, nursed and put to bed, the same as a child. She had a vacant expression of countenance—a silly, unmeaning laugh, when spoken to. The carriage of her body was awkward and unnatural, and she dribbled at the mouth. She was not permitted to associate with company. Her food was put on a plate and handed to her, without asking her what she would have. When upwards of thirty-five years of age, she spent her time sitting at the window of the house where she resided, and would sit there, even when the shutters were closed, without speaking with any one. She would cry like a child, when the children of the family in which she boarded, refused to divide their candies with her. She could not be taught the Lord's Prayer, nor to read, much less, to write. The utmost length to which her education ever progressed, was to spell words of two syllables. At a later period of her life, the experiment was renewed, but the result attended with no better success; this appearing to be the *ne plus ultra* of her intellectual capacity. When her father, Anthony Lispenard, died, his will contained the following remarkable provision, with respect to his daughter Alice: "And as it has pleased Almighty God, that my daughter should have such imbecility of mind, as to render her incapable of managing and taking care of property, my will further is, that she be allowed five hundred dollars for her maintenance, during her natural life." Yet, notwithstanding all this array of facts, as summed up by the surrogate, (Campbell,) and this deliberate judgment of the father himself, who, above all others, was best acquainted with the character and mental condition of his unfortunate child—and made, too, at a period when there was nothing to harden his heart towards his daughter, or alienate his affections from her—her will, bequeathing an immense estate, was set up and established. The Court of Errors in New York, main-

taining that *imbecility* of mind in a testator, will not avoid his last will and testament; that all persons, except *idiots, lunatics*, and those who are *non compos mentis*, of lawful age, and not under coverture or constraint, are competent to make a will, be their understanding ever so weak. *Shelford on Lunacy, p.* 37. That Courts, in passing upon a will, do not measure the extent of the understanding of the testator; *for if he be not totally deprived of reason*, whether he be wise or unwise, he is the lawful disposer of his property, and the will stands as a reason for his actions. *Ib.* 39. That a man's capacity may be perfect, to dispose of property by will, yet inadequate for the management of other business. As for instance—to make contracts for the purchase and sale of property; and therefore, a Court of Chancery may commit the property of a person, *incapable of managing his estate*, to the charge of a committee, and yet, after his death, give effect to a will made by him, whilst labering under such incapacity.

And I am constrained to say, after the most careful consideration, that these doctrines are in accordance with the authorities. *Swinburne*, one of the oldest, and perhaps still the best writer, upon this subject, says: (*Part* 2, §4.) "If a man of mean understanding, neither wise nor foolish, but indifferent, as it were, between a wise man and a fool, *yea, though he rather incline to the foolish sort*, so that for his dull capacity he may be termed *grossum caput*, a dunce, such a one is not prohibited to make a testament, unless he be yet more foolish, and so very simple and sottish that he may easily be made to believe things incredible or impossible; as, that an ass can fly, or that trees did walk, beasts and birds could speak, as it is in *Æsop's* fables." And *Lord Coke* defines a *non compos mentis* to be one who, by sickness, grief, or other accident, *wholly* loseth his understanding. *Beverly's Case*, 4 *Reports*, 123. *Coke's Lit.* 247, *a.* And Mr. *Senator Verplanck* thus eloquently discourses upon this subject, in the case already referred to in 26 *Wendell:*

"Taking mankind, such as observation shows us human nature to be, can any other than this be a safe, prudent, just or politic rule? When we observe the strange incongruities of human character, the astounding mixture of sagacity and weakness in the same mind, 'the fears of the brave and the follies of the wise'—when literary biography shows us the discoverers of truth and the teachers of wisdom, like Newton and Pascal, suffering under

'the variable weather of the mind, the flying vapors of incipient lunacy'—when, in ordinary life, it often happens that the most sagacious and prudent, in many of the affairs of business, are yet, in some point of domestic conduct, guilty of absurdities, such as the feeblest minds could not commit, one might almost adopt the startling conclusion of Dr. *Haslam*, who, after years of professional observation of the phenomena of mental disease, when examined in the remarkable case of Miss Bagster, in answer to the customary question, "Was Miss B. of sound mind?" replied—"I never knew any human being who was of sound mind."

"So again, if we look around our own circle of acquaintance, every one must have known aged, blind or infirm persons, unfitted, by the state of their minds, or of their senses, for the management of any affairs, and from their necessary seclusion from the concerns of life, entertaining false notions, and mixing up the past with the present. Yet these, and such as these, may, by the aid of their friends and families, upon whom they have a right to rely, and with a general understanding of their own interest, and the effects of their acts, make wills, conveyances, and other dispositions of property, which could not be set aside without gross and manifest hardship and injustice.

"To establish any standard of intellect, or information, beyond the possession of reason in the lowest degree, as in itself *essential* to legal capacity, would create endless uncertainty, difficulty and litigation—would shake the security of property, and wrest from the aged and infirm, that authority over their earnings and savings which is often their best security against injury and neglect. If you throw aside the old Common Law test of capacity, then, proofs of wild speculations, or extravagant and peculiar opinions, or of the forgetfulness or the prejudices of old age, might be sufficient to shake the fairest conveyance or impeach the most equitable will. The law, therefore, in fixing the standard of positive legal competency, has taken a low standard of capacity; but it is a clear and definite one, and therefore, wise and safe. It holds, (in the language of the latest English Commentator,) that, "weak minds differ from strong ones, only in the extent and power of their faculties; but unless they betray a total loss of understanding, or idiocy, or delusion, they cannot properly be considered unsound." *Shelford.*

Again—not only are *eccentricity* and *imbecility* no just grounds

for setting aside a will, but *old age* does not deprive a man of the capacity of making a testament; for a man may make his will, how old soever he may be, since it is not the integrity of the body but of the mind, that is requisite in testaments, provided the understanding has not become destroyed, by surviving the period that Providence has assigned to the sanity and stability of the mind. The want of recollection of names, is one of the earliest symptoms of the decay of memory, by reason of old age; but it is not sufficient to create incapacity, unless it is quite total, or extend to the immediate family and property of the deceased. I once walked more than a hundred yards with Luther Martin of Maryland, for the purpose of being introduced to his grand-son, whom he had brought to college, without his being able to recall to his mind the name of his son-in-law, the father of the young man. And yet, I have no idea that his faculties were so far gone and shattered, as to have lost their testamentary power. If the testator be capable of doing an act of thought or memory, it is enough.

Jacob Bennet, the testator, was between 90 and 100 years old, when he made his will, disposing of his *negroes, (New York!!!)* furniture and stock, on his farm. His will was executed—Chancellor *Kent* holding, that neither age, nor sickness, nor extreme distress, or debility of body, will affect the capacity to make a will, if sufficient understanding remains. He feelingly observes, that, "it is one of the painful consequences of extreme old age, that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man, over the disposal of his property, is one of the most efficient means which he has, in protracted life, to command the attentions due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent acts, but contains those very dispositions which the circumstances of his situation, and the course of the natural affections dictated." *Van Alst and others, vs. Hunter and others*, 5 *Johns. Ch. R.* 148.

In *Brunne vs. Molliston*, (3 *Wheat.* 129,) *Huston*, J. said, "That the decedent must be presumed to be competent to make a will, until the contrary is proved—that the presumption of competency is not destroyed, by any extremity of age, though it may be weakened, where the testator is very old, and circumstances additional are proved; but taken alone, it matters not that the tes-

tator was a hundred years old, at the time of executing the will." So, one who is deaf and dumb, whether so from infancy, or his misfortune has been superinduced by subsequent cause, may, nevertheless, make a testamentary disposition of his property.

One who is deaf and dumb from his nativity, is, in presumption of law, an idiot, and therefore, incapable of making a will; but such presumption may be rebutted; and if it sufficiently appears that he understands what a testament means, and has a desire to make one, he may, by signs and tokens, declare his testament. One who is not deaf and dumb by nature, but being once able to hear and speak, if, by some accident he loses both his hearing and the use of his tongue, then, in case he be able to write, he may, with his own hand, write his last will and testament. And if he be not able to write, then, he is in the same case with those who be both deaf and dumb by nature, i. e. if he have understanding, he may make his testament by signs, otherwise, not at all. Such as can speak, but cannot hear, they may make their testaments as if they could both speak and hear, whether that defect comes by nature or otherwise. Such as be speechless only, and not void of hearing, if they can write, may very well make their testaments themselves, by writing. If they cannot write, they may also make their testaments by signs, so that the same sign be sufficiently known to such as then be present. 1 *Wms. Ex'rs, 2d Amer. ed. p.* 15.

I would respectfully submit, whether, in this age of benevolence, I had almost said, of the revival of miracles, when, through the instrumentality of appropriate asylums, eyes have literally been given to the blind, and ears to the deaf, the *presumption* ought any longer to be against the testable capacity of mutes?

I would only add, once more, that a man may be capable of disposing by will, and yet incapable to make a contract, or to manage his estate. To this point the authorities are numerous. I will content myself to cite one only. Mr. Justice *Washington*, in *Harrison vs. Rowan*, (3 *Wash. C. C. R.* 580,) charged the Jury, "that it was not necessary that the testator should view his will, with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory, as will enable him to understand the business in which he is engaged, the property he means to dispose of, the persons who are the objects of his bounty, and the manner in which it is to be

distributed between them. It is the business of the testator to dictate the purposes of his mind, and of the scrivener to express them in legal form; that it was soundness of mind, and not the state of the bodily health, that was to be attended to. His capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business; as, for instance, to make contracts for the purchase or sale of property. For most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions, than they would in comprehending business in some measure new."

James Potts, senior, the testator in this case, was about ninety years old; was rendered almost speechless by age and the loss of his health; was bedridden, and on account of his bodily infirmities at least, if not mental, rendered pretty much incapable of attending to and managing his ordinary business.

[12.] Perhaps there is one principle which I have failed to guard with sufficient accuracy, to wit: the distinction between oddity or caprice, as exhibited in Mason Lee, and derangement.

[13.] Because if there be partial insanity only, and the will is the direct offspring of it, it will be invalid, although the general capacity be wholly unimpeached. And this partial insanity may be *quo ad hoc* or *quo ad hanc:* i. e. upon a particular subject, or as to a particular person. In either case, the sound and disposing mind is deficient or wanting in regard to this particular transaction. It is well established, both by medical and legal authorities, that a party may be both sane and insane, at *different* times, upon the *same* subject, and both sane and insane at the *same* time on *different* subjects; and it is in this last sense that the phrase *partial insanity* is generally used.

The case of *Dew vs. Clark*, is a striking illustration of that delusion, in relation to the act in question, which will defeat a will, while the testator in making it was sane in other respects and on all other subjects. The evidence showed, that the deceased was a sensible, clever man, conducting himself, in the ordinary transactions of life and his affairs, rationally; amassed a considerable fortune by his profession; his friends and acquaintances, some of them medical men, never considered or even suspected that he was deranged in his mind; yet it was shown that he labored un-

der some strange hallucination, both as to himself and his daughter. She was proved to have been always amiable in her disposition, of superior talents and engaging manners, diligent, industrious, submissive and obedient, patient under affliction, dutiful and affectionate, modest and virtuous, moral and religious; yet, in the deluded mind of her father, she was the most extraordinary instance of depravity, vileness, vice, crime, profligacy, artifice, disobedience, revolt and rebellion, and quite irreclaimable, while, in regard to himself, he considered himself a pattern of fatherly tenderness and affection, though tying his daughter to a bedpost and flogging her with the most unmerciful severity, and compelling her to perform the most menial drudgery, to which even a servant would not submit. These impressions accompanied him through life, and were recorded in his will. Neither the persuasion of friends, nor the sanction of religion, could change his mind or purpose. (8 *Watts*, 71, '2.) *Sir John Nichols*, taking a different view of both the father and daughter from what the testator did, pronounced against the validity of the will, which decree was confirmed by the delegates, and the Lord Chancellor, on a petition for a commission of review, refused to recommend it. *Hagg. Ecc. Rep.* 8.

If there be, then, a total deprivation of reason, from birth or subsequent calamity, whether permanently or existing only at the time of execution, the will is a nullity, however suitable and right the terms of its bequests, and with whatever good purpose and intentions it may have been made; but although the testator be not *non compos*, within the legal acceptation of the term, still, if he labor under *delusion* as to the special matter, he is not, in *that respect*, competent in the eye of the law. And while weakness of understanding is not, of itself, any objection in law to the validity of a will or contract, still, in connection with other circumstances, imbecility of mind, whether from age or disease, or any other cause, may be relied on to show that the particular will or agreement in controversy, was procured by fraud or undue influence; and less proof will be required in such case from him who alleges it.

[14.] Having said all that I deem necessary as to the degree of intelligence requisite to make a will; having endeavored to show that neither *peculiarity* of character, however extravagant, not amounting to general or partial insanity, *weakness* of understand-

ing, nor extreme old age, nor want of hearing or speech, or the capacity to transact the ordinary business of life, such as buying and selling property, will disqualify a person from making a will, I will pass on to the only other main matter of inquiry, and that is, what degree and kind of influence, exerted over the testator in obtaining a will, is sufficient to set it aside?

[15.] With respect to a will alleged to have been obtained by undue influence, I would remark, that it is not unlawful for a person, by honest intercession and persuasion, to procure a will in favor of himself or another; neither is it, to induce the testator, by fair and flattering speeches; for though persuasion may be employed to induce the dispositions in a will, this does not amount to influence in the legal sense. If a wife, by her virtues, has gained such an ascendancy over her husband, and so rivalled his affections that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. Nor would it be safe to set aside a will, on the ground of influence, importunity, or undue advantage taken of the testator by his wife, though it should be proved that she possessed a powerful influence over his mind and conduct in the general concerns of life; but where persuasion is used with a testator on his death-bed, when even a word distracts him, it may amount to moral force and inspiring fear. 4 *Greenlf.* 220.

On this subject, as on that with regard to capacity, no precise and distinct line can be drawn. Suffice it to say, that the influence exercised must be an unlawful importunity, on account of the *manner* or *motive* of its exertion, and by reason of which the testator's mind was so embarrassed and restrained in its operation, that he was not master of his own opinions in respect to the disposition of his estate.

In the case of the will of *Edward Campion*, (*Ex parte Fearon*, 5 *Ves.* 633,) the Court of Delegates, consisting of some of the most distinguished Judges and Civilians in England, set the will aside, on the ground that undue influence had been exercised over the mind of the testator by his physician and house-keeper; and Lord *Roslyn*, being satisfied with their decision, reported against granting a commission of review. And in *Hacker vs. Newburn*, (*Styles' Rep.* 427,) *Rolle, C. J.* held, that a will executed by a man in his last sickness, by the over importunity of his

wife, and for the sake of quiet, was not valid. Perhaps we could not do better than sum up all we have to say on this topic by another quotation from *Swinburne.* It is good to draw water from the *source* rather than from the *mouth* of the stream. *Antiquas exquirere fontes.* "If the testator be compelled by violence, or urged by threatenings, to make his testament, that testament being made by just fear, is ineffectual. Likewise, if he be circumvented by fraud, the testament loseth its force. For, albeit, honest and modest intercession and request is not prohibited, yet these fraudulent and malicious means, whereby men are secretly induced to make their testaments, are no less detestable than open force." 1 *Swinb.* 22.

It is objected, however, in this case, that the testator was under the control of his *slaves*, and that this circumstance, if well authenticated, ought, *ipso facto*, to destroy the will. That while it is allowed to free white persons, whether kindred or strangers, to influence others, by proper means, to make their wills, yet that where this influence proceeds from *slaves*, it indicates such moral degradation as should induce the Courts, from motives of public policy, to avoid their acts.

As to the source whence this moral coercion comes, the law makes no discrimination, consequently we can make none. The testimony does not show that any improper intercourse existed, at the time the will was executed, or previously, between the testator and his *slaves*, or any of them; but had it been otherwise, and this will had been the result of that miserable infatuation, however shocking it might be to our sense of decency and propriety, and proper subordination on the part of our negroes, still we dare not, on that account, impeach the will, unless the Legislature should see fit, in its wisdom, to abridge the right of the owner to dispose of his property for this cause. The only inquiry for Courts is, was the testator, from the infirmity of age or other cause, constrained to act against his will, to do that which he was unable to refuse, by importunity or threats, or any other way by which one person acquires dominion and control over another? If so, the validity of the will may be impeached; and it is wholly immaterial from what quarter this undue influence which destroys free agency comes, whether from a slave or a free white person. To set aside a will because it is capricious or unreasonable, or because the testator may have selected an unwor-

thy object for the bestowal of his bounty, is to deprive him of the most cherished of all rights, namely: the right, secured by law, to dispose of his estate by will, in such way as may seem good in his own eyes.

The will of W. B. Farr was several times before the Courts of South Carolina, and its validity contested, among other grounds, because it was obtained by undue influence exercised over the testator by the executor, Dr. Thompson, and *by a negro woman named Fan, and her son, Henry;* and that it was obtained by threats made by the same persons. *Cheves' Law and Equity Reps.* 37. 1 *Richardson's Law Reps.* 80. 1 *Spear's Rep.* 93. The proof showed that Fan was the paramour, and Henry the son, of the testator; that this woman had the influence over him of a white woman and a wife. He had a clock which he cursed and said he would not have bought it but for Fan; promised to destroy a dog that killed sheep, but did not do it because she objected; bargained for a negro, but would not buy till her pleasure was consulted; sold a negro girl at her desire, and made titles to another one that she offered for sale as her own, and when he had made the titles, said "he hoped she would now be satisfied, as there was no other woman left, he hoped he would have some peace." One witness thought she had such influence that she could have had any negro sold that she pleased. At Christmas, 1835, Farr said he should not live long, and wanted to divide his property out among his relations equally. Fan said, "what is to become of me and Henry?" Farr said he would give her money enough to maintain her during her life, and she might go to a free State. She replied, "before any of the Farrs should have any of the property she would lose her life." Fan refused to let a servant come to him when called; they quarreled about it; she shook her fist in his face and threatened to knock his teeth down his throat; witness heard them quarrel in the night; heard her call Hannah, a servant, to bring her the whip and she would beat his skin off. They would get drunk together and she was insolent to him; told him to hush or she'd give him hell; cursed him for a d—ned rascal; rubbed her fist in his face and dared him to open his mouth; called him a d—ned old palsied rascal. Testator told Dawkins, that Fan had tried to kill him with a spear; she threw it at him and stuck it in the bed post; Fan was drunk and he made them make friends. Many other disgusting details

were narrated on the trial, which need not be repeated. Farr was 66 years old when he died; was originally a man of strong mind, but he was much enfeebled by hard drinking, and his memory was impaired by a stroke of the palsy; still he was capable of doing business.

Judge *Earle*, in commenting upon this case, said, "This phrase of *undue influence*, so frequently resorted to in this country by disappointed relations, to avoid wills of persons on whom, while living, they had no claims, seems to me to be a modern innovation, and is not known in the English Courts. The true inquiry always is, whether there exists the *animus testandi?* The party therefore must be free, and under no compulsion from such threat or violence, as may reasonably be supposed to move a constant man. Even in case of such constraint or fear, if when they are over, the testator confirms the will, it is made good. Applying the general rules governing such cases to that made by the proof, it will be very difficult to find the evidence either of threat or violence, of fear or compulsion, or of excessive importunity, extorting from the feebleness of age or disease, what it was unwilling to grant, yet unable to withhold."

And Judge *Evans*, when commenting on the same will, many years afterwards, said, "whenever the validity of a will is disputed, the natural inquiry is, whether it is voluntary—whether it be conformable to the wishes and previously declared intention of the testator and according to the course of his affections? When a sane man, with legal solemnities, executes a will, the law presumes, in the absence of proof to the contrary, that it was done voluntarily, and that it contains truly his wishes and intentions in relation to the disposition of his property. The burden of proof lies on him who alleges the existence of undue influence, and its exercise in the procurement of the will. I have before said that Fan was greatly indulged, and that she had some influence over the testator, arising out of her position, can scarcely be doubted. From this arose her familiar mode of addressing him, her presumptuous claim to be his wife, and her dominion over the servants and household affairs; but beyond these the evidence furnishes no proof of influence possessed or exercised, or attempted to be exercised."

It is true that the Jury uniformly found against the will, and that the Court finally acquiesced, upon the principle that, where

the case consists of facts, which have been fairly submitted to the Jury, with full instructions from the Court, their verdict concludes the case. Still it serves to show the opinion of the distinguished Judges, who repeatedly had this case under consideration, of the nature and degree of influence which must be exerted over the testator, in order to invalidate his will; and that it matters not that the imputed control is at the instance of a slave, and that slave the mistress of the deceased, provided the testator was left a free agent.

It is only necessary to advert for a moment to the brief of the testimony in the case before us, to see how immeasurably short it comes on the score of unjust control, of that which accompanied Farr's will. John Hill testified that he visited the testator sometime before his death; that soon after he arrived at the house, two female slaves, one an old and the other a young woman, voluntarily took their stand on each side of the testator, and on them he seemed to rely for direction. Potts appeared to be very stupid and incompetent to transact any business. Jesse Kinsey swore, that Potts' negroes did pretty much as they pleased, and his principal house woman appeared to exercise a controlling influence over him—she was his interpreter; his speech was not only defective, but thinks there was a want both of bodily and mental strength; he was inclined to be fickle-minded and not very determined in carrying out his purposes; he was kind and indulgent to his slaves, and they obeyed or disobeyed his orders pretty much as they pleased. James Stewart, another witness examined, stated that for several years before Potts died he thought him very much under the influence of his negro woman Lucy. The last visit that William Harris made to the deceased, a negro woman interpreted for him. Mrs. Jemima Slaughter did not think the testator capable of making a will, from his extreme old age, want of speech and memory, and the influence the negroes appeared to exert over him; that two of his women especially seemed to have a great control over him in all his affairs; that she has heard him consulting with Lucy in relation to his business—who was a lively, talkative, saucy girl, who generally said what she pleased to her master without reproof. Cicero Lovelace, a medical practitioner of the botanic order, saw testator frequently a short time previous to his decease; his grown negroes all appeared to exercise more or less influence over him; on one

occasion he saw Charity and Lucy put a pair of socks on the old man contrary to his wishes; at first he resisted, they persevered and he finally yielded. He thinks he was pretty much in the hands of these women, who nursed him, except that he would not suffer his feet washed, nor his beard shaved. William Dougherty was several times at the house of the testator; was unable to understand him. Once he called to pay money; a negro woman got his note out of a chest, received the money and replaced the paper with the cash in the chest, locking it and retaining the key. Another time he wished to exchange another paper for his, when pretty much the same ceremony took place—the girl officiating entirely in the business.

Now, when it is recollected, that the main purpose of this caveat is to set aside this will on account of a bequest in it to Alonzo P. House, the grandson of the testator, who resided in the State of Alabama, and between whom and the slaves of the deceased no intimacy, much less *conspiracy*, is proven to exist, we see nothing in the whole report of this case to justify the suspicion that any undue influence whatever was practised in the procurement of this will; much less such improper influence as should be allowed to invalidate it. That, however, will be a question of fact to be passed upon by another Jury.

Upon the whole case, we are satisfied that there was reasonable ground for prosecuting this writ of error; and that in view of all the circumstances, it would best comport with the ends of justice to order a new trial.

[16.] It is insisted, that this application for a re-hearing should be refused, provided we are convinced that justice has been done in the case. A verdict manifestly in accordance with the weight of the evidence and the justice of the case, will not usually be disturbed on account of the misdirection of the Judge; but where, as in this case, material testimony has been excluded, erroneous instructions given by the Court to the Jury, and the proof misstated in summing up the evidence, the verdict will be set aside and a new trial granted.

No. 47.—SHEPHERD WILLIAMS, senr. plaintiff in error, *vs.* C. & G. H. KELSEY & HALSTED, defendants in error.

[1.] Where money was paid to A by B, who said he paid it for C, and by his directions: *Held*, that B was a competent witness to prove to whom the money belonged, and by whose directions he paid it to A, and that his declarations were not admissible in evidence, for that purpose, made at the time of such payment in favor of his alleged principal. If such declarations could be admitted as part of the *res gestæ*, his general or special agency to make the payment must first be shown.

[2.] That a witness may refer to a written instrument, memorandum, or to an entry in his books, to refresh or assist his memory, is a well established rule of evidence; and although the witness has no recollection of the fact, independent of the entry in his books, but will testify as to his uniform practice to make his entries truly, and at the time of each transaction, and will further state, that from such practice, he has *no doubt* the entry in question is correct, his testimony is admissible.

[3.] But where a witness states, that certain facts *seem to have transpired between the parties from his docket*, without adding the legal sanction of the oath of the witness to the truth thereof, from his recollection or otherwise: *Held*, not to be admissible.

[4.] The Cashier of the Central Bank is not a competent witness to prove the contents of the books of the Bank, under its charter, not within his own knowledge, except in those cases in which the Bank is a *party*.

[5.] Where a witness is examined by commission, the party cross examining may withdraw his cross questions if he chooses—the other party having the liberty to read them at his option.

[6.] In claim cases, arising under the peculiar provisions of our Statutes, the defendant in execution is not a competent witness for the claimant, nor can the declarations of the defendant in execution be received in evidence in favor of the claimant.

[7.] Where a creditor, who is the mortgagee, forecloses his mortgage, and purchases the mortgaged property at Sheriff's sale under it, and suffers the property so purchased to remain in the possession of the mortgagor after the sale, such retention of possession, by the mortgagor, is a badge of fraud as against other judgment creditors.

[8.] Where property is levied on by a judgment creditor, and claimed by a purchaser under a sale made in pursuance of the judgment of foreclosure of a mortgage under our Statute: *Held*, that such judgment of foreclosure was *prima facie* evidence of indebtedness by the mortgagor to the mortgagee, and that the burden of showing a want of consideration to support the mortgage, rests upon the plaintiff in execution, and not the claimant.

[9.] Whether the consideration for which a mortgage is alleged to have been executed, is *bona fide*, or merely colorable to defraud creditors, or so inadequate as to constitute a badge of fraud, is a question of fact which should

be left to the Jury, upon the whole evidence in the case, without any restriction on the part of the Court, as to the necessity of proving *all the items of indebtedness*, alleged to have been the consideration of such mortgage, by the claimant.

Levy and claim, in Houston Superior Court. Tried before Judge FLOYD, October Term, 1848.

On the 25th day of March, 1839, Shepherd Williams, senior, executed to Thomas Williams, an instrument obligating himself to pay certain debts therein specified, for Thomas Williams among which was a debt due the Central Bank. The several items of indebtedness specified in the instrument, were consolidated, and a note for $5124 48, was given by Thomas Williams to Shepherd Williams, sen. At the same time, for the securing the payment of the note, Thomas Williams executed to Shepherd Williams, sen. a deed of mortgage, for certain property therein specified, among which were three slaves, Tom, Sally and Harriet. The mortgage was afterwards foreclosed, and the slaves, Tom and Sally, were sold under a *fi. fa.* issued thereon, by the Sheriff of Houston County, on the 2d day of June, 1840, and Harriet on the 5th day of January, 1841, and purchased by Shepherd Williams, sen. through his agent, Washington Williams.

On the 21st day of August, 1846, an execution issued from the Superior Court of Houston County, in favor of the defendants in error, against T. & S. Williams, jr.—was levied on the slaves, Tom, Sally and Harriet, as the property of Thomas Williams, which were claimed by Shepherd Williams, sen. plaintiff in error.

At October Term, 1848, of Houston Superior Court, the cause stood for trial on the appeal.

The plaintiffs in execution offered in evidence their *fi. fa.* and proved that the slaves were in the possession of Thomas Williams at the date of the levy, and had remained in his possession since the sale under the mortgage *fi. fa.* and closed.

The claimant introduced in evidence, the mortgage and the *fi. fa.* issued on foreclosure thereof, and the bill of sale to the negroes, from the Sheriff of Houston County, to Shepherd Williams, sen.; also the agreement or receipt from Shepherd Williams to Thomas Williams, specifying the debts for which the note, the foundation of the mortgage, was given.

The claimant then offered in evidence the testimony of R. M.

Charlton, taken by commission, to prove that a judgment had been obtained by him, as attorney for the Central Bank, against Shepherd Williams and others, on the note specified in the agreement between Shepherd and Thomas Williams; also, to prove the payment of $400 thereon, by the son of claimant, who stated, at the time, that the money paid belonged to his father; which testimony was objected to by the plaintiffs, on the ground that the statements of witness in relation to the note, were not of his personal knowledge, but only as *appeared* from the docket kept by the late firm of Charlton and Ward, attorneys at law; and that the sayings of the claimant's son, at the time of the payment of the $400, were inadmissible. The objection was sustained, and the claimant excepted.

The claimant then offered in evidence, the testimony of A. M. Nisbet, taken by commission, to prove the discount and renewals of a note made by claimant, for the benefit of Thomas Williams, to the Central Bank. Plaintiffs objected to that portion of the testimony derived from the books and records of the Bank; which objection was sustained by the Court, and the claimant excepted.

After the claimant had submitted that portion of the testimony of A. M. Nisbet, not excluded, in answer to the direct interrogatories, and also the testimony of another witness, taken by commission, in answer to the direct interrogatories, the plaintiffs withdrew the cross interrogatories and answers, to which claimant objected. The Court overruled the objection and the claimant excepted.

The claimant offered to introduce Thomas Williams, the defendant in execution, to prove his indebtedness to the claimant at the time the mortgage was given, &c. The plaintiffs objected. The Court sustained the objection and the claimant excepted.

The claimant then offered to prove the sayings of Thomas Williams, in relation to the ownership of the slaves, since the sale under the mortgage *fi. fa.* The plaintiffs objected, and the Court sustained the objection, and the claimant excepted. The claimant closed, when

Plaintiffs introduced a witness, to prove that he (witness) rented from Thomas Williams a lot of land, specified in the mortgage, for the year 1847, and that witness paid him therefor. Claimant objected to the testimony. The objection was overruled by the Court and the claimant excepted.

The witness was then asked by claimant, if, in the negotiations previous to the final contract between himself and Thomas Williams in relation to the rent of the land, Williams did not state that he was acting as agent. Plaintiffs objected to the question. The Court sustained the objection and claimant excepted.

The Court charged the Jury, that if they believed, from the testimony, that Thomas Williams was really and in good faith indebted to Shepherd Williams, sen. he had a right to secure him by mortgage, provided the mortgage was not executed fraudulently, and for the purpose of delaying creditors, but that they must believe, from the testimony, that S. Williams had paid off and discharged the items of indebtedness, specified in the agreement produced in evidence, and if claimant had not shown the payment of said items, he had not shown such an indebtedness as would remove the presumption of fraud; that the retention of possession, after an absolute sale, was a badge of fraud, and, unexplained, sufficient of itself to justify the Jury in condemning the property; that the fact that the sale was by the Sheriff, under execution, did not alter the rule; that the possession of the former owner, after the Sheriff's sale, was still a badge of fraud; that if the purchase had been made by one not a creditor, and who advanced the money on the purchase, that would have been a circumstance which would have gone far to remove the presumption of fraud; but that here it was a creditor who purchased, and the fact that such purchase was made at Sheriff's sale, under execution, was not a circumstance to remove the presumption of fraud, created by the possession remaining in the former owner of the property, the defendant in execution; that there was no distinction in this State, between a Sheriff's sale, under execution, and a private sale by the owner of property, so as to remove the presumption of fraud, arising from retention of possession.

To which said opinions and charges of the Court, the claimant excepted, and upon the said several exceptions, assigned errors.

J. B. Hines and C. B. Strong, for plaintiff in error.

1st. The Court erred in ruling out that part of the testimony of Robert M. Charlton and John E. Ward, relating to sayings of the son of Shepherd Williams, made at the time of the transaction to which those sayings referred. 2 *Starkie on Ev.* 61, *top*

page. 2 *Pet.* 363. 6 *Cowen*, 99. 12 *Wheat.* 468. 3 *Brod. & Bing.* 5 *Esp.* 74. 1 *Greenlf.* 137.

2d. The Court erred in ruling out testimony of Robert M. Charlton and John E. Ward, in so far as relates to books kept by the firm of Charlton & Ward.

3d. The Court erred in ruling out testimony of A. M. Nisbet, so far as it relates to books kept by the Central Bank. *Prince's Dig.* 77.

4th. The Court erred in allowing the defendants to withdraw cross questions and answers, addressed by them to various witnesses, after the plaintiff in error had finished presenting the direct answers.

5th. The Court erred in excluding the testimony of Thomas Williams, the defendant in *fi. fa.* 1 *Richardson*, 242.

6th. The Court erred in requiring the plaintiff in error to prove the payment of the notes by Shepherd Williams, plaintiff in error, which were part of the consideration of the note made by Thomas Williams to Shepherd, and on which the mortgage was grounded. *Philp. Ev.* 3, 1228, *note* 961. 7 *John.* 304. 14 *Ib.* 310. *Prince's Dig.* 424. 7 *Cowen*, 360. 2 *John.* 177.

7th. The Court erred in excluding testimony of the sayings of the defendant in *fi. fa.* explaining the situation of the property and the nature of his possession. 2 *Term*, 53. 1 *Johns.* 340. 1 *Esp.* 458. 2 *Green.* 125.

8th. The Court erred in admitting testimony of Saunders, to prove that Williams had rented the lot of land to him, and received the rent therefor, which was included in the mortgage of personal property.

9th. The Court erred in ruling out the cross questions offered to be put to Saunders by counsel for plaintiff in error.

10th. The Court erred in ruling that in Georgia, the possession of the property being left in defendant after sale by a *fi. fa.* was badge of fraud. 4 *Barn. & Cres.* 433. 8 *Taunt.* 841. 2 *Bos. & Pull.* 59. 1 *Ld. Raym.* 724. 1 *S. L. Cases* 1. 5 *Rand.* 211. 2 *Term R.* 587. 6 *Rand.* 285.

S. D. Killen, for defendants.

The Circuit Judge properly excluded that portion of the testimony of Robert M. Charlton and J. E. Ward, referred to in the 1st and 2d assignment.

It is a well settled rule of law, that the best attainable evidence shall be adduced to prove every disputed fact. 1 *Starkie*, 500. 1 *Greenlf. Ev.* 82.

Was this the best evidence of which the case was susceptible? 1 *Greenlf. Ev.* 436, '7, '8. 1 *Starkie*, 35 *to* 40.

3d. The same doctrine will apply, with equal if not more force, to the testimony of Nisbet, the Cashier of the Central Bank, referred to in the 3d assignment, and supported by 1 *Greenlf. Ev.* 484. *Prince*, 220.

4th. The privilege of withdrawing cross interrogatories is supported by the practice of the Courts, from time immemorial.

5th. The issue below was, fraud or no fraud, between the defendant in *fi. fa.* and the claimant, and the presumptions are in the affirmative. *Peck vs. Land*, 2 *Kelly*, 1, *&c.*

6th. The sayings of the defendant in *fi. fa.* will be excluded after the rising of the *lis mota*, as in this issue. 1 *Greenlf. Ev.* 131, '2, '3.

7th. The acts of a party in possession, permitted by the claimant, are competent to charge him.

8th. There was no error in the charge of the Court, as alleged in 8th assignment. 17 *John.* 332. 12 *Wend.* 41. 15 *Ib.* 628. *Amer. Notes, Tarver's Case*, 1 *Sm. L. Cases*, 47 *and* 50. 2 *Kelly*, 1.

10th. There was no error in the charge of the Court, as alleged in the 10th assignment.

S. T. Bailey, for defendants in error.

The entry in the books of an incorporated Bank is not admissible evidence to show a deposit of money, in a suit to which the Bank is not a party, unless it be proved that the clerk who made the entry is dead or beyond seas. *Phil. Bank vs. Officer et al.* 12 *S. & R.* 49. *Ib.* 256. "This may be a hard case, but hard cases make bad precedents." *Ib.* 53.

Examined copies of *public books* are evidence. 1 *Phil. Ev.* 424.

But such copies are not evidence in case of private bank books. 12 *Serg. & Rawl.* 256.

A witness may refresh his memory by any book or paper, if he can afterward swear to the fact from recollection, but if he can

only swear from finding it in the book or paper, they are not evidence. 3 *Phil. Ev.* 551. 5 *Serg. & Rawl.* 87. 12 *Ib.* 87. 18 *J. R.* 451. 11 *Wend. R.* 477.

Books kept by private individuals are never evidence, unless to charge one to whom goods are sold. 12 *Serg. & Rawl.* 86. 5 *Ib.* 404. 1 *Binn.* 234. 15 *Mass. R.* 381. 8 *Wheat. R.* 326.

Entries made by one in the course of his duty, *at the time of a transaction*, are evidence after his death, but never while he is living and within the jurisdiction. 16 *Serg. & Rawl.* 90. 15 *Mass. R.* 381. 8 *Wheat. R.* 326. 3 *Pick.* 96. 13 *Ib.* 465. 18 *Ib.* 558. 20 *Ib.* 339.

It is illegal to admit declarations of a party in his own favor, even when the Court charges the Jury that it is not evidence. 13 *J. R.* 348.

It is essential to *entries* that are admissible as part of the *res gestæ*, that they should be made and so proved, contemporaneously with the accompanying acts. 1 *Greenlf. Ev.* §120. *Doe, &c. Pattershall vs. Turford*, 23 *Com. L. R.* 214.

Declarations of common reputation must be before any controversy has arisen, and by that is meant that state of facts on which the claim is founded. 1 *Greenlf. Ev.* §131.

In questions of fraud, the declarations of a party in his own favor are inadmissible. *Carter vs. Gregory*, 8 *Pick.* 168.

What was said at one time cannot be explained by declarations at another time, as evidence. *Peter's C. C.* 15. 2 *Bailey's R.* 464.

By the Common Law, possession of goods by an insolvent after absolute sale, was, *per se*, a fraud, and to be so declared by the Court; and the Sheriff's sale was in the same predicament, if the purchaser were the plaintiff in the execution, and no money paid; but it was otherwise in case of a stranger who pays his money; possession then becomes a badge of fraud, to be judged of by the Jury as to its *bona fides*. 2 *Kent's Com.* 518 *to* 536. *Kidd vs. Rawlinson*, 2 *Bos. & Pul.* 59. 10 *Vesey*, 145. 4 *Taunt.* 823. 8 *Ib.* 338. 4 *Barn. & Cres.* 652. 10 *C. L. R.* 432.

The rule of Common Law is to prevent false credit. 2 *Kent*, 523. 5 *Taunt.* 212. 1 *Com. L. R.* 85, '6.

Declarations of a debtor, when in possession of property, may be given against his vendee, and in his absence to show fraud. 3

Phil. Ev. 178, 602 *note.* 10 *Serg. & Rawl.* 423. 4 *S. & R.* 233. 6 *Rand.* 285. 1 *Rawle*, 362, 458.

Declarations of one claiming to hold under another, are not evidence, they being in his favor. 1 *J. R.* 340.

Declarations of a supposed grantee, who may be considered interested at the time, to declare in the particular manner testified to, not evidence for any purpose. 4 *Mass. R.* 702.

Possession after an absolute sale is, *per se*, fraud, unexplained. 10 *Serg. & Rawl.* 428. 2 *Kelly*, 13.

Any *one* of the badges of fraud will defeat the conveyance. *Peck vs. Land*, 2 *Kelly*, 15.

If the creditor become the purchaser at Sheriff's sale, and let the defendant retain the possession, and he insolvent, the same rules apply as in case of voluntary sale. 2 *Bos. & Pul.* 59. 9 *J. R.* 243, 341. 16 *Wend.* 526.

Admissions and declarations of an agent or attorney are admissible as part of the *res gestæ*, first *proving the agency.* 3 *Phil. Ev.* 604. 24 *Eng. Com. L. R.* 70.

And where the declarant is incompetent. 11 *Eng. Com. L. R.* 412.

Where it is proven that one is the agent of another, his acts and declarations are evidence against his principal, and part of the *res gestæ*, when about his duty. 2 *Starkie's Ev.* 34. 4 *Taunt. R.* 519, 565. 6 *Cowen*, 90. 2 *Peters' R.* 358.

Before faith is to be given to acts or entries by private agents, the agency must be proved. 1 *Greenlf. Ev.* §154. 2 *Jac. & Walk.* 464, 468.

If a verdict in a cause for the plaintiff will deprive a witness of the enjoyment of an interest in possession, he is incompetent. 1 *Stark. Ev.* 105. *Cowper*, 621.

Although a vendee charged with fraud release his vendor, he is not a competent witness, being *particeps fraudis*—the one could not sue the other in case of failure, so there was nothing to release. *Rea vs. Smith*, 19 *Wend.* 203.

By the Court.—WARNER, J. delivering the opinion.

[1.] The first exception taken to the decision of the Court below is, the rejection of the testimony of Robert M. Charlton, which consisted of the statements made by the son of the claim-

ant, to witness, when he paid him $400, as the attorney of the Central Bank, as to the purpose for which he paid the money, for whom, and by whose directions he paid it. The declarations of the son are sought to be made evidence, on the ground that he was the *agent* of his father, in making the payment of the money. There are two fatal objections to the admissibility of this testimony of the son. First, it is not shown that the son was either the *general* agent of his father, to transact his business, or that he was constituted his agent for that *particular transaction*, except so far only as his agency may be inferred from his *own act*, by the payment of the money to the witness. Second, because the admission or declaration of the agent, when acting within the scope of his authority, is to be considered as the admission or declaration of his principal. 2 *Starkie's Ev.* 60. *Story on Agency*, §135. This admission or declaration of the agent, that the money paid by him to the witness, was his father's money, and paid by his directions, is offered in behalf of the *claimant*, who is the alleged principal. The admissions of the principal, in his *own favor*, would not be competent, nor are the admissions or declarations of his agent competent in favor of his principal, any more than the principal's own declarations and admissions would be. The fact of agency might have been proved by the agent himself, and he would have been a competent witness to prove whose money it was he paid to the attorney of the Central Bank. If any fact material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his *testimony*, not by his *mere assertion*. *Fairlie vs. Hastings*, 10 *Vesey*, 127. The declarations of the alleged agent in this case, cannot be received as a part of the *res gestæ*, for the obvious reason that neither his general nor special agency has been established.

The second exception to the decision of the Court below is, the sustaining the objection taken by the plaintiff in execution, to that portion of the answers of Messrs. Charlton & Ward, offered by the claimant, which refers to the memoranda and entries made by them on their books, and their statement made to the Central Bank, as appears therefrom.

[2.] That a witness may refer to a written instrument, memorandum or entry in his books, to refresh or assist his memory, is a well established rule of evidence; and even where the witness has no recollection of the fact, independent of the entry in his

books, but will testify as to his uniform practice to make his entries truly, and at the time of each transaction, and will farther state he has *no doubt*, from such practice, that the entry in question is correct, his testimony is admissible; for then the witness speaks upon his own responsibility, under the legal sanction of his oath, his memory being refreshed by the entry in his book or memorandum, the same having been made in accordance with his known habit and practice. 1 *Greenlf. Ev.* §§436, 115. *Merrill vs. The Ithaca and Oswego Rail Road*, 16 *Wendell's Rep.* 5 *and* 6. *Bank of Monroe vs. Culver*, 2 *Hill's N. Y. Rep.* 531. While we recognize the rule above stated, the evidence offered does not come within it, in our judgment, and was properly rejected by the Court below.

[3.] The witnesses state, as attorneys of the Central Bank, that certain things were done, and transactions had, which are given in detail, "which *seem, from the docket kept by said firm, and the written statements made by said firm to the Central Bank.*" The objection is, that the witnesses do not say they kept a docket and were in the practice of making entries therein, at the time of the transactions to which they are called to testify, and that they have no doubt, from their usual course of doing business, the entries were truly made and are correct; but the *docket* is made to speak as to the transactions, without receiving that *legal sanction* of the witnesses which the rule requires. It is not sufficient that the facts appear on *the docket* of the witnesses; their legal sanction must be had, that they have *no doubt*, from their usual manner of doing business, the entries were made at the time they appear to have been made, and are correct and true.

[4.] The third exception taken, as appears from the record, was the rejection of that portion of the testimony of A. M. Nisbet, Cashier of the Central Bank, which went to prove the *contents* of the books of the Bank, of which contents the witness had no *personal* knowledge. This evidence is sought to be admitted under the 9th section of the amendatory Act of the charter of the Central Bank, which provides for the examination of the officers of the Bank, by commission, as to the contents of the books, whenever the Bank shall be *a party*. *Prince*, 76. In this case, the Bank is not a party to the suit, and the Act relied on only extends to such cases as to which the Bank may be a *party*, and be-

ing a Statute enacted in derogation of the Common Law rules of evidence, must be construed *strictly*. By the 17th section of the original charter of the Central Bank, all the transactions, operations and accounts of the Bank are required to be kept in books to be provided for that purpose. *Prince*, 74.

The Central Bank is a public institution, and the officers thereof are public officers. By the Act of 1830, the certificate of any public officer, under his hand and seal of office, either of this State or any County thereof, in relation to any matter or thing pertaining to their respective offices, or which, by presumption of law, properly pertains thereunto, shall be admitted as evidence, before any Court of Law or Equity in this State. *Prince*, 220. The officer examined, not having any *personal* knowledge of the facts about which he was interrogated, as to the contents of the books of the Bank, a certified copy from the books, under the hand and seal of the officer, would, in our judgment, have been competent, and the best evidence to prove the transactions of the Bank with its debtors, so far as the same is confined to the books of the Bank. The evidence offered was properly rejected by the Court below.

[5.] The fourth exception contained in the record, is to the decision of the Court in permitting the counsel for the plaintiff to withdraw their cross questions to the claimant's interrogatories, with permission to the claimant to read them if he desired to do so.

When one party introduces a witness and examines him, the other party is entitled to cross examine such witness, if he desires to do so, but he is not *compelled* to cross examine him; nor do we hold he is *compelled* to read the cross questions and answers of the witness, examined by commission; but, having put the cross questions to the witness, the other party is entitled to read them and the answers thereto, and so we understand the Court below to have ruled. Whether the witness be cross examined or not, he is the witness of the party introducing him. We find no error in the record so far as this exception is concerned.

[6.] The fifth exception taken to the decision of the Court below is, the rejection of the defendant in execution, who was offered as a witness on the part of the claimant.

This question arises under the peculiar enactments of our claim laws, and if it was a new question in our Courts, it might be somewhat difficult to assign any technical legal reason for rejecting the

witness; but, impressed as we are with the importance of maintaining and preserving the rules of evidence with respect to the titles of property in this State, as the same have *heretofore existed*, we do not feel it would be either safe or expedient to interfere with the rule of decision which, so far as we know, has generally prevailed in our Courts, ever since the enactment of our claim laws. In legal theory, it would seem that it would be for the interest of the defendant in execution to have the property found subject to the execution, and applied to the payment of his debts, and consequently that when called as a witness for the claimant, he would be called to swear against his interest. But twenty odd years' observation and experience in our Courts, has satisfied us that this legal theory will not hold good in practice, for we hesitate not to declare, that in nineteen out of twenty of the claim cases which arise in our Courts, the feeling, sympathy and interest of the defendant in execution is with the *claimant*. This fact is indelibly stamped on the face of the record now before us. How exceedingly rare is it to find the defendant in execution colluding with the plaintiff in *fi. fa.* which has been levied on his property? How often do you find him colluding with the claimant to screen his property from the payment of his just debts? The sale of the property by the defendant to the claimant is generally made after his pecuniary circumstances have become desperate. The claimant derives his title to the property from the defendant in execution, who feels interested to support and sustain it against one whom he supposes to be an unfeeling creditor, pressing the collection of his debt. The answer may be, that the *legal theory* of this view of the question is, that the interest of defendant is equally balanced between the creditor and the claimant, and, therefore, he is a competent witness. But our Courts have held, and we think rightfully held, that the defendant in execution has, in the *practical* application of the principle, a *preponderance* of interest in favor of the claimant. Whatever may be considered as the *legal theory* of the rule which excludes the defendant in execution from being a witness in favor of the claimant, we are satisfied that, in a *practical* point of view, the rule which has been heretofore so generally adopted by our Courts, is the *safest* and *best* rule; and believing it to be so, we feel no inclination to disturb it. It is not a matter of so much importance what the rule of evidence upon this subject shall be, so that the rule is uni-

form, and uniformly administered, and in establishing the rule, we think that both wisdom and sound policy dictate to us, not to *innovate* upon a rule of evidence which has so long been observed by most of our judicial tribunals, and impliedly, at least, received the sanction of the people upon whom it has operated. In *Edwards vs. Musgrove*, this question was submitted to the Judges of the Superior Courts, when sitting in Convention, and it was there held, that the defendant in execution was not a competent witness for the claimant. *Dudley's Rep.* 219. That decision has been published for several years, and no attempt has been made by the Legislature to alter the rule of evidence upon this subject; hence we conclude, that the operation of this rule of evidence, as established by the Judges in Convention, and generally followed in our Courts, has been considered a safe and satisfactory rule of evidence in this State, on the trial of claim cases originating under our claim laws. We therefore affirm the judgment of the Court below as to this branch of the case.

The sixth exception taken to the decision of the Court is, to the rejection of the declarations of Thomas Williams, the defendant in execution, in favor of the claimant, while in possession of the property. The same reasons which we have assigned for the rejection of the defendant in execution, as a witness in favor of the claimant, apply with equal force to the rejection of his declarations in his favor. This defendant, as is the case with almost every defendant in execution in a claim case, manifests a wonderful alacrity to make evidence for the benefit of the claimant's side of the question; but as we hold him inadmissible as a witness in behalf of the claimant, the same rule of policy will, also, exclude his admissions in his favor.

The seventh exception is, to the overruling the claimant's objection to the testimony of Warren E. Sanders, who was offered by the plaintiff, to prove that Thomas Williams, the defendant in execution, had rented to him, for the year 1847, the lot of land specified in the mortgage, together with the negroes levied on, and had paid him the rent therefor. There is no evidence furnished by the record before us, that the land included in the mortgage had ever been sold under the judgment of foreclosure, and until such sale the defendant's title to the land was not divested, and he had the right to rent it and receive the rent therefor; and such acts, on his part, would not be evidence of fraud as against the

plaintiff in execution, and we are of the opinion that the Court erred in admitting this testimony, under the state of facts as presented by this record. We are also of the opinion, that the Court erred in its judgment, in not permitting the witness, Sanders, to be cross examined as to what the defendant in execution said, in regard to his being the *agent* of the claimant, when making the negotiations for the rent of the land.

The witness stated, that when the trade for renting the land was finally closed, Williams did not say any thing about his being the *agent* for any one in renting the lot, but that they had several conversations previously about renting the land, and in negotiations for rent. Claimant then asked the witness if, in the previous negotiations about the rent, Williams did not state to him he was acting as *agent* for another. This evidence might have explained and rebutted the presumption, sought to be inferred from the evidence, that he rented the land as his own property. The negotiations for the rent, and the contract of renting, all appertained to the same transaction, and ought to have been received as explanatory of it.

The eighth exception is, to that part of the charge of the Court to the Jury, which relates to the possession of the defendant in execution, of the property, after the foreclosure of the mortgage and the sale of the property by the Sheriff.

[7.] The Court charged the Jury, that the retention of possession of the property by the defendant in execution, after an absolute sale by the Sheriff, was a badge of fraud, especially when the property was purchased by the mortgage creditor. We concur in opinion with the Court below, that the retention of the possession of the property, by the defendant in the mortgage *fi. fa.* after an absolute sale by the Sheriff, was a *badge* of fraud, which it was incumbent on the claimant to remove by a satisfactory explanation of that possession. The purchaser at the sale was the mortgage creditor, who is now the claimant, and the relation of father and son existed between the mortgage creditor and the defendant in execution. *Kidd vs. Rawlinson*, 2 *Bos. & Pullen*, 59. *McInstry vs. Tanner*, 9 *John. Rep.* 135. *Farrington & Smith vs. Caswell*, 15 *John. Rep.* 430. *Dickinson vs. Cook*, 17 *John. Rep.* 332. *Stevens, adm. vs. Barrett, adm.* 7 *Dana's Rep.* 259.

The ninth and last exception to the decision of the Court below, is to that portion of the charge of the Court to the Jury,

"that they must believe, from the testimony, that the claimant had paid off and discharged the items of indebtedness specified in the agreement produced in evidence, and if the *claimant* had not shown the payment of said items, he had not shown such an indebtedness as would remove the presumption of fraud." The items in the agreement were the consideration of the note, which the mortgage was given to secure. The objection is, that the Court ruled that it was incumbent on the claimant to prove the consideration for which the mortgage was given, when the law devolves that proof upon the plaintiff in execution, especially after the judgment of foreclosure of the mortgage, and that it was not indispensably necessary that all the items in the agreement should have been proved, to sustain the consideration of the mortgage. With regard to this last exception, our judgment is with the plaintiff in error.

[8.] After the judgment of foreclosure of a mortgage under our Statute, such judgment of foreclosure affords *prima facie* evidence of indebtedness, and the burden of showing a want of consideration, rests upon the party alleging it. In this case, the burden of proof rested on the plaintiff in execution, and not upon the claimant.

The instruction of the Court is, that the Jury must believe that the *claimant* had shown payment of the items in the agreement, which was the consideration of the mortgage, and that if the *claimant had not shown such payment*, the presumption of fraud was not removed.

Nor do we hold, even had the burden of proof rested on the claimant, that it was absolutely necessary all the items of indebtness in the agreement should have been proved. The effort is to impeach the mortgage under which the claimant derives his title to the property, on the ground that it is fraudulent as against creditors; and the want of sufficient consideration to support the mortgage, is alleged as a badge of fraud against it.

Fraud may be inferred from circumstances, such as the *smallness* of the consideration expressed, compared with the fair price of the property conveyed, or the want of proof of any price having been actually paid. *Hildreth vs. Sands et al.* 2 *John. Ch. Rep.* 35.

[9.] Whether the indebtedness of the defendant in execution to the claimant, was a *bona fide* indebtedness, or what was the ac-

tual amount of his indebtedness, to secure which the mortgage was given, or whether the mortgage was merely *colorable*, and without consideration, were questions of fact which the Court ought to have submitted to the Jury, irrespective of the proof of all the *specified items* in the agreement. If all the items of indebtness were not proved, was there a sufficient consideration shown to rebut the presumption of fraud in the execution of the mortgage? Does the consideration for which the mortgage is alleged to have been given, afford satisfactory evidence of the *bona fides* of the transaction, or was it merely colorable for the purpose of defrauding the creditors of the mortgagor? Under the charge of the Court, had the Jury believed that any one of the items of indebtedness, specified in the agreement, had not been proved to have been paid by the claimant, they would have been at liberty to find that the allegation of fraud had not been removed, although it had been shown that most of the other items were paid by him. We think that the charge of the Court was calculated to mislead the Jury in respect to the consideration for which the mortgage was executed, and which was alleged as a badge of fraud against the claimant, consequently a new trial must be granted.

Let the judgment of the Court below be reversed.

No. 48.—THOMAS ARNOLD, administrator, &c. plaintiff in error, *vs.* ELIAB WELLS and WIFE, defendants.

[1.] Notice of the *filing* of a bill of exceptions, held not to be sufficient. There must be notice of the *signing and certifying*.

[2.] The Clerk must certify and send up the record and bill within time, and his certificate must show that it was done in time.

[3.] The Court will not amend a writ of error, by striking out one party and inserting another.

Motion to dismiss the writ of error.

The defendant in error joined issue with a protestation, and moved to dismiss the case—

1st. Because there is no notice of the *signing* of the bill of exceptions.

2d. Because of the discrepancy between the parties to the original cause, as certified and sent up in the record, and in the writ of error.

3d. Because it does not appear, from the certificate of the Clerk, that the transcript of the record was certified and sent up, within the time prescribed in the Statute.

The facts were, that instead of filing a notice of the *signing* of the bill of exceptions, the plaintiff in error filed a notice of the *filing* of the bill of exceptions. In the writ of error, John Arnold was named as guardian of John B. Arnold, in lieu of James Shivers, who was one of the parties to the original cause.

The Clerk left blank the day of the month on which he certified and sent up the record to this Court.

C. J. McDonald, for the motion.

Wm. Dougherty, contra.

Judge *Warner* having been of counsel, did not preside in this cause.

By the Court.—Nisbet, J. delivering the opinion.

The writ was dismissed in this case,

[1.] First. Because the record furnishes no evidence that there was any notice of the *signing* of the bill of exceptions. There was notice of the *filing* of the bill—that is not enough. The Statute requires that the party defendant in error, shall be notified of the *signing* of the bill of exceptions.

[2.] Second. Because it does not appear, from the record, that the Clerk certified and sent up the transcript and bill, within the time prescribed by law. The certificate is in blank, as to the day of the month, and there is nothing from which the Court can know that it was certified and sent up within time. The certificate must show the date.

Third. Because, in the writ of error, a person was named as a party, different from the true party, as disclosed by the bill and record.

[3.] We will not amend, by striking out one party and inserting another. (See *Duke vs. Trippe*, determined at this term. *Supra.*)

No. 49.—HENRY HARRIS, plaintiff in error, *vs.* LEGRAND S. CANNON and another, defendants.

[1.] If a deed of bargain and sale be executed by an *infant*, it may be avoided by another deed of bargain and sale, made to a third person, without entry by the infant, when he arrives at age, in case the land continue in the possession of the infant, or be vacant and uncultivated.

[2.] If, when the second deed be executed, the lands be holden *adversely* to the infant, *it seems* that the second deed will not amount to a revocation of the first conveyance.

[3.] If the subscribing witnesses to a deed reside out of the State, secondary evidence may be resorted to, to prove its execution.

[4.] Is it competent for the lessor of the plaintiff, in an action of ejectment, to prevent a recovery, by a conveyance of the premises to the defendant, after suit brought?

Ejectment, in Meriwether Superior Court. Tried before Judge HILL, August Term, 1848.

This was an action of ejectment, brought on the several demises of Cannon and Moses Sinquefield, to recover a lot of land situated in the County of Meriwether.

On the trial, the plaintiff offered in evidence a grant from the State of Georgia to Cannon, for the premises in dispute, and a deed from Cannon to Sinquefield, bearing date on the 22d November, 1845, and proved by a witness the possession of Harris, at the commencement of the suit, and during the year 1845, and continuously up to the trial of the cause, and closed.

The defendant introduced a deed, executed by Cannon to one Griffin, on the 11th February, 1841, and a deed from Griffin to the defendant, dated on the 2d of June, 1841.

The plaintiff then offered the testimony of a witness, taken by commission, to prove that, at the time Cannon made the deed to

Griffin, he was a minor; to which the defendant objected, on the ground that the plaintiff had shown title out of Cannon, and that Cannon's infancy was a personal privilege, of which plaintiff could not avail himself.

The Court overruled the objection, and admitted the evidence, to which decision defendant excepted.

The defendant then offered in evidence a second deed from Cannon, which was executed on the 30th of August, 1847, to the defendant, in the State of Florida, and was attested by two witnesses, both of whom made their attestation officially, as Justices of the Peace; one whose character as such was authenticated by the certificate of the Clerk of Wakulla County, where the deed purported to have been made, and also, by the certificate of the Secretary of State of the State of Florida.

It appeared that the witnesses were residents of the State of Florida, when the deed was executed, and at the time of trial.

The counsel for plaintiff objected to the admission of this deed in testimony, and the Court sustained the objection, and the defendant excepted.

The defendant then introduced a witness, who was not one of the subscribing witnesses, to prove the execution of the deed, and the hand-writing of the attesting witnesses. To this testimony, counsel for plaintiff objected. The Court sustained the objection, and the defendant excepted.

The defendant offered in evidence, an order, purporting to be from Cannon, for the settlement of the case, which was attested by the witnesses, who attested the deed, to which plaintiffs objected. The Court sustained the objection, and the defendant excepted.

The counsel for the defendant asked the Court to charge the Jury, that in making their verdict, they should find specifically on one or the other of the two demises laid in the declaration, which the Court refused to do; but on the contrary, did charge the Jury that they might render a general verdict; to which decision and charge of the Court, defendant excepted, and upon the said several exceptions, assigned error.

ALEXANDER, for plaintiff in error.

DOUGHERTY & STROZIER, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first point presented in the record is, could Sinquefield, the grantee of Cannon, take advantage of the infancy of the infancy of the latter, in order to set aside the deed from Cannon to Griffin, made in 1841, and under which Harris, the defendant, claims? There is much contradictory authority upon this vexed question. The *dictum* is to be met with every where in the Digests and Text Books, that infancy is a personal privilege, of which no one can take advantage but the infant himself. The difficulty is, in the application of this abstract principle.

In *Nightingale vs. Withington*, (15 *Mass. R.* 261,) a minor had received a promissory note, in payment of his labors, in the employment of the maker of the note, and had indorsed the same to a third person, for a valuable consideration, the indorsee knowing the indorser to be under age; and afterwards, the father of the minor received the amount of the maker, in discharge of the note, both the father and the maker knowing of the indorsement; the indorsee was allowed to recover judgment against the maker, and *Parker*, Chief J. in delivering the opinion of the Court, said, "If an action should be brought against the infant, as indorser, for the default of payment by the promisor, without doubt, he may avoid such action by a plea of infancy; but that is a personal privilege which none but himself can set up, in avoidance of any contract made in his favor."

The same eminent Judge, in delivering the opinion of the Court, in *Worcester vs. Eaton*, (13 *Mass. R.* 375,) remarked that, "it is a general principle, that when infancy is set up in defence, against a deed, it must be in the form of a special plea, infancy not making a deed void, but voidable; and yet, it is held, that an infant, who has conveyed his land by deed of feoffment, or by bargain and sale enrolled, may, by entry, either within age or after, if he has not assented to the conveyance, after coming of age, revest the title in himself. The requisition of the plea of infancy, is undoubtedly applicable only to executory contracts." He continues—"Until a deed so made is avoided, no subsequent conveyance by the grantor can be good, because he would not be seized of the land; and none but himself or his heirs can set up a right to avoid a deed for infancy or duress, these being matters in de-

fence which he may waive, if he see fit, so that the title will remain good to the grantee, by virtue of such deed, until the grantor shall lawfully disaffirm it. He can do it only by entry, but having entered, his subsequent deed, accompanied by proof of facts, tending to avoid the first, will convey a title."

The case of *Jackson vs. Carpenter*, (11 *Johns. R.* 539,) is an authority directly in support of the judgment below. An infant, in 1784, conveyed lands in the military tract, and afterwards, in 1794, having arrived to full age, conveyed the same lands to another person, and such conveyance was registered. It was held, that the lands being waste and uncultivated, he was not concluded by the lapse of time; and that an entry was not necessary to avoid the former deed, executed by him during his infancy, but that this deed, not being a feoffment, might be avoided by one of the same nature and equal notoriety.

And the same doctrine was reiterated to the fullest extent, in *Jackson vs. Burchin*, (14 *Johns. R.* 124,) where the Supreme Court held, that a person having conveyed land, when an infant, may avoid his grant, by the same solemnity with which he made it, as if it were a feoffment with livery, by a subsequent feoffment and livery; if a bargain and sale, by a subsequent bargain and sale.

Other adjudications are to be found in New York, in corroboration of this doctrine.

The same point underwent the most elaborate examination in *Hoyle vs. Stone*, 2 *Dev. & Bat.* 320. *Burton & Badger* argued the question in behalf of the lessor of the plaintiff, and *Caldwell* for the defendant. And the Supreme Court held, *Ruffin*, Chief J. delivering the opinion, that a deed of bargain and sale, made by an infant, is avoided, by his executing, upon his arrival at full age, another deed of the same kind, and for the same land, to a different person.

So, also, in *McGill vs. Woodward*, (3 *Brevard*, 401,) the Court, in specifying the various ways by which an infant may disavow his intention of carrying into effect a contract made during infancy, say, that he may enter upon lands sold or conveyed by him, when under age; or he may, when he comes of age, convey the same land to another.

Chancellor *Kent* cites the cases of *Jackson and Carpenter*, and *Jackson and Burchin*, apparently, with approbation. He observes, that for an infant to disaffirm the voidable deed of his infancy,

which was by deed of bargain and sale, by an act equally solemn after he becomes of age, *is the usual and suitable course, when the infant does not mean to stand by his contract.* 2 *Kent's Com.* 5 *ed.* 238.

And Mr. Justice *Story*, in *Tucker vs. Moreland*, (10 *Peters' R.* 59,) after thoroughly investigating this principle, declares, that the two decisions in 11 and 14 *Johnson*, proceeded upon principles which were in perfect coincidence with the Common Law.

I have found no case in the English Reports, directly in point. That of *Frost vs. Wolverton*, *in C. B. Strange's R.* 94, is most nearly analogous. An infant covenanted to levy a fine, by such a time, to such uses. Before the time he came of age; then the fine was levied; and by another deed, made at full age, he declared it to be to other uses. The Court held, that the last deed should be that which should lead the uses.

Upon the general principle, therefore, I am strongly inclined to think, that the Court below was right; and it only remains to inquire whether there be anything in the particular facts of this case, to withdraw it from the operation of the rule.

[2.] In *Tucker vs. Moreland*, the infant had never been out of possession.

In *Jackson vs. Carpenter*, the lands in dispute were *waste* and *uncultivated*. *Yates*, Justice, in delivering the opinion, adverts to that fact, remarking, that the rules, as to proceedings in ejectment, for a vacant possession, in England, do not apply to the new or unsettled lands of this country; and that it might with equal propriety be said, that the doctrine of actual entry to avoid a deed given by an infant for new and unsettled lands, is equally inapplicable, and ought to be insisted on only so far as it comports with the principles which gave rise to its introduction.

And in *Jackson vs. Burchin*, Judge *Spencer*, after maintaining with his usual ability, the doctrine already quoted, viz: that the infant can manifest his dissent in the same way and manner by which he first assented to convey, says: "The law does not require idle and non-essential ceremonies; and it would be idle to require an entry on the premises, in 1795, when, not only this lot, but the whole country in which it was situated, was almost a wilderness. The second deed to the lessors, was neither an act of maintenance nor of fraud, admitting that they knew of the deed to Newkirk, (*the purchaser during the infancy.*) *I will not say that it*

might not have been an act of maintenance, had Newkirk been in possession of the lot, and holding under the first deed, but he was not."

In 1837, this point, with the qualification to which these cases refer, came directly before the Supreme Court of New York, in *Bool & Wife vs. Mix*, (17 *Wend.* 119,) and the following propositions were there affirmed:

1. That a deed of *bargain and sale*, made by an *infant*, is like a feoffment, with livery of seizin, *voidable* only, and not *absolutely void*; and *it seems*, say the Court, that the rule is universal, that all deeds or instruments, under seal, executed by an *infant*, are *voidable only*, with the single exception of those which delegate a naked authority—they are void.

2. That a *deed of lands*, executed by an *infant*, cannot be avoided till he come of age, though he may enter and take the profits in the meantime; but *it seems* a sale and manual delivery of *chattels*, by an *infant*, may be avoided while under age.

3. Before suit brought for the recovery of possession of lands conveyed in *infancy*, the party must make *an entry upon the land, and execute a second deed* to a third person, or do *some other act* of equal notoriety, in disaffirmance of the first deed—such as demanding possession, or giving notice of an intention not to be bound by the first deed, or an action cannot be sustained.

4. If there be a *feoffment with livery*, it may be avoided by entry, or by writ *dum fuit infra ætatem*. If a deed of *bargain and sale* be executed, it may be avoided by another deed of bargain and sale, made to a third person, *without entry*, in case the land be *vacant and uncultivated*; but in all other cases, *there must be an actual entry*, for the express purpose of disaffirming the deed.

5. If, when the second deed be executed, the land be holden *adversely* to the *infant*, it seems that the second deed will not amount to a revocation of the first conveyance.

And in *Roberts vs. Wiggins*, (1 *N. H. R.* 73,) it was held, that if the infant was out of possession, he should enter, and if in possession, should explicitly evince his intention to defeat the conveyance.

Admit, then, the general rule to be as laid down by Lord *Mansfield*, (3 *Burr.* 1804,) and *Shepherd*, in his *Touchstone*, (233,) that all gifts, grants or deeds, made by infants, by matter in deed or writing, which do take effect by delivery of his hand, are voidable

by himself, his heirs and his privies in estate—still, it may be insisted, that this only applies where the land is vacant, or in possession of the infant, or those claiming under him.

But it is otherwise in this case. Harris, the defendant in ejectment, who bought of Griffin, the grantee of Cannon, *the infant*, continued in possession of the premises in controversy, during the year 1845, and down to the present time. The deed by Cannon to Sinquefield, is dated 22d Nov. 1845. It was made, therefore, while Harris held *adversely* to Cannon. It does not appear what time had elapsed from the period when Cannon had attained to majority, and the execution of the second conveyance. In contracts voidable only, by an infant, on coming of age, he is bound to give notice of disaffirmance, within a reasonable time, especially where the first grantee is in possession; otherwise, a confirmation of the act of infancy may be justly inferred. Sinquefield's deed being void, then, as against the act forbidding the sale of pretended titles, how can Harris be treated as a trespasser, and subjected to costs and mesne profits, until some act of disaffirmance by Cannon? Here, there has not only been no entry upon the land, but setting aside Sinquefield's deed for maintenance, Cannon has done no act, whatever, to disaffirm the first conveyance. He has not even demanded possession of Harris, or given him notice that he did not intend to be bound by his first deed to Griffin. This, says Mr. Justice *Bronson*, is the only way in which the Courts can carry out the doctrine, that the deed of an infant is *voidable* only, and not *void*. Although the title of the defendant may be defeated, yet, so long as the deed remains unrevoked, he has the legal seizin of the land, and cannot be sued as a trespasser. It is little better than a contradiction in terms, to say that a man who has the rightful possession of lands, can be treated as a wrong-doer. 17 *Wend.* 136.

[3.] The defendant in ejectment offered in evidence a second deed, from Cannon to himself, dated 30th August, 1847, and also, an order from Cannon, directing the action to be settled. These papers were executed in Florida, and attested each by two witnesses, who subscribed their names officially, as Justices of the Peace, and whose character, as such, was authenticated by the certificate of the Clerk of Wakulla County, where the deed purported to have been made; and also, by the certificate of the Secretary of State of Florida. The witnesses were residents of

Florida, both at the time when the deed was executed and at the trial. The presiding Judge held, that these documents could not be read, without further proof as to their execution. The defendant then introduced a witness, to prove the actual execution of the deed and order, and the handwriting of the witnesses. Counsel for the plaintiff objected to this secondary evidence, insisting that interrogatories should have been addressed to the subscribing witnesses; and this being the judgment of the Court, the testimony was rejected.

We are unanimous, that in this opinion the Court erred. Whether the subscribing witnesses shall or shall not be resorted to, does not, as we conceive, depend upon the nearness or distance of their residence, either from the parties or the place of trial, but whether or not they reside within the jurisdiction of the Court. If they do, they must be resorted to; if they do not, secondary evidence is admissible, for the simple, yet, most satisfactory reason, that the foreign proof cannot be reached and coerced by the compulsory process of the Court. True, witnesses who reside abroad, will usually answer a commission, yet, they are not bound to do so. Their compliance with the mandate, is not of right, but of grace. And evidence is never deemed secondary, where the better is not within the power, compass or control of the party. And such seems to have been the uniform and unbroken current of decisions, both in England and in this country, from the days of Lord *Holt* to the present time. *Key vs. Gordon*, 12 *Mod.* 521. *Ibid*, 607, (*anonymous.*) 1 *Greenlf.* §572.

Nor does the fact, that the witnesses resided in Florida when these papers were executed, make any difference. The only inquiry is, did they live in the State at the time of the trial?

[4.] But, it is argued, that these instruments, if allowed to go before the Jury, would not avail to defeat the action; that the plaintiff in ejectment is not capable of defeating his own suit, by a conveyance to, or settlement made with, the defendant, after suit brought.

We subscribe to the doctrine, that if the plaintiff is entitled to the possession of the premises, at the time the demise is laid, it will be sufficient, although his right of possession be divested before trial; for the action of ejectment is intended to give the party compensation for the trespass, as well as to enable him to recover possession of the land; and he has a right to proceed for such

trespass, although his right to the possession should cease. *Adams on Ejectment*, 33.

We will not, however, anticipate the legal force and effect of the testimony, when tendered—"Sufficient unto the day is the evil thereof."

The plaintiff in error is entitled to judgment of reversal, and it is accordingly awarded.

No. 50.—RICHARD HENDERSON, plaintiff in error, *vs.* N. B. JOHNSON, defendant in error.

[1.] By the 4th section of the Statute of Frauds, the special promise to answer for the debt of another person, must not only be in writing, but also the *consideration* of the agreement; and parol evidence is not admissible to prove a consideration, *extrinsic* the written agreement.

Assumpsit, in Pike Superior Court. Tried before Judge FLOYD, August Term, 1848.

For the facts in this case, see the judgment of the Court.

A. R. MOORE, for plaintiff in error, cited and commented on the following authorities:

14 *Ves.* 190. 15 *Ves.* 286. 8 *John.* 29. 17 *Mass.* 122. 4 *Greenl. Rep.* 180. 6 *Cowen*, 81. 3 *Kent*, 121. *Roberts on Frauds*, 117. *Dane's Abr.* 253, 130. 6 *East*, 307.

MOORE & GLENN, for defendant in error, cited and commented on the following authorities:

Chit. on Cont. 499, *n.* 2, 507, *n.* 1, 517 *to* 519. *Prince*, 915. *Wain vs. Warlters*, 2 *Smith's Lead. Cas.* 147. *Sears vs. Brink*, 3 *John. Rep.* 209. 2 *Story Eq. Jur. p.* 62 *to* 75.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question made by the record, and urged on the argument of this case, is as to the admissibility of parol evidence to show the *consideration* for which the instrument executed by the defendant, and set forth in the record, was made.

The plaintiff alleges, that one Jesse Johnson, who was the father of the defendant, made and delivered to him his promissory note, on the 11th day of December, 1841, whereby he promised to pay the plaintiff or bearer, on or before the twenty-fifth day of December, 1842, one hundred and sixty-eight dollars and seventy-five cents, for value received. The plaintiff also alleges, he was determined to sue the said Jesse Johnson, and to prevent him from removing from the State of Georgia, which he designed to do, and that the defendant, for the purpose and for the consideration of enabling the said Jesse Johnson to remove, and for the farther consideration of the plaintiff's forbearance to sue, and hold the said Jesse Johnson to bail on said debt, the said defendant, on the ninth day of December, 1844, undertook and promised to pay the plaintiff the sum of money specified in the note of the said Jesse Johnson, in a letter or note in writing, which is in the following words:

"I have agreed with Mr. Richard Henderson, for him to have the rent of the place whereon Jesse Johnson lives, until he gets the amount of a note he holds against said Jesse Johnson, amounting to some one hundred and seventy dollars; or if the said land is sold sooner, he is to have his amount out of the first of the sale of said land.

[Signed,] "NATHAN B. JOHNSON.

"To Jno. Williams, Esq."

The plaintiff alleges that he did forbear to sue and to hold said Jesse Johnson to bail, but that the defendant has broken and violated his said agreement and undertaking, although he has rented the land for three years, and has sold the same for three hundred dollars, and refuses to pay the note of said Jesse Johnson. The defendant, by his plea, insists upon the Statute of Frauds.

Upon the trial of the cause, the plaintiff offered to prove, *extrinsic* of the written agreement, the *consideration* for which it was executed, as set forth in his declaration, which evidence was

rejected by the Court, and the plaintiff was non-suited; whereupon the plaintiff excepted, and now assigns the same for error here.

By the 4th section of the Statute of Frauds, it is declared, "No action shall be brought, whereby to charge the defendant, upon any special promise, to answer for the debt, default or miscarriages of another person, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." *Prince*, 915. In *Wain vs. Warlters*, (5 *East's Rep.* 10,) it was held, that by the word *agreement* mentioned in the Statute, it must be understood the *consideration* for the promise, as well as the promise itself, and that if *extrinsic* parol evidence could be received to show the consideration of the written agreement, the very object of the Statute would be defeated. *Saunders vs. Wakefield*, 4 *Barnewall & Alderson*, 595. *Sears vs. Brink*, 3 *John. Rep.* 211. *Grant vs. Naylor*, 4 *Cranch's Rep.* 224.

We are aware that a different construction has been given to the Statute of Frauds in several of the State Courts of the Union—in some of them in consequence of a different wording of the Statute—but we prefer to adopt the English rule of construction, believing it to be a safe and sound exposition of the Statute of Frauds, both as it regards the letter and spirit of the Statute.

Let the judgment of the Court below be affirmed.

No. 51.—Joel D. Newsom and others, plaintiffs in error, *vs.* Jesse McLendon and others, defendants in error.

[1.] The levy of an execution on personal property, is a satisfaction, so far as to throw upon the plaintiff the burden of proving, either that it was insufficient, or that its proceeds were applied to the extinguishment of prior liens, or that it was otherwise unproductive, and made so without fault in the plaintiff, or the levying officer.

[2.] A levy upon personal property, sufficient to pay the debt, which is dismissed by the plaintiff, with the consent of the defendant, extinguishes the judgment, so far as third persons may be affected by it.

[3.] Payment of a joint debt, by one of two defendants, against whom several judgments have been rendered, extinguishes both judgments.

[4.] If A holds a demand against B & C, as partners, and C is dead, and there are effects of the firm in the hands of B, the surviving partner, sufficient to pay the debt, and D holds property conveyed to him by C, to indemnify him as surety for C, *upon the equities subsisting between B & C*, Chancery will compel A to proceed against the property in the hands of B, the surviving partner, so as to leave the property conveyed to D, to be applied to his remuneration, as surety for C.

Application for an injunction, in Troup Superior Court. Decided by Judge HILL, at Chambers, 30th September, 1848.

This was a bill for discovery and injunction, in favor of plaintiffs in error, against the defendants in error, and presented to Judge *Hill* for his sanction. The bill alleged, that as securities for one Wilie Wormack, plaintiffs in error had been compelled to pay large sums of money; to secure and save harmless against said securetyships, the said Wormack conveyed to plaintiffs in error, in 1840, the premises upon which he then lived.

That Wormack and one Jesse McLendon, previous to the making of the conveyance, were partners in merchandize, and that they executed their note to one Thos. C. Brown, by signing thereto their individual names; and that the property for which the note was given, became the property of the partnership.

That during the existence of the partnership, Jesse McLendon had the entire control and charge of the effects thereof; and that upon its dissolution, all the goods, notes and accounts, &c. of the partnership, and particularly the property for which the note was given to Brown, went into the hands of the said Jesse, and he assumed the entire charge thereof.

That Brown obtained, before the execution of the said conveyance from Wormack to plaintiffs in error, separate judgments upon the note against Wormack and Jesse McLendon; that an execution issued upon the judgment against Jesse McLendon, and was levied upon a large amount of property, sufficient to have satisfied the same; for the forthcoming of which, on the day of sale, a bond was given.

That before the day of sale, Freeman McLendon and Jeremiah McLendon, (who has since departed this life, and the said Freeman appointed his executor,) with the assistance of, and for the pur-

pose of enabling Jesse McLendon to have and to hold all the effects of the said partnership, to his own use, paid off the said *fi. fa.* and from Brown took a transfer thereof, and also an assignment of the judgment against Wormack.

That Freeman and Jeremiah McLendon afterwards dismissed the levy made and entered upon the *fi. fa.* against Jesse McLendon, and caused an execution to issue on the judgment against Wormack, and to be levied upon the premises conveyed by Wormack to plaintiffs in error.

That Wormack afterwards died, wholly insolvent, whereby Jesse McLendon became surviving co-partner; and that a sufficient amount of the said partnership funds were in his hands, to pay off the said debt; and that Jesse McLendon himself is perfectly solvent and able to pay the said debt.

The bill charges, that at the time of the transfer of the *fi. fa.* against Jesse McLendon, from Brown to Freeman and Jeremiah McLendon, Jesse McLendon furnished a large portion of the money paid thereon, and that subsequently he has refunded to Freeman McLendon, and to the said Freeman, as executor, the amount advanced by the said Freeman and his testator upon the said *fi. fa.*

That complainants are unable to prove the material facts charged in their bill, other than by a resort to the consciences of the defendants.

The bill alleges that complainants have interposed their claim to the property transferred to them by Wormack, and levied upon by the execution against Wormack, and that the same is now pending upon the appeal in Troup Superior Court.

The bill prays for a perpetual injunction, to restrain the collection of the judgment against Wormack, out of the property conveyed by him to plaintiffs in error, and that in the meantime the assignees of the judgment may be restrained from proceeding in the claim case.

Judge *Hill* refused to sanction the bill; to which opinion and decision of the Court below, counsel for plaintiffs in error excepted.

W. Dougherty, for plaintiffs in error.

O. A. Bull, for defendants.

His Honor, Judge *Warner*, having been of counsel in the Court below, gave no opinion in this case, in the Supreme Court.

By the Court.—NISBET, J. delivering the opinion.

[1.] We think that the injunction in this case ought to have been granted, upon several grounds. First, because the bill charges, distinctly, that the execution in favor of Brown against Jesse McLendon, had been levied upon personal property belonging to him, sufficient to pay the debt, which was dismissed by the assignees of that execution. That levy, and the dismission of it, was a *prima facie* satisfaction, and discharged Wormack, the co-debtor with Jesse McLendon. Beyond all question, it discharged the judgment against Wormack, in favor of the complainants, who are sureties for Wormack, holding property conveyed to them by him, for their protection—against which property the assignees are proceeding. Again, the bill charges a fraudulent combination between the assignees of the judgment and Jesse McLendon, to get control of both the judgments, and dismiss the levy on Jesse McLendon's property; and all to benefit Jesse McLendon, by forcing the money out of Wormack.

In this case, there was, as the bill charges, a partnership debt contracted by Wormack & McLendon, for which they individually gave their note; suit was brought separately against both, and carried to judgment. The execution on the judgment against McLendon, was levied on his personal property, sufficient to pay it. Pending the levy, it was assigned. The assignees dismissed the levy. If this levy was a satisfaction of the debt against McLendon, it was also a satisfaction of the judgment against his partner and co-debtor, Wormack. The plaintiff can have but one satisfaction. Of this, there is no doubt. Nor is it questioned, that the assignees occupy no better position than the plaintiff himself would occupy. Any act done by them, which, if done by the plaintiff himself, before assignment, would discharge the judgment, would discharge it in their hands.

We state the general principle to be this: a levy is a satisfaction of the execution, so far as to throw upon the plaintiff the burden of showing, either that it was insufficient, or that the proceeds were applied to the satisfaction of prior liens, or that it was

otherwise unproductive, and made so without fault of the plaintiff or the Sheriff. *Curan vs. Colbert*, 3 *Kelly*, 249. We are aware of the necessity of guarding this rule carefully. Hence, we state that a levy dismissed by the plaintiff, with the consent of the defendant, is no satisfaction or discharge, so far as he alone is concerned.

[2.] In that event, it would be a satisfaction, so far as third persons are concerned, as sureties, junior judgment creditors or purchasers from the defendant. 5 *Hill's N. Y. R.* 377. 2 *Ib.* 364. 11 *Johns. R.* 110. 17 *Ib.* 274. 4 *Wend.* 332. 5 *Conn. R.* 392. Nor can I doubt but that a levy made on personal property of one partner, sufficient to pay the debt, and dismissed by the plaintiff, with the consent of the defendant, would discharge the other partner, as in this case.

I apprehend it is not to be questioned, that where a levy is made upon personal property, sufficient to pay the debt, it is *prima facie*, a satisfaction and discharge. If the defendant assents to the release of the levy, or anything can be shown by the plaintiff, in law or in fact, which, without fault on his part, renders the levy unavailable, the presumptions of law against him, growing out of the levy, are removed. The act of the Sheriff is not among those things which will prevent the operation of the rule. It is his duty to seize the property, and he acquires in it a qualified property. He may maintain trover or trespass, if it is taken from his possession. 2 *Saund. R.* 47, *and note* 1. 1 *Lev.* 282. 1 *Sid.* 438. 1 *Vent.* 52. 1 *Mod.* 30. 6 *Ib.* 291. 6 *Johns. R.* 195. Such is the Common Law. In case of claims upon levy of attachment or execution by Statute, the Sheriff is required to take forthcoming bonds, payable to the plaintiff. In such cases, his Common Law liability, so far as it is affected by this bond, does not continue. In case of levy without claim, he *may* take a forthcoming bond also, but his liability to the plaintiff continues, by express statutory provision. *Prince*, 465. By virtue of his office as Sheriff, and his right as such to seize the property, and of his qualified property in it, he is liable to make good a sufficient levy to the plaintiff; and it is for these reasons that no act of the Sheriff, contrary to law, by which the levy is released or made unproductive, will prevent the operation of the rule, that a levy is a satisfaction.

Our Statute gives to the judgment a lien from its date. This does not affect the rule I am considering—it is the lien which is discharged.

In *Clark vs. Withers*, it was resolved by the Court, "that when a Sheriff had seized, he was compelled to return his writ, and made himself liable at all events, (acts of God excepted,) to answer the value of the goods according to his return, and by the seizure the property was divested out of the defendant, and in abeyance."

"That the defendant was discharged, because the plaintiff having made his election, and the defendant's goods being taken, no farther remedy could be had against the defendant, but against the Sheriff only, &c." 1 *Salk.* 323. See also, 6 *Mod.* 292. 1 *Roll. R.* 57. 2 *Saund.* 47, *note* 1. In the United States, the Common Law on this subject has been very generally recognized. In *Peay, adm'r, vs. Fleming*, Judge *O'Neal* says: "A levy is, in legal contemplation, satisfaction of a *fi. fa.*; that is, it is presumptive evidence, that satisfaction may result or has resulted from it. But as soon as it is shown how the levy has been disposed of, and that satisfaction has not and could not have resulted from the levy, the legal presumption is rebutted, and the execution may be again levied, if it has not lost its active energy," &c. 2 *Hill's Ch. R.* 99. In *Davis vs. Barkley*, the Court of Appeals of South Carolina say: "It is a received rule, that a levy is satisfaction, at least, so far as to throw on the plaintiff the burden of showing, either that it was insufficient, or that the proceeds were applied to the satisfaction of some prior lien, or that it was otherwise rendered unproductive without his fault, or *the fault of the officer*." 1 *Bailey*, 142.

In *Ladd vs. Blount, Parsons*, C. J. says: "When goods sufficient to satisfy the judgment, are seized on a *fi. fa.* the debtor is discharged, even if the Sheriff waste the goods, or misapply the money arising from the sale, or does not return his execution. For by a lawful seizure, the debtor has lost his property in the goods; but the law is different in case of an extent on lands." 4 *Mass.* 403. *Also*, 2 *Pick.* 586.

In *Scribed, &c. vs. Deanes et al.* the Sheriff's return upon two *fi. fas.* was, that they were executed, and the property released by order of the plaintiff, in consequence of a compromise between the parties.

Chief J. *Marshall*, in reference to this return, said, "That this return determined the legal force of the judgments, is admitted. Of course, they no longer constitute a lien at law, on the lands of the debtor." 1 *Brockenbrough*, 171.

In *Denton vs. Livingston*, Ch. *Kent* said, "He, (the Sheriff,) is answerable for the amount of the sale of the sloop, and his excuse for not returning the money is insufficient. Instead of retaining the sloop in his possession, between the levy and sale, he delivered her to Ashley, the purchaser; and as he afterwards sold her to him, and has lost the possession, he is answerable for the money she sold for. There is no other remedy for the plaintiffs. *They cannot call upon the original defendant, for the amount of the sloop, for he would plead this seizure in bar.*" 9 *Johns.R.* 98.

In the *Ordinary vs. Spann*, *Mr. J. O'Neal* said, "A levy of a value equal to the debt demanded, undisposed of, is, in law, a satisfaction. This was fully adjudged in *Mayson vs. Irby & Day*, decided at *Dec. Session*, 1828, *in Columbia, in the Court of Appeals in Equity.*" 1 *Richardson's Rep.* 434. See, also, *Mayson vs. Irby & Day, in a note to this case in Richardson.* In the latter case, *(Mayson vs. Irby & Day,)* the Court of Appeals say, "When a levy is once made, the execution is satisfied." If the Court there, however, mean to say, that a levy is, *per se*, and necessarily a satisfaction, we dissent from their rule; holding it, as before stated, a legal presumption of satisfaction. See 23 *Wend.* 490. 1 *Watts & Sergt.* 251. 4 *Smedes & Marsh*, 118. 3 *Yerg.* 297. 6 *Ib.* 246. 6 *Ib.* 305.

To apply this rule to this case. The levy was made on personal property sufficient to pay the debt—unaccounted for, the presumption in law is that it was paid—but it is accounted for, because the bill charges, that it was dismissed by the assignees of the judgment and execution. It is, therefore, accounted for by *the fault* of the plaintiff's assignees. The dismissal is their own act. They have voluntarily parted with that which might have been productive to them of payment. *The levy and the dismissal was an extinguishment of the judgment.* Even if it were not as to the defendant, yet, in this case, it certainly is as to these complainants, because they are third persons affected by it. They are grantees of property held as sureties of Wormack, the co-debtor of Jesse McLendon. The effect of dismissing the levy is to bring the execution against Wormack down upon that property.

Now the question is, shall not the lien of that judgment be held to be extinguished in their favor? Are not the judgments against McLendon & Wormack nullities as to that property? As to that property, clearly the levy and its dismissal extinguished their liens.

The bill farther charges, that the purchase of these judgments and the withdrawal of the levy, was the result of a fraudulent combination between the purchasers and Jesse McLendon, for his (McLendon's) benefit, to free him from his liability to pay, and to coerce payment out of the property in the hands of claimants. If this levy was collusively dismissed by Jesse McLendon, the defendant, and the owners of the judgment, Chancery will protect third persons from injury thereby. Upon these grounds the injunction should have been granted.

[3.] Farther, the bill charges that the judgment against Jesse McLendon has been paid, *in fact*, by him to the assignees. It alleges, that a part of the money which was advanced by them to the plaintiff, Brown, in the purchase of the two executions against McLendon & Wormack, was furnished by Jesse McLendon, and that the balance, furnished by them, has been refunded to them by him, and, therefore, both executions are paid and extinct. If this is true, (and for the purposes of the question whether the injunction ought to be granted, the statements in the bill are to be taken as true,) both executions are extinguished, and keeping the execution against Wormack open, is a fraud against him and the complainants. And inasmuch as the complainants aver their inability to prove these facts on the trial, without a discovery from these persons, manifestly the claim cause should be enjoined until they answer.

[4.] But aside from all these views, there is an equitable principle which rules this case. Before stating it, with a view to its application, it is desirable to advert to the facts as charged in the bill.

The bill states, that Wormack and Jesse McLendon were partners in trade, and as such, purchased property of Brown and gave their individual note for the purchase money; that the property so purchased went into the concern; that this note was sued to judgment against each, severally; but that the debt was a partnership debt—*a joint debt against Wormack and Jesse McLendon;* that after these judgments were open, Wormack conveyed to the

complainants the property now levied on, as his individual property, to reimburse and indemnify them as his personal sureties; that Wormack died insolvent; that all the effects of the concern went into the possession of Jesse McLendon, the surviving partner, including the very property for which the note was given to Brown; and that the partnership effects in the hands of Jesse McLendon are amply sufficient to pay all the debts of the firm, these judgments included. These judgments became the property of purchasers, to whom they were assigned by Brown, the original creditor. Now, how stands the matter? Thus: the assignees are the creditors of Wormack & McLendon, holding a joint demand against them, and entitled, at law, to proceed against either of them for satisfactiom; the complainants are the creditors of one of them, (Wormack,) with no resource for payment but the property conveyed to them by him. Now, Equity will not, where one creditor holds a claim against two, and another holds a claim against one of those two, compel the former to proceed against that one of his joint debtors against whom the latter has no claim, in order that the funds of *his* debtor may be applied exclusively to the payment of *his* claim. I say, Equity will not generally do this, and will never do it for the sake of the creditor who has a single claim, but it will do it when *it is equitable as between the two debtors that it should be done.* Lord *Eldon*, in *ex parte, Kendal*, illustrates these two propositions thus: "We have gone this length—if A has a right to go upon two funds, and B upon one, having both the same debtor, and the funds are the property of the same person, A shall take payment from that fund to which he can resort exclusively, so that both may be paid; but it was never said, that if I have a demand against A and B, that a creditor of B shall compel me to go against A, *without more.* If I have a demand against both, the creditors of B have no right to compel me to seek payment from A, *if not founded in some equity*, giving B, for his own sake, as if he was surety, &c. a right to compel me to seek payment of A. It must be established that it is just and equitable, *that A ought to pay in the first instance*, or there is no equity to compel a man to go against A, who has resort to both funds." 17 *Vesey*, 520. Lord *Eldon* laid down the rule and the exception. The exception is to be found in cases where "*it is just and equitable that A ought to pay in the first instance.*" Mr. *Story*, in stating the rule, names the very exception which

this case makes, to wit: where the debt, though joint *in form, ought to be paid by one of the debtors only. Story's Eq. Jurisp.* §642. *Here*, the debt to the assignees, though joint against Wormack and Jesse McLendon, because due from them as partners, yet ought to be paid by McLendon, because he is the surviving partner, into whose hands the effects have passed, they being at the same time ample to pay. Equity will compel the assignees of these judgments to go upon the partnership fund, and leave the fund to which the complainants can alone resort, to wit: the property conveyed to them by Wormack, to be applied exclusively to their demand against him. 4 *John. Ch. Rep.* 17, 20. To avail themselves of this equitable principle, the claim cause ought to be enjoined, particularly as they seek discovery as to the facts, and aver inability to prove them at law.

Let the judgment of the Court below be reversed.

No. 52.—JOHN C. PERKINS and others, plaintiffs in error, *vs.* NICHOLAS DYER, defendant.

[1.] Ordinarily, guardians who have given security for the faithful performance of their duty, have the legal control over mortgage debts owing their wards, and a right to receive and collect the money due thereon, and to release the same, in the proper exercise of their discretion as guardians.

[2.] But where a mortgage is executed to a mother, as the natural guardian of her children, by the administrator of their deceased father, to secure them in their patrimony which he has wasted, it is not in the power of the mother fraudulently to discharge the mortgage lien, to the prejudice of the infant *cestui que trust*, especially where she has failed to give bond, as required by law, to protect them against mismanagement.

[3.] At Common Law, the mother, as guardian by nature or for nurture, has no control over the estate of her minor children.

In Equity, in Troup Superior Court. Application to Judge HILL for an injunction.

This was a bill for discovery and injunction, in favor of the plain-

tiffs in error against the defendant, presented to Judge *Hill* for his sanction.

The bill alleges, that Nicholas Dyer, as the administrator of William Backus, deceased, was indebted to said estate the sum of $1400, and that to secure the payment of the said balance in his hands, executed to Sarah Backus, as natural guardian of the orphans of William Backus, a mortgage on a lot of land in Coweta County; that subsequent to the execution of said mortgage, a judgment was rendered against Dyer, in Coweta Superior Court, in favor of Sandford H. Hubbard, upon which execution was issued and levied on said lot of land, and on the 1st Tuesday in February, 1844, the same was sold, when the complainants became the purchasers; that on the day and at the sale of said land, Nicholas Dyer and Sarah Backus caused to be exhibited to the public and to the complainants, a statement, in writing, of the settlement and satisfaction of the said balance in the hands of Dyer, as administrator, for the security of which the mortgage was executed, and an extinguishment of the lien on said land; that the paper was executed for the purpose of being exhibited at the sale, to induce purchasers to buy who would otherwise have been deterred from so doing in consequence of the mortgage, and that complainants were induced to purchase in consequence of the said paper or receipt; that Joseph Attaway was afterwards appointed guardian of the minors of William Backus, deceased, and foreclosed the mortgage, and has levied the *fi. fa.* issued on foreclosure thereof on the said mortgaged premises, which has been claimed by plaintiffs in error.

The bill farther charges collusion and fraud between Dyer, Sarah Backus and one Thomas Bonner, to defraud the complainants, or whoever might purchase the land; that Bonner had executed a deed to said land to Dyer, which had not been recorded; that at the time of the executing the release of the mortgage lien from Sarah Backus to Bonner, that was read and exhibited on the day of sale, it was understood and agreed by and between them, that Dyer was to cancel the deed of Bonner to himself, and procure Bonner secretly to execute a deed to Sarah Backus, and that the land was to go to sale under the Hubbard *fi. fa.* and after satisfying it, the balance of the proceeds of the sale were to be received by Dyer.

The bill further charges, that complainants are unable to make

proof of these facts charged, without appealing to the consciences of the defendants. The bill prays that the deed made by Bonner to Sarah Backus, as guardian, be set aside; that Bonner re-execute to Dyer a deed to the land to have the same effect as the one cancelled; that the lien of the mortgage be extinguished, and Joseph Attaway be perpetually enjoined from proceeding to collect the mortgage *fi. fa.*

Judge *Hill* refused to sanction the bill and grant the injunction, and the complainants excepted.

His Honor Judge *Warner*, having been of counsel in the Court below, gave no opinion in this case in the Supreme Court.

W. Dougherty, for plaintiffs in error.

Burch, for defendant in error.

By the Court.—Lumpkin, J. delivering the opinion.

We are not willing to control the discretion of the Chancellor in this case, seeing that it has been so beneficially exercised in behalf of infant mortgagees, who are incapable of protecting themselves.

[1.] Had Sarah Backus been duly appointed, by the proper Court, guardian of the person and estate of her children, then she would have had the legal control over the mortgage lien which she undertook to release; and, even as it is, had the money been wanting for the purposes of the trust, for making more advantageous investments, or for the maintenance and education of her wards, or for any other purpose whatever, advantageous to her minor children, this release to the purchaser might have been sanctioned and protected.

[2.] But instead of exercising this usurped power fairly and faithfully, and in conformity with her duty and the interest of her orphans, the bill itself alleges, that it was done falsely and fraudulently, and for the purpose of assisting Dyer. Under these circumstances, it is better that the purchaser at Sheriff's sale should suffer, than that those heirs should be deprived of the remnant of their inheritance, especially as the natural guardian in this case

has failed to give security to protect these infant *cestui que trusts* against this act of gross mismanagement.

[3.] It may be well enough to remark, that guardians by nature, at Common Law, had neither possession nor control of the estate of the ward, whether real or personal. 1 *John. Ch. Rep.* 3. 3 *Pick. Rep.* 213. And it is asserted by the late Ch. J. *Swift*, of Connecticut, that a mother is never considered as guardian of her children, unless it be of nursed children until the age of seven years. 1 *Swift's Dig.* 50. And whether considered as guardian by nature or for nurture, she has no control over the estate of her infant children. *Kline vs. Beebe*, 6 *Conn.* 494.

Had the mother given bond, as required by law, for the faithful and judicious discharge of her trust, the direction given to this case might have been different. As it is, the decree below must be affirmed.

No. 53.—LEROY NAPIER, plaintiff in error, *vs.* WILLIAM T. W. NAPIER, defendant in error.

[1.] Where, by a deed of trust, the sum of fifteen thousand dollars was raised, by the voluntary contribution of certain residuary legatees, and vested in a trustee, subject to certain trusts, one of which was, that the sum of five thousand dollars, and no more, should be appropriated for the payment of the debts of the *cestui que trust*, then owing, the said trustee to judge of the justness of the debts which might be presented for payment, and of the order and proportions in which the same should be paid: *Held*, on a bill being filed by the *cestui que trust*, alleging that all his debts have been paid by the trustee, and that there remained in his hands the sum of three thousand dollars of the five thousand dollars placed there for the payment of his debts, that the *cestui que trust* was entitled to an account from the trustee therefor, and to have the same invested for his benefit.

In Equity, in Bibb Superior Court. Decided by Judge FLOYD, January Term, 1849.

The bill states, that the defendant in error, who was complainant in the Court below, was the son of Thomas W. Napier, who

departed this life in the year 183—, having previously made a will, thereby bequeathing the whole of his estate to certain legatees, and entirely cutting the complainant out of any interest in his estate. The bill further states, that after the execution of the will, and just before his death, the said Thomas Napier repented his said act, and being then unable to have his aforesaid will in writing altered, and being anxious to make a provision for the complainant out of his large estate, declared it to be his will and injunction, that out of the large mass of residuary legacies bequeathed in his will, a reasonable portion or amount of his said estate should be set apart and secured for the benefit of complainant; that certain legatees under the will, in order to carry into effect the subsequently expressed wishes of Thomas Napier in reference to complainant, on the 3d day of April, 1840, entered into certain articles of agreement, whereby the parties therein named, covenanted and agreed mutually to and with the other, to raise a fund of $15,000, by equal contributions from the mass and residue of the said testator's estate, in proportion to the amount of their respective interest therein, and to pay the same then forthwith into the hands of the defendant, and that the said sum should constitute a trust fund in his hands, and vest in him as trustee and not otherwise, for the following purposes, and subject to the following trusts, viz: to apply $5000 thereof, and not more, to the disenthralment of the complainant from the debts he then owed—said defendant to judge of the justice of the said debts which might be presented to him for payment, and of the order and proportion in which they should be paid, but in no event should more than $5000 of the said fund be applied to the payment of existing debts against complainant. "The residue of the said fund of $15,000, was to be vested in and managed by the defendant, as trustee, for the use, benefit and support of complainant, and by him employed and invested in such manner as to him shall be deemed best, and the annual profits of the same to be applied by defendant to the support of the complainant, but in no event was the principal sum to be diminished by the trustee." The bill charges, that shortly after the execution of the instrument, the sum of $15,000 was paid, according to the terms thereof, into the hands of the defendant, as trustee for complainant, and that the defendant accepted the trust and received the said sum of $15,000.

Complainant charges, that the defendant had converted a large

portion of the $5000 designed first for the payment of the then existing debts against complainant, to his own use and benefit; that the defendant had used but a small portion of the sum in payment of complainant's debts, and that he was unable to state what amount had been so applied; that the debts which have been taken up, had been bought up for a sum much less than was due thereon—the defendant sometimes paying only twenty-five cents in the dollar for the said debts—and that the defendant now claims he should be allowed the full nominal amount of the said debts, so taken up by him with a portion of the said fund of $5000.

The prayer of the bill is, that the defendant may answer and account, and that he be decreed to appropriate such portion of said $5000, remaining in his hands, to such debts as were due from complainant at the time of the execution of the articles of agreement, which in justice and equity ought to be paid under the discretion given to him, and that the defendant might pay over to the complainant the balance of the said $5000 remaining in his hands, and the profits and gains thereof, after the payment of the debts as before mentioned, or that the defendant might be decreed to use and control the said balance for the benefit of complainant, and account to him for the profits and gains thereof.

To which bill a general demurrer was filed, alleging that taking the case made by the bill to be true, it is not such a case as the defendant is bound to make answer to said bill.

The bill and demurrer were heard before Judge *Floyd*, and after argument had thereon, the same was overruled, and the defendant ordered to answer. To which counsel for defendant in the bill excepted.

In overruling the demurrer, Judge *Floyd* based his decision on two grounds:

1st. That the complainant, even though it should be conceded that he had no right to any surplus of the five thousand dollar fund, that might remain after payment of his debts, was still entitled, under the statements of the bill, to have an account from the defendant, as to the manner in which he had exercised the discretion given him in regard to the application of that fund to the payment of complainant's debts, and to have a decree that defendant should exercise his discretion in the payment of the debts under the trust deed, unless the defendant should show cause why he

declined to do so. To which decision and opinion the defendant's counsel excepted.

2d. That the complainant was entitled to sue for and recover, from the defendant, any surplus of the said five thousand dollar fund that should remain in the defendant's hands, after he had fully exercised the function of paying the complainant's debts, as committed to his discretion by the trust deed. To which opinion and decision of the Court defendant's counsel excepted, and upon these exceptions assigned errors.

CHAPPELL, for plaintiff in error.

R. HARDEMAN, for defendant.

By the Court.—WARNER, J. delivering the opinion.

The error assigned to the judgment of the Court below is, the overruling the demurrer filed by the defendant to the complainant's bill.

[1.] The object of the bill is to require the defendant to discover in what manner he has disbursed the sum of five thousand dollars, paid into his hands for the discharge of the complainant's debts, and to account for the surplus, if any, which may remain in his hands after the payment of such debts.

The bill charges, that Thomas Napier, the father of the complainant, had made his will and excluded him as one of the legatees of his large estate; that during his last illness, he repented the act, and just before his death, too late to make any alteration in his written will, declared it to be his will and injunction, that out of the mass and residue of his large estate, bequeathed to his residuary legatees, a reasonable portion or amount thereof, should be set apart and secured for the benefit, maintenance and support of the complainant. In pursuance of this request and injunction of the testator, his residuary legatees entered into a written stipulation to carry the same fully into effect. After reciting the request and injunction of the testator as above expressed, the residuary legatees raised, by voluntary contributions, and conveyed to Leroy Napier, the sum of fifteen thousand dollars, as a trust fund, for the following purposes, and subject to the following trusts, namely: five thousand dollars thereof, and not

more, to the disenthralment of the complainant from the debts which he then owed—said trustee to judge of the *justness* of the debts which might be presented to him for payment, and of the *order* and *proportions* in which they should be paid; but in no event was more than five thousand dollars to be taken from the fund of fifteen thousand dollars, for the payment of complainant's existing debts.

The residue of said fund of fifteen thousand dollars, to wit: the sum of ten thousand dollars, to be vested in the trustee, and managed by him, for the use, benefit and support of the complainant, as to him should be deemed best and most judicious. The only controversy is with respect to the five thousand dollars, directed to be appropriated for the payment of the complainant's debts, by the trustee. The plaintiff in error insists, that the sum of five thousand dollars was held by him as a trustee, for the creditors of the complainant, and that, after the payment of his debts, he is entitled to hold the overplus as a trustee for the donors of the deed. The answer to that view of the case is, that there is no reversionary clause in the deed, which entitles them to such overplus. The fifteen thousand dollars was conveyed by the donors to the trustee, in accordance with the wishes of Thomas Napier, during his last illness, for the maintenance and support of the complainant, and is so stated on the face of the deed. The fifteen thousand dollars was raised and appropriated by the residuary legatees of Thomas Napier, deceased, for the *benefit of the complainant*, and not for the benefit of the donors, in any event, so far as appears on the face of the deed itself. The debts, it is alleged, have all been paid, and, as we are bound to presume, according to the *discretion* of the trustee, consequently he is no longer a trustee for the *creditors* of the complainant. The complainant alleges, that the trustee has now remaining in his hands, the sum of three thousand dollars, of the aforesaid sum of five thousand dollars, after the payment of all his debts, and the question is, whether the trustee is entitled to keep it for his *own use*, or to retain it for the *donors*, or be decreed to hold it in trust for the complainant? There is no clause in the deed which will entitle the donors to the fund, conveyed by them for the benefit of the complainant, according to the wishes and injunctions of the deceased testator, as expressed on the face of the deed, and we are not aware of any principle by which it will result to them by

operation of law. The creditors of the complainant are not entitled to it, because their debts are all paid. The trustee is not entitled to it for his own use, for it is a well established rule in Equity, that a trustee is not permitted to make any profit to himself in any of the concerns of his trust. 1 *Story's Eq.* §465. *Docker vs. Somes*, 2 *Mylne & Keen*, 664. We think that from a fair construction of this deed of trust, the complainant is entitled to the surplus of the five thousand dollars, after the payment of his debts, according to the discretion of the trustee. That discretion of the trustee in regard to the payment of the complainant's debts, has already been exercised in their extinguishment. According to the allegations in the bill, there are not now any debts of the complainant in existence, with regard to the payment of which the *discretion* of the trustee can be exercised. The wishes and injunctions of the deceased testator, during his last illness, were, that out of the mass and residue of his estate, a reasonable amount should be set apart and secured as a fund for the maintenance and support of the complainant, and thedeed of trust purports, on its face, to have been executed for the purpose of carrying into effect such wishes and injunctions of Thomas Napier, the deceased testator. The *leading object* of the deed of trust was, to set apart and secure a reasonable amount of money, as a fund for the maintenance and support of the complainant. The payment of his just debts was for his benefit, and in the opinion of all honest and well disposed persons, would be considered at least necessary for his *decent* maintenance and support with credit to himself and his family connexions. The donors of the deed were willing that five thousand dollars of the fund raised for his benefit, should be appropriated for the payment of his debts, but no more. Well, his debts have all *been paid*, and there remains a balance in the hands of the trustee of three thousand dollars of the fund originally raised, for *his benefit*, by the residuary legatees under his father's will, and in accordance with the request and death-bed injunctions of the testator, and we are of the opinion he is entitled to have the discovery prayed for from the trustee, and to have the surplus remaining in his hands, after the payment of all his debts, invested for his benefit.

Let the judgment of the Court below be affirmed.

No. 54.—DELOACH & WILCOXSON, plaintiffs in error, *vs.* MATTHEW H. MYRICK, defendant in error.

[1.] In the trial of a claim, it is not necessary for the plaintiff in execution to produce the judgment upon which his execution is founded, and the execution may be read in evidence without the judgment.

[2.] A levy upon real estate is not *prima facie* evidence of satisfaction, and although unaccounted for does not extingush the judgment.

[3.] Proof of the possession by defendant in execution, at the time or subsequent to the date of the judgment, of a slave of the same name, sex and age with the slave levied on: *Held*, sufficient to cast the *onus* upon the claimant.

Levy and claim, in Upson Superior Court. Tried before Judge FLOYD, October Term, 1848.

An execution in favor of Matthew H. Myrick, issued from Upson Superior Court, against John R. Hudson and others, was levied on a slave by the name of Sandford, on the 26th day of August, 1847, which was claimed by the plaintiffs in error. The cause stood for trial on the appeal at the February Term of said Court, 1849.

The plaintiff offered in evidence the execution, which was objected to by claimant on two grounds.

1st. Because the judgment upon which it was founded should first be shown in evidence.

2d. Because there appeared on the *fi. fa.* a levy on land which had been dismissed by order of plaintiff's attorney, before the levy on said negro boy.

The objections were overruled and the *fi. fa.* admitted in evidence. The Court required the plaintiff to show that the negro boy, Sanford, was in the possession of Hudson at the time or since the dismissal of said levy, which was made the 2d April, 1844.

Plaintiff proved that a negro boy by the name of Sandford, was in the possession of Hudson from 1843 to 1846, and closed.

The claimant moved to dismiss the levy, on the ground that plaintiff had not cast the *onus probandi;* which motion the Court refused. Whereupon, claimant withdrew his claim, and excepted to the decision of the Court, and assigned error thereon.

HAMMOND & POWERS, for plaintiffs in error.

SMITH & HUNTER, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] Upon the trial of this claim, the claimant objected to the execution going in evidence, until the judgment upon which it was founded was produced. The objection was overruled. We are asked to say whether that was or not an error. By the Common Law, the remedy of a party, whether the defendant in execution or a stranger, aggrieved by the levy of an execution upon property not liable to it, is an action of trespass. The rule of the Common Law is this: if the defendant in execution brings trespass against the Sheriff, he (the Sheriff) can justify, by the evidence of the writ, without producing the judgment; but if a third person brings trespass against the Sheriff, the Sheriff can defend only upon producing the judgment and the writ. The reasons given are these: In the *first case*, by proving that he took the goods in obedience to a writ against the plaintiff, he has proved himself guilty of no trespass; but in the *other case*, they are not the goods of the party against whom the writ issued, and, therefore, the officer is not justified by the writ in taking them. *Lake vs. Billers et al.* 1 *Lord Raymond*, 733. *Martin vs. Podgers et al.* 5 *Burrow*, 2631. *Buller N. P.* 234. 2 *Johns. Reports*, 45. *Doug.* 40. The reasons of the Common Law rule are brief, and it must be confessed not very satisfactory.

Our Statutes have given to persons, not parties to executions, remedies unknown to the Common Law, when they are levied upon property to which such persons have claim. They are found in our Claim Laws. The remedy provided in Georgia, by the interposition of a claim, is known to but few of our sister States. Statutes similar to ours obtain in Alabama. If the remedy by claim be considered as a substitute for the action of trespass as at Common Law, and be considered farther as controlled by the decisions in Great Britain upon that action, why then, the judgment ought to have been produced. The claimant, by our Statute, must be a person *not a party* to the execution. A Sheriff in England being sued by such a person, we have seen, could justi-

fy only by producing the judgment and the writ. By analogy, as against the claimant here, it may be contended, that the plaintiff in execution must also produce the judgment as well as the writ. Whilst I admit that the remedy by claim in Georgia, has superseded the action of trespass, being more simple, more direct and more ample, yet I deny that *a claim in Georgia* bears any, or if any, a very close analogy to that action. It is very different—depends upon principles peculiar to itself—and we are, therefore, left free to frame a practice, under our Statutes, wholly irrespective of those doctrines which, in England, have been held applicable to actions against the officer. *The object of the claim is to try the question, whether the property levied on is subject to the execution or not, as against the title which the claimant sets up.* Subject or not subject, is the issue, and that issue is submitted to a Jury to find. Now, it will be remarked, that the levying officer is no party to this issue. There is no proceeding against him as in England; there is no judgment rendered against him. If the issue is found for the plaintiff in execution, he cannot, so far as I can see, be in any event injuriously affected by it—if for the claimant, he cannot be directly affected by it. His relations to the plaintiff, as ministerial officer, in that latter event, are such as the law has ascertained and declared them. If he has done his duty according to law, he is in all contingencies safe. Farther, I remark, the question whether the property be subject to the execution, does not depend alone upon the question whether the lien of the judgment has ever rightfully attached upon the property. By Statute, the lien of a judgment attaches from its date, upon all the property then owned, and subsequently acquired, by the defendant, unless such property, so owned, be subject to older and, therefore, better liens. The lien may have attached and be discharged. It may have been discharged by the act of the plaintiff, by the act of the Sheriff, by payment of the execution by the defendant, or by limitation laws. The issue is not, therefore, determinable alone by reference to the date of the judgment. It may depend upon something *supervenient* the judgment. I farther remark, that the claimant cannot rely upon the fact, that the lien of the judgment has never attached upon the property, and that alone; for, upon the plaintiff's making out a *prima facie* case, that is, according to our phraseology, *casting the onus* upon him, he will be required to show title in himself. He cannot succeed

by showing a title in a third person, better than the lien of the judgment. This is the reason of the matter. Not only is it reasonable, but it is deducible from the Statute; because the Statute requires the Court to which the claim is made returnable, "to cause *the right of property* to be decided on by a Jury." From these general views, I conclude that the issue to be tried in a claim case is, whether the property levied on be subject or not to the execution, as against the claim or title set up by the claimant. These views of the issue are necessary to the elucidation of the question whether the Court erred in ruling that the production of the judgment was unnecessary.

One of the provisos to the Claim Law, is as follows: "Provided, also, that the burden of proof shall be upon the plaintiff in execution, in cases where the property levied on is, at the time of such levy, *not in possession* of the defendant in execution." *Prince*, 448. Upon the trial of the issue, made as I have stated, between the plaintiff in execution and the claimant, it is obvious, from the whole Act, and particularly from this *proviso*, that the Legislature intended that the plaintiff in execution should, in the first instance, be held to make out a *prima facie* case only. The *levy* must precede the interposition of the claim. At the time of the levy, it is not to be inferred that there will be a claim. The law contemplates—the whole machinery of the Claim Laws contemplates—in advance of any issue, a plaintiff with a process regularly obtained. For without such a process—certainly without *a process*—there can be no such thing as a claim at Sheriff's sale. The levy being made and a claim put in, and the issue joined, if it is apparent from the Sheriff's entries, or by proof, that the property was in the possession of the defendant, at the time of the levy, the plaintiff need proceed no farther—he may rest his case, and the claimant must show his title. The *onus* is cast. Possession in the defendant to an execution, levied by the Sheriff, raises the presumption that the property is liable.

The *proviso* contains a negative pregnant. It declares that, in cases where the property is *not* in the possession of the defendant, the burden of proof shall be on the plaintiff. The affirmative with which this negative is pregnant is, that if the defendant *is* in possession, the burden of proof shall not be upon the plaintiff—that is, the possession in that case shall be sufficient to cast the burden on the claimant. Now, in all such cases, the plaintiff

is required to make out only a *prima facie* case. *Farther*, in cases where the possession *is not* in the defendant, and the plaintiff takes the burden of proof, what is that burden? In our judgment, not to show a judgment, execution, levy and an unextinguished lien, but to show what is equivalent to possession in the defendant—what is, in other words, a *prima facie* case. For example, the burden is to show a process, levy, and that the property was in possession of the defendant at the time or after the judgment was rendered, so that the lien would attach upon it. Upon whom is it equitable that the burden should rest of making out a perfect case—the vigilant creditor who is, with his process in his hand, arrested in his efforts to realize his money, or the claimant who arrests him? The practice in our Circuit Courts is now and has been, I believe, from the beginning, in accordance with this construction of the Claim Laws. These things being so, we think that, when the plaintiff produces an execution, regular upon its face, and duly levied, the Court ought, in a claim case, to presume that the Sheriff has acted by rightful authority; that it is founded on a valid judgment, and that it ought to be admitted in evidence without producing that judgment.

In Alabama, where there are Claim Laws similar to our own, this question has been so determined. *Carlton et al. vs. King*, 1 *S. & Port.* 472. See, also, *Hooper vs. Pair*, 3 *Porter*, 401.

[2.] The second ground of error is the decision of the Court below, that the levy of an execution upon lands, dismissed by order of the plaintiff's attorney, and not otherwise accounted for, is not a satisfaction of the judgment. Whether the dismissal of a levy upon *personal property* by the attorney, not appearing to be by authority or consent of the plaintiff, will be a satisfaction of the judgment, may be a serious question. In New York it has been held that it will not. We find no necessity in this case to determine that question. We hold, that a levy dismissed upon lands, is no discharge of the defendant. A levy upon lands, unaccounted for, is no satisfaction of the judgment. A Sheriff, by a levy on lands, acquires in the land no such qualified property as he acquires by a levy on and seizure of personal property, and, therefore, incurs no such liability to the plaintiffs as he incurs in case of personal property. A levy upon real estate is not, as a levy upon personal property sufficient to pay the debt is, *prima facie*, a satisfaction. The lien of a judgment in Georgia, attaches

upon real estate equally with personalty, and that lien is not discharged by a levy. By Statute in Georgia, the Sheriff is required, when he levies upon land, to leave with the owner or tenant in possession, notice, in writing, of the levy, if such owner be in the County, or if there be a tenant in possession; and if there is no tenant, then he is required to transmit the notice to the owner within five days from the levy. He cannot take possession of the land, and he need not, as it is immovable. "A levy on land, (says *Butler, J.* in *Gassaway vs. Hall and others*,) seems to me to be nothing more than a specific declaration by the Sheriff, on the execution, that the land is liable to a specific lien, and that the Sheriff has asserted his legal authority to sell it. This assertion gives him a constructive right to the land, so that he may divest its owner of title at any time he may choose to sell it. It is making the lien by judgment enforceable by the Sheriff, and thus connects him with, and gives him control over, the land," &c. 3 *Hill's S. C. Reps.* 292. 14 *Wend.* 260. 23 *Ib.* 490. 4 *Hill's N. Y. R.* 619. 4 *Mass. R.* 403. 1 *Penn. R.* 425. 5 *Yerger*, 227. 6 *Ib.* 305. 8 *Johns. Rep.* 544.

[3.] Again, it is complained that the Court erred in ruling that the *onus* was shifted in this case. The evidence was, that a negro man, of the same name with that levied on, had been in possession of the defendant in execution for several years after the judgment was rendered, and that he exercised over him acts of ownership. The plaintiff in error insists that the proof is insufficient to cast the *onus probandi* upon the claimant, because it does not establish the identity of the slave about which the witnesses testified, with the slave in controversy. We have seen that it is only necessary, in the first instance, for the plaintiff in execution to make out a *prima facie* case. The identity here is not perfectly established—yet there is some evidence of identity. Possession of a slave by the defendant in execution, at the time or subsequent to the date of the judgment, of the same name, sex and age with the one levied on, we hold sufficient to cast the *onus* upon the plaintiff. As to what shall be sufficient evidence to do this, that is left to the discretion of the presiding Judge, and in a matter within his discretion, we will not interfere, unless his discretion has been plainly exercised contrary to law.

Let the judgment be affirmed.

No. 55.—THE BANK OF CHARLESTON, plaintiff in error, *vs.* MARY MOORE, executrix, and others, defendants.

[1.] After final judgment has been rendered against the original party, it is competent for the plaintiff, by *scire facias*, to charge the estate of the security on appeal, with the amount thereof.

[2.] The Act of 1826, authorizing judgment to be entered up against the principal and security on appeal, jointly or severally, is only cumulative; and the party may still proceed to enforce the judgment against the security, by writ of *scire facias*, or action of debt on the appeal bond, as at Common Law.

Scire facias, in Bibb Superior Court, before Judge FLOYD, January Term, 1849.

The Bank of Charleston instituted an action of assumpsit against Joshua G. Moore, as indorser upon a promissory note, returnable to August Term, 1840, of Bibb Superior Court. At August Term, 1841, a verdict was rendered against Joshua G. Moore; from which verdict he appealed, and gave, as his security on the appeal, one George W. Moore. Before trial on the appeal, both Joshua G. and George W. Moore, died. Mary Moore became the administratrix of Joshua G. Moore, and was, at the November Term of the Court, 1845, made a party to the suit. At the May Term, 1847, of the Court, a verdict was rendered against Mary Moore, as administratrix of Joshua G. Moore, and a judgment was entered up on the verdict against Mary Moore, as administratix of Joshua G. Moore, and against Mary Moore and Henry E. Moore, as executrix and executor of George W. Moore. At July Term, 1848, of the Court, an order was taken to vacate the judgment as to the executor and executrix of George W. Moore, and which was accordingly done, and the death of George W. Moore suggested to the Court, with the view to the issuing of *scire facias*, to make his representatives parties, so that judgment might be rendered against them. The *scire facias* was duly issued and served, and at January Term, 1849, of the Court, counsel for plaintiff in error, (who was also plaintiff in the Court below,) moved to make the defendants in error, as the executrix and executor of George W. Moore, parties to the suit, with the view of entering up judgment against them, on the verdict rendered against Mary Moore, as administratrix of Joshua

G. Moore, at the May Term, 1847, of the Court. Which motion was overruled by the Court below, and the counsel for plaintiff in error excepted, and has assigned errors thereon.

GRESHAM & HARDEMAN, for plaintiff in error.

POWERS & WHITTLE and POE & NISBET, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

The plaintiff having entered up judgment against the estate of Joshua G. Moore, the defendant, without making the representatives of George W. Moore, the security on appeal, a party, could the plaintiff afterwards, upon *scire facias*, charge the estate of George W. Moore with the judgment?

[1.] The Court below decided that this could not be done, for the reason that there was no case pending in Court upon which this proceeding could be predicated. Is not this equally true in every instance, where it is sought to make the bail liable, upon a return of *non est inventus* to the *capias* against the principal? A *scire facias* is usually founded on some matter of record, unless it be to repeal a charter or such like purposes. If it be to enforce a recognizance, it is an original proceeding, but if sued out upon a judgment, as in the present case, it is only a continuation of the former suit. 1 *Durnf. & East*, 388.

What is the undertaking of the security on appeal? It is not *primary*, but *ultimate*, that he will pay the eventual condemnation money; that is, whatever shall be recovered against his principal. It would seem, therefore, that the liability of the security did not accrue until after final judgment against the original party, and that *scire facias* or suit on the appeal bond would be the proper remedy.

[2.] It is true, that the Act of 1826, allows the plaintiff to enter up judgment against the principal and security on appeal, jointly or severally. *Hotchkiss*, 602. But this is *cumulative* and permissive only, not imperative. He may do it, or else, if he see fit, pursue his Common Law redress, by writ of *scire facias*, or action of debt on the bond. Could judgment go, under this Statute, against the representatives of a deceased security within twelve months from the date of their qualification? We think

not. The creditor would have to wait, then, the expiration of this period, or proceed to judgment separately against the original party, and upon his default, in due time resort, as he has here done, and we think properly, against the estate of the security.

The security on appeal is never treated or considered as a coordinate party during the progress of the suit. He is not known to the record as such. He is never notified of amendments made to the pleadings, or the filing of interrogatories. His death does not suspend the suit—better for him that it should not. When called upon to answer, he can plead to the writ, and show any irregularity in the record, or that the judgment was fraudulently and collusively obtained, or that it has been satisfied or released, or any other matter that the law judges sufficient for his discharge.

Judgment reversed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT CASSVILLE,

MARCH TERM, 1849.

No. 56.—Wm. K. Briers, plaintiff in error, *vs.* Robert P. Hackney and Wife and others, defendants.

[1.] Where the defendant, as guardian, pleaded in bar the receipts of his wards, as evidence of a final settlement with them, on their arrival at full age, to a bill filed against him by them to account: *Held*, that the admission of the defendant in his answer, in support of his plea, that he had not made his regular returns, as guardian, to the proper Court of Ordinary, of the receipts and disbursements of his wards' estate, was such a circumstance as cast suspicion upon the fairness of the settlement, and would avoid the plea.

In Equity, in Chattooga Superior Court. Tried before Judge Wright, October Term, 1848.

Robert P. Hackney and his wife, formerly Eliza C. Champion, and Erastus W. Champion, filed their bill in Chattooga Superior Court, against William K. Briers, the former guardian of Eliza C. Champion and Erastus W. Champion, alleging that they were the only surviving orphans of Jesse Champion, deceased; that as such orphans, they gave in for draws in the late Land and Gold Lottery, and drew the lot on which the village of Auraria now stands, worth $10,000, or some large sum; that Briers became the guardian of complainants, and as such, took possession of all their property, rented out the land, leased the houses standing

thereon, receiving large rents, and finally sold the said lot for $1700. The bill charged that Briers had never made any returns to the proper Court. The bill prayed an account and settlement.

To this bill Briers filed a plea, that after the said complainants came to lawful age, the said Hackney, for his wife, and the said Erastus, "did come to a full and complete settlement of all the matters and things touching the guardianship," and "after a full examination of the account then and there rendered, by this defendant, of all his actings and doings as guardian, did approve and allow the same, and did then and there receive of this defendant the balance due;" and upon the same day and year, did give to said guardian a receipt, under each of their respective hands, whereby they did "fully discharge and acquit this defendant from all future liability as guardian." Copies of which receipts were attached to the plea.

By an amendment to their bill, the complainants charged, that Briers, for the purpose of defrauding the complainants, failed to make any returns to the Court of Ordinary, and they being unable to ascertain the amount, were obliged to settle upon the representations alone of their guardian, who, by false and fraudulent representations, procured the receipts to be executed, and that Erastus Champion had never received as much as was expressed in the said receipt.

Briers, in an answer, filed in support of his plea, admitted that he did not make returns regularly to the Court of Ordinary, as required by law, but stated that he kept a full and fair account of all his actings and doings touching his guardianship, and denied that the complainants had relied alone on the representations of the defendant for the amount due them on the settlement made, or for the amount received by him as guardian. He denied ever making any false or fraudulent representations in making the settlements or procuring the receipts, or that such settlements were made in fraud of the just rights of complainants; "but, on the contrary, said settlements were made, and receipts given, upon a full, fair and correct statement and exhibit of all the actings and doings and accounts of this defendant, touching the estate of complainants that came to his hands," and "after a full examination of the whole matter, of all the accounts rendered, and all matters touching said estate;" that the complainants, in consideration of the accounts thus fully and fairly made to their satisfaction, did

release, discharge and acquit the defendant from all future liability as guardian. The answer, in support of the plea, farther denied and negatived all the other equitable circumstances charged in the bill, and insisted that the receipts were obtained upon no fraud or misrepresentations of the defendant, but were obtained fairly and honestly, and upon a full and complete settlement of all that was justly due.

Upon hearing the defendant's plea and the answer in support of it, the Court below disallowed the plea, and sustained the exceptions taken by the complainants, that the answer of the defendant did not cover the allegations made in the bill, as it originally stood, before the amendment. Whereupon, the defendant excepted and now assigns the same for error here.

W. Akin, for plaintiff in error, cited the following authorities:

Story's Eq. Pleadings, 516, 517, 521, '23, '24, 533, '34, '35, 496, '97. *Mitf. Eq. Pl.* 240, '1, '2, '3, '4, '5, 261. 1 *Atkyns*, 303 1 *Mad. Ch.* 101. 6 *Ves.* 586. 4 *John. Ch. Rep.* 693.

W. H. Underwood and T. R. R. Cobb, for defendants in error.

By the Court.—Warner, J. delivering the opinion.

[1.] The complainants filed their bill in the Court below, against the defendant, for a general account as guardian.

To this bill the defendant pleaded a final settlement with the complainants, and attached their respective receipts to his plea. To avoid the effect of the defendant's plea, the complainants amended their bill, and alleged that the defendant, for the purpose of defrauding them, failed and neglected to make any returns to the proper Court of Ordinary, or to any other Court, of his actings and doings as guardian, as by law he was bound to do, and ought to have done; and that the complainants were unable to ascertain the amount of money received by him, except by his representations. The complainants also alleged other acts of fraud on the part of the guardian, to avoid the receipts.

The defendant answered the amended bill, and denied all the charges and allegations of fraud, but admitted he had not made

his returns to the Court of Ordinary regularly, as required by law, of his actings and doings as guardian.

The Court below disallowed the defendant's plea in bar, and ordered him to answer fully the original bill; to which decision of the Court the defendant excepted, and now assigns the same for error in this Court.

Was the plea of the defendant, alleging a final settlement with his wards, according to the facts presented by this record, properly overruled by the Court below? In our judgment the defendant's plea was properly overruled.

That a receipt in full may be considered as *prima facie* evidence of a final settlement, is not denied; but even a receipt in full will not be a bar to a bill for an account, if there are suspicious circumstances appearing in the case. *Story's Eq. Pleadings*, 615, §799. Courts of Equity look with a jealous and scrutinizing eye, upon settlements made between a guardian and his ward, especially when the latter has just arrived at full age. In *Hylton vs. Hylton*, (2 *Vesey, Sen.* 548,) Lord *Hardwicke* says: "Where a man acts as guardian, or trustee in nature of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage, immediately upon his ward's coming of age, and at the time of settling accounts or delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take such an advantage."

Speaking of these settlements, Lord *Eldon* remarked, in *Hatch vs. Hatch*, (9 *Vesey*, 297,) "If the Court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud." The law required the guardian to make his annual returns of the receipts and disbursements of his ward's estate to the Court of Ordinary, for the inspection of all persons interested. It was his duty, under the law, to have made such returns, and public policy requires, that there should be a strict compliance with the law in this particular on the part of all guardians, executors and administrators. When the defendant made the settlement with his wards, he was in *default;* his accounts had not been submitted to the proper Court for inspection and approval, and that fact alone is sufficient to cast *suspicion* upon the settlement, and to avoid the defendant's plea, and we affirm the judgment of the Court below expressly on

that ground. We are not prepared to sanction a settlement made under such circumstances, until it is first shown to be fair and just, by the guardian, upon a full and impartial investigation before the proper tribunal.

Let the judgment of the Court below be affirmed.

No. 57.—JOHN D. FIELD, sen. plaintiff in error, *vs.* ANDREW HOWELL, defendant in error.

[1.] When the bill to enjoin a trespass, together with the answer responsive thereto, show a lease in the defendant, older than the complainant's title, the injunction will be dissolved, upon motion, after the coming in of the answer.

[2.] When an answer is responsive to a bill, defined.

[3.] A lease, for a term of years, being a chattel, may be made to commence *in futuro*.

[4.] When one buys land at Sheriff's sale, upon which there is a lease from the defendant in execution, older than the judgment, and at the time of the sale the lessee has not entered into possession, he buys it subject to the right of entry and user under the lease.

Motion to dissolve injunction. Decided by Judge WRIGHT, at Chambers, November, 1849.

John D. Field, sen. filed his bill, returnable to Lumpkin Superior Court, against Andrew Howell, charging, that in 1848, at a Sheriff's sale in Union County, he became the purchaser of lot No. 93, in the 10th district and 1st section of originally Cherokee now Union County, sold as the property of one Lorenzo D. Smith, and took a deed to the same from the Sheriff, who thereafter put the complainant in possession of the same; that said lot was valuable for gold mining, but at the time of the sale, the title to the land being in litigation, the mining was restrained by the order of the Superior Court of Union County; that subsequently, the litigation was determined in favor of Smith's title, whereupon complainant commenced and continued to mine for gold; that afterwards, one Andrew Howell, who by some means

had obtained a lease from Lorenzo D. Smith to a part of this lot, filed a bill in the Superior Court of Union County, against complainant, and one John Hall, who was mining for him, charging them to be trespassers, and praying an injunction, which injunction is still pending. The bill farther charged, that Howell never was in possession of the premises, and after the date of the lease, denied all interest, on oath, by lease or otherwise to said lot of land; that after the injunction was granted, the said Howell, with a large number of hands, commenced mining operations on the said lot, under this pretended lease, and was daily digging and carrying away large quantities of gold, and committing irreparable waste and damage to the premises; and that the said Howell is insolvent, and unable to respond for the amount of waste committed, or the rents and profits due the complainant, even if the lease be finally declared valid. The bill prayed an injunction against the trespass, and an account for the gold already taken therefrom.

Andrew Howell filed his answer, admitting the sale and purchase by John D. Field, sen. of the tract of land, but insisting that the same was fraudulent and void. He admitted that the lot was valuable for gold mining, and that the title was in litigation at the time of the sale. He admitted the filing of the bill enjoining the complainant, but insisted that he (Howell) had been in possession, and was mining on the land leased to him, before that bill was filed; that his lease was older in date than the sale and the judgment under which it was made. He denied that he had ever denied having a lease to the land, but explained the circumstance referred to in complainant's bill. He admitted he was poor, but denied being insolvent. He admitted he was digging gold until restrained by the injunction of the Court, and expressed himself willing and ready to settle and account for the rent, under the lease, with John D. Field, sen. or whoever was the legal owner of the fee in the land. He insisted that his lease was older than the judgment and *fi. fas* under which the land was sold, and that he was entitled to the benefit of that lease, notwithstanding the sale. A copy of the lease was made an exhibit to the bill filed by Howell against Field, and that bill, with its exhibits, was made an exhibit to the bill filed by Field. He referred to that exhibit for a copy of his lease. By the terms of that lease

possession was to be taken at the *end* of the litigation as to the title.

Upon the coming in of the answer, the defendant, Howell, petitioned His Honor, Judge *Wright*, at Chambers, showing that he had "fully answered the bill," and praying a *rule nisi* for the complainant to show cause why the injunction should not be dissolved. Whereupon, it was ordered, that the complainant show cause, on the 4th November, 1848, at Cassville, why the Injunction should not be dissolved.

Upon hearing the said motion, it was ordered by the Court, that the injunction be dissolved.

Which order and proceedings are excepted to as erroneous—

1st. Because the defendant's answer does not deny the equity in complainant's bill.

2d. Because there is no sufficient cause alleged for the dissolving said injunction in the petition for the *rule nisi*, or in the *rule nisi*, or in the order dissolving the injunction.

3d. Because an order dissolving an injunction ought to set forth and show a good cause of dissolution.

W. Martin, for plaintiff in error, cited—

1 *Kelly*, 6. 3 *Ves.* 140. 6 *Ib.* 707, 147. 17 *Ib.* 110, 128, 281. 7 *Ib.* 589. 2 *John. Ch. Rep.* 122. 1 *John. Rep.* 12. 2 *Ib.* 202, 473. 6 *Ib.* 497. 7 *Ib.* 320, 330.

Tripp and W. H. Underwood, for defendant.

By the Court.—Nisbet, J. delivering the opinion.

[1.] It seems that Howell, the defendant in error, had filed a bill against the plaintiff, Field, to enjoin him from working on a gold mine in the County of Lumpkin, in which bill he sets up a lease to the mine from one Smith, the original proprietor, of older date than the judgment against Smith, under which Field claims title, and also avers, that his (Field's) title is fraudulent and void. The injunction against Field was granted, and being still undissolved, Howell entered upon the premises and proceeded to dig gold. Field then brings his bill, which is in the nature of a cross bill, against Howell, setting forth his title, reciting Howell's bill

against himself, and asking an injunction against Howell, account of the gold already dug, &c. The injunction against Howell was granted and he answered Field's bill. When the answer came in, Howell moved, in Chambers, to dissolve the injunction, which motion the Judge granted, and to this decision Field has excepted.

We are not required in this case to inquire into the principles upon which a Court of Chancery will interfere to enjoin a trespass, the question made being determinable upon other grounds. Those principles are discussed and settled in *Moore vs. Ferrel*, (1 *Kelly*, 7.)

When the defendant sets up a title to the property, adverse to that of the complainant, in a proper case made, it was there held, that a Court of Chancery would not undertake to determine the title, but would lay hold of the property, in the exercise of a preventive power appertaining to that jurisdiction, and, by injunction, protect it until the law tribunal should determine the title. We affirm now this doctrine, but do not think that the facts disclosed in this record will allow of its application. They distinguish this case from that of *Moore vs. Ferrel*, and show a case, as we shall see, where the defendant Howell's title to enter and dig gold, is paramount to that of the complainant.

It is true that the record exhibits a case in which a party having enjoined his adversary from working a mine, enters himself and proceeds to work it; and it would seem, as argued by counsel, unjust that a Court of Chancery, having taken hold of land and by injunction restrained one of the parties from its use, should yet permit the other party to enter upon and use it. Equity would not, ordinarily, permit this to be done. It is obviously right, that where there is a conflict of title, and one party is enjoined until the title is determined, the other ought to be also. The Court below, however, was required to exercise its discretion as to the injunction, according to the case made by this bill and answer. We review its judgment, also, according to the case made in this bill and answer. The complainant must abide his statements and the answer to them. If he has in his bill made such statements and admissions as, together with the defendant's answer responsive thereto, show that, notwithstanding his own restraint by injunction, he is not entitled to restrain the defendant, the injunction must be dissolved, and he cannot complain. The

fact that this is a cross bill, does not vary the rule. Although it is a cross bill it asks an injunction, and must be subjected to the same rules as an original bill asking an injunction. The general rule is, that if the answer contains a sufficient defence to the case stated in the bill, the injunction will be dissolved. *Eden on Injunctions*, 145, 146. 1 *John. Ch. Rep.* 211. 3 *Daniel's Ch. Prac.* 1831, 1832, *and notes. Extraordinary circumstances* may exist, which will constitute an exception to the rule. See Mr. *Story* in *Poore vs. Carleton*, 3 *Sum.* 75, 76; also, 3 *Daniel's Prac. note on p.* 1832. There are here no extraordinary circumstances which take this case out of the general rule.

The bill, and the answer responsive to the bill, show a lease to Howell of the premises, older in date than the judgment against the lessor, under which the complainant claims title. There is a right to enter, prior in point of time, and founded on an admitted lease, against which no sufficient averments are made in the bill. If this be so, the Court below had, and we have, no alternative but to dissolve the injunction. I know of no rule of Law, or principle of Equity, which will justify us in restraining a man from the use of property, to the use of which he has an undisputed right. The bill charges, that the defendant, Howell, "*who by some means had obtained a lease from Smith to a part of the lot of land,* filed a bill," &c. After making this statement, the plaintiff proceeds to recite the substance of the bill filed by Howell against him, and makes it and its exhibits, by a clear statement, a part of his own bill. In the bill of Howell, his lease is set forth as the ground of his application to Chancery, for the writ of injunction, and a copy is appended as an exhibit, bearing date on the 3d day of October, 1845—the complainant Field's deed from the Sheriff, bearing date on the 4th of January, 1848. By these statements, and by the complainant Field's exhibits, one of which is Howell's bill and lease, the lease to Howell from Smith is admitted. These admissions as to the lease would not bind Field, if in his bill there were averments distinctly made against it, which would put its *bona fide* character in issue. It is argued that there are such averments. Before looking at them, I remark, that in Equity as well as at Law, the pleadings are to be taken strictly against the pleader, and remark farther, that an allegation of fraud is not sufficient, unless the grounds of fraud are distinctly stated. Upon looking carefully into the bill, I find no allegation at all

against the *bona fides* of the lease. It is spoken of in one instance as a *pretended* lease, without farther averment. And again the pleader refers to it hypothetically thus, "and your orator farther charges, that if the lease to said Howell be valid, (which he utterly denies,) your orator is at least entitled to the rents," &c. This denial of the validity of the lease is more distinctly made afterwards, and the ground of invalidity is set forth, and to which I will presently again advert. Again, the bill charges, that after the date of the lease, Howell denied, on oath, that he had any interest in the land by lease or otherwise. This averment, if uncontradicted, might perhaps be held sufficient to retain the injunction until the hearing. Its effect, however, is completely neutralized by a distinct denial in the answer. Now, none of these statements amount to any sufficient averment against the lease, under any rule of Equity pleadings recognized in our Courts. The bill, therefore, must be taken as admitting the lease from Smith to Howell. But it is insisted, that the bill may admit the existence of the lease, but it does not appear from the bill that it bears date before the judgment against Smith, under which Field, the complainant, claims title, and, therefore, the bill shows a better title than Howell's lease, his title from the Sheriff relating back to the date of the judgment. The position is a sound one. The purchaser at Sheriff's sale, buys the interest in the property owned by the defendant in execution at the date of the judgment; and, if at that time, Howell held no lease, Field acquired a title unencumbered by a lease to him, and of course Howell was a trespasser. As to the date of the judgment, the bill is silent; and it does not admit, expressly or by necessary implication, that the lease was executed before the date of the judgment. It gives the date of the lease, and also the date of the deed to Field, and the latter is several years subsequent to the former; but the answer states plainly that the lease was made anterior to the date of the judgment under which Field bought. The bill and the answer, therefore, establish the fact required. It is still objected, that that part of the answer which shows this fact is not responsive to the bill, but sets up that fact as matter in avoidance, which must be proved upon the trial, and cannot be taken as true on a motion to dissolve. The proposition is sound, that matter in avoidance, not responsive to the bill, is not to be held as true for the defendant on a motion to dissolve.

[2.] The enquiry then is, is the answer in this particular responsive to the bill? A defendant cannot by his answer charge himself, and by affirmatively setting up a distinct matter discharge himself; but an answer which embraces the same transaction, although but a part of it is literally responsive to the charge, I apprehend, may be evidence for him. Lord *Eldon*, in *Thompson vs. Lamb*, said, "He was clearly of opinion that a person charged by his answer, cannot by his answer discharge himself, not even by his examination before a Master, unless it is in this way: if the answer, on examination, states that on a particular day he received a sum of money and paid it over, that may discharge him; but if he says, that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge, because it is a different transaction." 7 *Vesey*, 587. The response certainly cannot be limited to the naked admission or denial of a fact stated, or a charge made, in the bill. The answer, unless full, would be liable to exception. A mere denial might be, and often is, an evasion of the question put, or of the charge made. Now, it is unreasonable not to give the defendant the benefit of that as evidence for him, which, if omitted, would be ground of exception for the plaintiff. That answer which fairly springs out of the charge, which is not collateral to, or independent of it, it would seem, ought to be evidence for the defendant. If the defendant admits or denies a fact charged, and then sets up matter which avoids the effect of the denial or admission, it is clearly not responsive; but if the complainant charges a fact, and the defendant answers fully as to that fact, in which matter is stated which operates to his benefit, upon principle, it is clearly, to my mind, wrong to take so much of it as is favorable to the plaintiff, as evidence for him, and exclude so much as makes in favor of the defendant, as being no evidence for him. The plaintiff by calling upon the defendant to answer an allegation of fact, thereby admits the answer to be evidence of that fact. If the answer relates to the fact singly, the whole of it is evidence for both parties. If the answer sets up matter foreign to the fact or thing charged, then the defendant is put upon proof of that matter—it becomes in the nature of an allegation of fact against the plaintiff, which he has notice of for the first time, and may be surprised by it. The philosophy of this thing is this: the plaintiff, by going into Equity and compelling the testimony of

the defendant, abides his answer in relation to any distinct fact which he ventures to put to his conscience, whether the answer be favorable, or otherwise, until, if it be unfavorable, at the trial under replication, he disproves its truth. If the bill and answer are before the Court, upon a motion to dissolve, he must abide the answer as it stands.

To apply these principles to the case in hand. The complainant charges, that Howell, by some means, held a lease upon the gold mine—He exhibits that lease—he charges that he holds a title by sale under a judgment against Howell's lessor. As to these allegations of fact, he submits himself to the conscience of Howell, the defendant, and requires his answer. In response, Howell states that he does hold such a lease; that the lease exhibited is a true copy; that there was such a judgment against his lessor, and a sale and purchase as charged, and that the lease bore date before the date of the judgment. Now, why take all of these answers as evidence for the plaintiff, and exclude the answer as to the date of the lease as improper testimony for the defendant? Does not the answer as to the date relate to the same thing—the lease—about which he is required to answer? To the same thing—the judgment—about which he is required to answer? Can the date of the one or the other be separated, as a thing collateral to or independent of it? Is not the date an essential element of the lease and the judgment? Suppose the date of this lease were a fact necessary to the plaintiff's recovery, under just the allegations made in this bill, and the defendant had answered nothing as to the date, would not the answer have been justly liable to exception? The answer as to the time when this lease was executed, it seems to us, springs legitimately out of the allegations in the bill, and is responsive thereto, and we hold, therefore, that by the bill and the answer, the fact is demonstrated, that the defendant, Howell, entered upon this land, having a lease upon it of older date than the judgment under which the complainant holds title, and if that lease be valid, he is not a trespasser, and having been enjoined the injunction ought to be dissolved. 2 *Story's Com. on Eq.* 743, 744. 1 *Johns. Rep.* 580. 2 *Johns. Ch. R.* 91. 3 *Mer.* 10. 12 *Sim.* 48. *Tomlyn's Law of Evidence*, 13, 14, 15. 2 *Daniel's Ch. Prac.* 983, 984, *note* 1. 10 *Yerg.* 115. 6 *Paige*, 295. 3 *Stew.* 95. 8 *Gill & J.* 171. 1 *Ired. Eq.* 226. 5 *Ham. Rep.* 284,

285. 1 *Russ. & Mylne*, 64. 5 *Sim.* 225. 3 *Russ.* 149. 1 *Greenlf. Ev.* §351. 9 *Cranch*, 160. 1 *Greenlf. Ev.* § 551.

The bill charges, that Howell's possession, under his lease, did not commence until after the complainant's title had accrued, and that it is, therefore, as against him, void. The facts are, that Howell's lease was made and delivered to him before the date of the judgment against Smith, and in the lease itself, it is stipulated that the lessee shall "commence operations within one month after the possession is settled." The land was in litigation between Smith and another, and Howell's right of entry was postponed until after the determination of the suit, and he was required to commence operations within one month from the time it was settled. Before the determination of the suit, the land was sold at Sheriff's sale, and Field became the purchaser. These facts are substantially charged in the bill, and either admitted or not denied by the answer. The point made there is this: Howell not having entered upon the possession of the land under his lease at the time that Field bought, the lease, without the possession, was void, and he, by his purchase, acquired a title to the land unencumbered. We rule it against the plaintiff in error.

[3.] A lease for a term of years, is not a freehold estate, but a chattel, and may be made to commence *in futuro*. *Livery of seisin* is not necessary to a lease for a term of years, and for that reason, unlike a freehold estate, it may be made to commence *in futuro*. At Common Law, the estate in a lease, to commence *in futuro*, did not vest until the tenant had accepted it by entering in possession; but until possession, he held the right of entry, which was called his interest in the term, or *interesse termini*. But where the words and consideration named in the lease, were deemed sufficient to raise a use, the Statute of Uses operated upon the lease, and annexed the possession to the use without actual entry. Under the Statute of Uses, the possession in this case, I think, was annexed to the use, it being a case where the words of the lease and the consideration named create a use.

[4.] If it did not, Howell held the right of entry, and Field bought subject to that right. I apprehend that the idea upon which the plaintiff in error has acted in framing his pleadings, is this, to wit: that Howell not having possession, the sale under the judgment extinguished the lease, and that he bought an unencumbered title. This, however, is an error. He bought the land

encumbered with the lease, for that was the interest, and only that, which the defendant in execution held. He bought no less, and could buy no more, than the estate in the land owned by him. 4 *Kent*, 96, 97. *Bac. Ab. title Leases, M. Coke Litt.* 270, *a. Shep. Touchstone, by Preston*, 267. 2 *Black*. 143, 144. *Co. Litt.* 46.

Let the judgment of the Court below be affirmed.

No. 58.—The JUSTICES OF THE INFERIOR COURT FOR THE COUNTY OF MORGAN, for the use of JOHN C. SELMAN and another, plaintiffs in error, *vs.* WILLIAM W. SELMAN, CARTER W. SPARKS and others, defendants.

[1.] A *retraxit* is a voluntary termination by the plaintiff, in open Court, of his suit, and a judgment thereon is a complete bar to a subsequent action for the same cause.

[2.] A *dismission* of a suit does not, in this State, amount to a *retraxit*, and is no bar to a future suit for the same cause of action.

[3.] When the provisions of the Act of 1812, authorizing an executor, administrator or guardian, whose residence shall be changed from one County to another, to make his returns in the County in which he lives, are fully complied with, the sureties on the first bond are discharged from all farther liability on account of their principal.

[4.] When the Court of Ordinary have granted letters testamentary, administration or guardianship, to a person entitled and capable of discharging the duties of the trust, no new appointment can be made, until the former authority is vacated by death, removal or in some other way; and the new appointment being void, the bond also is void, given for the faithful performance of the trust delegated to the new appointee.

Debt on Guardian's Bond, in Paulding Superior Court. Tried before Judge WRIGHT, February Term, 1849.

This was an action of debt upon a bond given to the Justices of the Inferior Court of Morgan County, by William W. Selman, as guardian of the orphans of Benjamin Selman, deceased, with Martin P. Sparks, Carter W. Sparks and John Howard, as sureties, dated the 12th January, 1830, to which action the defend-

ants pleaded a *retraxit*, by the plaintiffs, and a discharge by the guardian's removal to Coweta County, and giving a new bond in that County.

On the trial, the plaintiff gave in evidence a certified copy of the bond, the appointment of Selman as guardian, and his returns in Morgan County; and also an exemplification of a decree in Coweta Superior Court, in favor of the plaintiffs against their guardian, for $5255 70. Other evidence, not material to be recited, being given in evidence, the plaintiffs closed.

The defendants then tendered in evidence, an exemplification from the records of the Court of Ordinary of Coweta County, showing the appointment of the said Selman as guardian of the plaintiffs below, by said Court of Ordinary of Morgan County, and also the appointment of the said Selman as guardian of the plaintiffs by the Court of Ordinary of Coweta County, and a certified copy of the bond of the said Selman, given in the County of Coweta, as guardian, under the last appointment, with his actings and doings in both Counties, which the defendants pleaded as a discharge from the liabilities of the first bond.

To this evidence counsel for the plaintiffs objected, on the ground that the record showing that the appointment of Selman as guardian in Morgan County, was unrevoked—the latter appointment in Coweta County was void—which objection was overruled by the Court and the evidence admitted. To which decision counsel for plaintiffs excepted.

From this record it appeared, that William W. Selman was appointed guardian in Coweta County, at January Term, 1835, and gave bond with the usual conditions, for the discharge of his duties under the appointment that day made. On the 10th day June, 1835, a copy of his actings and doings in Morgan County, certified by the Clerk on February 23d, 1835, was recorded in the Clerk's office of the Court of Ordinary of Coweta County.

It was admitted on the trial, that an action had been before then commenced in Paulding Superior Court, by these plaintiffs against Thomas H. Sparks, one of the defendants, on the same instrument and for the same purpose; and that on the trial of said case, after the evidence had been submitted to the Jury, argument had, and the Court had charged the Jury, plaintiffs voluntarily dismissed their cause; and that afterwards, the same plaintiffs brought another suit against another of the defendants on the

ture waste by the guardian. 1 *Kelly*, 84. 2 *Bailey*, 397, *and cases therein cited.*

A security will not be discharged by implication of law, and he is liable unless the Statute authorizing a new bond to be given expressly discharge him. *United States vs. Nichall*, 6 *Conden. Rep.* 611.

The giving a new official bond by a Post Master, does not discharge his securities on the old bond for past or subsequent defaults of his principal. *Post Master General vs. Reeder*, 4 *Wash. C. C. Rep.* 678, *cited in* 3 *U. S. Dig.* 498.

W. Akin & W. H. Underwood, for the defendants in error, made the following points:

1st. The dismissal of the two former suits, under the circumstances, amounted to a *retraxit*, and was a bar to the present suit.

2d. The order of the Court of Ordinary of Coweta County, appointing William W. Selman guardian, did not affect the legality of the bond he gave. If the Court did *more* than the law required, it did not destroy that which was done according to the law.

The Court in Coweta had jurisdiction of the matter, and had the right to determine what was necessary to be done in the premises, in order to allow the guardian to remove his guardianship and to make his returns in Coweta. 1 *Kelly*, 486.

3d. The removal of the guardianship to the County of Coweta, and giving new bond and security as the Statute required, discharged the sureties to the first bond from all liability for waste committed by the guardian after the new bond was given. *Prin. Dig.* 241, 242. 2 *Bailey*, 60. 5 *Mason's C. C. R.* 82. *Theobald on Principal and Surety*, 43. 3 *Washington C. C. R.* 70. 2 *Bailey*, 486. *Ib.* 524.

By the Court.—Lumpkin, J. delivering the opinion.

The defendants, among other things, insist that being heretofore twice impleaded for the same cause of action, which suits were dismissed—the judgments rendered for the costs in their favor—were in the nature of judgments as upon a *retraxit*, and are a complete bar to a subsequent action for the same cause. It is

contended, on the other hand, that the doctrine of *retraxit*, as known to the system of English pleadings, is not of force in this State. We can see no good reason why it is not.

[1.] A *retraxit* is the public and voluntary renunciation by the plaintiff, of his suit or cause of action, in open Court; and if this is done, and a judgment is entered up thereon, we think that the right of action is forever gone. Why should it be otherwise? Its design is to put an end to litigation—a most desirable object in any country. If the plaintiff not merely fails to prosecute his suit, but goes one step farther, and admits either that he never had any cause of action, or that if he had, he is willing to renounce it, and the defendant signs up judgment thereon, as he is by law entitled to do, the effect is precisely the same as the record of a *verdict* and general judgment in his favor.

[2.] But we think there has been no *retraxit* in this case. It is true, the plaintiff has twice *dismissed* his suit. This, by the law, and the unbroken practice of our Courts since the organization of our Judiciary, he had a right to do, without prejudice, except as to the payment of costs.

Chief Justice *Marshall*, in *Hoffman vs. Porter*, (2 *Brock.* 156,) says the books mention a *retraxit*—a judgment of non-suit—and a discontinuance; that a *retraxit* only is a bar to a new suit, in which the plaintiff openly renounces his action, wherein it differs from a *mere dismission* by the party. The General Court of Virginia, in *Pinner, etc. vs. Edwards, etc.* (6 *Rand.* 674,) draw the distinction between a *dismission* and a *retraxit;* the former resulting usually from some obstructions in the progress of the cause, and not being a final disposition of it; whereas, a *retraxit* is a complete bar, and when done, the plaintiff cannot commence again. In *Evans vs. McMahan*, (1 *Ala. Rep.* 45,) the Supreme Court of Alabama sustained the distinction between a *dismission* and a *retraxit.* The question arose upon the sufficiency of the plea in bar, alleging, as in this case, a judgment by *retraxit*, but which substituted the words, "and *dismissed* the same," for "but from the same altogether withdrew himself." The form of the plea, as furnished by *Chitty*, is in these words: "The said A B came into the said Court, in his own proper person, and confessed that he would not farther prosecute his said suit against the said C D, but from the same altogether withdrew himself," &c. 3 *Chitty's Plead.* 477. The Court held, and we think very properly, that

the words, "and *dismissed* the same," were rendered entirely inoperative by what preceded and followed them, and could not be understood to make the judgment pleaded in that case indecisive of the rights of the parties, *as a judgment of dismissal would be.*

But the Act of 1843, (*Pamphlet, p.* 122,) is conclusive upon this point. To avoid the inconvenience and delay which frequently occurred on account of plaintiffs not being able to *dismiss* their suits except at regular terms of the Court, it authorizes it to be done during the vacation, on the same terms as if done in open Court, to wit: the payment of the costs, before they could recommence the action.

[3.] The next question presented by this record, is one of great practical importance, involving as it does the proper construction of the Act of 1812, the second section of which is in these words: "Any executor, executrix, administrator, administratrix or guardian, whose residence shall be changed from one County to another, either by the creation of a new County, removal or otherwise, shall have the privilege of making the annual returns required of them by this Act, to the Court of Ordinary of the County in which they reside, by having previously obtained a copy of all the records concerning the estates for which they are bound as executors, executrix, administrators, administratrix or guardians, and having had the same recorded in the proper office in the County in which they then reside, and having given new bond and security, as the law directs, for the performance of their duty." *Prince*, 241, '2.

What does this Statute authorize and require to be done, and what is the legal effect of a compliance with its provisions? The Act itself being silent as to the mode of its own execution, we deem it our duty to the people and the profession, to express our views briefly upon this subject. They will be considered as *directory*, at any rate, as to all *future* proceedings under this Act. We believe that an order ought to be entered on the minutes of the new Court, reciting the fact that the conditions of the Statute had been performed, to wit: the record been filed and the security given; that a certified copy of this order should be exhibited to the old Court, and an order passed and placed upon their minutes, exempting the executor, administrator or guardian from his obligation to account farther to them. This done, both records are complete—that in the old County is closed up, and that in the

new opened. And we are of the opinion, that it operates as an entire transfer of the estate, and that the securities on the first bond are responsible only for past waste, and not for any future mismanagement. The whole trust, we repeat, is removed. All future orders for the sale of property are to be taken in the new County. Letters of dismission are to be granted there. How can they be obtained any where else? They are to be issued only upon a full and fair settlement of the accounts of the party applying for them. How can the *old* Court judge of proceedings which have transpired in another jurisdiction? Whereas, the *new* Court have the record from the beginning before them. I am aware that the Statute declares, that dismission shall be granted in the County where the letters issued; but this provision does not apply where, by authority of law, the trust has been removed elsewhere.

It is argued that a security is never discharged by *implication*. In the manner of procedure suggested by this Court, such would not be the fact. The order on the minutes of the old Court, discharging the principal, would operate as a release of his bondsmen. We will not undertake to say that it cannot be done in any other way. The Act of 1837, (*Pamphlet, p.* 123, 124, 125,) authorizing the transfer of property in this State, to a non-resident guardian, is very similar in its features to the Act of 1812. Bond and security is to be given abroad, and upon proper proof of that fact, the Court of Ordinary here is required to pass an order, directing a transfer of the funds. This done, and a suitable receipt taken, who doubts that the security for the resident guardian is discharged? And yet it is by *implication* of law. It may be said, that in the case put, the assets are not only removed out of the State, but that they are placed in other hands; and this is certainly true. The illustration is merely used, to show that a surety may be discharged without a formal judgment for that purpose; and after all, a security residing in Chatham, would be able to exert no more supervision or control over an executor, administrator or guardian who had removed to Dade, or *vice versa*, than if the State boundary was passed. The Act never contemplated a continuing liability on the part of the old sureties, under such circumstances. Were we constrained thus to expound it, we should not hesitate to pronounce it unconstitutional. For the objection to a law, on the ground of its impairing the obligation of a contract, does not

depend on the extent of the change which the law may make in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, or imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation, and consequently is within the constitutional prohibition. *Smith's Commentaries*, 382. A surety binds himself for the faithful performance of the duty of the trustee, in a particular County, where they both live. To make him amenable for the good conduct of his principal to another jurisdiction, in another and perhaps remote county, would be to change the terms of the contract—*to impair its obligation.* Such has never been the practical interpretation of this Act—such, we apprehend, was not the intention of the Legislature.

But another example may be adduced to negative the doctrine that a surety is never discharged by implication. A party dissatisfied with the decision in the Justices' Court, pays the costs, and obtains a *certiorari*, having given bond and security for the eventual condemnation money. On the hearing, the judgment below is *affirmed* by the Superior Court. The party cast sues out a writ of error, and supersedes the judgment of affirmance by again giving bond and security, as required by law. I ask, is not the surety on the first bond relieved? His undertaking was for the payment of the condemnation money in the Superior Court; and this judgment has been vacated or superseded by the farther appeal of the party, as allowed by law. In principle we see no difference in the two cases.

We agree with the able counsel for the plaintiffs in error, that the mere taking of a *new* bond does not, necessarily, release the old sureties, and especially where the new bond is taken by authority of law, for the purpose of strengthening the existing security. If the security on appeals, good at first, becomes insolvent pending the appeal, the party appealing may be compelled to give additional security; but this does not relieve the old. If A and B are securities for C on his administration bond, and A, becoming dissatisfied, applies to the Court of Ordinary and is discharged, C continuing in his office, giving counter security—it has been ruled, that the discharge of A would not, in such case, release B, the other original security. Whether he will be liable for the

whole or a moiety only of the bond to which he is a party, is a question about which there is a contrariety of opinion and of decision.

Each transaction of this character must turn, in a good degree, upon the fact of whether or not the second or subsequent bond be given for a new and different undertaking altogether. If so, it does operate, *ipso facto*, as a discharge of the prior parties.

It only remains to enquire whether or not this case comes within the rule thus laid down? Has there been either a literal or substantial compliance with the Act of 1812? That Statute clearly contemplates a continuation of the old representation and not the creation of a new one. If there was room to doubt on this point, the amendatory Act of 1843 (*Pamphlet*, 58,) would settle the matter. It provides, that nothing in the second section of the Act of 1812, shall be so construed as to compel executors who are not bound by the existing laws of this State to do so, to give security upon removing their proceedings from one County to another. All *they* have to do is, to file an exemplification of the record of their former actings and doings. Others have to give a *new* bond in substitution of the old, and not for *finishing*, but for the full administration of the estate, "*as the law directs.*"

[4.] Is the present bond, which is the foundation of this suit, taken under the Act of 1812, *to continue* the already existing guardianship of Mr. Selman, granted to him in the County of Morgan, *as it should have been*, or to institute a new, distinct and independent guardianship in the County of Coweta? If we look to the defence set up in this case, we shall see the construction which the defendants themselves and their counsel put upon the obligation. They refer to it as a separate and original undertaking. If we examine the instrument itself, the same facts stand out in unmistakable features. Not only is there no allusion to the former guardianship—that would have been, perhaps, a fatal omission—but it purports plainly on its face, to be given under, and by virtue of, the new appointment made by the Court in Coweta, and guarantees only the proper discharge of the principal's duty as such newly appointed guardian. Can it be pretended that this is a compliance with the Act of 1812? Is not this whole proceeding void? No *new* guardianship could be created while the former remained unrevoked. The doctrine of the Common Law

in force in this State, and adopted in every part of the Union, is, that when the Court of Ordinary have granted letters to persons entitled and capable of discharging the trust, they have emptied or divested themselves of jurisdiction by the transfer, and cannot resume jurisdiction over the same matter until it reverts to them by the occurrence of some of those events or disabilities which, either for the time or perpetually, vacate the office—as the death of the party, the repeal of his authority, &c. *Went.* 39. 4 *Burns' Eccl. Law.* 3 *T. R.* 130. *Toller*, 128. *Rose vs. Hunely*, 4 *Cranch*, 244. *Wise vs. Withers*, 3 *Cranch*, 331.

In *Griffith vs. Thugier*, (8 *Cranch*, 9,) the Supreme Court of the United States (*present all the Judges*) held, that so long as a qualified executor is capable of exercising the authority with which he is clothed or has been invested, that authority cannot be conferred, by the Court of Ordinary, on any other person; and that if, during such capability by the executor, the Ordinary grant administration, either absolute or temporary, to another person, *that grant is totally void.*

In the case before us, the validity of the second appointment is not seriously insisted on. It is contended, however, that it is merely an act of supererogation, and that although in itself a nullity, that, nevertheless, the bond in Coweta is good. The misfortune is, that the bond itself is wrong, being taken under the new appointment, and consequently must fall to the ground with it. No suit can be maintained on it. It cannot, therefore, operate as a release of the old securities. But for the fact that the record, or a portion of it, has been filed in Coweta, there is not a particle of connexion between the guardianship in the two Counties.

We regret, extremely, to be driven to this conclusion, but it is irresistible. If it were a case of doubt, for myself, I should unhesitatingly decide for the defendants in error, not because the plaintiffs are strangers to me. My sympathy, I trust, would not in any case control my judgment. But here it is *orphan* against *orphan*—the children of Selman, the deceased ancestor, seeking to recover their patrimony out of the children of Sparks, the security of their guardian. But, there being no room to doubt, the law must take its course, whatever ruin it may entail on the parties. While we have discarded, in this country, the servile maxim, that the King (*Rex*) can do no harm, as good citizens it be-

comes us, perhaps, to maintain that, *lex* (the only potentate we acknowledge) *non potest peccare.*

The judgment below must be reversed and a new trial awarded.

No. 59.—THOMAS ECHOLS and WIFE, *et al.* plaintiffs in error, *vs.* JAMES W. BARRETT, admr. &c. defendant.

[1.] By a fair construction of the Statutes of this State, executors, administrators and guardians are required to take the oath prescribed, *before the Court of Ordinary.*

[2.] Where it appears from the record of the Court of Ordinary, that an administrator appointed by the Court, was one of the Justices presiding at the time of making the appointment: *Held*, that the appointment was void, for the reason, no one can be a judge in his own case.

[3.] In an action of trover, brought to recover the possession of a negro, by the administrator with the will annexed, the will is not competent evidence to show *property* in the testator to the slave, at the time of his death, by his *declarations* therein contained, that he *loaned* the negro to his son, through whom the defendants claimed title, and who had had the possession of the slave for twelve months anterior to the death of the testator.

[4.] The division of a testator's estate, by the legatees under the will, by consent, is no defence to an action at law brought by the legally appointed administrator, with the will annexed, to recover the possession of the testator's property, for the purpose of making a due and legal administration thereof.

[5.] Where a father *loans* a negro to his son, and delivers possession thereof, and the son sets up an *absolute* claim to the slave, and offers to sell him as his own property, the father having *notice* of such absolute claim and offer to sell, the possession of the son becomes adverse from that time, and the Statute of Limitations will commence running from the time of such adverse possession in favor of the son against the father.

Trover, in Clarke Superior Court. Tried before Judge DOUGHERTY, February Term, 1849.

This was an action of trover for a negro boy, Edmund, brought by James W. Barrett, as administrator, with the will annexed, of Henry Huff, deceased, against Elizabeth Huff, the widow of John Huff, who, pending the suit, intermarried with Thomas Echols,

William Akridge and Virgil W. Akridge. The defendants pleaded the general issue and the Statute of Limitations.

Upon the trial, the plaintiff offered in evidence the following certificate of the Clerk of the Court of Ordinary of Clarke County, to show that he was the legally appointed administrator:

"REGULAR TERM, May 3d, 1847.

"Present, their Honors Aaron F. Nunnally, Elizur L. Newton, Thomas Simonton, John W. Cook and James W. Barrett:

"*Ordered*, That James W. Barrett be, and he is hereby, appointed administrator, with the will annexed, on the estate of Henry Huff, deceased, and that the Clerk take bond and security in the sum of one thousand dollars, in terms of the law, out of term time.

"RECESS, May 29, 1847.

"Pursuant to an order passed at the last term of the Court, James W. Barrett was qualified as the administrator, with the will annexed, on the estate of Henry Huff, deceased, on his giving bond and security in the sum of one thousand dollars, to whom letters of administration, with the will annexed, accordingly issued in terms of the law.

"ASA M. JACKSON, C. C. O."

To this evidence defendants' counsel objected, on the ground, that the evidence showed that the administrator was not qualified before the Court, as required by law, and farther, because the administrator appointed, was a Judge presiding at the time of his own appointment. The Court overruled the objection, and counsel excepted.

The plaintiff offered in evidence, the will of Henry Huff, his testator, by the second clause of which, the boy, Edmund, was loaned to John Huff for life, and at his death without heirs, to be divided among his surviving brothers and sisters. The defendants' counsel objected to the evidence, which was admitted by the Court, and counsel for defendants excepted.

Defendants' counsel proposed to prove, that at the death of Henry Huff, after his will was carried to probate, all the legatees being of full age, had divided his estate according to the will, and acquiesced in such division; that there were no debts then nor now, and that this administration was taken out to recover this negro for the remainder-men mentioned in the will. The Court rejected the testimony, and defendants excepted.

There was considerable evidence on both sides. The plaintiff contending that the property went into the possession of John Huff as a loan, and the defendants contending it was a gift, and if a loan originally, that there had been four years' adverse possession. To sustain this last plea, the defendants offered the evidence of one Samuel Braswell, who swore, that "he had often heard John Huff offer to sell the boy. Henry Huff asked witness if he knew of John Huff offering to sell the boy. Witness told him he had heard him offer to sell. Henry Huff said nothing in reply. This was not long before his death."

The testimony being closed, the defendants moved for a nonsuit, on the ground, that under this will the remainder-men, and not the administrator, should sue for this negro. The Court overruled the motion, on the ground that no executor had ever qualified and assented to the legacy, and that the division by the legatees, and their acquiescence therein, did not have the effect of an assent. To which decision defendant's counsel excepted.

The Court charged the Jury, among other things, "That if John Huff received the negro as a loan, his possession was not adverse to Henry Huff, and the Statute would not run in his favor until the character of his possession was changed. To effect such change, the defendant had offered evidence, that John Huff had offered to sell the negro, and that Henry Huff had notice thereof. The mere act of offering to sell the boy was not sufficient of itself to make the possession adverse, but that fact must be brought to the knowledge of Henry Huff. An offer by John Huff to sell any qualified or limited interest or claim he might have or claim in the boy, would not constitute his possession adverse, since he might have such right and the same be consistent with paramount title in another. The witness, Braswell, has stated a general offer to sell, and the Jury might regret that he was not more specific, since this is a matter of fact, of which the Jury are the exclusive judges, and with which the Court has nothing to do; that the Jury had heard all the evidence, and were the judges of the same; that if they believed, from the evidence, that John Huff claimed an absolute property in the negro, and offered to sell the same, and that Henry Huff had notice thereof, that the Statute commenced running in John's favor from that time, as his possession then became adverse, and if four

years had elapsed from that time before the commencement of this suit, they should find for defendants.

To which charge the counsel for defendants excepted—

1st. Because that part of the charge about "offering to sell the qualified or limited interest of John in the negro," was about a state of facts of which there was no evidence before the Jury.

2d. Because that part of the charge referring to the testimony of Braswell, was calculated to mislead the Jury, by casting doubt upon testimony in itself perfectly plain.

And upon these several exceptions error has been assigned.

T. R. R. Cobb and N. G. Foster, for plaintiffs in error.

G. B. Haygood and J. Hillyer, for defendant.

By the Court.—Warner, J. delivering the opinion.

The first ground of error assigned to the decision of the Court below is, the admission of the certificate of the Clerk of the Court of Ordinary, as a part of the plaintiff's title to the negro sued for.

[1.] The plaintiff below sued, as the administrator, with the will annexed, of Henry Huff, deceased, and to make out his title to recover, he offered in evidence the certificate mentioned in the record, to establish his appointment as such administrator. Two objections were made to its admissibility. First, because it appeared, on the face of the certificate, that the administrator was not qualified *before the Court of Ordinary.* Second, because it appeared on the face of the certificate of the Clerk of the Court of Ordinary, that the administrator was one of the Justices of the Court, presiding at the time the judgment of the Court was rendered, appointing himself such administrator.

Both objections, in our judgment, were well taken, and should have been sustained by the Court below. By the fifth section of the Act of 1792, every executor, or administrator with the will annexed, is required to take the oath prescribed by that Act, well and truly to execute the same, *at the time of proving the will,* or *on granting administration.* By the seventh section of the same Act, every administrator is required, when letters are granted to him, to take the oath prescribed, *before* the Register of Probates. *Prince,* 227. The Court of Ordinary has been substituted in the place of the Register of Probates. By the first section of the

Act of 1810, it is declared, the Inferior Court, when sitting for Ordinary purposes, shall have the *original jurisdiction* of all testate and intestate estates, appointing administrators and guardians, to *qualify* executors, administrators and guardians, &c. *Prince*, 239. The Act of 1820, requires that the oath of a guardian, appointed by the Court of Ordinary, shall be taken *before the Court. Prince*, 244. The oath of an executor, administrator or guardian, should, in our judgment, according to a fair construction of the Statutes, be taken *before the Court of Ordinary;* and as a matter of practice, we think it would be more regular, to have the oath prescribed by the Statutes, entered on the minutes of the Court of Ordinary, and sworn to and subscribed by the executor, administrator or guardian. Then the oath would constitute a part of the record.

The argument for the defendant in error is, that the Court is bound to presume the administrator was duly qualified, when letters of administration have been granted to him by the Court of Ordinary. Such, undoubtedly, would be the legal presumption, had the plaintiff below offered in evidence his letters of administration; but he did not offer in evidence his letters of administration; he offered in evidence a certified copy of the record from the Court of Ordinary, from which it affirmatively appears, that the administrator was not qualified *before the Court*, but was qualified out of term time, or, as the Clerk states, in the "recess." The certified copy of the record offered in evidence affords no ground for presumption that the administrator was qualified before the Court during term time, but, on the contrary, expressly rebuts it. To presume he was so qualified, would be to presume against the facts apparent on the face of the record. Presumptions cannot be received in opp i-tion to affirmative facts. The Clerk certifies, that in the "recess," May 29th, 1847, James W. Barrett *was qualified* as the administrator of Henry Huff, deceased, pursuant to an order of the Court, passed at the *last term of the Court.* Whether he was qualified by the Clerk, in the "recess," or by some judicial officer, the record does not inform us.

[2.] With regard to the objection, that the plaintiff below presided in his own cause, at the time the judgment of the Court was rendered, appointing him administrator on the estate of Henry Huff, the record shows, that he was one of the presiding Justices

of the Court *at that time.* We are, however, asked to presume, that inasmuch as the record shows there were four other Justices presiding, that he retired, and did not preside at the time the order appointing him administrator was passed by the Court. As we have already said, to allow such a presumption to prevail, would be to presume against the facts apparent on the face of the record. The record does not show he retired from the judgment seat, but, on the contrary, shows that he was *there* as one of the presiding Justices when the order appointing him administrator was passed; and when a fact appears by the record, we do not feel ourselves at liberty to presume against the existence of such fact. That a party cannot be a judge in his own cause and give a judgment in his own favor, was not controverted on the argument.

[3.] The second ground of error assigned to the judgment of the Court below is, the admission of the will of the testator in evidence in favor of the plaintiff. The Court admitted the will as evidence of the plaintiff's title, and for *other purposes*, as the record informs us. That the will of the testator is admissible in some cases in favor of the executor or administrator, with the will annexed, is readily conceded; but under the state of facts presented by this record, we are of the opinion it ought not to have been admitted to show title in the plaintiff as against the defendants. The great question in the case, as appears by the record, was, whether Henry Huff, the testator, had *given* the negro in dispute to his son, John Huff, in his lifetime, or had only *loaned* him to his son—the defendants claiming title under John Huff. The only clause in the will which relates to the negro in dispute, reads as follows: "For the love and affection I have for my son, John Huff, I *loan* to him a negro boy named Edmund, so long as he may live, and after his death, to return to the surviving children, unless he should have an heir or heirs born to him—in that event, to go to them." The negro had been in the possession of John Huff, as one of the witnesses states, about one year before the testator's death. The testator had parted with the *possession* of the property in his lifetime. The will did not take effect until after the death of the testator. The administrator, with the will annexed, claims title to the negro as the legal representative of his testator, and to entitle him to recover as against the defendants, it was incumbent on him to have shown possession, or the right of possession, in his testator in his lifetime, by *competent* evi-

dence. The declaration of the testator, made in his will, that he had *loaned* the negro to his son, was not competent evidence, in our judgment, to establish that fact in favor of the administrator suing in his right. A party cannot give in evidence his *own declarations* in support of his own title, for the purpose of divesting the title of another, the more especially when such declarations have been made subsequent to the declarant's having parted with the possession and title to the property. *LaFarge vs. Kneeland*, 7 *Cowen's Rep.* 459. *Phœnix vs. The Assignees of Ingraham*, 5 *John. Rep.* 412. *Sprague vs. Kneeland*, 12 *Wendell's R.* 164. *Exrs. of McKane vs. Bonner*, 1 *Bailey's Rep.* 115. The principle is the same if the declarant be dead, and his declarations be offered for the benefit of his estate. *Romig vs. Romig*, 2 *Rawle's Rep.* 241. *Scull et al. admrs. of Irwin, vs. Wallace's Executors*, 15 *Serg. & Rawle*, 231, '3. The *right* of the administrator, with the will annexed, to recover the negro as a part of his testator's estate, if he constituted a part thereof, would be established by the grant of his letters of administration, or by the certificate of the Clerk of the Court of Ordinary, showing that letters had been legally granted to him. Assuming, as the Court below did, that the certificate of the Clerk of the Court of Ordinary was legal evidence of the appointment of the plaintiff as administrator, with the will annexed, on the estate of Henry Huff, such certificate afforded *sufficient evidence* of his right and title to the possession of the goods and chattels of his testator; but whether the negro in controversy constituted a part of his testator's goods and chattels, at the time of his death, was a question of fact for the plaintiff to establish by competent testimony. The will of the testator was not necessary to show his *title* to recover the possession of the negro; the grant of administration to him by the Court of Ordinary was sufficient for *that purpose*. For what object, then, was the will introduced by the plaintiff? For the *sole purpose*, so far as we can discover, to show the testator's *declarations*, after he had parted with the possession of the negro to his son, that he had *loaned* him to him; that the testator, at the time of his death, asserted *his title* to the slave, and this act of the testator, it is insisted, is competent evidence in favor of the testator's legal representative in an action of trover, to recover the slave from the defendants, who insist that the testator made an absolute gift of the slave to his son, in his lifetime; the plaintiff in-

sisting that it was not a gift, but a *loan* merely, and being a loan only, he, as the representative of the testator, is entitled to have possession of the slave as a part of his testator's estate. For the reasons already stated, we are of the opinion that it was not competent for the plaintiff to have given in evidence the will of the testator, for the purpose of showing that his son had the possession of the negro under a *loan* from him in his lifetime; but that it was incumbent on the plaintiff, after showing his grant of administration, with the will annexed, to have also shown, by other competent evidence, that the slave in dispute was the property of his testator, at the time of his death, independent of any declarations made in his will to that effect.

[4.] The evidence offered by the defendant, going to show that the legatees were of full age, that there were no debts, and that the estate had been divided by *consent* of the legatees, &c. was, in our judgment, properly rejected by the Court. It is the policy of the law, that there should be a due and legal administration on all testate's and intestate's estates; and when letters of administration are granted by the Court of Ordinary, the administrator is clothed with full power and authority to reduce to his possession the estate of the decedent, and administer the same according to law, without regard to the private arrangements or agreement of legatees or distributees. We do not say, that after a great length of time having elapsed from the death of the testator or intestate, a Court of Equity would not interfere upon a proper case being made; but it would require that a very *strong case* should be made, in our judgment, to authorize a Court of Equity to interfere with the due course of administration of a testator's or intestate's estate.

The motion for a nonsuit was also properly overruled by the Court. If the negro was the property of the plaintiff's testator at the time of his death, he, as his administrator, was entitled to reduce him to possession, and make distribution thereof, as directed by the will, if not needed for the payment of debts. The private arrangements or consent of the legatees, as to the division of the testator's estate, could not have the effect to defeat the rights of the administrator under the law.

[5.] The next ground of error is to the charge of the Court to the Jury. If that portion of the charge of the Court excepted to, stood alone and disconnected with other parts of the charge, it would, in our judgment, be erroneous; but when we take the

whole of the charge together, we are not prepared to say there is error in it, although we think that part of the charge which relates to the offer of John Huff to sell any *qualified* or *limited* interest or claim he might have to the negro, is objectionable, for the reason that the record does not disclose that there was any evidence going to show any offer to sell a *qualified* or *limited* interest in the slave. In *Paschal, admr. vs. Davis*, (3 *Kelly*, 260,) we held, that it was erroneous for the Court to charge the Jury on an *assumption* of facts that did not exist. The witness proved a *general offer* to sell the negro, and the Court stated to the Jury, that they might *regret* he was not more *specific*. The calling the attention of the Jury to the offer to sell a *qualified* or *limited* interest in the negro, when there was no evidence of an offer to sell such qualified or limited interest by John Huff, coupled with the expression of regret that the witness was not more specific on that point, was calculated to mislead the Jury, and to induce them to believe that there was *some evidence* of an offer to sell a qualified or limited interest in the slave by John Huff, and that it was a matter of *doubt*, from the evidence, whether he had offered to make a general sale of the negro, or to sell some special or qualified interest in him, when the offer to sell, as stated by the witness, was general and without qualification. While we are of the opinion that the particular portion of the charge excepted to as erroneous, had better been omitted by the Court, yet the latter portion of the charge states the law correctly, and fairly submits the question to the Jury. The Court charged the Jury, that they had heard all the evidence, and were the judges of the same; that if they believed, from the evidence, that John Huff claimed an absolute property in the negro, and offered to sell him, and that Henry Huff, the plaintiff's testator, had notice thereof, that the Statute commenced running in John's favor from that time, as his possession then became adverse; and if four years had elapsed from that time before the commencement of this suit, they should find for the defendants. We reverse the judgment of the Court below, on the grounds of error in admitting the certificate of the Clerk of the Court of Ordinary, and the admitting in evidence the will of the testator, and affirm the judgment of the Court on all the other grounds of error assigned upon the record.

Judgment reversed.

No. 60.—G. B. HAYGOOD, admr. &c. plaintiff in error, vs. OLDER NEAL, defendant.

[1.] The writ of error will be dismissed if no notice of the signing of the bill of exceptions is filed in office and served upon the opposite party, as required by the Act organizing this Court.

Issue was joined in this cause with a protestation, on the ground that there was no notice of the signing of the bill of exceptions, served upon the defendant, or filed in office, as required by the Act.

N. G. FOSTER and T. R. R. COBB, for the motion.

J. HILLYER and G. B. HAYGOOD, contra.

By the Court.

The writ must be dismissed. The same question has been made before us on several occasions, and the reasons for our decision have been given and repeated more than once. The Act organizing this Court is imperative, and we have no authority to change it.

Let the writ be dismissed.

No. 61.—COLEMAN PITTS, plaintiff in error, vs. ELEANOR HENDRIX, defendant.

[1.] The possession of land by a tenant in dower, or as the co-distributee of an estate, is such an interest as may be seized and sold under an execution.

[2.] A growing crop of corn, after it is laid by, and before maturity, passes to the purchaser of the land.

Trover, in Cass Superior Court. Tried before Judge WRIGHT, February Term, 1849.

This was an action of trover, brought by Eleanor Hendrix against Coleman Pitts, for one hundred barrels of corn. It appeared from the record of the proceedings, that ——— Hendrix, the husband of Eleanor Hendrix, died in possession of a certain tract of land—after his death, Eleanor Hendrix remained in possession. An execution against Eleanor Hendrix was levied by the Sheriff upon "all the interest she had in the land," which was sold, and purchased by Coleman Pitts. At the time of the sale there was a growing crop upon the land. So soon as the corn matured, Coleman Pitts gathered and carried it away; whereupon, Eleanor Hendrix commenced this suit.

The defendant's counsel insisted before the Court below, that the Sheriff, having seized and sold "all the interest which the plaintiff had in and to the land," and she being in possession of the same, could not deny having title to the land, and that the sale of the land under the execution as levied, conveyed to the defendant the interest and the estate which the plaintiff had in and to the land, and also the growing crop of corn on the land, and that he had a right to gather it after it matured.

All which positions were overruled by the Court as being inapplicable to this case; and the Court charged the Jury, that the plaintiff was entitled to recover, because the levy of the Sheriff was void for uncertainty, and, therefore, conveyed no title to the defendant for any thing; that a levy on land, to be valid, must distinctly point out the interest which the defendant has in the land—one-fourth, one-half, &c. just as the case might be—and this not having been done in this case, the sale was void, and the Jury ought to find for the plaintiff the highest value which the corn was proven to be worth.

Which decision and charge of the Court were excepted to by the counsel for the defendant, and upon these exceptions error was joined.

W. Akin, for plaintiff in error.

James Milner, for defendant.

By the Court.—Lumpkin, J. delivering the opinion.

We have scrutinized closely the facts of this case, to find, if we could, some legal reason to sustain the decision of the Court below. The contest between these parties is an unequal one, and it is apparent from the record before us, that the defendant, Pitts, has got greatly the advantage of his female adversary. He has bought her entire interest for fifty dollars, when the Jury have found that the crop alone, which was growing on the land at the time of the sale, to be worth one hundred and fifty-six dollars. Our investigation has been unavailing, however, except to satisfy us that, *in law*, the defendant is protected in his purchase.

[1.] Was the interest of Mrs. Hendrix, the defendant in execution, such as could be seized and sold? Every legal interest in real and personal property can be. The interest of a co-distributee in land which has not been divided, can be levied on and sold. A mere possession can be sold—it is the evidence of title—and the debtor and defendant will not be permitted to deny the title, or to set it up in any one else. Here, the defendant in execution was not only in possession of the land and cultivated it, but the evidence shows that she was the widow of the former occupant, who died on the premises, and that she has resided there ever since. She has, therefore, an interest in the land greater than the mere naked possession—either a right of dower or a child's part. If an interest in remainder or reversion, or even a contingent interest can be sold, it is clear that this was such an interest as was subject to levy and sale.

In the case of *Jackson vs. Graham*, (3 *Caines' Rep.* 188,) the plaintiff's title was deduced under a judgment, execution and Sheriff's deed thereon to the lessor, the defendant in the ejectment being the person against whom the judgment was rendered and execution issued; and it was shown, that before the entry of the judgment, the defendant had been, and then was, in possession. The defendant offered to prove that one Day was the real owner of the premises, and that the defendant had no interest in them. This evidence was rejected, and the plaintiff recovered. An application was made to set aside the verdict, and one ground taken was, that Graham was a *mere tenant at will*, and had no transferrable interest, either by his own act or by operation of law. The Court denied the motion, and gave judgment for the plaintiff, saying that the defendant under an execution became *quasi* tenant to the purchaser; that the purchaser was entitled to all the right the

defendant had in the premises, and to possession as part of his right, and that this would be of no prejudice to the real owner. The defendant had a chattel interest in the land liable to be sold. A Court of Law will not inquire what interest, what title, the defendant had under such circumstances. He is precluded from making the objection that he has no title.

In a very recent case, *Thomas vs. Simpson*, (3 *Barr's Rep.* 60,) this identical question is made and decided. There, as here, the widow was in the actual possession at the time of the death of her husband, retained the possession during the minority of her children, receiving and expending the rents, issues and profits of the premises. The Supreme Court of Pennsylvania held and declared, that it had been so repeatedly ruled in that State, that her interest was subject to execution and sale. And *Rogers*, Justice, in delivering the opinion of the Court, said, "Granting that Elizabeth Simpson, the widow, may have been treated as a disscisor, or retaining the possession of the premises without authority, yet, as her possession has been recognized by those who alone have a right to complain, *it is difficult to comprehend the position* that she acquires no right or interest at law in the real estate."

[2.] Did the growing crop of corn pass with the land? We think it did. Mrs. Hendrix's interest was sold, and this constituted an item of that interest. It necessarily passed, therefore, by the very terms of the sale. By law, the growing crop could only be separately sold, after maturity. If it did not pass under and by virtue of the sale of the land, it could not be reached at all. Before maturity, the crop only constitutes an element of value, and is not itself a distinct chattel.

A distinction is attempted to be drawn between a maturing and a matured crop—between a crop laid by and one ripe and ready to be gathered. We do not believe that this distinction can be supported. If I buy a tract of land, the owner of the crop is entitled to enter and gather it; or if the crop be separately sold, the purchaser has this privilege; but neither has the right to have his immature crop nourished on another's soil. It is inconsistent with the idea of exclusive and paramount title. If it were otherwise, small grain, such as wheat, rye, oats and barley, and even turnips and all other crops which do not require farther cultivation, might be claimed as not having been transferred with the land. It is desirable, perhaps, to have these specified in the ad-

vertisement, with the view to attract bidders. The omission to do so by the Sheriff, cannot affect the title of the purchaser.

The only other point made in the bill of exceptions, is the complaint against the charge of the Court to the Jury, that they *ought* to find the highest price of the corn which was proven. We have overruled that proposition in the case of *Foster vs. Brooks*, admr. &c. recently decided at Macon. The Jury *may* do it—they are not *obliged* to do it. It is a matter of *discretion* and not of *duty*.

The judgment of the Circuit Court must, therefore, be reversed and a new trial granted.

No. 62.—William Smith and Alfred Shorter, plaintiffs in error, *vs.* Daniel R. Mitchell, defendant.

[1.] The assignment of errors cannot enlarge the bill of exceptions, but must be supported by it.

[2.] The notice of the signing of the bill of exceptions must be signed by the party or his counsel.

Motion to dismiss the writ of error.

The defendant in error in this cause joined issue, with protestation, to the first assignment of error, because, in the assignment of errors, it is alleged that the counsel for Smith requested that the Jury should be polled *before the verdict was recorded*, when there is nothing in the bill of exceptions, or the record, to show that any such request or motion was made before the verdict was recorded.

The defendant in error farther moved to dismiss the writ of error, on the grounds—

1st. That no notice of the signing of the bill of exceptions by the presiding Judge, was served on the defendant in error, as required by law.

2d. Because the notice of the signing of the bill of exceptions by the presiding Judge, was not filed in the Clerk's office of the Court in which said cause was tried, according to law.

3d. Because the writ of error served on the defendant in error, is in a different cause from the one to which the defendant is cited to appear and defend.

4th. Because the case stated in the record is different from that in which the writ of error is sued out.

The notice served and filed in this case was not signed by the plaintiffs in error or their counsel.

The bill of exceptions stated the cause as being between Daniel R. Mitchell, and William Smith, Hugh M. Cunningham and Alfred Shorter. It farther appeared from the bill of exceptions, that Hugh M. Cunningham had died pending the suit, and that his representatives had never been made a party. The writ of error and citation stated the names of Smith and Shorter alone as plaintiffs in error, but in describing the case below, the writ of error stated the name of Cunningham also.

AKIN & McDONALD, for the motion.

W. H. UNDERWOOD & TRIPPE, contra.

Per Curiam.—NISBET, J. delivering the opinion.

[1.] The assignment cannot enlarge the bill of exceptions, and as in this case, it states a material fact, to wit: that the request to poll the Jury was made before the verdict was recorded, which does not appear in the bill, that statement must be stricken out of it.

In the descriptive part of the bill, and also of the writ of error, Cunningham is stated to have been a party to the cause below. The record shows that he had been a party, but had been dismissed by order of the Court. He was not a party when the cause was tried below. In the writ of error, and in the citation, he is not made a party—the only parties are Mitchell, Smith and Shorter. In this the pleadings all agree; the variance is immaterial, and the pleadings might be amended so as to conform literally, if necessary.

[2.] The notice of the signing and certifying of the bill, is not signed by any one. There is an acknowledgment of service on it by the defendant in error—it states the case truly and comes up with the record. That this is notice in fact, may be conceded,

but it is not legal notice. To be so, it must be signed by the plaintiff in error or his counsel. As this objection is now made for the first time, we will not dismiss this cause, but in future a notice, to be valid, must be signed.

No. 62.—WILLIAM SMITH and ALFRED SHORTER, security on appeal, plaintiffs in error, *vs.* DANIEL R. MITCHELL, defendant.

[1.] It is not the right of the parties to poll the Jury in civil causes, but it is discretionary with the Court to allow them to be polled or not.

[2.] The dispersion of the Jury, after the verdict is handed in to the Clerk, and before it is received by the Court: *Held*, to be a good reason for a refusal to permit the Jury to be polled.

[3.] If the proper parties are not before the Court, and the Court cannot make a complete decree without affecting their interests, the objection may be taken at the trial and the bill will be dismissed.

[4.] The mere non-joinder of a party, who might be a proper party, but whose absence works no prejudice to the rights of those who are before the Court, is not a fatal objection to the Court's proceeding to a decree, and the bill will not be dismissed on that account at the hearing.

[5.] If one in treaty with another for the sale of property, misrepresents a material fact, stating it to be true, when at the same time he knows it to be false, and the other party trusts to the statement and acts upon it, it is a positive fraud, for which Equity will rescind the contract.

[6.] Such a fraud may be perpetrated by acts as well as by words, and by any artifices designed to mislead, as well as by representations.

[7.] Whether a party thus misrepresenting a fact, knows it to be false or not, is wholly immaterial; for the affirmation of what one does not know to be true, or believe to be true, is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false. It is a fraud on account of which Equity will rescind the contract and reinstate the parties in their original rights.

[8.] If a party thus affirming a fact *believes it* to be true, when it is false, it is a fraud *in Law*, and Equity will rescind the contract and restore the parties to their original rights.

[9.] And if a party innocently, by mistake, misrepresents a fact, which is material, and to which the other party trusts, it is cause for rescinding the contract, because it operates as a surprise and an imposition upon him.

In Equity, in Floyd Superior Court. Tried before Judge WRIGHT, October Term, 1848.

Daniel R. Mitchell filed his bill of complaint in Floyd Superior Court, charging that on the 12th of May, 1841, being owner of a valuable tract of land lying near the city of Rome, in the fork of the Oostanaula and Etowah Rivers, it was agreed and contracted between him and one William Smith, that Smith would purchase the said land at the sum of $8,000; whereupon, Smith gave complainant his notes, one for $2,000, due December 25th, 1842, and the other for $6,000, due 25th December, 1843, and Mitchell gave his bond for titles. It was further agreed, at the same time, that if Smith should be unable to pay the notes, then Smith was to pay a reasonable rent per annum for the premises, and also $1,000 for the premises whereon the abutment of a contemplated bridge should be built, with the right of way through the land. Early in the year 1842, Smith stated to Mitchell, that he had made an arrangement with a Bank in Columbus, to take in payment of certain claims on the Western Bank of Rome, such notes as Mitchell, John H. Lumpkin and Thomas C. Hackett would say were good, and requested Mitchell to make a statement concerning a note on William H. Moore, of Alabama. Mitchell declined, stating that when he knew Moore, he was good, but that times were uncertain, and that he had heard nothing of him for some years back. The bill charges, that Smith and one Hugh M. Cunningham, of the State of Alabama, combining to defraud complainant, Smith procured from Cunningham, a letter directed to Smith, in which he stated in substance, that he boarded with Moore, and knew his situation as well as Moore did himself; that he did not owe more than $20 or $30,000, and owned two hundred negroes and three or four of the best plantations in Talladega, and if his property was sold, it would bring at least $100,000; that he considered him as good as any man in Alabama, and, moreover, that he had a claim against the United States of $40,000. Upon the presentation of this letter, complainant, (Mitchell,) having the utmost confidence in Cunningham, made a written statement, as desired by Smith, of the solvency of Moore. Shortly afterwards, Smith applied to Mitchell to know if he would take Moore's note for the notes ($8,000) he held on Smith, which Mitchell agreed to do if Cunningham would indorse the note. Smith assured complainant that Cunningham would do so, and then inquired, if Cunningham should be absent, or any thing happened, so that he might not procure his indorsement, would any

other good name do; to which complainant replied, he would take any body that was good. Smith said there was Tom Jones and Grief Harwell, that he knew were good, and he could get them. About 11th April, 1842, Smith tendered Mitchell with a note purporting to be signed by Moore, and Jones and Harwell as sureties, for $7,500, in satisfaction, together with $500 which Mitchell had promised as a *bonus* to Smith, whenever he launched a steamboat at Rome, of the notes of Smith for $8,000. Smith, the bill charges, again represented that Jones and Harwell were good, and that Moore was also good, and gave as a reason why Cunningham had not indorsed the note, that he was gone to Mobile, and again exhibited the letter of Cunningham before set out. The bill charges, that from these fraudulent and false representations of Smith and Cunningham, complainant was induced to give up his notes for $8,000 and receive the note for $7,500, and at the same time made a deed to the land to Smith.

The bill farther charges, that Moore was wholly insolvent, and was generally known to be so for several months before the letter of Cunningham was written; that Jones and Harwell were, at that time, and for a long time previously, utterly and hopelessly insolvent; that Moore was not in Alabama, but was in Washington City, Arkansas or Texas, at the time said note, purporting to be made by him, bears date; and that the same, whenever or wherever made, was prepared for the express purpose of perpetrating a fraud on the complainant or some one else; that Cunningham was not gone to Mobile, as falsely stated by Smith, and that the insolvency of Moore, Jones and Harwell was well known to Smith, and unknown to the complainant. The bill farther charged, that Smith had boasted he could "cheat Mitchell out of his eyes, and he wide awake."

The bill prayed that the deed to the land might be delivered up to be cancelled, and that Smith and Cunningham may be decreed to comply with the original contract of sale, and then receive titles, or that the said William Smith may be decreed to do so and to receive back the note of Moore, Harwell and Jones, or that the whole contract may be rescinded.

The answer of Smith admitted the sale and the agreement at the time, but insisted that the notes for $8,000 were to be discharged by other good notes. He denied that the letter of Cunningham was written before complainant gave the recommenda-

tion to the Bank, and stated that complainant said he knew Moore's condition, and was willing to take the note upon his own knowledge, but that he would like to have Cunningham's opinion about the indebtedness of Moore, and that the letter was written under these circumstances. He denied that the recommendation was procured by any fraudulent representation of himself or Cunningham. He denied that he applied to the complainant to take Moore's note, but that the complainant voluntarily proposed to take the note of Moore, stating that he knew him and knew his note to be good; and farther denied any fraudulent intention in transferring the note. He denied that complainant offered to take the note, provided Cunningham would indorse it; on the contrary, the complainant agreed to take Moore's individual note. Some time afterwards, the complainant asked defendant if Cunningham would not indorse it. Defendant replied that complainant knew Cunningham was not in the habit of indorsing notes for any person. Complainant said if Cunningham would not indorse it, perhaps Harwell and Jones would, and that would be satisfactory. He denied making any representation at that or any other time, as to the solvency or ability of Jones or Harwell, but concurred in opinion with complainant, that Moore was good—remarking, at the time, that complainant knew him better than he did. He denies that he knew Moore to be insolvent, nor does he now believe that he is. He does not know anything about the absence of Moore at the time the note was signed, but denies that it was procured with any fraudulent intention. The answer stated fully the consideration paid Moore for the note. He denied ever boasting that he could cheat Mitchell out of his eyes. The answer fully and distinctly denied every allegation of fraud or fraudulent intention.

The defendant, Cunningham, answered that portion of the bill charging confederacy on him, admitted the writing of the letter, insisting it contained the truth, and denied all fraudulent intention. On the first trial there was a decree against Smith.

At the April Term, 1848, the death of Hugh M. Cunningham being suggested, the case being on the appeal, on motion, it was ordered, that complainant have leave to amend his bill by striking out his name. At the same term, (April, 1848,) an order was entered on the minutes, that the defendants have leave to except to

the opinion of the Court, that the complainant could proceed against the surviving defendant at the trial term.

At the October Term, 1848, the cause came on for trial, when the counsel for defendants objected to the complainant's proceeding until the representative of Cunningham was made a party. The Court overruled the objection, and the counsel for defendants excepted.

There was a great volume of evidence submitted to the Jury and embodied in the bill of exceptions, with reference to the insolvency of Moore, Jones and Harwell, at the time of the exchange of the notes. The testimony was in some degree conflicting as to the *notoriety* of Moore's insolvency at the time. There was no conflict in the testimony showing that Jones and Harwell were notoriously insolvent. Moore, Jones and Harwell lived in Talladega County, Alabama, some ninety miles from Rome, where Mitchell and Smith resided. It was in evidence that Smith was frequently in Talladega, about the time Moore commenced to be suspected of failure, and had dealings with Moore, and that Mitchell never was there. There was evidence of several circumstances insisted on by the complainant, as proving notice to Smith, and there were other circumstances relied on by defendants, to show that Mitchell did not rely on Smith's statements in the making of the transfer. There was also evidence to show that the note was not genuine as to the signatures of Moore and Harwell.

It is unnecessary, for the proper understanding of the decision of this case, to embody more of this mass of testimony in this statement.

The counsel of defendants requested the Court to charge the Jury, "If the solvency of Moore was a matter of opinion or a fact, equally open to the inquiry of both, and there was no special confidence or relation between the parties, and each met the other on equal grounds, the mistaken opinion of Smith as to Moore's solvency, expressed to Mitchell, the plaintiff, (if expressed at all,) is not sufficient to avoid the contract of sale." Which charge the Court refused to give as asked, but charged the Jury, that this was the law, with this qualification—that if Smith represented Moore to Mitchell to be solvent, and Mitchell relied upon the statement of Smith, it was sufficient to avoid the contract.

The counsel for defendants requested the Court to charge the

Jury, that "to constitute the fraud complained of, Smith must have represented Moore to be solvent, when in truth and in fact he was insolvent, and that Smith knew it." This charge the Court refused to give, but charged, that "if Smith represented Moore to be good, when at the time he was insolvent, and Mitchell relied upon Smith's statement, it was immaterial whether Smith knew of his insolvency or not; it was a fraud, and was sufficient to set aside the contract."

After the charge, the Jury were taken to their room, and sometime after night the Judge came upon the bench to receive the verdict, but the Jury not coming into Court, the Judge directed the Clerk to receive the verdict when the Jury should be ready to deliver it; which was accordingly done in the absence of the Court, the Judge having retired to his lodgings. The next morning, at the meeting of the Court, the Jury being assembled and called, the counsel for the defendants moved that the Jury should be *polled*, and each Juror asked if he had agreed to the verdict, insisting that the verdict had been delivered to the Clerk, in the absence of the Court, without the consent of defendant or his counsel, and in the absence of defendant's counsel. The plaintiff's counsel objected because the Jury had dispersed. The Court overruled the motion.

All of which decisions, charges, and refusals to charge, and refusal to have the Jury polled, were excepted to and are alleged here as error.

ALEXANDER, UNDERWOOD & TRIPPE, for plaintiffs in error.

W. AKIN and C. J. McDONALD, for defendant in error, cited and commented on the following authorities:

2 *Cowen*, 438. 3 *Term R.* 51. 10 *Wend.* 412. 13 *Wend.* 277. 19 *John. R.* 290. *Chitty on Contracts*, 447, 448, 450, 451, 452, 453. 2 *Nott & McCord*, 76, 538.

1 *Nott & McCord*, 142. 2 *Kelly's Rep.* 71.

1 *Story's Com. on Eq.* 202. 2 *Kelly*, 72. 6 *Term R.* 637. 13 *Peters*, 26. 2 *Peters' Dig.* 357, §§44 *and* 45. 2 *Cow.* 129. 1 *Story Com. on Eq.* 121, 158, 161. 1 *Madd. Ch.* 262.

1 *McCord's R.* 24. *Ib.* 525. 1 *Chitty's Crim. Law*, 634. 4 *Pick. R.* 239. 12 *Pick.* 496. 5 *Greenl. R.* 333.

3 *McCord's R.* 276, 467. 2 *Salk.* 646. 3 *John. R.* 532. 4 *Term R.* 4. 6 *Wend.* 436. 7 *Wend.* 160. 1 *Kelly*, 556. *Ib.* 580.

1 *Cowen*, 306. 5 *Wend.* 87. 11 *John. R.* 408. 5 *Wend.* 490. 1 *Cowen*, 382. 5 *John.* 68. 9 *Ib.* 310. 11 *Wend.* 9. 13 *Ib.* 101. 1 *McCord*, 454. 7 *Durnford & East*, 64. *Chitty on Bills*, 173.

16 *John. R.* 201. 15 *Ib.* 240, '1. 6 *Ib.* 5. 6 *Conn.* 484, 491. 2 *John. R.* 455. *Chitty on Contracts*, 750.

2 *Paige's Ch. R.* 128. 2 *McCord's Ch. R.* 421. 1 *Smith Ch. Pr.* 512. 3 *Kelly*, 261. 6 *Ves. R.* 182, '3.

1 *Story's Eq. Jur.* §192. 1 *Story's Cir. Ct. Rep.* 172. 1 *Burrows' R.* 475.

Broderick vs. Broderick, 1 *Peere Wms.* 240. 13 *Peters*, 119.

Story's Eq. Jur. §193. 13 *Peters*, 36.

4 *Pick.* 242. 12 *Pick.* 512.

Fox vs. Smith, 3 *Cow.* 23. 1 *Chitty's Crim. Law*, 635.

By the Court.—NISBET, J. delivering the opinion.

[1.] The verdict in this case was handed to the Clerk, by order of the presiding Judge, in the recess of the Court, at night, and without the consent of the defendant, Smith, or his counsel. In the morning, the Jury having dispersed, and being now in Court, the defendant moved to examine them by the poll, whether they had agreed upon a verdict. The motion was refused. Under the circumstances of this case we do not think that the Court erred in this refusal. It does not appear from the record, that the verdict had been recorded when the motion to poll the Jury was made. I conclude, as a matter of legal inference, that it was not recorded. It cannot be recorded until returned, and when returned, can be recorded only upon the order of the Court. The delivery of the verdict to the Clerk, is no return—it was delivered to him simply for safe keeping until the Court should meet. If he had spread it upon the record, the record would have been a nullity. Being delivered to the Clerk, it was still necessary that it be read and received in open Court, and in the presence of the parties, that, before record, they might make all proper legal objections to its going to record. In criminal cases, I should hold the delivery of the verdict to the Clerk, and a dispersion of the Jury before its return, altogether irregular, and in civil cases,

a dangerous and highly inexpedient practice—particularly without the consent of the parties.

Because, although it is not the right of the parties, necessarily, to poll the Jury, yet it is a privilege within the discretion of the Court, which it will not, without good reason, deny to them; and the dispersion of the Jury, after the verdict is handed in to the Clerk, and before its reception by the Court, must always be a good reason for denying it. I take it for granted, that the verdict here had not been, because it could not have been, legally recorded, when the demand was made to poll the Jury. The unanimous agreement of the Jury is necessary to make their verdict legal. The verdict is the judgment of twelve men, freely rendered, upon the issue submitted to them for trial. Whether it be right upon principle, or prudent as to expediency, to require unanimous verdicts, are questions about which much may be said, both affirmatively and negatively, but which are not for our determination. Each Juryman is bound by his oath to give his verdict, and it is his unquestionable right, and his solemn duty, to withhold his assent to a verdict which his mind and conscience cannot approve. From these propositions it follows, that it is his right to object to the record of a verdict, returned by his fellows, to which his mind and conscience do not assent. Farther, it is the right of the parties, that each Juror should agree to the verdict—without this it is no verdict. Not only so, but it is their right *to know* that each Juryman has agreed upon the verdict. The only question is, *how is it to be ascertained that the Jury have agreed?* I reply, it is the duty of the Court to see to it, that each Juror agrees to the verdict, and it is within his discretion to adopt such means as the law and the usage of the Courts allow, to ascertain that fact. Among these means is the examination of the Jury, when they return their verdict, individually, or, as it is called, by the poll. This may be done whenever the Court, on any account, has reason to believe that the verdict is not unanimous. It may be done at the instance of a Juror, or at the instance of a party. It is our judgment, that in civil causes, (without saying what would be the rule in criminal cases,) it is discretionary with the presiding Judge to poll the Jury or not. We pretend not to prescribe rules for the exercise of this discretion. It is proper, however, to say, that the Jury ought to be polled, whenever there is any good reason to believe, no matter how the

fact is manifested, that any one of the Jury has not agreed to the verdict. To allow the parties the right to examine the Jury in all cases, would be to subject it to an influence which might occasionally, at least, destroy the independence of Jurors, and taint the purity of trial by Jury. The agreement of all the Jury is signified, in our practice, by the written verdict, the signature of the foreman, the call by the Clerk of the names of the Jury, and their tacit acquiescence. Ordinarily these things are sufficient to satisfy the Court that all are agreed. If, however, notwithstanding these evidences of assent, the Court is made to believe that they have not all agreed, whether by suggestion of a party, by facts or circumstances, it ought to order an examination. Over the whole matter the presiding Judge exercises a wise discretion, and in the exercise of that discretion he stands amenable to this Court, by writ of error. *Martin vs. Marwick*, 1 *McCord*, 24. *The State vs. Allen*, *Ib.* 525. 1 *Bailey*, 3. 2 *Alabama*. *The People vs. Perkins*, 1 *Wend.* 91. *Commonwealth vs. Roby*, 12 *Pick.* 496, 513. 5 *Greenleaf's R.* 333. 3 *Cow. R.* 23. 18 *Johns. R.* 128. 2 *Hale's P. C.* 299.

[2.] The motion to poll the Jury in this case was properly refused, because they had dispersed before it was made. It would be dangerous in the extreme to permit it after their separation—after each one had been exposed to the action of public opinion, or to the approaches of parties or their friends. Whilst the Juries of our country are as reliable for intelligence and integrity as those of any other country, yet it is possible for them—for one, say, out of the twelve—to be influenced to dissent, particularly in cases involving large amounts, much feeling, or great complexity, and more especially in cases sounding in damages, where the finding, in the very nature of the case, must be the result of compromise and concession. We are clear that the only safe, general rule is to deny the application in all such cases.

[3.] The question in relation to the parties, I consider as free from any difficulty. It is important to know what was the motion, the overruling of which is complained of. Cunningham was a party defendant to the bill. Upon the first trial a decree was had against Smith, and an appeal entered. At April Term, 1848, Cunningham being now dead, and his death suggested, on motion of complainant, (Mitchell,) it was ordered, that the bill be amended by striking out his name. At the same time an order was en-

tered on the minutes, "that the opinion of the Court, that the complainant has the right to proceed against the surviving defendant, be so far left open as to allow the defendant to except to the decision as made at the trial term."

At the October Term, 1848, counsel for the defendants moved the Court, that the complainant could not proceed until the representatives of Cunningham were made parties, which motion was overruled, and it is complained that the decision was erroneous. At the previous term, by an order, amounting to a judgment, Cunningham had been dismissed. The supplemental order did not, as we construe the two orders, (for they must be taken together, being in *pari materia*,) leave open what was there adjudged, to wit: that Cunningham be dismissed; but only reserved to the defendant the right, upon the trial, to except to the complainant's proceeding against the defendants left upon the record. The dismissing of Cunningham was one thing, the right to proceed against the other defendants after his dismission was another. The complainant, upon dismissing Cunningham, took the hazard of being able or not, to proceed to a decree against Smith and his surety on the appeal. To object to his doing so, was the right reserved by the supplemental order—the reservation was scarcely necessary, for the right, I apprehend, would have existed without it. The construction given to the two orders by plaintiffs in error, would place the Circuit Judge in the childish attitude of having passed an order dismissing a party, and at the same moment an order to consider him as not dismissed, but that the question of dismissing him be open.

At the term when the motion of plaintiffs in error was made, Cunningham was not on the record—he had been removed—and there was nothing on the record upon which to found a motion to make his representatives parties. What, then, was the complainant's motion? It was to dismiss the bill, because Cunningham being discharged, his representatives could not be made parties. The motion goes upon the assumption, that in the case made, Chancery cannot decree against the defendants, because the estate of Cunningham is not before the Court. It is competent for the defendant to object at the hearing, that the proper parties are wanting—there are some considerations which modify this rule, but such is the general rule. "If the proper parties are not made, (says Mr. *Story*,) the defendant may either demur to

the bill, or take the objection by way of plea or answer, or when the case comes on to a hearing, he may object that the proper parties are wanting, or the Court itself may state the objection and refuse to proceed to make a decree; or if a decree is made, it may, for this very defect, be reversed on a re-hearing or on an appeal; or if it be not reversed, yet it will bind none but the parties to the suit and those claiming under them." *Story's Equity Plead.* §75. 16 *Vesey*, 325, 326. *Mitford's Eq. Pl. by Jeremy*, 180. 2 *Atk.* 510. 3 *John. Cas.* 311, 316, 317. *Calvert on Parties, ch.* 2, §4. 2 *Daul. Ch. Prac. ch.* 12, §2.

The rule as to parties is variously stated by different commentators and eminent Chancellors; all, however, agree in this—that Chancery will not proceed to a decree unless all parties interested in the subject of the suit are before the Court. *See this question discussed in Rice vs. Tarver and others*, 4 *Ga. Rep.* 586 *to* 588, *and authorities there referred to.*

[4.] Had Cunningham or his estate such an interest in the subject of this suit, as made it impossible for the Court to proceed to a decree without doing injustice to it? Was the presence of his representatives necessary to enable the Court to make a decree which would do *complete* justice and close up the litigation? We think not. The bill shows that he was no party to either the first or second contract between Smith and Mitchell; he had nothing whatever to do with the transactions between these persons in the beginning; and he is in no way connected with the transaction by which the notes of Smith to Mitchell were paid off by Moore's note, except that in a letter to Smith, which he showed to Mitchell, he stated facts in relation to Moore's solvency, and gave his opinion that he (Moore) was solvent. The bill charges a confederacy between him and Smith, founded on this letter, to defraud the complainant, Mitchell. This is all the connection he had in any way whatever with the subject of the suit. *He*, therefore, not being before the Court, a decree against Smith could not have affected him one jot or tittle. The bill does not pray a decree against him at all, and the only reason why he was originally made a party, that occurs to me, was to procure his answer to facts charged upon Smith. He was not a necessary party to the complainant. He might have proceeded without him in the outset. The failure to make him a party would have been no good ground for a demurrer to the bill.

Having no interest which could be affected by a decree on the case as it stood upon the trial, it was competent for the Court to proceed to make a decree without his presence, or that of his representatives, he being dead, and, therefore, so far as his estate is concerned, the motion of the plaintiffs in error was legally denied; and for the reasons and facts stated, it is perfectly clear that his absence from the case could work no prejudice to the rights of Smith. The mere non-joinder of a party who might be a proper party, but whose absence produces no prejudice to the rights of the parties before the Court, will constitute no fatal objection at the hearing or re-hearing, or upon bill of review. *Story's Plead.* §§74, 236, 541, 544. *Whiting vs. Bank of the United States*, 13 *Peters*, 6, 14.

It is argued, however, that the surety on the appeal, Shorter, is interested in Cunningham's representatives being brought before the Court. A decree against the defendant, Smith, was made before Cunningham's death, and before the order of the Court discharging him. From this decree Smith appealed, and Shorter became his surety on the appeal. Now, it is said, that Shorter is surety for Cunningham; that he has undertaken to respond to the final recovery upon the credit of Cunningham's liability; that if made ultimately liable, he is entitled to go back upon his estate for remuneration, and, therefore, *his* interest requires that Cunningham's representatives should be made parties, and therefore the motion of the plaintiffs in error ought to have prevailed. All this would be true but for two very conclusive reasons: First, there was no decree made against Cunningham whilst he was a party. It is, in terms, against Smith alone. Shorter undertook nothing on Cunningham's credit. He engaged to respond for Smith alone, and if the appeal had been dismissed, and the decree had been thereby confirmed, Cunningham could not have been in any way chargeable upon it. The complainant would have had no right to have sought any recovery out of him—he had no judgment and could have no process. The relation of principal and surety, therefore, did not exist between Cunningham and Shorter. But suppose it did exist—suppose that Shorter did, in fact, undertake for both Smith and Cunningham, and that such is the judgment of the law upon the case—why, then, the subsequent discharge of Cunningham, upon the motion of the complainant, discharged the surety, and for that reason, he, the surety, could

not be prejudiced by a decree subsequently rendered. Secondly, at the time the motion of plaintiffs in error was made, Cunningham had been dismissed—no *future* decree could affect him, or rather his estate, and Shorter could not have been made liable on his account. We do not find any error in the Circuit Judge in overruling the motion.

[5.] The errors growing out of the instructions of the Court to the Jury on the law of the case, as claimed by the plaintiffs in error, may be reduced to two specifications. First, it is claimed that the Court erred in not instructing the Jury, as the rule of law to govern their verdict, the following proposition, to wit: "If the solvency of Moore was matter of opinion, or a fact equally open to the inquiry of both, and there was no special confidence or relation between the parties, and each met the other on equal grounds, the mistaken opinion of Smith as to Moore's solvency, expressed to Mitchell, is not sufficient to avoid the contract of sale." Second, it is claimed that the Court erred in instructing the Jury, "that if Smith represented Moore to be good, when at the time he was insolvent, and Mitchell relied upon Smith's statement, it was immaterial whether Smith knew of his insolvency or not; it was a fraud and sufficient to set aside the contract." I do not understand the Circuit Judge as denying the proposition asked to be given in charge to the Jury to be law, but as denying that it is applicable to the case. He admitted it to be law, but with a qualification which altogether changed it, and thus denied its application. The Court and the counsel for the plaintiffs in error, were at issue according to the two specifications which I have made. In considering them I shall have occasion to pass in review all the points made in the record and in the argument. We do not deny the proposition of the plaintiffs in error to be, in substance, sound law.

If two persons are in treaty about the sale and purchase of any article of property—a painting for example—and both have equal means of knowing its value and its merits as a work of art, where neither party is an artist or a connoisseur, and both are ignorant of its history, and the painting is present and open to the inspection of both, in such a case a mistaken *opinion* as to the value or character of the property would not invalidate the sale, for the reason that in such a case it is unreasonable, nay, it would be absurd, to believe that such an opinion influenced the purcha-

ser—he cannot be presumed to have acted upon it, he cannot be presumed to have placed any reliance or trust in it, but is presumed to have acted upon the counsels of his own judgment. There is a distinction, too, to be drawn between a mere opinion and the representation of a fact which is material, and which may be presumed to have influenced the purchaser. See this distinction taken by Mr. Justice *Barbour* in *Smith vs. Richards*, (13 *Peters*, 38, 39.) If, however, there is confidence reposed in the opinion of the seller; if he is himself an artist; if his means of knowing the character of the painting are better than those of the buyer, the parties do not treat upon equal terms; and if, in such a case, the vendor should represent it as a Titian, when, in fact, it is a daub, the contract would be in Equity rescinded, and at Law the seller would be liable in an action for deceit, whether he knew the statement to be false or not; because, under the circumstances, the law presumes that the buyer acted upon the representations of the seller. Now, the case first put is the case to which the rule of law applies, which counsel desired the Circuit Judge to administer. It applies to all such cases. 1 *Story's Eq.* §197. 13 *Peters' R.* 38. 2 *Kent*, 484, 485. *Hepburn vs. Dunlop*, 1 *Wheat.* 189. But this is not such a case—it is very far from it indeed. All that I have to do with the vast volume of testimony with which this record is needlessly encumbered, is to determine from it the entire irrelevancy of this rule of law to this case. *Here*, a sale of land had been made by the plaintiff below, (Mitchell,) to the defendant, Smith. Mitchell held Smith's notes to the amount of about $8,000 for the purchase money. The matter about which the parties were treating was the payment of these notes, by the transfer of a note made by one Moore, as principal, and Harwell and Jones as sureties. This note was made payable to Smith—it was for a large sum. Moore and his sureties resided in Talladega, Alabama. Smith was frequently at Talladega, knew Moore, was in communication with him, and had procured an intimate acquaintance and neighbor of Moore's to write a letter in relation to Moore's solvency, to wit: Cunningham. He, Cunningham, professed to know all about the condition of Moore, and with Cunningham, Smith was proven to have held the closest business and social relations. Smith was presumed to know, must have known, the consideration of the note. It was greatly his interest to know the situation of Moore—his opportunities of

knowing were good, and far better than Mitchell's. They did not treat upon equal terms. In the very nature of the case, Mitchell must be presumed to have confided in, and acted upon, the representations of Smith, and upon the letter of Cunningham, recommending Moore, which Smith had procured to be written to himself, and which he showed to Mitchell. The matter affirmed was a material and vitally important fact—not merely an opinion—to wit: the solvency of Moore and his sureties. I advert to these facts to show, that this is not the kind of case to which the rule, now under consideration, applies. This Court would fail to respond to the obligation which rests upon all judicial officers to sustain the morality of business transactions, if they omitted farther to say, that after a careful attention to all the evidence, they are convinced that this was a deeply laid, perseveringly prosecuted, and adroitly consummated fraud, both in law and in fact. The Jury of Floyd County have so held it, having twice found for the plaintiff. I dismiss this point, and come now to the second specification of error.

The argument of the able and experienced counsel for the plaintiffs in error, Messrs. *Underwood & Trippe*, in opposition to the final charge of the Court, seems to me to be resolvable into two propositions. First, that to avoid this contract upon the ground of the representation of a material fact, upon which the buyer of the note relied, to wit: the solvency of Moore and his sureties, which was untrue at the time, its falsity must be known to the seller.

And second, even admitting the *scienter* to be unnecessary, yet it is necessary that there should be an *intention* on the part of the seller to defraud the buyer. That is to say, that a moral fraud is necessary, in order to justify a Court of Chancery in rescinding the contract. The question whether there is or not a moral fraud—an intention to perpetrate a fraud—in most cases will, no doubt, depend upon the question whether the affirmation was made with knowledge of the falsity of the fact affirmed. Yet, no doubt it is true, that there may be a fraudulent intention in the representation of a fact, where the person making it is ignorant whether the fact be true or false. Whether in actions of deceit, for misrepresentation, or in support of the plea of fraud, in defence of actions of debt or assumpsit, it be necessary to prove knowledge of the falsity of the statement relied upon, has been,

I am free to admit, and even now may be considered, a question of some doubt in the Law Courts of Great Britain. The original writ of deceit was founded on moral fraud, or an intention to defraud. *Deceit*, actual fraudulent mind and motive, was the gist of the action. The writ itself ran, *fraudulente et maliciose. Fitz. Nat. Brev. p.* 95, *ed.* 1635. *Cro. Eliz.* 44. *Buller, J.* in *Pasley vs. Freeman*, 3 *T. R.* 56. In *Chandler vs. Lopus*, 2 *Croke*, 2, (1 *Smith's Lead. Cases*, 145,) it was held that no action lay against one who sold a stone, affirming it to be a *Bezoar* stone, but which proved not to be so—the majority of the Court agreeing that the defendant must have known that it was not a *Bezoar* stone, or there must be a warranty—*Anderson, J.* dissenting. This case is a leading authority on that side of the question. Lord *Mansfield*, in 1778, expressed a different opinion in *Pawson vs. Watson*, *Cowp.* 785. His Lordship said, "If in a life policy, a man warrants another to be in good health, when he knows at the same time he is ill of a fever, that will not avoid the policy, because, by the warranty, he takes the risk upon himself; but if there is no warranty, and he says the man is in good health, when in fact he knows him to be ill, it is false. *So it is if he does not know whether he is well or ill, for it is equally false to undertake to say that which he knows nothing of at all, as to say that is true which he knows is not true.*" The morality of this doctrine is summed up in these few words of Lord *Mansfield*. For myself, I can see no difference between a statement that a fact is so, knowing it not to be so, and a statement of a fact without knowing whether it is true or not. A fraudulent intention may be inferred equally in both cases. A man who is treating with his neighbor for the sale of property, is bound, in honor and in christian morality, to speak what he knows to be true, or to be silent. If he does make a statement without knowing whether it is true or false, and it is true, he deserves no credit for it, and if false, he is as much a liar as if he knew it to be false. He means to deceive—he intends that the other party, acting upon his statement, shall take the risk and abide the consequences of its truth or falsehood. He is, therefore, a deceiver. If he *believes* his statement to be true, without knowing it, he may be more excusable in conscience, but not the less liable in law, because the consequences are the same to the other party.

Nor do I believe the rule is less stringent in favor of one who has no interest in the transaction. He, too, should speak knowingly or not at all—he should not mislead others. The law is not unreasonable in visiting liability upon indifference, negligence or indiscretion. He may not carelessly mislead others. If a third person makes representations, knowing them to be false, his having no interest in his iniquity, according to Mr. J. *Buller*, "proves his malice to be the greater." It is like the malice of one who fires into a crowd of men in wanton sport. He has no malice against any one individual; he has no feeling of revenge to gratify, but has that brutal disregard to human life, that brutal indifference to human suffering, which proves malice against the whole race. So he who, without a personal interest in telling a falsehood, wilfully misleads another to the injury of his estate, exhibits proof (to say the least of it) of a fraudulent intent against all men. If, however, one having no interest in the matter, represents a thing to be so, honestly believing it to be true, and it turns out not to be true, even if another acts upon the statement, it may admit of question whether, in morals or in law, he ought to be held liable. Certainly not in morals, and in law his position is very different from that of one who gets an advantage by the transaction. These remarks apply generally with equal force to the suppression of the truth, in entering into contracts, when the suppression works injury to the other party. But I return, now, to the review of the decisions upon this question.

In *Pasley vs. Freeman*, (3 *T. R.* 51,) the decision turned upon the question, whether it was necessary that the person making the false statement should derive a benefit from it, and it was decided that it was not; but the opinions expressed by the Judges in that case, clearly maintain the materiality of knowledge, that the statement is untrue at the time it is made. In *Haycraft vs. Cresy*, (2 *East*, 92,) tried in 1801, the question was directly made, whether knowledge of the fraud by the defendant was essential to an action for a false statement as to the credit of a third person. *LeBlanc, J.* said, "By fraud, I understand an *intention to deceive*, without which the action is not maintainable." *Lawrence, J.* also held, "that the representation must be made *malo animo*." But Lord *Kenyon* held as follows: "It is enough to state that the case rested on this, that the defendant affirmed that to be true, within his own knowledge, that he did not know to be true. This is

fraudulent; not, perhaps, in that sense which fixes the stain of moral turpitude on the mind of the party, but falling within the notion of *legal fraud*, such as is presumed in all the cases within the Statute of Frauds. The fraud consists, not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know." This doctrine, as held by Lord *Kenyon*, was ruled in *Cross vs. Gardener*, (*Carthew*, 90.) In *Schneider vs. Heath*, (3 *Camp.* 506,) Sir *James Mansfield* maintains it in these clear and strong terms: "It signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false." In *Adamson vs. Jarvis*, *Best*, C. J. thus briefly, yet forcibly, expresses the same opinion: "He who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law, guilty of falsehood and must answer in damages." 4 *Bing.* 66. In *Humphries vs. Pratt*, (5 *Bligh N. S.* 154,) and in *Railton vs. Mathews*, (10 *Cl. & Fin.* 934,) the *House of Lords* affirmed the same doctrine. Distinctly to the same effect is the opinion of Lord *Abinger*, C. B. in *Comfoot vs. Fowke*, (6 *M. & W.* 358.) His Lordship there said, "Nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by *design or mistake*, of a material fact, *however innocently made*, avoids the contract on the ground of a legal fraud." The majority of the Court, however, were, in this case, dissentient from the opinion of Lord *Abinger*. In a subsequent case in the Exchequer, the Court, after taking time for consideration, held a different doctrine. *Alderson*, *B.* delivering the unanimous opinion of the Court, said: "In these cases, it is true, the agent is not actuated by any fraudulent motives, nor has he made any statements which he knows to be untrue, still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even although he does not know it to be false, but believes without sufficient grounds that the statement will ultimately turn out to be correct; and if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such be-

lief of the supposed agent is founded, and who has relied on the correctness of his assertions, it is equally just that he who makes such assertions should be personally liable for its consequences." *Smout vs. Ilberry*, 10 *M. & W.* 1. Very early after this decision, the contrary was ruled by the same Court, in two cases—*Moens vs. Hayworth*, (10 *M. & W.* 147,) and *Taylor vs. Ashton*, (11 *M. & W.* 401.) Moral fraud was held, in these cases, necessary to liability. In the last of these two cases, the Jury found for the defendants, but expressed the opinion that they were guilty of gross negligence, and adverting to that opinion, the Court say: "From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be fraudulently made." This is going very far indeed. If a representation is made upon which another acts to his injury, and to the benefit of the affirmant, the falsehood of which is within his means of ascertainment, and the want of knowledge of which is the result of gross negligence, I am without doubt that such representation would charge him, not only in damages, but with gross moral delinquency. It is unconscientious for a man to hold an advantage thus acquired. Neither Law nor Equity will permit him to do so. These decisions were followed in the Exchequer Chamber, by the case of *Ormrod vs. Huth*, affirming them. In this case the Court say: "The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied, without requiring a warranty, (which is a matter for his own consideration,) he cannot recover upon a mere representation of quality by the seller, unless he can show that the representation was bottomed on fraud. If, indeed, the representation was false, to the knowledge of the party making it, this would be, in general, conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true, by the party making it, although not true in point of fact, we do not think that this amounts to fraud in law." 14 *M. & W.* 651. In this case there was a sale of cotton by samples, and the samples were represented as fair. A part of the lot proved to be falsely packed. The purchaser had accepted the cotton and paid the purchase money, and he could not, therefore, repudiate the contract, and was remediless at law but in an action for damages. We cannot assent to the doctrine of this case. If

the purchaser, by samples, is without remedy unless he can prove a moral fraud—prove an intention to defraud—by proving the *scienter*, or in some other way, then he is at the mercy of the seller. The seller might know, he ought to know, by the representation he assumes to know, whether his samples are fair or not. He must be held to know or not, at his peril. It is not enough that he may believe what he states—he must be sure of his ground—his evidence must be sufficient at his peril. By his false statements—false in fact—he has got the purchaser's money and he has not got an equivalent. It is not right, or just, or honest, and he, in my judgment, is liable in damages for a fraud. Upon this point the Exchequer Chamber is at issue with the Supreme Court of the United States. That Court say, "We think we may safely lay down this principle—that whenever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation, in effect, amounts to a warranty; at least, that the seller is bound to make good the representation." 13 *Peters*, 42. To the soundness of this rule we yield our hearty assent. From this review of the leading English cases, both ancient and modern, it is obvious that there is quite a conflict of authority in Great Britain upon the question of the *scienter* in Courts of Law. The weight of authority, the paramount weight of opinion, if not the greater number of judgments, is against its materiality. Its immateriality has received the sanction of the *House of Lords*, of *Lords Mansfield, Kenyon, Abinger* and *Denman*, *Sir James Mansfield, Best, C. J.* and *Baron Alderson*. In addition to the cases referred to, the following may be consulted, as elucidating the subject: 4 *Taunt.* 847. 2 *East*, 314. 4 *Camp.* 22. 2 *Ld. Raymond*, 1118. 2 *M. & W.* 519. 4 *M. & W.* 337. 5 *Bing. N. C.* 97. 12 *East*, 632. 4 *Bing.* 66. 3 *Q. B.* 58. 2 *Cr. M. & R.* 157. 5 *B. & Ad.* 797. 3 *B. & Cr.* 623. 2 *East*, 488, *note*. 3 *B. & Ad.* 114. 1 *Wm. Bla.* 463.

Without reviewing the authorities in this country on the same question, (as this cause is to be determined upon equitable rather than legal principles,) I remark that they are also conflicting, but that the rule settled in *Chandler vs. Lopus*, seems most generally to have prevailed. I pass, now, to inquire how the questions made in this record, stand in Courts of Equity? And here, to

the inquirer the way is open and easy. He is in a more pleasant, if not a purer region. The mind is not so tightly laced or so straightly bound. He breathes more freely. The question is, whether a contract for the purchase of property will be set aside by a Court of Chancery, and the parties remitted to the position which they respectively occupied before the contract, in a case where the buyer acts upon the false representation of the seller, in relation to a material fact, whether its falsity be known to him at the time or not.

If a party intentionally, or by design, misrepresent a material fact, in order to mislead, or entrap, or cheat, or obtain an undue advantage of another, it is a plain case, it is what Mr. *Story* calls a "positive fraud in the truest sense of the terms." I need not enlarge upon a proposition so just and so plain.

[6.] The fraud may be practised by deeds or acts as well as by words, by artifices to mislead as well as by positive assertions. For example—in this case, if there was a fraud practised by Smith upon Mitchell, (and the Jury have found that there was,) it was done more by artifice than in words—by deeds rather than by representations. No doubt Mitchell was induced to take the note of Moore, upon the recommendation of Cunningham's letter mainly—a letter which, it is very apparent, Smith had procured to be written for the purpose of misleading and cheating Mitchell.

[7.] I find the rule of law which we recognize as governing this case, and as sustaining the judgment of the Court below, laid down with precision and perspicuity by Mr. *Story*, as follows: "Whether a party thus misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is *wholly immaterial*. For the affirmation of what one does not know or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false." *Story's Com. on Eq.* §193. This rule of manifest equity and sound morality, we have seen, was recognized in the British Courts of Law, by some of the most learned of the Common Law Judges. It ought not to be questioned in any Court professing to administer justice.

If the fact misrepresented is *known* to be false, then the fraud is positive, deliberate, and springs out of the mind and heart. The great rule of Christian equity, "Do unto others as you would

that others should do unto you," is violated, and an act of swindling imbues the conscience. The money of one man is abstracted by the sheer villainy of another, without any equivalent or reciprocity of benefits. In such a case, by universal consent, Courts of Equity will compel restitution. If the fact is neither known to be true or false, the affirmation of its truth is, in morals a falsehood, and in law a fraud. The turpitude in the latter case, by a nice balancing in the moral scales, may be considered as being a fraction less intense, and that is all the difference. The consequence to the injured party is the same in both cases, and the consequences to the healthfulness of contracts throughout the entire business world, if such delinquency was tolerated, would be, also, in both cases the same. In both cases there is an actual fraud, a moral fraud necessarily deducible from the affirmation of a fact which is false, and upon which another is induced to act to his injury. In all such cases the intervention of a Court of Chancery may be put upon the ground of fraud.

[8.] If the party affirming *believes* the fact to be true, but is mistaken, he is to be relieved from the imputation of a fraudulent intention—in morals he cannot be held as derelict—but in that case he has perpetrated a fraud in law, against which Equity will relieve, upon principles *ex equo et bono.* Natural justice will not permit one to retain the property of another, obtained through his own agency, and for which he has paid nothing.

To give applicability to the rule, as above stated, several things are necessary, to wit: First, the affirmation must be of a material fact, constituting an inducement or motive to the act of the other party, and by which he is misled. Without a doubt, in this case, the fact affirmed, to wit: the solvency of Moore and his sureties, was material, and constituted Mitchell's inducement to the contract. The solvency of Moore and his sureties was the moving element of the whole transaction, so far as Mitchell was concerned. Again, the misrepresentation must be in something in regard to which the one party places trust and confidence in the other. This was the case here. It was argued, that Mitchell did not place confidence in Smith's representations, because, by one witness, it was proven that he said that he placed no confidence in what he said. Whether he did or not, was a question for the Jury. If, however, he did not trust in Smith's representations, he, beyond all doubt, did trust in his acts, his devices, and partic-

ularly in the letter addressed to Smith by Cunningham, procured by Smith to be written to himself, and produced by Smith to Mitchell as proof of the solvency of Moore.

Nor does the rule apply to cases where the fact affirmed is of such a nature, that the other party had no right to place reliance on it, and it was his own folly to give credence to it, for Courts of Equity will not aid parties who will not use their own sense and discretion. This exception contemplates a case where both parties have equal opportunities and means of knowing the truth of the statement, and where, in the very nature of the transaction, it is unreasonable to believe that a sensible man would act upon the statement of the other side, and where, if he does, he must be considered as reposing a confidence not necessary, and not expected, and without ordinary sense and discretion. Such is not the case on this record.

[9.] The rule in Equity goes yet farther; for if a party innocently, *by mistake*, misrepresents a fact, it is equally conclusive, for it operates as a surprise and imposition upon the other party. Equity will reform a contract where a mistake has been made, innocently by both parties, to the injury of one. This is an old head of Equity jurisdiction. A mistake by one is as strong a ground for equitable interposition, as a mistake by both. With stronger reason will it interfere and set aside a contract, when the affirmation is not by mistake, innocently, but wilfully, with knowledge of the falsity of the fact, or with criminal recklessness, not knowing whether the fact be true or false. As to the last proposition, see *Pearson vs. Morgan*, 2 *Bro. Ch. Rep.* 389. *Burrows vs. Locke*, 10 *Vesey*, 475. *DeManville vs. Compton*, 1 *Vesey & B.* 355. *Ex parte Carr*, 3 *Ves. & B.* 111. 1 *Marsh on Ins. b.* 1, *ch.* 10, §1. *Story's Com. on Eq.* §193. *Rogers vs. Atkinson et al.* 1 *Kelly's R.* 12. 13 *Peters' R.* 26.

I shall not attempt to illustrate or sustain by reasoning farther the doctrine of the immateriality of knowledge of a fact represented as true, in order to rescind a contract in a Court of Equity, but refer to the following authorities as fully sustaining it. 11 *Maddock Chancery*, 208. *Neville vs. Wilkinson*, 1 *Bro. Ch. Cas.* 546. *Ainsly vs. Medlicot*, 9 *Vesey*, 21. 2 *Bro. Ch. Cas.* 385. 1 *Vern.* 136. *Fulton's Ex'rs vs. Roosevelt*, 5 *Johns. Ch. R.* 174. 2 *Cowen*, 129. *McFerran vs. Taylor & Massie*, 3 *Cranch*, 281. 6 *Vesey R.* 180, 189. *Jeremy*, 385, 386. *Smith vs. Richards*, 13 *Peters*, 26.

Grans vs. White, Freem. R. 57. *Laidlaw vs. Organ*, 2 *Wheat. R.* 178, 195. *Smith vs. The Bank of Scotland*, 1 *Dow. Parl. R.* 272. *Lowndes vs. Lane*, 2 *Cox's R.* 363. 3 *Meriv. R.* 704. 2 *Kelly*, 66. 4 *Ga. R.* 95.

Let the judgment be affirmed.

No. 63. RADFORD R. CLOUDIS, plaintiff in error, *vs.* THE BANK OF TENNESSEE, defendant.

[1.] It must *affirmatively* appear, either by the certificate of the presiding Judge, or the transcript of the record sent up by the Clerk, that the bill of exceptions was signed and certified within thirty days after the close of the term in which the cause was heard.

Motion to dismiss the writ of error.

1st. Because the bill of exceptions was not signed by the presiding Judge below within thirty days, as required by law.

2d. Because the bill of exceptions, writ of error, and citation and notice were not filed with the Clerk in the Court below, as required by law, within ten days after the bill of exceptions was signed.

3d. Because there has been no notice given.

4th. Because there has been no notice filed in the Clerk's office of the Court below.

5th. Because there is no certificate by the Clerk of the Court below, of the record and original papers, as required by law and the rules of Court.

It appeared from the record, that the cause was tried on Tuesday, the 17th of October, 1848, and the bill of exceptions was signed on November 20th, 1848. It did not appear from any of the papers on what day the Court adjourned.

On the bill of exceptions there was the certificate of the Clerk, dated December 1st, 1848, that these "were the original writ of error and citation filed in his office."

There was among the papers a writ of error, citation and no-

tice, but there was no entry on either of their being filed in the office of the Clerk below.

There was also a loose paper, purporting to be the certificate of the Clerk, that the accompanying papers were a true transcript of the record of the proceedings of the Court below. This paper was dated December 1st, 1848.

There was no certificate by the Clerk, showing that the bill of exceptions or notice of the signing thereof, ever were filed in his office.

HOOPER & MITCHELL, for the motion.

W. H. UNDERWOOD, contra.

By the Court.—LUMPKIN, J. delivering the opinion.

The pleadings in this case are incurably defective. The law requires that notice of the signing of the bill of exceptions shall be given to the adverse party, or his counsel, within ten days after the same shall have been done, and filed in the Clerk's office, with the bill of exceptions. This requisition of the Statute has not been complied with.

Again: by the Act of 1845, bills of exceptions, in both civil and criminal cases, were required to be drawn up and submitted to the Judge before whom such cause was tried, within four days after the trial thereof. This provision is repealed by the Act of 1847, and in lieu thereof, the party complaining is allowed thirty days after the close of the term in which said cause was heard, for drawing up and submitting his bill of exceptions for the signature and certification of the Judge.

[1.] Still it must be made *affirmatively* to appear from the record, that this duty has been performed within the time prescribed, to wit: thirty days after the close of the term in which said cause was heard; and this can be shown, either by the statement of the Judge in his certificate, or by the Clerk's embodying in the transcript of the record, the day of the adjournment of the Court at which the cause was decided.

It has often been intimated, that too much *precision* is exacted in bringing up cases to this Court. Our reply is, that in the distribution of power, we are the law-*expounding* and not the law-

making or law-*executing* department of the Government, and that we are ready, at all times, cheerfully to obey the will of the sovereign authority, in this as in every other matter. Whatever changes experience may suggest in the organic law creating this Court, dispensing with the *notice* of the signing of the bill of exceptions, and with the *filing* of these documents in the proper office, can hardly be reckoned among the number. For, however liberal the Legislature may have been upon the subject of amendments, they still require, and I apprehend always will, that process should be annexed to the writ, *and the defendant served with a copy*, a reasonable time before the trial. To do less would be to insure surprise, trick and artifice. If it was unreasonable, in the opinion of the Roman Governor, to send a prisoner, and not to signify withal the crimes alleged against him, the law judges it to be equally so, to pass upon the dearest civil rights of the citizen, without first giving him *notice* of his adversary's complaint. But the policy or propriety of this, as well as every other matter appertaining to the subject, belongs exclusively to another tribunal. In the meantime, we do but simply discharge our duty in executing whatever the people, through their representatives, have seen fit to ordain, resting upon the maxim, *id quod sibi populus constituet, jus est.*

No. 64.—ALFRED, a slave, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] The owner or manager of a slave, charged with a capital offence, when acting as the counsel of his slave on the trial, can lawfully waive the number of Jurors required by the Statute to be impannelled for the trial of such slave, and consent to take the first twelve on the Jury list.

[2.] On the trial of a slave charged with a capital offence, and a verdict of guilty, the Court will not interfere to grant a new trial, on the ground that the evidence was not sufficient to authorize the verdict, where there is *some* evidence for the consideration of the Jury, and no error in law apparent on the face of the record.

Certiorari, decided by Judge WRIGHT, Cass Superior Court, February Term, 1849.

Alfred, a slave, the property of James W. M. Berrien, was placed upon his trial before the Justices of the Inferior Court of Cass County, for the offence of an assault with intent to commit a rape, upon the person of a white girl of about four years of age. *Twenty-three* Jurors were impannelled, and the farther impannelling was waived by the owner of the slave, then in Court, acting as counsel for the slave. After the evidence was gone through, (which it is unnecessary to insert,) the Court being of the opinion that the testimony was insufficient to find the said Alfred guilty of the charge, charged the Jury that there would be no impropriety in a verdict of guilty of an assault and battery, if they thought he was not guilty of the crime charged. The Jury returned a verdict of guilty of the crime charged.

A *certiorari* was prayed to the Superior Court, on the grounds that the Jury were improperly impannelled, and that the verdict was contrary to law and evidence and the charge of the Court.

Upon hearing the *certiorari*, the Judge of the Superior Court refused to grant a new trial, and this decision is alleged as error.

W. H. UNDERWOOD, for plaintiff in error.

J. MILNER, for defendant.

By the Court.—WARNER, J. delivering the opinion.

Two grounds of error have been assigned upon the record to the judgment of the Court below.

First, that the Jury were not impannelled as required by law.

Second, that the verdict of the Jury was contrary to law and evidence and the charge of the Court.

[1.] The 9th section of the Act of 1816, which is amendatory of the Act of 1811, provides, that the Justices of the Inferior Court, or a majority of them, when notified of the commitment of a slave for a capital offence, shall cause to be drawn, fairly and impartially, from the Jury box, the names of persons subject to serve as Jurors, not less than twenty-six, nor more than thirty-six Jurors, who shall be summoned to attend at the time and place

pointed out for the trial of such slave by the Inferior Court. *Prince*, 792. On the trial of the slave, Alfred, only *twenty-three* Jurors were impannelled; but the reason why the legal number was not impannelled, the record states to be, that the slave was represented in Court by his owner, J. W. M. Berrien, Esq. and Thomas Berrien, as his counsel, who *waived* the impannelling the legal number of Jurors, and agreed that the first twelve Jurors answering to their names should try the cause. By the 9th section of the Act of 1811, of which the Act of 1816 is amendatory, it is provided, the owner or manager of the slave, shall have the right of challenging seven of the number of Jurors summoned, and the Court five on the part of the State. *Prince*, 791. The argument for the plaintiff in error is, that the slave being property, and supposed to be merely passive, the Court is bound to see that he had the legal number of Jurors summoned for his trial, and that his owner could not waive his right, as secured by law, to have the twenty-six Jurors impannelled.

The answer to that argument is, that the Legislature most clearly contemplated that the owner or manager of the slave would protect his own interest and the rights of his slave; for the right to challenge seven of the Jurors, is expressly given to the *owner* of the slave. Not only the interest which the owner has in his slave, but his personal attachment for him, will always prompt him to be vigilant in securing and protecting all the rights of his slave; and, as is too often the case, as we all know, the just penalty of the law is defeated in consequence of such interest and attachment. Here, the owner of the slave thinking, doubtless, it would be for the interest of his slave, as well as for his own interest, to take the first twelve on the Jury list, *waived* the impannelling more than twenty-three, and we think he had the legal right, under the law, to make such waiver.

[2.] With regard to the second ground of error, it has been urged upon us, that a new trial should be granted, because the evidence was not sufficient to authorize the Jury to have found the slave guilty of the offence with which he was charged. Had we been the Jurors who tried the cause, we might have drawn a different conclusion from the evidence than they did, and felt it to have been our duty to have found the slave not guilty; but there was *some* evidence of which the Jury were the *exclusive* judges, and they, in the exercise of their judgment, have found him guil-

ty, and we do not consider that we have the *legal* power and authority to control their verdict. We are free to say, that we have scrutinized this record very closely, to find a *legal* reason for setting aside the verdict in this case, inasmuch as the evidence is not as clear and satisfactory to our minds as we could wish, to authorize a conviction. In reply to the argument pressed upon us on the ground of humanity for the slave whose life is about to be forfeited by the judgment which, under the law, we feel bound to render in this case, it will be sufficient to remark, that we are not clothed with the *pardoning* power; the power *to pardon* is vested in another branch of the Government, by which, we cannot permit ourselves to doubt, it will be *properly* and *judiciously* exercised.

Let the judgment of the Court below be affirmed.

No. 65.—JAMES LOVE, plaintiff in error, *vs.* THOMAS C. HACKETT and another, admrs. of ROBT. WARE, and others, defendants.

[1.] It is the province of the Court to determine what is, in law, such a promise as will take a case out of the Statute of Limitation, but it is for the Jury to find what promise is in fact made.

[2.] A, a joint maker and surety on a note, promised the holder, that if he would not sue on it until a bill to marshal the assets of the principal, who was dead, was determined, and the amount allowed upon the note by the decree was paid, he would pay the balance then due on the note: *Held*, that upon the fulfilling of the conditions, the promise became an absolute promise to pay, and would be a sufficient reply to a plea by A, on a suit against him on the note, of the Statute of Limitations: *Held*, that it was incumbent on the plaintiff to show that the conditions were fulfilled, but that it was not necessary for him to prove that they were fulfilled *before* the institution of the suit, it being sufficient to show that they were fulfilled before the trial.

Assumpsit, in Floyd Superior Court, October Term, 1848, before Judge WRIGHT.

This was an action of assumpsit, commenced August 1st, 1846, upon a note for $700, principal, due 25th December, 1839, and signed by Robert Ware, Wm. Smith, John Smith and John H. Lumpkin, to which the defendants pleaded general issue, Statute of Limitations, and notice and failure to sue.

Upon the trial the note was given in evidence on the part of the plaintiff, and the depositions of Julius M. Patton, who swore, that he had a conversation with John H. Lumpkin, one of the defendants, in relation to the claim sued on in this case. It was at the April Term of the Superior Court of Floyd County, in the year 1844, as he believes. Witness mentioned to Lumpkin that he had established a copy of a note that had been lost, against Ware's estate, William Smith, John Smith and himself, and witness said to Lumpkin that he (Lumpkin) would have to pay the most of it, as it was thought Ware's estate would fall far short of paying the debts, and William Smith and John Smith were considered broke or insolvent, and witness supposed he (Lumpkin) did not wish to be sued upon the claim. Lumpkin said he did not wish to be sued on the claim; that he had lost, or should lose, considerable on account of Ware, and that he did not wish to increase his losses by adding costs thereto; and Lumpkin then said to witness, if you won't sue, or don't sue, (one or the other,) until the bill which had been filed by the administrators of Ware to marshal the assets of the estate, (then pending,) should be disposed of, and the amount which should be allowed to this claim was paid, then he would pay the note. Witness replied, that his client could have no right to complain if he got his money as soon as it could be collected by law, and asked Lumpkin if his promise was to pay the balance of the note so soon as the bill referred to was disposed of, and the amount allowed to this claim should be paid upon it. Lumpkin said that was his promise; to which witness replied, he would let the matter lie until the disposition of the bill, and expressed his belief that would be before he could collect the money if he were to sue. In October, 1845, the bill referred to not having been disposed of, witness said to Lumpkin that he wished him to put their agreement in writing, as life was uncertain. Lumpkin asked what was the promise he had made. Witness stated the same he has now sworn to. Lumpkin said witness had misunderstood him, he thought, in reference to the promise made. He said he had agreed to pay what might be due

upon the claim, so soon as the bill above referred to should be disposed of, and the amount allowed to it from the estate of Ware should be paid upon it, if he was liable. Witness replied to him, he had said nothing about his liability in the conversation referred to, and witness then asked Lumpkin, if he had disputed his liability at that time, how else could it have been ascertained than by bringing suit, and if he (Lumpkin) supposed the witness would have suffered it to lie so long if Lumpkin had disputed his liability in the conversation referred to. Lumpkin said, if that was witness' understanding of the promise he had made, witness had better sue. Witness replied, he most certainly should; and in the month of November, 1845, witness filed in the Clerk's office of the Superior Court of Floyd County, a declaration founded upon the claim now sued on, which declaration the Clerk failed to have copied and served. Lumpkin said nothing about paying his *portion*, but whatever might be due. The suit was filed before the bill was disposed of, for the reasons already stated. Plaintiff proved, on the trial, that the bill was determined, and the amount allowed by the decree thereon had been paid. The note was not barred by the Statute of Limitations at the time of either of the conversations with John H Lumpkin.

After the reading of this testimony, the plaintiff insisted that the acknowledgment and promise, as proved by the testimony, were sufficient to take the case out of the Statute of Limitations, and moved that the plaintiff was entitled to a verdict; which was overruled by the Court, and the plea of the Statute of Limitations was sustained by the Court, as a bar to the plaintiff's right to recover, and a judgment of non-suit was awarded.

The refusal of which motion for a verdict, and the awarding of the non-suit, were excepted to, and are now alleged to be erroneous.

W. H. Underwood and W. Akin, for plaintiff in error.

Hooper & Mitchell, for defendant.

Judge *Lumpkin* did not preside in this cause, being a relative to one of the parties.

By the Court.—Nisbet, J. delivering the opinion.

At the time when the alleged promise of the defendant, Lumpkin, was made, a bill was pending, by the administrator of Ware, who was principal on the note sued upon, to marshal the assets of his estate. The promise, relied upon by the plaintiff as a reply to the Statute of Limitations, was made in reference to this bill. The suit was brought after the Statute bar had taken effect, and before the conditions, (to wit: the termination of the bill to marshal the assets, &c.) had been fulfilled; *but at the time of the trial the conditions had been fulfilled*; that is, the bill was then disposed of and the amount allowed upon the plaintiff's claim had been paid. Upon the trial, the Court held, that the reply to the Statute was not sufficient, and non-suited the plaintiff, and we are asked to review that decision.

[1.] The evidence as to what was the promise of the defendant, being somewhat in conflict, it ought to have been left to the Jury to find what it was. Whilst it is with the Court to determine what will amount in law to a sufficient reply to the Statute, it is for the Jury to determine what it was. Regarding the question as before us, however, as the presiding Judge entertained it, upon a motion to non-suit the plaintiff, there seems to us no alternative but to take the promise as proven in the first conversation; the witness swearing that that was the promise, notwithstanding the subsequent explanations of the defendant.

[2.] What, now, is that promise? It is a promise to pay the balance of the note when the bill to marshal the assets of Ware is determined, and the amount allowed to it by the decree on that bill is paid. The view we take of this matter is this, to-wit: if the condition, at the trial, was fulfilled, it was then an absolute, unconditional promise to pay what was then due on the note. The fulfilling of the condition relates back to the time when the promise was made, and makes it, at the moment of fulfilment, an absolute, unconditional promise to pay. It was not necessary that the fulfilment of the condition should have taken place before the suit was brought. It was necessary that the plaintiff should prove that fact before he could remove the statutory bar—that he did do in this case. A promise which, in law, will be sufficient to take a case out of the Statute, will be a sufficient reply, even though made after suit brought. *Yea vs. Fowraker*, 2 *Burrow*, 1099. *Danforth vs. Culver*, 11 *Johns. R.* 146. 5 *Ga. Reports*, 486.

The plaintiff having proven upon the trial, the promise made before the Statute took effect, with the conditions, and having at the trial also proven that the conditions had been fulfilled, to wit: that the bill to marshal the assets of the estate of Ware, had been determined, and the amount decreed to the plaintiff's claim had been paid, the promise then stood as an absolute promise to pay what was then due on the note, and was unquestionably a sufficient reply to the plea of the defendant. *See Angel on Limitations*, 249 *to* 260. *Bell vs. Morrison*, 1 *Peters' R.* 351, *and the numerous authorities there quoted.*

Counsel for the defendant insisted that the plaintiff was not entitled to recover, because, instead of suing upon the original note, he should have brought his action on the new promise. The question thus raised in the argument, was not made in the Court below, and the presiding Judge did not pass upon it. It is not, therefore, made upon this record, and we express no opinion upon it. *See Administrator of John Martin vs. Broach*, 6 *Ga. Reps. ante, page* 2.

Let the judgment of the Court below be reversed.

No. 66.—BENNETT D. COOPER, plaintiff in error, *vs.* BURTON CLOUD *et al.* defendants.

Issue having been joined in this cause, under a protestation that no notice of the signing of the bill of exceptions had been served and filed, as required by the Act of 1845, and the Court having sustained a similar motion at this term, in another cause;

On motion of counsel, the writ of error was dismissed without argument.

No. 67.—JAMES RUSSELL and another, plaintiffs in error, *vs.* MARCH & BRIERS, defendants.

[1.] The record must show that the bill of exceptions was certified and signed by the presiding Judge, within the time provided by law.

[2.] It must appear that the bill of exceptions was filed in the Clerk's office of the Court below.

Motion to dismiss the writ of error.

HOOPER & AKIN, for the motion.

W. H. UNDERWOOD, contra.

By the Court.—WARNER, J. delivering the opinion.

The record in this case does not show that the bill of exceptions was certified and signed by the presiding Judge, within thirty days after the adjournment of the Court, or at what time it was certified and signed; nor does it appear that the bill of exceptions has ever been filed in the Clerk's office of the Court in which the cause was tried.

Let the writ of error be dismissed.

No. 68.—EHOOD DENNY, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] Under the 18th section of the 14th division of the Penal Code, a defendant is entitled to make his demand for a trial, at the first, second, or any subsequent term of the Court.

[2.] When, upon demand of trial made and entered, the Court passes an order, *that the defendant be tried at the next term or discharged,* the legal inference is that the Court did its duty, and that there was at that term a Jury impannelled and qualified to try the cause. When, under a demand, a defendant is finally discharged, the better practice is, that the order of discharge recite the fact, that at that term a Jury was impannelled and qualified to try the case.

Motion, decided by Judge WRIGHT, in Lumpkin Superior Court, March Term, 1849.

At the March Term, 1847, of Lumpkin Superior Court, an indictment was found against the plaintiff in error, Ehood Denny, for cheating and swindling. At the March Term, 1848, a demand was entered on the minutes for a trial on behalf of the defendant, and an order passed, that "he be tried at the next term, or be discharged." At September Term, 1848, no entry was made on the minutes or the docket. At March Term, 1849, when the case was called, Denny announced himself ready for trial, and the Solicitor General having refused to put him on his trial, the counsel for Denny moved to discharge him, under the order taken at March Term, 1848. The Court overruled the motion, and this decision is alleged to be erroneous.

T. R. R. COBB, representing W. MARTIN, for plaintiff in error.

J. MILNER, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] We are very clear that the defendant in this case was entitled to a discharge. The 18*th section of the* 14*th division* of the Penal Code, is in the following words: "Any person against whom a true bill of indictment is found, for an offence not affecting his or her life, may demand a trial at the term when the indictment is found, or at the next succeeding term thereafter, which demand shall be placed upon the minutes of the Court; and if such person shall not be tried at the term when the demand is made, or at the next succeeding term thereafter—*provided*, that at both terms there were Juries impannelled and qualified to try such prisoner—then he or she shall be absolutely discharged and acquitted of the offence charged in the indictment." *Prince*, 661.

This is another of those safeguards which the Legislature has wisely thrown around the citizen charged with an offence against the laws; the object of which is, to prevent vexatious delays; to limit the unequal power of the State over the prisoner, and to compel, in his behalf, an early trial. Its humanity and its equity

no one will question. The powers of the Crown in criminal trials, were formerly, in England, absolutely despotic. The Courts of Justice seemed to be organized rather to execute than to try the accused. Not so now in England. We, by divers benignant acts, of which this is one, have effectually guarded against the long delays of the law, and the caprice or the despotism of the State. This law puts it in the power of the accused to compel a trial, as early as the second term of the Court after the bill is found, in cases not capital; and if not then, at the term after he may choose to demand a trial—subject to one condition only, and that is, that both at the term when the demand is made, and at the term thereafter, there are Juries impannelled and qualified to try him.

In this case the bill was found at March Term, 1847. At the second term thereafter, the demand for a trial was made and entered on the minutes, and an order passed, that the defendant be tried at the next term, or discharged. At the term immediately succeeding the demand, nothing appears to have been done in the case, and at March Term, 1849, the State not being ready for a trial, the defendant moved for a discharge, which was refused. Upon what ground it was refused the record does not disclose. Counsel for the State insisted that the refusal was proper: *First*, because the demand was not made either at the first or second term after the bill was found. Their construction of the law is, that inasmuch as it allows the demand to be made at the first and second terms, it disallows it at any and all terms thereafter. This is not the true construction. Criminal Statutes are to be construed liberally in favor of the accused. There is nothing in the Statute which expressly excludes the right of demand at any term. Nor is the right denied by implication. The language of the law is not mandatory, but permissive. It declares, that the defendant *may* demand a trial at the first and second terms. It is true, that the word *may*, may be construed as leaving the defendant at his option to demand or not; but it is also significant of a right to do at the first or second term, that which before was either questionable or denied. In favor of the accused, the latter is the reasonable meaning. Without denying his right to demand a trial at any subsequent term, the Legislature has authorized it, at the first and second term. The provisions of our Penal Code in relation to this matter, appear to be in lieu of the English practice, rela-

tive to notice by the defendant of his intention to proceed to trial. There, after a traverse, the defendant may give notice to the prosecutor, of his intention to proceed to trial; and if, upon service of the notice, the party prosecuting, being three times called in open Court, does not appear at the session at which he is notified to appear and prosecute, the defendant is entitled to an acquittal. 1 *Chitty's Crim. Law*, 397, 398.

Our Penal Code protects the defendant from vexatious and oppressive delays, whilst, at the same time, the rights of the prosecution are guarded. By entry of the demand upon the minutes of the Court, the State is notified of the defendant's intention to proceed to a trial, or be discharged, at the subsequent term. It cannot be taken by surprise, for in all cases it has six months' notice.

The construction of the counsel is not in accordance with the reason on which, and the policy in which, the Statute is founded. The policy of the Act is to inhibit delays in criminal trials; and this policy is based upon sound reasons, which need not be here enumerated. That construction defeats the policy and disregards the reasons of it. If it is right and proper to allow the accused to force a trial by a demand at the first and second term, it is more manifestly right, and more obviously proper, the longer the cause is in Court. If it be right and proper before injurious delays have occurred, it is of course right and proper afterwards. To vary the form of expression—it is absurd to concede this right when there is less reason for it, and deny it when there is greater.

[2.] *Secondly*, the counsel claim that the refusal of the Court to discharge the defendant in this case, may be sustained upon the ground, that the order directing him to be discharged if not tried at the next term after the demand, does not show that at the term when the demand was made, there was a Jury impannelled and qualified to try the cause. It is true, that by the law, the demand avails nothing, unless at the term when the demand is made, and at the term at which he is ordered to be tried, there is a Jury impannelled and qualified to try the issue. We must presume, that in passing the order, the Court did its duty, and that it would not have been granted unless there was a Jury present qualified to try the case. The legal inference is to that effect. The order is in the nature of a judgment of the Court. We will not impeach it by implication. At the term at which the order directs the

trial, there was no entry in the case. The presumption is, that it was not called, and was, therefore continued by the Court. The rights of the parties stood over, unimpaired, to the next term. At that next term, the defendant asks the execution of the previous judgment of the Court, and the State not putting him upon trial, he was legally discharged. *Then*, also, it was necessary that a Jury be present, qualified to try him, and the final order of discharge ought to recite that fact—that is, it is the better practice that it should do so; and no doubt, had the Court granted the discharge, it would have been, in this case, recited in the order. Suffice it to say, that at the term at which the defendant asked a judgment of discharge, it does not appear to us, from the record, that there was not then present a Jury impannelled and qualified to try the case.

Let the judgment below be reversed.

No. 69.—JOHN EZZELL, plaintiff in error, *vs.* WM. MALTBIE and RICHARD D. WINN, executors of ELISHA WINN, deceased, defendants.

[1.] A executed his bond to B, conditioned to make him a title to a tract of land therein described, whenever the litigation then pending respecting it should terminate. B brought suit upon the bond, alleging a forfeiture thereof, in which there was a verdict and judgment for the defendant, who made no special defence to the action: *Held*, that the former recovery was no bar to another action, and that parol evidence was admissible to show, that on the first trial no other issue was submitted to the Jury, save only the fact as to the pendency of the litigation referred to in the bond; and that the testimony was restricted exclusively to that point.

Covenant, in Gwinnett Superior Court, before Judge DOUGHERTY, March Term, 1849.

John Ezzell commenced his action of covenant against the executors of Elisha Winn, deceased, upon the following instrument:

"GEORGIA, GWINNETT COUNTY:

"Know all men by these presents, that I, Elisha Winn, am held and bound unto John Ezzell, jr. in the sum of four hundred dollars, to be paid on conditions, that the said Elisha Winn shall make him, the said Ezzell, his heirs, &c. a good title to the land and premises whereon he now lives: say, the land conveyed to James Brown by James Clements, as per deed of record, in the Clerk's office of the Superior Court, for four hundred acres; say the same to be done so soon as the present dispute of the lands can be got through with, in default of which, I will pay him, the said Ezzell, the value of the said land.

"Given under my hand and seal, this 6th January, 1835.

[Signed,] "ELISHA WINN. [SEAL.]

"WM. MALTBIE."

The breach alleged was a failure to make titles to the land.

To this action the defendant pleaded a former recovery.

On the trial, the defendant gave in evidence the record of a former suit between John Ezzell and Elisha Winn, on the same instrument, with a verdict for defendant, and judgment thereon, 15th March, 1839. The record showed no plea on the part of the defendant.

The plaintiff then offered to prove, by one Henry P. Thomas, Esq. that the former recovery by Winn, in his lifetime, was not had upon the merits, but was obtained upon proof to the Jury upon that trial, that the obligation was not due at the time of the commencement of the said first suit, nor at the time of the trial of said case; in this, that the litigation referred to in the obligation was still pending, and that no other evidence was submitted to the Jury upon the trial of said first suit for the defendant, than that above stated, and that no other issue was submitted to the Jury.

To the admission of this evidence defendant's counsel objected. The Court sustained the objection and rejected the testimony, and this is the error alleged in the record.

JAS. P. SIMMONS, for plaintiff in error, cited and commented on the following authorities:

1 *Stark. on Ev.* 222, *and note. Greenl. on Ev. title Records and Judicial Proceedings. Seddon vs. Tulop*, 6 *T. R.* 608. 5 *Mass.*

334. *Bennett vs. Holmes*, 1 *N. Carolina Rep.* (*Dev. & Bat.*) 486. *Hughes vs. Blake*, 1 *Mason*, 515. *Phillips vs. Berrich*, 16 *Johns.* 136. 2 *Ib.* 229. 8 *Ib.* 442. 13 *Mass.* 155. 8 *Sergt. & Rawl.* 305. *Bridge vs. Sumner*, 1 *Pick.* 371. *N. Eng. Bank vs. Winslow & Lewis*, 8 *Pick.* 113.

ALEXANDER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

The question presented by this record is, when is a former recovery a complete bar to another suit?

Both policy and principle would seem to dictate, that whenever the record of the first suit covers the present cause of action, so that the merits *might have been* passed upon, the former judgment would be conclusive, *per se;* otherwise, that salutary axiom of legal policy, which is as old as the law itself, *nemo debet bis vexari pro una et eadem causa*, would cease to have any practical value; and, as was most forcibly remarked by Mr. Justice *Kennedy*, the public peace and quiet would be subjected to the will or neglect of individuals, and suitors would prefer the gratification of a litigious disposition to the preservation of the public tranquility and happiness; and the result would be, that the tribunals of the State would be bound to give their time and attention to the trial of new actions for the same causes, tried once or oftener before, between the same parties or privies, without any limitation, other than the will of the litigants, to the great delay and detriment, if not exclusion, occasionally, of other causes which never have passed in *rem judicatam*. *Marsh vs. Pier*, 4 *Rawle*, 288.

[1.] And yet we feel quite satisfied, that the proposition suggested at the outset of this opinion, is not, *although it should be*, the law of the case.

To constitute the former recovery a complete bar, Professor *Greenleaf* says, "it must appear to have been a *decision on the merits*." 1 *Greenlf. Ev.* 566. Judge *Tucker* adopts the same rule: "But the judgment must have been *upon the merits* or it will be no bar." 2 *Tuck. Com.* 159. Mr. *Chitty* seems to favor the idea, that to make the plea of a former recovery available, the defence should show, that in the prior action, the defendant had a verdict in his favor *on the merits*. 1 *Chitty's Plead.* 513, *note C.*

In *Seddon and others vs. Tulop*, (6 *T. R.* 608,) another test is applied, which is, that the plea of a former recovery is no bar, if upon evidence it appears that the matter of the existing suit was not, *in fact*, the subject of inquiry in the former suit; and this is a leading case in the books. It is true, that in the former action, there was a count on a promissory note for £51, and another for £25 7*s.* for goods sold and delivered, and that the last suit was brought only for the latter of these demands. Still, this can make no difference; for here the plaintiff was permitted to harass the defendant with the expense of two actions, when one would have answered the purpose. The record of the former suit covers the open account as well as the note. The last cause of action, to wit: the open account, is in both writs, and it could only be withdrawn from the operation of the first verdict and judgment, by parol proof, showing that, *in fact*, no evidence was given as to this cause of indebtedness. The authority of this case cannot be evaded, therefore, by saying, that the causes of action were distinct and embraced in different counts. Indeed, the Court of King's Bench took no such distinction, but placed its decision upon the ground, after full discussion, that the claim for the goods *now* made, was not *then* made, though it is apparent, from the record, it might have been.

But the case of *Hitchen vs. Campbell*, (2 *Blackstone's Rep.* 827,) was upon the same identical premises; and though it was argued by very eminent counsel, it was not even contended, that because the same sum demanded in the action might have been recovered in the former one, therefore the plaintiff could not recover it in that action. The only inquiry there was, *whether the same cause of action had been litigated and considered in the former action.*

So in the cases of *Rowell vs. Farmer*, (4 *T. R.* 146, '7,) and *Golightly vs. Jellicox*, (*Ib. in note*,) it was held, that an award made on a reference of all matters in difference between the parties, was no bar to any cause of action that the plaintiff had against the defendant at the time of the submission, if the plaintiff could prove, that the subject matter of the action was not inquired into before the arbitrator.

The same doctrine was ruled in *Martin vs. Thornton*, (4 *Esp. R.* 181.) This was an action for malicious prosecution, and for maliciously holding the plaintiff to bail. There had been an arbitration between the parties, and an award, which was produced. It

recited, that in the cause of *Thornton vs. Martin*, the plaintiff had no cause of action, and awarded to the plaintiff the costs; and that in the other action, *Martin vs. Thornton*, the plaintiff, Martin, had no cause of action, and ordered certain manuscript and printed papers to be given up, and finally directed that the parties should execute mutual releases. The defendant's counsel then called the arbitrator to prove that the reference before him was a reference of all matters in difference, and that a claim had been made before him, by Martin, for compensation for the injury. This evidence was objected to, and it was contended that parol evidence was not admissible, *as the award should speak for itself;* but it was ruled by Lord *Alvanley* to be competent and sufficient evidence. See also, *Comyn's Digest, title Action, l.* 4.

What the later authorities in England may be, it is needless perhaps to inquire, it being understood that we adopted the Common and Statute Law of the mother country, as it existed at the commencement of the revolution, and with it the construction put upon it by the British Courts at that epoch, and that we are not at liberty to consider and follow decisions posterior to that period. In other words, that the 14th day of May, *Anno Domini* 1776, is the Pillars of Hercules in our judicial geography, *this side* of which we may not come in our explanations. If this be so, legislation is imperiously demanded. We are, to all intents and purposes, *adscripti glebis*, and as much serfs in mind as those were in body, who used to go with the clod. This ought not so to be. We are entitled to the benefit of the later, if not the higher lights of the great luminaries of the law. Why should we be restricted to the year books, Dyer and Plowden, or to their successors, the Raymonds, Salkeld, Strange, Willes and Wilson, Burrow, Cowper and Douglass, the Blackstones, Bossanquet and Puller, however illustrious the Judges whose decisions they record, for an exposition of the Common and Statute Law of England? The science of law is pre-eminently progressive, and the shadows which overhung the age of *black letter* have been dissipating by degrees only. The British Courts have undoubtedly, since our separation, made great improvements in that portion of the law which is common to us both. Shall we be forever bound to follow *error*, although now admitted and declared to be such by the very tribunals which first established it? We honor our venerated predecessors of the olden time, who, brought up according

to the then philosophy of the schools, in habits of great subtlety and refinement, displayed wonderful acuteness of mind in maintaining every maxim, presumption and fiction of law, with scrupulous exactness. We would prefer, however, to follow the modern practice, which, in the administration of justice, and with a view to enlarge its boundaries, does not hesitate to sacrifice the shadow in order to secure the substance.

But I will return to the point from which I have wandered.

Some of the earlier decisions in this country maintained the rule with great stringency, that the operation of the record should not be varied by matter *in pais*. *Hess vs. Heble*, 4 *Serg. & Rawl.* 246. 6 *Ib.* 57. *Duffy vs. Lytle*, 5 *Watts*, 130. *Brockway vs. Kinney*, 2 *Johns.* 210. This last case went to the extent of holding, that every thing set out in the declaration was, of necessity, presumed to have been included in the judgment; and that even where there were two distinct counts, unless a *nolle prosequi* were entered, parol evidence could not be received to show, that with regard to one of them, no testimony had been given at the trial. And in *Wheeler vs. Van Houton*, (12 *Johns.* 313,) and *Bunnel vs. Pinto*, (2 *Conn.* 433,) it was held, contrary to *Rowell vs. Farmer*, and *Golightly vs. Jellicox*, that after a submission of all demands to arbitration, that parol evidence could not be received to show that a part of the plaintiff's demands had not been the subject matter of inquiry before the arbitrators.

This doctrine, however, has been much relaxed in the more modern cases; and in *Goddard vs. Selden*, (7 *Conn.* 521,) it was adjudged, that although a former recovery is, *prima facie*, conclusive as to all matters which either party could have legally presented to the Jury under the pleadings, yet that this presumption may be rebutted by clear evidence of a contrary character; and that where a particular subject is shown not to have been, in fact, embraced in the former judgment, it may be made the subject of another suit between the parties.

The same law has been fully recognized and applied by the Courts of Pennsylvania and New York. *Croft vs. Steal*, 6 *Watts.* 375. *Sterner vs. Gower*, 3 *Sergeant & Watts*, 143. *Wright vs. Butler*, 6 *Wend.* 289. In this last case, a second action was brought by the indorsee against the indorser, to recover money expended for the use of the defendant, in the payment of a note on which he was liable, there having been a recovery and judgment in the

first action. The defendant pleaded, first, the general issue; second, the former recovery, setting forth the declaration in the first action, which contained, in addition to the money counts, a special count on the note. Parol evidence was admitted to show, that the verdict of the Jury had been rendered only on the money counts, and that the special count on the note, had not been submitted to the Jury on the trial, and the plaintiff was allowed to recover.

Indeed, from a careful and extensive examination of the authorities, the conclusion to be drawn is, not that when a recovery has been had, and a new suit is brought, that the Courts are bound to consider *as embraced* that *which might have been embraced;* but that the former record will not be considered as having settled the present matter, unless the judgment to which this effect is ascribed, could not have passed without having decided the present matter.

In the case at bar, being reluctant to go one step beyond what we are compelled to do, we will overrule the non-suit, and direct the case to be re-instated, on the ground that the cause of action for which the present suit is brought, did not really exist at the time when the first trial took place. According to the condition of the bond, Winn was not bound to make titles until the litigation, which was then pending respecting the land, had terminated. The evidence which the plaintiff proposed to introduce, was to show that, on the former trial, no other issue but this was submitted to the Jury, and that the testimony was restricted entirely to it, and that the verdict was rendered against Ezzell solely for the reason that there was no breach of the bond, it being in proof, that the litigation referred to in the instrument was still pending and undisposed of.

Indeed, to my mind, the record itself leads necessarily to the same conclusion. To the first action there was no plea whatever filed; and if the right to sue had *then* accrued, there must have been a verdict for nominal damages at least for the plaintiff. The defendant having obligated himself, under the penalty of four hundred dollars, to make titles or pay what the land was worth, in the absence of any special defence, it could have been an inquiry merely as to the amount of damages. The judgment, consequently, under the pleadings, could only have been awarded against the plaintiff, on account of his failure to prove that the li-

tigation had terminated concerning the land—a condition precedent in the contract to his right to sue.

Rose vs. Standen, (2 *Modern Rep.* 294,) was an account for sugar and indigo. The defendant pleaded that the plaintiff brought an *indebitatus assumpsit*, a *quantum meruit*, and an *insimul computasset*, for one hundred pounds due to him for wares sold, to which he pleaded *non-assumpsit*, and that there was a verdict against him, and then averred that the wares mentioned in the former action were the same as those mentioned here. The plaintiff demurred, and it was said for him, that he had brought his former action on the case too soon; for if no account be stated, the action on the case on the *insimul computasset* will not lie, and so the former verdict might be given against him for that reason; but on the contrary it was argued, that the defendant shall not be twice troubled for the same thing, and that if the verdict had been for the plaintiff, that might have been pleaded in bar to him in a new action. But the Court were of the opinion, that the plea was not good, and that if the plaintiff had recovered, it could not have been pleaded in bar to him; that if no account be stated, the action on the case upon an *insimul computasset* would not lie—the *insimul computasset* implies an account—and upon *non-assumpsit* pleaded, the defendant might have given payment in evidence, and for that reason the Jury might find for him. It is true, he might have pleaded "*plene computavit*," which is the general plea, *but it may as well be presumed that the verdict was against the plaintiff, because the action would not lie*, and the matter being *in dubio*, the Court will intend against the pleader, he not having averred to the contrary.

In the case at bar we hold, from the pleadings in the former suit, that the *verdict must have been against the plaintiff*, because the action was prematurely brought, and could have been rendered on no other ground. If it were *doubtful*, upon this precedent we should be at liberty to *presume*, at any rate, that such was the case.

I know that some of the volumes of this collection were considered and pronounced by *Buller* and *Mansfield*, and other distinguished Judges, as apocryphal or reports of but little authority, but I am not aware that the *second* volume, containing special cases, most of which were adjudged in the Court of Common Pleas, when Sir *Francis North* was the Chief Justice on that

Bench, was ever assailed except by Lord *Holt*, of whom it is said, that upon a case being cited from 2 *Modern*, he said, *in ira* (!!!) "that no books ought to be cited at the bar but those which are licensed by the Judges." *Marv. Leg. Bib.* 518, '9.

The *New England Bank vs. Winslow, Lewis et al.* (8 *Pick. R.* 113,) is a case strictly analagous to the one under consideration. An action at law had been brought by the bank against Winslow and Henry Lewis, on a promissory note, on which they were indorsers. The defendants pleaded that the suit was commenced on the day when the note fell due, and before notice to them of its dishonor, and judgment was rendered in their favor, on the ground that the action was brought prematurely. The bank now sought, by bill, to recover the note, alleging that it never had been paid, and that Jeffries, the maker, was insolvent. The defendants urged the former judgment in their favor, in the suit, on the note as a bar to the bill.

The Court held, that issue might be taken on the fact, and parol evidence admitted, to show that the real merits of the action had not been inquired into in the former suit; and it appearing that no cause of action had accrued when the first suit was instituted, that the judgment in that action was no bar, either *at law* or *in equity*.

Upon the principle of these two precedents, we will reverse the judgment below, and remand the cause for a re-hearing.

No. 70.—JOHN GENTRY, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] Where the indictment charged the defendant with falsely and fraudulently *uttering* one piece of base and counterfeit money, made and counterfeited to the likeness and similitude of *legal* and *current* silver coin called a dollar, knowing the same to be counterfeit: *Held*, that the indictment was sufficient, under the provisions of the Penal Code; the more especially as there was *no objection* made in the Court below, that it was not alleged *to whom* the defendant uttered the counterfeit coin.

Indictment for uttering counterfeit coin. Tried before Judge WRIGHT, Cass Superior Court, February Term, 1849.

At the February Term, 1849, of Cass Superior Court, John Gentry was placed upon his trial before a Petit Jury, on the following indictment:

"GEORGIA, CASS COUNTY:

"The Grand Jurors, &c. in the name and behalf of the citizens of Georgia, charge and accuse John Gentry with the offence of fraudulently and falsely tendering in payment a base coin, knowing the same to be base; for that the said John Gentry, on the 12th February, 1845, in the County aforesaid, did tender to one Arthur Haire, one piece of base coin, made and counterfeited to the likeness and similitude of good, legal and current silver coin, called a Spanish dollar, knowing the same to be base, contrary to the laws of said State, the good order, peace and dignity thereof; and the Jurors aforesaid, in the name and behalf of the citizens of Georgia, farther charge the said John Gentry with having committed the offence of falsely and fraudulently uttering a counterfeit and forged coin, knowing the same to be counterfeit and forged; for that the said John Gentry, on the 12th day of February, 1845, in the County and State aforesaid, one piece of base and counterfeit money, made and counterfeited to the likeness and similitude of legal and current silver coin called a dollar, did falsely and fraudulently utter and tender the said counterfeit dollar, knowing the same to be counterfeit, contrary to the laws of said State, the good order, peace and dignity thereof."

The defendant, by his counsel, objected to the State's counsel proceeding under this indictment, and moved for a verdict—

1st. Because, by the Constitution and laws of the United States, the State Courts are divested of the power to punish for the counterfeiting of the coin of the United States, or for the coun terfeiting of any species of coin brought from any foreign nation, the value of which has been regulated by Congress, or for passing any such counterfeit coin.

2d. Because, in the first count in said indictment, said defendant was not charged with *falsely and fraudulently* tendering said Spanish dollar in payment.

3d. Because, in the second count in said indictment, it is not stated to whom said silver coin was tendered; nor is it stated

what kind of silver coin it was—whether a foreign coin or a coin of the United States—nor is it stated that the silver coin was of the likeness or similitude of any silver coin that was passing or in circulation within this State.

The Court sustained the exception to the first count and ordered the same stricken out, and overruled the other objections. To which decision, overruling the objections of the defendant, the defendant, by his counsel, excepted.

JOHN H. RICE and PATTON & JOHNSON, for plaintiffs in error.

J. MILNER, for defendant.

By the Court.—WARNER, J. delivering the opinion.

Three grounds of error have been assigned to the judgment of the Court below.

The answer to the first ground taken is, that the defendant was not indicted for *counterfeiting* the current coin of the United States, and, therefore, the question of jurisdiction by the State Courts to punish for counterfeiting such coin, is not made by the record.

The second ground of error alleged is, to the first count in the indictment, which the record shows, the Court below ordered to be stricken out. The Court below sustained the defendant's objection to the first count in the indictment, and we do not suppose he now considers himself aggrieved by a decision of the Court below in his own favor.

[1.] The third ground of error is, that it is not alleged in the second count of the indictment, *to whom* said silver coin was tendered, nor what kind of silver coin it was, whether a foreign coin or a coin of the United States, nor is it stated that said silver coin was of the likeness or similitude of any silver coin that was passing or in circulation within this State. The second section of the seventh division of the Penal Code declares, that "If any person shall falsely and fraudulently make, forge or counterfeit, or be concerned in the false and fraudulent making, forging and counterfeiting of any gold, silver or copper coin which now is, or shall be passing or in circulation within this State, or shall falsely and fraudulently make, or be concerned in

the false and fraudulent making, of any base coin, of the likeness or similitude of any gold, silver or copper coin which now is or shall be passing or in circulation within this State; or shall falsely and fraudulently *utter*, publish, pay, or tender in payment, *any such counterfeit* and forged coin of gold, silver or copper, or *any base coin*, knowing the same to be forged, or *counterfeited*, or *base*, or shall aid or abet, counsel or command, the perpetration of either of the said crimes, such person, on conviction, shall be punished by imprisonment in the Penitentiary," &c. *Prince*, 635. By the foregoing section of the Code, it is made an offence to *utter* any base coin, knowing the same to be forged or counterfeited or base.

The second count in the indictment charges the defendant with the offence of falsely and fraudulently *uttering* a counterfeit and forged coin, knowing the same to be counterfeit and forged. One objection is, that it is not alleged in the indictment, to whom the coin was *tendered* by the defendant. The answer to that objection is, that the defendant is not indicted for *tendering in payment* a counterfeit, forged or base coin. The defendant is indicted for *uttering* a counterfeit, forged and base coin, and there is no objection made, that *the person to whom he so uttered it is not stated in the indictment.*

It is also objected, that it is not alleged in the indictment, what kind of silver coin it was that the defendant uttered, whether a foreign coin, or a coin of the United States; nor is it alleged that the silver coin was of the similitude of any silver coin that was passing or in circulation within this State.

The defendant is charged in the indictment, with having falsely and fraudulently *uttered* one piece of base and counterfeit money, made and counterfeited to the likeness and similitude of *legal* and *current silver coin called a dollar*, knowing the same to be counterfeit.

The Statute makes it an offence to forge or counterfeit *any silver coin* which shall be passing or in circulation within this State, and also falsely and fraudulently to *utter* the same, knowing it to be forged or counterfeited. It is an offence within the Statute to utter any forged or counterfeit silver dollar, *legally current*, whether a foreign or American coin. The defendant is charged with falsely and fraudulently uttering a counterfeit and forged coin, of the likeness and similitude of a *legal and current silver coin* called

a dollar, knowing the same to be counterfeit. The first section of the 14th division of the Penal Code declares, that " Every indictment or accusation of the Grand Jury, shall be deemed sufficiently technical and correct, which states the offence in the terms and language of this Code, or so plainly that the nature of the offence charged may be easily understood by the Jury." *Prince*, 658. We think the Jury had no difficulty in understanding that the counterfeit dollar which the defendant was charged in the indictment with having uttered, was of the likeness and similitude of the silver dollar, made current by the law of Congress in this State, inasmuch as the indictment alleges, that the counterfeit coin was made and counterfeited to the likeness and similitude of a *legal* and *current* silver coin called a dollar. In our judgment, the objections to the second count in the indictment, as stated in the record, were properly overruled by the Court below.

Let the judgment be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT MILLEDGEVILLE,

MAY TERM, 1849.

No. 71.—SIDNEY R. CRENSHAW, plaintiff in error, *vs.* MATTHEW F. JACKSON, defendant.

[1.] A debt, to come within the Law of Set-Off, must be a money demand of a liquidated nature, and for which debt, *indebitatus assumpsit*, or some other action, *ex contractu*, will lie; and a right of action for damages, founded on a breach of warranty, cannot be off-setted.

[2.] Upon the transfer of a note payable to bearer, by delivery, the transferer ceases to be a party to it, and is not, generally, responsible thereon to the transferee, or any subsequent holder; but if he undertake to guarantee the payment of the note, he will be liable to the transferee on that special contract, and it is a proper matter of *set-off*.

[3.] A transfers for value, a note payable to bearer, to B by delivery, and at the time says, "C, (the maker,) although a poor man, is perfectly good for his contracts, and if C is not good I am good:" *Held*, that testimony of these sayings is admissible, as going to support a plea of a promise and undertaking to guarantee the payment of the note.

[4.] Upon a motion to arrest the reading of the depositions of a witness, who says that he was the agent of the party plaintiff, upon the ground that his authority as agent was in writing and ought to be produced, and upon the introduction of other evidence to prove that his authority was in writing: *Held*, that whether it be sufficiently proven that the authority was in writing, is a fact for the finding of the Court, and that this Court will not interfere with the finding of the Court below, under such circumstances, except in a clear, strong case.

[5.] *Held*, also, that a motion thus to arrest the reading of depositions, or the examination of a witness, is irregular, and that the better practice in all such cases is, for the reading or examination to proceed, and upon proof that the testimony was illegal, afterwards to move to withdraw it from the Jury.

Assumpsit, &c. in Oglethorpe Superior Court. Tried, October Term, 1848, before Judge SAYRE.

This was an action commenced by Crenshaw against Jackson, for the purchase money for a cotton gin sold him. The defendant pleaded payment, and the following plea of set-off: "And for further plea, &c. defendant says, that on 8th February, 1842, said plaintiff was indebted to this defendant, and was indebted at the time of the commencement of the action hereof, and is still indebted, in the sum of fifty-five dollars, besides interest; for that, on the day and year aforesaid, said plaintiff transferred and delivered to this defendant, in a fair course of trade, and for a valuable consideration, by this defendant then paid, two certain promissory notes made by one Samuel Ray, and payable to plaintiff or bearer, bearing date 22d January, 1842, and due and payable on 25th December next after the date last aforesaid—one of said notes being for the sum of $25, and the other for $30; and this defendant avers, that at the time said plaintiff transferred and delivered said notes to this defendant, the said plaintiff, in consideration that this defendant had at that time paid and delivered to said plaintiff a full and valuable consideration for said notes, undertook and promised to pay to this defendant the contents of said notes, with interest, according to their tenor and effect; and the said plaintiff, in consideration of said valuable and full consideration, paid as aforesaid by this defendant to said plaintiff for said notes, at the time of said transfer and delivery as aforesaid to this defendant, said plaintiff warranted said notes to be perfectly good and solvent, and also undertook and promised to pay said notes to this defendant, and then and there verbally guarantied the payment of the same to this defendant."

The plea farther alleged, that Ray was insolvent at the time, and has since absconded and gone to parts unknown, and that his insolvency was known to plaintiff at the time—"By means whereof and by virtue of the premises, the said plaintiff became liable to pay this defendant the contents of said notes, with inter-

est; and the said plaintiff was, at the time of the commencement of the action hereof, and is now, indebted to this defendant the sum of money mentioned in said notes, with interest; and being so indebted and owing, and in consideration thereof, the said plaintiff heretofore, to wit: on the day and year aforesaid, undertook and promised to pay this defendant the contents of said notes; wherefore this defendant pleads the same by way of set off," &c.

On the trial, plaintiff's counsel demurred to the plea of warranty, on the ground that it did not disclose a proper subject-matter of set-off. The Court overruled the demurrer, and plaintiff's counsel excepted.

The defendant offered in evidence, the depositions of Joshua R. Crane, who swore that he was present at the time of the transfer of the notes, and that Crenshaw said that the notes were good, and the maker, though a poor man, was perfectly good for his contracts, and that if Ray (the maker) was not good, he (Crenshaw) was good.

To which depositions plaintiff objected, on the ground that they did not support, and were not competent to support, any of the issues. The Court overruled the objection, and plaintiff excepted.

Defendant offered in evidence, the depositions of Jonathan P. Davis, who swore that he was impowered by Crenshaw to settle the debt of Jackson, and that, as agent, he gave Jackson the receipt attached to the interrogatories.

Plaintiff's counsel objected to the reading of the depositions, on the ground that the agency was created by writing, and in proof, offered the depositions of one Evans, who swore, "that he went to defendant for Mr. Jonathan P. Davis, with an order from plaintiff for a cotton gin." The Court held the proof of the agency's being in writing not sufficient, and admitted the evidence of Davis; to which decision plaintiff excepted.

Upon these exceptions error has been assigned.

L. H. Stephens, for plaintiff in error—

1st. A representation is no warranty unless *so intended*. *Pasley vs. Freeman*, 3 *T. R.* 58. *Sweet vs. Colgate*, 8 *American Com. Law*, 342. *Jackson vs. Wetherell*, 8 *American Com. Law*, 350.

2d. A declaration on a warranty cannot be supported by evidence of fraud or deceit. *Snell vs. Moses & Sons*, 1 *Johnson*, 96. *Ex'rs of Evertson vs. Miles*, 6 *John.* 138.

3d. Damages, neither for deceit, nor even on a contract of warranty, are a proper subject-matter of set-off. *Chitty on Contracts*, 841, 843, 845. *Prince's Dig.* 425.

4th. When a note is traded, with a warranty of solvency expressed or implied, a breach of the warranty entitles the transferee to recover, not the *amount of the note*, but the consideration he paid for it. *Story on Promissory Notes*, §117 *and note*, 118 *and note.*

T. R. R. Cobb, for defendant.

By the Court.—Nisbet, J. delivering the opinion.

To this action a plea of set-off was filed, in which several grounds of claim against the plaintiff are exhibited. Among them, a verbal warranty by plaintiff to the defendant, of the goodness of two promissory notes, transferred by him to the defendant for a valuable consideration. This part of the plea was demurred to, because it did not "disclose a proper ground of set-off." The Court overruled the demurrer, and the plaintiff excepted.

[1.] A right of action for a breach of warranty, we hold, is not within the English Statute of *Set-Off*. The debt claimed must be a money demand, and of a liquidated nature, and for which debt, or *indebitatus assumpsit*, or some action *ex contractu*, will lie. Such has been the construction of the British Statute. *Chitty on Contracts*, 842, 843. *Morly vs. English*, 5 *Scott*, 314. 4 *Bing. N. C.* 58. 6 *Dowl.* 202. *S. C.* 5 *M. & S.* 442. 6 *Rand.* 519. 5 *B. & Ald.* 93. 1 *Esp. R.* 378. *Montague on Set-Off*, 18. *Tidd*, 715. 4 *T. R.* 512. 2 *T. R.* 32. 3 *McLean*, 381. 3 *A. K. Marshall*, 31. 3 *Blackf.* 31. 2 *Wash. C. C.* 132. 6 *Conn.* 613. Although our own Statute is in some particulars more comprehensive than that of England, it does not vary from it in this regard. We think, therefore, the demurrer ought to have been sustained.

The plaintiff also excepted to the ruling of the Court, admitting the evidence of Joshua R. Crane, upon the ground that "it

did not support, and was not competent to support, any of the issues made by the pleadings."

To determine this point, it is necessary, first to ascertain what were the issues made. The plea is not full, nor accurately drawn, but, upon the whole, sufficiently so to be recognized. Different grounds of set-off, in the same plea, are like different counts in the same declaration, and the bad parts of it may be excluded and the balance retained. 2 *Wm. Bl. R.* 910.

One of the grounds of *set-off* is, an undertaking and promise of the plaintiff, in consideration of defendant's having paid him value for these notes, to pay their full value to the defendant, if the maker proved unable to pay. This is one of the issues made by the pleadings, and such promise is within the Statute of *Set-Off.*

[2.] These notes were made payable to bearer, and were transferred, by delivery. Now, it is generally true, that where a promissory note is payable to bearer, and it is transferred by mere delivery, without any indorsement, the person making the transfer ceases to be a party, and is not responsible thereon to the transferee, or any subsequent holder. *Story on Prom. Notes*, §117. *Ib. on Bills*, §109 *and note. Chitty on Bills*, 8 *ed. p.* 268, 269.

[3.] But if he undertakes to guaranty the payment of the note, upon such delivery, to the transferee, he may be liable on such special contract to him. *Story on Prom. Notes*, §117. *Chitty on Bills*, 8 *ed. p.* 269, 270. *Morris vs. Stacy, Holt N. P. R.* 153. It is contended, however, that the testimony offered and admitted, does not support this plea, and ought, on that account, to have been rejected. It is insisted, that it proves no promise or undertaking, but only a false representation, for which alone an action of deceit will lie. What is the testimony? The witness swore that he was present at the time the notes were transferred; that Crenshaw (the plaintiff) said that the notes were good, and the maker, though a poor man, was perfectly good for his contracts, and if Ray (the maker) was not good, he (Crenshaw) was good. The first part of this testimony, I admit, only goes to prove a representation, and does not, by itself, sustain the plea. We think, though, that the whole taken together, does go to support the plea, and was properly sent to the Jury for what it was worth, under the instructions of the Court on the law of the case. The last part of this statement, made by the plaintiff, is to be constru-

ed according to the way in which the parties would naturally understand such a declaration. It certainly was meant to convey some meaning, and the defendant must be considered as understanding it to mean something. When one, upon the transfer of a note, represents the maker as perfectly good, and adds, "if he is not good I am good," he is, I think, to be held as intending to be understood by the other party to say, "he (the maker) is perfectly good and will pay the note, but if he is not good, and does not pay it, I am good and I will pay it." There is no other intelligible or sensible meaning to be deduced from the words. They go to prove an undertaking to guaranty the payment of the note. We affirm this decision.

[4.] The remaining exception was taken to the admission of the depositions of Jonathan P. Davis, because he, testifying to certain acts done by him as agent of the plaintiff, under a written authority, the writing was not produced. The Circuit Judge did not deny, but that if the witness acted under a power in writing, the writing ought to be introduced. He placed his admission of the evidence on the ground that it was not sufficiently proven that the authority was in writing. The depositions of Davis being read, the plaintiff's counsel objected, alleging that his authority was in writing, and must be produced; and to show that it was in writing, offered the depositions of one Evans, who testified, that he (Evans) went to the defendant for Jonathan P. Davis, *with an order from the plaintiff*, &c. This statement of Evans, that he went to the defendant *with an order from the plaintiff*, is claimed to have shown that Davis' authority to settle with the defendant for the plaintiff, was in writing. The presiding Judge, in determining a question of fact addressed to him, held that it did not show that fact. To whom this order was given, does not certainly appear—both the witnesses, it seems, were agents of the plaintiff. The order spoken of by Evans, may have been an order to himself. That it was given to Davis, is not, to our minds, *clearly* proven. Whether it was or not, as before stated, was a fact for the finding of the Court. The Court found it against the plaintiff. Under such circumstances, we will not, but in a clear, strong case, disturb the finding, any more than we would the verdict of the Jury on the facts of a case. This is not a clear, strong case.

[5.] Besides, it was irregular, whilst the depositions of a witness are being read, or whilst a witness is on the stand being examined, to move to arrest the reading, or the examination, to show that his testimony ought not to be admitted, by reading other testimony, or by examining another witness. If, during the reading or examination, it comes out that the testimony ought not to be admitted, *then* it is proper at once to move to arrest it; but it is not proper to arrest it with a view to show, by other evidence, that it ought not to be admitted. The better practice, we think, is for the reading or examination to proceed, and if, by other testimony regularly admitted, it is made to appear that it is illegal, to move to withdraw it. It is true that, as argued by counsel, the impression of illegal evidence made upon the mind of the Jury, may not always be wholly effaced by its withdrawal; but the danger of that result is a less evil than the confusion and disorder which the other practice would introduce into trials. We shall not send this cause back, although we sustain the first exception; for if the plea as to the warranty had been stricken, there was still enough in the pleadings and evidence, to authorize the judgment. Let it, therefore, be affirmed.

No. 72.—Jesse Robinson, guardian of A. J. Lamar, plaintiff in *fi. fa.* and plaintiff in error, *vs.* John Schly, defendant, and William Cooper, claimant.

[1.] Where an execution has been levied on property which is claimed by a third person, and the claimant seeks to show that the judgment has been satisfied, he must prove that the payment was made to the *plaintiff in fi. fa.* or the person holding the legal control under him.

[2.] An assignment of a judgment should be in writing, in order to vest the legal title in the assignee: and if transferred by delivery merely, the assignee takes an equitable interest, and may use the name of the plaintiff for the purpose of enforcing his rights.

[3.] By the Civil Law, sales of immovable property were set aside, where the inadequacy of price amounted to one-half the value. This rule, however, even by that code, did not apply to personalty; and the Common Law has fixed no definite proportion as the test of inadequacy.

[4.] Mere inadequacy of price, or any other inequality in the bargain, does not constitute, *per se*, a ground of relief against the contract, either at Law or in Equity.

[5.] But where there are other ingredients in the case, of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must, necessarily, furnish the most violent presumption of fraud.

[6.] Before relief will be granted, the parties must be placed *in statu quo;* and on this account, the party seeking to set aside the contract, is driven, necessarily, into Equity, as the remedy at Common Law is not adequate to the exigencies of the case.

[7.] Instructions of the Court which assume or pre-suppose a fact proper for the decision of the Jury, should not be given where there is conflicting testimony.

[8.] An instrument conveying negroes, and their future increase, absolutely to the grantee, his heirs and assigns, "but I do hereby save and reserve to myself a life-estate in the property above conveyed to said J. S. his heirs and assigns:" *Held*, to be a *deed* and not a *will*.

[9.] A remainder in personalty may be created by deed, reserving a life-estate to the grantor or any one else.

[10.] A conveyance from M. D. M. to J. S. his heirs and assigns, of all the cattle, horses, furniture, bank-stock, money, &c. which she might leave or be possessed of at her death, is a will and not a deed.

[11.] An instrument may be a deed in part and a will in part.

[12.] The claimant is entitled, in all cases, whether he holds under the defendant in execution or not, to show that the *fi. fa.* which is levied on his property is inoperative, by reason of payment or any other cause.

[13.] The claimant cannot, for the purpose of protecting his property, show paramount title in a third person.

Fi. fa. levy and claim, in Richmond Superior Court. Tried before Judge HOLT, January Term, 1849.

A *fi. fa.* in favor of Jesse Robinson, as guardian of A. J. Lamar, against John Schly, was levied on several negroes, to which a claim was interposed by William Cooper, and the parties were at issue upon this claim.

The plaintiff's counsel gave in evidence the following instruments:

"STATE OF GEORGIA, LAURENS COUNTY:

"Know all men by these presents, that I, Mary D. Moore, of the County and State aforesaid, for and in consideration of the friendship and esteem, love and affection, and the many services rendered to me by John Schly, of Jefferson, I do, by these pre-

sents, give, grant and convey unto said John Schly, his heirs and assigns forever, the following property, to wit: a negro woman, named Jane, about forty-three years of age, and her four children, William, a boy, about fourteen years of age, Rosey, a girl, about thirteen years of age, Matilda, about twelve years of age, Willaby, a boy, about four years of age—together with the future increase and issue of the said female slaves; also, all my stock of cattle and horses, household and kitchen furniture, and my bank stock, which I may be possessed of at my death; as also, all money which I may leave at my death; also, all the real estate which I may be possessed of at my death, to him, the said John Schly, his heirs and assigns, forever; but I, the said Mary D. Moore, do hereby save and reserve to myself, a life-estate in the property above conveyed to the said John Schly, his heirs and assigns.

"In witness whereof, I have hereunto set my hand and affixed my seal, this tenth day of October, 1834.

[Signed,] "MARY D. MOORE, [L.S.]

"Signed, sealed and delivered in the presence of

"JAMES WRIGHT,

"EDWIN W. ORVIS."

"GEORGIA, LAURENS COUNTY:

"Whereas, William Cooper and Mary D. Moore have intermarried with each other, and said parties finding, from sad experience, and the great difference in their ages, as well as entire want of congeniality in their dispositions, and that they cannot agree but upon one thing, and that is, that they shall each live separate and apart from this time forward and forever, and that neither is to be bound for the contracts of the other; nor shall either molest or interfere with each other, or any thing or things held or owned by the other, as though no contract of marriage had ever existed; and whereas, said Mary D. the wife of said William, is entitled to a life estate under and by virtue of a deed of conveyance, made and executed by the said Mary D. whilst sole and unmarried, to John Schly, then of Jefferson County, and now of Richmond County, and executed by said Mary D. on the tenth day of October, 1834—a reference being had to said deed, now on record in the Clerk's office of said County, will more fully appear: and whereas, by this agreement of said parties, the said William Cooper does convey to a trustee of the said Mary D. all the rights which he acquired to all the property owned by said

Mary D. during her life, or otherwise, by virtue of his said intermarriage with the said Mary D. for her sole and separate use during her life, and for her maintenance; and that said trustee is, in consideration of such conveyance and separation, to indemnify and save harmless, the said William Cooper, from all the debts or contracts of said Mary D. now existing, or which she may in future contract: and whereas, the said John Schly has consented and agreed to become Trustee as aforesaid, by signing this agreement with said Mary D. the wife of said William Cooper; and said John Schly has also conveyed to said William Cooper, his right, under said deed, in fee, after the death of said Mary D. to one of said negroes, named in said deed made by said Mary D. to said John Schly, and which negro woman is named Matilda; in consideration of said conveyance, by said John Schly, of said negro woman, he, the said John Schly, his heirs and assigns, is to have all the property, both real and personal, herein conveyed to him as trustee aforesaid, with all the increase of the female slaves, to be his right, in fee simple, discharged from the trust aforesaid, at the death of the said Mary D. and which said John Schly is entitled to under said deed, made by said Mary D. to him, after the death of said Mary D. now the wife of said William Cooper; and also, in further consideration that said John Schly indemnifies said William Cooper against the debts at present existing against said William, to the amount of two hundred and fifty dollars.

"Now, know all men by these presents, that I, the said William Cooper, of said County, for the considerations herein before expressed and received, do hereby bargain, sell, convey and confirm unto the said John Schly, his heirs and assigns, forever, both as trustee as aforesaid, for and during the natural life of said Mary D. and for her separate maintenance and support, as also to the said John Schly individually, and discharged from said trust at the death of said Mary D. all the right, title and claim which I have acquired to any and all property, both real and personal, had and held by said Mary D. under said deed made to said John Schly, or which she may have otherwise acquired; and also, the following property, to wit: two lots in the town of Dublin, adjoining lots of Jeremiah H. Yopp, and whereon said Mary D. now resides; also, the following negro slaves, with the increase of the female slaves, to wit: Jane, a woman, about forty-eight years of age, William, a man, twenty-one years of age, Rose, a girl, about

nineteen years of age, Willaby, a boy, about fourteen years of age, Sam, a boy, about six years of age, Louisa, a girl, about four years of age; also, five shares of the capital stock of the Union Bank of South Carolina; also, two horses; also, all the stock of cattle; also, all the household and kitchen furniture—to have and to hold the same, to said John Schly, his heirs and assigns, forever, against me, the said William Cooper, my heirs and assigns; and the said John Schly doth hereby bind himself to do and perform all the covenants herein before set forth on his part, both as trustee and individually.

"In testimony whereof, the parties have hereunto set their hands and seals, this twenty-second day of December, 1840.

his
WILLIAM ⋈ COOPER, [L.S.]
mark.
MARY D. COOPER, [L.S.]
JOHN SCHLY, [L.S.]

"Signed, sealed and delivered in presence of
FRANCIS THOMAS,
LEWIS P. MADDOX, J. P."

The negroes levied on were identified as the same mentioned in the deeds, and the death of Mrs. Cooper was proven to have taken place before the levy.

The claimant showed his marriage with Mrs. Moore, and that letters of administration on her estate had been granted to him.

There was some evidence as to the relationship of attorney and client, between John Schly and Mrs. Moore, and the circumstances under which the instruments were executed.

The claimant proved by George Schly, that the plaintiff's execution was now proceeding for the witness' benefit—he claiming it under the following assignment:

"JESSE ROBINSON, Guardian of A. J. LAMAR, *vs.* JOHN SCHLY.	*Judgment, in the Superior Court of Richmond County, at June Term,* 1841.

"For value received, in the sum of thirty-five hundred dollars, of George Schly, I hereby assign and transfer said judgment to him, for his own use, without recourse on me.

"JOHN B. LAMAR,
"Guardian of A. J. Lamar, and assignee of Jesse Robinson, former guardian.
"*Macon, January 3d,* 1844."

The Court charged the Jury—

1st. That the plaintiff's execution was inoperative, and that they could not find the property subject to it, because there was no assignment in writing from Jesse Robinson, nor any evidence of John B. Lamar's being the successor of said Jesse in his said guardianship.

2d. That the conveyance of Cooper and wife to said John Schly was void, if the consideration was grossly inadequate; that a consideration not more than one-fourth of the value of the property, would be grossly inadequate; and that they might, under the circumstances of the case, consider it grossly inadequate, if the consideration paid to, or to be received by Cooper, were less than one-half of the value of the property.

Plaintiff's counsel requested the Court to charge the Jury, "that in estimating the value of the property conveyed by the second instrument to John Schly, they were to estimate the value, *so far as the negroes were concerned*, only of *the life estate* which Mary D. Moore had reserved in the first instrument;" which charge was refused, and the Court charged "that *the two instruments were to be taken as one, executed when the last was, and the value of the negroes estimated as if there were no remainder in the negroes vested in John Schly.*"

To all of which charges and refusal to charge, the plaintiff in *fi. fa.* excepted, and error has been assigned thereon.

A. J. Miller, for the plaintiff in error.

1st. The assignment of the judgment was proved by the evidence offered by the claimant below—and he could not object that it was not proved by the highest evidence. 5 *Peters' Rep.* 132.

2d. If there were no *legal* evidence of the assignment, the judgment still belonged to Jesse Robinson; there being no evidence of payment by the defendant below; and the *purchase* by George Schly, from an unauthorized person, cannot affect the plaintiff.

3d. The *invalidity* of a judgment, by reason of payment, cannot be urged by a claimant, who does not claim under the defendant.

4th. Inadequacy of consideration cannot be set up to avoid the conveyances, in a Court of Law. 1 *Story's Eq.* §245.

5th. Inadequacy of consideration *alone*, is not sufficient to set aside the conveyances, *even* in a Court of Equity. 5 *Vesey's R.* 845. 2 *Johns. Ch. Rep.* 1, 23. 1 *Story's Eq.* §244, 245.

6th. There was no inadequacy *shown*, in the consideration of either of the conveyances.

7th. The Court erred in expressing any opinion to the Jury upon "*the circumstances of the case;*" the testimony was contradictory, and should have been left to the Jury.

8th. "The circumstances of the case" were not such as to authorize any imputation of fraud.

9th. The conveyances were separate and distinct contracts—each valid of itself—and should not have been regarded as one.

10th. Under the first conveyance, John Schly took an estate in remainder in the negro slaves; and only the life estate of Mary D. Cooper in them was conveyed by the second. 3 *Kelly's R.* 460, 569. 4 *Ga. Rep.* 52.

KELLUM & CONE, for defendants in error.

1st. In order to entitle a party (other than the original plaintiff) to control and enforce an execution, it is necessary for him to show, either a legal or equitable title to the judgment or execution. 5 *Ga. Reps.* 364.

2d. A judgment and execution in favor of a plaintiff, as guardian or administrator, is an individual judgment. These words are "*descriptis personæ*," not affecting the character or rights of the plaintiff. 5 *Ga. Reps.* 56.

Gross inadequacy of consideration is evidence of fraud, and will avoid a deed, especially when the deed is made at the solicitation and by the persuasion of those in whom the maker of the deed has confidence, or there are other circumstances of a suspicious character. 1 *Story's Eq.* 274. *Ib.* 268, 269. 1 *Fonblanque's Eq. b.* 1. *ch.* 2. 1 *Maddock's Ch.* 212, 213, 214. 2 *Brown's Ch. Reps.* 558, 560, '1. 2 *Vesey, Sen.* 516. 9 *Vesey*, 246. 16 *Ib.* 517. 14 *Ib.* 273. 2 *Johns. Ch. Reps.* 23. 14 *Johns. Reports*, 527. 2 *Cowen*, 139. 4 *Desaussure*, 687.

A deed from a client to his attorney is void and will be set aside, if there is any improper influence, persuasion, unfairness or inadequacy of consideration; and the burthen of proof is on the attorney, to show that the transaction is fair, equitable, and

the consideration full and adequate. 1 *Story's Eq.* 330, '1. 1 *Maddox's Ch.* 94. 1 *Cox's Reps.* 112. 2 *Peere Wms.* 131. 13 *Vesey*, 116. 18 *Ib.* 301,219. *Jacobs' Reps.* 322. 2 *Harr.* 68. 2 *Young & Co.* 194, 195. 2 *Mylne & Keene*, 153. 2 *Ib.* 289, 294. 6 *Vesey*, 266, 268. 3 *Mylne & Keene*, 113. 18 *Vesey*, 120, 127. 6 *Ib.* 278. 1 *Russel & Mylne*, 539.

A conveyance executed by a person laboring under a mistake as to his right or title to the property, (the subject-matter of the conveyance,) will be set aside. 1 *Story's Eq.* 134, 140, '1. 2 *Russel & Mylne*, 614. 2 *Vesey, Sen.* 304. 2 *Merivale*, 269. 1 *Vesey*, 400. 2 *Brown's Ch.* 150. 2 *McCord's Ch.* 455. 1 *Hill's Ch.* 251. 1 *Edwards' Rep.* 467. 6 *Harris & Johns.* 24. 1 *Kelly*, 12, 238. 16 *Vesey*, 72. 4 *Prince*, 135.

The first instrument is a testamentary paper, and was revoked by the subsequent marriage of Mary D. Moore with claimant. All the property embraced in both instruments belonged, absolutely, to claimant at the time of the execution of the second instrument. 2 *Kelly*, 32. 3 *Ib.* 571. 4 *Ga. R.* 75. *Lovelass on Wills*, 317. 1 *Swinburne*, 25. *Co. Litt.* 111. *Carthen*, 38. *Habergam vs. Vincent*, 2 *Vesey, Jun.* 205. 4 *Brown's Ch. Reps.* 353. 4 *Hawks' Reps.* 141. 6 *Ala. Rep.* 631. 2 *Ib.* 155. 4 *Howard's Miss. Reps.* 220. 2 *Ib.* 737. 7 *Smede & Marshall*, 482. 2 *Brevard's Reps.* 411. 2 *Bailey's Reps.* 588. 2 *Spear's Reps.* 230. 1 *Spear's Eq. Reports*, 256.

As to the question of revocation. *Williams' on Ex'rs.* 94. 4 *Coke's Reps.* 60. 2 *Peere Wms.* 264. 2 *Brown's Ch. Reps.* 544. 2 *Term Reps.* 695.

By the Court.—LUMPKIN, J. delivering the opinion.

Many interesting questions are raised in this record.

[1.] Had the execution in favor of Jesse Robinson, as guardian of Andrew J. Lamar, against John Schly, the right to proceed against the property which is the subject-matter of this claim? The presiding Judge held that it was inoperative, and that the Jury could not find the property subject to it, as there was no assignment from Jesse Robinson, the plaintiff, to John B. Lamar, and no evidence of Lamar's being the successor of Robinson in the guardianship. This defect, if it be one, is rather one of form than of substance.

It will be borne in mind, that this *fi. fa.* was issued in the name of Jesse Robinson, as guardian of Andrew J. Lamar, and that for the sum of thirty-five hundred dollars, it was transferred by John B. Lamar to George Schly, the son of the defendant—John B. Lamar signing himself as guardian of Andrew J. Lamar, and successor of Jesse Robinson, the former guardian. The objection is, that the proof shows no privity between Lamar and Robinson. From the record it appears that, in order to show title out of Robinson, the claimant himself introduced George Schly, who testified that the *fi. fa.* was proceeding for his benefit; that he purchased it of John B. Lamar, guardian of Andrew J. Lamar, and successor to Jesse Robinson in that office, and the witness produced in Court the written assignment to that effect. It might with propriety, therefore, be insisted, that notwithstanding the evidence of the transfer from Robinson to Lamar was of a secondary character, still, inasmuch as it was offered by the claimant himself, he may be considered as waiving any objection to its competency as proof.

We prefer, however, to put the decision of this point upon broader ground, and one more in accordance with the truth of the case. It is not pretended that the payment proven was made to Robinson, but to Lamar. Unless, therefore, the *claimant* can connect Lamar with Robinson, the transaction was wholly gratuitous as between Schly and Lamar; and there is nothing in the testimony to defeat the lien of the execution, as in favor of the original plaintiff, Robinson. Lamar is a mere interloper, and the money paid to him is no satisfaction of the debt.

[2.] If, however, the execution has been assigned to Lamar by Robinson, and there be no written proof of the transfer, while the *legal title* would remain in Robinson, the *equitable interest* vests in Lamar, or in Schly, his assignee, who would have the right to use the name of Robinson, the original plaintiff, to collect the money. *Dix vs. Cobb*, 4 *Mass. R.* 511. *Parker vs. Grant*, 11 *Mass. R.* 157, *note*. *Wheeler vs. Wheeler*, 9 *Cowen*, 34. *Eastman vs. Wright*, 6 *Pick.* 316. *Welch vs. Mandeville*, 1 *Wheat.* 236. *Dunn vs. Snell*, 15 *Mass. R.* 481. *Allen vs. Holden*, 9 *Mass.* 133. *Brown vs. Maine Bank*, 11 *Mass. R.* 153. *Purson vs. Tollet*, 4 *Litt.* 435. *Southgate vs. Montgomery & Eivers*, 1 *Paige*, 41. *Andrews vs. McCoy*, 8 *Ala.* 920.

[3.] The Court charged the Jury, that they might, *under the*

circumstances of the case, hold the consideration paid by John Schly to William Cooper, for the property in dispute, grossly inadequate, provided it were less than one-half its value.

Why the Judge should have fixed upon one-half the value, or any other definite proportion, as the test of inadequacy, *under any circumstances*, we are somewhat at a loss to understand. It is true, *a moiety* was the criterion of the *Civil Law*, when applied to *immovable* property; but even by that code, sales of *personal* property were usually considered without redress, where there was *no fraud*, and the parties were turned over to the power of conscience and morals and religion.

[4.] We believe it to be well settled, that mere inadequacy of price, or any other inequality in the bargain, is not, *per se*, a distinct principle of relief in Equity. Much less does the Common Law know or recognize any such principle. The value of any commodity is its marketable price, which is, and always must be, forever changing; and it was well remarked by Lord Ch. Baron *Eyre*, in *Griffin vs. Spratley*, (1 *Cox's Rep.* 383,) for the purpose of demonstrating the inconvenience and impracticability, if not the injustice, of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief—"that if Courts were to unravel all such transactions, they would throw every thing into confusion and set afloat the contracts of mankind."

[5.] Where, however, there are other ingredients in the case, of a suspicious nature, or *peculiar relations between the parties*, gross inadequacy of price must necessarily furnish the most vehement suspicion of fraud. 1 *Story's Eq. Jur.* §246.

The deed from Mary D. Moore to John Schly, purports to be founded on "friendship and esteem, love and affection, and the *many services rendered*" by the grantee, who was an attorney; and while it is not denied that where the relation of client and attorney has completely ceased, a client may be generous to her attorney or counsel, as to any one else. No undue influence can in such case be rationally supposed longer to exist. Cicero, the father of his country, and second founder of Rome, whose eloquence and patriotism have been the admiration of every age and country, was enriched by the most munificent gifts from the patrons whom he had professionally served. Still, in all contracts between attorney and client, if made especially while the relation

subsists, Courts are bound, upon principles of public utility and public policy, to search the transaction to the bottom.

[6.] The question has been argued, and like all others in this case, with much learning and ability, by the counsel on both sides, whether inadequacy of consideration can be set up to avoid a conveyance in a Court of Law. The doctrine that the "Common Law kicks a suitor into the ditch, and Chancery has to come and pull him out," has been distinctly repudiated by this Court. Wherever suitable relief can be administered, the forum is a matter of indifference; but in this case it cannot be done on the Common Law side of the Court, although it be a claim case; for if the Jury, upon the trial, should determine to set aside the conveyances, on account of the inadequacy of the consideration, coupled with the relationship of the parties, this would not be done until the price paid was refunded, or the services rendered were ascertained and compensated. For Courts will not grant relief until the parties are placed *in statu quo*; and this cannot be done at law, until our Legislature, which has infused new life and energy into our judicial system, by the reforms already introduced, shall go one step farther, and authorize the verdict and judgment at Common Law to be framed to meet the exigencies of the case. And why should we falter? Inquiry and progress are the vital elements of republican Government. Our free institutions, what are they but innovations? The bulk of our legislation is but the correction, reform and abolition of the past. We owe every thing, as a people, to the fearless spirit of Truth; and it is fortunate for the community, while the bar of this State exercises such a deserved influence on the public mind, as well as in the public councils, that as a class it is generally found on the side of common sense and liberal principles.

[7.] Before dismissing this branch of the case, we must condemn the practice in Courts of *assuming* that any fact is established by the proof, with the view to predicate a legal opinion thereon. The books abound with authority to show, that if the instructions of the Court assume or presuppose a fact proper for the decision of the Jury, it is error, and a new trial will, therefore, be granted. *Lightburn vs. Cooper*, 1 *Dana*, 273. *Trotter vs. Sanders*, 7 *J. J. Marsh*. 321. *Dallam vs. Handley*, 2 *A. K. Marsh*. 418. *Sullivan vs. Endurs*, 3 *Dana*, 66. *Bowman vs. Bartlett*, 3 *A. K. Marsh*, 86. *United States vs. Tillotson*, 12 *Wheat*. 180.

Whether *the circumstances* to which the Court alludes, did or did not exist, were questions of fact, proper for the Jury alone to pass upon. The effect of such a charge is, to withdraw altogether from the consideration of the Jury, facts which it is their province alone to weigh. The growing intelligence of our people, and our special Jury trial, render this practice wholly unnecessary. The Jury *are sworn* to express their opinion upon the facts, by their verdict. The *opinion* of the Judge is not given, even under the sanction of his oath of office. *He is sworn* only to administer *the law.* Why should the presiding Judge be allowed to declare his opinion upon the facts without being sworn, when no one else, neither Juror nor witnesses, nor any other person, is permitted to do so? I trust that another Legislature will not intervene without its being made a distinct ground of error, for the Court to *intimate* its opinion to the Jury, upon the facts and circumstances of the case. Until this is done, trial by Jury, if not nominal, will certainly not be what it has been fondly proclaimed by its eulogists—"A privilege of the highest and most beneficial nature." Better abolish it altogether, if it cannot be protected from the control of the co-ordinate branch of the Judiciary. Life, liberty and property derive but little security from the constitutional *form* of trial by Jury, if its constitutional *force* is undermined and destroyed.

[8.] A material matter to be adjudicated in this record is, the character of the conveyance from Mary D. Moore to John Schly. Counsel for the plaintiff in *fi. fa.* asked the Court to instruct the Jury, that in estimating the value of the property conveyed by the second instrument to John Schly, (in order to determine the inadequacy of consideration,) they were to estimate the value, so far as the negroes were concerned, only of the life estate which Mary D. Moore had reserved in the first instrument. This the Court refused to do; but, on the contrary, charged the Jury, that the two instruments were to be taken as one, executed when the last was, and the value of the negroes estimated as if there was no remainder in the negroes vested in John Schly.

Now, the refusal of the Court to charge as requested, and the charge as given, can be justified only on the ground, that the first conveyance from Mary D. Moore to John Schly, was a testamentary paper. Is this its character as to the slaves in controversy? To read this instrument correctly, the latter clause, reserving a

life estate to Mary D. Moore, should be transposed so as to follow immediately the conveyance of the negroes. It will then read, "For and in consideration of the friendship and esteem, love and affection, and the many services rendered to me by John Schly, of Jefferson, I do, by these presents, give, grant and convey unto said John Schly, his heirs and assigns, forever, the following property, to wit: a negro woman, named Jane, about forty-three years of age, and her four children, William, a boy, about fourteen years of age, Rosey, a girl, about thirteen years of age, Matilda, about twelve years of age, Willaby about four years of age, together with the future increase and issue of said female slaves; but I, the said Mary D. Moore, do hereby save and reserve to myself, a life estate in the property above conveyed to the said John Schly, his heirs and assigns." That this clause applies to the negroes, and them only, is manifest from the fact, that in all the rest of the property, she disposes only of what remains at her death.

What, then, is the proper interpretation of this paper, thus read? That it was intended to be a deed, is apparent from its face. It does not purport to be signed, sealed and *published*, as a will, but it is *delivered* as a deed. Of the numerous tests which have been suggested to distinguish between a deed and a will, we take this to be the plainest and broadest. Does the instrument, regardless of its form, pass a present interest? If this paper does not, language would seem to be incapable of effecting this object. Mary D. Moore does not convey such of these slaves as she may have at her death, but she conveys them now, by name, together with their future increase. As to the cattle, horses, furniture, money, bank stock, and real estate, she only disposes of so much, and such portions thereof, as may remain on hand at her death; but not so as to the slaves—she carves out of these a life estate to herself merely.

[9.] That a remainder may be created in slaves, by deed or other writing, to take effect after the determination of a life estate, has been ruled again and again. *Catterlin vs. Hardy*, 10 *Ala.* 511. *Banks vs. Monksberry*, 3 *Litt.* 275. *Keen vs. Macey*, 3 *Bibb*, 39. 3 *Call.* 50. "Another ground," say the Court of Appeals of Kentucky, in the case from 3 *Littell*, "assumed in support of the first position is, that the reservation of the slaves to the donor and his wife, for life, is incompatible with the gift, and that the

operation of the deed was thereby hindered and defeated. If either the reservation or the gift must be void, because of their inconsistency, it is obviously much more consonant to general principles, that the former should be so than the latter. We cannot, however, admit that they are inconsistent with each other, or that either is void."

Had Mary D. Moore attempted to do any thing with this property, after the conveyance was executed, inconsistent with the title in Schly, the remainder-man, a bill in the nature of a bill *quia timet* would have been entertained for the purpose of securing him. 3 *Call*, 25. 2 *Munf.* 162. Or had her life estate in these slaves been sold by the Sheriff, under execution against her, John Schly would, under our Statute, have had the right to require the purchasers to have given security for its forthcoming at the death of the defendant.

[10.] The only doubt which could have been entertained, would seem to be as to the other clauses, in which Mary D. Moore only conveys what she might *leave* or be *possessed* of, at her death. It has been held, that where the limitation to the first taker is accompanied by a power of disposition, either express or implied, the limitation over is void, both because of the inconsistency and the *uncertainty* as to what part of the property is to go over. 3 *Ves.* 7. 1 *Hoven. Sup.* 137. Thus, where there was a gift to Charlotte Williams, of the residue of the testator's estate, with the right of disposition by will, and if she died without will, then whatever might remain at her death, to go to W. Ashby, the remainder over was held void for *uncertainty*. 1 *Meri.* 314. 8 *Vin. Abr.* 103. *Pl.* 50. 1 *Ves.* 9. So where an estate was given by will to A and his heirs, and if he should die without issue living at his death, *then so much of the estate as remained undisposed of by A to B*, the limitation over was held void, because of its uncertainty as to the property to go over. 4 *Rand.* 547.

I repeat, that inasmuch as Mary D. Moore disposes only of so much of the cattle, horses, furniture, money, bank stock, and real estate, as may remain at her death, doubts might arise whether these clauses were not void for uncertainty. They certainly would be, if the instrument, as to them, was held to be a deed. We believe, however, that upon a fair construction of the instrument, it is testamentary as to these.

[11.] Must a conveyance be necessarily homogeneous? Or

can it not be a deed in part,* and a will as to another part? What is there to prevent a person, in the same instrument, to sell or give a piece of property to one, and to will another piece to the same individual? A, in consideration of love and natural affection, or $500 paid him by B, gives or sells to B a negro, by the name of Jim, and wills and bequeaths at his death, the rest of his estate, real and personal, to the said B. Can legal ingenuity suggest a plausible reason for not construing this instrument a deed of gift or bill of sale as to Jim, and a will as to the residue of A's property? Such, we believe, is the true nature of the first instrument executed by Mary D. Moore to John Schly. And it is not accurate, we apprehend, to say, as the Supreme Court of Alabama did, in *Shepherd et al. vs. Nabers*, (6 *Ala.* 631,) that the *operation* of such a conveyance is postponed until after the donor's death. It is true, that the possession being withheld during life, it may be said not to be *consummated* until then. We think it clear, however, that the conveyance *operated at once* to vest *the remainder* in Schly.

If this view be correct, it is obvious that the charge as asked ought to have been given, and the instructions submitted were erroneous.

[12.] We cannot concur with counsel for the plaintiff in *fi. fa.* in the position, that the claimant could not attack the validity of the process on the ground of payment, unless he claimed under the defendant. Whoever undertakes to disturb another in the possession or enjoyment of his property, must be clothed with authority of law for so doing; and it is competent for the owner to ward off this attempt, by showing the invalidity of the process, by reason of payment or any other cause.

[13.] It is true, that the claimant will not be permitted to hinder or defeat the collection of the execution, by showing property out of the defendant. He has no right thus to interpose as a mere amateur combatant between the debtor and his creditor; but when his rights are assailed, he is at liberty to defend them by carrying the war into Africa—the enemy's country.

*See *Dudley vs. Mallery*, 4 *Ga. Rep.* 52.—[Rep.

No. 73.—PHILIP T. SCHLEY, plaintiff in error, *vs.* JONATHAN LYON and FRANKLIN RUTHERFORD, trustees of MARTHA BEDINGFIELD, defendants.

[1.] Where property was conveyed to trustees for certain specified objects, as stated in the trust deed: *Held*, that where there was something to be done by the trustees, to accomplish the objects of the trust, the same was not executed but executory.

[2.] Where an action of trover is brought by trustees in whom the legal title is vested, for a conversion of the trust property, and they allege in their declaration, that they sue "for and in behalf" of one of the *cestui que trusts*, the trustees are the real parties plaintiff in the action, and the words "for and in behalf" of the *cestui que trust*, will be regarded as surplusage.

[3.] In an action of trover by trustees, in whom the legal title was vested, for the recovery of a negro, against a wrong-doer who had converted the trust property to his own use, the general rule is, that the measure of damages is the value of the property at the time of the conversion, and the value of the hire of the negro from that time up to the time of the trial.

[4.] In an action of trover, where the property sued for is not of a fixed and determined value, but fluctuates in price, evidence may be given to the Jury of the value of the property at the time of the trial, as well as at the time of the conversion.

[5.] In an action of trover by a bailee, or special property-man, against the *general owner*, the measure of damages is the value of his special property only; but when the action is by the bailee or special property-man, against a *stranger* or *wrong-doer*, the plaintiff is entitled to recover the full value of the property converted by the defendant, and hold the balance, beyond his own interest, for the general owner.

[6.] In order to prove the advertisement of a Sheriff's sale in one of the public gazettes of this State, as required by law, the production of the newspaper in which the advertisement was published, is the best evidence; but if that cannot be done, in the exercise of ordinary diligence, then a copy of the advertisement, taken from the paper of file in the publisher's office, verified by the oath of the publisher, is admissible.

Trover, in Washington Superior Court, December Term, 1848. Tried before Judge HOLT.

On 13th October, 1831, John H. Bedingfield executed the following instrument:

"GEORGIA, WASHINGTON COUNTY:

"Whereas, a matrimonial contract was, on the 17th day of December, in the year 1829, duly and legally solemnized between John H. Bedingfield and Martha Lyon, both of the County and

State aforesaid; and John H. Bedingfield is desirous of settling upon the said Martha Bedingfield, the wife of the said John H. formerly Martha Lyon, a certain portion of property, consisting of the following negroes, to wit: Tom or Thomas, Clarissa, Emeline, Susan, Caroline, and Rosetta:

"Now, know all men by these presents, that I, John H. Bedingfield, for and in consideration of the trust and confidence reposed in Jonathan Lyon and Franklin Rutherford, of the County aforesaid, as well as the love, good will and affection which I have for and towards my wife, formerly Martha Lyon, have given and granted, and by these presents do firmly give and grant, unto the said Jonathan Lyon and Franklin Rutherford, the following negroes, as above named, to wit: Tom or Thomas, Clarissa, Emeline, Susan, Caroline and Rosetta, to have and to hold the said six negroes unto the said Jonathan Lyon and Franklin Rutherford upon trust. Nevertheless, that the said Jonathan Lyon and Franklin Rutherford shall well and truly, and without partiality, at the death of the said John H. Bedingfield, secure to the said Martha Bedingfield, the wife of the said John, by any reasonable conveyance, the negroes before named; and in the event of there being issue of the body of the said Martha Bedingfield, that the said Jonathan Lyon and Franklin Rutherford shall equally apportion and divide the aforesaid six negroes, and their increase, between the said Martha Bedingfield, and the heirs of her body, within nine months after the death of said John Bedingfield, if his death should first happen; but if the said John H. Bedingfield should die without issue, and the said Martha Bedingfield should afterwards intermarry, then the said Jonathan Lyon and Franklin Rutherford shall turn over to, and for the use and benefit of, James G. Rives, the brother or half-brother of the said John H. the negroes hereinbefore mentioned, as his right and property; and the said John H. Bedingfield, for the free and more clear disposal of the said six negroes, and their increase, doth covenant to and with the said Jonathan Lyon and Franklin Rutherford, to and for the use of the said Martha Bedingfield, and the heirs of her body, shall have, hold, use, occupy and enjoy, provided, nevertheless, that the said John H. Bedingfield shall continue to use, employ, and reserve, all and singular, the services of the said six negroes, and all and every of them, for and during the full end and term of his natural life, without any trouble to

the said Jonathan Lyon and Franklin Rutherford, or either of them; and the said John H. Bedingfield, for the free and more clear disposal of the said six negroes, and their increase, to the said Martha Bedingfield, her issue and their heirs and assigns, doth make this reasonable instrument of conveyance, in writing, with a special reservation to the said John H. Bedingfield, as herein before expressed.

"In witness whereof, the said John H. Bedingfield hath hereunto set his hand and affixed his seal, this 13th day of October, 1831.

JOHN H. BEDINGFIELD, [SEAL.]

"Signed, sealed and delivered in presence of

WILLIAM R. KING.
JAMES JONES, J. P."

John Bedingfield died in the year 1833. In February, 1833, the negro boy, Tom, was levied on as the property of John Bedingfield, and bought at Sheriff's sale by Philip T. Schley. John Bedingfield left no issue. Within the nine months from the death of John Bedingfield, the trustees named in the deed, "as trustees of Mrs. Bedingfield," brought an action of trover against Philip T. Schley, for the negro boy, Tom. Pending the suit, Mrs. Bedingfield married Wm. S. Dickson; and sometime in the year 1840, the negro boy, Tom, died. Upon the trial at December Term, 1848, the defendant introduced the *fi. fa.* levied on the slave, Tom, with an entry thereon of a general levy on the slave.

Plaintiffs offered in evidence, the depositions of Richard M. Orme, one of the publishers of the "Southern Recorder," for the purpose of proving that the following advertisement was published in the Southern Recorder:

"Will be sold, &c. one negro man, Tom. Levied on the interest of John H. Bedingfield in and to said negro, to satisfy sundry *fi. fas.* &c. December 28th, 1832.

[Signed,] S. A. JONES, Sheriff."

Defendant's counsel objected to this testimony, on the ground that the newspaper itself would be the highest evidence. The Court sustained the objection, and ruled out the evidence. Proper diligence was shown in endeavoring to obtain one of the papers.

Plaintiffs' counsel then proved by E. S. Langmade, that "he went to the office of the Southern Recorder, and there made a

copy, from the paper, of the advertisement, and from that copy made the copy on the interrogatory directed to R. M. Orme; and the copy on the interrogatories is a copy of the paper in Milledgeville," and then offered to read this copy in evidence. Defendant's counsel objected,

1st. Because the original paper is within the control of the Court; and

2d. Because it is a copy of a copy.

The Court overruled the objection, and defendant excepted.

Many exceptions were filed to the charge of the Court below, and refusals to charge as requested, but the following only have been relied on in this Court, viz:

1st. Because the Court erred in charging the Jury, that the measure of damages must be the value of the property at the time of the conversion, and reasonable hire until the time of the intermarriage of Mrs. Bedingfield with Wm. S. Dickson.

2d. Because the Court erred in charging the Jury, that the right to hire did not cease after nine months after the death of J. Bedingfield.

3d. Because the Court erred in refusing to charge, that the plaintiffs could not recover in this suit, unless Dickson, who intermarried with Mrs. Bedingfield, had been made a party to this suit.

4th. Because the Court erred in refusing to charge, that the rights of the trustees, suing as they alleged for the use of Mrs. Bedingfield, ceased upon her marriage.

5th. Because the Court erred in refusing to charge the Jury, that the trusts in the deed had been long since executed, and that upon the marriage of Mrs. Bedingfield, the legal and equitable title both vested in Rives, the remainder-man.

I. L. Harris and Jas. Thomas, for plaintiff in error, cited and commented on the following authorities:

5 *East*, 164. 9 *Ib.* 1. 1 *Cruise*, 306. 1 *Eq. Cas. Abr.* 383, 307. 1 *Rand.* 326. 3 *Ves. Jr.* 123, 127. 1 *Pr. W.* 105, '6, '7, 132, 259. 1 *Kelly*, 390. *Strong vs. Strong*, 6 *Ala. R.* 345. *McGowen and Wife vs. Young*, 2 *Stew. Rep.* 276. 2 *Stew. & P.* 160. 8 *Wend.* 509. 5 *Cow.* 17. 2 *Ib.* 460. 20 *John.* 475. 1 *Wend.* 295. 7 *Ib.* 497. 13 *Pick.* 152, 275.

4 *Kent*, 302. *Jones vs. Cole*, 2 *Bailey*, 330. *Fettiplace vs. George*, 1 *Ves. Jr.* 46. *Jarman on Wills*, 252. *Edmondson vs. Dyson*, 3 *Kelly*, 321. *Sedgwick on Damages*, 506.

Q. SKRINE, for defendants in error.

By the Court.—WARNER, J. delivering the opinion.

The plaintiffs, as trustees of Martha Bedingfield, instituted an action of trover in the Court below, to recover the possession of a negro slave, named Thomas, which had been converted by the defendant.

The plaintiffs derived their title to the slave, under a deed executed by John H. Bedingfield to them, by which the negro slave, Thomas, with other property, was conveyed, *in trust*, for the settler during his life, and at his death, to be conveyed, by some reasonable conveyance, by the trustees, to the settler's wife, Martha Bedingfield, and her issue, if any, within nine months after the death of said John H. Bedingfield; but if there should be no issue of the said John H. by his wife, Martha, and she should afterwards marry, then the trustees were directed to turn the property over to, and for the use of, James G. Rives, the half-brother of the said John H. Bedingfield. John H. Bedingfield died in the first part of the year 1833, leaving no issue by his wife, Martha.

[1.] The first question made is, whether this trust was executed or *executory* at the time of the *conversion* of the slave by the defendant. The slave was converted by the defendant before the expiration of the nine months from the death of Bedingfield. We are clearly of the opinion, the trust was *executory*, at least, until the expiration of the nine months from the death of Bedingfield, for the reason, that the trustees were required, by the trust deed, to make a *conveyance* of the trust property to the *cestui que trusts* at the expiration of that time—*there was something for the trustees to do. Edmondson and Wife vs. Dyson*, 2*d Kelly's Rep.* 321. At the time of the conversion of the property by the defendant, the absolute legal title thereto was in the plaintiffs.

[2.] The plaintiff in error also insists, that inasmuch as Mrs. Bedingfield married during the pendency of the suit by the trustees against the defendant, that her husband should have been made a party to that suit. Although the suit is in the name of

the trustees, *for and in behalf of Mrs. Bedingfield*, yet, we think it is, for all legal purposes, a suit by the trustees, to recover damages for a conversion of the property by the defendant, as against *their title*. They allege they were possessed of the negro slave, Thomas, as of *their own property*, and that the defendant converted him to his own use, to *their damage* one thousand dollars. The words in the first part of the plaintiff's declaration, "for and in behalf of Martha Bedingfield," may be regarded as *surplusage*.

The suit was properly brought in the name of the trustees, in whom the legal title was vested at the time of the conversion of the slave by the defendant, and the Court below did not err in deciding that the husband of Mrs. Bedingfield was not a necessary party.

The other exceptions taken to the charge of the Court to the Jury, may all be included in one general objection, and that is, to the rule of damages stated by the Court.

The Court below instructed the Jury, that the measure of damages must be the value of the property at the time of the conversion, and reasonable hire therefor until the marriage of Mrs. Bedingfield.

[3.] The general rule in actions of trover is, that the measure of damages will be the value of the property *at the time of conversion*, with interest thereon from that time. *Wilson & Gibbs vs. Conine*, 2 *Johns. Rep.* 280. *Bissel vs. Hopkins*, 4 *Cowen's Rep.* 53. The rule of damages for the conversion of negroes, is the value of the property *at the time of conversion*, and the value of their *labor*, in addition to the value of the property from that time. *Banks vs. Hatton*, 1 *Nott & McCord's Rep.* 221. *Hatton vs. Banks*, *Ib.* 223. The principle on which the Courts proceed in awarding damages in actions of trover is, that the plaintiff is entitled to a *full indemnity* for the injury sustained, by reason of the *wrongful conversion* of his property by the defendant; that the defendant shall not derive any benefit by his own *wrongful act*.

[4.] We do not desire to be understood as deciding, that when the chattel converted is not of a *fixed and determinate* value, evidence may not be given of its value, as well at the time of the trial as at the time of the conversion; for such evidence, when the value of the chattel *fluctuates*, would, in our judgment, be admissible. *Greening vs. Wilkinson*, 11 *Eng. Com. Law Rep.* 499. *West vs. Beach*, 3 *Cowen's Rep.* 83.

The plaintiff in error, however, contends, that notwithstanding the legal title to the property may have been in the trustees at the *time of the conversion by the defendant*, when the nine months expired after the death of Bedingfield the trust was *executed*, the legal and equitable title to the property then vested in her, and the plaintiffs, as trustees, were only entitled to recover hire for the negro, until the expiration of the nine months from Bedingfield's death. To answer this objection, it is necessary that we should consider the duty and responsibilities of trustees. It may be admitted as a general rule, that the power of trustees over the legal estate vested in them, exists only for the benefit of the *cestui que trust*. The trustees in this case were bound to act in good faith, and to exercise reasonable diligence to secure and protect the trust property for the benefit of the *cestui que trusts*; they were bound to exercise the same diligence with regard to the trust property, as if it had been their own, to prevent any waste or injury being done to it. 2 *Story's Eq.* 510, 512, 516, §§1268, 1269, 1275. If the trustees, with a knowledge that the defendant had converted the slave, Thomas, to his own use, had negligently permitted him to have removed him beyond the jurisdiction of the State, so as to have placed it out of their power to deliver him to the *cestui que trusts*, according to the directions contained in the trust deed, such negligence and careless indifference on their part, would have made them responsible for the value of the slave. The very object of their appointment was to protect and preserve the trust property for the benefit of those who were entitled to it under the trust deed. At the time the property was converted by the defendant, the legal title thereto was in the trustees. They were in duty bound to protect that property, and to use all legal and proper remedies to reduce it to possession, or the proceeds thereof, so as to turn it over to their *cestui que trusts*, in the due execution of the provisions of the trust deed. Their duty as trustees cannot, therefore, be considered as *fully executed*, until they had a reasonable time, according to the ordinary course of judicial proceedings, to reduce the property to possession, or the damages given by law for a wrongful conversion thereof. In *Guphill vs. Isbell*, (1 *Bailey's Rep.* 232,) it was held, that the trustee was entitled to the *possession* of the trust property, even against his *cestui que trust*, until the trust was *fully executed* or surrendered by the trustee. It was also held in that case, that

the trustee was entitled to a lien on the trust property, for all the expenditures incident to the execution of the trust, and that a Court of Equity would not divest him of the possession of the trust property without providing an indemnity. The trustees here, must necessarily have expended money in the employment of counsel, and in the prosecution of the suit against the defendant, for which they are entitled to be remunerated out of the trust property, and a final settlement necessary between the trustees and the *cestui que trusts*, before the trustees turn over to them the entire trust property in their hands, or the proceeds thereof. Whatever may be considered the rights of the respective parties in a contest as between the trustees and the *cestui que trusts*, as to the *right of possession* immediately after the expiration of the nine months from the death of Bedingfield, we are very clear it does not lie in the mouth of the defendant, who is a mere *wrong doer*, who converted the property as against the *legal title of the plaintiffs*, to raise the objection, that the trust was executed in Mrs. Bedingfield.

The defendant *converted* the property of the plaintiffs, and they are entitled, under the general rule of law, to recover the value of the property commensurate with their title at the *time of the conversion*, and the value of the labor of the slave from that time, if not up to the time of the trial, at least to the time of Mrs. Bedingfield's intermarriage, as charged by the Court below. In *Finch vs. Blount*, (32 *Eng. Com. Law Rep.* 591,) which was an action of trover for a horse and cart, evidence was offered on the part of the defendant, under the plea that he did not convert them, to show that the plaintiff was not the real owner of the horse and cart, and although the plaintiff might be entitled to a verdict for damages, such damages ought not, necessarily, to be extended to the whole value of the property. The Court rejected the evidence, and held, that the measure of damages was the value of the property. *Patterson, J.* remarking, "I have never heard, that where property is taken, the plaintiff is to have a farthing damages, and the defendant keep the property—that would be allowing the defendant to take advantage of his *own wrong*." *Cook vs. Hartle*, (34 *Eng. Com. Law Rep.* 528.) Where an action of trover, or trespass, is brought by a bailee of chattels against a *wrong doer*, he is entitled to recover the *full value* of the property as the measure of damages, for the reason that he is answerable

over to the bailor. 2 *Bl. Com.* 452. *Heyden & Smith's Case*, 13 *Coke's Rep.* 69. *Lyle vs. Barker*, 5 *Binney's Rep.* 457. *White vs. Webb*, 15 *Conn. R.* 502. In *Heyden and Smith's* case it was held, "If after taking the goods, the owner hath his goods again, yet he shall have a general action of trespass, and upon the evidence, the damages shall be mitigated. So is the better opinion in 11 *H.* 4, 23, that he who hath a special property in goods, shall have a general action of trespass against him who hath the general property, and upon the evidence, damages shall be mitigated; *but clearly the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over.*"

[5.] The distinction seems to be, that if the action of trover or trespass be brought by a *bailee* or *special property-man* against the *general owner*, then the plaintiff can recover the value of his *special property only;* but if the suit is against a *stranger* or wrong doer, then the plaintiff recovers the *full value* of the property, and holds the balance, beyond his own interest, for the general owner.

The case for the plaintiffs, as made upon the record, is much stronger, in our judgment, than that of a mere bailee who is chargeable over to his bailor. They are not only responsible over to the *cestui que trusts* for the trust property placed in their hands, but were clothed with the *absolute legal title* thereto at the time of the conversion by the defendant.

The Court below did not err in its charge to the Jury, against the plaintiff in error, on this branch of the case.

[6.] There is another ground of error assigned upon the record, and although it does not affect the merits of the case, and will not alter our judgment, yet, as a matter of practice, we think the question ought to be settled. The plaintiffs' counsel in the Court below, offered the testimony of R. M. Orme, one of the publishers of the Southern Recorder, a newspaper in which the Sheriff's sales of Washington County were published, under the law requiring such sales to be published in one of the public Gazettes of this State. The answers of the witness contained a copy of the Sheriff's sale from the newspaper on file in his office, *verified by his oath.* This evidence was objected to and ruled out by the Court.

The plaintiffs' counsel then proved by E. S. Langmade, that he went to the office of the Southern Recorder, and there made a

copy from the paper of the advertisement, and from that copy, made a copy on the interrogatories directed to Orme, and that the copy on the interrogatories, was a copy of the advertisement taken from the paper at Milledgeville. This copy of the advertisement on the interrogatories was objected to, because it was the copy of a copy; but the objection was overruled, and the evidence admitted; whereupon the defendant excepted. The best evidence of the advertisement of the Sheriff's sale in the public Gazette is, the production of the paper containing the advertisement; but if, in the exercise of ordinary diligence, that cannot be done, then, in our judgment, a copy made out by the publisher of the paper, from the papers on file in his office, *verified by his oath*, would be admissible as the next best evidence. The copy on the interrogatories, made from a copy by Langmade, was improperly admitted in evidence, and the copy made out by Orme, one of the publishers of the paper, from the file of papers in his office, and verified by his oath, was improperly rejected by the Court, provided ordinary diligence had been shown to procure the paper containing the advertisement.

As the rejection and admission of this evidence does not affect the merits of the main question in controversy between the parties, the judgment of the Court below must be affirmed.

Judgment affirmed.

No. 74.—Samuel Robinson and Henry Wood, propounders of the last will of Elisha King, plaintiffs in error, *vs.* Calvin King and others, caveators.

[1.] Under the Statute of Frauds, requiring wills to be subscribed by the attesting witnesses, *in the presence* of the testator, it is not necessary that the witnesses should be in the same room or the same house with him, or that the testator should, in fact, see the witnesses subscribe their names; but it is necessary that the situation and circumstances of the testator and witnesses are such, as that the testator, in his actual position, might have seen the act of attestation.

[2.] The following clause in a will, to wit: "It is my will and desire that my

old servant, Writ, and her five children, to wit: Mat, Sherrod, Chany, Dilla and Fanny, and her husband Jacob, may be made to live comfortable, under the superintendance of my friends, Samuel Robinson and Henry Wood, into whose care and under whose protection I do hereby give and place the negroes herein named, in view of their being treated with humanity and justice, subject to the laws made and provided in such cases:" *Held*, to be on its face in conflict with the Act of 1818, against manumission, and void.

[3.] Parol testimony held to be admissible, to show that a will is illegal and void, as being in conflict with the laws of the State against manumission.

Caveat, in Washington Superior Court, March Term, 1849. Tried before Judge HOLT.

A caveat was entered to the probate and recording of the will of Elisha King, deceased, on sundry grounds, two only of which have been reviewed before this Court, viz:

1st. That the will was not properly attested by the witnesses to the same; and

2d. That the following clause is void under the Statutes of Georgia, prohibiting the manumission of slaves—"It is my will and desire, that my old servant, Writ, and her five children, viz: Mat, Sherrod, Chany, Dilla and Fanny, and her husband, Jacob, may be made to live comfortable under the superintendance of my friends, Samuel Robinson and Henry Wood, into whose care and under whose protection I do hereby give and place the negroes herein named, in view of their being treated with humanity and justice, subject to the laws made and provided in such cases."

Upon the trial on appeal from the Court of Ordinary, it was in evidence that, at the time of the attestation of the will, the testator was lying in bed and signed the will, which was then taken into the piazza, some ten feet distant from the testator, to a table, and there subscribed by all the witnesses; but the situation of the table was such, that the testator could not see the witnesses attest the will. They were out of the room not more than three or four minutes. The testator was not able to rise from bed without assistance.

Parol testimony was offered to prove, by the admissions of Samuel Robinson and Henry Wood, the executors and legatees, that the object and intention of the testator in bequeathing the slaves to them, was to avoid the manumission laws of Georgia, and virtually to set them free.

Counsel for propounders objected to the testimony. The objection was overruled, and propounders excepted.

It was testified by Joseph Bangs, that "Robinson, after the death of King, asked the advice of witness what to do; that King, by his will, intended to free his negroes, and said he was afraid the community would think hard of him; that he had written a will to free the negroes, and had told testator he could free them; that he, Robinson, did not know then that it was against the law." Dr. J. S. Smith testified, that "Robinson told him, that old man King wanted to free his negroes, and asked witness' opinion of a draft of a will he showed him." One of the subscribing witnesses testified, that at the request of testator, he "read over to him the law on the subject of emancipating slaves, before the will was signed. After he read the law, testator turned over and said, 'well, they must go back again.' When witness got there in the morning, Henry Wood was there, and stated to witness, that Elisha King wanted to write his will and free his negroes."

The Court charged the Jury, that from the face of the instrument itself, it was the opinion of the Court, that the testator intended to give an estate in the negroes different from what the law admitted, and that the Jury were at liberty to ascertain that intention, either from the instrument itself, or from testimony, or from both together.

To all which charge counsel for the propounders excepted.

Counsel for propounders, among other things, requested the Court to charge, "That an actual presence of the testator when the will is subscribed by the witnesses, is not required by law; but that there is a constructive presence, and that the testimony in this case makes such a case of constructive presence as to satisfy the provisions of 29 *Charles II.*"

The Court refused so to charge, and counsel for propounders excepted.

JOHNSTON & THOMAS and I. L. HARRIS, for plaintiffs in error.

Points made by R. M. JOHNSTON—

1st. Parol testimony is inadmissible to explain the intention in the will of a testator. 1 *Jar. on Wills*, 350. *Cheney's Case*, 5 *Rep.* 68. 1 *Wend. Rep.* 549. 1 *J. C. R.* 234.

2d. It is admissible only, 1st, to remove a latent ambiguity, and

2d, to rebut a resulting trust. It is admissible in the first, because the ambiguity itself is created by parol testimony. 1 *Johns. C. R.* 234. 1 *Ves. Jr.* 259. 7 *T. R.* 148. 1 *Wend.* 549. 14 *John. Rep.*

3d. Where the will admits of two constructions, that is to be preferred which will tend to make it good. 2 *Jar.* 743. *Bac. Abr. title Will*, 539. 3 *Bur.* 1634. *Petersdorff, Abr. title Devise*, 143. 4 *Ves.* 311. 3 *P. Wms.* 260.

4th. When the will admits of two constructions, one consistent with, the other against law, the first shall be taken.

5th. A testator is rather to be presumed to calculate on the dispositions of his will taking effect than the contrary. 2 *Jar.* 745, *and authorities there referred to.*

6th. Effect is to be given to every will if a meaning can be found. 19 *Ves.* 664.

7th. Words of recommendation in a will are sufficient to make a bequest valid. 19 *Ves.* 664. 14 *J. R.* 1.

8th. The words of this will are not within the provisions of the Statute of 1818, forbidding the manumission of slaves. *Prince's Digest*, 975.

C. J. Jenkins and E. H. Baxter, for defendants in error.

Points made by C. J. Jenkins—

1st. The 3d clause of the paper propounded being caviated, on the ground that the object intended to be accomplished by it is *illegal*, parol evidence is admissible. Declarations of testator. Declarations of one of two joint legatees. *A fortiori* where a conspiracy in fraud of the law is charged. 2 *Roberts on Wills*, 39, 40. 1 *Eng. Eccl. Reps.* 452, '3. 1 *Greenlf. on Ev.* 334, '5, §§284, 287. 1 *Greenlf. on Ev.* 210, §§171, 172, 174. 2 *Ib.* 576, §190. *Atkins vs. Suryer, et al.* 1 *Pick.* 192. 13 *Ser. & Rawle*, 323, 328. *Prince*, 787, 794, *or Hotchkiss*, 806, 807.

2d. The terms of that clause do not imply a gift of the absolute property in the slaves to Robinson and Wood, but create a trust, in contravention of the Act of 1818, inhibitory of manumission, direct or virtual. *Ward on Legacies*, 1, 3. 1 *Roper on Legacies*, 1. 2 *Blackstone's Com.* 441. *Lewin on Trustees*, 15. 2 *Story's Pg.* 275, §964. 2 *Roper on Legacies*, 297. *Vance et al. vs. Crawford et al.* 4 *Ga. Reps.* 445.

3d. There is no ground for the distinction of actual and constructive presence of testator whilst witnesses are subscribing a will of lands. The real question is, whether or not, in the relative positions of the testator and the witnesses, at the moment, the former could see the latter subscribe. In this case the concurrent testimony of the subscribing witnesses is that he could not. 2 *Greenf. on Ev.* 564, §678. *Eddon vs. Hurdey*, 7 *Har. & John.* 61. *Russel vs. Falls*, 3 *Har. & McHen.* 457. *Brodwick vs. Brodwick*, 1 *Peere Wms.* 239. 1 *Maule and Selwin*, 294. *Neel vs. Neel*, 1 *Leigh*, 6.

IVERSON L. HARRIS, for plaintiffs in error.

Presence may be constructive as well as actual. Nor is actual presence, (if the Court should hold that the Statute required that,) limited in signification in philological works to being face to face, or in view.

The clause of the will making devise to plaintiffs in error, conveys a gift, and vests absolute property in them, and is not a mere trust or confidence. The words, "into whose care and under whose protection I do hereby give and place the negroes herein named," and the words, *I do hereby give unto them the aforesaid negroes, and do hereby deliver to them possession thereof*, convey precisely the same ideas, impose the same duties, and differ in no respect, except that the testator has expressed what necessarily follows and is implied under the last form of devise. No one will deny that the last is a good devise. It is difficult to perceive how the first can be denied to be efficacious, if they only differ as is stated.

The testator places the negroes under the "superintendance" of the plaintiffs, and thereby subjects them to the control, power, discretion and dominion of the plaintiffs. The words, "I do hereby give," construed in connection with *superintendance*, makes it an absolute devise of them as property; and the trust and confidence indicated by the words, that the negroes "may be made to live comfortable," and "in view of their being treated with humanity and justice," "subject to the laws made and provided in such cases," if violated, can be enforced only by the penal laws of the State compelling, to a certain extent, these moral duties to be performed.

There is no trust, express or implied in the clause examined, in reference to the *title*. No one, under the Statute of 1818, (*Prince's Digest*, 795,) will contend that it is an express trust for the purpose of effecting, or endeavoring to effect, the manumission of the slaves.

Nor can it be an attempt to manumit *indirectly*, for by the terms of the will, there must be either the allowing and securing, or attempting to allow and secure to the slave, *the right or privilege of working for himself*, or of allowing and securing to the slave the *profits* of his labor or skill.

Unless, then, the one or the other of these was designed by the testator, and that design collected from the instrument alone, there can be no implied trust; therefore no violation of the Act of 1818, or attempt to violate it.

The Court erred in allowing evidence of the sayings of Robinson, the executor, with a view to ascertain the intention of the testator, and the motive which influenced him, there being no latent ambiguity in the will. 3 *Cowen's edition Phil. Ev. note*, 960, *p.* 1425. *Ib. note* 961, *p.* 1428. *Ib. note* 986, *p.* 1478.

To allow such testimony is virtually to allow a repeal of the 22d section of the Statute of Frauds, and to substitute therefor the testimony of one witness in lieu of three. It moreover substitutes the uncertain memory of one witness, in lieu of the fixed meaning and the precise and very language of the testator himself. *See* 1 *Phillips' Ev.* 548.

By the Court.—NISBET, J. delivering the opinion.

[1.] The Statute of Frauds requires the attestation of a will of real estate to be "in the presence" of the testator. The first question in this case is, whether the will of Elisha King was subscribed in his presence. The testator signed the will in bed, and was not able to get up without assistance. The witnesses wrote their names to the will in a piazza adjoining the room where the testator lay, and were some ten feet distant from him. The room in which the testator was, communicated with the piazza by a door, but the situation of the testator and of the witnesses was such that the testator could not see the witnesses attest the will. This, we hold, was not an attestation "in the presence of the testator."

This requirement of the Statute is to prevent a fraud upon the testator, by substituting another will. The law requires the attestation to be in his presence, that he may have occular evidence of the identity of the instrument attested as his will. The construction of this clause of the Statute of Frauds is well settled. It is not necessary that the testator shall actually see the witnesses subscribe. If this was required a blind man could not make a devise. The simple turning of the head, or closing of the eyes at the moment of attestation, although done at the side of the testator, would, if that strictness was required, defeat his will. Nor is it necessary that the testator and the witnesses shall be in the same room, or even the same house. And, on the other hand, if they are in the same apartment, and the testator's view of the proceedings is necessarily obstructed, the attestation is insufficient. The rule is, *if the situation and circumstances of the testator and witnesses are such, as that the testator, in his actual position, might have seen the act of attestation, it is a good attestation.* I consider that this is a firmly settled rule of law, and shall not review the authorities to prove it, but content myself with a full reference to them. At the same time I admit that peculiar cases might occur, where modification of this rule might be admissible. I state it as the general rule, applicable to all ordinary cases and as controling this case. *Shires vs. Glasscock*, 2 *Salk.* 688. 1 *Ld. Raymond*, 507, *S. C. Winchelsea vs. Wauchope*, 3 *Russ.* 441, 444. *Todd vs. Earl of Winchelsea*, 2 *C. & P.* 488, *S. C. Davy vs. Smith*, 3 *Salk.* 395. *Russell vs. Falls*, 3 *Har. & McHen.* 463, 464. *Doe vs. Manifold*, 1 *M. & S.* 294. *Casson vs. Dade*, 1 *Bro. Ch. Cas.* 99. *Dewey vs. Dewey*, 1 *Metc.* 349. 1 *Show.* 89. *Carth.* 79, *S. C. Edelen vs. Hardy*, 7 *Har. & J.* 61. *Neil vs. Neil*, 1 *Leigh*, 6. 1 *P. Will.* 740. 1 *M. & S.* 294. *Newton vs. Clarke*, 2 *Curtis*, 320. 7 *Eng. Eccl. R.* 125. *Ib.* 150. 2 *Greenl. Ev.* §678. *Powell on Devises*, (*Jarm. Edit.*) 80 *to* 112.

If the situation of the parties is such that the testator may see the attestation by rising from his bed, it is not a good attestation. He must be able to see it in *his actual position.* In this case the testator was in bed and unable to rise without assistance, and by the testimony, the situation and circumstances of the testator and witnesses were such as that, in his actual position, he could not see the attestation. It is a plain case, and the decision of the Circuit Judge was right.

[2.] The Circuit Judge held that the following clause in the will of Mr. King is illegal and void upon its face, it being in conflict with the Act of 1818, against the manumission of slaves, because the intention of the testator was to give an estate in the negroes mentioned, different from what that Act admits, to wit: "It is my will and desire that my old servant, Writ, and her five children, to wit: Mat, Sherrod, Cherry, Dilla and Fanny, and her husband, Jacob, may be made to live comfortable under the superintendance of my friends, Samuel Robinson and Henry Wood, into whose care, and under whose protection, I do hereby give and place the negroes herein named, in view of their being treated with humanity and justice, subject to the laws made and provided in such cases."

It is our judgment that this clause is void, because it is in conflict with the Act of 1818. We arrive at this conclusion irrespective of the parol testimony which was admitted on the trial, and upon a construction of the clause itself.

By the Act of 1801, it is made unlawful for any person to manumit any slave, or any person of color who may be deemed a slave at the time of passing the Act, in any other manner or form than by an application to the Legislature for that purpose. *Prince*, 787. Penalties are prescribed in this Act for its enforcement. It is amended by the Act of 1818, which re-enacts the provision above referred to, with additional penalties. By the 4th section of the Act of 1818, it is declared that, "all and every will and testament, deed, whether by way of trust or otherwise, contract, agreement or stipulation, or other instrument in writing, or by parol, made and executed for the purpose of effecting, or endeavoring to effect, the manumission of any slave or slaves, either directly by conferring or attempting to confer freedom on such slave or slaves, indirectly or virtually, by allowing and securing, or attempting to allow and secure to such slave or slaves, the right or privilege of working for his, her or themselves, free from the control of the master or owner of such slave or slaves, or of enjoying the profits of his, her or their labor or skill, *shall be and the same are hereby declared to be utterly null and void.*" This section makes all persons executing such will, deed, &c. or parol stipulation, and also, all persons who may be concerned in giving effect to them, by accepting a trust or otherwise, liable to a heavy penalty. *Prince*, 794, '5, '6.

In *Spaulding vs. Grigg*, (4 *Ga. Rep.* 75,) we have given generally our views as to the intention and policy of this Act. It may be sufficient now to say, that the Acts of the Legislature against manumission, look to the prohibition of all manumission, and of all attempts to effect it, directly or indirectly. The policy of the State is to prevent it absolutely. The intention of the Legislature farther was to prohibit qualified manumission—to prohibit owners of slaves from placing them in a situation where, according to law, they would be pronounced slaves, yet where they would be entitled to some of the rights and immunities of freemen. In the position, for example, where they might have the control of their own time, and enjoy the fruits of their own skill and labor. To effectuate this policy, all wills and deeds, contracts or verbal stipulations, having for their object the manumission of a slave, or an attempt to manumit a slave, directly or by the creation of a trust, *are declared null and void.* If, therefore, it is apparent upon the face of this will, that it was the intention of the testator, directly or by creating an agency or trust, either to manumit these slaves, or to attempt to manumit them, or to place them or attempt to place them in a situation where they might be enabled to work for themselves, free from the control of a master, or where they might enjoy the profits of their skill or labor, it is illegal, and by Statute void. Our construction of this will is, that the testator did not intend to give these negroes to Messrs. Robinson and Wood, but to make them agents or trustees, to hold them in order that they might enjoy the privileges of manumission. He, in other words, intended to declare a trust, which was practically freedom in their hands. Whether, aside from the Acts against manumission, he was successful in declaring the trust in such way as would make it capable of execution, is an immaterial question. Under the Act of 1818, it is enough, if he has attempted to create this trust, to make it null and void. Perhaps the best definition of a will or testament is this—"The legal declaration of a man's intentions which he wills to be performed after his death." What then is the intention declared in this instance? It is not to *give* these negroes to Robinson and Wood as a legacy. A legacy is the transfer, by gift in the will, of the entire property in the chattel—the whole interest, the entire dominion passes. Here there are no words used which import an intention to part with the property in the slaves, and to clothe

these persons with the title. If the testator had simply said, *I give* Writ and her children to my friends Robinson and Wood, without anything farther, the intention to pass the fee would have been sufficiently declared. But not so; for he does not say that he gives the slaves to them. The word *give* in the clause is so qualified, as we shall see, as to convey no title. No words of perpetuity, or of inheritance, or of transfer are used. Indeed, it is very obvious that the testator, with care, avoids an absolute gift. Much stress was laid in the argument on the words, *I do hereby give;* but the connection in which they stand, clearly evinces that they were intended to mean no more than a tradition of the negroes *into their care and under their protection.* After declaring that it is his will and desire that the negroes should be made to live comfortable under the superintendance of Robinson and Wood, he proceeds to say, "into whose care and under whose protection I do hereby give and place the negroes herein named." He means then, not to *give* the negroes *to them*, but give them into their care. To *place* them in their hands to create an agency for their protection. The words declare no such intention as that these slaves shall be theirs—liable to their debts and subject to their alienation. The limitation of the bequest is for *the care and protection* of the negroes. The word *give* if it is significant of a gift, means a gift in trust; that they will *superintend* them, take *care of* and *protect* them. That such is the will of Mr. King, is obvious from the whole drift of the clause. Robinson and Wood are not the objects of his bounty, but the negroes are. They are the subjects of his solicitude. Their *comfort* in life is the object which stands prominently forth in every word of the will. The object is declared—he expresses that to be his will and desire—and they are placed under the *superintendance* of these convenient co-workers, "in view of their being treated with humanity and justice." Now, either the property in these negroes is in them or it is not. That it is not is clear. If not, what would be their condition in their hands at the death of the testator? That of quasi servitude and of practical freedom. Precisely that condition into which the Legislature has declared they cannot be placed. If I am right in this construction, then the last words of this clause, "subject to the laws made and provided in such cases," mean nothing. Suppose a testator should manumit his slaves out and out, and yet add, *subject, nevertheless, to the laws*

in such cases made and provided, would it be held that this last clause would make the will a good one? I trow not.

The *intention* is clearly, to my mind, *declared* in this will, and the insuperable difficulty is, that the declaration of intention is *not legal*. Upon the construction of the paper, then, we agree with Judge *Holt*, that this will, as to the bequest to Robinson and Wood, is void.*

[3.] The Circuit Judge admitted parol testimony to show the intention of the testator in the item of the will in relation to the slaves, and that is the only remaining question which was argued before this Court.

The Statute, as I have shown, makes void all kind of instruments in writing manumitting or attempting to manumit slaves; and also, all parol agreements or stipulations having the same objects, and expressly forbids all trusts for the like ends, no matter how created. A will, then, which seeks to accomplish on its face, any of these objects, is void because illegal. So, also, if unexceptionable on its face, it is void if there is a secret parol agreement, by creating a trust or otherwise, to accomplish the same ends. According to the spirit and policy of the laws of Georgia, and more particularly of the Act of 1818, we think it competent to show by parol, that a will is void, because against the law. No man can make a will against the law. That would be to make all men law-makers by their last wills and testaments. A paper purporting to be a will, which is in conflict with the laws, is no will. It is competent, by parol, to show that a will is illegal. Not to give a construction to the words of the will, not to show what the testator meant in the provisions of a will, but to show that it is void—no will, because against the law. I believe there is no doubt but that the proposition stated is true upon general principles. The policy of the Manumission Laws of Georgia, imperiously requires such a rule, if it were not so true. Without it, the whole effect of the laws might be, would be defeated. Secret parol trusts would abrogate the laws. They (the laws) have declared, that all trusts, by parol or otherwise, are void—this being so, the testimony is, by the Act itself, made admissible to prove them void. A law which makes a secret parol trust illegal, *ex vi termini*, authorises its proof. It has never been questioned

*See *Vance et al. vs. Crawford et al.* 4 *Ga. Reps.* 445.

that parol testimony is admissible to show usury in a written contract; or that a contract is founded on a gaming consideration; or for the compromise of a felony; or on any account illegal. Why should not the principle apply to wills as well as to deeds or other contracts? Wills are void by our laws, which in any form seek to manumit a slave—they are illegal and their illegality may be shown. Fraud vitiates all contracts, all transactions—frauds upon the law as well as frauds upon the parties. Where there is a devise or conveyance to trustees, upon a secret understanding that the property is to be applied to purposes which the law forbids or will not allow to take effect, that is a fraud upon the Legislature, as well as upon the parties who would become entitled upon the failure of the illegal gift, and parol evidence is admissible to prove the transaction. This is the general rule. *Hill on Trustees*, 164. *Mucklestern vs. Brown*, 6 *Vesey*, 52, 67. *Strickland vs. Aldridge*, 9 *Vesey*, 516. 2 *V. & B.* 259. *Podmon vs. Gunning*, 7 *Sim.* 644. *Edwards vs. Pike*, 1 *Ed.* 267. 2 *Atk.* 156. *Pring vs. Pring*, 2 *Vern.* 99. 2 *Crabb's Law of Real Property*, 550, 551. *R. vs. Lady Partington*, 1 *Salk.* 162. *Attorney General vs. Duplessis*, *Parker*, 144, 160. *Addington vs. Carne*, *Barnard*, 130.

Let the judgment of the Court below be affirmed.

No. 75.—Thomas McGehee, plaintiff in error, *vs.* Francis A. Cherry *et al.* defendants.

[1.] Bonds, notes and *other choses in action*, are not liable to be seized and sold under execution, unless made so specially by Statute.

[2.] A defendant in *fi. fa.* has the right to transfer promissory notes in his possession, to other than judgment creditors, in satisfaction of their claims. A judgment at law has no lien on notes in the hands of the defendant.

Garnishment, in Morgan Superior Court, March Term, 1849.

Thomas McGehee, a judgment creditor of Francis A. Cherry, issued and had served a summons of garnishment upon Bennet

Robinson, who filed his return stating, "He was employed by John Robson to follow Francis A. Cherry, for the purpose of trying to secure a debt he held against him, said Cherry, and that he had a *fi. fa.* belonging to James H. Hollingsworth & Co.; and that he was to receive as his compensation one-half of the amount that he might receive from said Cherry, who had absconded; and that he received from the wife of said Cherry, one note against James L. Horn, for $123 70, due 10th September, 1845, one on William Horn for $30 50, due 28th October, 1845, and one on George D. Ball for $35, due 3d September, 1845, for which he gave his receipt, to be credited on the claims of John Robson and James H. Hollingsworth & Co. for whom he was acting as the agent. It was in Pike County. The said Cherry not to be found when he overtook his family. The transaction was made with his wife."

It appeared that the *fi. fa.* of plaintiff was the oldest lien against the property of Cherry.

Upon this return counsel for McGehee moved to enter judgment against the garnishee for the amount in his hands, which motion was overruled in the Court below, and this decision is alleged as error, on the following grounds, to wit:

1st. That the Court erred in deciding that plaintiff's *fi. fa.* did not bind the notes specified in the deposition of the garnishee.

2d. In holding that it was competent for the agent of the defendant to transfer his notes in payment of debts of an inferior grade, so as to defeat the judgment lien of the creditor.

Foster & Foster, represented by T. R. R. Cobb, for plaintiff in error.

A. Reese, for defendant in error.

By the Court.—Lumpkin, J. delivering the opinion.

[1.] This bill of exceptions is based upon the idea, that a judgment lien attaches upon promissory notes, and that they are liable to be seized and sold under execution. We apprehend this to be a mistake. Bonds, notes and bank shares, until made so by Statute, and *other choses in action*, are not the subject of levy and sale by *fi. fa. Francis vs. Nosh, 7 Geo. II. K. B. cited in Com.*

Dig. tit. Execution, c. 4. *Bing. on Judg.* 111. *Ingalls vs. Lord,* 1 *Cowen,* 240. *McClelland vs. Hubbard,* 2 *Blackf.* 361. *Rhoads vs. Megonigal,* 2 *Barr.* 39.

Our Garnishment Acts are all founded upon the fact that *choses in action* cannot be levied on and sold by the Sheriff; and the same principle that a *chose in action* is not the subject of levy and judicial sale, is recognized in our Attachment Law. When the garnishee returns that he has in his hands, *notes*, bonds and other evidences of debt belonging to the absent debtor, the same are directed to be deposited with the Clerk; and after the plaintiff shall have established his demand, these *choses in action* thus surrendered, are not to be sold as other property, but turned over to the agent or attorney of the creditor, to be collected, and the proceeds, or so much thereof as shall be needed for that purpose, applied to the discharge of the plaintiff's debt. *Prince,* 33.

[2.] The notes, then, which were held by the defendant, Cherry, on Horn and Ball, he had a right to transfer to Robinson as the agent of his other creditors, in payment of their demands; and Robinson having given his receipt to the wife of Cherry for these notes, to be thus applied, before he was summoned, no judgment could go against him.

Let the judgment stand affirmed.

No. 76.—George W. Crawford, Governor, for the use of Geo. W. Tarpley, administrator of Thomas M. Tarpley, plaintiff in error, *vs.* Wyatt Meredith and William F. Bond, survivors, &c. defendants.

[1.] A Sheriff's bond, taken and approved by only *two* of the Justices of the Inferior Court, is not good and valid as a *statutory* bond, according to the provisions of the Statutes of this State.

Debt on bond, in Wilkinson Superior Court. Tried before Judge Merriwether, April Term, 1849.

This was a suit on the official bond of William Cooper, former

Sheriff of Wilkinson County. When the bond was offered in evidence on the trial, it appeared to have been "sealed and delivered in presence of Samuel Beall, J. I. C. William Fisher, J. I. C."

It was objected to by defendant's counsel upon the ground, that if relied on as the official bond of William Cooper, it did not, upon the face of it, show that it had been taken by a majority of the Justices of the Inferior Court, as the law directs; and that as it was attested by two Justices only, the presumption was that it had not been received and approved by a majority of the Justices, as pointed out by law.

The Court sustained the objection and rejected the evidence; which decision is alleged to be erroneous.

COCHRAN & CONE, for plaintiff in error, cited—

3 *Kelly*, 507. 5 *Ga. Rep.* 570. 1 *Peters' Reps.* 318. *Prince's Digest*, 430.

I. L. HARRIS, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question made for the decision of the Court below, as appears from the record, was whether the Sheriff's bond offered in evidence, was a good and valid *statutory* bond. The Court ruled it was not a good and valid statutory bond, and, we think, properly so ruled, for the reason, it appears, on the face of the bond, to have been taken and approved by only *two Justices* of the Inferior Court, whereas, by the 46th section of the Judiciary Act of 1799, Sheriff's bonds are required to be *approved* by the Justices of the Inferior Court, or any *three of them*. *Prince*, 430. By the declaratory Act of 1803, it is enacted, "that every Judge of the Superior, or a *majority* of the Justices of the Inferior Courts of the respective Counties throughout this State, is and are, and, by intendment of law, ought to have been taken, held, deemed and considered as competent in law to *take* the bonds or obligations of Sheriffs, and to qualify them as by law directed." *Prince*, 176, '7.

This bond having been taken and approved by only *two* of the

Justices of the Inferior Court, when the Statute requires it should have been *approved* by at least *three* of them, cannot be said to be a good *statutory* bond. Whether this bond is good as a *voluntary* bond, and binding as such on the parties to it, does not appear to have been raised or decided by the Court.

Let the judgment of the Court below be affirmed.

No. 77.—ADAM CASON, plaintiff in error, *vs.* THOMAS CHEELY & Co. defendants.

[1.] Contracts for the sale of goods, wares and merchandise, are not excluded from the operation of the 17th section of the Statute of Frauds, because they are executory.

[2.] Contracts for goods not *in esse* at the time, and of a peculiar character so as to be unsuited to the general market, to be made by the work and labor and with the material of the vendor, at the instance of the purchaser, are not within the 17th section of the Statute of Frauds.

[3.] But all such contracts as do not *primarily* contemplate work and labor to be done, or material to be furnished by the vendor, at the instance of the purchaser, and for his use and benefit, and in which work and labor are not the *essential* consideration, are within the 17th section of the Statute of Frauds, although work and labor may be requisite to make the goods or to fit and prepare them for delivery.

[4.] Cotton prepared for market: *Held* to be goods and merchandise, within the meaning of the 17th section of the Statute of Frauds.

Assumpsit, in Warren Superior Court. Tried before Judge SAYRE, April Term, 1849.

Thomas Cheely & Co. brought an action of assumpsit against Adam Cason, on an alleged contract made 23d September, 1846, by which Cheely & Co. bargained and contracted with Cason for the whole of his crop of cotton for the year 1846, for which they agreed to pay at seven cents per pound, and Cason agreed to deliver the cotton at the cotton factory of Cheely & Co. as soon as the same could be gathered and prepared for market. The peti-

tion alleged a breach of this contract by Cason, in failing and refusing to deliver the cotton.

To this suit Cason pleaded the Statute of Frauds and Perjuries, 29 *Charles II.*

The Court below overruled the plea and gave judgment for the plaintiffs, and defendant excepted.

JOHNSON & THOMAS and JOS. W. THOMAS, for plaintiff in error.

A. H. H. DAWSON and W. C. DAWSON, for defendants.

By the Court.—NISBET, J. delivering the opinion.

The contract in this case was for the whole of the crop of cotton of the defendant for the year 1846. The plaintiffs below stipulated to pay the defendant seven cents a pound for it, and he agreed to deliver it at their factory as soon as it could be gathered and prepared for market. The contract was entered into in the month of September of that year, and of course after the crop was planted.

The question is, whether it is within the 17th section of the Statute of Frauds, which is in the following words: "No contract for the sale of goods, wares and merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agent thereunto lawfully authorized." *Prince*, 917. There was no part acceptance, or any thing given in earnest, or note or memorandum signed by the parties. In considering this question, it is well to bear in mind, that the object of the Statute is to prevent frauds, and the perjuries which are often resorted to, to sustain them. It was considered by the British Parliament, that in contracts for the sale of goods, wares and merchandise, a wide field for fraud would be opened, and ample inducement and opportunity afforded for perjury, and subornation of perjury, if they were permitted to rest in parol, and to be dependant upon the memory of

men for their enforcement. Hence the requirement, that except in the excepted cases, they should be in writing. What contracts are within this section of the Statute, has been very much controverted in England. The decisions are not uniform or consistent. In fact, they are contradictory. A careful study of them, however, will enable one to arrive at a satisfactory conclusion as to what is the law of England on this subject.

[1.] I state then, in the first place, that a contract is not excluded from the operation of the Act, because it is executory. The starting point of the decisions in England, may be assumed to be the case of *Tower vs. Osborne*, (*Stra. R.* 506.) That case was founded on a contract for a *chariot*, agreed to be constructed for the defendant by the plaintiff, at the instance of the defendant. It was held not to be within the grasp of the Statute. The report of that case is very meagre, but from the case itself, and from the comments made upon it subsequently by *Lord Kenyon* and *Lord Loughborough*, and other eminent Judges, it is manifest that it did not go upon the ground simply that the contract was executory. The contract was for a specific article—a chariot—ordered perhaps to please, in form and color, a capricious fancy—unlike any, it may be, of the kind ever seen or imagined, and, therefore, not saleable in market—a thing which no body would buy but him that ordered it, and if not paid for by him, would prove an entire loss to the maker. It was not a purchase of a chariot *now* made and to be delivered at a future day, but an order, by agreement, for the construction, and delivery when completed, of a chariot. The essential consideration of the contract was, work and labor to be performed, and material to be furnished, and upon that ground, beyond all question, the case went. Such was the view which Lord *Kenyon* took of it, for in *Cooper vs. Elston*, he, speaking of it, said, "that was a mere contract for work and labor." 7 *T. R.* 16. See also, *Rondeau vs. Wyatt*, 2 *H. Bl.* 63.

The case of *Clayton vs. Andrews*, is the next in order of time, and out of that case has sprung the idea that executory contracts are not within the Statute. It was determined upon the authority of *Towers vs. Osborne*, and must be considered as resting upon the same basis with it. *That* was held not to be within the Statute, upon the ground that work and labor was the consideration of the contract, so *this*. In *this*, Lord *Mansfield* does not appear

to be desirous of extending the authority of *that case*, but simply to affirm it. The two cases may be said to be *in pari materia.* True, Lord *Mansfield* says, in *Clayton vs. Andrews*, that the Statute relates only to contracts for the sale of goods, where the buyer is *immediately* answerable, without time given him by special agreement, and the seller is to deliver the goods *immediately*, and from these words the idea started, that an executory contract is not within the Statute. Now, his Lordship's words are in conflict with the case which he quotes as authority. If the view of the Statute which he presents, be considered as an exposition of the case of *Towers vs. Osborne*, it is not too much to say, even of Lord *Mansfield*, that he misconceived that case. These two cases are anterior to our Declaration of Independence, and are the only cases directly on the question determined in England before that time. The case of *Clayton vs. Andrews*, I consider as going no farther than *Towers vs. Osborne*, in its authority. Together, therefore, they only show that contracts, where work and labor are the essential consideration, are not within the Statute. They do not show that, up to that time, (to wit: our Declaration of Independence,) it was settled in England, that contracts are without the Statute, because they are executory. If, however, the case of *Clayton vs. Andrews* be considered as going that length, (and I admit in the reported language of Lord *Mansfield* it does,) then I say, that it is the only case before that time which does go that length. And whilst we are bound to enforce the construction of the Statute of Frauds, as understood at the era of our independence, yet it must be a construction settled by a series of adjudications. One case—certainly one case of doubtful meaning, cannot be considered as settling the construction of a Statute; particularly when that case (which is true as to the case of *Clayton vs. Andrews*) has been repeatedly denied by English Judges to have established a construction of the Statute, and was, very early after it occurred, overruled. (That it was overruled, see *Cooper vs. Elston*, and *Rondeau vs. Wyatt*, *supra.*)

I consider it now as well settled in England and in our States, that the fact that a contract is executory does not of itself take a case out of the Statute. And why should it? The reasons upon which the policy of the Statute rests, apply with greater force to executory than to executed contracts. In the former there is opened a wider field for fraud than in the latter. In the former,

by reason of time, there is more room for the uncertainty, and imperfection and failure of human recollection, and therefore increased chances for perjury. Comparatively little litigation can grow out of an executed contract—the execution concludes in most cases the rights of parties; whereas, where contracts are *to be* consummated, misconstructions of what they are, imperfect compliance, or total failure to comply, are fruitful sources of litigation. If this construction prevails, as said by *Grose*, J. in *Cooper vs. Elston*, it will be a repeal of the Statute. I should remark, too, before passing from this branch of this discussion, that the facts of the case of *Clayton vs. Andrews* show, that it may be reconciled with *Towers vs. Osborne;* for in the former something was to be done to put the article (wheat) into a condition to be delivered. So thought the Judges in *Cooper vs. Elston*. Upon this view of it, it was a case resting upon work and labor.

Now, it is true that those contracts which are held to fall without the Statute, are executory contracts. All contracts for work and labor *to be done*, are executory. As in the case of *Towers vs. Osborne*—a chariot *to be* built; but they do not fall without it because they are executory, but because the consideration is work and labor. A rule that would exclude from the range of the Statute executory contracts, *per se*, would include not only those where work and labor are stipulated for, but all others where the delivery is postponed, and payment also until delivery. For example—a contract for a package of dry goods or a box of hardware, now in store, to be delivered sixty days hence, and to be paid for only on delivery, would be an executory contract, and, therefore, embraced in the rule. But I apprehend no book extant can show a case where such a contract has been held not to be within the 17th section of the Statute of Frauds; and upon this view many of the loose dicta to be found in the books, to the effect that executory contracts are not within the Statute, may receive a consistent solution.

[2.] The distinction upon which this question turns, to my mind, is this—if the contract is for the sale of goods, it is within the Statute, and if for work and labor done, it is not. The real difficulty is to fix a rule by which it may be determined what contracts are for the sale of goods, and what for work and labor done. There are two classes of cases which are easily determinable. Where the article exists at the time *in solido*, and is capable

of immediate delivery, (as cotton in bags,) the contract is clearly within the Statute, as in *Cooper vs. Elston.* All contracts for the sale of goods, existing at the time *in solido*, and capable of immediate delivery, constitute a class about which there can be no difficulty—they are within the Statute, without a case to the contrary. The other class of contracts which are equally free from difficulty, are like that in *Towers vs. Osborne*, where an agreement is made for goods not *in esse*, and, therefore, incapable of immediate delivery, but by the agreement to be made by the work and labor, and with the material of the vendor, and which, when made, may be reasonably presumed to be unsuited to the general market. Such as contracts for the manufacture of goods suited alone to a particular market, or for the painting of one's own portrait. In the former class, the contracts are for the sale of goods upon which no work or labor is to be bestowed. In the latter class, the work and labor and material constitute the prime consideration. They are for work and labor, and are, by authority and upon principle, without the influence of the Statute. *Ex equo et bono*, a man who agrees to bestow his labor in the manufacture of goods for a price, and which price he must lose unless the goods are received by him who ordered them, ought to be paid; and a Statute which would protect the purchaser from liability in such a case, would be alike impolitic and unjust.

The cases which are difficult of determination, are those which partake in some degree of both the classes referred to, yet fall decidedly within neither. Contracts for goods upon which some labor must be bestowed to prepare them for delivery, and which, when ready for delivery, are vendible in the general market. That the law in relation to such contracts was considered unsettled in England in the ninth year of the reign of George IV. is obvious from the Act of Parliament of that year, amendatory of the 17th section of the Statute of Frauds. That Statute, among other things, enacts, that that section of the Statute of Frauds "shall extend to all contracts for the sale of goods for the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be *delivered at some future time*, or may not at the time of such contract be actually *made, procured or provided, or fit or ready for delivery, or some act may be requisite* for the making or *completing* thereof, or *rendering the same fit for delivery.*" This Statute has not been construed so as to repeal the set-

tled law as to the second class of cases which I have referred to. Of course the settled law as to the first class mentioned by me, is not disturbed. This Act, I think, may be considered as declaratory of the paramount opinion in England as to what was the construction of the 17th section of the Statute of Frauds, touching the classes of cases which it enumerates. Which paramount opinion I take to be, that contracts for goods, which at the time *are not actually made, procured or provided, or fit or ready for delivery*, or upon which *some act may be requisite to be done for the making or completing them, or to render the same fit for delivery*, are not necessarily without the operation of that section. Contracts for the purchase of goods upon which some labor is necessary, not to make them, but to prepare them for delivery, have, it is true, been determined not to be within the Statute before it was amended. Such was the contract in the case of *Clayton vs. Andrews*. There *wheat* was bought, which had to be thrashed before it could be delivered. I can see no reason whatever, why all such contracts are not fully within the policy and fair intent of the Statute, nor is their any controlling reason why they should constitute exceptions. From the time of Lord *Mansfield* to this day, I do not find an unvarying course of decision upon the character of contracts last named. We are disposed to adopt a rule in relation to them in accordance with what I take to be the spirit of the Act of 9 *George IV.* which has been sustained in England by many decisions, and which has been very generally adopted by our own Courts.

There really is but one exception to the operation of the Statute, to wit: contracts for work and labor; and this grows out of the palpable injustice of compelling a man, by law, in any case to lose the price of his labor. All cases which are not within the reason of this exception, are not within the exception itself. Hence it is that a contract for goods, (cotton bagging, or cotton cloth, if you please,) which are of pretty uniform value, of common consumption, and, therefore, very generally in demand, with a manufacturer of these articles, is not within the exception, although not *in esse* at the time, and to make which work and labor are necessary. The manufacturer does not necessarily lose the price of his labor—if the purchaser does not take the goods, others will—the work and labor bestowed are in the line of his business, and his work and labor would be bestowed in the production of

such goods had the contract not been made. The goods and their price are the considerations of the contract, and not the work and labor and their price. With greater reason a contract for goods upon which work and labor must be bestowed, not to make them, but to prepare them for delivery, as the threshing of wheat, is not within the exception.

[3.] In the light of all these views, the rule which we adopt and which I find admirably well expressed by Judge *Butler* in *Bird vs. Muhlenburg*, (1 *Richardson's R.* 202,) is this: Such contracts only are excluded from the operation of the 17th section of the Statute of Frauds, "*as primarily contemplate work and labor to be done, at the instance of the purchaser, and for his use and accommodation, so as to make the work and labor of the contracting vendor, or such as he may procure to be bestowed at his expense, the essential consideration of the contract.*" The cases which recognise the principle thus expressed are numerous. I refer specially to a few.

In *Garbut vs. Watson*, there was a verbal contract by the plaintiffs, who were millers, for the sale of a quantity of flour, which, at the time, was not prepared and in a state capable of immediate delivery, because not ground. This was held a contract within the 17th section of the Statute of Frauds. *Abbot*, C. J. said, "in *Towers vs. Osborne*, the *chariot* which was ordered to be made, would never, but for that order, have had any existence; but here the plaintiffs were proceeding to grind the flour for the purpose of general sale, and sold this quantity to the defendant as a part of their general stock." *Bayley*, J. said, "The nearest case to this is *Clayton vs. Andrews*; but that decision was corrected by *Rondeau vs. Wyatt*. This was substantially a contract for the sale of flour, and it seems to me immaterial whether the flour was, at the time, ground or not. The question is, whether this is a contract for goods or for work and labor and materials found. I think it is the former, and if so, falls within the Statute of Frauds." *Holroyd*, J. said, "I am of the same opinion. I cannot agree with the judgment of the Court in *Clayton vs. Andrews*," &c. 5. *B. & Ald.* 613. This case overrules *Clayton vs. Andrews*. It also overrules *Groves vs. Buck*, (3 *M. & S.* 178,) to the same effect with *Clayton vs. Andrews*. See opinion of *Park*, J. in *Smith vs. Surnam*, (9 *B. & C.* 561.) The contract in *Smith vs. Surnam* was for trees growing on the land of plaintiff, to be deliver-

ed to the defendant, and was held within the 17th section of the Statute. *Bayley*, J. said, " It was said that this was a mixed contract for goods and chattels, and for work and labor to be bestowed and performed by the plaintiff for the defendant. It seems to me that the true construction of the bargain is, that it is a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, *was doing work for himself and not for the defendant.*" *Littledale*, J. holds this pointed language—" But where the contracting parties contemplate a sale of goods, although the subject matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller's bestowing work and labor on his own raw materials, that is a case within the Statute. It is sufficient, that at the time of completing the contract, the subject matter be goods, wares and merchandise. I cannot assent to any case which has decided that such a contract is not within the Statute." In *Watts vs. Friend*, A agreed to supply B with a quantity of turnip seed, and B agreed to sell the crop of seed produced therefrom at a stipulated price. This was held to be a contract within the Statute of Frauds, (17th section.) Because, said Lord *Tenterden*, C. J. "the thing agreed to be delivered would, at the time of delivery, be a personal chattel." This is a strong case for our position. Work and labor was here necessary to *produce the article*. It was an agricultural product, to be grown and prepared for delivery by planting and culture, as the cotton in the case at this bar. 10 *B. & C.* 446. To the same effect see 5 *Har. & J.* 213. 8 *Cow.* 215. 1 *D. & R.* 219, *S. C.* 21 *Pick.* 205. 23 *Wend.* 270. 5 *Ib.* 139. 1 *Richardson's R.* 199. 9 *Metclf. R.* 137. 6 *Taunt.* 11, *and generally Chitty on Contracts*, 385, '6, '7. 2 *H. B.* 63. 7 *T. R.* 14. 5 *B. & Ald.* 613. *Mov. & M.* 408. 10 *J. R.* 364. 18 *Ib.* 58.

[4.] It remains to apply these principles to the case before me. The contract was for the delivery of cotton *prepared for market*. I presume that cotton prepared for market will not be denied to come under the denomination of goods and merchandise. This contract was not for work and labor in the production of a peculiar article, and generally unsaleable, for cotton is, beyond any other merchandise in this country, saleable in the general market and in prompt demand; and although work and labor was necessary to make and prepare it, yet the contract does not contem-

plate, *primarily*, work and labor to be done at the instance of the purchaser, and for his benefit, so as to make work and labor the *essential* consideration between the parties. The *cotton, when delivered*, was clearly the subject matter and ultimate object of the contract. The article (cotton) was in the line of the plaintiff's business—that of planting. He had already planted his crop, for the contract for its proceeds was entered into beyond the time (23d of September,) when cotton could be planted and cultivated with success. The same work and labor which he would be required to bestow upon it under the contract, he would have been compelled to bestow upon it if the contract had never been made. This, if there were nothing else to prove it, demonstrates that work and labor were not the consideration of the contract. Whilst he (the plaintiff) was working and laboring to make this cotton, "*he was working and laboring for himself and not for the defendant.*"

This, in our judgment, was a contract for the sale of goods, and within the 17th section of the Statute of Frauds. The plea must prevail.

Let the judgment below be reversed.

No. 78.—Shimei Merritt and others, plaintiffs in error, *vs.* Wm. H. Scott and Thomas N. Beal, administrators of Wm. F. Scott, defendants.

[1.] Marriage articles will be executed *in favor* of all persons coming within the scope of the marriage consideration, and at their instance, but not at the instance of mere volunteers.

[2.] Those having natural claims upon the parties, such as the wife and offspring, and those claiming under or through them, alone come within the scope of the marriage consideration.

[3.] The fact that collaterals are first mentioned in the limitations of the articles, does not bring them within the reach and influence of the agreement.

[4.] Where a Court of Equity executes articles in favor of persons within the scope of the marriage consideration, it will, at the same time, execute them also as to volunteers—it being the rule of Chancery to do nothing by halves.

[5.] Where, upon application to a Court of Equity, the marriage articles are executed partially, viz: in behalf of one of the settlers, without being executed as to the volunteers: *Held*, that upon a subsequent application to a Court of Equity, at the instance of volunteers, the former decree cannot be invoked in their favor.

In Equity, in Baldwin Superior Court. Tried before Judge MERRIWETHER, February Term, 1849.

In the year 1810, John Neves and Catherine Jewell, in contemplation of marriage, entered into the following articles:

"GEORGIA, BALDWIN COUNTY:

"Articles of agreement made and entered into the 17th day of February, in the year 1810, between John Neves and Catherine Jewell, widow and relict of the late Thomas Jewell, deceased, all of the State and County aforesaid, as follows, viz: Whereas, a marriage is shortly to be had and solemnized between the said John Neves and Catherine Jewell, widow as aforesaid, are as follows, viz: that all the property, both real and personal, which is now, or may hereafter become, the right of the said John and Catherine, shall remain in common between them, the said husband and wife, during their natural lives; and then, should the said Catherine become the longest liver, the property to continue hers so long as she shall live, and at her death the estate to be divided between the heirs of the said Catherine and the heirs of the said John Neves, share and share alike, agreeable to the Distribution Laws of this State, made and provided; and, on the other hand, should the said John become the longest liver, the property to remain in the manner and form above.

In witness whereof, the said John and Catherine have hereunto set their hands and affixed their seals, the day and year above written.

JOHN NEVES, [L.S.]

her

CATHERINE ⋈ JEWELL, [L.S.]

mark.

Test: CORNELIUS MURPHY,

JESSE WARD.

The marriage was shortly thereafter consummated, and in the year 1828, John Neves died, leaving Catherine Neves, she surviving.

John Neves left a will, by which he desired, that immediately after his decease, and proof of his will, "that the Court of Ordinary should appoint a proper number of fit persons, who should be commissioned to divide his whole estate, both real and personal, between his wife, Catherine Neves, and his heirs, thereinafter named; that is, that his said wife, Catherine Neves, should have one-half of his whole estate, both real and personal, as aforesaid, for her own proper use, to her and her heirs forever; and that the other or remaining half of his whole property or estate, he disposed of and bequeathed in the following manner, that is to say, that the whole of his half of his said estate he gave and bequeathed to George W. Rowell, son of Capt. Richard Rowell, of the County of Baldwin aforesaid, to him and his heirs forever." Richard Rowell and Myles Green were named as the executors of this will; and by virtue thereof, Richard Rowell, who qualified as executor, took possession of all the estate, amounting to $20,000, of said John Neves.

In 1829, Catherine Neves filed in the Superior Court of Baldwin County, her bill in Equity, charging the above facts, and farther, that the said John Neves owed but few debts, and that she offered to assume the payment of them, and praying an injunction upon Rowell from farther intermeddling with the said property, and that he might be decreed to turn over and deliver the whole of said property to her, as provided in the articles of agreement.

Upon the trial of this bill at the July Term, 1835, the following verdict or decree was rendered:

"We, the Jury, find for the complainant a life estate in the property agreeably to the provisions of the marriage contract, leaving all other persons to contest their rights at her death; and we farther find, that complainant do pay to defendant the sum of nine hundred and two 35-100 dollars, which have been allowed by the Special Jury at this term, upon an appeal from the Court of Ordinary, as expenses and costs incurred by the defendant in proving the will of John Neves, deceased, and resisting the marriage contract between John Neves and Catherine, his wife; and we farther find for the complainant the costs of suit."

In the year 183—, Catherine Neves intermarried with one William F. Scott, and subsequently, in the year 1844, died, leaving no issue.

In 1845, Shimei Merritt, James Green and his wife, and Eli-

zabeth Hunter, the heirs at law and distributees of Catherine Neves, at the date of the marriage articles, filed a bill in Equity in the Superior Court of Baldwin County, charging that the property had largely increased, and praying that one-half of the same might be turned over and delivered by the said William F. Scott to the complainants.

Pending this bill, William F. Scott died, and his representatives were made parties.

On the trial at February Term, 1849, the foregoing facts being in evidence before the Jury, counsel for complainants requested the Court to charge the Jury—

First, that where the parties to a marriage contract or agreement, make no provision for, or stipulation in favor of the issue of the marriage, but make provisions for and stipulate for their heirs at law, in such case the heirs at law are within the marriage consideration, and are entitled to the aid of a Court of Equity, to enforce their rights according to the terms and provisions of the marriage contract.

Second, that the said Catherine, previous to her intermarriage, being possessed of a considerable estate, had a perfect legal right to make the contract, as set forth in the complainants' bill, with the said John Neves; that said contract was binding on said John; that the stipulations and provisions in said contract in favor of the heirs at law of said Catherine, are legal and such as a Court of Equity will enforce, and that, therefore, complainants are entitled to recover one-half of said estate, as it existed at the time of the death of the said Catherine, together with one-half of the increase of the female slaves since that time, and a reasonable hire for one-half of the negroes, and one-half the rent of the land.

Third, that by virtue of the decree rendered in the case of Catherine Neves *vs.* Richard Rowell, said Catherine became seized and possessed of an absolute legal estate of the whole property during her life, with contingent remainders to such persons as at her death might be next of kin or heirs at law of the said John Neves and the said Catherine Scott.

Fourth, that upon the death of said Catherine, said contingent remainders became vested in such persons as answered the description of next of kin or heirs at law of the said John and the said Catherine at that time, and that, therefore, the next of kin or

heirs at law of said Catherine are entitled to one-half of the whole estate.

Fifth, that the execution of the marriage contract, by virtue of the decree rendered in the case of Catherine Neves *vs.* Richard Rowell, in favor of the said Catherine, was, by operation of law, an execution in favor of those who were entitled in remainder after death, and from that time said contract ceased to be executory, and became executed as to all the parties in interest.

Sixth, that the said Catherine having asserted and maintained in a Court of Equity, her right under said marriage contract to the whole of said property during her life, and having enjoyed the same during that time, it is not competent for any one claiming by, through or under her, now to repudiate said contract and thereby defeat the claims of the heirs at law under such contract.

Which instructions the Court refused to give the Jury, and complainants, by their counsel, excepted.

The Court charged the Jury, that by the terms of the marriage articles, Neves took such a title to the property that he might dispose of the same absolutely at his death, subject only to the life estate of Mrs. Neves, she surviving him; that a Court of Equity would not specifically execute marriage articles upon the application of any persons, except those who were within the scope of the marriage consideration, or claiming under such persons, and not upon the application of mere volunteers; that the complainants were not within the scope of the marriage consideration, nor did they claim under those who were; that they were mere volunteers, and as such the Court would not decree the specific execution of the articles in their favor; that while the Court would, upon a bill brought by persons within the scope of the consideration of the marriage, decree a specific execution throughout, as well in favor of the volunteers as the complainants, yet the decree of the Court in the case of Mrs. Neves against Rowell, as executor, was not such a partial execution as entitled the complainants to a farther execution in their favor; that said decree expressly left open all the questions now presented by the complainants, to be litigated at the death of Mrs. Neves, and by requiring her to pay out of the property embraced in the marriage settlement, certain expenses incurred by the executor in reference to the estate of Neves, recognized the legal right of Neves to make an absolute disposition of said property, subject

to the life estate of Mrs. Neves; and that the complainants were not entitled to any relief, but that the Jury, under the law, should find for defendants.

To which charge of the Court complainants excepted.

CONE, for plaintiff in error.

ROCKWELL and W. C. DAWSON, for defendant.

The following points and authorities were submitted by Mr. CONE:

1st. Marriage articles and contracts will be enforced in favor of all persons who are within the marriage consideration. *Atherley on Marriage Settlements*, 126. *Story's Eq.* §986, 987.

2d. Those persons are within the marriage consideration for whom the marriage contract *primarily* and *specially* provides, and the making provision for whom may reasonably be supposed to have been the motive, inducement and occasion for making the contract. *Goring vs. Nash*, 3 *Atk.* 185. *Vernon vs. Vernon*, 2 *Peere Wms.* 600. *Edwards vs. The Countess of Warwick*, *Ib.* 175. *Stephens vs. Trueman*, 1 *Vesey, Sen.* 73. *Ithell vs. Beane*, *Ib.* 214. *Osgoode vs. Strode*, 2 *Peere Wms.* 245. *Trevor vs. Trevor*, 1 *Ib.* 622. *Laney vs. Fairchild*, 2 *Vernon*, 101. 1 *Levinty*, 150, 239. 1 *Chancery Cases*, 103. 2 *Story's Eq.* §986. 2 *Kent's Com.* 172. 1 *Atkins*, 265. 2 *Brown's Ch. Cases*, 494. 2 *Iredell's Eq. Reps.* 241. 2 *Hill's Ch. Reps.* 3. *Tabb vs. Archer*, 3 *Henning & Munford*, 399. 1 *Ib.* 213. 3 *Atkins*, 646. 3 *Cruise's Dig.* 363. *Holt vs. Holt*, 2 *Peere Wms.* 648. 1 *Reps. in Ch.* 84.

3d. Where Courts of Equity execute marriage articles or contracts at all, they execute them throughout. *Story's Eq.* §986. *Atherley*, 125. *Osgoode vs. Strode*, 2 *Peere Wms.* 255. 2 *Ib.* 622. *Goring vs. Nash*, 3 *Atkins*, 186, 190. *Tabb vs. Archer*, 3 *Henning & Munford*, 399.

4th. Courts of Equity will regard that as done which ought to have been done. 3 *Peere Wms.* 215. 1 *Ib.* 522. 2 *Hill's Ch. Reps.* 3.

5th. The decree in the case of *Neves vs. Rowell* was, upon its face and by its terms, a partial execution of said contract, and a Court of Equity never executes marriage articles or contracts in

part, but *in toto.* This Court will consider that as done which then ought to have been done, and decree accordingly.

6th. The legal effect of the decree in the case of *Neves vs. Rowell, Exr.* was to divest the personal representative of John Neves of all title to the property, and to vest the same in Mrs. Neves during her life, with contingent remainders to those who may be entitled according to the terms of the contract.

By the Court.—LUMPKIN, J. delivering the opinion.

It shall be my aim to *popularize* this opinion as much as possible. For while I am not enthusiast enough to believe that the time will ever come when every man will be his own lawyer, still I feel it to be a duty to accommodate our decisions, so far as we can, to the comprehension of those who are not lawyers by profession. The Legislature has seen fit to require the Reports to be distributed to all the Counties in the State. All men here are, by birth-right, hereditary law-makers, and judges upon the reputation and lives, as well as arbiters of the property of their fellow citizens, and that in the last resort. Every man is presumed to know the law. He is bound to do so at his peril. While ignorance of the fact excuses in civil as well as criminal conduct, ignorance of the law does not. It is right, therefore, that every man should read and understand the decisions of the Courts, and to enable him to do this, they should be divested, as far as practicable, of all technicality and intricacy.

Science, so long locked up in cloisters and colleges, has been brought, through the medium of popular tracts and lectures, to the hearth and home even of the cottager, and has thus been made eminently useful to the ordinary business of life. Shall botany, chemistry and philosophy in all its branches, be thus *republicanized,* and the law alone, in this age of inquiry and progress, remain a secret system, which the initiated only can pry into? The Americans, above all others, are a plain, practical people, and they will have justice dispensed to them in a plain and intelligible manner.

Moreover, all factitious distinctions in society, created by professions or any thing else, should be discouraged; and among the benefits resulting from the practice suggested, would be the removal, to a good degree, of those prejudices which now exist in

the bosoms, even of enlightened men, against this noble science, the mother of peace, the handmaid of morality. The sooner she is emancipated from the cumbersome appendages of the scholastic and feudal ages, the better.

With these preliminary observations we will proceed, after a brief summary of the facts, to the questions presented in the record.

This bill was filed by the complainants against the defendants, to enforce certain articles of agreement entered into by John Neves and Catherine Jewell, anterior to their marriage, to this effect: "That all the property, both real and personal, which was or might thereafter become the right of the said John and Catherine, should remain in common between them, the said husband and wife, during their natural lives; and should the said Catherine become the longest liver, the property to continue hers so long as she might live, and at her death to be divided between the heirs of the said Catherine and the heirs of the said John, share and share alike, agreeably to the distribution laws of the State; and, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above."

The marriage, it appears by the bill, was consummated. John Neves died in 1828, some eighteen years thereafter, having previously made and published his will, by which he devised and bequeathed one-half of his estate to one George Rowell.

Catherine, the widow, instituted proceedings on the Chancery side of the Superior Court of Baldwin County, against Richard Rowell, the executor of John Neves' will, wherein she insisted that, under and by virtue of the marriage articles heretofore set forth, she was entitled to the whole property during her life, after paying the debts of the estate, and the expenses of administration; and that said settlement between her and her deceased husband could not be affected or controlled by his testament. The following final decree was rendered by the Special Jury in the premises: "We find for the complainant a life estate in the property, agreeably to the provisions of the marriage contract, *leaving all other persons to contest their rights at her* (Mrs. Neves') *death*."

Under this decree Catherine Neves took possession of the property, real and personal, and remained in possession of the same until her intermarriage with one William F. Scott, in 1835, and

Scott, after the marriage, exercised control thereof. Catherine died in 1844, without ever having had issue. Scott has since died, and this bill is filed by Shimei Merritt and others, who claim to be the first cousins and *heirs at law* of the said Catherine, and as such entitled to recover the one-half of the whole estate which came to the hands of Scott upon his intermarriage with the widow of John Neves.

Are the complainants, *as heirs at law* of Catherine Scott, entitled to the interposition of a Court of Equity, to compel the performance of the marriage articles in their behalf, entered into between John Neves and Catherine Jewell?

We hold the following propositions to be well settled, namely:

[1.] *First.* That marriage articles like these will be specifically executed upon the application of any person within the scope of the consideration of the marriage, or claiming under such person.

But, *secondly*, that in no case whatever will Courts of Equity interpose in favor of *mere* volunteers, whether it be upon a voluntary contract, or a covenant, or a settlement, however meritorious may be the consideration, and although they stand even in the relation of a wife or a child.

And *thirdly*, that where a bill is brought by persons who are within the scope of the marriage consideration, or claiming under them, there Courts of Equity will decree a specific execution throughout, as well in favor of mere volunteers as the plaintiffs in the suit, so that indirectly mere volunteers may obtain the full benefit of the articles in cases where they could not directly insist upon such rights. *Atherley on Marr. Sett. ch.* 5, *p.* 131 *to* 145. *Story's Eq. Jur.* §§433, 706 *a*, 793 *a*, 986, 987, 1040.

[2.] Who, then, are within the reach and influence of this consideration of the marriage? In *Morgan Jenkins* and *Dame Margaret Kemishe*, (reported by Sir *Thomas Hardres*, *p.* 395,) Lord *Hale* remarked, that "the consideration of marriage and of the marriage portion, will run to all the estates raised by the settlement." But this dictum has not been followed, either in England or in this country, but, on the contrary, its authority has been pretty uniformly questioned or denied. Repudiating, then, what is reported to have been said by the Chief Baron in *Jenkins and Kemishe*, I answer, in the language of Lord *Macclesfield*, in *Osgoode vs. Strode*, (2 *P. Wms.* 255,) that "the marriage and marriage portion, support only the limitations to the husband and

wife and their issue, and such as claim under them, which are all that can be presumed to have been stipulated for by the wife or her friends." And that Equity will interpose at their instance only, *all others being volunteers;* and the reason why relief will be granted upon the application of those is, that the settler is under a natural and moral obligation to provide for them, whereas no such reason applies to distant heirs or relatives or mere strangers. And this is what the books mean when they say that the wife and offspring are within the scope of the provisions of the marriage articles, while others are not. Nor is this doctrine new in Equity jurisprudence. All uses and trusts to be raised by any covenant or agreement, must be founded on some meritorious or some valuable consideration, for Courts of Equity will not enforce a mere gratuitous gift, or a mere moral obligation or voluntary *executory* trust. It is otherwise, of course, where the trust has already vested. If A and B, for a valuable consideration as between themselves, covenant to do some act for the benefit of a third person, who is a mere stranger to the consideration, he cannot enforce the covenant against the two, although each one might enforce it against the other. *Sutton vs. Chetwynd*, 3 *Merriv.* 249.

And this acknowledged principle is precisely the point involved in this bill. It is an attempt by the complainants, who, in legal contemplation, are *third persons* to the contracting parties, although distantly related to one of them, to enforce the covenant between John Neves and Catherine Jewell, in their favor. Chancery will not lend its aid for this purpose. 1 *Fonbl. Eq. ch.* 6, §8. 2 *Ib. ch.* 2, §2, *and notes f, g, i.* 1 *Ves. Jr.* 53, 54. 2 *Keen. Rep.* 81, 97, 98. 8 *Sim. Rep.* 324.

Before dismissing this branch of the subject, I would observe, that the *case in Hardres* is not, after all, perhaps, in conflict with this position. For there, the settlement contained a provision for the *first* wife and her offspring, with remainder to the heirs of the body of the husband. And it was held, that it did extend to the issue of the *husband* by a *second wife.*

[3.] While it is not denied in the argument that, as a general rule, Equity will not interpose in behalf of those standing in the attitude of the complainants, yet it is urged, with much ingenuity, that inasmuch as the marriage articles make no provision for the offspring of the intended nuptials, (and in this respect are without a prototype in the books,) that, therefore, the next of kin of

the settler must be considered as occupying the place which issue usually do, and consequently coming within the scope of the marriage consideration. The reply to this is, children are within the reach of the marriage consideration, not because they stand next or nearest to the settler, but because the settler is under natural and moral obligation to provide for them; and this reason does not apply to relations who are distantly connected, although, in point of fact, they may be nearest in blood to the settler.

The wife can enforce the articles, because founded upon marriage, which is a valuable consideration. The issue can claim execution of them, because they come within their influence, the settler being naturally and morally bound to make suitable provision for such. *None others can.* And so rigidly is this rule regarded, that specific performance will not be enforced, even in favor of *brothers and sisters* when claiming as volunteers. *Goodwyn vs. Goodwyn*, 1 *Ves.* 228. *Byas vs. Byas*, 2 *Ves.* 164. And if the conclusion be well warranted, that Equity will not enforce a specific performance, at the instance of a volunteer, although so near a relation as a brother or sister, and we maintain this position to be true, still less will it do so for a more remote relative. *Tudor vs. Anson*, 2 *Ves.* 582. *Strode vs. Russell*, 2 *Vern.* 621. *Marston vs. Senom*, 3 *Bro. C. C.* 170.

[4.] I have already stated, that Courts of Equity would enforce marriage agreements *in favor* of persons *at whose instance* they will lend no assistance. This happens where the articles contain limitations, both to those to whom Equity *will* lend its aid and to those to whom it will *not*. As for instance, if the covenant contain limitations, both to the issue of the marriage, and also to volunteers, for whom the settler is under no natural or moral obligation to provide, if a bill for a specific performance is brought by the issue, the Court will direct the articles to be executed *in toto;* and consequently the settlement will contain limitations in favor of the volunteers. Whereas, if the bill had been brought by the volunteers, the Court would have dismissed it. The doctrine is, that where Courts execute articles at all, they always execute them *in toto* and not partially. *Atherley*, 125.

Now, the complainants insist, that the decree rendered in this case, at the instance of Catherine Neves against Richard Rowell, the executor of her deceased husband, was such a partial execution of the marriage articles, at the suit of the wife, as will inure

in their favor, although volunteers; and that, by reason of this proceeding, they are withdrawn from the operation of the rule which excludes volunteers from moving in their own behalf.

[5.] It is too late now to inquire, neither is this the proper occasion for such a discussion, whether or not such a decree as that quoted could have been rightfully rendered. If it could, then it is certainly not universally true, that Courts of Chancery, where they execute marriage articles at all, *always* execute them *in toto;* for it plainly appears, by the reading of this decree, that the articles were *partially* executed *only* in favor of Mrs. Neves. Moreover, it seems to have been penned with the express design of preventing the present parties from evoking it in their favor. For the Special Jury find and decree, "*that all other persons except Mrs. Neves, be left to contest their rights at her death.*" We cannot see, then, how the parties can be helped by this decree. It may have been irregular, still it remains unreversed, and to say the least of it, it does not place the complainants in any better condition than they occupied before. It was undoubtedly competent for the Court to have enforced the agreement in their favor. It expressly, however, refused to do so, and left them exactly where it found them. How, then, does this proceeding assist the plaintiffs?

Many cases may be found, where settlements have been made through the instrumentality of a party whose concurrence was necessary to its validity, and who procures a provision to be made in favor of one who would not come within the consideration of marriage. Such person is held not to be a mere volunteer, but as falling within the range of the consideration of the agreement. *Goring vs. Nash, Atk.* 186. *Doe ex dem. Hamerton vs. Whitton,* 2 *Wils.* 356. But as was very properly remarked by the learned Judge, in delivering his opinion in a case before him upon these same articles, but between different parties, in the Sixth Circuit Court of the United States for the District of Georgia, "These cases themselves establish that the marriage consideration alone will not support the limitation to a brother or a sister, and are, therefore, adverse to the claim of the present plaintiffs."

Let the judgment of the Court below be affirmed.

No. 79.—THE JUSTICES OF THE INFERIOR COURT OF BALDWIN COUNTY, plaintiffs in error, *vs.* WILLIAM R. BIVINS, relator, defendant.

[1.] When a Sheriff has collected money on an execution and fails to pay it over, the party injured by such failure may have an attachment for contempt against such Sheriff; and if such attachment is procured at the instance of the plaintiff in execution, for his own benefit, and to redress his own individual injury, it is a *civil* process, and such plaintiff in execution is liable to pay the costs of the Sheriff's imprisonment, and not the County.

Application for *mandamus*, before Judge MERRIWETHER. Decided in Baldwin Superior Court, February Term, 1849.

John S. Stephens, former Sheriff of Baldwin County, was attached and imprisoned in the jail of said County, for a contempt of the Superior Court, in failing to pay over money collected on a *fi. fa.* in favor of John A. Breedlove. After remaining imprisoned one hundred and sixty-five days, he was discharged by order of the Superior Court, he being utterly insolvent.

William R. Bivins, the Jailor, applied to His Honor Judge *Merriwether* for a *mandamus*, to be directed to the Justices of the Inferior Court of Baldwin County, requiring them to show cause why a *mandamus* absolute should not issue, requiring them to pay to the Jailor the amount of his fees for keeping and dieting said Stephens.

Upon hearing the return, the only question submitted for the decision of the Court below was, the liability of the County, under the Statutes of Georgia, for the payment of these fees. The Court below decided in favor of the relator, Bivins, and the Justices excepted.

I. L. HARRIS, for plaintiffs in error.

KENAN and W. C. DAWSON, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question involved in this case is, whether the County of Baldwin or the plaintiff in execution, at whose instance

the attachment issued, is bound to pay the cost of Stephens' imprisonment. The attachment, after reciting that a rule absolute was granted against Stephens, as late Sheriff, at the *instance* of John A. Breedlove, plaintiff in execution, against John R. Smith *et al.* for the amount of principal and interest due on the *fi. fa.* stated therein, requiring payment thereof to be made instanter, which Stephens failed to do, the Sheriff was commanded to arrest Stephens, "and him safely keep in close custody, without bail or mainprise, until he shall pay over *to the plaintiff* the sum of nine hundred and sixty dollars, principal, and two hundred and eighty-five dollars, interest, with interest on principal sum from the 25th March, 1842, until paid, at and after the rate of twenty per cent. per annum, and all costs due on said *fi. fa.* and the farther sum of two dollars sixty-two and a half cents, Clerk's cost hereon, and fees for this service."

After being imprisoned one hundred and sixty-five days, Stephens was discharged from imprisonment by the judgment of the Superior Court, on the ground of his being *bona fide insolvent.* Was the late Sheriff, Stephens, imprisoned for a *criminal* offence against the public laws of the State, or was he imprisoned to enforce a *civil* remedy? If he was imprisoned for a criminal offence, and was insolvent, then the County was bound to pay the cost, and the judgment of the Court below was right; but if the imprisonment of Stephens was not for a criminal offence, and intended merely to enforce a *civil* right for the benefit of Breedlove, the plaintiff in execution, and made at *his instance*, then the County is not liable to pay the costs of the imprisonment. The construction which we give to the term "prisoners," as used in the Acts of 1792 and 1801 is, that such prisoners only as are confined in jail on a *criminal* charge are intended to be "dieted" at the expense of the public. *Prince*, 263, 264.

We have not been able to bring our minds to the conclusion that Stephens was imprisoned for a *crime.* The 50th section of the Judiciary Act of 1799, declares, that "the Sheriff shall be liable, either to an action on the case, or an attachment for contempt of Court, at the *option of the party*, whenever it shall appear that he hath *injured such party*, either by false returns or by neglecting to arrest the defendant, or to levy on his property, or to pay over to the plaintiff or his attorney the amount of any sales which shall be made under or by virtue of any execution, or

any moneys collected by virtue thereof." It will be perceived that the Statute gives the party injured by the Sheriff, two remedies against him when he neglects to pay over money collected by virtue of executions in his hands. Breedlove, the plaintiff in the execution, as stated in the record, elected to proceed against the Sheriff for contempt of Court.

The attachment recites, that the rule absolute was granted against Stephens at the *instance* of Breedlove, the plaintiff in execution, and he is ordered to be imprisoned until he pays over to *the plaintiff* the principal, interest and cost due on said *fi. fa.* In whatever light the proceeding against the Sheriff for contempt may have been viewed at Common Law, we think our Statute clearly points it out as a *remedy* which the party injured by the Sheriff may pursue against him, at his option, for his own *private advantage;* and when the Sheriff is imprisoned under the order of the Court, at the *instance* of the injured party, for his private advantage and redress, we cannot consider him as imprisoned for a *crime* against the people of the State, for which any portion of them may be taxed to defray the expenses of such imprisonment.

The party injured by the conduct of the Sheriff, and at whose instance the remedy given by the Statute is sought to be enforced, for his individual benefit and redress, should, in our judgment, pay the costs of the imprisonment.

We concede the power of the Court to punish the Sheriff for contempt of Court by imprisonment, independent of any action for that purpose by the injured party for his own benefit.

Whether, on motion of the Solicitor General, acting in behalf of the people of the State, the Court should feel it to be its duty to imprison the Sheriff for a contempt of Court, in disobeying its process, the County would not be liable for the costs of his imprisonment, it is not now necessary to decide; but that, in our judgment, would present a very different case than the one made by this record, taking into view the provision of the Statute of 1799. In *ex parte Thurmond,* (1 *Bailey's Rep.* 605,) it was held, that an attachment against a Sheriff for contempt in neglecting to collect money under execution, or to to pay it over when collected, is merely a *civil* process, so far as its object is to *redress the injury of the party* who procures it to be issued; but so far as it is designed to *punish the Sheriff* for neglect of his official duty, it is

a *criminal* process. In that case the great question was, whether the Sheriff imprisoned for contempt of Court, under an attachment for failing to pay over money collected by him on executions, was entitled to be discharged under the insolvent laws of South Carolina. It was conceded by the Court, that the insolvent debtors' Act of that State had no application to cases of a sentence imposing punishment in a *criminal* matter, but that the Act related altogether to imprisonment, the object of which was to compel one party to render to another his debt, duty, demand, cause or thing in a *civil* proceeding, and the Sheriff was held to be entitled to be discharged from his imprisonment under the insolvent debtors' Act. The rule absolute against the Sheriff, upon which the attachment was founded, it appears, was made at the *instance* of Breedlove, the plaintiff in the execution, and he is ordered to be imprisoned until he shall pay over to the plaintiff the principal, interest and costs due on the *fi. fa.* The object of the attachment for contempt of Court against the Sheriff was, in our judgment, *to redress the injury of the plaintiff in execution*, and procured at *his instance*, and for *his individual benefit*, and, therefore, the costs of the imprisonment should be paid by him and not by the County of Baldwin.

Let the judgment of the Court below be reversed.

No. 80.—JUSTICES OF THE INFERIOR COURT OF PUTNAM COUNTY, for the use, &c. plaintiffs in error, *vs.* JOHN BARRINGTON and others, defendants.

[1.] The fact must appear affirmatively, that the bill of exceptions was tendered and signed within the time prescribed by the Statute.

In this cause a motion was made to dismiss the writ of error, on the ground that it did not appear that the bill of exceptions was signed and certified within thirty days from the adjournment of the Court.

The bill of exceptions specified that the cause was tried at Feb-

ruary Term, Baldwin Superior Court, which sits on the 4th Monday in said month. The certificate of the Judge bore date 29th March, 1849.

ADAMS and CONE, for the motion.

J. WINGFIELD and DAWSON, contra.

By the Court.—NISBET, J. delivering the opinion.

[1.] By the old law organizing this Court, it was necessary that the plaintiff in error should tender his bill of exceptions, and that the presiding Judge should sign it, within four days after the trial of the cause. 1 *Kelly*, 6. By the Act of 1847, the Legislature has altered this provision of the first law, and now parties plaintiffs in error may draw up and submit for the signature of the presiding Judge, their bills of exceptions, within thirty days after the close of the term in which the cause was heard. The bill must now be certified and signed within thirty days from the adjournment of the term. A bill not signed within that time, is not, by the law of the State, cognizable by this Court; and the bill, or the record, or both, must show that it is signed within that time. We cannot look out of the record for any thing. It must appear to us affirmatively, and that by the papers regularly brought here, that the law has been complied with. The date of the signature of the Judge in this case we have, but the time of the adjournment of the term at which the cause was tried no where appears. However painful the duty, we have no alternative but to dismiss the cause. A convenient practice would be for the Clerk to certify the day of adjournment with the record. If, however, it appears from the bill or the record, when the term closed, it will be sufficient. *See Act of* 1847, *Pamphlet, p.* 82.

No. 81.—HARPER TUCKER, assignee, &c. plaintiff in error, *vs.* FREDERICK BUTTS and SEATON G. DAY, garnishee, defendants.

[1.] An attorney at law, who has money or other effects belonging to the defendant in his hands, is subject to be garnisheed.

Garnishment, in Baldwin Superior Court, February Term, 1849. Decided by Judge MERRIWETHER.

Harper Tucker, as assignee of a judgment in favor of the Central Bank against Frederick Butts, issued a summons of garnishment, directed to Messrs. Harris & Day, practising attorneys at law. Seaton G. Day, one of the garnishees, in his return stated. that he had in his hands the sum of $185 09, collected by him as the attorney at law of Frederick Butts.

Upon this return the counsel for plaintiff in *fi. fa.* moved to enter up judgment against the garnishee; which motion the Court refused to grant, on the ground that an attorney at law is not subject to garnishment.

This decision of the Court is here assigned to be error.

HARRIS, for plaintiff in error.

McDONALD, represented by R. HARDEMAN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is an attorney at law subject to process of garnishment? The words of the Statute, it is conceded, are sufficiently broad to comprehend attorneys. It authorizes a summons to issue in behalf of the creditor against "*any person* who may be indebted to the defendant, or who may have any money, effects, property, real or personal, or any bonds, notes or other evidences of debt whatsoever, in his, her or their hands, belonging to the defendant." *Prince*, 37.

It is insisted, however, that an attorney is exempt, because he is an officer of the law; and it is true, that the Courts do exercise a summary control over him, by compelling him, in furtherance of public justice, to discharge his duties to his client and others.

In all other respects he is the mere agent of the party, and as much liable to be garnisheed as an attorney in fact, or any other person. *Coburn vs. Ansart, Trustee*, 3 *Mass. Rep.* 319.

It is attempted to analogize this case to that of a Sheriff, who, it is admitted, is not amenable to the garnishment process; at any rate, until after he has been guilty of some official neglect or misconduct, by which he has deprived himself of his official protection. But otherwise, the character of the two are widely different. While the Sheriff, lawfully and consistently with his duty, holds the money collected by him, it is in the custody of the law, and, therefore, protected from this sort of interference.

We cannot hesitate, therefore, to reverse this judgment; for while some inconvenience may result to the profession from holding attorneys responsible to this proceeding, a contrary doctrine would, we apprehend, be productive of much mischief.

No. 82.—William Dearing, *et al.* plaintiffs in error, *vs.* The Bank of Charleston, defendant.*

[1.] A complainant in Equity may amend the title of his bill, so as to make it conform to the true character of the case made by it. The prayer of the bill may also be amended, so as to enable the complainant to have such relief as the allegations in his bill will entitle him.

In Equity, in Richmond Superior Court; motion to amend. Decided by Judge Holt, March Term, 1849.

A *fi. fa.* in favor of William Dearing against Samuel H. Peck, was levied on 310 shares of the principal stock of the Augusta Insurance and Banking Company, as the property of Peck. The stock was sold by the Sheriff, and a portion bought by Dearing. The Bank refusing to transfer the stock on account of a claim set up to the same by the Bank of Charleston, Dearing filed a bill in the Superior Court of Richmond County, against the Insurance

*This cause was before this Court on other questions, and the decision reported in 5 *Ga. Rep.* 497.—[Rep.]

and Banking Company and the Bank of Charleston, and praying that the former Company might be ordered to transfer the shares to him. A rule was published for four months, requiring the Bank of Charleston to appear and answer. No appearance being entered, the bill was taken *pro confesso*, and a decree taken in accordance with the prayer.

The Bank of Charleston afterwards filed a bill in the Superior Court of Richmond County, entitled a bill *in the nature of a bill of review*, charging that they had no notice of the former bill, and praying that the former decree might be "*opened, reviewed and revised, altered, added to or amended.*"

Counsel for the Bank of Charleston moved in the Court below, to amend the said bill by striking out the title to the same, viz: "*in the nature of a bill of review;*" and also by adding the following additional prayers, viz: "that your orator may be declared entitled, as against the said William Dearing, to the whole of the said shares, and to all the dividends since the seventh day of January, 1845; and that if the said shares be still standing in the name of A. G. Rose, Cashier, it may be decreed that the same do so remain, notwithstanding the order made in the case hereinbefore mentioned for the transfer of the same to the said William Dearing, and that the said William Dearing be enjoined from enforcing the execution of the said order, and that the Augusta Insurance and Banking Company account for all the dividends to your orator. But in case the said shares and dividends may have been actually transferred and paid over to the said William Dearing, then, and in that case, that he may be declared a trustee for your orator, and ordered to reconvey the shares, and account for the dividends that he or his agents may have received, and be enjoined from attempting to sell or dispose of the said shares."

Counsel for Dearing objected to the amendments, which objection was overruled by the Court, and defendants excepted and have alleged error in the Court—

1st. In allowing the complainants to strike out *the title* of the bill.

2d. In allowing the amendments to be made when they were inconsistent with and foreign to the object of the original bill.

A. J. Miller, for the plaintiff in error, made the following points:

1st. A bill "in nature of a bill of review," can be filed only for the purpose of reviewing a decree. *Story's Eq. Pl.* §420, '1, '2. 3 *McLean's Rep.* 41.

2d. It cannot be amended by changing its title or otherwise, to accomplish a different object. 1 *Daniel's Ch. Pr.* 463, '5. *Story's Eq. Pl.* §425.

GOULD, for defendant in error, contendad

1st. There was no error in striking out the title of the bill. The Court can always make such an amendment. If the bill *is* "a bill in nature of a bill of review," striking out the title will not alter its nature. If it is *not* such a bill, the title is incorrect and should be struck out.

2d. The amendment is consistent with the object of the original bill, which charges that Dearing took nothing by his purchase but Peck's equity, after paying the debt due the Bank, and prays that the Bank retain the stock and dividends till their debt be paid.

The present amendment only carries this out, and hence,

3d. The bill is not multifarious, as amended, for its sole object is to restore the complainants to the rights of which the former decree deprived them.

But, to take another view of the case, allowing amendments is discretionary, a mere matter of practice, and, in Equity, this discretion is very liberally exercised. *Story's Eq. Pl.* §883, '4, '5.

As a general rule, discretionary orders, especially in mere *practice*, are not subject to writ of error.

The Statute organizing this Court brings them, and all other orders of Superior Court, under this jurisdiction; but the drift of all our decisions is to exercise the power only in extreme cases, which this certainly is not. *Evans vs. Rogers*, 1 *Kelly*, 463. *Saffold vs. Kenan*, 2 *Ib.* 341. *Sanders vs. Smith*, 3 *Ib.* 127.

By the Court.—WARNER, J. delivering the opinion.

[1.] The error assigned to the decision of the Court below is, that the complainant was permitted to amend the *title* of his bill, and the *prayer* for relief. This bill, as originally filed, was not either a bill of review, or a bill in the nature of a bill of review,

but was a bill for discovery and relief, if its true character is to be determined by the allegations made in it. When this case was before us on a former occasion, we ruled, that the decree against the Bank of Charleston, a non-resident, was a *nullity*. The complainant, it is true, entitled it "a bill in the nature of a bill of review;" but that was a *misnomer*, and the complainant now seeks to give to it its *legitimate* name. Under the very liberal practice indulged by Courts of Equity with regard to amendments, the complainant was, in our judgment, entitled to make the amendment in question, especially as there seems to be no objection as to the *time* at which the amendment was proposed to be made. In Courts of Equity, mispleading in matter of *form* is never allowed to prejudice any party; the real and substantial merits of the case are always looked to. *Story's Eq. Pl.* 678, §883. 2 *Maddock's Ch. Pr.* 368. *Polk vs. Clinton*, (12 *Vesey*, 66,) is an authority for amending the *prayer* of the bill. We think the amendment was properly allowed by the Court below; but in any event we should reluctantly interfere with the discretion of the Court below, in allowing the amendment of the pleadings in a suit in Equity.

Let the judgment of the Court below be affirmed.

No. 83.—George W. Dye, plaintiff in error, *vs.* Wiley Wall, defendant.

[1.] In the sale of a slave where there is a contract of warranty, the purchaser may consider the contract as a nullity, and bring his action on the case for deceit, and in such action it is not necessary that he should set forth the contract.

[2.] In an action for fraud and deceit in the sale of a slave, the bill of sale, although not described in the declaration, is admissible to prove the sale.

Action on the case for deceit, in Elbert Superior Court. Tried before Judge Sayre, March Term, 1849.

George W. Dye filed his petition in the Superior Court of El-

bert County, setting forth, that "heretofore, to wit: on the 24th day of May, 1842, your petitioner, at the special instance and request of said Wiley Wall, bargained with the said Wiley to buy of him a certain negro boy slave named Ben, at and for the price or sum of $330, and the said Wiley, by then and there falsely and fraudulently warranting the said negro boy to be sound, then and there, on the day and year aforesaid, sold said boy, Ben, to your petitioner." This count alleged the boy to be unsound, and a *scienter* on the part of Wall.

A second count in the declaration was similar to the first, so far as the allegations specifying the contract. A third count was similar, except it alleged the warranty to be, that Wall warranted "the boy to be sound as far as he knew."

Upon the trial the plaintiff offered in evidence the following bill of sale to prove the sale:

"Received, of George W. Dye, six hundred and eighty dollars, in full payment for two negroes, to wit: Nancy, a girl, about twelve years of age, Ben, a boy, about eleven years of age. The said negroes I warrant to be sound so far as I know. The right, title and claim to said negroes I do bind myself, my heirs, &c. to defend to the said George W. Dye, his heirs, &c. forever, against the claim or claims of all and every person or persons whatsoever.

"In witness I have hereunto set my hand and seal, this 24th May, 1842.

"WILEY his ⋈ mark. WALL.

"Test: BUD. C. WALL.
NATHANIEL GRAY."

To this evidence defendant's counsel objected, because the written contract is not set forth in either of the counts of the declaration.

The Court below sustained the objection and ruled out the testimony, and this decision is alleged to be erroneous.

McMILLAN, represented by W. C. DAWSON, for plaintiff in error.

T. R. R. COBB, for defendant.

By the Court.—NISBET, J. delivering the opinion.

The declaration in this case contains a count upon the contract of warranty, contained in the bill of sale, to the admissibility of which in evidence exception was taken, and the plaintiff was put upon his election, whether he would rely upon that count or upon the counts for the fraud and deceit in the sale. He elected to rely upon the latter, to support which the bill of sale was offered in evidence. It contains a qualified warranty of soundness. The ground of objection to it as evidence is, that it is not set forth in either of the counts of the declaration. Is this necessary? Were it offered under the count on the contract, it is clear that it would not be admissible unless correctly set forth. Whether a plaintiff can, in the same action, in different counts proceed for the fraud and on the contract of warranty, is a question not made by this record, and upon which we express no opinion. As this case is made before us, the question is the same as it would be if there were no count upon the contract. The question then is this—in an action for fraud and deceit in the sale of a slave, is the written evidence of the sale, which contains a warranty, admissible when it is not described in the declaration?

[1.] I apprehend there is no doubt but that a party may, where there is an express warranty, waive his right to go thereon and proceed upon the fraud. Fraud vitiates all contracts, and is, of itself, a substantive ground of action. The party may treat the contract as a nullity and go in an action on the case for damages. *Barney vs. Dewey*, 13 *Johns. Rep.* 226. *Upton vs. Vail*, 6 *Johns. R.* 182. *Wallace vs. Jarman*, 2 *Starkie*, 162. *Spafford vs. Griffin*, 13 *Johns. R.* 328. *Frost vs. Raymond*, 2 *Caines' R.* 193. *Bostwick vs. Lewis*, 1 *Day*, 250. *Comyn's Dig. Action on the case for Deceit*, (*a.* 8.) 13 *Johns. R.* 396. 6 *Cow.* 346. 7 *Wend.* 9. *Hancock vs. Ship*, 1 *J. J. Marshall*, 447.

[2.] Nor is it necessary in an action on the case for deceit, to set forth the contract. If it were, it is conceded that not being done, the written evidence would not be admissible. This point was ruled in *Barney vs. Dewey*, (13 *Johns. R.* 226.) *Spencer*, J. said, "It was not requisite to set forth the contract between the parties, or any consideration; it is enough to state the fraud and deceit and the damages."

In this action it is necessary to prove the sale of the slave. The bill of sale is the highest evidence of that fact, and although not set forth in the declaration, was admissible for that purpose.

Let the judgment be reversed.

No. 84.—ETHAN BREWER and another, ex'rs, &c. plaintiffs in error, *vs.* CLARK BREWER.

[1.] The writ of error will not be dismissed because the record does not show that the costs in the Court below have been paid.

A preliminary motion was made in this case to dismiss the writ of error, on the ground that the costs in the Court below were not paid, and the cause was not brought up *in forma pauperis.*

CONE, for the motion.

DAWSON, contra.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This Court decided, at an early day after its organization, that the payment of costs by the party complaining, in the Court below, was not a condition precedent which the record must show had been performed, before we could take jurisdiction of the cause. If the cost is not paid, the defendant in error may cause execution to issue, and proceed at once to make it in the Court below.

No. 84.—ETHAN BREWER and another, executors of DREWRY BREWER, deceased, plaintiffs in error, *vs.* CLARK BREWER, defendant.

[1.] It is now settled that the acknowledgement, in order to bar the Statute of Limitations, must contain a promise to pay, either express or implied, and that an implied promise is created from an acknowledgment of a present subsisting debt.

Assumpsit, in Jasper Superior Court. Tried before Judge MERRIWETHER, April Term, 1849.

Suit was commenced by the executors of Drewry Brewer against Clark Brewer, upon the following acknowledgment:

"I do hereby acknowledge the credit of three hundred and thirty-two 50-100 dollars to be due to the estate of Drewry Brewer, deceased. August 5th, 1847.

[Signed,] CLARK BREWER."

The credit referred to was alleged to be upon the following note:

"On or before the 25th of December next, we or either of us promise to pay Elner Skinner, or bearer, seven hundred and fifty-nine dollars, for value received. May 24th, 1838.

[Signed,] CLARK BREWER,
ETHAN BREWER, Security."

"Received, May 29th, 1838, of the within note, three hundred and thirty-two dollars and fifty-cents.

"Received sixty dollars. December 21st, 1838.

E. SKINNER.

"Received on the within note, sixty-five dollars. March 13th, 1830.

ELNER SKINNER,
by J. A. SANONTON."

The defendant pleaded the Statute of Limitations.

Upon the trial the Court charged the Jury, that "under the decisions made by the Supreme Court of the State of Georgia, the said acknowledgment did not take the case out of the Statute of Limitations."

And to this decision exceptions were filed.

W. C. DAWSON, for plaintiff in error.

A. REESE and CONE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

Does the written acknowledgment of Clark Brewer, given to the executors of Drewry Brewer, take the case out of the Statute of Limitations?

[1.] To my mind it is, to all intents and purposes, a *due bill*, and might very properly have been declared on as such. The presiding Judge, in ruling that this acknowledgment was not sufficient to take the case out of the Statute, cited as authority, *the decisions of this Court.* None are designated. We apprehend that His Honor was misled by the oral report of some unpublished opinion.

In *Dickinson vs. McCamy*, (5 *Ga. Rep.* 486,) we say—"A direct promise to pay is not indispensably necessary. Nor is any set form of words requisite to take the case out of the Statute. The acknowledgment, however, must admit that the debt continues due at the time of making it." And in *Broach vs. Martin and others*, (6 *Ga. Rep.* 21,) this Court expressly recognize and adopt the position of Mr. *Angell* on this subject, namely: that the new promise, to take the case out of the Statute, may be either express or implied; *and that an implied promise will be inferred from a clear and unqualified acknowledgment of the debt.* Not that it was once due and owing, but that the liability still subsists. Beyond this we have never gone.

Believing, therefore, that the written acknowledgment of the defendant in this case is sufficient, both on the score of amplitude and definiteness, we must reverse the judgment.

No. 85.—JOHN ROBSON, *administrator de bonis non* of ISAAC WALTON, deceased, plaintiff in error, *vs.* L. T. P. HARWELL and WIFE, defendants.

[1.] In a bill in Equity every material fact to which the plaintiff means to offer evidence, must be distinctly stated, or otherwise he will not be permitted to offer or require evidence of that fact. No facts are properly in issue unless charged in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence, for the Court pronounces its decree *secundum allegata et probata.*

[2.] In a bill filed by the *cestui que trust* to execute a parol trust of lands, no

evidence by parol is admissible, nor can a decree be rendered in favor of the plaintiff, unless the charge of fraud is distinctly made. It cannot be considered as inferentially made by a statement of the parol agreement which declares the trust, and of a failure to execute it.

[3.] Where R conveys to W a tract of land, in consideration that W will put upon it twenty negroes, and will, at his death, convey those negroes and their increase to M, and W enters into possession of the land: *Held*, that this is a trust of personalty, created by W and declared in favor of M, which a Court of Chancery will execute against the representatives of W in favor of M.

By LUMPKIN, J.

[1.] The case of *Miller and others vs. Cotton and others*, (5 *Ga. Rep.* 341,) reviewed and affirmed.

[2.] Under the Statute of 29 *Car. II.* all declarations of trusts in lands must be *manifested* or proved by writing, signed by the party to be charged therewith.

[3.] If a recovery is sought on the ground of *fraud*, it must be alleged, or circumstances amounting to a charge of *fraud*.

[4.] Where lands have been obtained by fraud in the grantee, upon a parol assurance that he would convey them in a particular manner to third persons not parties to the contract, *the grantor or his heirs at law* are the proper parties to seek redress for the fraud in a Court of Equity.

[5.] Where a recovery is sought on the ground of the fraud of the grantee in obtaining a conveyance of lands, the recovery can extend only to the property so fraudulently obtained, and mesne profits for the use of the same.

[6.] A contract made for the sale of both *real* and personal property, which is *entire* and founded upon one and the same consideration, if void *in part* is void in *toto*.

By WARNER, J.

[1.] Whenever there has been a *partial performance* of a parol agreement for the conveyance of land, within the Statute of frauds, a *part execution* of the *substance* of the agreement, acts done and performed, unequivocally referring to and resulting from the agreement, and such that the party in whose favor the agreement was made, would suffer an *injury* amounting to *fraud*, by the *refusal* of the other party to execute it, a Court of Equity will in such cases decree a specific performance of the agreement.

[2.] To authorize the admission of parol evidence to establish an agreement for the conveyance of land, within the Statute of Frauds, a sufficient foundation must be laid therefor in the complainant's bill, by making such averments as, in the view of a Court of Equity, will constitute *fraud*, or such as from which a Court of Equity will presume *fraud*.

[3.] A parol agreement to convey lands set up by a Court of Equity, has equal validity with a deed containing a covenant to convey, for it is a principle in Equity, that what is agreed to be done for a valuable consideration, is considered as actually done.

[4.] Where a bill is filed for specific performance of an agreement, and the defendant has put it out of his power to perform, by a sale of the property, the Court will decree compensation by way of damages.

In Equity, in Morgan Superior Court. Tried before Judge MERRIWETHER, March Term, 1849.

Littleton T. P. Harwell and his wife, Martha Harwell, formerly Martha Robinson, filed their bill in Morgan Superior Court against Peter Walton, administrator of Isaac R. Walton, deceased, charging—

That Martha S. Harwell was born in 1804, and at the age of four days was adopted by Isaac R. Walton, deceased, as his child; that about the year 1818, the said Isaac R. being desirous to settle a plantation, was so well pleased with a lot of land belonging to complainant's father, Littleberry Robinson, known as the Black Gum Hill lot, that after repeated applications to buy the said lot, which the said Robinson repeatedly refused to sell or convey to said Walton, that said Littleberry Robinson finally, about the first of December, 1818, at the earnest solicitation of said Isaac R. and in consideration of an agreement and promise, then entered into by the said Isaac R. to the said Littleberry, that he would put twenty negroes, slaves, upon said lot of land, and add thereto such other land as might become necessary for the said slaves and their increase to cultivate, during the lifetime of the said Isaac R. and at his, said Isaac R.'s, death, to deliver and convey, or cause to be delivered and conveyed to your oratrix, the adopted child of the said Isaac R. as aforesaid, the said Black Gum Hill lot, with such other land as might be added thereto for the purposes aforesaid, together with the said twenty slaves and their increase, and such stock, plantation tools and furniture, utensils, &c. as might be upon said place, at the death of said Isaac R. he, the said Littleberry Robinson, did convey to the said Isaac R. the said Black Gum Hill lot of land, worth $4000, together with a stock of cattle, sheep, &c. worth $500, upon said lot of land, the said Isaac R. paying nothing for the

said land and stock, as they are informed and believe; nor was he, by the agreement with said Littleberry Robinson, bound to pay for the conveyance of said land, and delivery of said stock, any other consideration than that set forth in said agreement; that in pursuance of said agreement, the said Isaac R. in good faith, did put twenty negroes, slaves, upon said plantation, and went into the possession of the same, and did purchase other lands adjoining said lot, and often, during his lifetime, told the complainants and others, that the said plantation and all that was thereon would belong to them at his death. The bill farther charged, that the said Isaac R. died without conveying or causing to be conveyed the said property as agreed upon. The bill specified the property that was upon the plantation at the death of Walton, and charged that the same was sold by the administrator. The prayer of the bill was, that the administrator might be decreed to deliver to said complainants, said plantation, negroes, stock, &c. such as it was at the death of the said Isaac R; and if the administrator shall answer that he has sold the said property, so that the same cannot be conveyed and delivered, that he be decreed to pay out of said estate the full value thereof; or that he be decreed to pay the sum of $4000, with interest thereon from the time Walton received the land, and for general relief.

The answer of Peter Walton, the administrator, denied the agreement set up in the bill, and insisted upon the Statute of Frauds.

Peter Walton died pending the bill, and John Robson was appointed administrator, *de bonis non*, of Isaac R. Walton, and made regularly a party to the proceedings.

On the trial on the appeal, after the bill was read to the Jury, counsel for defendant moved to dismiss the bill, on the ground that the facts stated therein did not make such a case as would authorize the equitable interference of the Court. Which motion the Court overruled as being inadmissible at that time, in the orderly conduct of a suit in Chancery. To which decision counsel for defendant excepted.

Complainants offered in evidence the testimony of Robert Taylor, taken by commission, to prove the admissions of Isaac R. Walton, to which counsel for defendants objected—

1st. Because parol evidence is inadmissible to prove the ex-

press trust in the land alleged in the bill, in order to enforce its specific performance.

2d. If the facts stated in the bill amounted to and made out a case of fraud, the *heirs at law* of Littleberry Robinson, and not the complainants, were entitled to recover under the same.

3d. Because a remainder in property cannot be created by parol.

4th. That a specific performance of personalty cannot be decreed under the allegations in this bill.

The Court overruled the objection and admitted the evidence, and defendant excepted.

Much evidence was introduced on the trial unnecessary to be embodied here.

Upon the close of the evidence for the complainants, the defendant's counsel moved to dismiss the bill, on the ground that the case stated in the bill, and attempted to be sustained by the evidence, was not such a case as would entitle the complainants to a decree.

The Court overruled the motion and defendant excepted.

The defendant then offered in evidence the will of Littleberry Robinson, to show that Mrs. Harwell received under it an equal share of his estate. The evidence was rejected by the Court, and defendant excepted.

The Court charged the Jury, that if from the testimony the contract stated in the bill had been proved, according to the rules of law which it would give them in charge, they were bound to find for complainants the value of the property, with interest from the sale. To which charge defendant excepted.

Counsel for defendant requested the Court to charge the Jury—

1st. That there having been no written evidence of the creation or manifestation of the trust as to the land, the same cannot be executed by a decree of specific performance.

2d. That the remainder in this case being created by parol, is void.

3d. That a specific performance of personalty cannot be decreed on the facts charged in this bill.

4th. That the evidence in this case is contradictory, and if the Jury should find the testimony setting up this pretended trust to be contradicted by other evidence, and contradictory in itself, they cannot decree in favor of complainant.

5th. That the Jury cannot decree in favor of the complainants, unless they are satisfied that at the time of the agreement about the land, Isaac R. Walton induced Littleberry Robinson to convey the land to him with a fraudulent intent *at the time* not to comply with his contract.

6th. That by the contract set up in the bill, an estate for life was created in Isaac R. Walton, and a remainder in the land and negroes in Mrs. Harwell, which being in parol, is void.

7th. That if the Jury believe that the conveyance of the land from Littleberry Robinson to Isaac R. Walton, was fraudulently procured by Walton, that the *heirs at law* of Robinson, and not the complainants, would be entitled to recover; and in that event they could recover only the land so fraudulently conveyed, and not the negroes and other property.

All of which the Court refused to charge, as it had already adjudicated all the grounds except the 4th and 5th. On the 4th ground, the Court declined giving an opinion to the Jury by way of direction, that the evidence was or was not contradictory, but charged, that if the evidence was contradictory in itself, the Jury could not find for the complainants. On the 5th ground, the Court charged, that the fraudulent intent need not to be proved to have existed *eo instanti*, with the making of the contract with Robinson, but if he failed to do what he promised, the law will evidence his intent by his act, and connecting his failure to convey with the original agreement, will presume the existence of that fraudulent intent on the part of Walton at the time of the conveyance by Robinson.

To all of which charge, and refusal to charge, defendant excepted; and upon these several exceptions error has been assigned.

J. Hillyer and T. R. R. Cobb, for plaintiff in error.

A. Reese and F. H. Cone, for defendants.

The following points and authorities were relied on by Mr. Cone, in his argument for the defendants.

1st. The statements in the bill make a case of fraud on the part of plaintiff's intestate.

It is not necessary to charge the fraud in so many words. If

the facts and circumstances stated amount to fraud, that is sufficient. *Story's Eq. Pl.* 24, 25, 212. 3 *Cowen's Reps.* 576. 2 *Summers' Rep.* 612. 2 *Ala. Reps.* 605.

I shall first consider the case in relation to the real estate.

Parol evidence is admissible to show the fraudulent use of a deed, or that a party receiving a deed, absolute on its face, received it under a promise to dispose of the property conveyed by it, in a particular way, and has refused or neglected to perform such promise. 2 *Story's Eq.* §768, 1265, 395, 437. 7 *Simons' Reps.* 644. 6 *Paige's Reps.* 355. 1 *Dallas' Reps.* 424. 13 *Ala.* 475. 1 *Atkins' Rep.* 391. *Roberts on Frauds*, 102. 2 *Wash. C. C. Reps.* 397. 6 *Wheaton*, 481. 1 *Paige*, 147. 3 *Atkins*, 539. 11 *Vesey*, 626. 2 *Ala.* 571.

The Statute of Frauds was never devised to protect fraud, and when a person obtains a conveyance of property, upon a parol assurance or promise that he will dispose of it in a particular way, a Court of Equity will compel him to perform the promise. 9 *Vesey*, 516. *Pres. Ch.* 3. 1 *Vernon*, 296. 2 *Ib.* 506. 2 *Vesey & Beame*, 259. 6 *Vesey*, 252. *Ambler*, 69. 1 *Vesey*, 123. 3 *Atkins*, 359. 2 *Freeman*, 52. 5 *Viner's Abg.* 521. 8 *Bligh*, 111. 1 *Cox*, 414. 1 *John. Ch. Reps.* 582. *Ib.* 406. 3 *Cowen's Reps.* 539. 2 *Desaussure*, 14. 2 *Vesey*, 155. 10 *Vesey*, 243. 1 *Hovenden on Frauds*, 495. 2 *Merivale*, 120. 1 *Atkins*, 380. 1 *Story's Eq.* §330. 1 *Young & Collyer*, 583. 2 *Ala. Reps.* 571. 1 *Vesey*, 120, 284, 289. 1 *McCord's Ch.* 119.

All the arguments and authorities in relation to the real estate, apply with increased force to the personal estate, as that is not affected by the Statute of Frauds.

The case presented by the bill does not create an estate in remainder in the personal property in the defendant. Walton, for a valuable consideration, agreed to convey the property, at his death, to defendants. A Court of Equity will execute such a contract. 13 *Ala.* 475. 2 *Story's Eq.* §724. 1 *Wheaton*, 151. 1 *Peters*, 305. 22 *Pickering's Reps.* 231.

The Court not being unanimous, the Judges delivered their opinions *seriatim*.

NISBET, J. delivering the opinion of the Court.

I am unwilling to affirm the judgment of the Court below, so far as the real estate is concerned, and affirm it as to the personal property. The Statute of Frauds requires trusts of real estate to be manifested in writing. A deed was, in this case, executed from Robinson to Walton to the land in question. There was no declaration of a trust in writing as to the realty. So far as the land is concerned, as a general proposition, it is not questioned but that written evidence of a declaration of the trust is indispensable to take such a case out of the operation of the Statute. The bill, however, sets up a parol declaration of a trust in behalf of Mrs. Harwell, as to both the personalty and the land; and, if I correctly understand it, it was filed to compel the administrator, without an allegation of fraud, to execute that trust. Although trusts of land must be generally proven by written testimony, yet Equity will execute a parol trust of land, upon the ground of fraud, in favor of the party injured. The decision of the Judge below was founded on this exception to the general rule. It went upon the ground that Walton perpetrated a fraud upon the complainants, by failing, at or before his death, to convey or deliver the property to them, in pursuance of his verbal assurances to that effect—the *Judge* holding that such failure related back to the time when the agreement was entered into, and manifested a fraudulent intent at that time. To be, however, a little more explicit as to the opinion of the Court below: The *Judge* charged the Jury, "that it was not necessary to prove that the fraudulent intent of Walton existed *eo instanti* with the making of the agreement to convey to Mrs. Harwell. If such an intent arose afterwards, and in pursuance of that intent to defraud Mrs. Harwell, Walton failed to do what he had contracted to do, and on account of which he obtained the conveyance of the Gum Hill tract of land from Robinson, the law will evidence his intent by his acts, and connecting his failure to convey, with his original agreement to convey, it will presume the existence of that fraudulent intent on the part of Walton, at the time of the conveyance by Robinson." I refer to the opinion of the Court, for the purpose of establishing the ground upon which the judgment goes. That ground is *fraud.*

[1.] To my mind no evidence of fraud could have been properly admitted under this bill, and no decree ought to have been rendered on the ground of fraud, because it makes no issue of

fraud—it contains no charge of fraud—and the defendant is not, therefore, notified to respond to any such allegation. The pleader who drafted this bill, could not have contemplated a recovery upon the ground of a fraud by Walton upon the rights of Mrs. Harwell; if he had, he would have said so. He would have brought it home to the conscience of the defendant, by direct, intelligible averments. He would have so framed his bill as not to have permitted the answer to evade the very point upon which his recovery is to rest. He would have so framed it, as that there could be no sort of doubt about his right to take testimony in relation to the fact of fraud. The bill before me was clearly filed for the purpose of relief against the failure of Walton to execute his trust agreement with Robinson; not because of his fraudulent intention, but because the contract or agreement, being an honest one in the beginning, was just such a contract as a Court of Equity would enforce. It sets up an agreement by which a trust is created, and by its averments and prayers demands an execution of it. It invokes the powers of a Court of Chancery to interpose in behalf of the *cestui que trust.* That I am right in this view of the bill, will appear from a brief analysis. It charges that Mrs. Harwell was born in 1804, and at the age of four days was adopted by Major Walton; that in the year 1818, he being desirous of settling a plantation, and being well pleased with a lot of land belonging to her father, Capt. Littleberry Robinson, called the Gum Hill lot, importuned him to sell it to him; that Robinson finally, in December, 1818, did convey to him that tract of land, valued at $4000, and the stock upon it, valued at $500, *in consideration of a promise and agreement there made and entered into by said Walton with him, that he, Walton, would put twenty negroes on the land, and add thereto such other land as might become necessary for said slaves and their increase to cultivate, during his (Walton's) lifetime, and at his death, that he would deliver or convey, or cause to be conveyed to Mrs. Harwell, his adopted daughter, and who was the child of Robinson, the said Black Gum Hill lot, with such other lands as might be added thereto, together with the twenty slaves and their increase, and such stock, plantation tools, furniture and utensils as might be on the place at his death;* that the said Walton, the bill proceeds to charge, paid nothing for the land and stock on it; that in good faith Walton did put upon the plantation the twenty negroes, and purchased other lands adjoining and added

thereto; that he often, during his life, told the complainants and others, that that plantation and all that was on it, would belong to them at his death. The bill farther charges, that Walton died without conveying the property, as agreed to be done, to Mrs. Harwell; it specifies the property and its value that was on the place at his death, and charges that it had been sold by Walton's administrator. The prayer is, that the administrator be decreed to convey and deliver to the complainants the plantation, stock and negroes, such as they were at his death; and if the administrator shall answer that he has sold the property, so that the same cannot be conveyed and delivered, that he be required to pay out of the estate of Walton the full value thereof; or that he be decreed to pay the sum of four thousand dollars, with interest thereon from the time that Walton received the land; also, there is a prayer for general relief.

I have not the bill before me. The foregoing analysis is taken from the bill of exceptions, and is, I have no doubt, correct. Now, the sum and substance of it is, that the agreement made between these parties creates a trust, and not being consummated in Walton's life time, will be enforced upon his representatives. That is the specific demand made by the complainants. The agreement, as charged, was fully proven, by the deed to the land from Robinson to Walton, and by parol. The parol testimony was objected to and admitted, and exception taken thereto. As the case stood by the pleadings, the complainants clearly relied upon the the agreement as declaring a trust of these lands, and they went for the execution of the trust. Does the bill, as I have represented it, go upon the idea of fraud—does it make any charge of fraud, or is there any issue of fraud made by it? I think not. And none can be implied from the charges made, because it goes upon other and distinct grounds of equitable relief. I cannot consider it a case involving the principles upon which relief, in the execution of a parol trust, is granted upon the ground of fraud. The pleadings do not warrant the judgment, so far as the land is concerned.

The rule is, that every material fact to which the plaintiff means to offer evidence, must be distinctly stated in the bill; or otherwise, he will not be permitted to offer or require evidence of that fact. No facts are properly in issue, unless charged in the bill. Nor can relief be granted for matters not charged, although they

may be apparent from other parts of the pleadings and evidence, for the Court pronounces its decree *secundum allegata et probata.* The reason is, that the defendant may be apprised by the bill, what the suggestions and allegations are, against which he is to prepare his defence. *Story's Eq. Plead.* §§28, 257. 1 *Daniel's Ch. Prac.* 377. *Gordon vs. Gordon,* 3 *Swan,* 472. 6 *Price,* 240, 259. 18 *Vesey,* 302. 7 *Wheat.* 522. 11 *Peters,* 229. *James vs. McKernon,* 6 *Johns.* 564. *Irnham vs. Child,* 1 *Brow. Ch. R.* 94. *Sidney vs. Sidney,* 3 *Peere Williams,* 276. *Watkyns vs. Watkyns,* 2 *Atk.* 96. *Whaley vs. Norton,* 1 *Vern.* 483. *Clarke vs. Turston,* 11 *Vesey,* 240. *Houghton vs. Reynolds,* 2 *Harr. R.* 264. *Mitf.* 34. 3 *Atk.* 182. 2 *Vesey,* 225. 3 *Wend.* 653. 3 *Bligh,* 211. 3 *Woode's Lectures,* 371. *Miller et al. vs. Cotton et al.* 5 *Ga. Reps.* 346, 347. 9 *Ala.* 985.

Fraud is a material fact—it is, of itself, a distinct head of Equity. Upon the view taken of this cause by the Court below, it is *that,* without which the complainants have no right to recover. Now, as to the land, the ground upon which a parol trust will be enforced, is fraud. The evidence by parol is admitted to show it only in case of fraud. In the absence of any charge of fraud, by what rule—on what authority—is parol evidence admissible? Where there is no charge of fraud, and the trust cannot be proven by written evidence, *the plea of the Statute of Frauds, requiring trusts of land to be manifested in writing, must be conclusive.* The charge of fraud is necessary to let in the evidence, and if so, necessary to the decree.

To sustain the rule of pleading I am now insisting upon, I refer particularly to the case of *James vs. McKernon* (6 *Johns. R.* 559.) In that case, a bill was filed for an account, and the defendant set up an agreement under seal between the parties. It was held that the complainant could not prove the agreement fraudulent, as there was no allegation of fraud in the bill. *Spencer,* J. said, "In my opinion the decree cannot be supported, if the evidence in the cause was ever so strong to prove fraud on the part of the appellant; and for this plain reason, that the Court cannot afford relief not sought for by the bill, and entertain the question of fraud, which is not so much as suggested by the complainant. *It is an invariable and universal rule of the Court of Chancery, to found its decrees upon some matter put in issue between the parties by the bill and answer; and the rules and practice of that Court require,*

that in framing the bill, the matter of it be plainly and succinctly alleged, with all necessary circumstances of time, place, manner and other incidents."

Chancellor Kent, in the same case, says, "The good sense of pleading, as well as the language of the books, require that every material allegation of this kind should be put in issue by the pleadings, so that the parties may be duly apprised of the essential enquiry, and may be enabled to collect testimony and frame interrogatories to meet the question. Without the observance of this rule, the use of pleading becomes lost, and parties may be taken at the hearing by surprise. As the pleadings stand, I am of opinion that the fact of fraud or no fraud in procuring the agreement, was not put in issue, and that the depositions, so far as they related to the point, ought not to have been read at the hearing. The general rule is, that no interrogatories can be put that do not arise from some fact charged in the issue."

I refer, also, to the case of *Lord Irnham vs. Child*, (1 *Brow. Ch. Rep.* 93,) as strongly sustaining the rule. That was a bill to redeem an annuity. The bill alleged, that upon settling the terms of the annuity, it was agreed that it should be redeemable, but both parties agreeing that if that fact appeared on the face of the transaction, it would make it usurious, it was agreed that the grant should contain no clause of redemption. It was drawn and executed accordingly without such clause. Upon the trial parol evidence was offered to prove this agreement, and was rejected, because the bill contained no allegation that the agreement to redeem was left out by fraud.

Lord *Thurlow*, after adverting to the fact that there could be no purchase of an annuity out of lands but by deed, said, "whether this question arises upon the Statute, or at Common Law, I do not see much difficulty. The rule is perfectly clear, that where there is a deed in writing, it will admit of no contract that is not part of the deed. Whether it adds to or deducts from the contract, it is impossible to introduce it on parol. It is contended, that it is the general authority of a Court of Equity to relieve in cases of fraud, trust, accident or mistake, and that this applies to agreements as well as to other subjects. This must always clash with arguments drawn from the Statute. It is admitted that the deed will bind if no fraud is committed, but objected, that when fraud intervenes, then the evidence may be introduced. The ob-

jection is founded on a great deal of wisdom and good sense; but the question is, if it were always to be admitted, whether it would not be subversive of justice. The Court has held that it would. *If the agreement had been varied by fraud, the evidence would be admissible.* The argument then must be to impute fraud to the party. The rule of evidence is not subverted if there is clear proof of fraud." This extract from the opinion of the Chancellor, exhibits the form in which the question was made, and the striking resemblance of the case to the one at this bar. The bill exhibited a deed without any provision for the redemption of the annuity, but set up a parol agreement that it should be redeemable, and was filed to compel the party to execute the agreement. The question was, whether the agreement could be proven by parol. The Chancellor concedes that it may, *if the agreement was varied by fraud; but he rejected the evidence because the bill contained no allegation of fraud.* Here, also, the bill admits a deed from Robinson to Walton, and sets up a parol agreement to convey the land to Mrs. Harwell at Walton's death, and asks the execution of it. The question is, whether parol evidence can be admitted to prove that agreement. Admitting that this is a case (for the sake of the argument) where the evidence is admissible if fraud were charged, I say, upon the authority of Lord *Thurlow*, that it cannot be admitted, *because the fraud is not charged.*

In the case in *Brown*, the fraud, as in this case, was claimed to be inferred from the facts stated. But the Chancellor held, that *it must be charged.* (For the rule as to charging fraud at law, see 6 *Johns. R.* 138.)

All the cases where parol testimony is admitted against a deed, to set up a parol trust as to land, so far as I am informed, go upon the idea of fraud in the beginning, and that must be distinctly charged.

[2.] I might rest my dissent to the judgment of the Court below, upon the want of sufficient allegations in the bill to admit the evidence. I am not, however, satisfied that if that objection did not exist, there ought to be a recovery, for the complainants, of the lands in question. Separating that part of this transaction which relates to the personal property from that which relates to the realty, and how does the matter stand? It is a bill filed by the *cestui que trust*, Mrs. Harwell, and her husband, to have exe-

cuted a trust declared by parol at the time the deed was executed. The land is the trust. That was absolutely and unconditionally conveyed by Robinson to Walton, in consideration that Walton would, at his death, convey it to Mrs. Harwell, together with the personal property. The agreement between the parties, that Walton shall so convey it, which exists in parol, is the declaration of the trust. The object, then, of the bill, so far as the land is concerned, is to engraft upon the deed a parol trust, and to cause it to be executed by a decree. The *cestui que trust* moves, in a Court of Chancery, to set up and cause to be executed, a parol trust of land upon the ground of fraud. Can *she* do it? I do not deny that a parol trust of lands may be enforced in Equity, upon the ground of fraud. Fraud, in such a case, is a sufficient reply to the Statute. The Statute, intended to prevent *frauds* as well as perjuries, cannot be made a cover for frauds. This is well settled in the books—no one controverts it. The question, however, is, whether such a trust, upon the ground of fraud, can be enforced at the instance of the *cestui que trust*, or whether the right to enforce it is not confined to the original parties to the trust agreement? If the latter be the true rule, then these complainants are not the proper parties. The bill should have been filed by the representatives of Robinson. I will not discuss this question—I will only say, that in the facts and reasoning of the case of *Miller and others vs. Cotten and others*, the judgment of this Court seems to me to have been already plainly declared against the right of these complainants, and that I have no fault to find with that judgment. 5 *Ga. Reps.* 341.

[3.] None of these difficulties are in the way of the judgment below, touching the personal property. As to *that*, the bill makes the following case: Major Walton, in consideration of the conveyance to him by Robinson, of the Gum Hill tract of land, with the use of it for life, agrees to put upon it twenty of his own negroes, which, with their increase, and all the stock, utensils, furniture, &c. on the plantation at his death, he agrees, at his death, to convey and deliver to Martha S. Harwell, (then Martha S. Robinson.) What is the legal effect of this agreement? To my mind clearly this: Major Walton, for a valuable consideration, to wit: the life estate in the land, (which was executed to him by the deed and his taking possession, both of which the bill shows,) created a trust in these negroes, their increase and the stock, &c.

and declared it in favor of Mrs. Harwell. The consideration is a valuable consideration. It moves from Robinson to him. Upon *that* the trust agreement is founded. Dying without having executed it, his representatives are bound to fulfil it. Chancery will constrain them to do it.

It was said in the argument, that the bill makes a case of a life estate in Walton, with remainder to Mrs. Harwell by parol, and inasmuch as a remainder in personalty cannot be created by parol, it is void. This cannot be construed into an attempt to create a remainder in these negroes, &c. There is no life estate created at all. Walton is the owner of the negroes. Upon them he declares a trust, which was never revoked, to take effect at his death; and having made a trust out of his own property, and declared it in favor of Mrs. Harwell, he held it during his life as her trustee, and at his death it was hers. Here is no contest with creditors or purchasers. The question is, whether Equity will not, in favor of the *cestui que trust*, compel the administrator of the trustee to respond. The Statute of Frauds does not extend to personal property, and does not, therefore, lie in the way; and as the execution of this trust does not depend upon *fraud*, no averment as to fraud was necessary in the bill. This Court has determined, that a trust of personalty may be created and proven by parol, and I shall not, therefore, labor that point. *Kirkpatrick vs. Davidson*, 2 *Kelly*, 297.

It is farther argued, that the contract in relation to the land and the personal property, is one entire contract, and if void by the Statute of Frauds in relation to the lands, it is also void in relation to the personalty.

It is true, that illegality of *consideration*, both by Statute and at Common Law, will destroy a contract, and the contract is void, although some part of the consideration be good. The illegal consideration taints the whole contract. In this case no part of the consideration is illegal. The consideration of Walton's agreement to convey the property to Mrs. Harwell, was the conveyance to him of the Gum Hill tract. That was a lawful consideration.

It is also true, that if there be an entire promise to pay several sums in one and the same contract, and the promise to pay one of them is void by Statute, the whole is void at law. In that case the plaintiff must declare for the whole sum, and must go upon

the express contract as a whole, and it being void in one part cannot be separated and made available for the other. This rule is illustrated in *Loomis vs. Newhall*, (15 *Pick.* 159.) The defendant there promised, by parol, to pay the debt of another, and in the same contract agreed to pay certain expenses which the plaintiff had incurred. The first part was void by the Statute of Frauds, and the second was valid as an original undertaking; yet inasmuch as the contract was an indivisible one, and void in part, it was held void *in toto*. This is not a case within that rule. It is not a promise to pay money, but an agreement to do certain things, the enforcement of which belongs alone to a Court of Equity.

It is laid down in some ancient cases, that if a contract be good in part, and void in part, by the Common Law, the part void will be repudiated, and the part good enforced, the Common Law being a nursing father; but a contract in part good, and in part void *by Statute*, is altogether void, the Statute being a tyrant. This distinction, however, between a Statute and the Common Law, seems to have been repudiated, and all such contracts are upon the same footing. *Story on Contracts*, §224.

The rule is, that whenever the contract is to perform legal and illegal acts, and they can be separated, it will be valid, in as far as it is legal, whether the other part be in violation of a Statute, or void at Common Law. A modification of this rule is this, to wit: when a Statute expressly enacts that all contracts containing any matter contrary thereto, shall be void, all contracts, however separable, which contain any thing repugnant to it are void. *Moys vs. Leak*, 8 *T. R.* 411. *Kerrison vs. Cole*, 8 *East*, 231. *Doe vs. Pitcher*, 6 *Taunt.* 359. 5 *Taunt.* 727. 4 *M. & S.* 56. 13 *East*, 87. 11 *East*, 165. 15 *East*, 440. 4 *Taunt.* 549. *Ib.* 105. *Ib.* 57. 1 *Smith's L. Cases*, 284. 7 *T. R.* 200. *Story on Contracts*, 144. *Chitty on Contracts*, 693.

Now, I remark, *first*, that this case does not fall within the modification of the rule above stated. The Statute of Frauds contains no express enactment declaring that all contracts in relation to parol trusts of land, containing matter repugnant to it, shall be void—nor does it contain any thing equivalent thereto. It does not even declare a contract for a parol trust in lands void—it only declares, that unless trusts in lands are *manifested and proven* in writing, they shall be void. *Prince*, 915. Hence

letters or other documents long posterior to the transaction in date, have been held equivalent to a formal and coeval declaration of a trust in lands. *Foster vs. Hale*, 5 *Vesey, Jr.* 308. 3 *Ib.* 696. 2 *Brow. C. R.* 161, 318. 2 *Bro. P. C.* 39. *Roberts on Frauds*, 101.

In this particular the *seventh section* of the Statute is essentially different from the *fourth section*, which requires agreements, &c. to be in writing and signed, and if not, void. The 7th section declares a rule of evidence only, and recognises a parol declaration of trusts in land to be legal, if it can be set up by written evidence subsequently furnished.

I remark, *secondly*, that this contract is separable. The stipulations of Walton are, that he will convey the land, and also the personal property, to Mrs. Harwell. It is not like a promise to pay in one contract two sums of money, but it is to do two acts, to wit: convey the land, and convey the personalty. There are, in fact, two trusts declared, one of the lands, the other of the personalty. The subject matter is different, and the mode of conveying different. *The one act does not depend upon the other.* If Walton had chosen to do so, he could have executed this agreement as to one subject matter and not as to the other, and the execution would have been held good, *pro tanto.* The contract here is in all its parts a legal contract. It is legally sustained as to the personalty by the evidence, and not so sustained as to the reality.

Admit, however, that if Walton and Robinson, or their representatives, were litigating their rights under this agreement at Law, the rules of pleading, and the law regulating their rights, would make recovery there impracticable. Yet the rule is not necessarily the same in Equity. We are here in a Court of Equity—a decree may be so rendered as to protect the interests of all parties—a decree may be rendered to execute a contract in part—to enforce it so far as it is sustained by legal evidence, and to abstain from executing it so far as it is not. Besides, it is a third person who is in Chancery asking justice—the *cestui que trust.* Shall she be turned away because she can get only partial justice? Shall she be turned away, because she cannot prove the whole of her case by lawful evidence? The decree in favor of the complainants as to the personalty, does not conflict with the policy of the Statute. That is not directed against parol trusts of

personal, but real estate. The rights of Robinson's estate cannot be affected by executing the trust as to the personalty. From Robinson, and his representatives, nothing is asked, or could be, in the nature of the case. He contracted with Walton for the benefit of the complainant, and his part of the contract was executed when he conveyed the land to Walton.

The case of *Chatter vs. Beckett* (7 *T. R.* 197.) is the strongest Common Law authority against the view I take of this subject. It is obvious to remark that, that was a contest at Law between the original parties, and the contract was entire. It was a promise to pay two sums; one the debt of another, and the other an original undertaking of the promisor. It is clear, that in an action on this promise, the plaintiff must recover the whole or none. Again, part of that promise was in conflict with the 4th section of the Statute, which makes contracts to answer for the debt or default of another *void*, unless in writing, and therein differs from *the 7th section*, as I have shown. The same things are true of the case of *Crawford vs. Morell*, (8 *J. R.* 253,) and of the case of *Loomis vs. Newhall*, (15 *Pick.* 159.) All distinguishable from this case. Indeed, I find no case in the books where an agreement in part void, because in conflict with the *7th section*, has been declared wholly void. I do not believe there is any such. And there are a number which sustain the judgment I render in this case. Thus, in *Doe vs. Pitcher*, (6 *Taunt.* 359,) a deed which contained several limitations, one of which was void, as being to charitable uses, in conflict with the Mortmain Act, (9 *Geo. II. c.* 36,) was held good as to all the other limitations. So also, where a deed contained provisions in violation of the Property Tax Acts, it was held valid as to other provisions contained in it. See *Redshaw vs. Balders*, 4 *Taunt.* 57, 105, 113, 553. *How vs. Sage*, 15 *East*, 440.

And farther, although a bill of sale for transferring property in a ship, may be void as such, for want of reciting the certificate of registry, as required by 26 *Geo. III.* yet the mortgagor may be sued on his personal covenant in the same instrument, for the repayment of the money lent. 8 *East*, 281. 5 *Bing. N. C.* 86. 6 *Scott*, 794, *S. C.* 1 *B. & C.* 327. 2 *D. & R.* 499, *S. C.* 4 *B. & C.* 120. 6 *D. & R.* 176, *S. C.*

In *Lexington vs. Clarke*, a woman, upon the death of her husband, promised orally to pay rent due upon a lease to her deceas-

ed husband, and also to pay rent subsequently to become due for her own possession; and it was held, that the agreement was entire, and although void as to one part by the Statute of Frauds, it was nevertheless good as to the other part. That case is stronger than this, for this contract, I hold, is separable. (2 *Vent.* 223.)

So where there was a verbal contract to sell a certain farm, and certain dead stock, and growing wheat at separate prices, it was held that the contracts were distinct; and, although the agreement as to the land was void under the Statute of Frauds, because oral, yet the agreement as to the wheat and dead stock, was binding. 3 *B. & C.* 361. *S. C.* 5 *D. & R.* 228. Also, 5 *Taunt.* 787. 13 *East*, 87. 11 *Ibid*, 165. *Story on Contracts, section* 225.

Mr. Smith, commenting upon this doctrine, sums it up with his accustomed perspicuity and precision as follows: "If some of the conditions in a bond, *or promises in a contract*, are illegal, the illegality of those that are bad, does not communicate itself to, or contaminate those which are good—*except*, where from some peculiarity in the contract, *its parts are inseparable or dependent upon one another.* 1 *Smith's Lead. Cases*, 285. The *general rule* then is, that the illegality of one promise in a contract, does not make void other promises—the *exception* is when the promises are inseparable, or dependent one upon another. In this case the promises of Walton are not inseparable—*are not dependent*—and this case, therefore, is not within the exception.

LUMPKIN J.

[1.] Being unable to distinguish this case from that of *Miller and others vs. Cotten and others*, (5 *Georgia Rep.* 341,) so far as the *land* is concerned, I concur in the judgment of reversal as to the *real estate.*

It occurs to me, that the similitude between them is perfect in every fact and feature. In truth, as far as I can perceive, no two cases have been before us since our organization, where the facts bear a more striking resemblance, and the principles of law involved, are more indentically the same.

In *that* case, the bill charged that Ebenezer Duffy, being the owner of a certain tract of land, for certain reasons, (unnecessa-

ry to be here repeated, but equally as plausible as those charged in this case,) conveyed the land by an absolute deed to his father, Daniel Duffy, upon an agreement, by the father, to enjoy the land during his life, and at his death to convey it, or cause it to be conveyed, to the wife and child of Ebenezer Duffy, the bargainer, and the bill was filed by the widow of Ebenezer Duffy, who had intermarried with Stephen Cotten for the purpose of enforcing the performance of this trust agreement.

In *this* case, the bill charges that Littleberry Robinson, being the owner of a certain tract of land, for certain reasons, conveyed the same, absolutely, to Isaac Walton, upon an agreement, by Walton, to enjoy the land during his life, and at his death to convey it, or cause it to be conveyed, to the child of the bargainer, (Mrs. Harwell,) and the bill is filed by the child, who had intermarried with L. T. P. Harwell for the purpose of enforcing the performance of this trust agreement.

Mutatis mutandis—and the decree sought in the one case might be entered on the bill filed in the other.

In *that* case, we say, "After the most patient and careful inquiry, our conclusion is, that the design of this proceeding is the execution of a parol declaration of a trust in the remainder of this land, after the fruition and termination of the life-estate of Daniel Duffy. It addresses itself to the consciences of the defendants, viz: the legal representatives of Daniel and Jesse Duffy, to *discover* the *trust agreement.* It *prays* the *performance* of this agreement. In corroboration of this view, we may refer to the character and capacity in which the complainants come into Court. *It is not as the heirs at law* of Ebenezer Duffy, to whom this land would descend by operation of law, in the event of the deed from Ebenezer Duffy to Daniel Duffy being set aside on the ground of *fraud.* But they apply, as before stated, as *remainder-men in trust,* asking to have the secret trust between the father and the son executed in their behalf. So far from *repudiating the deed* of Daniel Duffy, on account of the fraud in its inception and procurement, they set up this conveyance: they concede, that under and by virtue of it, Daniel Duffy had a good estate for and during the term of his natural life, and they expressly waive calling upon his executors for an account of the rents, issues and profits which accrued previous to his death. They demand that, by a decree in Chancery, the parol trust may be executed."

In *this* case, there can be no doubt that this is a bill for a specific performance of this parol agreement. It was so admitted to be by the learned counsel for the defendant in error; so that we may say of this case, that "the design of this proceeding is the execution of a trust in the remainder of this land, after the fruition and termination of the life-estate of Isaac R. Walton, the prayer of the bill being that the representative of Walton, may be decreed to convey and deliver to complainants, the said plantation, &c., *such as it was at the death of the said Isaac R.* It addresses itself to the conscience of the defendant, viz: the legal representative of Isaac R. Walton, *to discover the trust agreement.* It *prays the performance* of this agreement. In corroboration of this view in this case, we may refer to the character and capacity in which these complainants come into Court.

It *is not as the heirs at law* of Littleberry Robinson, to whom this land would descend by operation of law, in the event of the deed from Robinson to Walton being set aside, on the ground of *fraud.* But they apply as *remainder-men in trust,* under the parol agreement, asking to have the secret trust between Robinson and Walton executed in their behalf. So far *from repudiating* the deed from Robinson to Walton, on *account of the fraud in its inception, they set up this conveyance:* they concede, that under and by virtue of it, Isaac R. Walton had a good estate for and during the term of his natural life, and waive by their prayer calling his representatives to an account for the rents, issues and profits which accrued previous to his death. They demand that, by a decree in Chancery, the parol trust may be executed."

The presiding Judge in the Court below, and the learned counsel for defendant in error, based the decision of the Court below, upon the ground of *fraud,* and this is the only feature distinguishing this case from *Miller et al. vs. Cotten et al.,* sought to be drawn by the latter in the argument before this Court. Let us see if there is any ground for this distinction.

From the bill of exceptions, (not having the transcript of the record,) I find the following synopsis of the bill, approved by the Judge below:

"The bill charged that Martha S. Harwell, formerly Martha S. Robinson, was born in 1804, and at the age of 4 days was adopted by Isaac R. Walton, dec'd, as his child—that about the year 1818, the said Isaac R. being desirous to settle a plantation, was well

pleased with a lot of land belonging to complainant's father, Littleberry Robinson, known as the Black Gum Hill lot—that after repeated applications to buy the said lot, the said Littleberry Robinson, finally, about 1st December, 1818, in consideration of an agreement and promise by the said Isaac R., that he would put twenty negro slaves upon said lot of land, and add thereto such other lands as might become necessary for said slaves and their increase to cultivate during the lifetime of the said Isaac R., and at his death, (said Isaac R's,) to deliver and convey, or cause to be delivered and conveyed to the complainant, as aforesaid, the said Black Gum Hill lot, with such other lands as might be added thereto, for the purpose aforesaid, together with said twenty slaves, their increase, and such stock, plantation furniture, utensils, &c., as might be upon said place at the death of said Isaac R. he, the said Littleberry Robinson did convey to the said Isaac R., the said Black Gum Hill lot of land, together with a stock of cattle, &c., amounting to $500, upon the said lot of land, the said Isaac R. paying nothing for said land and stock, as they are informed and believe.

"The bill farther charged, that in pursuance of said agreement, the said Isaac R., *in good faith*, did put twenty negro slaves upon said plantation, and *did purchase* other lands adjoining said lot, and often during his lifetime told complainants and others, that the said plantation and all that was thereon, would belong to them at his death. The bill farther charged, that said Isaac R. Walton died without conveying, or causing to be conveyed, the said property as agreed upon."

Such is the bill in this case, and if there is a charge of fraud, or any intimation of a fraudulent intent on the part of Walton, at the *time of procuring the deed*, or at *any other time*, it is more than I have been able to see. In the case referred to, we held that "*the facts upon which relief is prayed, on the ground of fraud, must be plainly, fully and distinctly alleged*," and this decision is there sustained by numerous authorities. I shall here repeat only one paragraph of the decision of the Lord Chancellor in *Irnham vs. Child*, (1 *Bro. C. C.* 93.) "*If the bill afforded a proper allegation*, it would be time enough to consider the evidence; *but certainly there is no fraud stated on the face of the bill. The bill does not go to destroy, but to affirm and reform the contract.* It must be dismissed."

So here, does the bill go *to destroy* the contract? Does it not *affirm it?* and seek by a decree of Chancery, *not only to recover back the land conveyed,* which would be the effect where fraud is charged, *but to compel the representative of Walton to convey land bought by Walton from other persons, and the negroes and other property of Walton, which there is no pretence were ever the property of Robinson?* Is not this *affirming* the contract? If it is not, how happens it that the title of Walton to his negroes and other property became divested out of him and vested in the complainants? This would be giving an effect to *fraud,* more potent and powerful than has been heretofore known, and in addition to *deed, devise,* and all the other conveyances known to the law, the title to land may pass by *fraud!* The bill then seeks to *affirm* the contract. But is there any such principle known to the law, as *affirming* for the one purpose, and *disaffirming* for another?

But if the allegations in the bill made a case of *fraud,* there is another objection fatal to the claims of these complainants. In the case above referred to, we say, "No such case is made in this bill. *The bill should not only have made a proper case, but have been brought by proper parties, viz: the heirs at law of Ebenezer Duffy.*" So here, if the bill made a proper case, these are not the proper parties. The heirs at law of Littleberry Robinson, and not the complainants, are entitled to relief.

The distinction, then, sought to be drawn by the defendants in error between this case and the case of *Miller and others vs. Cotten and others,* not only does not exist in fact, but if it did, would be fatal to their cause.

If then the decision of this Court in the case last named, be correct law, so far as the real estate is concerned in this case, the decisions of the Court below, in sustaining this bill and admitting parol evidence for the purpose of proving the trust agreement alleged, were erroneous and must be reversed.

After the decision of this Court in the case referred to, *cordially* sanctioned by the *whole Court,* I had supposed the question settled and closed; but I do not object to its revision. Indeed, I am quite willing that it shall be regarded, hereafter, as the rule of this tribunal, that its judgments are always open to discussion, either from the Bench or the Bar, when supposed to be erroneous; and that our judicial authority shall rest alone upon the reason by which it is supported. Assuming, then, this to be the doc-

trine, at least for the present, I propose to examine the principles upon which the case of *Miller* and *Cotten* rests. For if they are sound, they ought to be sustained.

First, I will consider these bills, (for I can draw no distinction between them,) as filed to enforce the specific execution of the alleged parol agreement, without any allegation of fraud; and, *second*, I will examine the effect that such allegations, if made, would have upon the rights of the parties.

That parol evidence is inadmissible to vary, add to or contradict a written contract, is a rule of law so long and so well established, that it would be pedantry to refer to authority in support of it. Upon this rule alone, how can evidence be admissible to curtail and cut down the *fee simple* granted by a deed, and convert it into a life estate? I might here inquire, how far such evidence is admissible to prove a *different* consideration from that expressed in a deed; but waiving this question, the above view is, to my mind, plain, simple and unanswerable. It may be replied, that the object is not to alter or change the deed, but to engraft upon it a trust. Though I might reply, that evidence of this trust, *created at the time of the making of the deed*, would be inadmissible without the Statute of Frauds, upon the principle above alluded to, yet I desire to meet the question, and inquire how far such evidence is admissible under the provisions of the 7th section 29 *Car. II. c.* 3.

[2.] That section provides, "*that all declarations or creations of trusts*, or confidences of any *lands*, tenements or hereditaments, shall be *manifested or proved by writing*, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else shall be void."

In the face of this provision of the Statute, how can parol evidence be admissible to *prove* that which the Statute requires shall be *proved by writing?* The statement of the proposition is sufficient to refute it; and when I add, that the decision of no respectable Court can be found, (where the Statute has been adopted,) at variance with the position now taken, it seems to me that the argument on this view of the case is exhausted. There are few sections of this celebrated Statute, that have not been more or less frittered away by nice distinctions and encroachments of Courts of Equity, but I think I may safely say none less so than the one under consideration. There are cases of imperfectly ex-

pressed trusts, where Courts of Equity will interfere and compel the party to carry out the trust in good faith. *Rob. on Fr.* 96. Such was the case of *Podmore vs. Gunning*, (7 *Sim.* 644,) cited and relied on by counsel for defendants. Devises have been allowed to be defeated by proof of a secret illegal trust, contrary to the policy of the law. *Mucklestone vs. Brown*, 6 *Ves.* 52. 9 *Ves.* 515. But these are exceptions not within the reason or policy of the Statute. I have examined carefully the authorities relied upon by the defendant in error, and have found none of them contradicting the position here assumed, except the case of *The Lessee of Thomson et ux. vs. White*, (1 *Dallas*, 447.) That case, however, is no authority, as the State of Pennsylvania did not adopt the English Statute of Frauds, but enacted a Statute similar of her own, and in that Statute *has entirely omitted the 7th and 8th sections of the English Statute*, under which the present question arises. *Per Ch. J. Tilghman, in Lessee of German vs. Gabbald*, 3 *Binney*, 304.

There is another exception, and that is where the transaction is infected or tainted with *fraud;* and this brings me to the second and last view of this portion of this cause necessary to be considered.

That Courts of Equity will not permit the Statute of Frauds to be used as a cover for fraud, is a position that no jurist will deny. It shall be my task to show, *first*, that there is no fraud charged in this bill, nor do the circumstances charged amount to a fraud; and *second*, that if they did, the *complainants* are not entitled to the relief sought.

[3.] I have already extracted and incorporated into this opinion the charges made in this bill, from which it appears that the only complaint is, that Isaac R. Walton *failed* to do what he, in *good faith*, promised and intended to do. Does this failure constitute *fraud?* In *Miller and others vs. Cotten and others*, we held that it did not, (*p.* 350.) Did we hold right? Can that be *dolus malus* which was done, and *charged to have been done bona fide?* For we must recollect that the *fraud* must be in the *original* transaction—in the procuring of the deed. The *failure to perform* is mere evidence, say the defendants in error, of the original intent. Says Judge *Merriwether*, in the charge excepted to, "It is not necessary to prove that the fraudulent intent of Walton existed, *eo instanti* with the making of the agreement. If such an intent

arose afterwards, and in pursuance of that intent to defraud Mrs. Harwell, Walton failed to do what he had contracted to do, the law *will evidence his intent by his acts*, and connecting his failure to convey with the original agreement to convey, *will presume the existence of that fraudulent intent on the part of Walton at the time of the conveyance by Robinson.*"

Without inquiring into the correctness of this ingenious exposition of the law at this time, how could it apply to a bill which charges, in terms, *good faith* on the part of Walton? That he never denied the trust to the hour of his death, but in *good faith* went on to execute it! A bill filed evidently under the idea that the part performance of the trust would take it out of the provisions of the Statute. But to return. Did the failure to convey constitute *fraud?* *Fraud*, under the Civil Law, is defined to be "any cunning, deception or artifice used to circumvent, cheat or deceive another." And this definition Judge *Story* adopts as sufficiently descriptive of *actual fraud*. *Story's Eq. Jur.* §§186, 187. 4 *Peters*, 297. *Constructive frauds* are such as "by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, are deemed equally reprehensible with positive frauds." §258. "But if there has been no fraud, and no agreement to reduce the settlement to writing, but the other party has placed reliance solely upon the honor, word or promise of the husband, no relief will be granted, for in such a case the party chooses to rest upon a parol agreement and must take the consequences." 2 *Story's Eq. Jur.* §768. So says Lord *Hardwick*, in *Whitton vs. Russell*, (1 *Atk.* 448,) "Every breach of promise is not to be called a fraud." So in the case of *Moss vs. Riddle*, (5 *Cr.* 351,) the plea of the defendant stated a promise on the part of the plaintiff which he had *failed to comply with*, by which the defendant alleged the writing sued on became void. This plea, it was insisted, contained sufficient allegations of fraud; but Ch. J. *Marshall* said, "There is no allegation of fraud, and the circumstances pleaded do not, in themselves, amount to fraud. *Fraud consists in intention, and that intention is a fact which ought to be averred.*" So in *Governeur vs. Elmendorf*, (5 *John. Ch. R.* 82,) counsel for defendants insisted that, from the facts stated in the answer, a case of fraud was made out. But Ch. *Kent* says, "I do not understand that any such charge exists in the answer or was intended by it, as a substantial ground of defence,

though such a charge is now put forward by the defendants' counsel as one of their points. But it is requisite that the *charge of fraud should be made a distinct ground of allegation by the party in pleading*, otherwise it *is not to be deemed in issue*, and cannot affect the contract in question." See, also, the remarks of the same learned Chancellor, in *James vs. McKernon*, 6 *Johns.* 564. See, also, *Roberts on Frauds*, 79. 3 *Rand.* 507, *and cases there cited.* 4 *Munf.* 273. 6 *Har. & John.* 435, 445. 4 *Ga. Rep.* 519. 12 *Peters*, 196.

I am tempted, at the expense of being tedious, to insert here the cases referred to in *Miller vs. Cotten* upon this point, and more especially the case of *Irnham vs. Child*, (2 *Bro. Ch. C.* 93,) but I forbear, conceiving that the point is amply sustained by the authorities quoted and referred to.

Counsel for the defendant commented at some length upon the case of *Kennedy's Heirs and Executors vs. Kennedy's Heirs*, (2 *Ala. N. S.* 571,) as being an authority in point, to show that the charges in this bill were sufficient to amount to a charge of fraud. That was an application, by the children and sole heirs of William E. Kennedy, to set aside a deed made by their father to Joshua Kennedy. William E. Kennedy was a free drinker, gradually becoming more intemperate and subject to intoxication, and when intoxicated, or partially so, would make conveyances of his real estate to any one who would ask him. He lived in the house with Joshua Kennedy, his brother, who *acted as his agent*, and in whom he placed great confidence, and at his urgent solicitation, and that of other friends, William made the deed sought to be set aside, upon the assurance of Joshua, that he would hold it in trust for the benefit of complainants. Previous to Joshua's death, he denied the trust, and set up title in himself. The Court held that these allegations amounted to a charge of fraud, and it is not necessary for me to attack the correctness of the decision; on the contrary, I think the confidential fiduciary relationship of the parties, of itself, would require a Court of Equity to look with suspicion upon such a transaction.

The rule I am contending for is not only the rule of the books, but it is the dictate of sound reason. Let the doctrine be once established, that a failure to comply with a parol promise made cotemporaneous with a deed, is *ipso facto*, a fraud and can be proved, and the promise decreed to be performed in Equity, on

the ground of fraud, and you do what the Master of Rolls, in *Portmore vs. Morris*, refused to do—*demolish one of the foremost rules of law.* You have but to allege a *failure* to comply with any *parol* stipulation, and Equity must relieve on the score of fraud. If this bill had charged that the parol agreement now set up was intended to be inserted—would have been inserted in the written contract, but for the fraudulent promise on the part of Walton to execute it any how; or that it was intended to be so inserted, but by fraud of Walton was withholden; or that a different paper was executed than was intended, and thus was effected by any "contrivance or design," on the part of Walton, then there might be some pretence that the allegations made a case of fraud; but when the bill charges, that the parol agreement never was intended to be inserted in the written contract; that reliance was placed solely upon the word of Walton, and that it was not misplaced, for he, in *good faith*, proceeded to do as he promised, and acknowledged the trust to the day of his death, and by accident or neglect, not culpable, died without consummating his promise, I must adhere to my opinion that it makes no case of fraud.

2d. But if it did, would these complainants be entitled to the relief sought? I think not. *First*, because they are not the proper parties; and *second*, because, in cases of fraud, the relief sought can extend only to the property so fraudulently obtained.

[4.] The effect of fraud is to vitiate the contract and restore the parties to their original position. Where deeds had been fraudulently obtained, the remedy in a Court of Law was inadequate, and recourse was had to Chancery to rescind the contract and order the deed to be delivered up to be cancelled, or order a reconveyance; and this is the universal relief afforded in Equity in cases of fraudulent conveyances of lands. In *Pickett vs. Loggon*, (14 *Ves.* 234,) Lord *Eldon* says, "It has long been settled, that if a conveyance has been obtained by means which, in this Court, have the character of fraud, imposition, &c. the person deriving title under it is a trustee, and the species of relief is by directing a reconveyance." Again, in *Winch vs. Winchester*, (1 *Ves. & Bea.* 378,) the same learned Chancellor says, "As to the admissibility of the evidence, it must depend upon the purpose for which it is produced. If the defendant insists that the evidence be received, *he will be entitled to have the contract performed*, with an

abatement of the price. I think it is not admissible for that purpose, *as the Court cannot execute in his favor a written agreement with a variation introduced by parol evidence;* but if he offers the evidence for the purpose of *getting rid* of such contract altogether, for that purpose, I think it may be received." And so says Judge *Story*—" A fraudulent purchaser will be held as a trustee for the honest but deluded and cheated vendor." 2 *Eq. Jur.* §1265. In *Whelan vs. Whelan*, (3 *Cow.* 580,) the question was directly made, whether the fraudulent grantee could be decreed to hold as trustee according to the parol agreement, or whether the conveyance should be decreed fraudulent and void, as was there prayed. *Woodworth*, J. says, " The farm in St. Lawrence County, on the face of the agreement, was conveyed, unconditionally, to William. He admits in his answer, that he agreed to convey it to Charles. There was no declaration or evidence of the trust *in writing* and the deed is absolute. *This case cannot be taken out of the Statute of Frauds. It follows then, that Charles could not compel execution of this trust.* Decree, that the deed be annulled and held for naught." *Suydam*, Senator, concurring, says, " There being no *written* declaration of trust, I can see no reason why we should not adjudge a reconveyance. On a bill *filed by Charles, or his children, William might set up the Statute of Frauds and defeat a conveyance,*" *p.* 587. So in the case in 2 *Ala. Rep.* above referred to, the decree was a reconveyance of the land.

These cases might be multiplied to any conceivable extent, but it is unnecessary. I need only add, that I have not been able to find a case where a Court of Equity has ever held the fraudulent grantee of land trustee for any person save the grantor and his heirs; and that no such case exists, I may safely infer from the fact, that the able and indefatigable counsel for defendants in error produced none on the argument. The only case which seems to look that way, was the case of *Sellack vs. Harris*, reported in 5 *Vin. Abr.* 521, and referred to in 2 *Story's Eq. Jur.* §768. In this case the father had purchased lands in fee with the money of his second son, and intended to devise them to him; but the eldest son promised that he should enjoy them accordingly. The eldest son refused to comply after the death of the father, and it was decreed that he should. Not having this work, I do not know the reasons on which this decision went. I learn from 3 *Woodes' Laws of Eng. p.* 438, that Lord Keeper *Wright* and the

Master of the Rolls held the eldest son entitled and refused relief; but Lord Chancellor *Cowper* was of another opinion. The case does not conflict with the position I have laid down, for several reasons. *First*, the purchase being made with the money of the second son, there was a *resulting trust* in his favor, and the eldest son, therefore, held as trustee for him; and *second*, as there was no conveyance obtained, a reconveyance could not be decreed, for the fraud being perpetrated on the father, a conveyance to his estate by the heir would be a conveyance to himself. The relief granted was the only relief that in the case could be given.

I know there is a class of cases to be found in the books, where a person intending, most frequently by will, to confer a benefit upon a third person, has been hindered from so doing by the fraud of another, that such last person has been decreed to make good the injury thus inflicted; as where executors, residuary legatees or heirs have hindered the testator from bequeathing annuities or legacies, upon promises to pay them any how, such persons, after the death of the testator, have been forced by Equity to make good their promises; but upon examination, all such cases will be found to involve the right to personalty only. It is true, that in some of the cases legacies have been charged upon lands, because the testator was estopped from making such charge by the fraudulent promise of the heir. The reason of these cases is, that the descent to the heir was by the consent of the testator, he failing to make the payment of the legacy a charge on the land. Such consent was obtained by fraud. The testator being dead, Equity cannot restore the parties as they were. The relief then granted by a Court of Equity, is to take away from the heir the benefit of this consent thus fraudulently obtained.

I think I may safely say, no precedent can be found where the fraudulent grantee in a deed to land has been held as a trustee for any one, save the grantor and his heirs. For them he certainly is trustee. It would be very curious that he is at one and the same time trustee for the deceived grantor, and trustee also for the person for whose benefit the promise was made. To illustrate: Walton here, according to this position, is liable as trustee for the grantor, Littleberry Robinson, or his heirs, and at the same time is liable to precisely the same extent as trustee for Mrs. Harwell. Would a judgment in favor of the grantor protect him against the claims of Mrs. Harwell, or will this decree protect him

against the heirs of Robinson? If so, which is entitled? The one that sues first?

These complainants are not the proper parties. No benefit to them is alleged to have been hindered or prevented by the fraudulent promise of Walton; and were it necessary, it might be a grave question whether or not they are not mere volunteers, in any view, in whose favor Equity never decrees a specific performance.

[5.] But if they were the proper parties, and if the bill made a proper case of fraud, they could not have the relief prayed, because they seek, under this bill, to have decreed to them, not only the land so fraudulently obtained, but also all the land purchased by Walton adjoining the same, and negroes and stock to the value of $10,000 besides! Such an effect to a fraudulent purchase of lands is, I confess, new to me, and a precedent for it cannot, I apprehend, be found in the books. Indeed, this mode of *conveying title by fraud*, is rather a new head of legal science. A fraudulent grantee might be decreed to account for the rents, issues and profits. He ought to be forced to reinstate the party deceived to all the rights he enjoyed before the fraud was committed, and as if the fraud never had been committed; but the proposed plan of amalgamating the *contract* and the *fraud*, and where the *contract* fails on account of the Statute, to have recourse to the *fraud*, and where the *fraud* is insufficient for the purpose, to fall back on the *contract*, is, to my mind, an anomalous proceeding. As I before remarked, this bill seems to have been filed upon the idea that a part performance of the *trust* might be gathered from the facts alleged. No such position was assumed in the argument in this Court, nor does the Judge below base his decision on any such idea. Nor would it avail the defendants in error if such position had been taken, for the *acts* done by Walton were none other than every purchaser does upon buying land. He took possession, placed his own negroes upon it, and retained possession until his death. These acts are indicative of *no trust*; nor is there any other *fact* alleged from which a Court of Equity could presume the part performance *of a trust.*

And it may be well to remark in all cases, that "in order to make the acts such as a Court of Equity will deem part performance of an agreement within the Statute, it is *essential that they*

should clearly appear to be done solely with a view to the agreement being performed." 2 *Story's Eq. Jur.* §762.

I will only add, that the same acts charged in this case, existed in the case of *Miller et al. vs. Cotten et al.* and were there considered as insufficient to take that case out of the Statute. There Daniel Duffy went in possession under the deed, and retained possession till his death. Here, Walton did precisely the same acts. I see no reason for changing my opinion as to the effects of them.

I have thus, at some length, investigated the principles on which my view of this case, as well as our decision in *Miller and others vs. Cotten and others*, are founded, and a farther examination of the authorities but strengthens my conviction of the correctness of that decision.

It remains to add but a few words in reference to the personalty included in this bill. If the ground of relief here is *fraud* in Walton, I think I have already shown that such fraud can give no right to recover any thing but the land so fraudulently obtained, and that being the basis on which the Court below founded its decision, I might dismiss this part of the case without farther remarks.

[6.] But viewed as a bill to enforce the performance of this alleged contract, the complainants, it would seem, are remediless, because a contract made both for the sale of *real and personal* property, which is *entire*, founded upon one and the same consideration, and is not reduced to writing, is *void*, as well in respect to the *personalty* as the *realty;* no principle of law being better settled than that an *entire contract void in part is void in toto. Thayer vs. Rock*, 13 *Wend. Rep.* 53. *Crawford vs. Morrell*, 8 *John.* 253. *Van Alstine vs. Wimple*, 5 *Cow.* 162. 7 *Term*, 201. 2 *Vent.* 223.

But I forbear to discuss this branch of the case, or to examine how far this doctrine is applicable to the facts and circumstances embraced in this bill.

WARNER, J.

[1.] The object of the complainants' bill is to obtain the *specific execution* of an agreement made between Littleberry Robinson

and Isaac R. Walton, the defendant's intestate, for the benefit of Mrs. Harwell, one of the complainants, who is the daughter of Robinson. Littleberry Robinson, the father of one of the complainants, being under a natural and moral obligation to make a suitable provision for his daughter, entered into the following parol agreement with Isaac R. Walton, in his lifetime:—Robinson, on his part, contracted and agreed to convey to the said Walton, a certain tract of land in the County of Morgan, known as the Black Gum Hill lot, of the value of four thousand dollars, together with the stock of cattle, sheep and hogs upon the place, of the value of five hundred dollars. The said Walton, on his part, contracted and agreed, in *consideration* of said conveyance of land and stock to him by said Robinson, that he would place twenty negro slaves upon said lot of land, and add thereto such other lands as might become necessary for the said slaves and their increase to cultivate during the lifetime of said Walton, and at his death would deliver and convey, or cause to be delivered and conveyed to the complainant, (Mrs. Harwell,) the said Black Gum Hill lot of land, with such other land as might be added thereto, for the purpose aforesaid, together with the said twenty slaves and their increase, and such stock, plantation tools and furniture as might be upon said place at the death of said Walton.

The complainants charge in their bill, that Robinson *executed* his part of the agreement, by making the conveyance of the land and stock to Walton, the latter paying him nothing therefor; nor was he bound, by said agreement, to pay any other consideration than that set forth in said agreement for the land and stock so conveyed; and that the said Walton, in *pursuance of said agreement*, did put twenty negro slaves upon said plantation, and went *into possession of the same*, and did purchase other lands adjoining the said Black Gum Hill lot, as the increase of said slaves made it necessary, so that said settlement of land, at the death of Walton, comprised five hundred acres; that Walton, in his lifetime, often told the complainants and other persons, that said plantation and all that was on it would, at his death, by virtue of his said agreement with said Robinson, be the property of complainants. The complainants also allege, that said Walton departed this life in the month of January, 1845, without making the conveyance as stipulated by said agreement, or giving any directions as to the delivery and conveyance of said property to the com-

plainants. The defendant in his answer, denies the agreement, and insists on the Statute of Frauds in bar of the complainants' right to a decree. On the trial of this cause in the Court below, exceptions were taken to the decision of the Court, in overruling the motion to dismiss the complainants' bill for want of equity, to the admission of parol evidence offered to prove the agreement, and to the charge of the Court to the Jury; but all the objections are properly reducible to one, and that is, the failure of the complainants to make such a case by their bill, and the evidence in support of it, as will authorize a Court of Equity to grant them the relief for which they pray.

As we are not unanimous in our opinions in this case, I shall proceed to express my separate reasons for the judgment which I feel bound to render in favor of the complainants.

The main ground of objection to the complainants' recovery, as urged by the counsel for the defendant, is the Statute of Frauds. Their position is, that the agreement to convey land is void by that Statute, and the agreement being void as to the land, is also void as to the personalty; that an agreement void in part is void as to the whole. As I am for affirming the judgment of the Court below as to the entire agreement, including the land as well as the personal property, I shall not discuss the question whether an agreement void in part is void as to the whole, but shall leave the discussion of that branch of the case entirely to my brethren.

By the 4th section of the Statute of Frauds, it is declared, "No action shall be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." *Prince*, 915.

In a Court of Law, I concede the complainants could not enforce a *specific* execution of this agreement, although based upon a sufficient consideration, nor in a Court of Equity, unless there had been a *part performance* of it.

Whenever there has been a *part performance* of a parol agreement for the conveyance of land, *a part execution of the substance* of the agreement, acts done and performed, unequivocally referring to, and resulting from the agreement, and such that the party

in whose favor the agreement was made, would suffer an *injury* amounting to *fraud*, by the *refusal* of the other party to execute it, a Court of Equity will, in such cases, decree a specific performance of the agreement. 1 *Maddock's Chan.* 378. *Fonblanque's Eq. top page*, 157, 3*d Amer. Ed.* 2 *Story's Eq.* 62, §759. *Clerk vs. Wright*, 1 *Atkyns' Rep.* 12. *Walker vs. Walker*, 2 *Atkyns' Rep.* 100. *Gregory vs. Mitchell*, 18 *Vesey*, 328.

The principle by which Courts of Equity are governed in decreeing a specific execution of parol contracts, within the Statute of Frauds, when there has been a part performance, is, that inasmuch as the Statute was enacted to *prevent fraud*, a party will not be permitted to take shelter under the Statute and *perpetrate fraud;* or, as Mr. Justice *Story* states the principle, "Where one party has *executed* his part of the agreement, in the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a *fraud* upon the former to suffer this refusal to work to his prejudice." *Story's Eq.* 64. The rule, as stated by Mr. *Fonblanque*, is equally explicit and satisfactory—"If the agreement be carried into *execution* by one of the parties, as by delivering *possession*, and such execution be accepted by the other, *he that accepts it* must perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the *words*, but upon the *fact performed*, and it is *unconscionable* that the party that has received the *advantage* should be admitted to say, that such contract was never made." *Fonblanque's Eq.* 157.

In *Buckmaster vs. Harrop*, (7 *Vesey*, 346,) Lord *Eldon* states the ground of the interference of the Court to decree a specific performance of agreements within the Statute, to be *fraud in refusing to perform the agreement after performance by the other party. Niven vs. Belknap*, 2 *John. R.* 587. *Massey vs. McIlvrain*, 2 *Hill's Ch. Rep.* 425.

I have endeavored to establish the principle on which Courts of Equity proceed to decree a specific execution of agreements within the Statute of Frauds.

[2.] The next question to be considered is, whether the complainants have made such a case by their bill, as to bring it within that principle; or in other words, have the complainants, by their bill laid, the *foundation* for the introduction of the parol evidence, which was admitted on the trial by the Court below? The com-

plainants have alleged the agreement made by the contracting parties, and the *consideration* for that agreement; that the agreement was *certainly executed* on the part of Robinson, by conveying to Walton the Black Gum Hill lot of land, and the stock thereon, of the value of forty-five hundred dollars, and the acceptance thereof by Walton, who went into *possession* of the same, and cultivated it until his death, without paying any other consideration therefor, than his agreement to convey the property at his death to the daughter of Robinson, and the adopted daughter of the defendant's intestate; that Walton, the defendant's intestate, placed twenty negro slaves on the land so conveyed by Robinson, *in pursuance of the agreement*, and did purchase other lands adjoining the Black Gum Hill lot, as the increase of said slaves made it necessary, and departed this life in January, 1845, without making any conveyance of the property to the complainant, Mrs. Harwell, as by the terms of the agreement on his part, he was bound to have done. So it will be perceived, that the agreement was not only *wholly executed* on the part of Robinson for the benefit of his daughter, but was so far executed by Walton, as to *place twenty negro slaves upon the land, in pursuance of the agreement, who went into the possession of the land and stock*, cultivated, used, and enjoyed the same during his lifetime, without paying any other consideration, than his agreement to convey the property to the daughter of Robinson, for whose benefit the contract was made, but which conveyance he never executed on his part, as in Equity and good faith, by the terms of his contract with Robinson, he ought to have done. Such refusal and failure to execute the agreement on the part of Walton, when it had been *executed* on the part of Robinson, in the confidence that he would act in good faith on his part towards his daughter, and having enjoyed the benefit of that agreement for a number of years, is a *fraud* upon the rights of Mrs. Harwell; and such a fraud too, as a Court of Equity will not permit to be sheltered and protected under a Statute enacted to *prevent fraud*. It is not necessary to allege the commission of a fraud *in totidem verbis*. If the bill states, with distinctness and precision, facts and circumstances which in themselves amount to fraud, it is sufficient. *Kennedy vs. Kennedy*, 2 *Ala. Rep.* 604.

I place my judgment expressly upon the ground, that there was such a *part execution* of this agreement on the part of the contracting parties, according to the case made by the complainants'

bill, that the *refusal* and *failure* of Walton, to execute his part of the agreement, by making a conveyance of the property, according to the terms of that agreement, is, according to the well settled principles by which Courts of Equity view such transactions, a *gross fraud* upon the rights of Mrs. Harwell, for whose benefit the agreement was made; and, therefore, the parol evidence was properly admitted by the Court below.

The verdict of the Jury establishes the agreement, and the acts of part performance, as charged in the complainant's bill, and the evidence, in my judgment, was amply sufficient for that purpose.

The testimony of John B. Walker, one of the several witnesses examined for the complainants, is very strong in support of the agreement, not only as to the declarations of Walton, but to his *acts*. In 1840, the witness drew a will for Isaac R. Walton, who gave the Black Gum Hill plantation, negroes, and every thing appertaining to it, horses, mules, stock, &c. to Mrs. Harwell, one of the complainants. When it was written and read to him, he said, "he had now done what he had promised Littleberry Robinson in his lifetime, to do." The plantation was kept separate from his other plantations. Witness kept the will, and afterwards gave it back to Walton, who told him he intended to destroy it, and it was destroyed in 1842—said one of his reasons for destroying the will was, that Doctor Harwell did not please him, and he wished to change that clause.

Taking the whole of the testimony contained in the record, and in my judgment, there will be found but few cases in which parol agreements have been established by more convincing and irrefragable evidence. The counsel for the defendants have insisted, with some degree of zeal, that the principles settled by this Court, in the case of *Miller vs. Cotten*, (5 *Ga. Rep.* 341,) must control this case. I have not been able myself to perceive the analogy insisted on in the argument. In the judgment rendered in *Miller vs. Cotten* I concurred, and it now meets with my entire approbation. If I understand the questions involved in the judgment of the Court, in that case, it does not now stand in my way. In that case, the complainants claimed to be entitled as *remainder-men in trust*, under a deed made by Ebenezer Duffy to Daniel Duffy, which deed on its face, purported to have been made for a valuable consideration paid by the grantee to the grantor. The complainants claimed under this deed, and relied on it as part of their

title. They offered parol evidence, to *contradict the face of the deed*, under which they claimed title, and to engraft a *trust* in their favor upon that deed by parol evidence, without alleging any *fraud* in the execution of the deed. The 7th section of the Statute of Frauds declares that, "All declarations, or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." *Prince*, 915. The parol evidence offered to contradict the face of the deed under which the complainants claimed title, and to *engraft a trust* in their favor as remainder-men *upon the deed*, was rejected by the Court in *Miller vs. Cotten*, there being no allegation that the deed was written different from what the parties intended, or any *fraud* whatever in its execution. In this case, the complainants do not seek to *engraft any trust*, in their favor, *upon the deed* from Robinson to Walton. The complainant's title to relief is based upon the *agreement* alone, and not upon the deed from Robinson to Walton; that deed was executed just as it was intended to have been executed by the parties to it, and constituted the *consideration* for the agreement, which the complainants now seek to have specifically executed in their favor. The complainants allege the agreement between the parties under which they claim to be entitled to equitable relief, and also allege the conveyance of the land and stock by Robinson to Walton, as the *consideration* for the agreement paid by Robinson to Walton, as *part performance* of the agreement. It was part of the agreement between the contracting parties, that Robinson should convey the land and stock to Walton, *not in trust* for the benefit of Mrs. Harwell, but as a *consideration for the agreement*, by which Walton bound himself to place twenty negro slaves upon the land, and purchase other lands, as the increase of the slaves should render it necessary; and at his death to convey the *whole*—the Black Gum Hill lot—the twenty negroes and their increase—the stock, and the land afterwards to be purchased, as the increase of the slaves should render it necessary, to Mrs. Harwell.

The only object for alleging a conveyance of the land and stock to Walton by Robinson, was, to show the *payment of the consideration* of the agreement by Robinson, and that Walton had enjoyed the *full benefit of the contract* on his part, and then *fraudu-*

lently refused to execute his part of the agreement, which fraudulent refusal operated as an *injury* to the rights of Mrs. Harwell, for whose benefit the agreement was made.

In the consideration of a Court of Equity, the *refusal* of Walton to fully execute his part of the agreement, by making a conveyance of the property, amounts to *fraud*, and constitutes in this case, the *gravamen* of the complainants' bill.

In *Miller vs. Cotten*, the parol evidence was offered to engraft a *naked parol trust* upon a deed for land, under which the complainants claimed title, without having laid *any foundation*, whatever, for the introduction of such evidence, by the allegation of any fact in their bill, from which a Court of Equity could even *presume fraud*, so as to take the case out of the 7th section of the Statute of Frauds. In this case the complainants seek to obtain the specific execution of an agreement for the *conveyance* of land, within the 4th section of the Statute of Frauds, not to engraft a mere *naked parol trust upon a deed*, absolute upon its face, within the 7th section of the Statute.

In *Miller vs. Cotten*, there was *no foundation* laid in their bill for the introduction of parol evidence. In this case the complainants have laid the *foundation* for the introduction of parol evidence, to take the case out of the Statute, by alleging such a *part execution* of the agreement, by one of the contracting parties, and *acceptance* by the other, that to permit one of the parties to recede from the agreement, would, in view of a Court of Equity, operate as an *injury* to the complainants, for whose benefit the agreement was made, amounting to fraud; and that, in my judgment, constitutes a clear and marked distinction between this case and *Miller vs. Cotten*. The object of the agreement was to make provision for Mrs. Harwell, who was the daughter of one of the contracting parties, and the adopted daughter of the other. The complainants are not *mere volunteers*. 2 *Story's Eq.* 103, §793. *Minturn vs. Seymour*, 4 *John. Ch. Rep.* 500. *Ellis vs. Nimmo*, 10 *Eng. Ch. Rep.* 534.

The agreement was executed on the part of Robinson, in the *confidence* that it would be executed by Walton, for the purpose of making a suitable provision for his daughter, and his refusal to execute his part of the agreement is *injurious* to, and a *fraud* upon, the rights of that daughter, now one of the complainants. "Fraud, (says Mr. Justice *Story*,) in the sense of a Court of Equi-

ty, properly includes all acts, omissions and concealments which involve a breach of legal or *equitable duty*, trust or *confidence* justly reposed, and are *injurious to another*, or by which an undue and *unconscientious advantage* is taken of another; and Courts of Equity will not only interfere in cases of *frauds* to set aside acts done, but they will, also, if acts have, by *fraud, been prevented from being done by the parties*, interfere and treat the case exactly as *if the acts had been done.*" 1 *Story's Eq.* 197, §187. *Kennedy vs. Kennedy*, 2 *Ala. Rep.* 571.

[3.] In a Court of Equity, all agreements are considered as performed, which are made for a valuable consideration, in favor of persons entitled to insist upon their performance; they are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed; they are also deemed to have the same consequences attached to them, so that one party, or his privies, shall not derive benefit from his *laches* or *neglect;* and the other party, for whose *profit* the contract was designed, or his privies, *shall not suffer thereby.* 1 *Story's Eq.* 79, §61. Having taken this agreement out of the Statute, a Court of Equity will execute it according to the *intention* of the contracting parties, for it is a rule in Equity, that what is *covenanted* to be done for valuable consideration, is considered as *actually done. Bash vs. Dalnay*, 3 *Atkyns' Rep.* 534. *Crabtree vs. Bramble, Ib.* 687. In *Massey vs. McIlvain*, (2 *Hill's Ch. Rep.* 428,) it was held, that a *parol* agreement to convey land, set up by the Court, has equal validity with a deed containing a covenant to convey. In *Greenaway vs. Adams*, (12 *Vesey*, 401,) the Master of the Rolls said, " The *party injured* by the non-performance of a contract, has the choice to resort either to a Court of Law for damages, or to a Court of Equity for a *specific performance.*" The complainants in this case have resorted to a Court of Equity for the specific performance of the agreement made for *their benefit*, and for the reasons already stated, I am of the opinion they are entitled to have it executed according to the *intention* of the contracting parties.

[4.] The decree rendered for the complainants, is for the sum of twelve thousand and ten dollars, and twenty-seven cents by way of damages; the defendant by a sale of the property mentioned in the agreement, having put it out of his power *specifically* to perform the agreement. In such a case it is competent for a

Court of Equity to decree compensation by way of damages. *Phillips vs. Thompson*, 1 *John. Ch. Rep.* 150. *Greenaway vs. Adams*, 12 *Vesey's Rep.* 400.

In every view in which I have been enabled to consider this case, I have an abiding confidence that, according to the fundamental principles by which Courts of Equity are governed in dispensing justice, the judgment of the Court below, decreeing a specific execution of the *entire* agreement, should be affirmed.

INDEX.

ABATEMENT.

See *Administrators, &c.* 1. *Tenants in Common*, 1, 2.

ACCOUNT.

See *Administrators, &c.* 10.

ADMINISTRATORS, EXECUTORS, &c.

1. Where a free person of color is a party to a suit in the Courts of this State, and dies, the suit abates, and administration should be taken out on the estate of such free person of color. *Scranton et al. vs. Demere*..... 92

2. In an action by the present guardian against the administrator of the former guardian and his sureties on the bond, the plaintiff must show *affirmatively* some act of waste or mal-administration by his predecessor during his life; and the bare reception of money for his wards, without farther proof of default, is not, *per se*, a breach of the bond. *Ray, adm'r and others vs. The Justices, &c. Macon County*..... 303

3. The Act of 1820, authorizing securities to be joined with the principal in suits upon executors', administrators' and guardians' bonds, *considered. Ibid.*

4. In an action by the present guardian against the administrator of a deceased guardian and his securities upon their bond, in which the breach alleged is the receipt of three several sums of money by the former guardian, which he had appropriated to his own use, the measure

of damages is the aggregate of principal and accruing interest. *Ibid.*

5. Ordinarily, guardians who have given security for the faithful performance of their duty, have the legal control over mortgage debts owing their wards, and a right to receive and collect the monies due thereon, and to release the same in the proper exercise of their discretion as guardian. *Perkins and others vs. Dyer*..... 401

6. But where a mortgage is executed to a mother, as the natural guardian of her children, by the administrator of their deceased father, to secure them in their patrimony, which he has wasted, it is not in the power of the mother fraudulently to discharge the mortgage lien, to the prejudice of the infant *cestui que trust*, especially where she has failed to give bond as required by law, to protect them against mismanagement. *Ibid.*

7. At Common Law, the mother, as guardian by nature or for nurture, has no control over the estate of her minor children. *Ibid.*

8. An administrator who has been guilty of gross neglect in not making returns of the condition of the estate in his hands: *Held*, that interest should be compounded against him every *six* years on balances in his hands. *Fall, administrator, vs. Simmons and others*..... 265

9. An executor, administrator or guardian who fails to make returns annually, according to law, forfeits all commissions for his trouble in managing the estate. *Ibid.*

10. Where a guardian pleads in bar of an account, the receipts of his wards as evidence of a final settlement: *Held*, that his admission in his answer in support of his plea, that he had not made regular returns to the Court of Ordinary, was such a circumstance as cast suspicion upon the fairness of the settlement and would avoid the plea. *Briers vs. Hackney and others*..... 419

11. Where the provisions of the Act of 1812, authorizing an executor, administrator or guardian, whose residence shall be changed from one County to another, to make his returns in the County in which he lives, are fully complied with, the sureties on the first bond are discharged from all farther liability on account of their principal. *The Justices, &c. vs. Selman and others*..... 432

12. Where the Court of Ordinary have granted letters testamentary, of administration or guardianship, to a person entitled and capable of discharging the duties of the trust, no new appointment can be made, unless the former is vacated by death, removal or some other way; and the new appointment being void, the bond also is void, given for the faithful performance of the trust delegated to the new appointee. *Ibid.*

13. By a fair construction of the Statutes of this State, executors, administrators and guardians are required to take the oath prescribed, *before the Court of Ordinary. Echols and Wife vs. Barrett*..... 443

14. Where it appears from the record of the Court of Ordinary, that an administrator, appointed by the Court, was one of the Justices presiding at the time of making the appointment: *Held*, that the appointment was void, for the reason that no one can be a judge in his own case. *Ibid.*

15. The division of a testator's estate by the legatees under the will, by consent, is no defence to an action at law, brought by the legally appointed administrator, with the will annexed, for the purpose of recovering the testator's property, to make due and legal administration thereof. *Ibid.*

See *Appeal*, 2, 3. *Distribution*, 1. *Equity*, 8, 9, 10. *Evidence*, 30. *Parties*, 1. *Slaves, &c.* 1.

ADVERTISEMENT.

See *Bond*, 3. *Evidence*, 32.

AMENDMENT.

See Equity, 29. *Steamboats, &c.* 7. *Writ of Error*, 1.

APPEAL.

1. Where a warrant of attorney was executed under the rule of the Court, to confirm an appeal entered by the agent of the party to the suit, in which it was recited that he "ratified" and "confirmed" all that the agent had done or might thereafter do in the premises, "without incurring cost to me:" *Held*, that the authority of the agent to enter the appeal was ratified by his principal, and that he would be bound for all costs necessarily incident to the entering such appeal, notwithstanding the qualification in the warrant of attorney. *Scranton and others vs. Demere and others*..... 92

2. After final judgment against the original party, it is competent for the plaintiff, by *scire facias*, to charge the estate of the security on the appeal. *The Bank of Charleston vs. Moore*..... 416

3. The Act of 1826, authorizing judgment to be entered up against the principal and surety on the appeal, is only cumulative, and the party may still proceed to enforce the judgment against the surety by writ of *scire facias*, or action of debt on the appeal bond, as at Common Law. *Ibid.*

ASSIGNMENT OF ERRORS.

See *Practice*, 3, 13.

ASSIGNOR AND ASSIGNEE.

See *Promissory Notes*, 6, 7.

ATTACHMENT.

1. Where a Sheriff has collected money on an execution,

and fails to pay it over, the party injured by such failure may have an attachment for contempt against such Sheriff; and if such attachment is procured at the instance of the plaintiff in execution, for his own benefit, and to redress his own individual wrong, it is a *civil* process, and such plaintiff in execution is liable to pay the costs of the Sheriff's imprisonment, and not the County. *The Justices, &c. vs. Bivins* 575

ATTORNEY.

1. An attorney at law who has money or other effects belonging to the defendant in his hands, is subject to be garnisheed. *Tucker vs. Butts et al.* 580

See *Appeal*, 1.

BAILMENT.

1. There is, on the part of the hirer, an implied obligation not only to use the thing hired with due care and moderation, but also not to apply it to any other use, or detain it beyond the time for which it was hired. *The Mayor, &c. vs. Howard* 213

2. If the thing hired is used for a different purpose from that intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss occurs, even by inevitable casualty, he will generally be responsible therefor. *Ibid.*

3. The contract of hire being one of mutual benefit, the hirer is bound only for ordinary diligence, or for that care and diligence which the generality of mankind use in keeping their own goods of the same kind. *Ibid.*

See *Trover*, 4.

BANK.

See *Surety*, 1, 2.

BANKRUPT LAW.

1. The Court declines expressing any opinion as to the validity of the Bankrupt Law of 1842, it being unnecessary to the decision of the cause. *King vs. The Central Bank* 257

2. It is not a valid defence for an indorser, that the maker has been discharged under the Bankrupt Law. *Ibid.*

BILL OF EXCEPTIONS.

See *Practice Supreme Court.*

BOND.

1. A bond may be delivered as an *escrow* by the sureties to the principal obligor. *Crawford, Gov. vs. Foster*..... 202

2. If two of the sureties of a Sheriff's bond, sign upon condition that the instrument is not to be considered as executed until the signatures of two others are obtained, and it is left, with the knowledge and by the consent of the Justices of the Inferior Court who were officiating in taking it, in the hands of the principal obligor for that purpose, it is no error to admit evidence of those facts, or to hold that the bond is void as to the defendants who subscribed it, provided the condition is not performed. *Ibid.*

3. In an action on a forthcoming bond, conditioned to deliver property to the Sheriff at the time and place of sale, *when required* by him: *Held*, that it was unnecessary to prove a *personal* demand—the advertisement being a sufficient notice to the party. *Thompson vs. Mapp*, 260

4. A Sheriff's bond, taken and approved by only *two* of the Justices of the Inferior Court, is not good and valid as a statutory bond. *Crawford, Gov. &c. vs. Meredith and another* 552

See *Administrators, Executors, &c.* 2, 3, 4, 10, 12. *Evidence*, 31. *Pleading*, 2. *Sheriff's Bond*, 1, 2, 3.

BOOKS.

See *Evidence*, 26, 27.

BRIDGES.

See *Ferries and Bridges.*

CASHIER.

1. The Cashier of the Central Bank is not a competent witness under its charter to prove the contents of the books of the Bank, not within his own knowledge, in cases where the Bank is not a party. *Williams vs. Kelsey & Halsted* 365

See *Surety*, 1.

CHARGE OF THE COURT.

1. The Court in its charge to the Jury should never assume that certain facts are or are not proven; and should the Court feel it to be its duty to intimate its opinion that there is or is not sufficient evidence to establish a certain matter, it should, at the same time, instruct the Jury to consider the evidence and to decide as they shall find the truth to be. *Potts vs. House, ex'r*, 324

2. It is error in the Court to discredit the testimony of *relatives* as such—relationship being a circumstance only from which the Jury may infer a bias. *Ibid.*

3. It is error in the Court in its charge to the Jury, to intimate doubts as to the competency of legal evidence which has been submitted to them on the trial, it being calculated to weaken its force in their estimation. *Ibid.*

4. Instructions of the Court, which assume or presuppose

a fact proper for the decision of the Jury, should not be given where there is conflicting testimony. *Robinson vs. Schly and Cooper* 515

See *New Trial*, 1, 9.

CHARTER.

See *Corporation*, 1, 2, 3, 4.

CHOSE IN ACTION.

See *Promissory Notes*, 6, 7.

CITIES.

See *Savannah*, 1.

CLAIMS.

1. In the trial of a claim, it is not necessary for the plaintiff in *fi. fa.* to produce the judgment upon which his execution is founded. The execution may be read in evidence without the judgment. *Deloach & Wilcoxson vs. Myrick* 410

2. Proof of the possession by defendant in *fi. fa.* at the time or subsequent to the date of the judgment, of a slave of the same name, sex and age with the slave levied on: *Held* sufficient to cast the *onus* on the claimant. *Ibid.*

3. The defendant in *fi. fa.* cannot be a witness for the claimant, nor can his declarations be given in evidence on his behalf. *Williams vs. Kelsey and Halsted* 365

4. Where property is levied on and claimed under a sale under foreclosure of a mortgage: *Held*, that the judgment of foreclosure is *prima facie* evidence of indebtedness, and casts the burden on the plaintiff in *fi. fa.* of showing a want of consideration in the mortgage. *Ibid.*

5. The claimant is entitled in all cases, whether he holds under the defendant in *fi. fa.* or not, to show that the *fi. fa.* levied is inoperative, either by payment or otherwise. *Robinson vs. Schly and Cooper*..... 515

6. The claimant cannot, for the purpose of protecting himself, show paramount title in a third person. *Ibid.*

See *Execution*, 4, 5. *Evidence*, 29. *Mortgagor and Mortgagee*, 1, 2, 3. *Witness*, 3.

CONSENT RULE.

See *Ejectment*, 1.

CONSTABLE.

See *Evidence*, 15, 16, 17, 19.

CONSTITUTION.

1. The 17th section 1st article of the State Constitution, inhibiting the passage of any law by the Legislature containing any matter different from what is expressed in the title, does not require that the title should set out a synopsis of the entire Act. *Martin, adm'x, vs. Broach, ex'r*..... 21

2. Where the title specifies some of the objects of the Statute, and contains this general clause, "and for other purposes therein contained," portions of the Act not specifically indicated in the title, are nevertheless good under this general clause. *Ibid.*

See *Practice Supreme Court*, 3. *Corporation*, 2, 3.

CONTRACT.

1. Mere inadequacy of price, or any other inequality in the bargain, does not constitute, *per se*, a ground of relief against the contract, either at Law or in Equity. *Robinson vs. Schly and Cooper*..... 515

2. But where there are other ingredients in the case, of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most violent presumption of fraud. *Ibid.*

3. By the Civil Law, sales of immovable property were set aside where the inadequacy of price amounted to one-half the value. This rule did not, by that code, apply to personalty; and the Common Law has fixed no definite proportion as the test of inadequacy. *Ibid.*

See *Bailment*, 1 *to* 3. *Equity*, 18 *to* 23, 30 *to* 40. *Husband and Wife*, 1, 2, 3.

CORPORATIONS.

1. Corporations may be dissolved for a breach of trust. *Young vs. Harrisons* 130

2. A public corporation which exists only for public purposes, may be dissolved, modified, enlarged or restrained, at the will of the Legislature. *Ibid.*

3. A private corporation is a contract between the Government and the corporators, and the Legislature cannot repeal, impair or alter the rights and privileges conferred by the charter, against the consent and without the default of the corporation, judicially ascertained and declared, in a proceeding instituted by the Government directly for that purpose. *Ibid.*

4. A forfeiture for *non-user* or *mis-user*, must be by judgment of a Court of Law—the corporation being first called upon to answer. No advantage can be taken of any non-user or misuser on the part of the corporation by any defendant in any collateral action. *Ibid.*

See *Promissory Notes*, 3.

COSTS.

See *Attachment*, 1. *Parties*, 2.

COUNTERFEIT COIN.

See *Criminal Law*, 9.

CREDITORS.

See *Judgment*, 2.

CRIMINAL LAW.

1. On the trial of criminal cases, moral and not mathematical or metaphysical certainty, is all that the law requires or that is attainable. *Giles vs. The State*..... 276

2. The doubts of a Jury, to justify an acquittal, should be reasonable, and not a mere vague conjecture or possibility of the innocence of the accused. *Ibid.*

3. Direct and irrefragable evidence cannot and need not be always produced in criminal cases—all that is necessary is that the Jury, whether the proof be positive or presumptive, be satisfied of the defendant's guilt. *Ibid.*

4. The owner or manager of a slave, charged with a capital offence, when acting as the counsel of his slave on the trial, can lawfully waive the number of Jurors required by the Statute to be impannelled for the trial of such slave, and consent to take the first twelve on the Jury list. *Alfred vs. The State*..... 483

5. On the trial of a slave charged with a capital offence, and a verdict of guilty, the Court will not interfere to grant a new trial on the ground that the evidence was not sufficient to authorize a verdict, where there is *some* evidence for the consideration of the Jury, and no error in law apparent on the face of the record. *Ibid.*

6. Under the 18th section, 14th division of the Penal Code, a defendant is entitled to make his demand for trial at the first, second or any subsequent term of the Court. *Denny vs. The State*..... 491

7. Where, upon demand made, the Court passes an order that the defendant be tried at the next term or discharged, the legal inference is, that the Court did its duty, and that there was at that time a Jury impannelled and qualified to try the cause. *Ibid.*

8. Where, under a demand, a defendant is finally discharged, the better practice is that the order of discharge recite, that at that term there was a Jury impannelled and qualified to try the cause. *Ibid.*

9. Where the indictment charged the defendant with falsely and fraudulently uttering one piece of base and counterfeit money, made and counterfeited to the likeness and similitude of *legal* and *current* silver coin called a dollar, knowing the same to be counterfeit: *Held*, that the indictment was sufficient under the provisions of the Penal Code; more especially as there was *no objection* in the Court below, that it was not alleged *to whom* the defendant uttered the counterfeit coin. *Gentry vs. The State* 503

See *Libel*, 1 *to* 5.

DAMAGES.

See *Trover*, 1.

DECEIT.

See *Equity*, 18 *to* 23. *Evidence*, 33. *Pleading*, 3.

DECREE.

See *Equity*. *Legacy*, 1. *Promissory Notes*, 7.

DEED.

1. An instrument may be a will in part and a deed in part. *Robinson vs. Schly and Cooper* 515

2. An instrument conveying negroes and their future increase, absolutely to J. S. his heirs and assigns, "but I do hereby save and reserve to myself a life estate in the property above conveyed to said J. S. his heirs and assigns:" *Held* to be a *deed* and not a *will*. *Ibid.*

3. A remainder in personalty may be created by deed, reserving a life estate to the grantor or any one else. *Ibid.*

4. A conveyance from M. D. M. to J. S. his heirs and assigns, of "all the cattle, horses, furniture, bank stock, money, &c. which she might leave or be possessed of at her death," is a *will* and not a *deed*. *Ibid.*

See *Evidence*, 8. *Infant*, 1, 2.

DEFENDANT IN EXECUTION.

See *Evidence*, 29. *Witness*, 3.

DEMAND FOR TRIAL.

See *Criminal Law*, 6, 7, 8.

DEPOSITIONS.

See *Interrogatories*.

DISCOVERY AT LAW.

See *Interrogatories*, 2.

DISTRIBUTION OF ESTATES.

1. A dies leaving a wife and no children, but grand children living: *Held*, that the grand children, under our Statute of Distribution, take *per stirpes* and not per *capita*. *Odam et al. vs. Caruthers, adm'r*..... 39

2. The "*last* or *only child*," as used in the Statute of 1804, as amended by the Statutes of 1841 and 1843, refer to the only *surviving* child of the mother. *Holder and Wife vs. Harrell* 125

3. A dies intestate, leaving a widow and one child. The widow married the second time and gave birth to a child by the second husband. A's child dies intestate: *Held*, that the estate of the child descended to the child by the second marriage, to the exclusion of the mother. *Ibid.*

DOUBTS.

See *Criminal Law*, 1, 2, 3.

DOWER.

See *Execution*, 2.

EJECTMENT.

1. There can be no special pleading in ejectment, for the *consent* rule which admits lease, entry and ouster, compels the defendant to plead only "not guilty," or the Statute of Limitations. *Doe ex dem. Cumming vs. Butler* 88

2. The general issue in ejectment denies the defendant's possession, as well as the plaintiff's title. *Ibid.*

3. Is it competent for the lessor of the plaintiff in an action of ejectment, to prevent a recovery by a conveyance of the premises to the defendant after suit brought? *Harris vs. Camron* 382

See *Infant*, 1, 2.

EMINENT DOMAIN.

See *Ferries and Bridges*, 3, 4.

EQUITY.

1. On the trial of an Equity cause in the Superior Courts of this State, counsel for the complainant is entitled to open and conclude the argument to the Jury, where both parties have introduced evidence. *Guerry vs. Perryman and Dennard* 119

2. Courts of Equity have jurisdiction to order a new trial in a Common Law Court, after judgment, on a proper case made; but it is a jurisdiction which should be exercised with great caution and circumspection. *Booth and another vs. Stamper* 172

3. When a decree is rendered in favor of A against B and C, B in a bill filed to review that decree, is entitled to make C a party complainant, without his authority and against his wishes. In such case, however, C is entitled to sever. *Hargraves vs. Lewis* 207

4. Where a bill was filed to rescind a contract for the sale of land by the vendee, on the ground that the title is encumbered with a judgment lien, the vendee having a deed with covenants of warranty: *Held*, that the allegation that the vendor resided without the State, and had no property therein, was sufficient to retain the bill. *Clark et al. vs. Cleghorn* 220

5. Where the answer of the defendant plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based, as a general rule, the injunction will be dissolved. *Ibid.*

6. The holder of a promissory note, who transfers it by delivery, for a valuable consideration, warrants by implication, unless otherwise agreed between the parties, that he is the lawful holder, and has a just and valid title to the instrument, and a right to transfer it by delivery. He also warrants in like manner, that the instrument is genuine and not forged or fictitious, and that he has *no knowledge* of any facts which prove the instrument, if

originally valid, to be worthless, either by the failure of the maker, or by its being already paid, or otherwise to have become void or defunct; and any *concealment* of these facts on the part of the transferrer of the note, operates as a *fraud* on the rights of the transferree, for which a Court of Equity will entertain jurisdiction to compel discovery and grant relief. *Winter vs. Bullock*, 230

7. Where a cause is submitted to the Jury, on bill and answer and replication, and the defendant introduces no evidence, the defendant is entitled to the conclusion in the argument. *Fall, adm'r, vs. Simmons et al*..... 265

8. Charges in a bill by a distributee against an administrator, that he had frequently called on him to account and pay up: *Held*, to be immaterial, and when denied by the answer, need not be proven. *Ibid.*

9. Where a testator, by his will, directs a sale of his real and personal estate, for the payment of his debts, and after payment thereof, the residue of his estate to be equally divided between his wife and children—the children to receive their shares as they successively attain the age of twenty-one years: *Held*, that the legacies of the children vested in possession on their arriving at the age of twenty-one years respectively, and that the executor was liable to account therefor, notwithstanding there was no allegation in the bill that the debts had been paid, as it was charged a sufficient time had elapsed for that purpose, and that the sales of the testator's property had not been accounted for by the executor. *Womack vs. Greenwood, ex'r*..... 299

10. An administrator may be made a party to an injunction bill, for the purpose of enjoining him from interfering with a legacy in the hands of an executor, to which his intestate had no title, before the expiration of twelve months from the date of his qualification; there being no claim made against him in the bill for any *matter* or *cause of action* against his intestate in his lifetime. *Ibid.*

11. If A holds a demand against B and C as partners, and C is dead, and there are effects of the firm in the hands of B, the surviving partner, sufficient to pay the debt, and D holds property conveyed to him by C, to indemnify him as surety for C; *upon the equities subsisting between* B and C, Chancery will compel A to proceed against the property in the hands of B, the surviving partner, so as to leave the property conveyed to D to be applied to his remuneration as surety for C. *Newsom et al. vs. McLendon et al*..... 392

12. Where, by a deed of trust, the sum of $15,000 was raised by the voluntary contributions of certain residuary legatees, and vested in a trustee, subject to certain trusts, one of which was, that the sum of $5,000, and no more, should be appropriated for the payment of the debts of the *cestui que trust*, then owing, the said trustee to judge of the justness of the debts which might be presented for payment, and of the order and proportion in which the same should be paid: *Held*, on a bill being filed by the *cestui que trust*, alleging that all his debts had been paid by the trustee, and that there remained in his hands the sum of $3,000 of the $5,000 placed there for the payment of his debts, that the *cestui que trust* was entitled to an account from the trustee therefor, and to have the same invested for his benefit. *Napier vs. Napier*..... 404

13. The failure of a guardian to make returns to the Ordinary, as required by law, will cast such a suspicion upon the fairness of a settlement made with his ward, as will avoid a plea of a final receipt in bar of an account. *Briers vs. Hackney and Wife*..... 419

14. Where the bill to enjoin a trespass, together with the answer responsive thereto, show a lease in the defendant older than the complainant's title, the injunction will be dissolved upon motion, after the coming in of the answer. *Field vs. Howell*..... 423

15. Where an answer is responsive to a bill defined. *Ibid.*

16. If the proper parties are not before the Court, and the Court cannot make a complete decree without affecting their interests, the objection may be taken at the trial, and the bill will be dismissed. *Smith and Shorter vs. Mitchell* 458

17. The non-joinder of a party, who might be a proper party, but whose absence works no prejudice to the rights of those who are before the Court, is not a fatal objection to the Court's proceeding to a decree, and the bill will not be dismissed on that account at the hearing. *Ibid.*

18. If one in treaty with another for the sale of property, misrepresents a material fact, stating it to be true, when, at the same time, he knows it to be false, and the other party trusts to the statement, and acts upon it, this is a positive fraud, for which Equity will rescind the contract. *Ibid.*

19. Such a fraud may be perpetrated by acts as well as by words, and by any artifices designed to mislead, as well as by representation. *Ibid.*

20. Whether a party thus misrepresenting a fact, knows it to be false or not, is immaterial, for the affirmation of what one does not know to be true, or believe to be true, is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false. It is a fraud, on account of which Equity will rescind the contract, and reinstate the parties in their original rights. *Ibid.*

21. If a party thus affirming a fact, *believes* it to be true, when it is false, it is a fraud in law, for which Equity will rescind the contract. *Ibid.*

22. And if a party innocently, by mistake, misrepresents a fact which is material, and to which the other party trusts, it is cause for rescinding the contract, because it operates as a surprise and an imposition upon him. *Ibid.*

23. Before relief will be granted on the ground of inadequacy of price, the parties must be placed *in statu quo.* And on this account the party seeking to set aside the contract is driven necessarily into Equity, as the remedy at Common Law is not adequate to the exigencies of the case. *Robinson vs. Schly and Cooper*..... 515

24. Marriage Articles will be executed in favor of all persons coming within the scope of the marriage consideration, and at their instance, but not at the instance of mere volunteers. *Merritt et al. vs. Scott and Beal, Adm'rs, &c*..... 563

25. Those having natural claims upon the parties, such as the wife and offspring, and those claiming under and through them, alone come within the scope of the marriage consideration. *Ibid.*

26. The fact that collaterals are first mentioned in the limitations of the articles, does not bring them within the reach and influence of the agreement. *Ibid.*

27. Where a Court of Equity executes articles in favor of persons within the scope of the marriage consideration, it will, at the same time, execute them also as to volunteers, it being the rule of Chancery to do nothing by halves. *Ibid.*

28. Where, upon application to a Court of Equity, the Marriage Articles are executed partially, viz: in behalf of one of the settlers, without being executed as to the volunteers: *Held,* that upon a subsequent application to a Court of Equity, at the instance of the volunteers, the former decree cannot be invoked in their favor. *Ibid.*

29. A complainant may amend the title of his bill so as to make it conform to the true character of the case made by it. The prayer of the bill may also be amended so as to enable the complainant to have such relief as the allegations in his bill will authorize. *Dearing vs. The Bank of Charleston*..... 581

30. In a bill in Equity, every material fact to which the plaintiff means to offer evidence, must be distinctly stated. No facts are properly in issue unless charged in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleading and evidence, for the Court pronounces its decree, *secundum allegata et probata*. *Robson, Adm'r, &c. vs. Harwell and Wife*..... 589

31. In a bill filed by a *cestui que trust* to execute a parol trust of lands, no evidence by parol is admissible; nor can a decree be rendered in favor of the complainant, unless the charge of fraud is distinctly made. It cannot be considered as inferentially made by a statement of the parol agreement which declares the trust, and a failure to execute it. *Ibid.*

32. Where R conveys to W a tract of land, in consideration that W will put upon it twenty negroes, and will, at his death, convey those negroes and their increase to M, and W enters into possession of the land: *Held*, that this is a trust of personalty, created by W, and declared in favor of M, which a Court of Chancery will execute in favor of M, against the representatives of W. *Ibid.*

33. The case of *Miller et al. vs. Cotten et al.* reviewed and affirmed. *Ibid.*

34. Where lands have been obtained by fraud in the grantee, upon a parol assurance that he would convey them, in a particular manner, to third persons, not parties to the contract, the *grantor*, or *his heirs at law*, are the proper parties to seek redress for the fraud in a Court of Equity. *Ibid. By Lumpkin, J.*

35. Where a recovery is sought on the ground of the fraud of the grantee in obtaining a conveyance of lands, the recovery can extend only to the property so fraudu-

lently obtained and mesne profits for the use of the same. *Ibid. By Lumpkin, J.*

36. A contract made for the sale of both *real* and *personal* property, which is *entire*, and founded on one and the same consideration, if void in *part* is void in *toto*. *Ibid. By Lumpkin, J.*

37. Wherever there has been a *part performance* of a parol agreement for the conveyance of lands within the Statute of Frauds, *a part execution* of the *substance* of the agreement, acts done, unequivocally referring to and resulting from the agreement, and such that the party in whose favor the agreement was made, would suffer an *injury* amounting to *fraud* by the *refusal* of the other party to execute it, a Court of Equity will, in such cases, decree a specific performance of the agreement. *Ibid. By Warner, J.*

38. To authorize the admission of parol evidence in such a case, a sufficient foundation must be laid therefor in complainant's bill, by making such averments as will constitute *fraud*, or from which a Court of Equity will presume fraud. *Ibid. By Warner, J.*

39. A parol agreement to convey lands, set up by a Court of Equity, has equal validity with a deed, containing a covenant to convey; for it is a principle in Equity, that what is agreed to be done for a valuable consideration, is considered as done. *Ibid. By Warner, J.*

40. Where a bill is filed for specific performance of an agreement, and the defendant has put it out of his power to perform, by a sale of the property, the Court will decree compensation by way of damages. *Ibid. By Warner, J.*

See *Administrators, &c.* 10. *Contract*, 1, 2, 3. *Judgment*, 2. *Legacy*, 1. *Promissory Notes*, 7.

ESCAPE.

1. In an action of debt against the Sheriff, on his official Bond, for an escape, on *mesne process*, the insolvency of the original debtor may be given in evidence in mitigation of damages—the injury actually sustained by the plaintiff, and not the specific amount of his debt, being the measure of damages. *Crawford, Gov. &c. vs. Andrews et al*..... 244

See *Evidence*, 5.

ESCROW.

See *Bond*, 1.

EVIDENCE.

1. Parol evidence is admissible in a suit by the plaintiff against the defendants, as joint and several makers of a note, to show that one was surety only to the paper—such fact not appearing on the face of the note itself. *Bank of St. Marys vs. Mumford & Tyson*..... 44

2. Where a note is made by A & B, and they say *I promise to pay* to the order of B, it is a joint and several note. Suit being brought upon this note by the holder against B as maker: *Held*, that B is an original promisor, and that parol evidence is inadmissible to show that B signed the note as surety only; and thereby let him in to the benefit of the Act authorizing sureties to give notice to holders of notes, &c. to proceed to collect the same. *By Judge Nisbet, dissenting. Ibid.*

3. The words of a witness are to be taken in their ordinary meaning; and when testifying to a fact within his knowledge, the evidence may go to the Jury, notwithstanding he fails to affirm positively that it is, or is not so. *Hammock vs. McBride*..... 178

4. Offers of compromise, with a view to settle or prevent litigation, are inadmissible; but an independent ac-

knowledgment of a fact, may be received, although made pending a treaty for the amicable adjustment of a controversy. *The Mayor, &c. vs. Howard* 213

5. The opinion of a witness may be given in evidence as to the insolvency of a party, provided it is accompanied by the facts upon which the opinion is founded. *Crawford, Gov. &c. vs. Andrews and others* 244

6. Parol evidence is admissible to establish the *fact* of the sale of personal property and the *time* when it was made, notwithstanding the contract was reduced to writing. But the document itself is the best evidence of the *terms* of the agreement. *Thompson vs. Mapp* 260

7. A witness who is liable to an action by the party for whom he is called, in case that party should not recover, is incompetent to testify, without a release. *Ray, Adm'r. vs. The Justices, &c. Macon County* 303

8. If the subscribing witnesses to a deed reside without the State, secondary evidence may be resorted to, to prove its execution. *Harris vs. Camron* 382

9. To admit secondary evidence of the contents of a paper, its existence must be proven, and its destruction or loss. *Doe ex dem. Vaughn vs. Biggers* 188

10. When the loss of a paper is relied on, the law does not require positive proof of loss; but proof sufficient to raise a reasonable presumption. *Ibid.*

11. It is the province of the Court to determine whether the loss is sufficiently proven to admit secondary evidence. *Ibid.*

12. Before secondary evidence will be admitted, the party will be required to show that he has exhausted, in a *reasonable degree*, all the *sources of information and means of discovery* which the *nature of the case suggests*, and which were accessible to him. *Ibid.*

13. Where a paper has been traced into the possession of a person, reasonable diligence must be used to procure the testimony of that person, before secondary evidence is admissible. *Ibid.*

14. Where the person is without the jurisdiction of the Court, may not secondary evidence be admitted? Query. *Ibid.*

15. Where a Justice's Court execution is lost, and its contents proven, and also a levy on land by the Constable, and a return of the same to the Sheriff, the Court will presume that there was also on it the entry of "no personal property to be found." *Ibid.*

16. The general rule is, that where an officer is required to do an act, the omission to do which would be a culpable neglect of duty on his part, it ought to be intended that he has duly performed it, unless the contrary is made to appear. *Ibid.*

17. The rule as to the admission of secondary evidence is this: where there is no ground for presuming that better secondary evidence exists, any proof is received, which is admissible by the other rules of law, unless the objecting party can show that better evidence was previously known to the other party, and might have been produced. *Ibid.*

18. Presumption of the loss of a paper may arise from lapse of time, which will be taken into account in determining the question of diligence in the search. *Ibid.*

19. A deed to land sold by the Sheriff, under a Justice's Court fi. fa., will be admitted in evidence upon proof of the loss of the *fi. fa.* the levy and sale, and proof by presumption, the entry of "*nulla bona*" by the Constable was upon it. This case distinguished from *Hopkins & Burch*, 3 *Kelly*, 222. *Ibid.*

20. When the answer of a witness is written without

punctuation, the best rule is to read it so as to make sense of each and every part—to connect such parts as will be, when joined together, susceptible of an intelligible meaning; and if a proposition or statement becomes absurd, by connection, to let it stand as an independent statement. *Ibid.*

21. It is not competent to prove insanity by the reputation of the neighborhood. *Foster vs. Brooks, Adm'r*..... 287

22. As to the *opinion* of physicians, subscribing witness to wills, and other witnesses, as to the *capacity* of the testator, see *Wills*, 2, 3, 4, and *Potts and others vs. House, Ex'r*..... 324

23. While, as a general proposition, it is true that affirmative testimony should outweigh that which is negative, yet this rule of evidence does not apply, where some of the witnesses swear that the testator could measure corn, calculate interest, and transact ordinary business; and others that he could not. The testimony in both cases is of the same character. *Ibid.*

24. The testimony of *relatives*, as such, should not be discredited. *Relationship* is a circumstance from which the Jury may infer a bias. *Ibid.*

25. Where money was paid by A to B, who said he paid it for C, and by his direction, *Held*, that A was a competent witness to prove to whom the money belonged, and by whose directions he paid it to B; and that his declarations were not admissible in evidence for that purpose, made at the time of such payment, in favor of his alleged principal. If admissible as a part of the *res gestæ*, his agency must first be shown. *Williams vs. Kelsey & Halsted*..... 365

26. That a witness may refer to a written instrument, memorandum, or to any entry in his books, to refresh or assist his memory, is a well-established rule of evidence; and although the witness has no recollection of the fact,

independent of the entry in his books, but will testify as to his uniform practice to make his entries truly, and at the time of each transaction, and will further state that from such practice he has *no doubt* the entry in question is correct, his testimony is admissible. *Ibid.*

27. But where the witness states that *certain facts seem to have transpired between the parties from his docket*, without adding the legal sanction of the oath of the witness to the truth thereof, from his recollection or otherwise—*Held*, not to be admissible. *Ibid.*

28. The Cashier of the Central Bank is not a competent witness to prove the contents of the Books of the Bank, not within his own knowledge, under its charter, in cases where the Bank is not a party. *Ibid.*

29. Under the peculiar provisions of our Statute, the defendant in execution is not a competent witness, nor can his declarations be given in evidence in favor of the claimant. *Ibid.*

30. In an action of trover to recover a negro, by the administrator with the will annexed, *the will* is not competent evidence to show *title* in the testator at the time of his death, by his *declarations* therein, that he had *loaned* the negro to his son, through whom the defendants claimed, and who had had possession of the slave twelve months before the testator died. *Echols & Wife vs. Barrett* 443

31. A executed his bond to B, conditioned to make him a title to a tract of land therein described, whenever the litigation then pending respecting it should terminate. B brought suit on the bond, alleging a forfeiture thereof, in which there was a verdict and judgment for the defendant, upon the "general issue." *Held*, that the former recovery was no bar to another action, and that parol evidence was admissible to show that, on the first trial, no other issue was submitted to the Jury, save only the fact as to the pendency of the litigation referred to

in the bond, and that the testimony was restricted exclusively to that point. *Ezzell vs. Maltbie & Winn, Ex'rs* 495

32. In order to prove the advertisement of a Sheriff's sale in one of the public gazettes of this State, as required by law, the production of the newspaper in which the advertisement was published, is the best evidence; but if that cannot be done, in the exercise of ordinary diligence, then a copy taken from the paper of file, in the publisher's office, verified by the oath of the publisher, is admissible. *Schley vs. Lyon and another, Trustees*... 530

33. In an action for fraud and deceit in the sale of a slave, the bill of sale, although not described in the declaration, is admissible to prove the sale. *Dye vs. Wall*.... 584

See *Bond*, 2. *Claim*, 1 *to* 5. *Criminal Law*, 1, 2, 3. *Escape*, 1. *Interrogatories*. *Libel*, 1, 2, 4, 5. *New Trial*, 2, 3, 4. *Practice Superior Court*, 7, 8. *Promissory Note*, 1, 7. *Set-Off*, 3. *Statute of Frauds*, 1. *Surety*, 3.

EXECUTION.

1. An execution issued upon an order absolute against the Sheriff, is irregular and void—the proper remedy being an attachment. The sureties on his bond are not, however, discharged on that account; their liability being for the official default of their principal, which is established by the judgment on the rule. *Towns, Gov. &c. vs. Hicks and another* 235

2. The possession of land by the tenant in dower, or as the co-distributee of an estate, is such an interest as may be seized and sold under execution. *Pitts vs. Hendricks* 452

3. A growing crop of corn, after it is laid by, and before maturity, passes to the purchaser of the land. *Ibid.*

4. Where an execution has been levied on property claim-

ed by a third person, and the claimant seeks to show that the judgment has been satisfied, he must prove that the payment was made to the plaintiff, or the person holding legal control under him. *Robinson vs. Schly & Cooper* 515

5. An assignment of a *fi. fa.* should be in writing, in order to vest the legal title in the assignee; and if transferred by delivery merely, the assignee takes an equitable interest, and may use the name of the plaintiff for the purpose of enforcing his rights. *Ibid.*

See *Judgment*, 4, 5, 6, 9, 10. *Legacy*, 1.

EXECUTORS.

See *Administrators, &c.*

EXECUTORY CONTRACT.

See *Statute of Frauds*, 3, 4, 5.

EXECUTORY TRUST.

See *Trust and Trustee*, 1.

FERRIES AND BRIDGES.

1. The right to receive toll for the transportation of travelers and others across a river or a public highway, is at Common Law, a franchise of the Crown. In this State it belongs to the people collectively. *Young vs. Harrisons* 130

2. The owner of land on the banks of a river has not, as a matter of right, and merely because he is owner, the privilege of keeping a public ferry. His right to do so can only arise by grant, actual or implied. *Ibid.*

3. The State has a right to erect bridges whenever and wherever the Legislature may deem them necessary for the convenience of the public. *Ibid.*

4. The right of *eminent domain*, by which the State may take private property for public purposes, when the necessities of the country require it, is an inherent right of this, as of every other Government. *Ibid.*

5. The State may construct public works, such as roads and bridges, by taxation, or the personal labor of its citizens, or through the instrumentality of individuals or corporations. *Ibid.*

6. A bridge may be established, and a keeper appointed, without any regard to the ownership of the soil, should the Legislature so direct. *Ibid.*

7. The franchise or right to keep ferries and bridges, should, if practicable and consistent with the public welfare, be conferred on the owners of the soil, rather than on strangers. *Ibid.*

FORMER RECOVERY.

See *Evidence*, 31.

FORTHCOMING BOND.

See *Bond*, 3.

FRAUD.

1. Possession remaining with the vendor, is *prima facie* evidence of fraud; and the rule is the same with relation to voluntary conveyances, or conveyances for a valuable consideration. *Fleming vs. Townsend*..... 103

2. *Purchasers* are not within the terms of 13*th Eliz.*, nor is personalty within the terms of 27*th Eliz*; but purchasers fall within the spirit of 13*th Eliz.*, and personalty within the spirit of 27*th Eliz.* *Ibid.*

3. Upon Common Law principles, a voluntary convey-

ance is void against a subsequent *bona fide* purchaser, without notice. *Ibid.*

4. Possession remaining with the mortgagor after a sale by the Sheriff, under the mortgage, and purchase by the mortgagee, is a *badge of fraud* as against other judgment creditors. *Williams vs. Kelsey & Halsted*..... 365

See *Contract*, 1, 2. *Equity*, 6, 18 *to* 23, 30 *to* 40. *Judgment*, 12. *Mortgagor and Mortgagee*, 1, 2, 3.

FRAUDS.

See *Statute of Frauds.*

FREE PERSONS OF COLOR.

See *Slaves, &c.*

GARNISHMENT.

See *Attorney*, 1. *Judgment*, 10.

GRAND CHILDREN.

See *Distribution*, 1.

GRANT.

See *Ferries and Bridges. Limitation of Actions*, 4, 5.

GROWING CROPS.

See *Execution*, 3.

GUARANTY.

See *Set-Off*, 2, 3.

GUARDIAN'S BOND.

See *Adm'rs, &c.* 2, 3, 4, 11, 12.

GUARDIAN'S RETURNS.

See *Adm'rs, &c.* 10.

GUARDIAN AND WARD.

See *Adm'rs, Exec'rs, &c.*

"HEALTHY."

See *Slaves, &c.* 2. *Warranty,* 1.

HIRE AND HIRER.

See *Bailment,* 1 to 3.

HUSBAND AND WIFE.

1. Cohabitation and joint use of goods purchased by the wife during coverture, is strong presumptive evidence of the assent of the husband, and of the agency of the wife, in the purchase; which, however, may be repelled by proof that the credit was, in fact, given to the wife. *Connerat vs. Goldsmith* 14

2. A sells goods to the wife of B, and takes her note for the amount—she having a separate estate—and gives her a receipt for the bill. The husband and wife are living together, and the goods go into their joint use and occupation; *Held,* that the credit was given to the wife, and the husband is not liable, in a suit by the creditor, for the price of the goods. *Ibid.*

3. In such a case, a parol promise by the husband to pay the debt, is void under the Statute of Frauds, because it is a promise to answer for the debt of another, and ought to be in writing. *Ibid.*

IMPLIED WARRANTY.

See *Promissory Notes,* 8.

INADEQUACY OF PRICE.

See *Contract*, 1, 2, 3. *Equity*, 23.

INDICTMENT.

See *Criminal Law*, 9.

INDORSER.

See *Bankrupt Law*, 2.

INFANT.

1. If a deed of bargain and sale be executed by an infant, it may be avoided by another deed of bargain and sale, made to a third person, without entry by the infant, when he arrives at age, in case the land continue in possession of the infant, or be vacant or uncultivated. *Harris vs. Camron and another* 382

2. If, when the second deed be executed, the lands be holden adversely to the infant, it seems that the second deed will not amount to a revocation of the first conveyance. *Ibid.*

See *Promissory Notes*, 5.

INFERIOR COURT.

1. Have no authority to grant new trials in Georgia. *Booth & Ranes vs. Stamper* 172

INJUNCTION.

See *Equity*.

INSANITY.

See *Evidence*, 21. *Wills*, 2 *to* 12.

INSOLVENCY.

See *Escape*, 1. *Evidence*, 5.

INTEREST.

See *Administrator, &c.* 8. *Judgments*, 3. *Usury*, 2.

INTERPRETER.

See *Wills*, 5, 6.

INTERROGATORIES.

1. The depositions of a witness, taken on the ground of non-residence, cannot be read on the trial, if the witness has notoriously resided within the county where the cause is pending for some time previously; and his attendance can be coerced by subpœna. *Hammock vs. McBride* 178

2. Under the Act of 1847, to compel discovery at Common Law, the party to whom interrogatories are propounded, must make just such answers as he would be required to do on a bill of discovery. *Thompson vs. Mapp* 260

3. Where the answers of a witness are written without punctuation, the best rule is to read it so as to make sense of each and every part. *Doe ex dem. Vaughn vs. Biggers* 188

4. Where a witness is examined by commission, the party cross-examining may withdraw his cross-questions if he chooses, the other party having the liberty to read them at his option. *Williams vs. Kelsey and Halsted* 365

See *Practice Superior Court*, 7, 8.

JAILER'S FEES.

See *Attachment*, 1.

JUDGMENTS.

1. Are binding and conclusive between parties and privies until reversed or set aside, and cannot be collaterally questioned by third persons, except on the ground of fraud and collusion in their procurement. *Hammock vs. McBride*..... 178

2. Creditors and *bona fide* purchasers may attack a judgment for fraud whenever it interferes with their rights, either at Law or in Equity. *Ibid.*

3. The Act of 1814, requiring the amount of principal and interest to be stated separately in judgments, applies to suits on promissory notes and other special contracts bearing interest, and not to cases where the recovery is in damages. *Ray, Adm'r, et al. vs. The Justices, &c. Macon Co*..... 303

4. The levy of an execution on personal property is a satisfaction of a judgment, so far as to throw upon the plaintiff the burden of proving either that it was insufficient, or that its proceeds were applied to the extinguishment of prior liens, or that it was otherwise unproductive, and made so without fault in the plaintiff or the levying officer. *Newsom vs. McLendon*..... 392

5. A levy upon personalty sufficient to pay the debt, which is dismissed by the plaintiff with the consent of the defendant, extinguishes the judgment, so far as third persons may be affected by it. *Ibid.*

6. Payment of a joint debt by one of two defendants, against whom several judgments have been rendered, extinguishes both judgments. *Ibid.*

7. A levy upon real estate is not *prima facie* evidence of satisfaction, and although unaccounted for, does not extinguish the judgment. *Deloach & Wilcoxson vs. Myrick*..... 410

8. The assignment of a judgment should be in writing, and if transferred by delivery merely, the assignee takes an equitable interest, and may use the name of the plaintiff for the purpose of enforcing his rights. *Robinson vs. Schly & Cooper* 515

9. A judgment has no lien on promissory notes in the hands of the defendant; nor are *choses in action* liable to be seized and sold under execution, unless made so specially by Statute. *McGehee vs. Cherry* 550

10. A defendant in *fi. fa.* has the right to transfer promissory notes in his possession to other than judgment creditors, in satisfaction of their claim. *Ibid.*

See *Claim*, 5. *Execution*.

JUROR.

1. The speaking of a juror, after being charged with the case, with persons not members of the Jury, about the evidence, and expressing his opinion as to the rights of one of the parties: *Held* to be a serious indiscretion, worthy of judicial censure. *Foster vs. Brooks, adm'r* .. 287

JURY.

See *Criminal Law*, 4, 5. *Limitation of Actions*, 8. *Practice Superior Ct.* 5, 6.

JUSTICES' COURT FI. FA.

See *Evidence*, 15, 16, 17, 19.

KELLY, JAMES M.

Report and Resolutions on his death, 115.

LAND.

See *Lease*, 2. *Equity*, 30 *to* 40. *Execution*, 2, 3.

"LAST CHILD."

See *Distribution of Estates*, 2, 3.

LEASE.

1. A lease for a term of years being a chattel, may be made to commence *in futuro.* *Field vs. Howell*..... 423

2. Where one buys land at Sheriff's sale, upon which there is a lease from the defendant in execution older than the judgment; and at the time of the sale, the lessee has not entered into possession, he buys it subject to the right of entry and user under the lease. *Ibid.*

LEGACY.

1. Where a decree was obtained in favor of legatees against the executors of the testator's will, for their legacies under it, and the executors have admitted assets in their hands sufficient to pay them: *Held*, that property which had been distributed to another legatee, under the will, with the assent of the executors, could not be first seized and sold, in satisfaction of such decree against the executors alone, when it did not appear there was any deficiency of assets, to pay all the legacies, and the legatee whose property was taken was no party to the decree; notwithstanding it was declared by the decree, that it should be a lien upon, and bind the whole estate of the testator. The estate of the testator in the hands of the executors is first liable for the satisfaction of the decree, before such portion of it as had been distributed to legatees who were not parties to the decree, and who had been in the possession of it for several years, with the assent of the executors. *Scranton et al. vs. Demere et al.*..... 92

LEGISLATURE.

See *Corporation*, 2, 3.

LEVY.

See *Judgment* 4, 5.

LIBEL.

1. In an indictment for a libel placed in a situation where it might have been seen and read, *Held*, that it is unnecessary to aver or prove that it was seen or read. *Giles vs. The State* 276

2. If a libel import defamation on its face of a particular person, it is unnecessary to insert inuendoes in the indictment. *Ibid.*

3. It is libellous to charge a person with being a drunkard, a cuckold, and a tory. *Ibid.*

4. A person who appears to have written a libel, which is afterwards published, will be considered as the maker of it, unless he show another to be the author of it, or prove the act to be innocent of itself. *Ibid.*

5. If a libel appears in a man's handwriting, and no other author is known, it turns the proof upon him; and if he cannot produce the composer, he is presumed by law to be the man. *Ibid.*

LIEN.

See *Administrators, &c.* 6. *Promissory Notes*, 2. *Steamboats*, 1 *to* 7.

LIMITATION OF ACTIONS.

1. An acknowledgment or promise to take a case out of the Statute of Limitations, must specify and plainly refer to the particular debt, or demand, or cause of action which is sought to be revived. *Martin, Adm'x, vs. Broach, Ex'r* 21

2. Where there is any dispute as to the facts which

go to prove the making of a new promise, there (whether a sufficient acknowledgment or promise has been made to take the case out of the Statute) is a mixed question of law and fact to be passed upon by the Jury; but where the facts are undisputed, it is for the Court to determine whether they take the case out of the Statute or not. *Ibid.*

3. A promise to pay a debt barred by the Statute, constitutes a new cause of action, which a party seeking to avail himself of, must declare upon, in the words in which it was made, or according to its legal effect. The old debt is regarded as the consideration which supports the promise; and in declaring, must be set out as the inducement to it. *Ibid.*

4. The Statute of Limitations does not run in favor of a tenant in possession of land, while the title thereto is in the State. *Smead and Savage vs. Doe ex dem. Williams, Adm'r*..... 158

5. Under the Statute of 1767, the plaintiff in ejectment has seven years to institute his action for the recovery of the possession of land, from the time his title or cause of action accrued. *Held*, that the cause of action does not accrue until the land is granted him by the State. *Ibid.*

6. The Statute of Limitations does not commence to run against the estate of a deceased testator, until *probate* of the will and *qualification* of the legal representative of such estate. *Garland vs. Milling, Ex'r*..... 310

7. Where a father *loans* a negro to his son and delivers possession thereof; and the son sets up an *absolute* claim to the slave, and offers to sell him as his own property, of which the father had *notice*, the possession of the son becomes adverse, and the Statute of Limitations begins to run. *Echols and wife vs. Barrett*..... 443

8. It is the province of the Court to determine what is in

law, such a promise as will take a case out of the Statute of Limitations; but it is for the Jury to find what promise is in fact made. *Love vs. Hackett, Adm'r. and others* 486

9. A, a joint maker and surety on a note, promised the holder, that if he would not sue on it until a bill to marshal the assets of the principal, who was dead, was determined, and the amount allowed upon the note by the decree was paid, he would pay the balance then due on the note. *Held*, that upon the fulfilling of the conditions, the promise became an absolute promise to pay, and would be a sufficient reply to a plea by A, on a suit against him on the note, of the Statute of Limitations. *Held*, farther—that it was incumbent on the plaintiff to show that the conditions were fulfilled, but that it was not necessary for him to prove that they were fulfilled *before* the institution of the suit; it being sufficient to show they were fulfilled before the trial. *Ibid.*

10. It is now settled that the acknowledgment, in order to bar the Statute of Limitations, must contain a promise to pay, either express or implied; and that an implied promise is created from an acknowledgment of a present subsisting debt. *Brewer and another, Ex'rs vs. Brewer* 587

See *Usury*, 1.

LOST PAPERS.

See *Evidence*, 9 *to* 19.

MANUMISSION.

See *Wills*, 15, 16.

MARRIAGE ARTICLES.

See *Equity*, 24 *to* 28.

MISREPRESENTATION.

See *Equity*, 18 *to* 22.

MORTGAGE.

See *Adm'rs, &c.* 5, 6.

MORTGAGOR AND MORTGAGEE.

1. Where a creditor, who is the mortgagee, forecloses his mortgage, and purchases the mortgaged property at Sheriff's sale under it, and suffers the mortgagor to retain possession after the sale, such possession is a badge of fraud as against other judgment creditors. *Williams vs. Kelsey & Halsted* 365

2. Where property is levied on by a judgment creditor, and claimed by a purchaser under a sale made in pursuance of a judgment of foreclosure of a mortgage under our Statute; *Held*, that such judgment of foreclosure was *prima facie* evidence of indebtedness by the mortgagor to the mortgagee; and that the burden of showing a want of consideration for the mortgage, rests upon the plaintiff in execution, and not the claimant. *Ibid.*

3. Whether the consideration for which a mortgage is alleged to have been executed, is *bona fide*, or merely colorable to defraud creditors, or so inadequate as to constitute a badge of fraud, is a question of fact, which should be left to the Jury upon the whole evidence in the case, without any restriction on the part of the Court, as to the necessity of proving *all the items of indebtedness* alleged to have been the consideration of such mortgage. *Ibid.*

NEGRO INTERPRETER.

See *Wills*, 5, 6.

NEWLY DISCOVERED EVIDENCE.

See *New Trial*, 3, 4.

NEW PROMISE.

See *Limitation of Actions*, 3.

NEW TRIAL.

1. If the finding of the Jury is in conformity with the charge of the Court, and no complaint is made of the charge, the refusal to set aside the verdict and grant a new trial will not be reversed, although the law may not have been properly submitted, the corrective Court being satisfied with the verdict. *The Mayor, &c. vs. Howard* 213

2. A verdict will not be set aside, and a new trial granted, where the case has been fairly submitted on its merits, and no rule of law violated, nor manifest injustice done, although there may appear to have been a *preponderance* of evidence against the verdict; especially if the Judge who tried the case is satisfied with the finding. *Giles vs. The State* 276

3. A new trial will not be granted on the ground of newly discovered evidence, unless it be competent and material to the issue, and would probably produce a different result if offered, especially where it is merely *cumulative*, and in corroboration of testimony offered on the former trial. *Ibid.*

4. Where the party comes to the knowledge of newly discovered evidence through the information of others, the affidavit of the informant should be produced. *Ibid.*

5. The Inferior Court have no authority to grant new trials in Georgia. *Booth and Raines vs. Stamper* 172

6. As a general rule, the Supreme Court will always more readily control the discretion of the Court below, in refusing a new trial than in granting it, for the reason that a refusal to grant a new trial operates as a final adjudi-

cation of the rights of the parties. *Oliver vs. Pace and Biggers* 185

7. Where one of the defendants was a *bona fide* holder of a promissory note and there was no evidence to impeach the consideration in his hands, the amount of which was not allowed by the Jury: *Held*, that the discretion of the Court below in grantiug a new trial to the defendants, was properly exercised. *Ibid.*

8. Where the Court below fairly submits the facts in the case to the consideration of the Jury, and there is no error in law in the charge of the Court, this Court will not disturb the verdict of the Jury. *Garland vs. Milling, Ex'r* 310

9. A verdict manifestly in accordance with the weight of the evidence and the justice of the case, will not be disturbed on account of the misdirection of the Judge; but where material testimony has been excluded, erroneous instructions given by the Judge, and the proof misstated in summing up the evidence, a new trial will be granted. *Potts vs. House, Ex'r* 324

See *Charge of the Court*, 1, 2, 3. *Criminal Law*, 5. *Equity*, 2. *Juror*, 1.

NON COMPOS.

See *Wills*, 9, 10, 11, 12.

NON RESIDENCE.

See *Equity*, 4.

NOTICE.

1. To sustain a voluntary conveyance against a subsequent *bona fide* purchaser for valuable consideration, the notice must be *actual;* and the registration of the conveyance is not such noticas will deeprive him of the bene-

fit of the Statute *27th Elizabeth. Fleming vs. Townsend* 103

See *Bond*, 3. *Promissory Notes*, 6, 7.

NOTICE TO SUE.

See *Surety*, 1, 2, 3.

NUISANCE.

See *Savannah*, 1.

OATH.

See *Administrators, &c.* 13.

PAROL EVIDENCE.

1. Parol evidence is inadmissible to prove the consideration of a written promise to answer for the debt of another. The *consideration*, under the Statute of Frauds, should be in writing. *Henderson vs. Johnson* 390

See *Evidence, passim. Promissory Notes*, 1. *Surety*, 3. *Wills*, 15, 16.

PAROL TRUST.

See *Equity*, 30 *to* 40.

PARTIES.

1. Where letters testamentary were revoked under the Act of 1834, on account of the birth of a posthumous child, and an intestacy declared, neither by the Common or Statute Law of England, nor the Acts of our own Legislature, can the newly appointed administrator be made a party defendant to a suit pending against the removed executor. *Martin, Adm'x, vs. Broach, Ex'r* 21

2. A party may use the name of another person as plaintiff in a suit, without his authority or consent, upon indemnifying him for costs, if the use of such person's name is necessary to the assertion of his legal rights. *Hargraves vs. Lewis* 207

See *Equity*, 3, 10, 16, 17, 34. *Trust and Trustee*, 2.

PARTNERS.

See *Equity*, 11.

PERSONAL PROPERTY.

See *Vendor and Purchaser*, 1 *to* 4.

PHYSICIANS.

See *Wills*, 2.

PLEADING.

1. A count in trover, in the usual form, is not demurrable. The Statute of 1847, prescribing a form of declaration to recover personal property, is permissive only, and not compulsory. *The Mayor, &c. Columbus vs. Howard* ... 213

2. Where an action on a Sheriff's bond is brought for the purpose of recovering a sum of money found to be due to two jointly, on an order absolute against the Sheriff, it is no objection to the sufficiency of the breaches assigned, that the declaration does not state the amount of the interest of each in that sum. *Towns, Gov. vs. Hicks and Webb* 235

3. In the sale of a slave, where there is a contract of warranty, the purchaser may consider the contract as a nullity, and bring his action on the case for deceit; and in such action it is not necessary that he should set forth the contract. *Dye vs. Wall* 584

See *Appeal*, 2, 3. *Ejectment*, 1, 2. *Equity*, 8. *Limitation of Actions*, 3. *Process*, 1. *Steamboats, &c.* 1 *to* 7. *Tenants in Common*, 1 *to* 4.

POLICE REGULATIONS.

See *Savannah*, 1.

POLLING JURY.

See *Practice Superior Court*, 5, 6.

POSSESSION.

See *Execution*, 2. *Lease*, 1, 2. *Vendor and Purchaser*, 1, 5.

PRACTICE SUPERIOR COURT.

1. This Court will not interfere with the established practice of the Circuit Courts of Georgia, in relation to the alternative form of the verdict in trover. *Foster vs. Brooks, Adm'r* 287

2. On an appeal from an order of the Court of Ordinary, establishing a will, the burden of proof as to the capacity of the testator, rests upon the party claiming under the will; and the propounder must go forward on the trial, and is entitled to open and close the argument. *Potts vs. House, Ex'r* 324

3. A *retraxit* is a voluntary renunciation by the plaintiff, in open Court, of his suit; and a judgment thereon is a complete bar to a subsequent action for the same cause. *Justices, &c. vs. Selman and others* 432

4. A *dismission* of a suit does not, in this State, amount to a *retraxit*, and is no bar to a future suit for the same cause of action. *Ibid.*

5. It is not the right of the parties to poll the Jury in civil causes; but it is discretionary with the Court to allow

them to be polled or not. *Smith and Shorter vs. Mitchell* 458

6. The dispersion of the Jury after the verdict is handed in to the Clerk, and before it is received by the Court: *Held* to be a good reason for a refusal to permit the Jury to be polled. *Ibid.*

7. On a motion to arrest the reading of depositions of an agent, on the ground that his authority was in writing: *Held*, that this is a fact for the finding of the Court, which the Supreme Court will not interfere with, except in a clear, strong case. *Crenshaw vs. Jackson* 509

8. Such a motion is irregular, and the better practice is, for the reading to proceed; and upon proof afterwards, that the testimony is illegal, to move its withdrawal from the Jury. *Ibid.*

See *Criminal Law*, 8. *Equity*, 1, 7, 8, 16, 17. *Execution*, 1. *Interrogatories*, 4. *Process*, 1.

PRACTICE SUPREME COURT.

1. If the bill of exceptions bears date previous to the trial of the cause, and there is nothing in the record by which it may be amended, the writ of error must be dismissed. *Perry and Peck vs. Higgs* 43

2. If thirty-five days intervene between the signing the bill of exceptions, and the suing out and serving the writ of error, citation and notice, the writ of error will be dismissed. *Ibid.*

3. Where the bill of exceptions is signed and certified only *eight* days before the session of the Supreme Court for that judicial district, the writ of error should be made returnable to the next succeeding term for that district, such being the first term within the meaning of the amended Constitution. *Chapman vs. Stiles* 113

4. If no assignment of errors is filed as required by the rule, the writ of error will be dismissed. *Goneke et al. vs. Garrett* 119

5. A writ of error will not be dismissed because the same cause has been previously before the Supreme Court, where the error assigned is different, and the objection not raised or pleaded in the Court below. *Hargraves vs. Lewis* 207

6. If the Clerk of the Circuit Court fails to make out a complete transcript of the record within *ten* days from the filing of the original notice, with entry of service thereon, the writ of error will be dismissed. *Leak vs. McDowell* 264

7. Writ of error dismissed: 1st. Because notice of the signing and certifying of the bill of exceptions was not filed in the Clerk's office of the Court below. 2d. Because the Clerk of the Court below did not certify and send up to this Court, a transcript of the record and the bill of exceptions, within the time prescribed by law, and the 31st rule of this Court. *Duke, Adm'r, vs. Trippe* 317

8. Notice of the *filing* of a bill of exceptions is not sufficient. It must be notice of the *signing and certifying*. *Arnold vs. Wells and wife* 380

9. The Clerk must certify and send up the record within time, and his certificate must show that fact. *Ibid.*

10. The Court will not amend a writ of error, by striking out one party and inserting another. *Ibid.*

11. The errors complained of below, must be *specified* in the bill of exceptions. *Weathers vs. Doster* 227

12. If no notice of the signing and certifying of the bill of exceptions is served on the opposite party, and filed as

the law directs, the writ of error will be dismissed. *Haygood, Adm'r, vs. Neal* 452

13. The assignment of errors cannot enlarge the bill of exceptions, but must be supported by it. *Smith and Shorter vs. Mitchell* 458

14. The notice of the signing of the bill of exceptions must be signed by the party or his counsel. *Ibid.*

15. It must *affirmatively* appear, either by the certificate of the presiding Judge, or the transcript of the record, that the bill of exceptions was signed and certified within thirty days from the adjournment of the term in which the cause was heard. *Cloudis vs. The Bank of Tennessee*, 481. *Russell and another vs. March and Briers* 491

16. It must appear that the bill of exceptions was filed in the Clerk's office of the Court below. *Ibid.*

17. The fact must appear *affirmatively*, that the bill of exceptions was signed within the time prescribed by the Statute. *Justices, &c. vs. Barrington* 578

18. The writ of error will not be dismissed because the record does not show that the costs in the Court below have been paid. *Brewer and another, Ex'rs, vs. Brewer*, 587

See *Writ of Error*, 1.

PRESUMPTIONS.

See *Evidence*, 15 *to* 19.

PRINCIPAL AND AGENT.

See *Appeal*, 1. *Evidence*, 25. *Practice Superior Court*, 7, 8. *Promissory Notes*, 3. *Surety*, 1.

PROCESS.

1. Process taken out more than twenty days before the next ensuing term of the Court to which it is made returnable, and not returned to such next ensuing term, but altered and made returnable to another term, to be held after the one to which it was first made returnable, *is void* under the provisions of the Judiciary Act of 1799. *Bank of St. Marys vs. Mumford and Tyson*..... 44

PROMISSORY NOTES.

1. An inquiry can be made into the consideration of a promissory note, whenever the proper administration of justice requires it. *Butts vs. Cuthbertson et al*..... 166

2. Whenever a Statute gives a summary remedy for services rendered, the taking of a promissory note does not waive the Statutory lien. *Ib.*

3. A promissory note given by an agent, will bind the corporation, provided he acts within the sphere of his powers, or the act was subsequently ratified. *Ibid.*

4. If A gives his promissory note to B, in liquidation of the book debt of C: it does not of itself destroy the account; nor is it, without other proof, such a payment that the original debt cannot be resorted to. *Ibid.*

5. A note given by an infant for necessaries, is valid. *Per Lumpkin, J. Ibid.*

6. The assignee of a promissory note not negotiable, takes it subject to all the equities which existed between the assignor and maker thereof, at the time of the assignment, and all equities which may attach in favor of the maker before notice of the assignment. *Guerry vs. Perryman*..... 119

7. Where, by a decree of a Court of Equity, a specific sum of money was decreed to be due to the maker of

an *unnegotiable* promissory note, by the payee thereof: *Held*, that such decree could not be impeached by extrinsic evidence, so as to impair or defeat the equitable right of such maker, to set off such decree for the *full amount* thereof, against such note in the hands of an assignee for a valuable consideration, but who had never given any notice to the maker of the note, of such assignment. *Ibid.*

8. The holder of a promissory note who transfers it by delivery, by implication warrants that he is holder, and has a valid title; also, that the instrument is *genuine*, and that he has *no knowledge* of any facts which prove the instrument, if originally valid, to be worthless, either by the failure of the maker, or by payment, or otherwise void or defunct. *Winter vs. Bullock* 230

See *Equity*, 6. *Judgment*, 9, 10. *Set-Off*, 2, 3. *Surety*, 1, 2, 3.

PURCHASER.

See *Judgment*, 1, 2. *Vendor and Purchaser*, 1 *to* 4.

RECEIPT.

See *Admr's, &c.* 10.

RECORD.

See *Notice*, 1. *Wills*, 1.

REMAINDER.

1. May be created in personalty by deed, reserving a life estate to the grantor or any one else. *Robinson vs. Schly and Cooper* 515

RESCISSION OF CONTRACT.

See *Equity*, 18 *to* 23.

RETRAXIT.

See *Practice*, 3, 4.

RETURNS TO COURT OF ORDINARY.

See *Adm'rs, &c.* 10.

REVIEW, BILL OF.

See *Equity*, 3.

RICE.

See *Savannah*, 1.

RIVERS.

1. There are three kinds of rivers. 1. Such as are wholly and absolutely private property. 2. Such as are private property, subject to the servitude of the public interest by a passage upon them. 3. Rivers where the tide ebbs and flows, which are called arms of the sea. *Young vs. Harrisons*..... 130

See *Ferries and Bridges*, 1 *to* 7.

ROADS.

See *Ferries and Bridges*.

RULE ABSOLUTE AGAINST SHERIFF.

See *Execution*, 1. *Sheriff's Bond*, 1, 2.

SATISFACTION.

See *Judgment*, 4, 5, 6, 7. *Promissory Notes*, 4.

SAVANNAH.

1. The City Council of Savannah, under authority of an Act of the Legislature, passed two several Ordinances

prohibiting the cultivation of rice within the corporate limits, and providing for the destruction of growing crops: *Held*, that these ordinances were good and valid, and binding upon the inhabitants as *police* regulations, and that the City Council had power and authority to judge of, and declare the planting of rice within the corporate limits, to be injurious to the health of the City, and a public nuisance, and to abate the same. *Green vs. The Mayor, &c.* 1

SCIRE FACIAS.

See *Appeal*, 2, 3.

SECONDARY EVIDENCE.

See *Evidence*, 8, 9 *to* 19.

SECURITY.

See *Surety*.

SECURITY ON APPEAL.

See *Appeal*, 2, 3.

SET-OFF.

1. A debt, to come within the law of set-off, must be a money demand of a liquidated nature, and for which *indebitatus assumpsit*, or some other action, *ex contractu*, will lie. A right of action for breach of warranty is not such a debt. *Crenshaw vs. Jackson* 509

2. Upon the transfer of a note payable to bearer by delivery, the transferrer ceases to be a party to it, and is not generally responsible thereon to the transferree, or any subsequent holder. But if he undertake to guaranty the payment of the same, he will be liable on that special contract, and that is a proper subject-matter of set-off. *Ibid.*

3. A transfers a note, payable to bearer, to B by delivery, and says, "C, (the maker) although a poor man, is perfectly good for his contracts, and if C is not good, I am good:" *Held*, that these sayings are admissible to support a plea of a promise, and undertaking to guaranty the payment of the note. *Ibid.*

SETTLEMENT.

See *Adm'rs, &c.* 10.

SHERIFF.

See *Attachment*, 1. *Escape*, 1. *Sheriff's Bond*, 1, 2.

SHERIFF'S BOND.

1. An execution issued upon an order absolute against the Sheriff, is irregular and void; the proper remedy being an attachment. The sureties on his bond, however, are not discharged on that account; their liability being for the official default of their principal, which is established by the judgment on the rule. *Towns, Gov. &c. vs. Hicks and Webb* 235

2. A judgment against a Sheriff, on a rule to pay over money, is no satisfaction, and no discharge of the sureties on his bond. *Ibid.*

3. A Sheriff's bond, taken and approved by only *two* of the Justices of the Inferior Court, is not good as a *Statutory* bond. *Crawford, Gov. &c. vs. Meredith and another* .. 552

See *Bond*, 2. *Escape*, 1. *Pleading*, 2.

SHERIFF'S SALE.

See *Evidence*, 32. *Execution*, 2, 3. *Lease*, 2.

SLAVES AND FREE PERSONS OF COLOR.

1. Where a free person of color is a party to a suit, in the

Courts of this State, and dies, the suit abates; and administration should be taken out on the estate of such free person of color. *Scranton et al. vs. Demere et al.* . . 92

2. A warranty of a slave to be *healthy*, does not extend to a warranty of soundness of mind, but of body only. *Nelson vs. Biggers* 205

See *Bailment*, 1, 2, 3. *Criminal Law*, 4, 5. *Evidence*, 30. *Legacy*, 1. *Limitation of Actions*, 7. *Pleading*, 3. *Wills*, 5, 6, 15, 16.

SPECIFIC PERFORMANCE.

See *Equity*.

STATUTE OF DISTRIBUTION.

See *Distribution*, 1.

STATUTE OF FRAUDS.

1. By the 4th section of the Statute of Frauds, the promise to answer for the debt of another person, must not only be in writing, but also the *consideration* of the agreement. Parol evidence is inadmissible to prove a consideration *extrinsic* of the written agreement. *Henderson vs. Johnson*, 390. *Wain vs. Walters*—considered and approved. *Ibid.*

2. Contracts for the sale of goods, wares and merchandise, are not excluded from the operation of the 17th section of the Statute of Frauds, because they are executory. *Cason vs. Cheely* 554

3. Contracts for goods not *in esse* at the time, and of a peculiar character, so as to be unsuited to the general market, to be made by the work and labor, and with the material of the vendor, at the instance of the purchaser, are not within the 17th section of the Statute of Frauds. *Ibid.*

4. But all such contracts as do not *primarily* contemplate work and labor to be done, or material to be furnished by the vendor, at the instance of the purchaser, and for his use and benefit, and in which work and labor are not *the essential* consideration, are within the Statute, although work and labor may be requisite to make the goods, or to fit and prepare them for delivery. *Ibid.*

5. Cotton prepared for market, *Held*, to be goods and merchandise, within the meaning of the 17th section of the Statute of Frauds. *Ibid.*

See *Equity*, 30 *to* 40. *Husband and Wife*, 3.

STATUTE OF LIMITATIONS.

See *Limitation of Actions*. *Usury*, 1.

STEAMBOATS, &c.

1. In suing out proceedings under the Act of 1841, giving liens to boat hands, captains, &c., it is not necessary for the petitioner to aver that the boat was in the act of traversing the river when the services were rendered. It will be sufficient to state generally, that she was navigating the river. *Butts and others vs. Cuthbertson*..... 159

2. He should aver that his claim is prosecuted within twelve months from the time it fell due. *Ibid.*

3. The affidavit should aver a demand upon the owners of the boat or their agent personally, should name them, and aver refusal to pay. *Ibid.*

4. The judgment should be entered up against the owners, as well as the boat herself. *Ibid.*

5. It is necessary that the affidavit state that the boat had arrived at the landing, port, or place of destination, to which she had been freighted. *Ibid.*

6. It is not competent after judgment upon such proceeding, to amend, by substituting an entire new affidavit and petition. *Ibid.*

SUMMARY PROCESS.

See *Promissory Notes*, 2. *Steamboats*, 1 *to* 7.

SURETY.

1. Notice to the *Cashier* of the Bank, by the surety, to sue the principal, is a sufficient notice to the Bank, especially where it appears that the Bank *acted* upon such notice. *Bank of St. Marys vs. Mumford and Tyson*..... 44

2. A bank, when *holder* of a promissory note, is within the provisions of the Act of 1831, authorizing sureties to give notice to sue. *Ibid.*

3. Parol evidence is admissible to show that one of the joint makers of a note is surety only, such fact not appearing on the face of the note. *Ibid. Judge Nisbet dissenting.*

See *Administrators, &c.* 11, 12. *Bond*, 2. *Equity*, 11. *Sheriff's Bond*, 1, 2.

TENANT IN COMMON.

1. One of several tenants in common may sue separately in trover, and the defendant may plead the non-joinder in abatement; but if he fail so to plead, he cannot take advantage of it on the trial, nor by motion in arrest of judgment; but will be confined to giving in evidence the interest of the other co-tenants in mitigation of damages; and the plaintiff may proceed to recover his proportion or aliquot interest in the common property. *Starnes and Paine vs. Quin*..... 84

2. In such a case the other co-tenants may afterwards sue severally, for their interest, and the defendant cannot

plead the non-joinder of their co-tenants in abatement. *Ibid.*

3. One tenant in common cannot bring trover against his co-tenant, unless in case of the destruction or sale of the property. *Ibid.*

4. In case of sale, trover will lie at the instance of the other tenants, against the purchaser; such sale is void as to them, and does not make him a co-tenant with them. *Ibid.*

TESTAMENTARY PAPERS.

See *Deed*, 1 *to* 4.

TRACY, HON. EDWARD D.

Report and Resolutions on his death 235

TRESPASS.

See *Equity*, 14.

TROVER.

1. In actions of trover, where there is conflicting evidence of the value of the property at the same time: *Held*, that the Jury may find the highest value proven, but are not compelled so to find; the *true value* derived from all the evidence being the criterion generally of the damages. *Foster vs. Brooks, Adm'r* 287

2. In trover for a slave, the measure of damages, as a general rule, is the value of the property at the time of the conversion, and the value of the hire of the negro since, up to the time of the trial. *Schly vs. Lyon and another, Trustees* 530

3. Where the property sued for is not of a fixed value, but

fluctuates in price, evidence may be given of the value at the time of the trial. *Ibid.*

4. In trover by a *bailee* against the *general owner*, the measure of damages is the value of his special property only; but where the action is against a *stranger*, or wrong-doer, the measure of damages is the full value of the property—the bailee holding the balance beyond his own interest for the general owner. *Ibid.*

See *Pleading*, 1. *Practice*, 1. *Tenants in Common*, 1, 2, 3, 4. *Trust and Trustees*, 2.

TRUST AND TRUSTEES.

1. Where, under a trust deed, something is required to be done by the trustees to accomplish the objects of the trust, the trust is executory, and not executed. *Schly vs. Lyon and another, Trustees, &c.* 530

2. Where an action of trover is brought by trustees, in whom the legal title is vested, for the recovery of a negro, the allegation that they sue "for and in behalf of one of the *cestui que trust*," is surplusage, the trustees being the real parties. *Ibid.*

See *Equity*, 12, 30 *to* 40.

UNDUE INFLUENCE.

See *Wills*, 13.

USURY.

1. The right to recover back money paid on a usurious contract accrues from the actual payment, and not the agreement to pay. *Rushing vs. Rhodes* 228

2. A note originally usurious may be purged of the usury, by agreement of the parties, as where new notes were given for the principal sum loaned, with the lawful interest added to the principal, at the time of each renewal;

Held, that an agreement to pay interest on interest that was lawfully *past due*, did not constitute usury; and that each renewal of the note was a new contract: *Pinckard vs. Ponder* 253

UTTERING COUNTERFEIT COIN.

See *Criminal Law*, 9.

VENDOR AND PURCHASER.

1. Possession retained by the vendor after an absolute sale of real or personal property, is *prima facie* evidence of fraud, which may be explained; and after the possession is proven, the burthen of explaining it rests upon those who claim under the sale; and the rule is applicable to voluntary conveyances and to sales for valuable consideration. *Fleming, Guardian, vs. Townsend* 103

2. *Purchasers* are not embraced in the terms of the Statute 13*th Eliz.*; nor is *personal property embraced* in the terms of 27*th Eliz.*; but purchasers fall within the spirit of 13*th Eliz.*, and personal property within the spirit of 27*th Eliz.*. *Ibid.*

3. Upon Common Law principles, a voluntary conveyance is void against subsequent *bona fide* purchasers, for value, without notice. *Ibid.*

4. *Notice* to the purchaser must be *actual*. The registration of the conveyance is not such notice as will deprive him of the benefit of Statute 27*th Eliz.* *Ibid.*

5. Where a creditor, who is the mortgagee, forecloses his mortgage, and purchases the mortgaged property at Sheriff's sale under it, and suffers the property so purchased to remain in the possession of the mortgagor, after the sale, such retention of possession by the mortgagor, is a badge of fraud as against other judgment creditors. *Williams vs. Kelsey & Halsted* 365

See *Equity*, 4.

VOLUNTARY CONVEYANCES.

1. Of personalty: are void against subsequent *bona fide* purchasers, without notice. *Fleming vs. Townsend*.... 103

2. Possession by the donor is *prima facie* evidence of fraud, and the burthen of explaining it rests upon the party claiming under the conveyance. *Ibid.*

See *Vendor and Purchaser*, 1 *to* 4.

VOLUNTEERS.

See *Equity*, 24 *to* 28.

WARRANT OF ATTORNEY.

See *Appeal*, 1.

WARRANTY.

1. A warranty of a slave to be *healthy*, does not extend to a warranty of soundness of mind, but of body only. *Nelson vs. Biggers*..... 205

See *Equity*, 6. *Pleading*, 3. *Set-Off*, 1.

WATER-CRAFT.

See *Steamboats*.

WIDOW.

See *Distribution*, 1.

WILLS.

1. The 3d section of the Act of 1755, which requires all wills and testaments to be recorded within three months

from the death of the testator, is not of force in Georgia. *Harrell and Harrell vs. Hamilton, Ex'r* 37

2. The opinions of physicians as to the sanity of the testator are admissible, whether founded on the symptoms and circumstances, as coming within their own observation, or as testified to by others. *Potts and others vs. House, Ex'r* 324

3. The opinions of the subscribing witnesses to a will, as to the sanity of the testator, are admissible without stating the facts on which they are founded. *Ibid.*

4. The *mere* opinions of other witnesses are not admissible, unless accompanied with the facts on which they are founded; but having stated the appearance, conduct, conversation, or other particular facts, from which the state of testator's mind may be inferred, they are at liberty to express their belief or opinion, as the result of those facts. *Ibid.*

5. If a negro interpreter, incapable by law of being sworn, is the only channel of communication between the testator and scrivener who writes the will, and there is no other evidence of the testator's knowledge of its contents, or his assent thereto, than that which is derived through this medium, the will cannot be executed. *Ibid.*

6. But if the will be written in the presence of the testator, and in a language which he understands, and it is read over to him, and his dictation and approval of the instrument are interpreted by a negro in his hearing, and in the hearing of others interested in its contents, and he signifies no dissent thereto, by signs or otherwise, but, on the contrary, is understood to express himself satisfied, the will may be established; especially if it appears to have been made in conformity to the previously declared intentions of the testator, as to the disposition of his property.

7. As a general proposition, *affirmative* testimony should outweigh *negative*. This rule, however, does not apply where some of the witnesses swear that the testator *could measure corn, calculate interest, &c.* and others that he could not. The testimony in both cases, is of the same character. *Ibid.*

8. Neither *eccentricity* nor *imbecility of mind*, nor *extreme old age*, nor being *deaf and dumb*, whether from birth, or the calamity be superinduced, nor *incapacity to make contracts* for the purchase and sale of property, are sufficient to invalidate a will. *Ibid.*

9. The words "*non compos*" (of unsound mind) are legal terms, and import a total deprivation of understanding. *Ibid.*

10. If a testator be *non compos*, his will is a nullity, however just and prudent its provisions. *Ibid.*

11. If the testator be *partially* deranged, either as to the legatee or subject matter of his will, he will be considered as wanting sound and disposing mind and memory as it respects *this particular will*, however unimpeachable his character and capacity in other respects. *Ibid.*

12. If the testator has capacity to recollect, discern and feel the relations, connections and obligations of family and kindred, his will shall stand, however capricious or unreasonable its provisions. *Ibid.*

13. Influence in procuring a will to be made, *to be undue*, must amount to *moral coercion;* it must destroy the free agency of the testator, and constrain him to do what is against his will, but what he is unable to refuse; and it is immaterial whether this undue influence be exercised by a negro or a free white person. *Ibid.*

14. Under the Statute of Frauds, requiring wills to be subscribed by the attesting witnesses in the presence of the testator, it is not necessary that the witnesses should be

in the same room, or the same house with him; or that the testator should in fact see the witnesses subscribe their names; but it is necessary that the situation and circumstances of the testator and witnesses are such that the testator, in his actual position, might have seen the act of attestation. *Robinson and Wood vs. King*.. 539

15. The following clause in a will held to be void, as in conflict with the Act of 1818, against manumission of slaves: "It is my will that my old servant *Writ*, and her five children, and her husband, may be made to live comfortable, under the superintendence of my friends, A and B, into whose care, and under whose protection, I do hereby give and place the negroes herein named, in view of their being treated with humanity and justice, subject to the laws made and provided in such cases." *Ibid.*

16. Parol evidence held admissible to show that a will is illegal and void, as being in conflict with the laws of the State against manumission. *Ibid.*

See *Deed*, 1 *to* 4. *Evidence*, 30.

WITNESS.

1. It is error in the Court to discredit the testimony of *relatives*, as such; relationship being a circumstance only, from which the Jury may infer bias. *Potts vs. House, Ex'r*..... 324

2. As to *opinions* of witnesses, see *Wills*, 2, 3, 4, *and case above referred to.*

3. In claim cases, under the peculiar provisions of our Statute, the defendant in execution is not a competent witness for the claimant; nor can the declarations of the defendant in execution be received in evidence in favor of the claimant. *Williams vs. Kelsey and Halsted*.... 365

See *Cashier*, 1. *Evidence*, 3, 5, 7, 25, 26, 27. *Interrogatories*, 1.

WRIT OF ERROR.

1. The Court will not amend a writ of error, by striking out one party and inserting another. *Arnold vs. Wells and Wife*..... 380

See *Practice Supreme Court.*