REPORTS OF CASES

IN LAW AND EQUITY, ARGUED AND
DETERMINED IN THE

SUPREME COURT OF GEORGIA,

AT ATLANTA.

Part of September Term, 1879, and of
February Term, 1880.

VOLUME LXIV.

BY JACKSON & LUMPKIN, REPORTERS.

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1881.

JUDGES AND OFFICERS

OF THE

SUPREME COURT OF GEORGIA

DURING THE PERIOD OF THESE REPORTS.

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HON. JAMES JACKSON, Associate Justice, ... Macon.
HON. MARTIN J. CRAWFORD, Asssociate Justice,* . Columbus
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SAVANNAH, ...	HON. WILLIAM D. HARDEN, .	Savannah.

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*Hon. LOGAN E. BLECKLEY having resigned, Hon. MARTIN J. CRAWFORD was appointed to succeed him. He qualified February 9th, 1880.

† ¶ Judge CRAWFORD having resigned to accept a position on the Supreme Court Bench, Judge BUTT was appointed to succeed him. He qualified February 9th, 1880, but resigned in the following May, when Judge WIMBERLY was appointed to succed him. He qualified May 22d, 1880.

NOTE.

By act of 1866 (section 4270 of the Code), the decisions of the Supreme Court are required to be announced by written synopses of the points decided. The decisions thus announced from the bench by Justices Bleckley and Jackson, up to the end of the September term, 1879, are made the head-notes to the cases; the decisions of Chief Justice Warner are published as his opinions, the head-notes being made by the reporters. All other head-notes by the reporters are designated by (R.) Beginning with the February term, 1880, all head-notes are made by the reporters, the decisions being published as the opinions of the Justices delivering them.

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CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA.

SEPTEMBER TERM, 1879.

PRESENT—HIRAM WARNER.....CHIEF JUSTICE.
L. E. BLECKLEY.....ASSOCIATE "
JAMES JACKSON..... " "

WEITMAN, administrator, *et al. vs.* THIOT *et al.*

1. Where a bond and mortgage were executed in 1854 and matured in 1855, and the maker died, and letters of administration issued in 1861, and the administrator died in 1864, and the estate was unrepresented until 1872, when letters *de bonis non* were issued:

Held, that inasmuch as the statute of limitations was suspended from 1864 to 1868, and the time intervening between the termination of the first administration and the commencement of the administration *de bonis non* is not to be counted until the expiration of five years more, and nine months and fifteen days in addition are to be added before the bar prescribed by the limitation act of 1869 would attach, the bond and mortgage were not barred by that act in 1872, when the letters *de bonis non* were issued.

2. Administration *de bonis non* having been granted in 1872 to one of several trustees for the purpose of securing the payment of the bond and mortgage, they were not barred whilst he was the sole administrator, and when he administered the assets and applied them to the debt due from the intestate to the trustees without unreasonable delay.

3. An administrator cannot sell the lands of intestate whilst in the adverse possession of the heirs at law, and actual possession of part

of a tract will constructively extend to the limits described in a deed recorded, or of the boundaries of which the adverse party had knowledge.

4 Where the real issue of the case on trial turned on the question of such possession in the heirs as against the administrator on a bill brought by the heirs to set aside the sale of the mortgaged property for the purpose of paying the debt, and the evidence was conflicting thereon, and the court charged erroneously on other controlling points, a new trial should be granted.

5. Deeds thirty years old, apparently genuine, and coming from the proper custody, are admissible without proof of execution or of proper record.

Statute of limitations. Administrators and executors. Title. Deeds. Evidence. New trial. Before Judge FLEMING. Effingham Superior Court. April Term, 1879.

Anna N. Thiot and her children filed their bill against Weitman, administrator, *et al.*, alleging, in brief, as follows:

Complainants are the widow and children of Charles H. Thiot, who resided in Effingham county, was a soldier in the army, and has not been heard of since the war; last heard from with the army in North Carolina, in 1865, about the close of the war. Charles H. Thiot was a brother of Alex. W. Thiot, who died October 10, 1860. Part of the real estate owned by Charles H. Thiot at time of his death was 100 acres, known as the Pierce tract; 200 acres, known as the Rudesperger tract, and 200 acres known as the Sweigofer tract. Elbert G. Weitman, without the knowledge or consent of complainants, and without *actual* notice to them, took out letters of administration on Alex. W. Thiot's estate in May 1873, and in July, 1873, obtained an order from the court of ordinary for the sale of the land of Alex. W. Thiot, and by virtue of the order, on the first Tuesday in September, 1873, exposed the lands above described as the lands of Alex. W. Thiot, for sale, and the German Lutheran Congregation became the purchaser for $175.00. Charles Thiot took out letters of administration on Alex. W. Thiot's estate in 1860, and complainants believe fully administered it. Said lands had either been

sold by Alex. W. to Charles H. or vested in Charles H., as next of kin to Alex. W., upon his death. There were no legal debts against the estate of Alex. W. Thiot in May, 1873, and hence no necessity of administration or of sale. Weitman and the German Lutheran Congregation confederated together for the purpose of enforcing a debt of the German Lutheran Congregation against Alex. W. Thiot barred by the statutes of limitation. Prayer to enjoin the German Lutheran Congregation from taking possession of the land under the sale, to revoke the letters of administion to Weitman, to cancel the deed made by Weitman, and to have the possession of the land given to complainants.

The bill was amended as follows:

The land was owned by Charles H. Thiot, and was in his possession at his death. It was held adversely to all the world by Charles H. Thiot and by complainants as his heirs at law. Weitman is one of the trustees of the German Lutheran Congregation, and the administration by him was to secure the debt against Alex. W. Thiot, although the debt, which was secured by a mortgage on the land of Alex. W. Thiot, was barred by the statute of limitation. Alex. W. Thiot never owned title to more than one-third of said lands.

The defendants answered, in brief, as follows:

They do not know complainants to be heirs at law of Charles H. Thiot. The land was not the property of Charles H. Thiot, but of Alex. W. Thiot. The estate of Alex. W. Thiot was not fully administered by Charles Thiot, but he died before administration was completed, and, on the suggestion of his death, Elbert G. Weitman was appointed administrator in his place. In the due course of administration, and for the purpose of paying the debts of the estate, Weitman, as administrator, applied to the ordinary for and obtained an order for leave to sell the land, and sold the same according to law. Defendants believe that

complainants had *actual* notice of both the application for letters and the leave to sell. The German Lutheran Congregation became the purchaser of the land, being the highest bidder at the sale. There were legal and valid debts against the estate of Alex. W. Thiot when Weitman took out letters, and when he sold the land. There was no collusion or confederation to injure complainants or to subject the estate to the payment of any unjust claim. That the debt held by the German Lutheran Congregation against the estate was a bond and mortgage made by Alex. W. Thiot to secure the payment of $500.00, money borrowed by him from the German Lutheran Congregation, the mortgage being upon the land in question. Charles H. Thiot was security on the bond. The debt had never been paid. Complainants were not in possession of the land at the time Weitman became administrator nor since; nor did Charles H. Thiot at any time have possession thereof. It was unoccupied at the time Weitman sold it, although it was notoriously known and considered to be the property of the estate of Alex. W. Thiot. Weitman, as administrator, sold the same to the German Lutheran Congregation, and it took control and had it surveyed.

The evidence was somewhat conflicting, especially on the question of possession by complainants. They claimed that while the lands were known as three distinct places, they were contiguous to each other so as to form virtually one tract, and that they were in possession, actually exercising control over and using a part of the land, and their possession extending to the boundary of the whole tract. Defendants denied such possession in complainants. It appeared that the mortgage and bond were made in 1854, and the indebtedness matured in 1855; that Alexander Thiot died in 1860, and Charles Thiot, father of Charles H. Thiot, was appointed his administrator in 1861: that he died in 1864: and that the estate was unrepresented until 1872, when Weitman (who was one of the trustees of the Luthe-

ran Congregation) was appointed administrator *de bonis non*.

Complainants offered in evidence, in support of their title, two deeds, one from Polhill *et al.*, administrators, to Charles Thiot, dated November 27, 1819; the other from Taylor & Davis to Martha Thiot, dated June 12, 1824. Neither of these deeds was attested by an official witness, nor was there any proof of execution. The first had an entry on it showing that it had been recorded; the other did not. Complainants' counsel stated that he had received these deeds from Mrs. Thiot, one of complainants. Defendants objected to them, but they were admitted.

The jury found for complainants. Defendants moved for a new trial on the following, among other grounds:

(1.) Because the court erred in admitting in evidence the deed from Taylor & Davis to Martha Thiot.

(2.) Because the court admitted the deed from Polhill *et al.*, administrators, to Charles Thiot.

(3.) Because the court charged the jury that if complainants had possession of the land the sale was void.

(4.) Because the court charged the jury that if a party is in possession of a part of a tract of land they are in possession to the boundaries of the tract.

(5.) Because the court charged that if a claim is barred by the statute of limitations, no recovery can be had upon it.

The motion was overruled, and defendants excepted.

RUFUS E. LESTER, for plaintiffs in error.

J. R. SAUSSY; H. B. TOMPKINS, for defendants.

JACKSON, Justice.

The court instructed the jury in this case that the sale by the administrator *de bonis non* was void, because he had obtained the letters and the order to sell fraudulently, in this, that the debt due to the church was barred when the letters were granted in 1872—barred by the act of 1869. The

bond and mortgage were executed in 1854 and matured in 1855; the maker died in 1861 and letters were granted to his father, who died in 1864; thence to 1872 there was no administration: hence, in the judgment of the court below, the bond was barred by the limitation act of 1869. Even if it were so barred, it would seem that the grant of letters would have been good if taken out to pay an honest debt; or, at any rate, that the ordinary had adjudicated that question, and that the letters of administration, not having been got by fraudulent or false representations of any sort, would stand until revoked by the court which granted them.

1. However that may be (and it is not necessary to decide it in this case), were the bond and mortgage given by the intestate in 1854 and due in 1855 barred by the act of 1869? We think not. The statute of limitations was suspended in 1868, and only then it could begin again to run. The estate was then unrepresented, and the bar would not attach until five years more had expired: because the period of five years is allowed from the close of the administration first granted to the beginning of that *de bonis non* by our statute. Code, §2928. To this, as there was no administrator to sue on the 1st of January, 1870, nine months and fifteen days should be added from the expiration of five years after July, 1868. 55 *Ga.*, 85. So that it is very clear that when administration was granted in 1872, this debt was not barred, and therefore the court was wrong in the charge which pronounced it barred. And the creditor had a clear right to administer without considering or deciding whether he could have done so to secure a barred debt.

2. But the sale did not take place until nine months and fifteen days after the grant of administration *de bonis non*, so that it may be asked why was not the debt barred when the sale took place and the proceeds were applied to the debt? The answer is, because the administrator could not sue himself, and inasmuch as he was one of the trustees who held the legal title in common with others, the spirit of

the decision in 57 *Ga.*, 568, would apply, and the debt would not be barred while he was trying to sell and have it paid, and not unreasonably delaying the matter. The facts show that he pressed the matter as rapidly as was practicable, and was guilty of no *laches*. Therefore the bond and mortgage were not barred in equity when the sale took place.

3, 4.—It is clear that the lands, if held and possessed by the heirs adversely, cannot be sold by the administrator until he sues and recovers them. Code, §§2564, 2483, 2486; 56 *Ga.*, 430.

But that is a contested point on the facts, and while the court charged the law thereon, and that was the real issue in the case, yet the charge of the bar of the statute and fraud of the administrator concluded the case for complainants without reference to this issue; and therefore the case must be tried over again. The charge in respect to the extent of possession by construction when the party actually possesses part, is right, as we understand it. The law is that it extends as far as the boundary of the tract described in the deed, if recorded, or if the boundaries are known to the contesting party.

5. There was no error in admitting the deeds which were over thirty years old, they appeared genuine, and came from the proper custody. Code, §2700.

The judgment is reversed on the ground that the court erred in the charge in respect to the debt being barred and fraud in the administrator in taking out letters and selling the land mortgaged to pay it.

Judgment reversed.

The South Carolina Railroad Company *vs.* The Peoples' Saving Institution.

The Same *vs.* Williams *et al.*

Fisher, receiver, *vs.* The Peoples' Saving Institution.

The Same *vs.* Williams *et al.*

1. That a foreign railroad company was allowed by special act of the legislature to contract with a municipal corporation on the Georgia line and extend its road into that city, and by the same act was made liable to suits in the proper courts in this state, did not change its charter as a foreign corporation so as to prevent an attachment against it. The remedy provided by the act was merely cumulative.
2. The mere pendency of a bill to foreclose a mortgage on a railroad, and for the appointment of a receiver in the United States circuit court of South Carolina, could not affect the operation of the attachment laws of this state, although some of the plaintiffs in attachment were parties defendants before any levy was made, and the others were made so afterwards, the bill not being a general creditors' bill, but a bill to foreclose a mortgage, and no receiver having been appointed prior to the levies.
3. The fact that an attachment has been levied on that part of a foreign railroad which extends into this state and its appurtenant property here, does not, without more, render the levy illegal.
4. Where attachments have been levied on the property of a foreign corporation in this state, and afterwards a receiver is appointed for the corporation in its own state, before he can plead to or defend the attachment suits, he must apply to the courts where they are pending and be made a party.
5. Where, after the levy of attachments on the property of a foreign corporation in this state, a receiver is appointed in its own state, and takes possession of all the property, including that levied on, subject to the disposition of the attachments, it is not a proper mode of disposing of them for the receiver to petition the court where they are pending to order the property levied on to be turned over to him.

Corporations. Railroads. Attachment. Jurisdiction. Laws. Levy and sale. Receivers. Parties. Practice in the Superior Court. Before Judge Snead. Richmond Superior Court. April Term, 1879.

Reported in the decision.

BARNES & CUMMING, for plaintiffs in error.

FRANK H. MILLER, for defendants.

WARNER, Chief Justice.

The above stated cases were argued together here upon the following abstract of facts as contained in the record thereof:

The Peoples' Saving Institution, a corporation created under the laws of the state of South Carolina, and doing business in the city of Charleston, on the 9th day of July, 1878, levied an attachment against the South Carolina Railroad Company, as a non-resident corporation, returnable to October term, 1878, of the superior court of Richmond county, on two lots of land, situate in said county, on the track with right to use horse power thereon, extending from lot first levied on through Washington street, Augusta, to the Georgia Railroad track, as granted under certain contracts with the city council of Augusta, and others, dated August 10, 1852, July 31, 1857, and June —, 1869, notice of the levy being served July 10, 1878, on F. K. Huger, in possession of property as agent of defendant, at the office of defendant, and under said attachment caused process of garnishment to be served July 9, 1878, on the Georgia Railroad and Banking Company, and on the Charlotte, Columbia and Augusta Railroad Company, and on July 10th on F. K. Huger, individually, and as agent at Augusta of the South Carolina Railroad Company, on July 16th on the Southern Express Company, and July 17, 1878, upon Wellington Stevenson. On the 21st of October it filed its declaration on said attachment, alleging, among other things, that said South Carolina Railroad Company was indebted to plaintiff $6,485.94, with interest from June 14, 1878, on a judgment obtained in the court of common pleas of the county of Charleston, South Carolina. The above men-

tioned contracts are fully set forth in the bills of exceptions.

The Georgia Railroad Company and the Charlotte, Columbia and Augusta Railroad Company answered, denying any indebtedness. Their answers were traversed and exception taken to the latter. F. K. Huger answered, denying any indebtedness individually, and as agent stating disposition of effects in accordance with the orders of his superior officers. To this answer plaintiff filed a traverse and exceptions. The Southern Express Company answered, admitting an indebtedness of $1,108.72, and Wellington Stevenson an indebtedness of $30.00.

On the 25th of July, 1878, George W. Williams and others, all residents of Charleston, South Carolina, levied an attachment against the South Carolina Railroad Company, returnable to October term, 1878, of the superior court of Richmond county, upon the same property mentioned as the subject matter of levy in the first attachment; also on the bridge across the Savannah river, with the abutments, piers and privileges thereof. Notice of this levy was served upon Frank K. Huger, in possession of the property as agent of defendant, at the office of the defendant, July 25, 1878. On the 21st of October, 1878, they filed their declaration on said attachment, alleging, among other things, an indebtedness to plaintiffs of $43,065.21, besides interest.

An order was taken during the term allowing defendant further time to file pleas to both of the aforementioned cases, which, in pursuance of the order, were filed on the 28th of February, 1879, being sworn to by John H. Fisher, receiver of the South Carolina Railroad Company.

The material facts as set forth in the pleas are, that Cyrus Gatewood *et al.* filed on the 5th day of July, 1878, a bill in the United States circuit court for the district of South Carolina against the South Carolina Railroad Company, and other defendants, among whom were the plaintiffs in the second above named attachments, for the foreclosure of a

mortgage, usually known as the second mortgage of the South Carolina Railroad Company, and the appointment of a receiver. On the same day the court issued its order, which was served on the same day on the South Carolina Railroad Company and the plaintiffs named in the second of the foregoing mentioned attachments, enjoining the delivery of any property of said company, save to a receiver to be appointed by the court. On the 26th of July, 1878, the complainants in said bill amended the same, making the Peoples' Saving Institution a party defendant to said bill, and on said 26th of July the said Institution was served with a copy of same, and said Institution has since appeared and answered. On the 19th of September, 1878, the said United States circuit court for the district of South Carolina, appointed John H. Fisher receiver, with directions to defend all existing actions against the South Carolina Railroad Company, and all that might thereafter be brought against the company or himself.

The order appointed him receiver of the entire property embraced in the trust deed (the mortgage) set forth in complainants' bill, and this embraced all the property described in the levies of the attachments, and also of all the earnings and income of or from said property, whether the same may have accrued before or since the 5th day of July, 1878.

On the 31st of July, 1878, the complainants in said bill filed their auxiliary bill in the United States circuit court for the southern district of Georgia, and on the 10th day of December, 1878, the said circuit court for the southern district of Georgia passed an order appointing the said John H. Fisher receiver of all property embraced in the trust deed (a mortgage) mentioned in complainants' bill, as is in the state of Georgia, and of all the earnings or income of or from said property, whether the same may have accrued before or since the 5th day of July, 1878, and with all the powers, privileges, rights, liabilities and duties imposed upon said receiver by the circuit court of the United States for the district of South Carolina.

It is declared to be the intent and meaning of this order to confirm and adopt the order of the appointment of the United States court for the district of South Carolina, so far as the circuit court for Georgia has jurisdiction in the premises.

The receiver is also directed to make a report of his actings and doings under the Georgia confirmatory order to the United States court for South Carolina.

The mortgage for the foreclosure of which the bill was filed, was a second mortgage of the South Carolina Railroad Company, dated 1st day of October, 1872. It conveyed to the trustees therein named the entire property of said company, whether in Georgia or South Carolina, for the purpose of securing the mortgage bondholders, subject to the lien of the first mortgage of said company, bearing date the first day of July, 1868. These appear as set forth in the amended bill, made a part of the bills of exceptions in these cases. All of the bonds provided for by said mortgages or deeds of trust have been issued and are now outstanding.

The attachment of the Peoples' Savings Institution was based on a judgment obtained by said Institution in the court of common pleas for the county of Charleston and state of South Carolina, on the 14th day of June, 1878, (see declaration in attachment) for $6,485.94. This judgment was a balance due on a note dated October 6, 1877, (long subsequent to the execution of the second mortgage) payable January 7, 1878, for $14,000. Said note was secured by a pledge of 56 second mortgage bonds, each bearing plainly printed on its face and indorsed on its back, "second mortgage bonds of the South Carolina Railroad Company." They were received as security for said note, with full knowledge that they were bonds secured by a second mortgage of its property. At maturity of note, said bonds so pledged were sold, and were accounted for to defendant in a statement of the sale as second mortgage bonds. The suit in which the judgment was rendered was for the bal-

ance of said note, after crediting proceeds of the sale of said bonds.

The attachment in the case of George W. Williams *et al.* was based on an alleged indebtedness of defendant to plaintiffs for $43,065.21, evidenced by certain promissory notes—one dated May 12, 1877, due January 1, 1878, for $20,000; a second dated October 9, 1877, and payable on demand, for $19,000, and a third dated February 13, 1878, payable on demand, for $9,000. A second count of said declaration is based on an account composed of three items, dated, respectively, October 9, 1877, January 11, 1878, and February 13, 1878. This indebtedness was contracted long subsequent to the execution of either of the mortgages. The first of said notes recites that there is deposited with the holder as collateral security nine of the sterling bonds of said company (being the first mortgage bonds) and twenty-two of the second mortgage bonds. The second recites a like deposit of thirteen first mortgage bonds and sixty-two second mortgage bonds. The third, a like deposit of sixty-six second mortgage bonds. They thus acquired actual knowledge of the first and second mortgages at the time of the creation of their debt.

The plaintiffs in both cases are all residents of South Carolina. The Peoples' Savings Institution was made a party defendant to the bill early after the levy of its attachment. George W. Williams and his co-plaintiffs were parties defendant before the levy of their attachment.

In the case of George W. Williams *et al.*, all the plaintiffs named were members of the board of directors of the South Carolina Railroad Company at the time of the execution of both of the mortgages, and one of said plaintiffs, Henry Gourdin, was one of the trustees named in the first mortgage, and they all voted for the resolution directing the creation of said mortgages, and under and by virtue of which said mortgages were created and executed.

Said mortgages were properly recorded in the state of South Carolina, but had not been properly placed on the

records in the county of Richmond, and state of Georgia, at the time said attachments were levied. They had been entered in the book of records but had been probated before a notary public of South Carolina, and had not been probated before any duly authorized officer of the state of Georgia. Such record, it is admitted, was defective.

It is admitted that since the date of the levy of the attachments, said mortgages have been properly probated before a Georgia commissioner, resident in South Carolina, and properly entered of record.

The pleas based on these facts were first to the jurisdiction of the court in both cases. The second plea in the case of the Peoples' Saving Institution concluded with a prayer, that inasmuch as said Institution had positive knowledge of the mortgages, any lien obtained by the attachment, or the judgment rendered thereon, should be postponed to said mortgages. In the case of George W. Williams and others, there were five pleas besides the plea to the jurisdiction, the first, praying that inasmuch as collaterals in the hands of plaintiffs are not exhausted, suit should be dismissed; the second, that an account should be taken of the value of these collaterals, and judgment allowed only for excess of the amount of the claim over and above such value; third, that inasmuch as plaintiffs had actual knowledge of the mortgages, the lien of their judgment should be made posterior to the mortgage liens; the fourth alleges that it was duty of plaintiffs, as directors of the South Carolina Railroad Company, to see to proper probate and record of the mortgages, that their failure to do so was a breach of duty on their part, and that as a consequence any lien which they might acquire should be posterior to the lien of the mortgages; and fifth, that inasmuch as said plaintiffs participated as directors in the execution of said mortgages, the lien of the mortgages should be made superior to any lien either under said attachment, or any judgment based thereon. All the pleas were sworn to by John H. Fisher, receiver of South Carolina Railroad Company,

on March 4, 1879. To these pleas plaintiffs in both cases filed a demurrer, accompanied with a motion to dismiss the same, and at the same time served defendant with notice to produce, on the hearing, a copy of each and every legal or equitable proceeding set forth in the pleas and of the deeds of mortgage referred to therein, with probates thereof in South Carolina and Georgia.

The grounds of demurrer were:

First. That the pleas were not properly verified.

Second. That they set forth no legal defense to plaintiffs' action.

Third. That the defendant, as a foreign corporation, cannot, as to liabilities incurred in South Carolina, be sued in *personam* in Georgia, and the proceedings in Georgia by attachment cannot be set aside or affected by any proceedings against the corporation in South Carolina.

Fourth. That the proceedings in the United States courts in South Carolina and Georgia were void as to proceedings in the state courts of Georgia, especially when the attachment in the first case was levied before the party plaintiff therein was made a party defendant in the proceedings in the United States courts.

Fifth. Because the levy of the attachment gives jurisdiction at its date, not the date of the suit or the appointment of a receiver.

Sixth. Because the comity of this state recognizes no rule of pleading, which it would violate the statute law of Georgia to enforce.

On Saturday, the 12th of April, argument was had thereon. In compliance with the notice there was produced at the hearing, and the same were referred to in argument, and are now embraced in the bills of exceptions, the mortgages of the South Carolina Railroad Company referred to in the pleas; a certified copy of the order of the circuit court of the United States for South Carolina, passed September 19th, 1878, appointing John H. Fisher, Esq., receiver of the entire property embraced in the

second of said mortgages; copy of an order of Judge Woods, of the fifth circuit court of the United States for the southern district of Georgia, in a bill auxiliary to the bill in which the preceding order was passed; a copy of an order by Judge Erskine, December 9th, 1878, and a further order of Judge Woods, December 10th, 1878; also the contracts between the South Carolina Railroad Company and the City Council of Augusta, dated August 10th, 1852, July 13th, 1857, and June —, 1869, referred to in the levies of the attachments, made a part of the brief of evidence, and embraced in the bills of exceptions. The statutes of Georgia and South Carolina relative to said South Carolina Railroad were also, by consent, made a part of the record in said case, having been referred to by counsel in the course of argument. Both sides announced that they would file with the court written briefs of argument. The counsel for defendant filed with their brief a motion, of which due notice was given to counsel for plaintiffs, to dismiss said attachments on the ground that an attachment would not lie against the South Carolina Railroad Company, said company having been made expressly suable in the county of the state in which its road terminates, by section vii of the act of the legislature of Georgia of February 18th, 1854, to charter the Charleston and Savannah Railroad.

As thus presented, the cases were submitted to the court, and afterwards, to-wit: the 21st of April, 1879, being the first day of the April term, 1879, the demurrer was sustained and the pleas were ordered stricken, and the court held that the receiver was acting *ultra vires*, and was not properly in court.

On the 24th of April, 1879, and during said term of the court, John H. Fisher, receiver of the South Carolina Railroad Company, presented a petition to the superior court of said county, in both of said cases, praying, while protesting that the seizure by the sheriff under the aforesaid attachments was illegal, that his possession should be removed, and that he, the petitioner, should have the same possession,

actual and constructive, which the South Carolina Railroad Company had before the levy of the said attachments, which petition was refused by his honor, Judge Snead, on the 25th of April, 1879.

On the same day Judge Snead awarded judgment in both cases, to be enforced by execution against the lots of land levied on under the attachments, also on the track with right to use horse power thereon, extending through Washington street to the Georgia Railroad track, as granted under the contracts with the city council of Augusta; also, against all the rights and privileges that properly appertain to the South Carolina Railroad, as an instrument of transportation, as well as the right of way and superstructure, and all other rights which passed to the South Carolina Railroad under contracts with the city council of Augusta, and others, as far as described in the levy of attachments.

It was provided in the case of the Peoples' Saving Institution, bnt which was omitted in the case of George W. Williams *et al.*, that said judgment was to be enforced against the money and choses in action in the hands of the Southern Express Company and Wellington Stevenson, garnishees, and also against whatever may be hereafter found in the hands of other garnishees. The judgment in the case of George W. Williams *et al.*, also provided that it should be enforced by execution on the bridge across the Savannah river, with the abutments, piers and privileges thereof.

The exceptions are that the court erred in the case of the Peoples' Saving Institution:

First. In not dismissing the attachment under section 7 of the act of the legislature, February 18th, 1854.

Second. In sustaining the demurrer.

Third. In striking the pleas of defendant.

Fourth. In holding that the receiver was acting *ultra vires*.

Fifth. In striking the plea to the jurisdiction of the court.

Sixth. In striking the second plea.

Seventh. In striking the plea praying that the verdict and judgment should be so moulded that the lien should be posterior to the mortgage lien.

Eighth. In refusing petition of John H. Fisher, receiver, for possession of attached property.

Ninth. In passing the order refusing such possession.

Tenth. In rendering the judgment on said attachment.

Eleventh. In rendering judgment to be enforced against the property levied on under the attachment.

Twelfth. In rendering judgment to be enforced by execution on the track and right to use horse power extending through Washington street, Augusta, said right not being subject to levy and sale under attachment.

Thirteenth. In rendering judgment against all the rights and privileges that properly appertain to the South Carolina Railroad as an instrument of transportation, as well as the right of way and superstructure, and all other rights which passed to said road under contracts with the city council of Augusta, as described in the levy of the attachment.

Fourteenth. In rendering judgment to be enforced against all the rights and privileges that properly appertain to the South Carolina Railroad as an instrument of transportation, as well as the right of way and superstructure, said rights and privileges not being subject to levy and sale under attachment.

Fifteenth. In rendering judgment to be enforced against the preceding and all other rights which passed to the South Carolina Railroad under contracts with the city council of Augusta, as far as described in the levy of attachment, such other rights not being subject to levy and sale under attachment.

Sixteenth. In not making the lien of said judgment posterior to the lien of the mortgages.

Seventeenth. In providing in said judgment for enforcing same against money and choses in action in the hands of the Southern Express Company and W. Stevenson, garnishees.

Eighteenth. In providing in said judgment for enforcing same against any effects thereafter to be found in the hands of other garnishees.

Nineteenth. In providing in said judgment for enforcing same against money or property thereafter found in the hands of F. K. Huger, individually.

Twentieth. In providing for enforcing same against same thereafter found in his hands as agent, in Georgia, of defendant.

Twenty-first. In passing order requiring Southern Express Company, as garnishee, to pay to plaintiff on said judgment the sum of $1,108.72.

In the case of George W. Williams *et al.*, the exceptions are the same as in the case of the Peoples' Saving Institution, saving the 7th, 8th, 10th and 12th, which complain of error in striking the 4th, 5th and 6th pleas of defendant; and the 9th, 11th and 13th, which complain of the court in not providing, in rendition of judgment, that the lien of attachment and judgment thereon should be posterior to the mortgage lien, on the grounds set forth in the 4th, 5th and 6th pleas respectively. The 22d exception assigns as error rendering judgment to be enforced against the bridge across the Savannah river, with the abutments, piers and privileges thereof, and the 23d complains of the same judgment on same ground, and on the further ground that said privileges are not subject to levy and sale under attachment.

Besides the foregoing bills of exceptions, John H. Fisher, as receiver ot the South Carolina Railroad Company, filed two bills of exceptions, one in the case of the Peoples' Saving Institution and one in the case of George W. Williams *et al.* They both complain of the decision of the judge of the superior court in refusing his petition for possession of the road, and in passing the order denying him such possession.

The exceptions taken to the rulings of the court below are attenuated and specific, but may be embraced in the following objections as insisted on here by the plaintiffs in

error as the main controlling questions made by the record: First, that the remedy by attachment could not be sustained in this state because the defendant could have been sued here by the ordinary process of law. Second, that the courts of this state had no jurisdiction to order the seizure of defendant's property in this state by attachment after the filing of the bill in equity against it in the United States circuit court of South Carolina, as set forth in the record. Third, that the levy of the attachments upon the defendant's property in this state was illegal, the same being only a part of its entire railroad. Fourth, that Fisher, the receiver of the United States circuit court should have been allowed to have defended the attachment suits by filing the several pleas set forth in the record. Fifth, that the court should have granted the petition of Fisher, the receiver, to take possession of the property of the defendant in this state levied on by the attachments.

1. As to the first ground of complaint, the South Carolina Railroad Company is a foreign corporation, and its residence is in that state, and by the laws of this state, attachments may be issued when the debtor resides out of the state, and against foreign corporations. Code, §§3264, 3251. By the 7th section of the act of 1854, the South Carolina Railroad Company, by an arrangement with the city council of Augusta, was allowed to extend its road into said city, and was made liable to be sued by persons having claims against it in the proper courts of the counties and cities of this state, but that did not make it any the less a foreign corporation, and liable to be proceeded against by attachment, as provideed by the general laws of the state—the provision that it might be sued in the courts of this state was merely a cumulative remedy for the better protection of our own people, but did not alter or repeal the general attachment laws of the state, nor any part thereof.

2. As to the second ground of complaint, the bill in equity filed in the circuit court of the United States in South Carolina, was not a general creditors' bill, but a bill

to foreclose a certain mortgage made by the South Carolina Railroad Company. No receiver had been appointed by that court when the attachments were levied upon the defendant's property in this state, and the mere pendency of that suit could not interfere with the execution of the attachment laws of this state within the jurisdictional limits thereof.

3. As to the third ground, it does not appear that the general assembly has ever granted any franchises, privileges or immunities to the South Carolina Railroad Company in this state which would prevent a levy and sale of its property found here under legal process. All the rights and privileges which have been granted to it in this state, that we have been able to discover, is to extend its road into the city of Augusta, by an arrangement or contract made with the council of that city, and therefore the illegality of levying the attachments on the defendant's property in this state is not apparent to us. Perhaps a court of equity, on a proper case being made, would restrain the sale of that part of the defendant's road which is in this state, under the attachment judgments, and decree that the entire road of the defendant should be sold; but that is not now the question here. The question here is as to the right of the plaintiffs in attachment to obtain judgments thereon in this state.

4. In relation to the fourth ground, the preliminary step of Fisher, the receiver of the United States circuit court, should have been to have made application to the court below to be made a party to the suits against the defendant for the purpose of defending the same. if he desired to do so. This not having been done, there was no error in the court's striking the pleas filed by him.

5. As to the fifth ground, it appears that the receiver was already in possession of the property, and as the only object appears to have been to get rid of the attachments levied thereon, the petition of the receiver was properly refused by the court.

We therefore affirm the judgment of the court below in all the cases, with directions that the judgments rendered in the attachment cases shall not be enforced by a sale of the property levied on, until a reasonable time shall have elapsed for the final disposition of the injunction granted by decree of the circuit court of the United States.

Let the judgment of the court below in all the cases be affirmed with directions as herein indicated.

Judgment affirmed with directions.

MUNROE *et al.* *vs.* PHILLIPS, administratrix.

WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. In 1868, no ordinary had power to dismiss from his trust a guardian of free persons of color, appointed as such prior to the abolition of slavery, and appoint a successor in such guardianship. An order of dismission based on the appointment of a successor, and on an accounting with him instead of with the wards, is void if no citation or other notice to the wards, nor any election by them, is made to appear by recitals in the order, or otherwise. After the *status* of free persons of color became changed both civilly and politically, a guardian of that class of persons was placed in new relations, and his holding of the property of his wards was thenceforth more in the nature of a general trust. Nevertheless, the ordinary had and has jurisdiction of returns relating to his management. Such returns are not conclusive upon him in all respects, but are open to explanation.
2. During the existence of slavery, there was no law or public policy against the ownership of personal property by free persons of color, and no law for any slave to have a guardian. The appointment of a white man as guardian for certain negroes, and his acting in such capacity, involved their freedom as a foregone conclusion. If they were *de facto* free in "slavery times," and he made returns to the ordinary in 1868, reaching back to 1854, in which he debited and credited them as his wards, it need not further appear whether they were free *de jure* or not, in order to hold him to account lawfully for a fund which he received for their benefit in 1854, and to the management of which, as their guardian, his said returns relate. He stands committed to their having acquired freedom by some lawful means, and to their ownership of the fund.

3. The burden of proving that the fund was converted into Confederate bonds in a legal way, is upon the guardian, or his representative.
4. When the plaintiffs have introduced in evidence one of several returns to the ordinary, made at the same time and sworn to in one and the same affidavit, the defendant may introduce the rest of the series, and the whole may be considered by the jury as one entire document. They are, however, not bound to give equal credit to all the several parts.
5. As to the effect of infancy in reply to the limitation act of 1869, see *Jordan vs. Tickner*, 62 *Ga.*, 123; *Windsor vs. Bell*, 61 *Ib.*, 671.

Guardian and ward. Free persons of color. Slave. Statute of limitations. Evidence. Before Judge CRAWFORD. Muscogee Superior Court. November Adjourned Term, 1878.

Reported in the opinion.

BLANDFORD & GARRARD; THORNTON & GRIMES, for plaintiffs in error.

PEABODY & BRANNON; JAMES RUSSELL, for defendant.

BLECKLEY, Justice.

On the 23d of April, 1878, three sisters—Victoria Munroe, Maria Gray and Missouri Overton—brought assumpsit against Laura Phillips as administratrix of Pleasant J. Phillips, deceased, in Muscogee superior court. The declaration alleged that the defendant's intestate, as guardian of the plaintiffs, received from Henry Lowe, their reputed father, the sum of $4,268.76, on the first of January, 1854, to and for the use of the plaintiffs; that he undertook and promised to pay the plaintiffs said sum when requested; that neither he, while in life, nor his administratrix, since his death, has paid the same, *etc.* The defendant pleaded, first, non-assumpsit; second, that at the March term, 1868, of the court of ordinary of Muscogee county, which court had jurisdiction of the trust, the intestate was by the judgment of that court discharged from his trust as guardian

of the plaintiffs, and then delivered all property and paid all money held by him as such guardian, upon a fair settlement of his accounts, to Philip Munroe, his successor in the guardianship, filing in the office of the ordinary the receipt of the said successor in full; and that more than five years had elapsed after each of the plaintiffs became of age before their action was commenced; third, that more than ten years had elapsed before the suit, after the right of action, if any, had accrued; and, fourth, that more than four years had elapsed before the suit, after the right of action, if any, had accrued.

The case was tried, and the jury found for the defendant. The plaintiffs, not moving for a new trial, sued out a writ of error on the rulings and charge of the court, and its refusal to charge. The evidence at the trial disclosed the following state of facts: The plaintiffs were the negro slaves of Henry Lowe, and they, together with their brother, Polk, were his reputed children by Sophy Lowe, a woman of color (his own slave); that in the year 1854, the defendant's intestate received from Henry Lowe $14,000.00 for Sophy and her four children, of which sum $1000.00 each was for her and the three girls, and $10,000.00 for Polk, the son; that this fund was not turned over by Lowe to the intestate by deed, will or other writing, but it was in divers notes on good and solvent persons, and the notes were delivered in the presence of a witness; that Lowe had previously made a will providing for Sophy and her children, but being advised that it was not lawful to bequeath property to slaves, he gave the fund into the hand of the intestate in the manner above stated; that all this occurred in Georgia, where all the parties resided; that Lowe died in July, 1854, and not long thereafter, perhaps in 1855 or 1856, the intestate sent Sophy and the plaintiffs to Washington, D. C., and Polk to Pittsburg, Pa., or they went at his instance, he paying their expenses; that the purpose was for Sophy to reside in Washington and educate her children, but she soon concluded to return to Georgia, and did return in two or three weeks,

bringing the plaintiffs back with her; that after their return they staid in Harris county about three weeks, and the intestate then removed them to Columbus, in Muscogee county. The plaintiffs introduced in evidence a certificate of the clerk of the inferior court of Muscogee county, under the seal of said court, dated May 6, 1856, describing Sophy as a free person of color residing in that county, reciting that advertisement had been made, and certifying that she was duly registered as a free person of color, and certifying also that the intestate was then her guardian. They likewise introduced the records of the court of ordinary of Muscogee county, containing all the returns of the intestate as guardian of the plaintiffs and their mother. The returns were all made and sworn to at the same time, one and the same affidavit verifying the whole series, and it was dated March 2, 1868. The plaintiffs read as their evidence only the returns for the first two years, the years 1855 and 1856, the former showing a balance against the guardian of $4,148.19, and the latter of $3,913.45. The defendant read the other returns, and, over the objections of plaintiffs, read from the same records an order, or orders, passed by the ordinary at the March term, 1868, discharging the intestate from the guardianship of the plaintiffs, and appointing Philip Munroe in his place. It appeared that there was a full settlement and a receipt in full between the outgoing and incoming guardian; that the former turned over to the latter, as the assets, certain Confederate bonds and treasury notes, and gave him $50.00 in money for each of the plaintiffs. The new guardian was the husband of Victoria, one of the plaintiffs. Not long after this transaction, Munroe and wife and the other two plaintiffs all emigrated to Liberia, the intestate advising the two girls to go with their sister and her husband. The two never returned, but married in Liberia, and are there still. Munroe and wife came back to Georgia about 1871 or 1872, and Munroe died a year or two thereafter. As to the ages of the plaintiffs, it appeared that Victoria arrived at majority in 1863, and

married Munroe some time during the late war; the elder of the other two plaintiffs attained her majority in 1871, and the younger in 1872. Sophy, the mother, died in 1864. The intestate, Phillips, died October 12, 1876, and letters of administration were issued to the defendant at March term, 1877. There was evidence introduced by defendant showing that Confederate money was collected during the war on paper payable to the intestate as guardian, and that he funded in Confederate bonds. No order to fund, such as the statutes passed during the war required, was produced. The judgment of the ordinary discharging the intestate from the guardianship, and appointing Munroe to succeed him, did not recite any citation or other notice to the next of kin or to the wards, nor any election by them; nor did any such citation, notice or election appear by other testimony.

The several propositions excepted to in the charge of the court were in substance as follows: 1. That a guardian is not estopped by his returns. 2. That if the plaintiffs were slaves in 1854, and if the fund claimed was at that time turned over to Phillips for their use and benefit, as part of a scheme for their emancipation, and for their support afterwards in Georgia, the gift was void, and plaintiffs cannot recover. 3. If the settlement was without fraud it was final, save that it was subject to be opened by the minor wards within five years after they arrived at majority. 4. That the limitation of ten years does not apply. 5. That if the guardian received Confederate money when he received it for himself, and when other prudent creditors received it, and if he afterwards invested it in Confederate bonds, in good faith and as the best that could be done at the time, then he would not be liable; and more especially, if without fraud he turned them over to Munroe, who received them in satisfaction. One of the exceptions is to the refusal of the court to charge, at the plaintiffs' request, as follows: "If Lowe placed money in Phillips' hands when the plaintiffs were slaves, for their benefit, and if the

plaintiffs afterwards became free, and Phillips, after their freedom, made returns to the court of ordinary whereby he admitted that he had money in his hands as their guardian, then he is bound by his returns to the ordinary."

1. There is no dispute that the plaintiffs are persons of color, and that Phillips was once their guardian. His character of guardian is alleged in the declaration, and is admitted in the second plea. But that plea makes the point that he was legally discharged by the ordinary, and a successor appointed, in March, 1868. The record shows that the order of discharge was based on the order granted at the same term appointing the successor, and upon an accounting with the successor and not with the wards. It fails to show, nor is there any evidence whatever, that there was any citation or other notice to the next of kin or to the plaintiffs, or any election by them, or any of them, to change the guardianship. The general law providing for the dismission of guardians requires a previous publication of the application. Code, §1849. The provision for the resignation of a guardian is found in the next preceding section, and reads as follows: "Any guardian who, from age, infirmity, removal from the county, or for any other cause, desires to resign his trust as such, may apply to the ordinary having jurisdiction of the trust, setting forth the reasons therefor, and also the name of some suitable person willing to accept the trust, whereupon the ordinary shall cite such person and also the nearest of kin of such ward, to appear at the next term of said court, and if the ordinary shall be satisfied that such change of guardians will not be detrimental to the interest of the ward, and no good cause is shown against it, he shall grant the prayer of the applicant, discharging him from his trust on the following conditions, viz: that he shall forthwith deliver all property and pay all money held by him as such guardian, upon a fair settlement of his accounts, to his successor; and upon the filing of the evidence of such settlement, and the receipt in full of his successor, the guardian shall be discharged from his

said trust. The ward shall have the privilege, within five years after he comes of age, to re-open such settlement and call for an account." If this provision were applicable, we think the evidence fails to show that it was pursued. It contemplates that the nearest of kin of the ward shall be cited, and have an opportunity to show cause. But we do not think it can be held applicable, for the reason that all guardianships of free persons of color were terminated, as guardianships strictly, when the *status* of free persons of color became changed both civilly and politically by the results of the war and what ensued. If Phillips was the guardian of negroes prior to the war, they were free persons of color, for there was no law for any slave to have a guardian; and the distinctive legal class "free persons of color" had ceased to exist in this state in 1868. This great change of *status* placed those who had been guardians of that class in new relations, and their subsequent holding of the property of their former wards was in the nature of a general trust, superinduced by operation of law. The guardianship proper having terminated, such guardians could no more resign to or before the ordinary than could a guardian appointed for an infant, during infancy, resign after his ward had become of age. Adult negroes could at once call their former guardians to account; and infant negroes could do so too, suing, if not by a next friend, by a guardian appointed for them as infants. Doubtless it would have been perfectly competent for the ordinary, on due citation, or on the election of the two plaintiffs who were then minors, to have appointed a guardian for them, not as free persons of color, but as infants. The mistake was in applying the law of resignation and succession, where the law of a new and original guardianship of altogether another class from that which had existed and expired, was applicable. Nor was this quite all of the mistake, for as to the plaintiff who was no longer a minor in 1868, there was no cause for a further guardianship of any sort. The true view of the situation of Phillips in 1868 is,

not that he was the holder of a living guardianship with power to resign it, but that he had already been turned out of office as guardian and converted into a trustee of a more general class; nevertheless, as all trustees having in their hands a pecuniary fund, as a part of the trust estate, or receiving any sums of money as income or proceeds of such estate are, by section 2324 of the Code, to make returns to the ordinary . . . under the same rules and regulations as are prescribed for guardians, the ordinary was not without jurisdiction of the returns which Philips made. We rule, too, that his returns are not conclusive against him in all respects, but are open to explanation. See 45 *Ga.*, 520; 59 *Ib.*, 213, and compare 11 *Ib.*, 262; 25 *Ib.*, 696.

2. But we do not agree with the circuit judge that they can be explained to the extent of breaking up the whole trust, and putting a negative upon the very existence of the trust relation and of the admitted guardianship out of which that relation sprang. We are dealing with personalty and not with realty, and this is material to be borne in mind when comparing the present case with some cases that have preceeded it. While slavery existed, there was no law or public policy against the ownership of personal property (other than slaves) by free persons of color, but a different rule prevailed as to realty. Personalty could be owned by free persons of color, without limit, in all parts of the state. But by a slave nothing could be owned, for all his acquisitions belonged, as he did, to his master. The appointment of Phillips as guardian for the plaintiffs and their mother, and his acting in the capacity of their guardian, presupposed their freedom—involved it as a foregone conclusion. He could not have been the guardian of slaves; there was no law for it. If these negroes were *de facto* free (and the evidence indicates they were, long before slavery was abolished) and if Philips acted as their guardian from and after 1854, debiting and crediting them as his wards, (and his sworn returns show that he so did) what matters it whether they were free *de jure* or not?

We have the oath of Phillips that he was their guardian, that he had their funds as such, and expended a part thereof for their benefit. The other evidence shows that the funds came by gift from their reputed father, and not from Phillips. The latter was not dealing with the wards as free, at his own expense, and never in his life-time made the point that they were not free. As late as 1868, he recognized and avowed their freedom, as dating at least as far back as 1855, and their title to the original fund in his hands, and this he did by a solemn admission in *judicio*. Can his representative, at this late day, raise the question of their freedom *de jure*, and overturn the whole fabric of guardianship, trust and title? Has so wide a range ever been taken under the name of explaining returns? All slavery long ago abolished, one of the wards (the mother) dead, the guardian dead, and now the questions are made for the first time, were the wards free? Could they legally have a guardian in 1855, and for the ten years succeeding? Could they own the personal property which the guardian never claimed for himself, but always treated as theirs? We think the guardian stood committed to the theory that his wards had acquired their freedom by some lawful means, and to their ownership of the fund, (the fund being personalty) and that his administratrix must abide the consequences.

3. The returns are open to explanation as to the amount of the fund, the changes through which it underwent, etc., but no conversion of it from one form into another, as into Confederate bonds, could be recognized as binding upon the wards, unless it was made in a legal way. To invest trust assets in Confederate bonds, the statutes on that subject in force at the time, with reference to the procuring an order from the judge of the superior court, had to be pursued. The burden of proof on this branch of the case is upon the defendant.

4. Though the plaintiffs read but two of the returns, it was competent for the defendant to introduce the rest, and for the jury to consider the whole as one entire document,

giving more or less credit to the several parts as they thought they deserved. The returns were all made at the same time, and sworn to in one and the same affidavit.

5. The declaration is not properly framed, and if it had been demurred to, it ought to have been amended. Indeed, it ought still to be amended, so as to set out the actual facts more fully. But the question of limitation was not raised upon the declaration separately; and on the evidence, the ten years term, and not that of five or of four years, applies Code, §2922. The cause of action could not be considered as accruing before free persons of color ceased to exist in our system as a separate class. The two plaintiffs who were infants when the war closed would have the full ten years from the time they attained majority. Code, §2926 It will be noticed that the application of the act of 1869 was not suggested in the record. If it had been, with the declaration left in its present shape, the following cases would have been somewhat in point: *Windsor vs. Bell*, 61 *Ga.*, 671; *Jordan vs. Ticknor*, 62 *Ib.*, 113. And see *Beavers vs. Camp*, last term. The declaration is very unsatisfactory, when compared with the evidence, but it is amendable, and no direct point seems to have been made upon it below.

Cited by counsel for plaintiffs. On change of guardians, Cobb's Dig., 985, 977; Code, §1811. On estoppel by returns, 11 *Ga.*, 262; 25 *Ib.*, 696; 1 G'rl'f on Ev., §§207, 208; 1 Bos. & Pull., 293; Code, §3753. On period of limitations, Code, §§2922, 2926, 2931.

Cited by counsel for defendant. On gift to slaves, 6 *Ga.*, 539; 20 *Ib.*, 338; 26 *Ib.*, 225, 625; 30 *Ib.*, 253, 275; 38 *Ib.*, 655; 46 *Ib.*, 361, 399; 58 *Ib.*, 118; 61 *Ib.*, 248. On change of guardians, Code, §1848; Cobb's Dig., 985, 999; and sufficiency of recitals in the order, 47 *Ga.*, 195; 52 *Ib.*, 604; 56 *Ib.*, 307, 308. On limitations, 54 *Ga.*, 500; 55 *Ib.*, 35; 56 *Ib.*, 416; 58 *Ib.*, 382.

Judgment reversed.

Lynch *vs.* Goldsmith.

1. An instrument in the following terms: "Atlanta, Ga., February 11th, 1873. This is to certify that Mike Lynch has deposited in the Dollar Savings Bank three hundred and fifty dollars, subject to his order, on the following terms: interest at seven per cent. on call, or ten per cent. by the year. J. M. Willis, cashier," and indorsed in blank by Lynch the payee, is in effect a negotiable promissory note, payable generally on demand, and due immediately, and no demand, notice or protest is necessary to charge the indorser.
2. The indorsement of negotiable paper in blank imports, *prima facie*, an undertaking to pay, and the burden of rebutting the presumption is on the indorser.
3. Where the indorsement is in blank, and the indorser, at the time of negotiating the instrument, construes the indorsement as a transfer of title unattended with liability on his part, and the other party knows he so construes it, and does not object, that construction, in the absence of an express agreement to the contrary, will control as between these two parties.
4. Considered alone, or in connection with the rest of the instructions given to the jury, so much of the charge of the court was erroneous as directed the jury thus: "See what material facts going to illustrate the issue stand undisturbed before you, and then see to what conclusion those material facts in the case undisturbed lead your minds, and as they may lead your minds, you so believing them, why, you must so find," the losing party being dependent for success chiefly on the controverted matters in the evidence, while the matters not controverted, considered by themselves, necessitated a verdict against him.

Negotiable instruments. Indorsement. Protest. Charge of court. Before Judge Clark. City Court of Atlanta. December Term, 1878.

Goldsmith sued Lynch as indorser on five certificates of deposit differing only in dates and amounts, one of which is copied in the first head-note, aggregating $1,450.00, besides interest. The declaration was in the short statutory form with copies attached. The defendant pleaded as follows:

1. The general issue.
2. That on December 9, 1873, the defendant exchanged

the certificates sued on with plaintiff for a house and lot, and indorsed them in blank solely for the purpose of passing the title thereto, and not with any intention of becoming liable on said indorsement, as was well known to the plaintiff.

3. That at the time of this exchange, the certificates were worth par, and were selling in Atlanta at eighty cents on the dollar, whilst the house and lot were not worth more than $2,000.00.

4. That no demand was made on the Dollar Savings Bank, the place where said moneys were left on deposit, before this suit was brought.

5. That said certificates were made and were payable at the Dollar Savings Bank, a chartered bank having its place of business in the city of Atlanta, that payment was never demanded, that said certificates were never protested, and that defendant was never notified of any demand or of any protest.

The plaintiff introduced in evidence, besides the five certificates sued on, three others aggregating $550.00, which had been transferred to him by defendant at the same time, and with which he had subsequently parted.

The plaintiff testified, in brief, as follows: Came into possession of the certificates on December 9, 1873. Made repeated demands on the Dollar Savings Bank, and on each of its officers, but it was in a state of suspension, and has so remained ever since. The certificates were not protested. The bank was a chartered institution doing business in the city of Atlanta. Told defendant that the certificates had not been paid.

Defendant introduced the deed to the lot for which he exchanged the certificates. It purported upon its face to be in consideration of $2,000.00.

J. M. Willis testified, in brief, as follows: Was cashier of Dollar Savings Bank. It suspended September 25, 1873. It was put into the hands of the stockholders on October 1st, and on the 4th of the same month W. S.

Thomson, Esq., under their direction, took charge of it. After that, witness assisted him. Subsequently plaintiff came into the bank and asked witness how they were getting on? to which he replied that they were trying to get the bank on its feet again, etc. Plaintiff showed him some certificates which he had bought of Lynch, but made no demand for payment. The certificates then sold for 60 to 75 cents on the dollar. It was then thought that the bank would pay all of its debts and leave something for the stockholders.

M. Lynch, the defendant, testified, in brief, as follows: There was about $175.00 in interest due on the certificates at the time of the trade. They cost him $2,003.40; that is to say, he had to pay $3.40 more than the principal to get one of them. On or about December 1, 1873, plaintiff asked defendant if he had any money in the Dollar Savings Bank. Defendant replied that he had, and inquired what plaintiff would give for the certificates? Plaintiff said he had no money, but would give a house and lot for them. Defendant replied that he did not want a house and lot, but would rather sell them for cash and throw in the interest. After that, every time plaintiff passed his store, he would come in and talk about the "swap." Defendant continued refusing until plaintiff told him to go and look at the house, which he did, and after consulting with his partner he consented to trade. Plaintiff came to see him from seven to a dozen times on the subject. In not exceeding twenty minutes after defendant consented to swap, plaintiff brought the deed and put it on his show case. Defendant then got the certificates, when plaintiff said that as they were payable to his order he must indorse them, and he (plaintiff) would stand between him (defendant) and danger, but he could not do anything with them unless defendant's name was on them. Defendant then indorsed them in blank. He did not put his name there to be liable if the bank failed to pay; if he had ever thought that he would be liable he would not have done it. It was solely

on the faith of plaintiff's promise to stand between him and danger that he indorsed. Two or three days after the trade, and after defendant had been to the house, and had seen that it had only two good rooms in it, and two shed-rooms, he met plaintiff and said: "I did not think you would swindle me; I want you to rue back, and I will give you ten dollars for the trouble of drawing the papers." Plaintiff declined this proposition. For various reasons stated, does not regard the house and lot as worth more than $1,500.00, if that, though it is assessed by the city at $1,800.00.

W. S. Thomson, Esq., testified that he took charge of the assets of the bank for the stockholders about October 1, 1873, and so remained until January, 1874. The bank was adjudicated to be bankrupt about March 24, 1874, and witness and Candler were appointed trustees, and have since had charge as such. About December 10, 1873, certificates of deposit sold for 80 cents cash as an investment. They were then worth from 75 cents to par. Plaintiff never made any demand on witness for the payment of the certificates held by him.

The above synopsis of the evidence for the defendant will clearly show the nature of the case and the questions involved. It is only necessary to add that the plaintiff, in rebuttal, controverted every material statement. He insisted that he parted with his house and lot for the certificates on a bank in a state of suspension solely and expressly on the faith of defendant's indorsement, and that he only did this in response to the urgent and repeated solicitations of defendant; that his house was well worth $2,200.00, the price charged, not $2,000.00 as erroneously stated in the deed; that the interest on the certificates at the time of the trade amounted to about $200.00; that from the suspension of the Dollar Savings Bank, defendant was in a great state of excitement and alarm lest he should lose his money, and seemed to be of the opinion that because plaintiff was the cashier of the Georgia Banking and Trust Company, with

which the Dollar Savings Bank kept an account, and in close intimacy with the officers of the latter institution, that he could save him in some way; that defendant was not satisfied to leave the certificates with him simply for collection, but insisted that he (plaintiff) should become interested in them in some way, and after many entreaties and importunities on the part of defendant this trade was made; that the house was well worth the sum asked, and that defendant well knew that plaintiff would never have taken the certificates therefor unsecured by his indorsement, so as to be protected in case he failed to collect from the bank.

There was testimony upon collateral points tending to sustain and refute the statements of the parties at interest, not deemed material here.

The jury found for the plaintiff the full amount sued for, with interest.

The defendant made a motion in avert of judgment as follows, to-wit:

1. Because said defendant, if bound at all upon the instruments sued on, was bound as a security, and was liable as a security, and not as an indorser, and he was improperly sued in said action as appears on the face of the record.

2. Because the Dollar Savings Bank, the maker of said instruments sued on, and on which said defendant was so liable, if liable at all, as security, was not sued.

3. Because the instruments sued on were not in law such as could be transferred by blank indorsement, and thus create the liability on the person making such indorsement, of indorser as known to our law.

4. Because no demand and notice were averred as is necessary to charge an indorser on a negotiable instrument, payable at a chartered bank, if said instruments sued on are promissory notes and so payable.

The motion was overruled and defendant excepted.

The defendant also filed his motion for a new trial upon the following, amonst other grounds, to-wit:

1. Because the court erred, in charging the jury as fol-

lows: "It is immaterial, gentlemen, whether this is called a promissory note or what is the particular class or style of paper this is under the law. It is sufficient that it is negotiable paper. The paper is in evidence, and undisputed as to its contents, and it is a promise on the part of the bank to pay to Lynch, or his order, the sum of money. It draws interest at 7 per cent. per annum, if on call, and at 10 per cent. by the year. I say that that is substantially the contents of the papers that are sued on. It was not, in my judgment, necessary that upon this paper there should have been any demand upon the bank for its payment, or as a consequence, any protest or notice of protest to Lynch to hold him liable, if you believe that at the time of this indorsement this bank was in a state of suspension. But so far as the demand is concerned, if you believe that a demand was made upon the president or the cashier of this bank, or both, that would satisfy the requirements of the law so far as demand is concerned."

2. Because the court erred in charging as follows: "Every indorsement of a paper is a new contract as between the indorser and the person to whom indorsed, who is called the indorsee, and is an engagement upon the part of the indorser, if that indorsement is not upon any condition, not limited or qualified in any way, that he will become liable to the indorsee or any one to whom he may indorse that paper according to the legal tenor and effect. That being the true law governing indorsements, and if you believe the evidence satisfies your minds that Mr. Lynch put his name upon these papers without qualification, without restriction, the presumption is that he intended to bind himself according to the law of indorsement, as I have stated to you, and if he expects to relieve himself from the effect of that indorsement, he should show, to the satisfaction of the jury, some reason, good in law, why he should not be made so liable."

3. Because the court erred in charging as follows: "But if the matter was not understood between the two parties

at the time, or rather, I should have stated it, that in order for you to find that Mr. Lynch is not liable upon this indorsement, you must believe from the evidence, that it was the contract and the understanding of both the parties at the time, that it was not to be so."

4. Because the court erred in charging as follows: "See what is most natural, probable and reasonable under the several circumstances in the case, and also see, and perhaps more particularly see, what material facts going to illustrate this issue, stand undisturbed before you, and then see to what result and to what conclusion those material facts in the case undisturbed lead your minds, and as they may lead your minds, and you so believing them, why you must so find."

5. "Because the court erred in refusing to charge as follows: "Lynch pleads that he exchanged said instruments sued on for a house and lot in the city of Atlanta, and that he indorsed said instruments in blank solely for the purpose of passing the title thereto, and not with any intention or purpose of becoming liable upon said indorsement, and that this was well known to Goldsmith. The court charges you that if the indorsement was made by Lynch to pass title to the instruments sued on, and with the intention of not being liable thereon as indorser, and Goldsmith knew that was Lynch's understanding when Lynch made said indorsement thereon, then Lynch would not be liable."

The motion was overruled, and defendant excepted.

Error was assigned upon the refusal to arrest the judgment and to grant a new trial.

Julius L. Brown; Hopkins & Glenn, for plaintiff in error, cited on liability of Lynch as surety, and not as indorser, 4 *Ga.*, 115, 280; 29 *Ib.*, 704; if indorser, there should have been averment and proof of demand and notice, 41 *Ga.*, 614; 44 *Ib.*, 185; 9 Fla., 212. Certificates were not negotiable promissory notes, Code, §§2103, 2105,

2774; 56 *Ga.*, 206; 6 Watts & S., 227, 235; 8 *Ib.*, 353; 57 *Ga.*, 510; 44 *Ib.*, 636; 8 *Ib.*, 178; 2 Dan. Neg. Ins., §§1698, 1704; 48 N. Y., 478; 1 Greenleaf's Ev., §305; 28 Pa. State, 452. Charge as to demand and notice error, Code, §2781; 44 *Ga.*, 178; 25 Miss., 571; 2 Wheat., 29; 3 John. Ch., 142; 27 Maine, 285; 2 Binney, 279; 8 John., 322. Refusal of request error, 4 *Ga.*, 294; 42 *Ib.*, 290. Error to refer the jury specially to the undisturbed facts, 61 *Ga.*, 322, 475; 59 *Ib.*, 408, 584; 57 *Ib.*, 489.

John D. Cunningham; B. F. Abbott; George C. Spann, for defendant, argued as follows: If Lynch was security, defect cured by verdict, 62 *Ga.*, 73; 45 *Ib.*, 98; Code, §3590. Bank not necessary party, Code, §§2162, 2168. Certificates negotiable, Code, §2776; 56 *Ga.*, 605; Dan. Neg. Ins., §§1702 *et seq.* No demand and notice necessary, Code, §2781; 56 *Ga.*, 605; 52 *Ib.*, 438; Morse on Banking, 33. Charge legal, and refusal covered by general charge, 50 *Ga.*, 119; 53 *Ib.*, 570, 633; 60 *Ib.*, 264, 609; 41 *Ib.*, 186; 43 *Ib.*, 529; 55 *Ib.*, 696; 54 *Ib.*, 146; 61 *Ib.*, 401; 60 *Ib.*, 309; 58 *Ib.*, 306.

Bleckley, Justice.

There was no cause for arresting the judgment. The declaration was framed on a correct theory of the law, was full enough, and set forth a cause of action. The instructions of the court, except that portion of the same embraced in that ground of the motion for new trial numbered 4th in the report, were substantially correct, but did not exhaust the case. The request to charge reported in the 5th ground of the motion was proper, and was in writing. It should have been given to the jury. A new trial results from the denial of the request, and from the misdirection which is quoted in the last head-note; but it is proper to go over some of the points made in the record, and dispose of them severally.

1. The instruments issued by the bank and indorsed by Lynch are, in effect, negotiable promissory notes, payable generally on demand and due immediately. That they are promissory notes, see 7 *Ga.*, 84.; 6 *Ib.*, 588; 7 *Ib.*, 584; 9 *Ib.*, 338; 17 *Ib.*, 574. They contain words of negotiability, being payable to Lynch's order. 56 *Ga.*, 205 (text); 62 *Ib.*, 79, (text). That they are to be construed as payable generally, and at no particular place, and therefore not at a chartered bank, see 13 *Ga.*, 287. And that they belong to the class of paper payable on demand, and consequently due immediately, see 56 *Ga.*, 605; 15 *Ib.*, 257; Code, §2791 With reference to demand upon the maker and notice to the indorser, the Code is decisive. It provides, in section 2781, that when promissory notes are made for the purpose of negotiation, or intended to be negotiated, at any chartered bank, and the same are not paid at maturity, notice of the non-payment, and of protest for non-payment, must be given to the indorser, or the indorser will not be held liable, and that upon *no other notes* shall notice or protest be held necessary to charge the indorser. The instruments which we are considering were indorsed long after maturity, and therefore if they had been expressly payable at bank, the indorser was not entitled to notice. 44 *Ga.*, 178. Again, if, as we have held, the instruments were payable generally, demand and notice were unnecessary to bind the indorser. 44 *Ga.*, 63. The better opinion seems to be that the face of the paper, and that alone, is to govern on the question of right to notice. 4 *Ga.*, 106; 30 *Ib.*, 271; 52 *Ib.*, 131; 59 *Ib.*. 776. Apparently *contra*, 28 *Ib.*, 177.

Having spoken thus far for the court, candor obliges me to add, that since the decision was pronounced, the following line of reflection has occurred to me: What is a certificate of general deposit issued by a bank? Is it not an acknowledgment of the bank that it has received a loan of money from the depositor, coupled with a promise implied, if none be expressed, that it will repay the loan *at the bank* upon *actual* demand or call, if no particular time or place

be specified? Does not the known course of business require this construction, and does not the nature of the transaction suggest it? If these questions be answered in the affirmative, there is no *dishonor* of the certificate until after *actual* demand *at the bank*, and consequently not until after such demand is the paper over-due. If demand must be made at the bank, then the bank is the place of payment; and the right of the indorser to notice would seem to follow unless the fact that the bank was in a state of suspension, and so known to be by both parties, when the certificates were negotiated, constitutes an excuse for the omission of notice. But I pass on to the other points.

2. There can be no possible doubt that the indorsement of Lynch imported, *prima facie*, an undertaking to pay, and that the burden of rebutting is on him. He was the payee of the certificates, and he indorsed in blank, and after so indorsing, made delivery, and received value. Formerly he would have been precluded from shielding himself by parol evidence, but under the Code he may do so. While a blank indorsement, standing by itself, still has a distinct legal meaning, it is, in relation to extrinsic facts, an unbounded ambiguity—a line with an unlimited margin on either side.

3. As was his right, Lynch attempted to explain and qualify his indorsement by his own testimony, after pleading that he indorsed solely for the purpose of passing title, and with no intention of becoming liable, and that this was well known to the plaintiff. In the request to charge which the court declined, it was sought to have this defense recognized as legally available. The action was between the original parties, and no rights of third persons were involved. The Code says, in section 2756: "The intention of the parties may differ among themselves. In such case, the meaning placed on the contract by one party, and known to be thus understood by the other party, at the time, shall be held as the true meaning." It seems to us clear that the request to charge was within this section of the Code; and

there was undoubtedly some evidence that Lynch understood the effect of indorsing in blank, under the special circumstances, to be as he alleged in his plea, and that his understanding was known at the time to Goldsmith. The indorsement being in blank, this evidence did not contradict the writing, but went to explain its ambiguity. The conflict in the evidence should have been left to be settled by the jury, but they should have been instructed as matter of law that the defense was sufficient if they found as matter of fact that it was proved.

4. The absolutely predominant influence which the court, in charging the jury, gave to the "undisturbed" facts was error. The facts which were in repose, unless some of them were made to bend to those which were in agitation, necessitated a recovery by the plaintiff. The true dispute lay in the region of the controverted facts, and to reach a correct verdict without disposing of them was impossible. Not by one description of facts or another, but by *all* the facts, ought the finding to be governed.

Judgment reversed.

Flanegan *vs.* The State of Georgia.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case]

1. Where a homicide was committed in the dark and in the midst of a crowd, and there is question whether a wound in the back from which the death may have resulted, was made by the prisoner or by another, a declaration made by a bystander immediately after the rencounter, to the effect that he, the bystander, cut the accused in the back with a knife, when the accused had no such cut in the back, but deceased had, is admissible for all purposes as part of the *res gestæ*, and a charge of the court confining such evidence to the single object of impeaching the testimony of the bystander, is error for which a new trial should be granted, though in other respects no errors were committed, and the case otherwise was fairly tried, the fight occurring in a crowd at night, and the evidence being conflicting.

2. Newly discovered testimony tending to impeach a witness, and in the main cumulative, will not be sufficient ground, of itself, for the grant of a new trial.
3. That a juror while charged with the case, had one or two casual communications with persons not on the jury, and that the bailiff in charge procured newspapers for him late in the evening and shortly before the verdict was found, will not necessitate a new trial, it appearing that nothing was said or done which had any bearing on the case, or which damaged the defendant. (R.)
4. Taking the entire case together, we find no other error except that stated in the first head-note. (R.)

Criminal law. Charge of Court. Evidence. *Res gestæ.* New trial. Jurors. Before Judge CRAWFORD. Marion Superior Court. April Term, 1879.

The following, in connection with the opinion, sufficiently reports this case:

Flanegan, as principal in the first degree, and two others, as principals in the second degree, were indicted for the murder of one Tullis. The evidence on the trial of Flanegan was, in brief, as follows: At a party which took place at the house of a Mr. Gordon, Tullis wanted a fiddle which Flanegan had, and refused to give up; after playing awhile, he went out to the front of the house, and in a short time one Pickett came in and reported to Tullis that Flanegan was out there abusing him. Tullis went out, and a colloquy ensued in which Pickett joined with Tullis, and rendered himself efficient in bringing on a difficulty. Finally Tullis invited Flanegan to go out in the yard and fight; the latter seems to have been loth to do so, but at length they did go, and a fight ensued. Several others besides the principal actors took a hand in the affair. Such as were made witnesses testified that they were separating the parties, and acting as peace-makers, while other witnesses insisted that most of them acted in a manner too energetic to comport with peaceful intentions. Tullis was cut with a knife; Flanegan was not hurt; Tullis died from his wounds. The evidence for the state pointed to Flanegan as the one who did the cutting. One of his lines of defense

was that it was dark, and in the *melèe* the cutting was done by some other than himself. When Gunnels, a witness for the state who testified to having sought to separate the combatants, was asked if at the time, or within a moment or two thereafter, he had not said "Where's the God damned rascal? Let's kill him!" and if Pickett had not replied "He's gone, but I gave him five gashes in the back before he got away," the witness denied any such conversation. Other testimony was introduced to show that it did take place. In his charge, the court limited the effect of this testimony to the purpose of impeaching Gunnels. In regard to the details of what was said by the parties, etc., the evidence was very conflicting.

The jury found the defendant guilty of voluntary manslaughter. He moved for a new trial on the following, among other grounds:

(1.) Because the court erred in limiting the scope of the testimony, as set out above.

(2.) Because of newly discovered evidence. [On examination of the affidavits in support of this ground, it appeared that the new evidence was merely cumulative of that already introduced.]

(3.) Because one of the jurors communicated with various people after being charged with the case; and because the bailiff in charge of the jury left his post and carried messages for the juror. [The affidavits for the state show that the juror spoke to a lady at the hotel where the jury were domiciled, and asked her for a pack of cards called "authors;" that he received the cards and also a cigar; that the bailiff, at the request of the juror, sent for some newspapers and afterwards went himself for them. But these affidavits show that nothing was said by the juror to any one in regard to the case under consideration; that the jury were kept under lock and key; that, under the direction of the court for the bailiff to allow the jury to have papers, etc., to read during the night, he had endeavored

to get the newspapers which the juror wanted, and did obtain and deliver them late in the evening just before the verdict was found; that nothing was said or done to influence the juror in his decision.]

The motion was overruled, and defendant excepted.

W. S. WALLACE; BLANDFORD & GARRARD; E. M. BUTT, for plaintiff in error.

H. BUSSEY, solicitor-general, by JOHN PEABODY, for the state.

JACKSON, Justice.

The defendant was indicted for murder and found guilty of voluntary manslaughter; a new trial was denied him, and he excepted.

1. After a very mature consideration of this case, we have concluded to grant a new trial on the ground that the court erred in one material point in the charge to the jury. It appears from the record that Gunnels, a witness for the state, in answer to cross questions, said that he did not say just after he pulled the accused from the deceased or jerked his hand back from striking him, or within a moment or two thereafter, "where's the God damned rascal, let's kill him," and that Munroe Pickett did not reply "he's gone, but I gave him five gashes in the back before he got away," or words to that effect. It afterwards appeared by other testimony that conversation to that effect immediately at the close of the fight did take place between the two. Upon this state of facts the court instructed the jury in the charge as follows: "But the defendant further insists in that connection, that if there was a knife used on that occasion it was not used by the defendant, and if the killing took place, it took place by reason of the fact that one Pickett was the guilty party and not the accused, and insists upon the testimony which has been submitted to you on that subject as being sufficient to satisfy your minds that

Pickett was the party who committed the offense. In that connection the court says to you did Gunnels ask 'where's the damned rascal,' referring to the prisoner at the bar, following it up with the words 'let's kill him?' If so what Pickett said, if he said anything in reply to that remark of Gunnels, was not evidence to establish the fact that he did give Tullis a number of gashes in the back, but may be considered as evidence of what transpired between Gunnels and himself to see whether Gunnels did or did not swear truly."

In view of the facts disclosed in the record, we think that this charge was erroneous. The deceased had severe wounds in the back, one physician testifying that they killed him or largely contributed to his death; the accused had no such wounds in the back; the two men were fighting in the dark, and Pickett, if he cut one of them in the back with a knife, making several bad gashes, in all human probability cut the deceased, and if deceased died from these wounds, or would not have died but for these wounds in the back, Pickett may have killed him, though intending the licks or stabs for the accused. The conversation occurred just as Flanegan got away, and while deceased was bleeding with the wounds of which he died. Pickett was not making evidence for Flanegan, if he made the remark. It was part of the *res gestæ*. It was almost instantaneous with the stabbing which the witness swore he said he gave; therefore being *res gestæ*, it became an act done during the fight or evidence thereof, if he said it, and was testimony not only to impeach Gunnels, but to show that he did the stabbing in the back of deceased by mistake. It is clear therefore to us that the court was wrong to exclude it from the jury except to be used as impeaching the other witness. The jury had the right to consider it for all purposes, to be weighed by them with the other evidence. *O'Shields vs. The State*, 55 *Ga.*, 696; *Mitchum vs. The State*, 11 *Ga.*, 615; 1 Greenleaf Ev., 10 Ed., §§108–114.

2. The newly discovered evidence appears to be cumula-

tive and tending only to impeach the witnesses for state. Therefore alone, it could not operate to require a new trial. 25 *Ga.*, 182; 37 *Ga.*, 48; 39 *Ga.*, 718; 56 *Ga.*, 364; 59 *Ga.*, 391. But the case will be tried over, and then, of course, it can be used.

3. The trouble about the juror was answered by the explanations. So about the bailiff. Prisoner was not hurt. 18 *Ga.*, 534; 19 *Ga.*, 102.

4. The part of the charge first excepted to gave the law substantially to the jury in regard to justifiable homicide, and taking the case altogether, we are unable to see any error except the exclusion from the jury of the evidence of Pickett's sayings to show that he did what in the *melèe* he said he did, as testified to by some witnesses. This evidence was good to be considered by the jury and weighed as part of the transaction for whatever they thought it worth; and on this ground, coupled with the conflict of evidence, the fact that Pickett helped bring on the fight, the darkness of the night, the reluctance, apparently, of accused to fight, and the general confusion, we think that the case should be tried again.

Judgment reversed.

Thompson *vs.* Douglass.

1. The question being as to the fact of the agency for the proprietor of a hotel in Savannah of one who purchased goods as the caterer, there was no error in excluding from the jury the evidence as to the custom of the proprietors of hotels in the city of Savannah in buying provisions through the hotel caterer.
2. Where the evidence tended to show a liability by reason of purchases made by a general agent, unless the principal had given notice to the seller that he must look to the agent for his money, and this was the real point at issue, it was error to charge that if the purchaser was a special agent for a particular purpose, the seller should examine his authority.

Evidence. Principal and agent. Charge of Court. Before Judge TOMPKINS. Chatham Superior Court. February Term, 1879.

Thompson sued Mrs. Douglass in a justice court on an account for merchandise. On the trial the justice gave judgment for the plaintiff, and defendant appealed. On the trial in the superior court, the evidence for plaintiff tended to show that Mrs. Douglass was proprietress of the Pavilion hotel, and traded with plaintiff, using a pass-book; that she informed plaintiff that she had employed a caterer; that a few days after that, one Seymour, as caterer of the hotel, began making orders for groceries, which were sent to the hotel; that plaintiff considered the articles as furnished to defendant, and so charged them; and that he never knew that defendant disputed such charges until Seymour ran away; that she then denied owing the account, but afterwards promised to pay it if it was withdrawn from the hands of an attorney, but she failed to pay it, and it was sued.

The evidence for defendant tended to show that she traded with plaintiff, and instructed him not to let any one have goods without her book; that she found she could not conduct the entire hotel business, and accordingly made arrangements with Seymour by which he was to keep the restaurant and furnish meals to the boarders; that she then went to several stores where she had traded, and notified the proprietors that Seymour would be responsible for all goods purchased in his department; and that she so notified plaintiff among others. Defendant admitted that she told plaintiff that she would pay him the bill when she was able, if he would withdraw it from the hands of the attorney; she testified that she told plaintiff that she saw how he had been misled, and while it was hard on her, she would pay for what Seymour got rather than have plaintiff lose the debt; that she did make a payment on the debt, with money

which she received from a boarder who owed both her and Seymour.

The jury found for the defendant. Plaintiff moved for a new trial on the following, among other grounds:

1. That the court erred in excluding from the jury the evidence of the plaintiff showing that in Savannah the custom of hotels was to buy provisions on the credit of the proprietors through the hotels' caterers, and by orders signed by the caterers only.

2. Because the court erred in charging the jury: "If the goods sued for were bought by Seymour as special agent for a particular purpose, the plaintiff should have examined his authority," and in reading in this connection §2196 of the Code.

The motion was overruled, and plaintiff excepted.

A. P. & S. B. Adams, for plaintiff in error.

P. W. Meldrim; J. R. Saussy, for defendant.

Warner, Chief Justice.

The plaintiff sued the defendant in a justice's court on an account for the sum of $84.03, and judgment was rendered in his favor. The defendant entered an appeal to the superior court, and on the trial of the case in the last named court, the jury, under the charge of the court, found a verdict in favor of the defendant. A motion was made for a new trial on the several grounds therein stated, which was overruled, and the plaintiff excepted.

1. There was no error in excluding from the jury the evidence as to the custom of the proprietors of hotels in the city of Savannah in buying provisions through the hotel caterers.

2. The court charged the jury, amongst other things, that "if the goods sued for were bought by Seymour as a special agent for a particular purpose, the plaintiff should have examined his authority," and read the 2196th section of the

Code. This charge of the court, in view of the evidence in the record, was error. According to that evidence the defendant would have been liable to the plaintiff for the goods sold to Seymour as her caterer for the Pavilion hotel, as her general agent in that capacity, unless she had notified the plaintiff before the goods were sold and delivered, of the new arrangement which she had made, and told him that Seymour would be responsible for all the goods purchased in his department and that she had nothing to do with it. If the defendant did thus notify the plaintiff, then she was not liable for the goods afterwards sold and delivered to Seymour by the plaintiff, and that was the main controlling question in the case, and should have been submitted to the jury by the court in its charge. The charge of the court in relation to Seymour being the special agent of the defendant for a particular purpose, and that the plaintiff should have examined his authority as such special agent, was calculated to divert the minds of the jury from the main issue made by the evidence in the case, and to direct their attention to an issue not made by the evidence, to-wit: whether Seymour was a special agent for a particular purpose and did the plaintiff examine his authority as such special agent. The jury may have found their verdict on the fact (assuming, as the charge of the court did, that Seymour was a special agent for a particular purpose) that there was no evidence that the plaintiff did examine as to Seymour's authority, whereas the evidence shows that the goods were sold and delivered by the plaintiff on the authority of defendant herself.

Let the judgment of the court below be reversed.

Watson *vs.* The State of Georgia.

1. The refusal to arrest a judgment on the ground therein stated cannot be made the ground of a motion for new trial. Such refusal may be excepted to in a bill of exceptions which brings up the whole case for review, but not in a bill of exceptions which brings up only the motion for a new trial.
2. Though the indictment need not allege that the money fraudulently converted by the defendant was lawful currency of the United States under section 4424 of the Code; yet if alleged, the description must be proved as laid, and therefore proof that money, without more, was so converted will not support a conviction under such an indictment

Practice in the Supreme Court. Criminal law. Verdict. Before Judge Underwood. Floyd Superior Court. March Term, 1879.

Watson was indicted for larceny after trust. The indictment alleged that he was the agent at Rome of the Singer Manufacturing Company, and in that capacity received of various persons named specified amounts, "which said several sums of money the said Watson received in lawful currency of the United States, and then and there, in the said county of Floyd, did wrongfully and fraudulently convert the same to his own use," etc.

The jury found defendant guilty. He moved in arrest of judgment on various grounds. The motion was overruled. Defendant then moved for a new trial, one of the grounds being that the court erred in overruling the motion in arrest of judgment. Other grounds were that the verdict was contrary to law and the evidence, and that the evidence failed to show what kind of money was appropriated. This motion was also overruled, and defendant excepted.

Capers King; J. Branham; L. J. Featherston, for plaintiff in error.

C. T. CLEMENTS, solicitor general, by T. W. ALEXANDER, for the state.

JACKSON, Justice.

1. In this case it seems that there was a motion in arrest of judgment predicated upon many alleged errors in the bill of indictment; but the motion was overruled and was not excepted to so that we can consider it here. The only case brought before us is the conduct of the court in overruling the motion for a new trial. The case of The State *vs.* Watson in its totality has not been brought up, but only the motion for a new trial in that case. So that we cannot review the motion in arrest or the grounds thereof. It is true that the first ground of the motion for a new trial is the refusal of the court to arrest the judgment, but such refusal is no ground for a new trial. That refusal was itself a final judgment and should have been at once excepted to. The two motions are distinct, and each can be brought here, or both, if the whole case is brought up; but the law will not compel the court to travel in the circle of refusing the one motion and then make that refusal the ground for another distinct motion. The grounds are not repeated in the motion for a new trial as reasons why it should be granted; but the refusal to arrest is the only ground connected with that motion which is alleged as error. This view will dispose of all errors complained of in respect to the indictment. One of them, perhaps, would have been held good; and that is, that there is no allegation in the indictment that the money *belonged to* the Singer Machine Company, or that the persons paying it over to the defendant were agents of that company. But all these objections are disposed of by the ruling first made above, which is all that is before us now.

2. This brings us to the consideration of the grounds proper in the motion for a new trial.

It was unnecessary that the indictment should have al-

leged that the money converted was "*lawful currency* of the United States;" but being alleged it ought to be proven, In *Fulwood vs. The State*, 50 *Ga.*, 591, it was ruled that in an indictment for aiding and abetting an assault with intent to murder, it was not necessary to allege how and with what implements the aiding and abetting was done, but being alleged it had to be proved. So in *Crenshaw vs. The State*, it was decided this term that the description of the hog need not have been as full and minute as it was laid in the indictment, but being laid it should be proved. The principle there ruled covers this case. All money is not lawful currency of the United States, and there is no proof that the money here converted was that sort of money. Therefore, under the unanimous ruling of this court in the 50th, we are constrained to grant a new trial in this case.

Besides, the general aspect of the case seems to us such as that justice would be better subserved by another and more thorough investigation, especially in respect to the fraudulent intent of the defendant in the use of the money of his principal. On that trial any minor inaccuracies will doubtless be corrected by the able and experienced judge who presides in the Rome circuit.

Judgment reversed.

Elliott *vs.* Deason.

1. If a promissory note, when made and delivered, is payable to a certain person or . · . (a blank being left suitable to the insertion of bearer or order) and afterwards the maker, for the purpose of securing the payment of the note to the payee or his assigns, executes and delivers a mortgage in which the note is described as payable to the payee or bearer, the mortgage, on a rule to foreclose the same at the instance of an assignee, will be treated as explaining the intention of the parties in respect to the blank in the note, and the note being indorsed to the assignee of the mortgage or to her trustee, will be held negotiable.
2. Negotiable paper transferred *bona fide*, whether before or after maturity, and whether for a valuable consideration or for a good con-

sideration only, is not subject in the hands of the holder to a set-off between the maker and the payee, arising subsequently to the transfer and out of transactions wholly disconnected with the paper or the contract on which it is founded.

3. When negotiable paper is assigned to a married woman, or to a naked trustee for her use, both being absent, delivery may be made to a friend acting on her behalf, and the same will be as effective as if made directly to her or to the trustee.
4. When a mortgage is assigned to a married woman, and the negotiable note which it was given to secure is also assigned, but to a naked trustee for her use, the title to both is in her, and she may foreclose the mortgage in her own name
5. A mortgage to the mortgagee and his assigns, having upon it a written assignment purporting to be made for value received, and for love and affection, the assignment bearing date before the maturity of the debt, there is some evidence, in view of the general presumptions of law, of an assignmest for value—enough to warrant the court in touching upon that subject in charging the jury.
6. Advances by a partner to carry on the partnership business are generally on the credit of the firm, and not on the separate credit of the copartner. Reimbursement involves, therefore, a settlement of the partnership accounts; and to settle them so as ascertain the balance, if any, due for advances, there should be an accounting between the partners, either out of court or in court. For an accounting to be had in court, both partners should be present as parties before the tribunal.
7. Parol evidence is not admissible to show that a transcript of a record from another court is incomplete. A certificate to a transcript which states that "the following and annexed writing is a true, correct and complete copy of the original on file and remaining of record in my office" is not sufficient. It should show with due certainty that the transcript embraces all that is of record or on file in the given case. Where the verdict undoubtedly should have been the same without the illegal evidence as with it, the admission of the evidence is not cause for a new trial.

Negotiable instruments. Mortgage. Trusts. Parties. Husband and wife. Partnership. Evidence. New trial. Before Judge UNDERWOOD. Floyd Superior Court. March Adjourned Term, 1879.

Mrs. Deason commenced proceedings against Elliott to foreclose a mortgage on certain real estate in Rome, executed to secure the payment of the following note:

"On or by the 9th day of January, 1872, I promise to pay W. L. Prentice, or ——, five thousand and five hundred dollars for value received, 10 per cent. interest. This January 9, 1871.

[Signed] J. M. ELLIOTT."

On the back of the note were several credits, not material here. Also the follwing transfer:

"For love and affection I have for my daughter, Mattie P. Deason, I hereby transfer to J. T. Deason, her husband and trustee, this note and the mortgage taken to secure the same, also the steamboat stock I hold as collateral to secure the same. Witness my hand and seal, this January 9th, 1871.

[Signed] W. L. PRENTICE."

"Attest: C. G. Samuel.

A mortgage was executed cotemporaneously with this note on certain property, which was subsequently taken up and canceled and a new mortgage made covering other property, dated June 8th, 1871. On this was the following transfer:

"GEORGIA—Floyd county.

For value received, and for love and affection, I hereby transfer this mortgage to my daughter, Mattie Deason, wife of J. T. Deason, now residing in Jefferson county, Alabama, and I authorize said J. T. Deason as her trustee to collect the note. This is intended to secure and control the same for my said daughter and such children as he may have by her. Witness my hand and seal, this June 8th, 1871.

"Test: C. G. Samuel. W. L. PRENTICE."

The note to secure which this instrument was given was described therein as payable to "W. L. Prentice or bearer."

The defendant showed for cause against the foreclosure:

1. The general issue. 2. That the transfer was made after the maturity of the note, and was without consideration. That it was voluntary, and made when Prentice was insolvent. 3. That Prentice was, at and before the transfer, indebted to defendant $2,957.60, besides interest, for money advanced to him for his use in the partnership of Elliott & Prentice, which began on December 10th, 1871. Also various items of indebtedness arising from expenses incurred and losses in the business of said firm.

The evidence showed that the note and mortgage, at the time of the transfer, were delivered by Prentice to one Samuel for the use of Mrs. Deason, he being her brother-in-law; that the papers have been in his possession ever since. Much testimony was introduced on the subject of the partnership relations of Prentice & Elliott, advances by Elliott for the firm, losses in cotton transactions, and expenses of litigation, all of which is deemed immaterial here.

The jury found for the plaintiff. The defendant moved for a new trial on the following grounds:

1. Because the defendant proposed to prove by Samuel, one of plaintiff's witnesses, that the mortgage and note sued on had never been delivered to J. T. Deason, the trustee named in the assignment on the note and mortgage, and that he had never seen either of them, and the court refused to allow this proof to be made.

NOTE.—The court did not refuse to allow the defendant to prove any distinct fact connected with the delivery or possession of the note and mortgage.

2. Because the court refused to allow the defendant to show by D. S. Printup, that the record offered in evidence by the plaintiff of the suit of John Inman against Elliott, was but a part of the record of that suit, and because the court admitted that record in evidence against the objection of the defendant's counsel that the certificate of the clerk did not show that it was a copy of the whole of said record.

3. Because the court charged the jury as follows: "The plaintiff alleges that the note and mortgage were assigned before the note was due—it is for the plaintiff to show this. If this is shown, or if the transfer was for value, and before the maturity of the note, and without notice of any existing equities between Elliott and Prentice, then the transfer would be good, and the plaintiff would be entitled to recover."

4. Because the court charged the jury as follows: "If the transfer was made on the papers and they were not de-

livered, then the defense set up would be good up to the time the papers were delivered and as to such transactions as occurred before delivery, but if the note and mortgage were delivered to Mr. Samuel for Mrs. Deason, and she knew it, and he held them for her, then she would be liable only to such equity as existed at the time of such delivery."

5. Because the court charged the jury as follows: "You will go further and inquire whether Elliott is a creditor of Prentice, and if the indebtedness arises out of the partnership. Has that partnership been settled by a judgment of a court? Unless the partnership has been settled by a judgment of a court, how is it to be ascertained that Elliott is a creditor? If there has been no judgment of a court, then the defendant would have to show that Prentice made the transfer to shuck himself, to strip himself of his property and put it where a creditor could not get it."

The motion was overruled and defendant excepted.

J. Branham; Daniel S. Printup, for plaintiff in error.

C. Rowell, for defendant.

Bleckley, Justice.

1. The uncertainty in the note is aided by the mortgage. In the former a blank was left suitable to the insertion of the word bearer or order; and in the latter, the note is described as payable to the payee or bearer. We think there is no doubt that both documents should be treated as negotiable paper in a commercial sense.

2. The holder of a negotiable instrument has a right to dispose of it before or after due, and with or without receiving value. If, after he has parted with it *bona fide*, matter arises which would be appropriate as a set-off were he still the holder, and if such matter springs out of transactions wholly disconnected with the paper or the contract on which it is founded, his transferee, the new holder, will not be affected. Code, §2904.

3. Delivery can be made to the absent. Any friend may receive the instrument on behalf of the transferee or beneficiary. This followed by ratification would suffice.

4. A married woman may, in Georgia, take and hold property just as another person. When a mortgage is assigned to her, and the note to a naked trustee for her use, she is the owner of both, and may foreclose in her own name.

5. It is not impossible for a transaction to be founded on both a valuable and a good consideration. Money may be the motive in part and affection in part—the two combined may make up the whole consideration. The assignment of the mortgage bore date before the debt matured, and purported to be for value received, and for love and affection. There is a general presumption that negotiable paper, in the hands of a transferee, passed for value and before due, unless the contrary appears. This was enough to warrant the court in touching upon that subject in charging the jury.

6. If advances were made by Elliott to carry on the business of a partnership of which he and Prentice (Mrs. Deason's father) were members, the probability is that they were not made on the individual credit of Prentice, but on the credit of the firm. If the firm received the advances, the firm would be the debtor for them, and Elliott's reimbursement would involve a settlement of the partnership accounts. The balance ought to be ascertained, either out of court or in court. And, certainly, to have an accounting in court, the partners ought both to be present as parties to the litigation. Here only one of them was present, and for that reason, if for no other, the settlement of the partnership account was, in this suit, impracticable.

7. The transcript from the record of the United States court could not be proved by parol to be incomplete. On the other hand, the clerk's certificate was quite insufficient to authenticate it. The certificate should have gone much further than it did. But the verdict was correct, and the illegal evidence may now be ignored.

Judgment affirmed.

Davis *et al.*, commissioners, *vs.* Horne.

If the time covered by a contractor's bond for keeping in repair a county bridge has expired, and the county does not make a new contract for that purpose, but undertakes to keep the bridge in repair itself, it will be liable for damages resulting from a failure to do so.

Bleckley, Justice, dissented.

County matters. Roads and bridges. Damages. Before Judge Simmons. Houston Superior Court. November Adjourned Term, 1878.

Reported in the decision.

E. Warren; Davis & Riley, for plaintiffs in error.

Duncan & Miller, for defendant.

Warner, Chief Justice.

This case came before the court below on a *certiorari* from the county court of Houston county. On the hearing of the same the court sustained the *certiorari* and awarded a judgment against the defendants for the sum of $50.00 and costs; whereupon the defendants excepted.

It appears from the evidence in the record that Jordan Horne sued the county of Houston to recover damages on account of his horse having fallen through a defective bridge in said county. It was admitted that the bridge had been built by a contractor; that the county authorities had taken from him the bond and security required by law to keep it up, etc., for seven years; that the seven years had expired, and that since that time the county had undertaken to keep it in repair itself; and the question is whether, upon this statement of facts, the county was liable for the damages sustained by the plaintiff. This case comes within the ruling of this court in *Mackey vs. The Ordinaries of Mur-*

ray and Whitfield Counties, 59 *Ga.*, 832, and must be controlled by it.

Let the judgment of the court below be affirmed.

JACKSON, Justice, concurred, but furnished no written opinion.

BLECKLEY, Justice, dissenting.

In the scheme of the Code, one who has erected a public free bridge at the expense of the county, under contract with the ordinary, is responsible for its safety in so far as faithful construction and repairs will render it safe; and this responsibility continues through at least seven years, and may continue through a longer period if his contract so provides. His liability for injuries sustained in using the bridge is not to the county, but directly to the person or persons injured, and it exists whether he has given bond and security or not. In case the ordinary has neglected his duty in respect to taking bond and security, the county is also liable. The contractor may be liable and the county not; but the county is never liable unless the contractor is. The first step, therefore, in making a case for recovery against the county is, after proving the injury, to show that it is an injury for which the contractor is liable; the next step is to show that the ordinary has failed to take from him the bond and security which ought to have been taken. These two steps will fix liability upon the county, and nothing else will. The Code makes the county stand as surety for the contractor if there has been official neglect to exact other security; but the substituted surety stands bound no longer than the primary and proper security would have been bound if the official neglect had not occurred. In 59 *Ga.*, 832, the injury happened after seven years from the completion of the bridge had expired, and there was no evidence of any undertaking by the contractor which made it his duty to keep up or repair the structure through a longer period than seven years; for this reason, there was,

on the part of the plaintiff in that case, a failure to take the first step above indicated, and consequently the action, as I then thought and still think, was not maintainable. In the present case, there is a failure in both steps, and I have not the slightest doubt that the law is with the county, and that the judgment ought to be reversed. Code, §§670, 671, 690, 691; 41 *Ga.*, 225. The theory that the various counties have been made liable by the Code for injuries sustained on defective bridges generally, as well as in the instances expressly enumerated in sections 669 and 691, seems to me quite untenable. Freeholders of Sussex *vs.* Strader, 18 N. J. Law (3 Harrison), 108. Fortunately, the constitution of 1877 will, as to injuries sustained after its adoption, protect the tax-payers against all pecuniary consequences of any misconstruction of the Code, for the payment of damages is not among the objects for which county taxes may be assessed and collected.

Denham *vs.* Kirkpatrick.

1. An action for damages transferred from the county court to the superior court because the plaintiff's title to land was involved, goes in its entirety to the superior court, and will be fully and finally disposed of therein.
2. A deed tainted with usury is void as title, and if good as an equitable mortgage construed with bond to recovery, it is good only to secure the principal debt
3. Where the holder of such a deed, on the sale of the land by the sheriff, states he holds an equitable mortgage for fifteen hundred dollars and that the purchaser will buy subject to that incumbrance, and becomes a bidder himself, with full knowledge that five hundred dollars of the fifteen hundred is for interest taken by himself for one year's loan of one thousand dollars, and the land is knocked off to him, and another bidder who contested with him would have given five hundred dollars more for the land, had the mortgage been represented as to secure but one thousand dollars:

Held, that the equitable mortgagor is entitled in an action plainly and distinctly setting out the above stated facts and proving them on

the trial, to recover from the buyer the difference between the price at which the land was bid off and what it would have brought but for the misrepresentation, with interest up to the trial.

4. It is always right for the court, before their discharge, to have the verdict of the jury put in proper form, the substance thereof not being changed.

Courts. Jurisdiction. Title. Usury. Mortgage. Damages. Practice in the Superior Court. Before Judge SNEAD. Richmond Superior Court. April Term, 1879.

Kirkpatrick brought suit in the county court of Richmond county, against Denham. The declaration alleged, in brief, the following facts: Plaintiff was the owner of a lot in the city of Augusta, which was levied on and brought to sale in June, 1876, under a *fi. fa.* against him. Just as the lot was exposed for sale by the sheriff in the presence of a large number of bidders, defendant caused his attorney to announce publicly that he held an equitable mortgage for $1,500.00 on the place, and that the purchaser would take subject to this lien,—the attorney exhibiting at the same time a paper as such mortgage. This statement was false, fraudulent and malicious, and, by frightening bidders, enabled defendant to buy in the land at a price much below its value, thereby damaging plaintiff.

This declaration was filed in the county court, September 14, 1878.

Defendant pleaded the general issue, the statute of limitations, and estoppel from claiming title by reason of a deed conveying the property out of defendant before the sheriff's sale.

On account of the collateral issue in regard to the title, the case was transferred to Richmond superior court. (Acts 1874, p. 79). When the case was called in that court, counsel for defendant insisted that nothing was for trial there except the collateral issue of title. The court overruled this position and ordered the case to proceed.

The evidence showed substantially the following facts:

In December, 1875, plaintiff, who then owned the place, borrowed $1,000.00 from defendant. For this he gave his note for $1,500.00 due at twelve months, and to secure this, made a deed for the lot to defendant, and took a bond for re-conveyance upon payment of the note. At the sheriff's sale defendant's attorney made an announcement, or had it made. He testified that it was stated that defendant had a deed to the property the consideration of which was $1,500.00,and would claim under it as an equitable mortgage, and that purchasers would buy subject to whatever incumbrance defendant might have under the deed. Witnesses for plaintiff state the announcement as it was set out in the declaration. Defendant himself became a bidder. One Wilson was also a bidder. The latter was willing to pay $3,700.00 for a clear title; considering that the incumbrance would be $1,500.00, he bid $2,200.00, and, defendant bidding $2,210.00, he became the purchaser. Had it been announced that the incumbrance was $1,000.00 Wilson would have bid $2,700.00.

The jury found for plaintiff $588.95. Defendant moved for a new trial on the following grounds, among others:

1st. Because the court erred in holding that the whole case was before the superior court for trial.

2d. Because the court refused to charge, as requested by defendant's counsel, "that to support an action for slander of title, it must be shown that the statement made by defendant to the injury of the title, was both false and malicious;" but instead of charging as so requested, qualified the same by saying "that if the statement was false, that was, alone, sufficient to authorize the plaintiff to recover actual damages, and if malicious, then the plaintiff could also recover exemplary damages."

3d. Because the court refused to charge, as requested by defendant's counsel, "that if the case is not an action for slander of title, then it is an action for words, and if not brought within one year from the time the action accrued, then it is barred by the statute of limitations."

4th. Because the court refused to charge the jury, as requested by defendant's counsel, "that the plea of usury is a personal plea, and until Kirkpatrick, the plaintiff in this case, availed himself of this plea, Denham, the defendant, could in good faith and without malice or falsehood, claim that there was due him in the transaction fifteen hundred dollars."

5th. Because the court erred in charging the jury "that if they found from the evidence that $500.00 of the sum named as the consideration in the deed from Kirkpatrick to Denham was usury, then said deed was void as title, and the statement, if made by defendant or his counsel at the sale, that he held an equitable mortgage upon the property for fifteen hundred dollars, was false, and the plaintiff was therefore entitled to recover whatever actual damages he may have sustained; and further, if the jury found that the statement was also malicious, then plaintiff is entitled besides to exemplary damages."

6th. Because the verdict was contrary to law and evidence.

7th. Because the court erred in the following: When the jury returned to the court-room with their verdict it was as follows:

"We, the jury, find for plaintiff the sum of four hundred and ninety dollars, with interest from date of the sale of the property."

Counsel for plaintiff arose, and stating that he desired no interest to be expressed in the verdict, moved the court to instruct the jury, if they meant to give the interest as damages to plaintiff, to retire to their room and so amend the verdict as to include all the damages in one general verdict of damages. Whereupon the court so instructed the jury, and they retired to their room and immediately afterwards returned with the following addition to their finding: "The amount of damages with interest is five hundred and eighty-eight dollars and ninety-five cents." Counsel for plaintiff still objecting to the form of the verdict, the court

directed the foreman, if such was the intention of the jury, to include or embody the whole amount in one general verdict reading in damages. Whereupon the foreman, without the jury retiring, wrote the following verdict over his name as foreman: "We, the jury, find for plaintiff the sum of five hundred and eighty-eight dollars and ninety-five cents damages,"—which was read aloud by the clerk, all of the jury being in their seats and all of them tacitly assenting to the verdict so amended, but the court not inquiring particularly of the balance of the jury if such was their verdict; all of which was objected to by defendant's counsel.

The motion was overruled, and defendant excepted.

VERDERY & VERDERY; H. CLAY FOSTER, for plaintiff in error.

S. WARREN MAYS, for defendant.

JACKSON, Justice.

1. When this case for damages, arising upon misrepresentation of title of defendant in *fi. fa.* to his land, to the extent of spreading too heavy a cloud over it, was transferred to the superior court from the county court as involving title to land, the entire cause was transferred, and the superior court was right to retain jurisdiction of the entire case.

2. Not only our Code of laws (omitted from the Code of 1873 because there was at that date no law against usury, but found in the Code of 1868, §2025) but frequent rulings of this court, makes deeds for land tainted with usury void, if used to transfer title; and no recovery in ejectment could be had on such a deed.

We have not decided that such a deed with bond to reconvey would be good for anything as an equitable mortgage. The nearest approach to such a decision is to be found in *Sugart vs. Mayes*, 54 *Ga.*, 554; but there it is

merely intimated that such might be the equity of the case. However that may be, it is quite certain that the deed could only be held good as a security for the legal part of the consideration, and that in this case, under the act of 1875, p. 105, is only the principal. So there is no error in the ruling of the court on these points.

3. But the main question in the case is, whether the pleadings and facts proven under them make such a case as entitled the plaintiff to recover? The defendant says that the suit is for slander of title under section 3025 of the Code, and that the facts do not sustain such an action, and that the charge was inapplicable to the action for slander of title. The reply is that the action is complaint, or, as it would have been termed at common law, an action on the case founded on equitable principles, for the recovery of money which in good conscience the plaintiff ought to recover. The declaration alleges, in substance, that defendant represented at the sale of the plaintiff's property by the sheriff that he held an equitable mortgage thereon for fifteen hundred dollars, whereas, in truth and fact, if he held a mortgage at all, it was for only one thousand dollars; that he made this representation with a fraudulent view and intent to bid for the land at the sale and to get it at a less price than it was worth; that he did bid, and it was knocked off at a less price to him, and that plaintiff was entitled to recover from him the difference between what the land brought and what it would have brought but for his false and unfair statement. The *allegata* and *probata* agree better in this case than any I believe I have ever reviewed, and if the *allegata* entitle plaintiff to recover, his case was fully made out by the proof.

If one interferes with a judicial sale, or any other sort of sale, by statements by which he gets the property at less than others would have given, he must state the truth, *the whole truth*, and nothing but the truth. This defendant stated that he had an equitable mortgage for fifteen hundred dollars, whereas five hundred of it was interest for the

loan of one thousand for one year; which made the truth to be, if he had any mortgage at all, that he had one only for one thousand dollars. Thereby he got the land for $500.00 less than another bidder swore he would have given for it. He ought not *ex æquo et bono* to keep this money, and the verdict is just and right. When one thus interferes with a judicial sale particularly, he must not cloud the title of defendant in *fi. fa*, without stating all the truth, especially must he not do so for the purpose of getting an advantage at the sale at the expense of other bidders and of the defendant in *fi. fa*.

In respect to the view that the pleadings in this state have been held too loose in past adjudications, and that they are too loose here, we have but to say that whatever they may have been in other cases, in this the plaintiff has most clearly and distinctly set forth his cause of action, giving in it every fact which makes his equitable case on the declaration full and complete, and ample to authorize a recovery. This is all that he has ever been required to do in this state since the judiciary act of 1799. Cobb's Digest, pp. 470–486.

And the struggle has always been with our legislature to make pleadings as simple as possible ever since that act of 1799, and so far from our courts innovating upon law when they sustained such pleadings, they have co-operated with the law-making power when they have done so; and have generally endeavored to conform to special pleading as far as conscience would permit them to go. And now that the legislature, not the courts on their own motion, have broken down the barriers between law and equity by distinctly enacting that no suitor shall be driven into equity to enforce any right which law or equity may give him, but may elect either forum—Code, §3082—there can be no doubt of the legality of this suit and the rightfulness of this recovery; and if anybody finds fault and wishes the law changed, let such an one go to the law-making and not to the law-expounding authorities.

The verdict is not for punitive, but actual damage; therefore it does not matter what the court charged on that subject, though it would seem, as this was a tort, or at least in the nature of a tort, the judge was not far wrong under our Code, section 3066.

4. The substance of the verdict was not altered. Only the interest found by the jury to be paid as damage separately from the principal was consolidated with it in the presence of, and by the consent of, the jury before their discharge.

Judgment affirmed.

Cuyler *et al. vs.* Wayne, administrator.

1. When parties to a proceeding to sell realty for partition who were served, afterwards, on a bill filed by one in interest who was not served, to set aside the sale as to him, answered that they were "content to stand by it so far as their interest was concerned in said proceeding and to abide its result," they cannot subsequently attack the sale on the ground of want of service of all parties.
2. Where a bill was served on a minor, and her step-father answered as her *prochein ami*, she would be bound by the decree in the absence of any fraud.
3. In all cases of the appointment by the ordinary of the guardian of a minor—whether the clerk of the superior court or some other proper person—bond should be required; but the grant of letters without taking bond would not be void as against a *bona fide* purchaser under the guardian, without notice of the want of a bond.

Partition. Parties. Equity. Minors. Before Judge Tompkins. Chatham Superior Court. October Term, 1878.

Reported in the decision.

T. M. Norwood; Wright & Featherston, for plaintiffs in error.

J. R. Saussy; George A. Mercer, for defendant.

WARNER, Chief Justice.

The suit below was an action of ejectment in Chatham superior court, brought by Thomas H. Cuyler, Estelle Smith (formerly Cuyler), and Georgia C. Branham (formerly Cuyler), against John C. Ferrell, to recover an undivided half of certain real estate situated in the city of Savannah, and also the rents thereof since October 1, 1863, of the yearly value of $3,000.00. Suit brought on December 30, 1869.

Ferrell, after suit was brought, died, and Henry C. Wayne, his administrator, was made party in his stead, at the January term, 1872.

The defendant pleaded the general issue and the statute of limitations.

The case came on for trial on January 23, 1879, before his honor, Henry B. Tompkins, judge of said court, presiding, when, by the written agreement on both sides, the whole case was submitted to the court for trial without a jury, except as to the amount of mesne profits, which was referred to a jury and assessed at $500.00 per annum for as many years as the court should decide plaintiffs were entitled to recover.

The plaintiffs introduced the will of Jeremiah Cuyler conveying the entire property, one undivided half of which is involved in this suit, to certain daughters for life, with remainder to his two sons John M. and Telamon Cuyler, in fee. It was shown that the last of the life tenants died in 1863, and that the title then vested in possession in John M. Cuyler, as to one undivided half, and as to the other half in the three plaintiffs, the children of Telamon Cuyler, he having previously died. The defendant then admitted that he or his intestate, Ferrell, had been continuously in possession of the property since August 14, 1863, and that they claimed title under or through the plaintiffs.

It was proved that Thomas H. Cuyler was born on January 29, 1845, and Estelle Cuyler on January 24, 1851.

S. P. Bell testified that he was a real estate agent and knew the property in dispute. The entire property, one undivided half of which is sued for, had been worth for rent since the close of the war an average annual sum of $2,500.00; was worth much more for several years after the war, but is now worth less.

Plaintiffs closed.

The defendant introduced the following record:

PARTITION PROCEEDINGS.

"GEORGIA—Floyd County.

"To John R. Freeman, guardian of Thomas Cuyler, and A. B. Ross, guardian of Estelle Cuyler, minor children of Telamon Cuyler, deceased: You are hereby notified that I shall apply to the superior court to be held in and for the county of Chatham on the second Monday in May next, for the appointment of partitioners to divide the lot of land fronting on Broughton and Bull streets, in the city of Savannah, devised by the will of Jeremiah Cuyler, deceased, to his daughters for life, remainder to Telamon and John Cuyler and their heirs, said life estate having terminated, and that an order for the sale of said lots will be prayed for.

(Signed) J. BRANHAM, JR.,
Trustee Georgia C. Branham, etc.

"April 8, 1863.

"GEORGIA—Floyd County.

"We acknowledge due and legal service of the within, and waive all other and further notice. This April 17, 1863.

(Signed) JOHN R. FREEMAN, *Guardian for Thos. Cuyler.*
A. B. ROSS, *Guardian for Estelle Cuyler.*

"Filed May 16, 1863. W. H. BULLOCH, *Clerk S. C. C. C.*"

Then follows a petition to the superior court of Chatham county, signed by J. Branham, Jr., trustee for Georgia C. Branham, showing that the property, one undivided half of which is involved in the present suit, had vested as to one undivided half in John M. Cuyler, and as to the other half in the children of Telamon Cuyler, deceased, to-wit: "Thomas H. Cuyler, minor, of whom John R. Freeman is guardian; Estelle Cuyler, minor, of whom A. B. Ross is guardian, and Georgia C. Branham, formerly Georgia C. Cuyler, the wife of petitioner," and of whom the petitioner was trustee. That the said John M. Cuyler and the said

Freeman, as guardian of Thomas H. Cuyler, and the said Ross, as guardian of Estelle Cuyler, and the petitioner, are the common owners of said property, the said guardians and the petitioner being entitled to one-half, making the petitioner's share one-sixth of the whole. The petitioner was desirous of having the property partitioned between the aforesaid parties and himself; that it could not be divided fairly by metes and bounds on account of improvements. Therefore he prayed for the appointment of commissioners to sell the property for division as by law in such case provided; states "that notice of this application has been given, a copy of which is hereto annexed." Dated May 11, 1863.

Then follows the order of the court, reciting the substance of the petition; that the petitioner had proved his title to one-sixth of the property; that a division by metes and bounds was impracticable; "and it further appearing that the notice required had been given," a sale of the property is ordered; and George W. Wylly, Thomas Purse and John Williamson are appointed to conduct said sale, and directed to sell at public outcry, etc., after advertising thirty days, and to make return of their proceedings to the next term of said court. Dated May 16, 1863. (Signed) "W. B. Fleming, Judge E. D. Ga. Filed May 16, 1863. William H. Bulloch, Clerk, etc."

Next follows the return of the commissioners, stating "that in pursuance of the terms of the decree," etc., the property "was duly exposed for sale before the court-house in Chatham county, and brought the sum of $36.000.00." That the expenses of the sale were $1,243.50, leaving a balance of $34,756.50. Of this they had paid to J. Branham and J. R. Freeman, guardian of Thomas H. Cuyler, and to A. B. Ross, guardian of Estelle Cuyler, each the sum of $5,807.83, leaving a balance of $17,333.00, or one-half the proceeds of the sale, which, they say, "under the will of Jeremiah Cuyler, is devised to Dr. John M. Cuyler, a surgeon in the army of the United States." This sum they

had invested under the currency act of the Confederate States in 4 per cent. certificates, etc. Report signed by the commissioners, and dated June 1, 1864.

The defendant next introduced the deed made by said commissioners in pursuance of said sale conveying the property to John C. Ferrell, the defendant's intestate, dated August 14, 1863, which deed the plaintiffs admitted to be regular and conveyed the title if the sale was legal or binding on them.

It was also in open court admitted by the plaintiffs that Branham, in right of his wife, and Freeman, as guardian of Thomas H. Cuyler, and Ross, acting as guardian of Estelle Cuyler, received from the commissioners in the partition proceedings, on October 1, 1863, the proceeds of the sale of the property, the parties having come to Savannah for that purpose; that on the same day they invested the money (Confederate currency) in a farm in Floyd county, taking the title to them in their said representative capacities; that on October 29, 1868, Estelle Cuyler was married to H. H. Smith. On June 7, 1869, Branham and wife, and Smith and wife, Estelle, and Thomas H. Cuyler, exchanged the farm for a house and lot in Rome, Georgia, all joining in the deeds. That Branham soon after bought Thomas H. Cuyler's interest in the house and lot for $700.00 or $800.00. Smith and wife, Estelle, sold their interest on December 9, 1870, for $700.00, and invested the proceeds in part purchase of a lot in Rome, taking the title to Smith, as trustee for Estelle, on January 12, 1871, on which lot Smith afterwards built a house, and he and his family have continuously lived there since.

Ross also acted as guardian for Estelle in the division of some negroes of the estate of Telamon Cuyler in July, 1862, the day after he was appointed guardian; but he was a mere nominal party to the proceeding, and did not receive the negroes, which remained with Estelle's mother and stepfather, D. M. Hood.

It was admitted by the plaintiffs that J. R. Freeman was

regularly appointed and qualified as guardian of Thomas H. Cuyler on July 7, 1862, by the ordinary of Floyd county.

The defendant also introduced a transcript of the record of the proceedings had in the court of ordinary of Floyd county for the appointment of A. B. Ross as guardian of Estelle Cuyler.

The first thing in said proceedings is the order of the ordinary, which, after reciting that citation had issued requiring all persons concerned to show cause why guardianship should not be granted to A. B. Ross, or some other fit person, for the property of Estelle Cuyler, and no cause being shown, etc., proceeds: "It is ordered by the court that letters of guardianship issue to A. B. Ross, clerk of the superior court of the county aforesaid, according to the statute in such case made and provided, he taking the usual oath of office." Signed by the ordinary, and dated July 7, 1862.

Then follows the oath taken by Ross, as guardian, in the usual form; also the letters of guardianship, which are signed by the ordinary, and are addressed to "Absalom B. Ross," simply. Both dated July 7, 1862.

The defendant admitted that Ross never gave any bond as guardian of Estelle.

The defendant, Wayne, testified that he, as administrator, took charge of the property in dispute in 1871; that the entire property had been worth since then an average rent of $175.00 per month ($2,100.00 per annum), but the taxes, insurance and repairs had been about $1,000.00 a year, exclusive of commissions for collecting the rent.

The defendant also introduced the record of a suit in equity in the United States circuit court for the southern district of Georgia, brought in February, 1867, by John M. Cuyler, against D. M. Hood and his wife Frances, "Estelle Cuyler, a minor," Joel Branham and Georgia C., his wife, and John C. Ferrell. The bill states that the complainant is a son of Jeremiah Cuyler; sets forth the will of Jeremiah,

and his title under that will to one undivided half of the property therein conveyed, and the title of the heirs of his brother, Telamon Cuyler, to the other half, as shown in former part of this brief of evidence, (Frances Hood having been the widow of Telamon Cuyler, but her interest and that of her husband, D. H. Hood, having been conveyed to her children, as shown in the partition proceedings); that Thomas H. Cuyler, the remaining heir of Telamon, then resided out of the jurisdiction of the court, and could not be served; that complainant has heard that some of the parties during the war had instituted proceedings and had the property sold for partition, and that John C. Ferrell had purchased the property at such a sale and paid for it in Confederate currency; that complainant was at that time a surgeon in the United States army, and engaged in the discharge of his duties as such, and had no notice whatever of such proceedings, and the same are not binding on him, etc. He prays that the property may be partitioned, that he may possess his half in severalty, and that an account be taken of the rents, and for general relief.

There is a return of the marshal showing that the defendants were served.

The defendant John C. Ferrell answered the bill, setting up as his defense his purchase of the property at the sale made under the decree of Chatham superior court in the proceedings instituted by J. Branham in 1863 for partition, hereinbefore set forth.

J. Branham and wife, Georgia C., and Estelle Cuyler, also answered the bill, in which they admit the complainant's allegations, give a statement of the proceedings and sale for partition, and reasons why they desired a partition, and state that they are willing to abide the same. In the concluding part of the answer it is stated that B. M. Hood answers for Estelle Cuyler as next friend, she being still a minor.

The decree rendered October 26, 1863, is as follows:

"This cause came on to be heard at this term of court

and was argued by counsel, and thereupon, on consideration thereof, it is ordered, adjudged and decreed as follows:

"First. That partition be made of the premises in said bill of complaint described, so that one moiety thereof shall belong to the complainant in severalty, and be to him delivered for his several possession and enjoyment forever.

"Second. That William R. Boggs, A. N. Wilson and A. S. Hartridge, Esqrs., are hereby appointed commissioners to make such partition in terms of the law, and report their action to the next term of this court. And if said commissioners shall find it impracticable to divide said premises into two equal moieties so that one of the same may be assigned to the complainant, then they shall report that fact to the court, and abstain from further action until further order.

"Third. That E. J. Harden, Esq., is hereby appointed a master in chancery *pro hac vice* in this case, to take the account between the complainant, John M. Cuyler, and the defendant, John C. Ferrell, of all rents and profits, if any, that may be due from the latter to the former, whether by actual receipt of rents and profits issuing out of said premises, or by reason of the occupation of the premises by the defendant himself, charging said defendant with one moiety of the whole, and giving him credit of one moiety of the actual and necessary expenses incurred and paid by him touching said premises."

On November 16, 1868, two of the commissioners named in the foregoing decree, report to the court that they find it impracticable to divide the premises into two equal moieties.

On December 10, 1872, the following decree appears:

"JOHN M. CUYLER, complainant,
vs.
HENRY C. WAYNE, administrator,
JOHN C. FERRELL, defendant. } In Equity.

"This cause came on to be further heard at this term and was argued by counsel, and therefore upon consideration

thereof it was ordered, adjudged and decreed as follows, viz: That the lots numbers one and two, Huck's Tything, Percival ward, in the city of Savannah, with the improvements and appurtenances, belong in equal undivided moieties to the said complainant and his assigns and to the said defendant as the administrator of the estate of John C. Ferrell, as of and from October 26, 1868, the date of the original decree in said cause. That the said parties so holding the said property as tenants in common shall determine among themselves as to their ownership respectively of the said lots and appurtenances, equalizing the value thereof according to the election which may be made in the manner provided by the commissioners appointed by this court, the final report of said commissioners having been adopted by the court. It is further ordered that the complainant do recover his costs against the said defendant."

On the trial of this case the court rendered a finding in favor of the defendant, and ordered that the defendant have leave to enter up judgment against the plaintiffs, and judgment was so signed by counsel for the defendant. Date of finding and judgment, January 24, 1879.

The plaintiffs on the same day moved the court to set aside said finding and judgment, and for a new trial, on the following grounds:

1. Because the said finding and judgment are contrary to the evidence and without evidence.

2. The finding and judgment are contrary to law.

3. The plaintiff, Estelle Cuyler (now Smith), pending the trial, in open court, proposed and offered to allow the $700.00 which had come into her hands from the proceeds of the sale of the property for partition in 1863, and which she found in her possession on arrival at majority, as shown by the evidence, or the value of the Confederate money received by Ross acting as her guardian from the sale of the property, as a set-off against her share of the rents and profits, or as a charge upon her share of the property in favor of the defendant, if there should not be a sufficient

amount of rents to cover the same; and she offered to amend the declaration by adding to it this proposition and offer. But the court ruled she could not make such proposition or amendment, and declined to consider the same.

The motion for new trial was overruled and the plaintiffs excepted.

Two questions were mainly insisted on here by the plaintiffs in error: First, as to the validity of the sale of the property for partition by the judgment of the court in May, 1863, on the ground that John M. Cuyler was not a party to that proceeding. Second, that the sale and partition of the property was not binding upon Estelle Cuyler, now Mrs. Smith, because she was a minor at the time, and was represented by Ross, who had been appointed her guardian, but who had not given bond and security as such.

1. In relation to the first question, whether the sale of the property for partition was legal and valid or not, the plaintiffs, in their answer to the bill filed against them and the purchaser of the property by John M. Cuyler, ratified and confirmed it, for they state in reference thereto "that they are content to stand by it so far as their interest is concerned in said proceeding and to abide its result."

2. The bill was served upon Estelle Cuyler, and was answered by D. M. Hood, as her step-father and next friend, or, as he describes himself in his signature to the affidavit to the answer, "D. M. Hood, *prochein ami* of Estelle Cuyler," and she is therefore bound by it as well as the other parties thereto. 53 *Ga.*, 514.

3. We might rest our judgment in this case right here, but as the question was discussed on the argument as to whether a guardian was required to give bond and security, especially when the clerk of the superior court is appointed a guardian for minors by the ordinary, or whether it is discretionary with the ordinary to require bond and security, we will express our opinion upon that question. In our judgment the law requires that bond and security should be given in all cases on the appointment of a guardian by the

ordinary. Code, §1812. But the grant of letters of guardianship by the ordinary without taking bond, though erroneous, would not make the grant of the letters void as against a *bona fide* purchaser who had no notice that a bond had not been given. 13 *Ga.*, 10. In the case under review, Ferrell, the defendant's intestate, alleges that he was a *bona fide* purchaser at the partition sale of the property in dispute, and, as such, is entitled to be protected against the claim of the plaintiffs on the statement of facts contained in the record. There was no error in overruling the plaintiffs' motion for a new trial.

Let the judgment of the court below be affirmed.

WATTS & BROTHER *vs.* THE SAVANNAH & OGEECHEE CANAL COMPANY.

An incorporated canal company whose business is to maintain and keep open a waterway for the use of the public, taking tolls for such use, and having, at or near the terminus of the canal, basins for the accommodation of its customers, with a usage or regulation that timber which lies in the canal, or in the basin, for more than fifteen days after the transportation is completed, shall be subject to an additional charge at a fixed rate per month, is not liable, in the absence of special contract, for the exercise of any care or diligence in guarding or protecting the timber, beyond keeping the canal and basins in good order; and if from rafts lying in the basins or in the canal itself, sticks of timber be lost at any time, by theft, sinking, or otherwise, without some wrongful act on the part of the company or its servants (the burden of proving which is on the owner), the company is not answerable for the damages.

Canals. Tort. Contract. Damages. Before Judge HARDEN. City Court of Savannah. May Term, 1879.

Reported in the opinion.

J. R. SAUSSY; P. W. MELDRIM, for plaintiffs in error.

R. E. LESTER, for defendant.

BLECKLEY, Justice.

The declaration alleges that the defendant is a corporation of this state, having its principal place of business in the city of Savannah, and has damaged the plaintiffs two hundred dollars; that the defendant was and is engaged in the business of canalage, affording, by means of its canal, transportation from the river Ogeechee to the river Savannah, and to and from intermediate points, charging and receiving certain tolls; that it has attached to and connected with its canal certain ponds used as booms, for the safe-keeping and custody of such timber as may be delivered to it, charging and receiving compensation for the boomage or safe-keeping; that the plaintiffs, in the year 1876, on divers days (specifying them) delivered to it certain described timber of the value of $106.37, for safe-keeping in said booms; that by reason of the carelessness and negligence of the defendant, its agents and servants, said timber has been wholly lost to the plaintiffs; and that "the said defendant, though often requested, has refused and still doth refuse to deliver to your petitioners the said timber or any part thereof, or to pay the value thereof;" wherefore process is prayed, etc. The defendant pleaded not guilty, and "*ultra vires.*"

At the trial, the court, on motion of the defendant, ordered a nonsuit, holding the plaintiffs' evidence insufficient to make a *prima facie* case for recovery. Whether or not this adjudication was erroneous, is the question made by the writ of error.

One of the plaintiffs testified to the description, ownership and value of the timber lost. It constituted a part of three rafts brought to Savannah over the defendant's canal, one of which was left in the canal and the other two were placed in the basins. No arrangement for care and custody was made between the parties. The defendant has nothing to do with the transportation of timber over the canal, except to keep the canal and locks open, the care and

custody during transportation being in the owners. No receipt is given by the defendant. Its custom is to allow the timber to remain fifteen days without charge, and after that time to charge for dockage at the rate per month of twenty cents the M feet. Timber, after inspection, is allowed to remain in the canal or may be placed in the basins or artificial harbor, from which it is taken by owners as required, they, by their servants, or the servants of their factors, moving the timber from the basins to and through the locks, and the lock-keeper suffering it to pass on orders which are sent to him by such owners or their factors. Sometimes a whole section is taken out at once, and again only a few pieces. The lock-keeper enters in a book which he keeps, an account of all timber that passes the locks. The timber in the rafts of which the sticks now sued for formed a part, became loose, and the witness had it brought together and staked, and the president of the Canal Company allowed him twelve dollars for expenses incurred in so doing. The rafts remained in the canal basins until after the yellow fever of 1876, and dockage at the usual rate was paid to the company upon all except the lost timber. When the rafts were sold and ordered out, seven sticks could not be found. The witness does not know what became of them. The president of the company promised to settle for them, but never did so. The price charged at other booms is fifteen to twenty cents the M. feet per month and they, too, do not receipt for timber.

A clerk of the plaintiffs testified that the basins are from 150 to 300 yards from the lock-house where the lock-keeper resides. Upon the arrival of timber near the lower lock, it is regularly inspected by sworn inspectors, who give the lock-keeper the name of the owner, number of pieces, and the dimensions, and he makes entries accordingly in his book; it is by this means that he knows what to charge and from whom to collect. Timber is put in the basins, sometimes by the owners, sometimes by the canal company. No receipt is required or given. An order is given to the

lock-keeper to pass through the locks and the timber is so passed per order. One of the three rafts of the plaintiffs was put in the basin by the defendant. The witness saw all the timber a few months before the seven sticks were lost, and it was in good condition. When witness went for it, the lock-keeper admitted that it was short seven pieces according to the entries in his books, and he assisted witness two days in searching for the missing pieces. Timber if loblolly, fat or rotten will sink, but none of this was of such character, and none of it was found in a sunken condition.

Another person, a timber dealer, and familiar with the trade testified, that an account of the timber brought down the canal is given by the inspectors to the lock-keeper. The defendant has control over the location of timber placed in the basins, and the lock-keeper can place it where he pleases. It is usually inspected in the basins, and is cut loose so as to be turned over, and then fastened by pinning the outside sticks, but not securely. The dockage or boomage has been charged and received by the defendant for years on timber remaining over fifteen days in the canal or the basins. The price is about the same as at the river booms. These latter charge 15 to 20 cents per M feet per month. At them there is tide-water, and a watchman is employed, and the timber tied, but in the canal basins there is no tide-water; the banks prevent the timber from getting away or being stolen. It could not be removed except through the locks. There is no watchman at the canal basins—the lock-keeper is about 150 yards from them. Witness has known timber passed through the locks by mistake—that is, the timber of one party was allowed to pass as the timber of another—such taking was by the servants of the factor who had the sale of the timber. The canal company has nothing to do with the custody or control of timber while it is being transported over the canal.

Did this evidence make a case? We think not. Accord-

ing to the charter of the canal company, *Dawson's* Comp., 90, *et seq.*, and amendments thereto, acts of 1831, p. 200, of 1837, p. 214, of 1847, p. 141, of 1849–50, p. 208, the business of the corporation is to maintain and keep open a water-way for the use of the public, taking tolls for such use. In the light of the charter and of the evidence, the company is not a carrier; it is not engaged in the business of transportation; it furnishes nothing but the water upon which the commerce of the canal floats; its servants render no assistance in the actual work of navigation; and it assumes no custody or control of the property which enters the canal and passes over or through it. The basins at the Savannah terminus are but expansions of the canal proper, and are evidently intended for the more ample accommodation of customers, since all have a right to their use free of any charge additional to the ordinary tolls, for fifteen days, and this indulgence is equally applicable whether the timber lies in the basins or in other parts of the canal. The regulation which subjects customers to a further assessment under the name of boomage or dockage, in case they fail to withdraw their property within fifteen days after the transportation is completed, has for its object, most probably, the clearing away of the commerce which has arrived at destination, to make room for subsequent arrivals, so as to keep the canal from choking up. Without something to stimulate discharge, those customers who have been served might render it impracticable to serve, with reasonable expedition and equal advantage, those who are behind them. In order to keep the canal open alike to the whole public, that portion who bring their rafts into port early, must get out of the way of that portion who come later; and there can be no doubt that to give each individual the half of a month, or the twenty-fourth part of a whole year, to move out, is a very liberal allowance of time. To furnish mere water-surface and support during a longer period, on condition that it is paid for at an established rate per month, does not impress upon the canal the character of a water

warehouse, or make the company a bailee for storage and safe-keeping. The business of the company is exclusively that of road-making and road-mending, and, in the absence of special contract, it owes no duty to customers beyond that of keeping the canal and basins in good order, and open for use. Whether the property afloat is, for the time, stationary in suitable situations, or in motion along the main channel, makes no difference; the legal relation of the company to it is the same in the one case as in the other. The manning of rafts which are moored, or the keeping of watch over the same, is neither more nor less in the line of the company's business than is the like service in respect to those which are making the voyage; and no new duty arises toward such as have become subject to charges on account of continuing to occupy space in the canal or its basins for a longer term than fifteen days after reaching port. The true nature of this further assessment is a graduated toll upon lingering rafts, proportioned to the length of time they respectively enjoy the use of the company's water-way, and somewhat to the extent of water-surface they occupy. For any wrongful act of the company to the commerce of the canal, the company would be liable in damages, whether the property lost or injured was, at the time, in transit or at destination; but the mere disappearance of property from the canal or the basins, unaccounted for, is not evidence of any such act. In the present case, the missing sticks of timber might have sunk, or they might have been stolen and carried away. How they disappeared, or what became of them, is simply an unsolved mystery. One of the witnesses had known instances in which the lock-keeper had, by mistake, suffered timber to pass through the lock, but he did not pretend that he had any knowledge that this particular timber passed out that way. If mistake in the other instances could be detected, no reason appears why it could not also be detected in this, if it had occurred; and to argue from known mistakes that an unknown one has taken place, not simply that it *might*

have taken place, is unsound. There was no evidence that mistakes were habitual with the lock-keeper, or committed with a frequency more than ordinary, or that he was unfit for his position, or below the average in competency. There is no wrongful act of commission or omission on the part of the company even pointed to by the evidence, much less established, in regard to this particular timber. The timber disappeared, was searched for thoroughly and could not be found; the president of the company promised to pay for it, and failed to comply with the promise; these are the facts which bear against the company with most force, and they wholly fail to support the declaration. It would be altogether unwarranted to infer liability from the president's promise to pay, as the circumstances did not justify the promise, and as the president himself seems to have reconsidered it, and declined compliance. The company is not shown to have failed to perform its charter obligations, or to have done any wrongful act, and hence the non-suit was properly awarded.

Judgment affirmed.

De Loach *vs.* Hardee's Son & Company.

Where suit is brought for the purchase money for fertilizers on a contract containing this stipulation: "which said note is given for forty-one hundred pounds of fertilizer known as the Sea Fowl Guano, valued at this date at $143.50, which I buy and accept from N. A. Hardee's Son & Co., entirely upon its analytical standard, they in no case to be held responsible for the practical results:"

Held, 1. That evidence by a chemist who applied the test of analysis to a sample of the fertilizer, and who testified from his analysis that it did not come up to the analytical standard of such fertilizer, is admissible, though his analysis was imperfect, and the condition of the sample as to its preservation unknown to the chemist, and the date of the analysis was not given—such evidence being competent, and its effect being for the jury to pass upon in connection with other evidence which might have been introduced to supply its want of sufficiency to make a complete defense.

2. That testimony in respect to the practical result of its application to defendant's crop, while inadmissible by the terms of the contract to hold plaintiffs responsible, standing alone, yet may be admitted to throw light upon the true issue, whether or not the fertilizer delivered actually came up to the analytical standard stipulated in the contract.

Evidence. Contracts. Before Judge FLEMING. Bulloch Superior Court. April Term, 1879.

To the report contained in the opinion it is only necessary to add the following:

A witness for defendant, Dr. Lane, testified as follows:

"Am a physician and chemist, and competent to make chemical analysis. I analyzed the sample of fertilizer brought to me by defendant, of which he has spoken. Subjected it to chemical tests to find out principally the portion of insoluble matter in it, and to find out the presence of the usual fertilizing ingredients of the fertilizer. The test was perfect for discovering the insoluble matter which is wholly unfertilizing. I found eighty-five per cent. of sand and other matter wholly insoluble, and fifteen per cent. of soluble matter. I found only a trace of ammonia, not, in my opinion, an amount equal to two per cent, nor anything like that. I cannot swear to the quantity of ammonia precisely, because I had no way of measuring the quantity accurately, not being fitted up for that. But I did test it so as to discover its presence and found only a trace. I found also phosphoric acid in it, but did not test the quantity; neither that nor the ammonia was left in the insoluble matter.

"The analytical standard of the Sea Fowl Guano is, as specified in the report of the commissioner of agriculture of the state, viz: moisture, 15.65; phosphoric acid. insoluble 3.13; do. soluble, 5.66; reverted, reduced or precipitated,3.30; ammonia, 2.91. This sample, so analyzed by me, did not come up to this by a great deal.

"The process I adopted for this analysis was this: I took 120 grains, placed it in a glass tube, and poured over

it a solution of sulphuric acid, and let it remain so three days, then poured the acid off, washed the remainder out carefully with alcohol and rain water, preserving all the insoluble matter, which I dried on paper thoroughly dry in the sun, and weighed it. It weighed 102 grains. Before separating the soluble from the insoluble matter, after the mass had remained three days in the glass tube, I tested it for ammonia by dipping in the solution litmus paper, which is the test for ammonia, and found only a trace of it.

"I am a farmer as well as physician and chemist, and have used fertilizers largely for many years on my own crops. I have used many kinds, and it has been my habit to analyze the various fertilizers used by me in the manner aforesaid to determine the quantity of insoluble matter in them, for insoluble matter is not fertilizing, and does no good, except to act as a body to hold the soluble matter. I used the Sea Fowl Guano on my crop last year. I analyzed a sample of it to find the insoluble matter. It came up to the standard I have spoken of, and proved to be a good fertilizer in its results upon my crop. This sample I analyzed for De Loach has immensely more insoluble matter than was shown by the same test to be in the sample I analyzed for myself. The fertilizer I analyzed for De Loach would be worthless as a fertilizer. That is to say there are some fertilizing properties in it in the shape of soluble matter, as I have testified, which of course would produce results upon land, but it would have to be used in immensely large quantities. The application of 150 to 300 pounds (the usual quantity) to an acre would be of little or no service. 2000 pounds to the acre might produce well. But a fertilizer requiring to be used in that quantity is not a first-calss fertilizer. It is not such a fertilizer as would sell for $65.00 or $70.00 a ton on credit. The usual quantity of good fertilizer used upon land in this county is 150 to 200 pounds per acre."

In reply to questions by the court, the witness said: "I cannot swear whether or not there was in the fertilizer

which I analyzed 15.65 moisture, nor if there was phosphoric acid insoluble 3.13, or soluble 5.66, or reverted, reduced or precipitated 3.30, or ammonia 2.91. I was not prepared, and did not test for any of these chemicals, except for the ammonia, and of that I found some, but not, in my opinion, as much as 2.91. But I cannot swear there was not that much. After dipping some paper in the ammonia I poured the solution on the ground, and then dried and weighed the remains. These remains appeared to be sand, but I made no test except by the eye. There were one hundred and twenty grains of the fertilizer put in the glass tube, and one hundred and two grains of what *looked like sand*, when I had finished the experiment. This left about eighty five per cent. of insoluble matter. This is the reason I say that the fertilizer does not come up to the standard."

On motion of plaintiffs' counsel, all this evidence as to the analysis was ruled out.

Defendant also offered to testify as to the effect of this fertilizer on his crops, which the court refused to allow. Both these rulings were complained of as error.

Rufus E. Lester; D. R. Groover, for plaintiff in error.

T. W. Oliver, Jr., by brief, for defendants.

Jackson, Justice.

This action is based upon a contract to pay $143.50 for a certain quantity of Sea Fowl Guano. The jury found for the plaintiffs, much of defendant's testimony having been ruled out by the court. He moved for a new trial on the ground that it was so ruled out, and also on the ground of newly discovered evidence. The motion was overruled, and the defendant excepted.

1. The contract contained the following stipulation: "Which said note is given for 4,100 pounds of fertilizer known as the Sea Fowl Guano, valued at $143.50, which I buy and accept from N. A. Hardee's Son & Co., entirely

upon its analytical standard, they in no case to be held responsible for the practical results."

It will thus be seen that the only issue which defendant could make was this: Did the guano come up to the analytical standard bargained for? He put in a plea that it did not come up to the standard bargained for, and was therefore not the article which he agreed to pay for, and was worthless.

This plea he had the right to make good by legal and competent proof; and upon the competency of that proof the court is to judge: upon its sufficiency, the jury; or the court, on motion for a non-suit, or for a new trial. The court here excluded the evidence from the jury, and the question is, was the rejection of it right?

A doctor and chemist swore that he had analyzed the guano—that its analytical standard was to be of such and such ingredients according to the report of the Georgia commissioner of agriculture, and that this guano by sample furnished him by the defendant, did not, by a great deal, reach that standard. What the true standard was seemed to have been agreed upon tacitly—no objection being made to the mode of ascertaining it from the commissioner's report; but the chemist had not perfectly analyzed the sample, as appeared from questions put by the court, and could not swear exactly to the component parts of the guano, though he did swear that the soluble matter, which is the only fertilizing quality, was, by a great deal, less than the standard.

We think that his testimony was competent and admissible for what it was worth. Whether sufficient by itself to authorize a verdict, is not the question. It might have been aided by other testimony. The main defect in it, it strikes us, is that it does not appear whether the sample analyzed had been preserved in such manner as to insure that it was a fair sample of the guano when delivered. The ammonia would have evaporated, and much of the fertilizing properties of the manure been lost, had it not been so preserved. It was therefore important to show

when it was analyzed by Dr. Lane, and where and how kept until that time.

But all this might have been supplied by questioning the witness or by other witnesses, and relates more to the sufficiency and effect of evidence than to its admissibility.

On the whole, we think it admissible, to be passed upon by the jury under the charge of the court. See *Allen vs. Young*, last term, not yet reported; 51 *Ga.*, 298; 53 *Ib.*, 635.

In the case of *Allen vs. Young*, the stipulation is very similar to this, and there this court held that "the precise right of the purchaser was to receive an article containing the chemical and fertilizing properties enumerated in the guaranty, and these in the proportions and up to the degree of strength held out as a standard," and we further say that the best mode to arrive at it is to test a sample by analyzing it, due care being had to preserve a sample in order to insure its fairness. "Test or comparison by indirect means might be practicable, too," we go on to say in the syllabus of that case.

So that that case would seem to strengthen the view we take of this.

So in the case in 53 *Ga.*, 637, it is ruled that the opinion of a chemist after analysis is evidence to be considered by the jury—not conclusive, of course—but, nevertheless, evidence.

2. While, by the express terms of his contract the defendant cannot plead that the practical result of the use of the guano was that it made nothing, and defend himself on that ground, and therefore cannot introduce evidence for that purpose; yet such evidence is admissible to strengthen the testimony of the chemist that the guano did not come up to the stipulated standard, and to show that by its failure to meet the standard agreed upon, the defendant was damaged. If it came up to the stipulated standard, it is wholly immaterial whether it made a lock of cotton or grain of corn; but the fact that it made neither is evidence

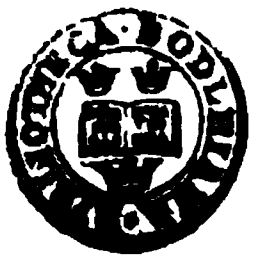
that it did not come up to that standard, especially where the evidence is, as in this case, that other Sea Fowl Guano which came up to the standard, or nearly so, did help the production largely.

And this view seems, too, to accord with the ruling in *Allen vs. Young*, last term, where we say on a similar contract, or intimate, at least, that the effect on crops could be considered in connection with the admission of the seller made on the trial.

The ground of newly discovered testimony was not pressed.

We think, however, that the case had better be tried over, in accordance with the views given above. It may be that the result will be the same before the jury. That should depend much upon the preservation of the sample analyzed as a fair sample of the manure sold; but the defendant's evidence was improperly excluded, and this entitles him, as it went to the vitals of his case, to a new trial.

Judgment reversed.



The Central Railroad *vs.* Kenney.

Neither the amendment to the plaintiff's declaration, nor the evidence offered in support thereof, takes it without the ruling when it was here before, and consequently the judgment refusing a new trial must be reversed.

Jackson, Justice, dissented.

Railroads. Master and servant. Damages. Before Judge Hillyer. Henry Superior Court. April Term 1879.

Reported in the decision.

A. R. Lawton; Stewart & Hall, for plaintiff in error.

Geo. W. Nolan; W. F. Wright; J. J. Floyd, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant, as one of its employees, to recover damages alleged to have been sustained by him in having been thrown off the defendant's road when going thereon in one of the defendant's crank-cars, in consequence of its alleged defective construction, and the negligence of the defendant. On the trial of the case the jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of $2,500.00. A motion was made for a new trial on the several grounds therein stated, which was overruled, and the defendant excepted.

It appears from the record, that on the last trial of this case, the plaintiff amended his declaration and alleged "that the crank-car from which plaintiff was thrown, was not constructed as crank-cars usually are and were before that time, and of that fact plaintiff had no knowledge, and said car so constructed was much more unsafe than crank-cars constructed as usual, and that of this defendant had notice, and did not communicate the same to plaintiff."

The main controlling question in this case is whether the foregoing amendment to plaintiff's declaration, and the evidence introduced by him on the last trial of this case, takes it out of the ruling of this court in 58 *Ga.*, 485, in the case between the same parties, as to the right of the plaintiff to recover from the defendant under the law. What are the allegations in the amended declaration? First, that the crank-car from which plaintiff was thrown was not constructed as crank-cars usually are and were at that time—without alleging wherein it was not so constructed, or in what manner it was constructed differently from what crank cars usually are and were, so as to have put the defendant upon notice as to what was the alleged difference between the car from which he was thrown and other crank-cars usually used on defendant's road and other railroads. How was its construction different from other crank-

cars usually used on railroads? Second, that of that fact (to-wit) the fact that the crank-car was not constructed as crank-cars usually are, the plaintiff had no knowledge. How could the plaintiff have had any knowledge of the difference in the construction of that crank-car and other crank-cars usually used on railroads, if no such difference in its construction existed, or when the difference in its construction was not alleged and described? Third, that the said car so constructed, that is to say "not constructed as crank-cars usually are," was much more unsafe than crank-cars constructed as usual, and of this the defendant had notice, and did not communicate the same to the plaintiff. What was the difference in the construction of *the* crank-car from which the plaintiff was thrown and other crank-cars usually used on railroads of which the defendant had notice and did not communicate to the plaintiff? Can any human being tell what was that difference in the construction of the crank-car from which the plaintiff was thrown, and the construction of other crank-cars usually used on the defendant's and other railroads, of which the defendant had notice and failed to communicate to the plaintiff, from the allegations in the plaintiff's amended declaration? The legal presumption is that the plaintiff stated his case as strongly in his own favor in the amendment as the facts would authorize him to do. So much for the new case made by the plaintiff's amended declaration. What is the evidence of Reed, the plaintiff's witness, in support of the alleged new case made by the amendment? He states that he used the crank-car about two years and that it was properly constructed so far as he knew, except one wheel which was a little loose on the axle, of which he notified the plaintiff (the plaintiff testified that he wedged the wheel and said that he believed that it was as good now as it was the day it came out of the shop), that it frequently ran off the track with him at frogs—small flanges and light wheels made it liable to run off the track at frogs. Such cars as the plaintiff was

hurt on are liable to run off going over frogs rapidly, because of the small flanges and light weight wheels, as before stated. Plaintiff had several years experience as section master on the road, and had seen the car from which he was thrown in use repeatedly and rode on it with witness.

There is nothing in Reed's evidence going to show that the crank-car was not constructed as crank-cars usually are, but on the contrary states that it was *properly* constructed. It is true that he states that it frequently ran off with him at frogs, not on account of its improper construction, or because it was was not constructed as crank-cars usually are, as alleged in plaintiff's amended declaration, but because such cars are liable to run off when going over frogs for the reasons stated by the witness. There is no evidence that this crank-car was any more liable to run of the track at frogs than any other crank-car of its class, and the plaintiff himself testified that he did not know what did cause it to run off. It is true this car had frequently run off with Reed at frogs, but all such cars are liable to run off at frogs when going rapidly, and there is no evidence how the car was going when it ran off with Reed. If this car had any hidden defect, not discoverable by ordinary dili gence, different from other cars of the same class which caused it to run off at frogs when other cars of the same class would not, and the defendant knew it, then the plaintiff should have alleged and proved it at the trial. According to the allegations in the plaintiff's amended declaration, and the evidence adduced in support thereof, there is nothing to take the case out of the rulings of this court as made between these same parties and reported in 58 *Ga.*, 485.

Let the judgment of the court below be reversed.

Bleckley, Justice, concurring.

I concur in the judgment, not on the idea that the plaintiff's amendment to the declaration is not sufficiently certain and definite (there being no demurrer for want of cer-

tainty), but for the sole reason that the plaintiff failed to prove the matter of the amendment. His own witness testified that the car was properly constructed. If the particular car had a hidden vice not common to cars of its class, and if the supervisor knew of such hidden vice, the plaintiff was entitled to notice of it; but if the car would run off at frogs merely because it was a light car with short flanges, and if crank-cars properly constructed are constructed in that way, and therefore would be as liable as this particular one to jump the track at frogs, I think the plaintiff took the risk, and that he cannot recover.

JACKSON, Justice, dissenting.

In my judgment the case made on this trial takes this judgment of the superior court without the decision of the case between the same parties in the 58*th Ga.*

The supervisor of the track, the immediate superior officer of the plaintiff, who was a section master, directed the plaintiff to attend to some business on a section other than his own, and with which he was unacquainted, and put the plaintiff in charge of the supervisor's crank-car, with the use and working of which plaintiff was also unacquainted, having been on it but once with the supervisor; and although the supervisor knew that the car was light and the flange of the wheel quite shallow, and that the car ran off the track very easily at frogs, and had frequently run off with the supervisor at frogs, yet gave no notice thereof to the plaintiff, who did not know it ever ran off. The plaintiff had been accustomed to a pole-car, much heavier and less liable to run off the track, and in consequence of his want of notice of the character of this car on which the supervisor placed him, and of its having frequently run off the track with the supervisor at frogs, passing the point of danger with less care than he would have used had he known of its liability to run off at such a place, the car was thrown from the track and plaintiff was badly crippled.

This is substantially the case made by the plaintiff's proof,

the jury passed upon the evidence and believed this version of the transaction, introduced under an amendment not demurred to; the presiding judge, certainly not inclined to be partial against railroad companies, as he is a director of one of them, approved the finding, and the rule applied to all natural persons that this court will not interfere with the discretion of the presiding judge in refusing a new trial on the ground that the verdict is strongly against the weight of the evidence, unless that discretion has been abused, should be applied, I think, in this case, under these facts, to this company.

If the above facts were believed by the jury, the company was negligent in that the supervisor did not warn his subordinate of the character of the car and the danger to be apprehended when it passed over the frogs, and the jury having found the fact of negligence against the company, it being peculiarly their office to pass upon questions of negligence—and there being evidence sufficient to support the finding—I cannot say that the judge abused his discretion, and therefore I think the judgment should be affirmed, and I dissent from the reversal.

Cumming *et al.* *vs.* The Trustees of the Reid Memorial Church.

The fourteenth item of testator's will was as follows: "My house and lot on the north side of Walton Way, in the village of Summerville, near Augusta, I give and bequeath, in *fee simple*, to James W. Davies, Thomas W. Coskery, and Jonathan S. Wilcox, of Summerville, *in trust*, that they and their successors allow to William Berrien, hereinbefore mentioned, to occupy, free of rent, during his natural life, the piece of ground at the northwest corner of said lot, known as the 'Potato Patch,' and to remove on to said piece of ground, for his use during life, the building on said lot known as 'Violet's House.' Said lot is supposed to contain about five-eighths of an acre, known as the 'Potato Patch.' I desire the above named James W. Davies, Thomas W. Coskery, and Jonathan S. Wilcox, to obtain for themselves and their successors, a decree of incorpora-

tion, as trustees of a Presbyterian church in connection with the present general assembly of the Presbyterian church in the southern states; and hold the western portion of the lot hereby bequeathed to them, to-wit: one hundred feet in breadth, from the western line, as a church lot; the remainder of the entire lot, with its appurtenances and improvements, except 'Violet's House,' above mentioned, they are directed to sell in the manner and on the terms they deem expedient, and are authorized to fully convey the same in *fee simple*. With the proceeds of said sale, I direct them, or their successors, to build a church of the Presbyterian denomination aforesaid, in the church lot hereinbefore provided for. The plan and style of said building is necessarily left to the discretion of the trustees. But I recommend, if the means be sufficient, that it be of brick, well but plainly finished, with a basement for a Sunday-school room."

The will was dated on the 31st of July, 1869, and on the same day the following codicil was executed: "I desire Porter Fleming to be an additional trustee under the clause in the foregoing disposing of my house and lot in Summerville."

On April 2, 1870, a third codicil to the will was executed, confirming and republishing the same, the third item of which was in the words following, to-wit. "I desire George M. Thew and William A. Walton to be additional trustees under the clause in said will disposing of my house and lot in Summerville; and to the entire board of trustees for the erection of the church in said will provided, I give and bequeath further the sum of eight thousand dollars, should the residuum of my estate amount to so much."

On July 25, 1872, a fourth codicil was executed, the seventh item of which was in the words following, to-wit: "Jonathan S. Wilcox, one of the trustees appointed in said will for my house and lot in Summerville, having departed this life, I appoint Lindsay C. Warren as trustee in his room, with all the rights and powers given to said Jonathan S. Wilcox by said will."

On July 14, 1875, the sixth and last codicil was executed, as follows, so far as relates to this case: "Should my estate not be able to pay off in full all legacies specified in this my last will and testament, including the eight thousand dollars bequeathed to the church to be erected in Summerville, and all other expenses, I now revoke so much of said eight thousand dollars as may be necessary to accomplish said object, as my desire is to pay off all legacies in full." "Mr. Henry Moore, an additional trustee to the church to be erected in Summerville."

The following memorandum was found among the papers of the testator, and entered of record by the ordinary, and attached to the bill as an exhibit with the will and codicils: "My desire is that the church building to be erected in Summerville, shall be placed back

from Walton Way at a sufficient distance so as not to obstruct the view from my residence west, say from 75 to 80 feet, or more if deemed necessary by the trustees to place it thus far from Walton Way to effect that object. As regards said church building, should the trustees deem it advisable not to build it two stories in height, they are authorized to build it but one story high, pitched similar to the church in Augusta called the 'Christian Church,' the roof to be covered with XX tin, and, in time, the house called 'Violet's House' can be removed in rear of same, added thereto in length, and converted into a Sunday-school room. My desire is the church shall be occupied or used for church purposes exclusively. Taking off 100 feet on Walton Way for the church lot, there ought to remain to dwelling lot 500 feet front on Walton Way, including one foot more on the street leading to the cemetery, to which it is entitled. It is my desire that the church should be named 'The Louise Reid Presbyterian Church,' or 'The Reid Memorial,' but if the trustees deem it not a suitable name, or proper, it is left with them and my executors to name it." This memorandum is dated July 19, 1872.

On demurrer to the bill, filed by the next of kin to the testator, setting out the foregoing facts, and alleging that the house and lot had been turned over to the trustees and sold for $9,400.00, with which they had completed the church edifice, and that the executors had also turned over the sum of $8,000.00 to the trustees, no part of which had been applied by them to the erection or completion of the church building, and praying for discovery touching the use by the trustees of said $8,000.00, and for account and payment to said complainants of said sum, or such part thereof as had not been expended in the matter of erecting and completing the said church building, on the ground that, by the said will and codicil, the said $8,000.00 was bequeathed to said trustees solely to be used by them in the erection and completion of said church edifice, and not having been so used, they held the same in trust for the complainants as testator's next of kin, there being no residuary legatees in said will designated;

Held 1*st*. That even if the memorandum was improperly admitted to record by the ordinary, yet it is such a paper as may be used, like other surrounding circumstances, to aid in the construction of ambiguous clauses of the will on the same subject matter, and being exhibited to the bill in connection with the will and codicils, the memorandum may be considered on demurrer in construing the will and passing upon complainants' case as made by themselves.

Held 2*d*. That the testator's intention, gathered from the whole will and all the codicils bearing upon the bequest of $8,000.00, and read with the additional light thrown upon it by the memorandum, was to give the said sum absolutely to the said trustees to be used and expended by them as they might see fit, not only in erecting

and completing said church edifice, but in adding thereto, in keeping it in repair, and in sustaining and preserving the church in perpetual memory of his wife and himself; and that therefore the complainants have no equitable interest in said fund, and the demurrer to their bill was rightfully sustained and the bill properly dismissed.

Wills. Legacies. Evidence. Before Judge SNEAD. Richmond Superior Court. April Term, 1879.

Reported in the opinion.

M. CUMMING, for plaintiffs in error.

JONES & EVE, for defendants.

JACKSON, Justice.

This bill was brought by the heirs at law of the testator to recover $8,000.00, or so much thereof as had not been expended by the defendants in erecting and completing a church edifice in the village of Summerville, and county of Richmond. A demurrer thereto was filed substantially on the ground that the complainants had no equitable interest in said fund, and were not therefore entitled to ask discovery in regard thereto or any accounting thereabout by the trustees of said church. The court below sustained the demurrer, and the complainants excepted.

There were no residuary legatees named in the will, and the complainants allege that the bequest of the testator to the trustees of this sum of money was made solely to be used by them in erecting and completing a church edifice, that the church building had been furnished by another fund provided therefor without the aid of this fund, and that these complainants, no residuary clause being in said will, were, by virtue of being next of kin and heirs at law of the testator, the beneficiaries of the fund, that the trustees having possessed themselves of it and not needing it for the uses declared in the will, held it in trust for complainants,

and must account to them therefor. On the other hand the defendants maintain that the bequest to them is absolute—not confined to the use only of building the church, but of preserving and sustaining it as a memorial church in memory of testator's name and bounty.

So that the point at issue is this: does the will give the trustees this fund alone to complete the erection of the church edifice, or does it give the fund in the wider sense and for the broader use of preserving and sustaining it as a place for the worship of God? Or to put it more broadly still: is the fund given as a building fund only, or is it given absolutely to these trustees for the use of this church as a body corporate—in adding to the edifice, if necessary, in repairing the building from time to time, in sustaining the church as a worshiping congregation, and thus preserving this house of worship in perpetual memory—so far as human things can perpetuate memory—of the testator's bounty and of his name?

The question has been discussed with rare ability, and all the light which research and learning and talent can throw upon a point has been shed upon it. At last, however, the question is, what was the intention of the testator in respect to this fund—for his will is the law that must rule the use of this fund, and his intention with respect to it is his will. All the rules in the books are mere adjuncts to strengthen —mere props to support this fundamental rule. On this corner stone the entire fabric rests, and that which it does not sustain falls, or may be rejected as mere scaffolding.

To ascertain this intention, the whole will, with all the codicils which bear at all on the bequest, will be considered; and if there be still any ambiguity as to the will, or which is the same thing, as to the desire or intention of the testator touching the use of this money, surrounding circumstances, cotemporaneous facts, written memoranda duly authenticated, may all be invoked to see what the testator meant.

This case is before us on demurrer, and nothing can be

considered here, of course, except that which appears in the bill of complainants; but all the exhibits made thereto are parts of the bill and to be considered on demurrer in connection therewith.

The fourteenth item of the will makes the first allusion to the desire of the testator in respect to this church. It is as follows:

"My house and lot, on the north side of Walton Way, in the village of Summerville, near Augusta, I give and bequeath, in fee simple, to James W. Davies, Thomas W. Coskery, and Jonathan S Wilcox, of Summerville, *in trust*, that they and their successors allow to William Berrien, hereinbefore mentioned, to occupy, free of rent, during his natural life, the piece of ground at the northwest corner of said lot, known as the 'potato patch,' and to remove on to said piece of ground, for his use during life, the building on said lot known as 'Violet's House.' Said lot is supposed to contain about five-eighths of an acre, known as the 'potato patch.' I desire the above named James W. Davies, Thomas W. Coskery, and Jonathan S. Wilcox, to obtain for themselves and successors a decree of incorporation, as trustees of a Presbyterian church in connection with the present general assembly of the Presbyterian church in the southern states; and hold the western portion of the lot hereby bequeathed to them, to-wit: one hundred feet in breath, from the western line, as a church lot; the remainder of the entire lot, with its appurtenances and improvements, except 'Violet's House' above mentioned, they are directed to sell in the manner and on the terms they deem expedient, and are authorized to fully convey the same in fee simple. With the proceeds of said sale, I direct them or their successors, to build a church of the Presbyterian denomination aforesaid, in the church lot hereinbefore provided for. The plan and style of said building is necessarily left to the discretion of the trustees. But I recommend, if the means be sufficient, that it be of brick, well but plainly finished, with a basement for a Sunday-school room."

On the same day the following codicil was executed, July 31st, 1869.

"I desire Porter Fleming to be an additional trustee under the clause in the foregoing disposing of my house and lot in Summerville."

On April 2, 1870, a third codicil to the will was executed, confirming and republishing the same, the third item of which was in the words following, to-wit:

"I desire George M. Thew and William A. Walton to be additional trustees, under the clause in said will disposing of my house and lot

in Summerville; and to the entire board of trustees for the erection of the church in said will provided, I give and bequeath further the sum of eight thousand dollars should the residuum of my estate amount to so much."

On July 25, 1872, a fourth codicil was executed, the seventh item of which was in the words following, to-wit:

"Jonathan S Wilcox, one of the trustees appointed in said will for my house and lot in Summerville, having departed this life, I appoint Lindsay C. Warren as trustee in his room, with all the rights and powers given to said Jonathan S. Wilcox by said will."

The foregoing will and codicils were written, the bill states, with the assistance of counsel learned in the law.

On July 14, 1875, a sixth and last codicil was executed It was written by the testator, without the assistance of counsel, on the back of his will. So much of it as relates to the present case is in the words following, to-wit:

"Should my estate not be enabled to pay off in full all legacies specified in this my last will and testament, including the eight thousand dollars bequeathed to the church to be erected in Summerville and all other expenses, I now revoke so much of said eight thousand dollars as may be necessary to accomplish said object, as my desire is to pay off all legacies in full."

"Mr. Henry Moore an additional trustee to the church to be erected in Summerville."

On the 19th of July, 1872, a memorandum was made by the testator, which was found by the executors among his private paper, and admitted to record by the ordinary, and which appears annexed to the bill and exhibited with the will and codicils, which is as follows, so far as it bears on the point at issue:

"My desire is that the church-building to be erected in Summerville shall be placed back from Walton Way at a sufficient distance so as not to obstruct the view from my residence west, say from 75 to 80 feet, or more, if deemed necessary by the trustees to place it thus far from Walton Way to effect that object

' As regards said church building, should the trustees deem it advisable not to build it two stories in height, they are authorized to build it but one story, high pitched, similar to the church in Augusta, called the Christian church, the roof to be covered with xx tin, and, in time,

the house called *Violet's House* can be moved in the rear of the same, added thereto in length, and converted into a Sunday-school room.

"My desire is the church shall be occupied or used for church purposes exclusively. Taking off 100 feet on Walton Way for the church lot, there ought to remain to dwelling lot 500 feet front on Walton Way, including one foot more on the street leading to the cemetery, to which it is entitled.

"It is my desire that the church should be named the 'Louise Reid Presbyterian Church,' or the 'Reid Memorial,' but if the trustees deem it not a suitable name, or proper, it is left with them and my executors to name it."

This memorandum is dated July 19, 1872.

1. Whether this last paper was properly admitted to record or not it is unnecessary that we decide. It is enough that the memorandum was found among the papers of the testator, that it bears a date intermediate the execution of the will proper, and the codicils thereto bearing upon this church. That renders it such a cotemporaneous circumstance as makes it proper for consideration to throw light on the true intention of the testator in the bequest, the same being somewhat ambiguous and capable of two constructions. The memorandum is in the record; it is referred to in the sixth codicil of the will; it is certified to by the ordinary with the other papers, to-wit: the will and codicils, and if the others were exhibited, about which there seems to be no dispute, this memorandum so embraced in the certificate of the ordinary and spread out after the bill, would seem to be also in the same exhibit. On the demurrer to the bill, which embraces all that is attached thereto in any exhibit, we think it legitimate to consider the memorandum in so far as it may throw light upon the mind of the testator in regard to this bequest.

2. So considering these several clauses of the will altogether and the memorandum, it seems reasonably certain that the testator had in view not only the erection but the preservation as a place of worship of this church. It was to be a Reid memorial church. It was to be so named to carry his name to posterity, or that of Louise Reid, presumed to be his deceased wife. The preservation of the

church, therefore, must have been in his eye as much as its erection. Looking at it merely as a place, a building, it must decay. The paint would grow old and faint, and need renewing; and the house itself would need repair. Besides, by the memorandum, on a contingency, an addition was to be made to it by adding a certain house for a Sunday-school room, and that house was to be lengthened. All these things would require money after the building itself, as to its main structure, was completed; and it assuredly comports with the nature of the original bequest and all the codicils that funds be set apart for this purpose.

The very fact that in the original item the trustees were required to have themselves *and their successors* incorporated, corroborates the correctness of the view we take of the permanent nature of the memorial of himself had in his eye by the testator. Not only so, but the character of the church, its connectional or denominational relations, was in the mind of the testator, and the form and mode of worship therein. It was to be a Presbyterian church; it was not to be independent, but "connected with the present general assembly of the Presbyterian church of the southern states." So that in the original will, not the mere erection of a house of worship was in the testator's mind, but the sort of worship therein was a big idea with him. The bequest, and all that bears thereon, breathes a spirit of devotion to the Presbyterian doctrine of faith and mode of worship; so that even if all the proceeds of the house and lot had not been expended in the building, it would not require much stretching to cover with the intention of the testator the sustentation as well as the erection of the church.

But when the codicil with the specific bequest of $8,000.00 comes to be considered, the intention becomes clearer. After naming certain additional trustees "under the clause in said will disposing of my (his) house and lot in Summerville," he adds, "and to the entire board of trustees for the erection of the church in said will provided, I give and bequeath further the sum of $8,000.00 should the

residuum of my (his) estate amount to so much." The words "for the erection of the church in said will provided" are descriptive of the persons before named in the will and codicil. It was necessary either to name each of them over again, or to use some general words embracing them all in a single phrase; because he was about to make them a large bequest.

Further, the last codicil is still stronger in favor of the construction we put on the will. There the testator calls the $8,000.00 a legacy. He says, "should my estate not be enabled to pay off in full all legacies specified in this my last will and testament, including the $8,000.00 bequeathed to the church," etc., thus by implication terming this bequest a legacy. It is true that in the latter part of the clause he expresses a desire to pay in full all legacies at the expense of this bequest, and would seem therein to nullify such use, by implication, of the word before; but the bill alleges that this was written without the aid of counsel, and we may expect some inaccuracy of language. In this clause he is revoking enough of this $8,000.00 fund to pay in full other specific legacies. If it had been his purpose not to give this $8,000.00 except to aid in the church building, this would have been the place to say so. He was here considering how to pay in full divers legacies; and to that end was revoking part of this bequest. Had he meant to confine this to building, he would here have said, should the proceeds of my house and lot suffice to build the church without this fund, then I revoke this and direct it applied to the other legacies.

Again, if this had been designed as a building fund, because the proceeds of the house and lot would not suffice to complete the church without it, would the testator have turned any part of it over to legacies to strangers, and leave the church unfinished? We think not. This church was the main thought in his mind. To complete the edifice he gave the house and lot. It was to be two stories or

one, as the proceeds of that house and lot held out. Then $8,000.00, or so much thereof as was a residuum after paying other legacies, was to go to this church, to be used to keep it up, to repair it, to sustain it, to keep it in existence—a living church where the worship of God after the Presbyterian faith, doctrine and usage, was to be perpetuated for generations, and the name of the founder, if the trustees and executors did not deem it inappropriate so to connect his name with a place where God was to be worshipped, was to be held in respect by those who worshipped in its pews and preached from its pulpit.

Note further this last codicil in this respect, to-wit: the words "bequeathed to the church to be erected," evidently to it as a body corporate; otherwise he would have said naturally "bequeathed for the erection of the church." He does not even say to the trustees, but to the church, which was by prior direction to be incorporated.

And note further, in the third codicil the words, "should the residuum of my estate be sufficient," then this fund is given, thereby making the gift turn on anything being left, and treating this church as a sort of residuary legatee.

Some criticism has been made upon the other codicils appointing additional trustees, and the language used in them, and great acumen has been displayed in distinguishing these from the last—especially as they were written by a lawyer, this by the unskilled testator; but we do not think it sufficient to set off against the broader view we take of the will in its entirety, and the evident intention of the testator to be gathered from it and all the codicils and the memorandum.

We think, therefore, that the intention of the testator was to give this money to these trustees, to be used by them in and about the adding to, repairing, replenishing, re-carpeting, re-cushioning this church, as it should need corporeally such embellishment, and in sustaining therein the worship of Almighty God, according to the Presbyterian mode, and in connection with the general assembly of

that church south; that the complainants, therefore, have no equity in their bill whereby to call the trustees to account or discovery; and that the court below was right to sustain the demurrer, and to dismiss the bill.

Judgment affirmed.

SMITH *vs.* WADE, constable, *et al.*

Where the constable's answer to a rule shows money in his hands collected on the execution, and fails to show any legal reason for not paying it over, the rule should be made absolute. Notice to the constable, not accompanied with any judgment, *fi. fa.*, or other lien upon the money, is no justification for withholding the money from the plaintiff whose execution brought it into court. On the facts stated in the petition for *certiorari*, it should receive the sanction of the judge.

Certiorari. Rule. Levy and sale. Before Judge UNDERWOOD. Floyd County. At Chambers. July 29, 1879.

Mrs. Smith petitioned for the writ of *certiorari*, presenting the following facts: She obtained an "attachment absolute" against Chambers, former constable of the 919th district, G. M., in the case of petitioner against Bailey, for $25.00, with interest at 20 per cent. per annum theron from October 9, 1877. A *fi. fa.* was issued thereon by Towers, N. P., and *ex officio* J. P.; this *fi. fa.* has been reduced to $4.50 principal, with interest. It was placed in the hands of Wade, constable, for collection; and on January 11, 1879, the defendant therein paid to him $5.50. This amount the constable refused to pay over on demand. Wherefore she ruled him. He set up no excuse for his failure except the receipt of the following notice:

"J. L. WADE—You are hereby notified to hold up any money in your hands in favor of M. L. Smith to pay cost in the case of Moses Bailey *vs.* M. L. Smith *vs.* Moses Bailey. January 11, 1879.

[Signed] J. L. CHAMBERS, former L. C."

The magistrate refused a rule absolute, and dismissed the rule *nisi*. Wherefore petitioner prays the writ of *certiorari*. The writ was refused, and petitioner excepted.

W. D. Elam, by brief, for plaintiff in error.

Forsyth & Hoskinson, for defendants.

Bleckley, Justice.

Mrs. Smith ruled constable No. 1, and obtained an execution against him. He paid to constable No. 2 a balance due upon this execution. She then ruled constable No. 2, who answered that constable No. 1 had served him with a notice to hold up the money, and produced a copy of the notice, or, perhaps, the original.

Whether this pair of constables are pulling together or against each other, we see not how Mrs. Smith is to get her money by mere constable power. She seems to us to need judicial assistance. The magistrate ought to have made the rule absolute, and as he refused, the judge of the superior court should have sanctioned the petition for *certiorari*. Mere notice to an officer to detain money which he has collected on legal process, will not justify him in holding it. 53 *Ga.*, 79.

Judgment reversed.

Johnson *vs.* Christie, sheriff, *et al.*

The comptroller-general is not authorized by law to transfer tax *fi. fas.* issued by him against wild lands on payment of the amount due thereon.

See concurrence of Bleckley, Justice.

Tax. Officers. Comptroller-general. Wild lands. Before Judge Hood. Terrell Superior Court. May Term, 1879.

Johnson *vs.* Christie, sheriff, *et al.*

This was a rule *nisi* granted on petition of T. F. Johnson against S. R. Christie, sheriff of Terrell county. In his petition and amended petition the movant, Johnson, alleges that on the 18th day of February, 1878, and other days and times, he had duly assigned and transferred to him by W. L. Goldsmith, comptroller-general of the state of Georgia, two hundred wild land tax *fi. fas.*, issued against various lots of land in Terrell county, for which he paid to Goldsmith, as comptroller-general, $———, being the amount of tax due the state on such land and the accrued cost thereon. That he placed the *fi. fas.* in the hands of S. R. Christie, sheriff of Terrell county, who proceeded to levy and advertise the same for sale in terms of the law. That on or before the day of sale, various affidavits were filed with said sheriff, alleging that said lots were not wild lands, etc., as to ninety-seven of said *fi. fas.*, which he, as sheriff as aforesaid, failed to expose to sale, and upon which there is due and owing to movant $1,097.00, being the amount of tax and cost paid by him to the comptroller-general for the tax and accrued cost on said *fi. fas.* That the sheriff sold the other lots levied on under and by virtue of said *fi. fas.*, and that he has in his hands eight hundred dollars or other large sum arising from said sale.

By an amendment he alleges that he has paid to the state of Georgia the full amount of taxes due on each of said *fi. fas.*, and fifty cents cost charged by the comptroller general for issuing each of the same; that the *fi. fas.*, each and all of them, had been assigned to him, the said T. F. Johnson, by the comptroller-general, and that he had them duly recorded in Fulton and Terrell counties, within three months from the transfer thereof, and appends to his amended petition a list of the *fi. fas.*, the lots against which they issued, the amount of tax paid by him and the date of the transfer.

By another amendment to his petition movant sets forth that the *fi. fas.* were sold and transferred to him by W. L. Goldsmith, comptroller-general, with the guaranty that they

were valid, legal and binding liens on the lots of land set out in each of the *fi. fas.*, and that said lots were wild lands; and for the ninety-seven lots not sold he asked to be reimbursed not only the money paid for said *fi. fas.*, but the cost and expense incurred.

On motion of the solicitor-general, W. L. Goldsmith, comptroller-general, was made a party to the proceedings.

The sheriff's answer admitted the sale of the land, except the ninety-seven lots, and alleged a large number of the lots had been purchased by Johnson, the transferee, but not paid for; he also admitted that the *fi. fas.* had been placed in his hands by Johnson, and generally the matters set up in the petition for rule *nisi*.

On the hearing the court discharged the rule, and movant excepted.

Guerry & Parks, for plaintiff in error, cited Code, §891; acts of 1872, p. 75; acts 1874, p. 105.

Jas. T. Flewellen, solicitor-general; D. A. Vason; S. D. Irvin, for defendants, cited acts 1874, pp. 105, 106; Code, §891; Supplement to Code, §133; 73 Penn., 467; Cooley on Tax, 322, 323; 18 Grattan, 100; 9 Wallace, 320; 48 *Ga.*, 177; Code, §188; acts 1876, pp. 16, 30.

Warner, Chief Justice.

Johnson, as the transferee of certain wild land *fi. fas.*, brought a rule against the sheriff of Terrell county, requiring him to show cause why he should not pay over to him the money in his hands arising from the sale of certain described wild lands for taxes. Upon the hearing of the rule the court decided that the transfer of the *fi. fas.* to the plaintiff in the rule was made without authority of law, and was therefore void, and discharged the rule, whereupon the plaintiff excepted.

It appears from the evidence in the record that the tax *fi. fas.* were issued by W. L. Goldsmith, comptroller-gen-

eral of the state, against certain described wild lots of land for the taxes due thereon, and that the tax due the state on said wild lands was paid by said Johnson to the comptroller-general, who thereupon transferred said *fi. fas.* to him after the tax due to the state had been paid, and the question is whether the comptroller-general had any lawful authority to do so. The general rule is that when an officer performs an official act it must be affirmatively shown that he had the lawful authority to do that act, and this is especially so in regard to the execution of the tax laws of the state. After the most careful examination, we have been unable to find any law which authorized the comptroller-general to transfer tax *fi. fas.* issued against wild lands, after the tax due thereon to the state has been paid to him by any person, and therefore we affirm the judgment of the court below discharging the rule against the sheriff.

Let the judgment of the court below be affirmed.

BLECKLEY, Justice, concurring.

As to whether the transfer by the comptroller-general to the plaintiff in error was valid or not, is a question on which I do not and need not, for the purposes of this case, express an opinion. It was not as thoroughly argued at the bar as so difficult and important a question ought to be. The general lien law of 1873 provides for tax liens, as well as many other liens, and then declares that "all liens provided for by this act may be assigned by writing." Nor is it necessary to decide now whether a public officer can use a process to collect money, and then retain the money on account of an alleged defect in his authority to raise it. See 56 *Ga.*, 290; 8 Gr'l'f R. 334. Though the comptroller-general was made a party to the rule in the court below, he did not except to the judgment. So far as Johnson, the plaintiff in error, is concerned, the judgment discharging the rule against the sheriff was, on the facts contained in the record, correct, for the following reasons:

1. The transferee of a *fi. fa.* against specific property is

not entitled to the surplus produced by an official sale of the property, over and above the amount of the *fi. fa.* and costs, but such surplus belongs to the owner of the property.

2. When two or more *fi. fas.* are proceeding *in rem*, each against different specific property, such as a lot of land, money produced by a sale under one of the *fi. fas.* cannot be applied to pay off any of the others. One lot of wild land assessed by the comptroller-general, is not chargeable with the taxes or costs due on another.

3. Where the comptroller-general has issued a *fi. fa.* for taxes against certain land as wild, the sheriff ought not to levy and sell, if the fact be that the land is not wild but improved.

On these grounds I concur in the judgment of affirmance.

HARRIS *et al. vs.* POUNDS *et al.*

In a contest between two sets of trustees of a camp-meeting ground, one holding an appointment under the quarterly conference of the Methodist church, and the other under a grant from the superior court by virtue of authority claimed to be derived from the act of 1872—Code, §1677—and both claiming to hold the title for the use of the Methodist church of Warren county for camp-meeting worship, and no allegation being made that either has interfered or threatens to interfere with the beneficiaries in the enjoyment of the religious worship at said camp ground, equity will not interfere by injunction, but will leave the parties to settle the legal title by information in the nature of a *quo warranto*.

Equity. Injunction. Trusts. Before Judge POTTLE. Wilkes Superior Court. November Term, 1879.

Pounds *et al.* filed their bill in Wilkes superior court against Harris *et al.*, setting out the following facts:

That some time prior to the 31st of December, 1838,

John Nisbet and Aaron T. Kendrick deeded to Fuller and others, trustees of Fountain Methodist Episcopal Camp-ground, at Fountain, Warren county, 200 acres of land for the use of the Methodist Episcopal church of Warren county; that the deed has been lost, according to the information and belief of complainants, and that they also believe that the record of the same was destroyed by fire. That on the 31st of December, 1838, the legislature incorporated for thirty years "The M. E. Camp-ground, in the county of Warren, known by the name of 'Fountain Camp-ground,'" naming as incorporators Aaron T. Kendrick and all the grantees in said deed and their successors in office, giving them the power and authority usual in such charters. That the third section of said charter provided as follows: "And be it further enacted, that when any vacancy may happen in the trustees by death, resignation or otherwise, that a majority of the trustees in office shall be, and are hereby, required to fill any and every such vacancy or vacancies from time to time." That on the expiration of said charter, no renewal was made until the 7th of April, 1877, when, by an order of the superior court of Warren county, defendants, as trustees of said camp-ground, were named as incorporators, and said camp-ground again incorporated. That they were never elected trustees by the M. E. church or its authority; that the said church allowed them to remain until September, 1878, when, they refusing to report to said church and acknowledge its authority, said church, under its laws, dismissed them from office and appointed complainants as trustees of said camp-ground. That defendants refuse to surrender the said camp-ground to complainants, and threaten to proceed against them as trespassers should they enter on said camp-ground. The bill then refers to the act of 1805—Code, §§2343 *et seq.*—and recites that complainants have had their appointment recorded as therein required. The bill prays for an injunction against defendants, to restrain them from holding the camp-ground, etc., and that they may be removed from

office. Defendants demurred to the bill on the following grounds:

1st. Because there is no equity in the bill.

2d. Because title to the land embraced in the original deed and charters was never in trustees of M. E. church, nor were they ever amenable as such trustees to the discipline of said church, but title to said land was and is in other trustees, who are in no way subject to said church's authority.

3d. Because complainants have no authority to act as trustees of said camp-ground, not having been elected trustees as is required in original deed and the acts of and order of incorporation, as set out in exhibits to said bill.

4th. Because complainants have full and adequate relief for all their alleged wrongs in an ejectment suit in a common law court.

On the hearing, the court overruled the demurrer and granted the injunction, and defendants excepted.

W. M. & M. P. Reese; C. S. DuBose, for plaintiffs in error.

W. D. Tutt, for defendants.

Jackson, Justice.

It is quite clear that equity has jurisdiction over charities and religious trusts and uses in a particular and special manner under our Code. §§3155, 3157, 3158. Indeed it has such jurisdiction over trusts generally, Code, §3193, but especially over such trusts and uses as those set up in this bill. Therefore we cannot say that the chancellor should have dismissed the bill. Perhaps he was right to retain it until the question of the legal title to the trusteeship of this camp-ground could be tried and settled at law.

But the question here is not whether the bill should be dismissed; it is, ought the injunction to have been granted? It seems that the trustees of both sides claimed the right to

administer the trust. Neither set, apparently from all the allegations in the bill, set up any title adverse to the beneficiaries or uses to which the ground was dedicated. Both sets appear from the allegations in the bill to be Methodists, and the only difference seems this, that the one holds under appointment of the quarterly conference, the other under the court. Those holding under the court are in possession, it seems, and the effect of the chancellor's judgment or decree is to turn them out of, and put the others in control of, the grounds. An injunction restrains; it does not oust; its effect is to leave disputants in *statu quo;* it does not actively intervene so as to change possession under a *de facto* title; at least, such is the scope of an interlocutory injunction which only stands until the hearing, and which is the act of the chancellor alone before the facts are found by the jury.

The trustees who claim to be in under the appointment of the court are certainly in *de facto*, and the question of their title ought to be settled by the proper tribunal, we think, before they should be ejected and others put in possession and control. So it was ruled substantially in *Hussey vs. Gallagher*, 61 *Ga.*, 86.

It is true that the defendants do not appear to have followed the act with exactness under which they claim their appointment, and when properly investigated under an information in the nature of a *quo warranto*, it may be made to appear that their title is worthless. It seems to us, however, that a proceeding at law of that sort is the remedy of complainants under the allegations of their bill. They do not allege that defendants are preventing, or threatening to prevent, the Methodist people of Warren county from worship at the camp-ground. It is true that it is charged that they have done something which is not acceptable to the quarterly conference, but what that is is not distinctly alleged, except that they do not make returns to that body. If they were interfering with worship at the grounds, or otherwise using the land for their own emolument, or

changing the use and directing it to purposes inconsistent with the trust, then equity would restrain until the hearing, and on the hearing grant full relief; but no such allegations are made in the bill, and no depositions were exhibited on either side, no answer put in, but every fact on which the chancellor acted is set out in the bill.

While, therefore, on a *quo warranto* it may appear that these defendants are not entitled to the trust, because more than five applied to the court, and because camp-grounds are not apparently within the statute under which they hold—see Code, §1677; yet we hold that no reason appears in the bill why the harsh remedy of interlocutory injunction should be used against them.

Judgment reversed.

O'Connor *vs.* The State of Georgia.

1. A police officer may make an arrest without a warrant for a crime committed in his presence, or if the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant. But there must be an offense committed by the party arrested.
2. Where a police officer, without warrant, arrested a man who was guilty of no offense, and in preventing an escape struck and killed the prisoner, these facts would at least warrant a verdict of involuntary manslaughter in the commission of an unlawful act.
3. Where the evidence and the prisoner's statement conflict, the latter must yield to the former

Officers. Municipal corporations. Police. Criminal law. Evidence. Before Judge Simmons. Bibb Superior Court. April Term, 1879.

To the report contained in the decision it is only necessary to add the following grounds of the motion for new trial:

(1). Because the verdict was contrary to law and evidence.

(2). Because the court erred in charging as follows: "If you believe, from the evidence, that Franklin had not violated any criminal law of the state or any of the criminal ordinances of the city, then the defendant had no right to arrest him; and if he did arrest him it was an unlawful act, and if he struck him a mortal blow while under this illegal arrest, and Franklin died from such blow, although the defendant had no intention to kill him when he struck him, then he is guilty of involuntary manslaughter in the commission of an unlawful act, and you should so find."

(3). Because the court charged the jury as follows: "In making up your verdict you should not go outside of the evidence sworn to on the stand."

C. J. Harris; Hill & Harris; A. O. Bacon, for plaintiff in error.

C. L. Bartlett, solicitor-general; Samuel Hall, for the state.

Warner, Chief Justice.

The defendant was indicted for the offense of murder, and on his trial therefor was found guilty of involuntary manslaughter in the commission of an unlawful act. A motion was made for a new trial on the various grounds contained therein, which was overruled, and the defendant excepted.

1. 2. It appears from the evidence in the record, that the defendant was a policeman in the city of Macon, and that he arrested the deceased and was taking him to the barracks in said city, that the deceased attempted to escape from him, when defendant struck him on the head with a club, from which blow he died that same day, in the barracks, where he was confined. There is no evidence in the record that the deceased had committed any offense against the state or the ordinances of the city, nor is there any evidence that any person had lodged any complaint against the deceased for having violated any law of the state or city and

notified the defendant thereof, or that the deceased had committed or attempted to commit any violation of the law in the presence of the defendant at the time he arrested him. It is true that the defendant, in his statement to the jury, not under oath, says that he had heard that the deceased had, on the day before the arrest, offered to sell a pair of shoes found in his possession to Mrs. Noon, and at the time of his arrest was trying to sell the shoes to Molly Raoul. There was no evidence that the shoes had been stolen from any person, but, on the contrary, it was found that the deceased was a shoemaker, and that the shoes had been left with him by Fanny Cooper, the owner of them, to be stretched, and that deceased was to bring them to her the morning he was arrested with them in his possession. The defendant did not offer to prove by Mrs. Noon, or by Molly Raoul, the truth of his statement in regard to the deceased offering to sell the shoes to them, or either of them, even if that would have authorized him to have made the arrest of deceased. An officer may make an arrest without a warrant for a crime committed in his presence, or if the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant. Code, §4723. But there must be an offense committed by the party arrested. In the case under review there was no offense committed by the deceased to have authorized his arrest by the defendant. We have carefully examined the various grounds of error assigned to the rulings of the court during the progress of the trial, as well as to the charge of the court to the jury, and we find no error in overruling the motion for a new trial. In our judgment the law and the facts in the case required at least the verdict which the jury have rendered.

3. In charging the jury as to the prisoner's statement, nothing is better to be used than the language of the statute, and where the evidence and the statement conflict, the latter should yield to the former. *Brown vs. The State*, 60 *Ga.*, 210.

Let the judgment of the court below be affirmed.

Davis & Company *vs.* The Mayor and Council of Macon.

1. The city of Macon, having power by charter to tax all persons exercising within the city any profession, trade or calling of any nature whatsoever, may levy and collect a license tax upon every firm retailing fresh or butcher's meat in the city, whether from stalls, stores, or by peddling the same on the streets. An exception in the ordinance exempting farmers selling their own produce, does not make the tax invalid as to others. The tax is a business tax, and a farmer's business is production, not trade, and the sale by himself of what he rears or produces is merely occasional and incidental.
2. The city may also tax a butcher or retailer of meats, upon the wagon or wagons used in his business, and this likewise is a part of the business tax. The validity of this specific tax is not impaired by exempting the wagons used in delivering milk from dairies on country farms, since the city may tax one class of business and exempt another, or may tax different occupations and their instrumentalities unequally.
3. That all property taxes have been paid, is no obstacle to the imposition and collection of a business tax, measured in part or in whole by the employment and use of vehicles already taxed *ad valorem* as property.
4. The fact that the meat in which a retailer deals was produced in Georgia, and was never in the city until carried in for delivery from the wagon to customers at their doors, will not hinder the city from taxing the retailer on his business.
5. A butcher whose residence, shop and slaughter-pen are all out of the city limits, and who purchases cattle outside, and slaughters them outside, and has no place of business inside, but who habitually hauls inside a part of his fresh meat, and from his wagon delivers it to regular customers at their doors in the city, making no charge, and receiving no compensation for the delivery, is within the ordinance referred to above, both as to license tax and the specific tax upon his wagon; and the ordinance is none the less obligatory upon him than upon residents of the city who retail fresh or butcher's meat therein, and use wagons for delivering the same to customers.

Injunction. Municipal corporations. Tax. Constitutional law. License. Before Judge Simmons. Bibb County. At Chambers. September 16, 1879.

Reported in the opinion.

John L. Hardeman, for plaintiffs in error.

W. B. HILL, for defendants.

BLECKLEY, Justice.

In July, 1879, the city corporation of Macon issued a *fi. fa.* against H. G. Davis & Co. for fifty dollars, "it being license city tax for retailing fresh and butcher's meats in the city, and peddling the same on the streets, for the year 1879." Also a *fi. fa.* for twenty-five dollars, "it being license city tax for running a one-horse wagon for the year 1879." Both these *fi. fas.* were levied by the city marshal upon certain personal property of Davis & Co. An ordinance of the city, passed June 12th, 1879, declared that the various amounts specified therein should be levied and collected as license and business taxes for the year 1879; among the numerous specifications in the ordinance were the following: "Each person or firm (farmers selling their own produce excepted) retailing fresh or butcher's meat in the city, whether from stalls, stores, or by peddling the same on the streets, shall pay a license of $50.00. . . . "For each and every wagon used by butchers and bakers in their business, and wagons used by brewers and manufacturers of soda water, or for the delivery of oil, milk or any other article (except wagons delivering milk from dairies on country farms), and package delivery wagons, where such wagons are used for hauling in the city, and drawn by one horse, shall pay $25.00

By charter, the city of Macon has power to tax property, real and personal, within the city, at a rate not exceeding (for all purposes) one and a half per cent. *ad valorem*, and also "power to levy and collect a tax upon . . . . all persons exercising within the city any profession, trade or calling, or business of any nature whatever." Acts of 1871-2, pp. 120, 121. The constitution of 1877 (art. vii, section 2) declares "all taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed, within the territorial limits of the authority

levying the tax, and shall be levied and collected under general laws. . . . The general assembly may, by law, exempt from taxation (certain specified property). No poll-tax shall be levied except for educational purposes, and such tax shall not exceed one dollar annually, upon each poll. All laws exempting property from taxation, other than the property herein enumerated, shall be void." The Code, in section 1605, provides that "No municipal corporation of this state shall levy or assess a tax on cotton or the sales thereof, nor shall any such corporation levy or asses a tax on any agricultural products raised in this state, or the sales thereof (other than cotton), until after the expiration of three months from the time of their introduction into said corporations."

On the first of August, 1879, H. G. Davis & Co. filed their bill against the corporation of Macon, praying for an injunction against the collection of the two executions above described, and that said corporation and its officers be restrained from proceeding further at law touching the matters in questions. At the hearing of the order to show cause, the injunction was refused, and that is the alleged error.

The charges of the bill make the following case: The complainants do not reside within the corporate limits of the city; they carry on the business of butchers, but have no slaughter-pen, stall or place of business within the city; their slaughter-pen is about one mile outside of the city limits, and their shop is in Vineville; a few of their regular city customers reside in the city of Macon, and the complainants deliver to these, at their doors, fresh meats, using for this purpose a one-horse wagon, which wagon is the property of complainants; that for such delivery they charge nothing, nor are they paid anything; that they do not retail fresh or butcher's meat in the city from a stall or store, nor peddle the same upon the streets; and that the cattle they slaughter are raised in Georgia, not bought in the city, but bought from farmers in Bibb and adjacent

counties, brought to the complainants' pens outside of the city limits, and there slaughtered, and the interval between the purchase of the cattle and the sale of the meats is never longer than two weeks; and that the city has no public market. The bill proceeds to allege that the executions were issued and levied; complains that the levies were excessive, etc., and then attacks the validity of the ordinance for the following reasons: That the tax is not uniform upon the class taxed; that the city has no authority to license delivery wagons of non-residents used for their own purposes; that the city has no authority to tax agricultural products raised in Georgia, or the sale thereof, until after the expiration of three months from their introduction into the city; that by exempting farmers selling their own produce, the ordinance fails in uniformity; that complainants have paid all state and county taxes due on their property; that the city does the greater part of the work on the streets with the Bibb county chain-gang, to the support of which the city does not contribute. The bill also makes the point that the complainants are not within the provisions of the ordinance, because they are non-residents of the city, have no place of business within it, and do not retail meats within it from stalls or stores, or by peddling on the streets.

1. The power of the city to impose the so-called license tax is denied. But the authority to levy and collect a tax upon all persons exercising within the city any profession, trade or calling or business of any nature whatever, is expressly granted by the charter. This power is surely broad enough to reach the complainants if they carry on, within the city, the business of retailing fresh or butcher's meat. Why not? 59 *Ga.*, 188; 60 *Ib.*, 133.

The ordinance is further attacked as invalid because it has an exception in it exempting from its operation farmers selling their own produce. The exception would probably have been implied had it not been expressed, for the tax imposed is a business tax, a tax on avocation or calling. The business of a farmer is production, not trade, and the

sale directly by himself of what he rears or produces is merely occasional or incidental. No doubt very considerable restrictions might be imposed upon farmers as to the manner of conducting their trade; but while the public authority can restrict them in that respect, it is not obliged to do so as a condition of taxing other persons on their business or avocations. We need not and will not say that for the purpose of upholding a general meat-market, or a system of meat-markets, in a city, farmers could not be prohibited from retailing or peddling meat of their own raising within certain hours, and perhaps they could be confined to certain localities within the corporate limits. We have not thought it necessary to advert to authority on such questions as these, or even to address our minds to them with any earnestness, for it is manifest that, construing the ordinance in the light of the charter, the tax with which we are dealing is a business tax; and the disposition of meat as the immediate sequel to rearing animals upon a farm is obviously no separate calling from that of farming. It is but the primary link of connection between the producer and the consumer—a link fastened to the farmer's vocation, and with which the commercial chain begins if other links are added before the consumer is reached, and which constitutes the entire process where consumption is by the first purchaser. The constitutional requirement that "all taxation shall be uniform upon the same class of subjects," is not infringed by the ordinance in the provision which we are considering. The producer whose trade is incident to production, and the middle-man whose trade is intermediary between the producer and the consumer, belong not to the same class, but to different classes of subjects in a scheme of taxation. At least, the difference is wide enough to justify, if not to compel, its recognition in shaping the scheme.

2. The tax of the complainants upon the wagon which they use in their business is attacked because the ordinance exempts wagons used in delivering milk from dairies on

country farms; this discrimination also is urged as breaking up the uniformity which the constitution requires as to the same subjects of taxation. It is manifest that this wagon tax is a part of the business tax, and nothing can be plainer than that the delivery of milk from a farm-dairy is a different business from that of retailing butcher's or fresh meat. In adjusting a business tax, those who are engaged in the same business are to be taxed alike; but there is nothing in the constitution to prevent the different occupations and their instrumentalities from being taxed unequally, nor to prevent the taxation of one class of business and the exemption of another. 60 *Ga.*, 597.

3. It is insisted, further, that by the tax upon the wagon, the *ad valorem* principle of the constitution is violated. This objection proceeds upon the theory that the wagon is mere property, and subject only to state and county taxes, the owners not residing within the corporate limits of Macon, which taxes have been duly assessed and paid. The complainants contend that having paid all taxes on the value of the wagon as property with which they are chargeable, they cannot be required to pay an additional specific tax to the city upon the same property. But as already stated, the tax now in question is not a property tax, but a business tax; the wagon is treated as an instrument used in carrying on the business of the complainants within the city, and it has been ruled, and no doubt rightly ruled, that the number and kind of vehicles may be regarded in measuring a tax of this description. 62 *Ga.*, 645. That the complainants are in no default to the state and county in respect to taxes upon the value of the wagon as property, is no protection to them against the business tax now demanded. Frommer *vs.* Richmond, 31 Grattan, 646; S. C., 8 Reporter, 538. The suggestion in the bill that the streets of the city are not kept in repair at municipal expense, but by the labor of the county convicts, needs no discussion; for it does not appear that the city has been absolved from the legal obligation of keeping its streets in order. By

what means, as matter of fact, the obligation is complied with for the present, seems quite immaterial. That the complainants do not burden their customers with any charge for deliveries, cannot affect the question of taxation.

4. The next point relates to the effect of section 1605 of the Code upon both of the assessments we are considering. That section inhibits taxation by any municipal corporation on agricultural products raised in this state, or on the sales thereof, until after the expiration of three months from their introduction into the corporation. If fresh or butcher's meat can be classed as an agricultural product, without something in the context of the statute to show that the phrase, agricultural products, was, in this particular instance, used in a sense animal as well as in a sense vegetable, there ought to be evidence that the meat in question was produced in the pursuit or by the fruits of agriculture. Cattle, so far as we know, may be Georgia raised and belong to farmers, and yet never have consumed a pound of food derived from agriculture. In the middle and lower parts of the state, herdsmen or stock-raisers are perhaps indebted to natural pasturage alone for the subsistence and growth of the animals which they rear, and which afterwards find their way to market. We are not informed by the record that the agricultural industry of the state produced, or contributed to the production of the meats in which the complainants dealt. The cattle were bought from farmers, but there is no express allegation that they were "agricultural products." And when it is thought of closely, would it not be rather an unusual application of the phrase "agricultural products" to make it comprehend beef cattle? In ordinary usage, is not that phrase confined to the yield of the soil, as corn, wheat, rye, oats, hay, etc., in its primary form? When there has been conversion of the fruits of the soil into animal tissues, are we still to apply the phrase? And suppose we are to disregard the change in its first stage, and call a cow or a steer agricultural product, must we carry the name forward to the steak or roast which the butcher sells us from

the slaughtered animal? If cattle fall under the denomination, so do hogs; and if beef, so does bacon. Passing from this verbal difficulty, and turning to an argument of altogether another class, it is to be noted that the tax we are considering is not laid upon the beef sold, nor upon the sale thereof, nor is the amount of the tax measured by the amount of sales. The tax is upon business and upon the vehicle used therein, and to conduct such business by such means has no necessary relation to "agricultural products raised in this state," granting that fresh beef is to be classed as an agricultural product. It would be possible to conduct a like business by like means with beef raised elsewhere; and if the complainants chose to deal in Georgia raised beef, *as a business*, are they to be therefore exempted from all business tax? Is a merchant or factor to pay no business tax because he sells Georgia produce, rather than Alabama or Tennessee produce? And is the taxability or non-taxability of a butcher to depend upon the state in which the animals he slaughters happened to be reared? Granting that the discrimination could be made (and that it could is by no means certain), *must* it be made? We rather think not. Could a lawyer escape a professional tax by confining his practice to cases in which non-taxable property, such as that used for worship or burial, public charity, colleges, incorporated academies, etc., was involved or in controversy? It would be strange if he could.

5. The ordinance being good, are the complainants within it? Their residence, their shop and their slaughter-pen are all out of the city limits. They purchase and slaughter outside, and have no place of business inside, but they habitually haul inside a part of their fresh meat, and from their wagon deliver to regular customers at the doors of the latter, within the city; they make no charge for the delivery, but it is evident that they distribute the meat from their wagon in retail parcels. Where they cut and weigh to suit parcels to the demand of customers, does not appear. We are to suppose they do it in the wagon, as they do not aver

to the contrary. The pleadings and evidence are equally silent as to where orders are taken, and where payments are made, and whether made on each and every delivery, or by the week, month or year. There is no suggestion that the meat is not paid for, though the hauling is free. We cannot see but that the wagon is made a kind of portable shop, and moved daily to the door of each customer. Although the complainants allege that they do not peddle meats, they seem to rest the allegation on the fact that they confine their dealings to regular customers; but where a dealer supplies constantly recurring wants, he may be a peddler, however regular and uniform the demand may be for his wares. There is a striking degree of regularity in the patronage of almost every business. When I was a solicitor-general, nothing in my experience struck me with more force than that, term after term, in each county of my circuit, I met substantially the same body of people who had connection with the criminal docket—the same array of prosecutors, defendants and witnesses. Here and there a new man would come in, and occasionally a prosecut*or* would become a prosecut*ed*, and *vice versa*, and the witness class would sometimes disintegrate and mix up with the other two; but my *intimates* were, and continued to be for four years, very much the same individuals. They were my *regular customers*. It is not improbable that every peddler who follows the road has his regular customers, and that the regularity with which they buy induces him to return again and again to the same neighborhood, unless he has nomadic tastes which solicit him to disregard all routine. The complainants vouchsafe to us no explanation of their method of dealing with their customers, save that they deliver at their doors, and make no charge for delivery. Making, as we are bound to do, every reasonable presumption against them where they might explain and do not, we hold that they are within the ordinance, both as to the license tax and the specific tax upon the wagon, and that the ordinance is no less obligatory upon them than upon

residents of the city who retail fresh or butcher's meat therein, and use a wagon or wagons for making delivery to customers.

Judgment affirmed.

Tummons *vs.* Hamilton.

A deed executed on the 10th of September, 1874, while there was no law making usury illegal in Georgia, could not be tainted with usury, and therefore void as title.

Interest and usury. Title. Deeds. Before Judge Underwood. Floyd Superior Court. March Term, 1879.

Mrs. Tummons sued out a warrant to dispossess Hamilton of certain property occupied by him, on the allegation that he was a tenant holding over. He filed a counter-affidavit and issue was joined, the point at issue being whether Mrs. Tummons was the landlady of Hamilton or not. Plaintiff put in evidence, among other things, a deed from the defendant to her, dated September 10th, 1874, conveying the premises in dispute. Defendant contended that the deed did not convey title to plaintiff, because it was only intended as a security for a debt arising out of the sale of a mule by plaintiff to him in the summer of 1874, and because usury was charged, and a deed tainted with usury would be void. On this point the court charged as follows: "If the deed was made in consideration of the payment of a note in which there was usury, and the consideration of the deed was tainted with usury, no tenancy can be predicated upon a title thus tainted with usury, the relation of landlord and tenant cannot arise in such a case, and the tenant is not estopped from denying the landlord's title; if you are satisfied from the evidence that the deed is founded upon any such usurious contract, the plaintiff cannot recover."

After a verdict for defendant, plaintiff moved for a new trial. It was refused, and she excepted.

W. D. Elam, by brief, for plaintiff in error.

No appearance for defendant.

Jackson, Justice.

A motion was made for a new trial on various grounds, none of which seem to be material and tenable except the assignment of error in regard to the taint of usury in the deed from Hamilton to Mrs. Tummons. That deed was made on the 10th of September, 1874, pending the abolition of usury in this state, and the court charged that "if the deed was made in consideration of the payment of a note in which there was usury, and the consideration of the the deed was tainted with usury, no tenancy can be predicated upon a title thus tainted with usury, the relation of landlord and tenant cannot arise in such a case, and the tenant is not estopped from denying the landlord's title. If you are satisfied from the evidence that the deed is founded upon such usurious contract, the plaintiff cannot recover." Under the law as ruled by this court a deed made on the 10th of December, 1874, could not be so tainted with usury as to render the title void, and therefore this charge is erroneous; and inasmuch as the verdict of the jury is in these words: "We, the jury, find for the defendant because of usury," the error is vital.

In the case of *Ballard vs. The Peoples' Bank of Newnan*, 61 *Ga.*, 458, it was held that a deed made on the 25th of March, 1873, was not usurious, all laws on the subject of usury having been repealed on the 19th of February, 1873. So in the case of a mortgage in *Neil vs. Bunn*, 58 *Ga.*, 583, the same point in principle was ruled. So in *Broach vs. Barfield*, 57 *Ga.*, 601, it was held that "in 1874 there was no law in Georgia making usurious any agreement, written or verbal, for any rate of interest whatever." So

in 59 *Ga.*, 616, the case of *Cooper vs. Braswell*, it was held that "from February 13th, 1873, up to February 24th, 1875, there was no law against usury in this state; and with the repeal of the usury laws, the act annulling a deed tainted with usury, we think, was also repealed. Hence the deed of December, 1874, was good."

So that the question is not open with us and the judgment must be reversed, inasmuch as the right of plaintiff to dispossess defendant in the dispossessory warrant rested on the deed made in 1874, and the court charged and the jury found in the teeth of the decisions made in the cases cited.

Judgment reversed.

Thomas, trustee, *et al.* *vs.* Jones & Norris.

1. That the judge of the circuit who granted a rule *nisi* on a motion for new trial is related to one of the parties within the fourth degree, is not good objection to the hearing of the motion by the non-resident judge who tried the case, and to whom the motion was submitted by consent of parties.
2. Two of the grounds, among others, being that the verdict was contrary to law and evidence, and the resident judge having granted a rule *nisi*, the motion was submitted by consent to the non-resident judge who tried the case. In answer to the rule, respondent showed for cause that neither the grounds of the motion nor the brief of the evidence had been approved. The judge hearing the motion corrected and approved them and overruled the objection:

Held, that there was no error in this proceeding.

3. That court was adjourned to a specified time at which no cases were to be tried except by consent, did not prevent the filing of a motion for a new trial.
4. The verdict was proper against the trust estate, but the usee for life and her trustee alone being parties defendant, the judgment should have been against the life estate only.

Practice in the Superior Court. New trial. Trusts. Parties. Judgments. Before Judge Pottle. Richmond Superior Court. October Term, 1878.

Reported in the decision.

J. C. C. BLACK, for plaintiffs in error.

F. H. MILLER, for defendants.

WARNER, Chief Justice.

It appears from the record in this case that to April term, 1876, of Richmond superior court, Jones & Norris commenced their action at law against J. J. Thomas and J. L. Clanton, trustees of Gertrude Thomas, wife of said J. J., and against said Gertrude Thomas, to recover out of the trust estate the sum of $992.36, a bill of particulars being annexed showing the provisions furnished from June 20, 1874, to December 2, 1874, with names of twelve laborers employed. *Non est inventus*, was returned as to Clanton, but J. J. Thomas, trustee, and Gertrude Thomas, acknowledged service March 2, 1876.

The trust was created under deed from Turner Clanton dated January 6, 1854, and recorded April 4, 1854.

The terms of the trust are as follows: "For the sole and separate use of said Gertrude, during her natural life, and that the same shall not be liable for the debts, contracts or liabilities of the said Jefferson, or any after-taken husband, and that upon the death of said Gertrude, to vest in her child or children, if any she have, share and share alike, the issue of a deceased child to take in the place and stead of its deceased parent. But if the said Gertrude leave no child or children, or the descendants of a child in life at the time of her death, as aforesaid, then the same shall return to and vest in the said Turner Clanton, if in life, and if not in life, then to the heirs at law of the said Turner Clanton." All the property set forth in plaintiffs' declaration was held under said trust. Portion was afterwards conveyed, February 1, 1868, from J. J. Thomas, individually, and portion from distribution of Turner Clanton's estate, March 30, 1869.

The declaration sets out as follows: "That the children interested in the remainder and now in life are Turner C. Thomas, Mary Bell Thomas, Jefferson J. Thomas, Cora Lou Thomas, Julian C. Thomas and Katherine Thomas.

"That the trust estate became and is now liable for these provisions, money and supplies furnished the said trustees and *cestui que trust*, to feed and clothe the laborers engaged in cultivating the land, raising the crops thereon, and in keeping the premises in repair. When the debt became due the said J. Jefferson Thomas, as one of the trustees, executed his promissory note dated May 4, 1876, and due December 1, thereafter, for the sum of $1,124.35, and delivered the same to J. B. Norris, one of your petitioners, which note was not paid at maturity.

"That the said J. Jefferson Thomas is entirely insolvent and cannot be held liable on said note as trustee, which is hereby tendered back to him."

J. J. Thomas as trustee, and Gertrude Thomas separately, pleaded the general issue, which pleas were sworn to October 20th and 23d, 1877, they being represented by T. Oakman, Esq.

After this a portion of the trust property was placed in the hands of defendants' attorney, Thaddeus Oakman, and he ordered by J. J. Thomas, trustee, in writing, filed with the record, to pay over the moneys collected to plaintiffs' claim then in suit against the trust estate, and payments were made as set out in the record and allowed in the judgment

The case was heard and verdict rendered November 6, 1878, as follows:

"We, the jury, find for plaintiffs against the trust estate set out in the petition, the sum of $952.78, with interest and costs of suit, to be enforced by execution against the property and without personal liability of the trustee, as the trust estate is liable for the debt and its payment."

Judgment was entered November 6, 1878, against the property, and execution stayed by Judge E. H. Pottle, of the Northern circuit, when he entered the judgment on the verdict, for thirty days.

On January 22, 1879, motion for a new trial was filed, and *supersedeas* granted by Judge CLAIBORNE SNEAD, of Augusta circuit, and rule *nisi* made returnable January 25, 1879.

The grounds of motion were:

1. Because said verdict is contrary to law.

2. Because said verdict is contrary to evidence, and without sufficient evidence to support it.

3. Because the court overruled a motion of defendants to dismiss said case, on the grounds that the petition on its face did not make said trust estate liable in said action.

4. Because the court held that the facts alleged rendered said trust estate liable in said action.

5. Because the court struck defendants' plea of general issue, and held defendants must plead specially.

Cause was shown by Jones & Norris as follows:

1. The rule *nisi* is void, having been issued by his Honor Judge SNEAD, who is related within the fourth degree of affinity to Gertrude Thomas, one of the defendants, and has, after one stay of execution has expired, been renewed without cause.

2. Because the grounds of the motion are not approved by the Hon. E. H. POTTLE, who presided in the case, and no reason given for his not doing so.

3. Because no brief of testimony has been filed and approved by the said judge, or any other judge, or consented to by the plaintiffs prior to or at the filing of said motion.

4. Because the brief of evidence filed is incorrect in the following particulars: "It was admitted by defendants' attorney that the articles sued for had been delivered to the trustee and used for the maintenance and support of the laborers employed in cultivating the trust estate and property in Richmond and Columbia counties, set out in the petition, for the use and benefit of the trust estate, the income of which estate was received by him as trustee, the names of the laborers appearing in the bill of particulars. That after the suit was brought, and plea of general issue filed,

a part of the trust property was placed in the hands of Thaddeus Oakman, defendants' attorney, to pay this debt as one due by the trust estate, and that the amount of the payments by him were to be credited on the judgment if rendered in favor of the plaintiffs, he (Oakman) not then having the original receipts present in court. Also, that all the beneficiaries of the trust were correctly set out in the petition."

5. Because the session of the court at which the motion is now made is specially for criminal cases, under the act authorizing such sessions, and the motion for new trial is therefore not filed in time nor within sixty days from the rendition of the judgment which stayed execution thirty days.

6. Because the motion failed to set out the events of the trial, which are as follows: "Defendants demurred to the declaration, which demurrer was overruled. Plaintiffs then put in evidence the deeds, will, and so forth, creating the trust as set out in the petition, with the admissions set out in the 4th objection, in addition to the brief filed, when defendants moved for a non-suit." Upon the discussion of this motion the court asked what plea was filed, to which a reply was given the general issue only; the judge then remarked it was insufficient, and defendants should plead specially. Plaintiffs' attorney then stated that under the evidence before the court it was solely a matter or question of law applicable to the facts which were not in controversy, and proposed that a verdict should be taken in accordance with the ruling of the court as to the liability of the trust estate for debts created for maintaining the laborers thereon. The proposition was consented to, and after argument the court held the trust estate liable, and a verdict was taken accordingly, without further objection from defendants' attorney.

The minutes of Richmond superior court show:

That the regular October term, 1878, commenced October 21, and was held four weeks, during which time juries were in attendance.

On November 14, 1878, Judge POTTLE presiding, the following special jurors were drawn: thirty-six for second day of December, 1878.

Court adjourned to November 15, 1878. November 15, met and adjourned to November 16, 1878. November 16, met and adjourned, no time being named, but order taken afterwards fixed the day to December 2, 1878. December 2, court met pursuant to adjournment, Judge GIBSON presiding. Adjourned to December 17, 1878, and daily to December 21, and then until 13th January, 1879. On 20th December, jurors were drawn for the court to meet January 13, 1879.

Court met January 13, 1879, Judge SNEAD presiding, and continued daily in session until rule *nisi* granted January 22, 1879.

It is admitted that no order appears on the minutes calling any adjourned or special term of the court.

Also, that about 20th December a meeting of the bar was held in the court-room, at which the presiding judge and judge elect were present, when it was, after hearing the views of Judge SNEAD about the court to meet in January, resolved that no cases would be tried at the January session of the court, except by consent, when that term met. The judge refused, in view of this action of the bar, to allow a motion to be made to dismiss a plea, parties not consenting.

At the time of the passage of the order of the judge correcting the minutes so as to fix a day of adjournment, Judge SNEAD ruled that he did not construe the action of the bar to prohibit the filing of a motion for new trial, or the correction by the court of its own minutes.

After the filing of motion, granting of rule and filing of return thereto, an order was passed as follows: "It appearing that this court was adjourned on the 16th of November last until the 2d day of December thereafter, but that entering the same on the minutes the clerk failed to state the term to which the court adjourned:

"It is ordered that the clerk amend the minutes by entering thereon the day to which the court adjourned, and that this order be placed on the minutes.

CLAIBORNE SNEAD, Judge Superior Court."

After the return of the rule an order was taken as follows: "Parties by their counsel in the above-stated case consenting, it is ordered that said motion for new trial be submitted to the Hon. E. H. POTTLE, Judge of the Northern Circuit, who presided in said case, to be heard and determined in vacation, with liberty to either party to except as in term time. No right is intended to be waived hereby by either party, except the question of jurisdiction in the granting of the rule *nisi* by Judge SNEAD, but not the time and term at which the action was had."

The papers were then submitted to Judge POTTLE, who overruled the motion February 22, 1879.

On the brief of evidence and motion for new trial he certified as follows: "I certify that the brief of evidence is correct, except that which is contained in the fourth ground of plaintiffs, in answer to the rule in this case, should be made part of the brief; such was the testimony allowed on the trial.

E. H. POTTLE, Judge Superior Courts N. C."

"I also certify that the grounds of the motion are correctly stated except that the facts set forth by plaintiffs' counsel in his sixth ground of answer to the rule is a true version of the history of said case during the progress of the trial, and they are adopted by me.

E. H. POTTLE, Judge Superior Courts N. C."

February, 22, 1879.

The defendants' brief of evidence, previously filed, admitted the trust as set out in the declaration, that the property was held thereunder, the giving of the promissory note set out to close the account, that J. J. Thomas purchased the articles in bill of particulars, and gave the note as trustee, and was insolvent.

The assignment of error in bill of exceptions is, refusal

to grant new trial on the grounds set forth in the said motion.

1, 2, 3. The grounds insisted on by the plaintiffs by way of objection to the defendants' motion for a new trial being heard and considered by the court as hereinbefore set forth, were not well taken.

In view of the evidence in the record, the verdict was right, but from that evidence the court should have entered a judgment on the verdict for the sale of the life estate only of Mrs. Thomas in the trust property, and not the entire *corpus* of the property in which the remaindermen were interested. We therefore affirm the finding of the jury and the overruling of the motion for a new trial, and direct that the judgment of the court thereon be modified so as to order a sale of the life estate only of Mrs. Thomas in the trust property, or so much thereof as may be necessary to pay the plaintiffs' demand against it.

Let the judgment of the court below be affirmed, with directions as herein indicated.

The State *ex rel.* Lynch *vs.* Bridges, jailer, *et al.*

1. On *habeas corpus* in behalf of one confined under mesne process for the recovery of personal property, the legality of the imprisonment does not depend upon the truth of the plaintiff's affidavit, but upon the sufficiency and due verification of the material facts alleged therein, together with the substance of the declaration, the jurisdiction of the court, and the sheriff's return. If the court has jurisdiction of the person and of the subject matter, and the declaration sets forth a cause of action, and the affidavit conforms to the statute, and there is proper process, with due service, and the property has not been seized because it was not to be found, and the requisite bond and security have not been given, the prisoner ought to be remanded.
2. In the present case, neither the affidavit nor the declaration, nor do they both together, show the commission of a larceny or other felony, with full certainty.

3. When the wife of a prisoner sues out a *habeas corpus*, she can bring a writ of error upon the final decision made on the hearing of the *habeas corpus*.
4. An acknowledgment of service on a bill of exceptions by counsel signing as attorneys for "respondents," will be construed as evidence of service on all the respondents, where the record fails to show that any of the respondents were represented by different counsel in the court below.

Habeas corpus. Husband and wife. Parties. Practice in the Supreme Court. Before Judge SNEAD. Richmond County. At Chambers. February 18, 1879.

On the 18th day of November, 1878, there was filed in the clerk's office of Richmond superior court, an original affidavit as follows:

"STATE OF GEORGIA, Richmond County.

"Personally appeared, Hugh Dempsey who after being duly sworn, says that he is the superintendent and agent acting in this behalf for the Southern Express Company, a corporation existing under and by virtue of the laws of the state of Georgia. That said corporation is about to commence an action at law against Walter S. Lynch returnable to the April term, 1879, of Richmond superior court, for the recovery of certain personal property, consisting of a certain package done up in buff paper and having written thereon '$25,000, Reeves, Nicholson & Co., Athens, Ga.,' the same being sealed with wax having the initials of G. W. W. & Co. stamped thereon, measuring about ten inches in length by seven and half inches in width, and about six and half inches in depth, and shipped by Geo. W. Williams & Co., of Charleston, South Carolina.

"That said personal property was delivered to Walter S. Lynch, November 5, 1878, as a messenger between Port Royal and Augusta, to be brought by him to Augusta, Georgia, for transmission to Athens, Georgia, and it has not been transmitted by him or delivered to the Southern Express Company, and that the same is in the possession and under the control of said Walter S Lynch.

"That deponent for and in behalf of said corporation, has reason to apprehend and does apprehend that the said personal property will be removed away and will not be forthcoming to answer the judgment that shall be made in the case.

"That the said personal property is of the value of twenty-five thousand dollars, and the package contained divers, to-wit: twenty notes of the United States, commonly called currency notes, for the payment of the sum of one hundred dollars each; five hundred of the

same denomination of notes, each of the value of twenty dollars; one thousant of the same denomination of notes, each of the value of ten dollars; six hundred of the same denomination of notes, of the value of five dollars each.

"Deponent further swears that in behalf of said corporation he does verily and *bona fide* claim said personal property for said Southern Express Company, who have paid the value thereof to said George W. Williams & Co., and he desires bond and security may be required of said Walter S. Lynch for the forthcoming of said property.

HUGH DEMPSEY."

Declaration was filed the same day in trover at common law as follows:

"The petition of the Southern Express Company, a corporation of the county and state aforesaid, showeth that Walter S. Lynch, of the county aforesaid, has greatly endamaged your petitioner, for that whereas, heretofore, to-wit: on the fifth day of November, in the year of our Lord, one thousand eight hundred and seventy-eight, and in the county aforesaid your petitioner was possessed as of its own property, of a certain package done up in buff paper and having written thereon '$25,000.00, Reeves, Nicholson & Co., Athens, Ga.,' the same being sealed with wax, having the initials of G. W. W. & Co. stamped thereon, measuring about ten inches in length, by about seven and a half inches in width, and about six and half inches in depth, and shipped by George W. Williams & Co., of Charleston, South Carolina, of great value, to-wit: of the value of twenty-five thousand dollars, and being so thereof possessed as aforesaid, your petitioner afterwards, to-wit: on the day and year and in the county aforesaid, casually lost said package out of its possession, and the same afterwards, to wit: on the same day and in the county aforesaid, came to the possession of the said Walter S. Lynch by finding.

"Yet the said Walter S. Lynch, although he well knew the said package to be the property of your petitioner as aforesaid, has not delivered the same to your petitioner although often requested to do so, and afterwards, to-wit: on the day and year, and in the county aforesaid, converted and disposed of said package to his own use."

The declaration contained also a second count which differed only from the first in that it set forth a description of the treasury notes which were in the package, and proceeded:

"Yet the said Walter S. Lynch, although he well knew the said package and contents aforesaid to be the property of your petitioner as aforesaid, has not delivered the same to your petitioner, although often requested so to do, and afterwards, to-wit: on the day and yea

and in the county aforesaid, converted and disposed of said package and contents to his own use, to the damage of your petitioner fifty thousand dollars."

To this was annexed a copy of the original affidavit and process.

Original was indorsed:

"Filed in office 18th Nov., 1870. S. H. CRUMP, Clerk.

Sum sworn to..... .....$25,000.

Take bail for ....$50,000."

The original declaration and copy were placed in the sheriff's hands, whose action is set forth in his return on the original writ as follows:

"Served a copy of the within petition and process and copy of the affidavit on the defendant, Walter S Lynch, arrested him at the same time, and not being able to give bond and not producing the property, I put him in jail this 18th day of November, 1878, in the custody of Theodore C. Bridges, jailer.

"CHARLES H. SIBLEY, Sheriff R. C."

The original papers were first lodged with the jailer but withdrawn, and the following paper deposited with the jailer when the originals were returned to court:

"The Southern Express Company, } Trover and Bail,
vs. April Term, 1879,
Walter S. Lynch. } Richmond Superior Court.

Sum sworn to, $25,000.00.

"The defendant having been this day served with a copy of the petition, process and bail affidavit in the above stated case, was arrested by me, and on failure to enter into recognizance for the forthcoming of the property sued for, and being unable to find that property myself, or to seize and take possession thereof, I now, pursuant to the requirements of the law, commit him to jail, to be kept in safe and close custody until the property sued for is produced, or until he shall enter into bond with good security for the eventual condemnation money.

CHARLES H. SIBLEY,

"November 18th, 1878. Sheriff Richmond Co."

Mrs. Elizabeth M. Lynch, as wife of Walter S. Lynch, petitioned for a writ of *habeas corpus*, February 10, 1879, upon the following grounds:

1. That the arrest and confinement is illegal, because the affidavit for bail attached to the declaration was made by a

person not authorized to make such affidavit for a corporation.

2. Because the affidavit for bail in said action was not filed in the clerk's office of the court to which said petition was returnable, to-wit: the superior court of said county, and a copy thereof affixed to the original petition and the copy thereof.

3. Because the copy of the original petition, affidavit and process, was not served upon Walter S Lynch by the sheriff or other lawful officer, but was served upon him (if such an act can be called a service), by being handed to him by Hugh Dempsey, who was neither the sheriff nor other lawful officer.

4. Because such action was not instituted in good faith for the purpose and with the intention of recovering the property described therein or the value thereof, but was begun, and is continued by the plaintiff therein in fraud of law, and for the purpose, by oppression and long confinement in jail, and the bringing of your petitioner and her children to want, or a worse fate, to extort money from the friends or relatives of the defendant in payment of a claim for the money lost by defendant or stolen from him while in transit to the point of delivery.

5. Because said property was not "in the possession, custody or control of defendant" at the time of the demand therefor as sworn to by said Hugh Dempsey, as "superintendent and agent," said affidavit of said Dempsey being false and without the slightest foundation in fact and truth.

6. Because an action of "trover and bail" will not lie for the recovery of money under the facts of this case.

7. Because said action cannot be maintained, the injury complained of amounting to a felony, as defined by the Code of this state, and the said company having failed and refused to prosecute said defendant, either simultaneously or concurrently, or previously to the institution of said action for the same, or to allege a good excuse for the failure to so prosecute.

The jailer returned as the cause of commitment the paper lodged by the sheriff, and justified his confinement of relator solely under the act of December 13, 1820.

He prays that the City Council of Augusta, sheriff, and Southern Express Company be made parties, and submitted to the court solely for his protection in the premises, and asked decision on the following:

1. That this petition nor writ of *habeas corpus* has ever been filed in the clerk's office of Richmond superior court, and is not valid until placed on the docket of that court.

2. That the writ should have been issued against the sheriff of Richmond county or the City Council of Augusta, and not to him, as jailer.

3. That the judge of the superior court of the Augusta circuit has no jurisdiction in vacation under a writ of "*habeas corpus*" to determine the validity of civil process returnable to a regular term of a court of this circuit.

4. That the process under which Lynch is held in custody is lawful, and that at April term, 1879, it being the appearance term of Richmond superior court, which is a court of competent jurisdiction, can only a motion be lawfully made or entertained in respect to the validity of the process or detention thereunder.

On the filing of the return of the jailer, the court ordered that the sheriff, Charles H. Sibley, and the Southern Express Company be made parties.

The sheriff then answered, adopting the return of the jailer, also that he did, on the 18th day of November, 1878, personally serve the defendant, Walter S. Lynch, with a copy of the petition and process and bail affidavit in the case, and that his return upon the original papers to April term, 1879, of Richmond superior court, is correct and true.

The Southern Express Company also adopted the answer of the jailer.

The petitioner's attorney then filed a traverse as follows:

'And now comes the petitioner, Mrs. E. M. Lynch, by her attorneys, 'and traverses the truth of the facts set forth in the foregoing answer

of T. C. Bridges, jailer, and the Southern Express Company, and alleges the facts as set forth in the grounds of her petition to be correct and true, and also accepts as true the answer of Charles H. Sibley, sheriff, and contests the sufficiency of the causes set forth in the answer of the said Bridges for the detention of the said W. S. Lynch, and strikes the 2d and 3d grounds of the petition for writ."

The demand served on Lynch was as follows:

"To Walter S Lynch:

Demand is hereby made upon you for the immediate delivery to the Southern Express Company of a certain package done up in buff paper, having written thereon '$25,000 00, Reeves, Nicholson & Co., Athens, Ga.,' the same being sealed with wax having the initials of G W. W. & Co. stamped thereon, measuring about ten inches in length, seven and a half inches in width and about six and a half inches in depth, and delivered to you November 5, 1878, as a messenger between Port Royal and Augusta, Ga., to bring to Augusta, Ga., for said Southern Express Company.

"That upon failure to comply immediately with this demand an action will be brought against you for converting the same.

"November 18, 1878.

Southern Express Company."

By Hugh Dempsey, superintendent."

The bill of exceptions recited the history of the case during the trial, as follows: . . . . Upon the request of said jailer and in accordance with the desire of said parties, the Southern Express Company, plaintiff in the action upon which said Walter S. Lynch was committed, and Charles H. Sibley, sheriff of said county, by whom said defendant was committed, were made parties. The request of said jailer to have the City Council of Augusta also made a party was refused.

The return of said jailer was traversed in writing and issue joined thereon, and petitioner offered evidence to disprove the statement made in the affidavit for bail, "that the same (the personal property sued for) is in the possession and under the control of the said Walter S. Lynch," and to show that the same was lost or stolen from the possession, custody or control of the said Walter S. Lynch, while in the employ of the Southern Express Company, November 5th, 1878, evidence of which was in the

possession of the maker of said affidavit, prior to and at the time of the making of said affidavit, and that said property had not been in the possession, custody or control of the said Walter S. Lynch since that time. Petitioner offered also to prove that the failure to deliver said personal property to the plaintiff on demand, or surrender or point out the same for seizure by the sheriff, was due alone to the inability of the said Walter S. Lynch to comply therewith on account of the loss or theft as aforesaid. That he did not enter into the recognizance provided for by law, solely because that by reason of his poverty he was unable to give such a bond.

All of which was repelled by the court, and the announcement made that it would only receive evidence as to whether or not the Southern Express Company, as plaintiff in said action, had prosecuted the defendant under section 2970 of the Code, or alleged a good excuse for its failure to prosecute. The petitioner thereupon put in evidence the admission of the plaintiff that it had not prosecuted the defendant, the original declaration with affidavit attached, and accepted in lieu of said original affidavit, and the demand made by plaintiff upon the defendant prior to the filing of said suit, to be found in the brief of the evidence.

The respondent Bridges and the Southern Express Company offered the commitment from the sheriff under which the defendant was held after the withdrawal of the declaration, etc.

The judge refused to discharge the prisoner, whereupon a bill of exceptions was sued out by Elizabeth M. Lynch, and error assigned on the following grounds:

1. Because the court erred in repelling proof of the falsity of the statement in the affidavit for bail by Hugh Dempsey, to-wit: "that the same, (referring to the package sought to be recovered in said action) is in the possession and under the control of the said Walter S. Lynch," and to show that said package was lost or stolen from the possession, custody and control of the said Walter S. Lynch while in the

employ of the Southern Express Company, November 5th, 1878.

2. Because the court erred in repelling evidence by petitioner that the failure to deliver said personal property to the plaintiff on demand, or to deliver the same to the sheriff for disposition as provided by law, was due solely to the fact that said property was not in his possession, custody or control, having been lost or stolen out of his possession, custody and control as aforesaid, and his failure to enter into a recognizance for the forthcoming of said property as provided by law, was due alone to the fact that from his poverty he was unable to give such recognizance.

3. Because the court erred in deciding that section 2970 of the Code was limited to physical injuries, and did not apply to torts to property, although such torts amounted to a felony as defined by the Code of this state, and that therefore, although the record in said case made out a *prima facie* case of larceny after trust, which was a felony as defined by the Code of Georgia, it was not incumbent upon the said Southern Express Company, as plaintiff in said action, to prosecute for the same, or to allege a good excuse for the failure to so prosecute, and that plaintiff could maintain said civil action without having "either simultaneously or concurrently or previously" prosecuted for the same, or alleging a good excuse for the failure so to prosecute.

4. Because the court erred in remanding the said defendant to jail under the law and facts of this case.

5. Because the court erred in deciding that upon a traverse of a return to a writ of *habeas corpus*, no evidence was admissible except the record in the case in which defendant was held in custody, and evidence to establish that the plaintiff had or had not prosecuted for the tort under section 2970 of the Code.

When this case was called a motion to dismiss the writ of error was submitted upon the ground that the wife of the prisoner was not, herself, entitled to a review of the

decision by bill of exceptions, the prisoner not complaining. And because the acknowledgment of service was simply signed by "Frank H. Miller and J. S. & W. T. Davidson, attorneys for respondents," not showing that all of the parties respondent were represented in such acknowledgment. The record failed to disclose that any of such respondents had been represented by other and different counsel in the court below.

The motion was overruled, the court holding as stated in the third and fourth head-notes.

H. CLAY FOSTER, for plaintiff in error.

FRANK H. MILLER; J. S. & W. T. DAVIDSON, for defendants.

BLECKLEY, Justice.

1. There was an action of trover, and the court had jurisdiction both of the person and the subject matter. There was such an affidavit as the statute prescribes. The declaration sets forth a cause of action; there was regular process, and due service. The property had not been seized because the officer could not find it, and the requisite bond and security were not given by the defendant. These facts made a case for imprisonment. Code, §3420. To go beneath them and inquire into the *truth* of the matters alleged in the declaration and affidavit, would be to engage the *habeas corpus* court in a work of subsoiling which can be fitly done only by the court in which the main action is pending, and upon a regular trial in the due course of proceedings. Imprisonment until a trial can be had does not depend upon whether the plaintiff has a good case for a recovery, but upon whether he puts a good case upon paper, and locates it in the proper forum. In what he alleges there may not be one word of truth, but his alleging it in the manner prescribed and upon the sanctions which the law ordains, entitles him to have the property produced

or the defendant imprisoned if the latter will not give bond and security. What is needed to justify an imprisonment is only due process of law, and it is obvious that there may be the same legality of process in behalf of an unjust suitor as of a just one. The time for discriminating between cases of merit and those without merit is at the trial. Indeed, the sole object of a trial is to find out whether the complaint is well or ill-founded. Where imprisonment takes place on *mesne* process, the range of inquiry upon *habeas corpus* is simply, whether the plaintiff has brought a proper suit in the proper court, and has taken all the steps in procedure which the law lays down as conditions precedent; these things appearing, the lawfulness of the custody follows necessarily. The investigation relates to what has been done; not to whether it ought to have been done.

2. It was urged in argument that the tort complained of amounted to a felony in our law, and therefore that the action of trover could not be maintained without an averment in the declaration that the wrong-doer had been prosecuted, etc. In the affidavit is some indication of a larceny after trust, but the commission of this offense does not appear with full certainty, from either the affidavit or the declaration, nor from both together.

3. 4. The motion to dismiss the writ of error was not well taken on either of the grounds.

Judgment affirmed.

Tritt *vs.* Roberts.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. It is not the agreement of counsel but the certificate of the presiding judge which verifies the brief of evidence to enable this court to review the case; therefore the judge, even after counsel had agreed upon a brief satisfactory to themselves, may correct it by

interlineations or otherwise so as to make it conform to his recollection of the facts.

2. Possession of part of one lot embraced in the same deed with other lots will not be extended by construction to the other lots, unless the deed be on record, so as to work a title by prescription; and constructive possession of the unoccupied lots will not begin to run until the date of the record.

Practice in the Superior Court. Deeds. Title. Prescription. Before Judge LESTER. Cobb Superior Court. March Term, 1879.

Reported in the opinion.

A. S. CLAY; W. T. & W. J. WINN, for plaintiff in error.

C. D. PHILLIPS; GOBER & LESTER, for defendant.

JACKSON, Justice.

Roberts brought an action of *trespass quare clausum fregit* against Tritt, for taking and carrying off of lot eight hundred and thirty, in the sixteenth district and second section of Cobb county, certain rails thereon. The jury found for the plaintiff, and the defendant made a motion for a new trial; it was overruled, and thereupon he excepted.

1. One complaint made in the bill of exceptions is, that the court erred in altering a brief of the evidence which had been agreed upon by counsel. This court looks to the presiding judge to certify the bill of exceptions, and not to the counsel. Agreement of counsel without such certificate would not avail to bring the case here in order to have it reviewed. Code, §4252. Therefore the judge may correct the brief of evidence before he decides the motion for a new trial so as to make it conform to the facts proven before him, as he remembers them; and this he may do even after counsel have agreed upon the brief as perfectly satisfactory to themselves. It is upon the judge, not upon counsel, that the law imposes the duty to verify the facts

set out in the bill of exceptions or appended to the motion for a new trial.

2. The plaintiff attempted to show a prescriptive title, and under the evidence, as corrected by the court below, the verdict could be supported, though the testimony is very conflicting on the question of actual possession of a part of this lot by the plaintiff. But we cannot tell whether the jury passed at all upon that issue, to-wit: continuous adverse possession of lot 830 for seven years, for the reason that the court charged the jury that if this lot, 830, was embraced in the same deed with other lots, and if defendant was in possession of either of the others, that possession extended to the boundary described in the deed and would embrace this lot too. The proof was that plaintiff did possess an adjoining lot, having a twenty acre field thereon cleared and cultivated for years, and a deed was in evidence covering number 830 and two other lots. But there is no evidence in the record that the twenty acre field was within either of the lots included in this deed, and therefore there is no evidence to support this charge. Moreover, if by inference the jury could have concluded that the twenty acre cleared field was in one of the lots in the deed which was put in evidence embracing number 830 and two others, still the charge was erroneous, because that deed was not recorded until March, 1879, pending the suit, and until it was put on record the possession of part of one lot covered by it would not by construction be extended over any other lot covered by it, as was ruled in the case of *Janes, administrator, vs. Patterson*, decided at the last term.

The principle is that the holder of a perfect title to a lot of land and resting thereon must have somewhere to look to ascertain if another is in possession thereof, and if time is working a prescriptive right against him. If his adversary has part of his lot lot actually in possession he can see that and take warning; if there be a deed *on record* covering his lot and other lots, and his adversary has possession of the other lots or either of them, he can see that posses-

sion, and looking at the recorded deed he can see that it extends over his lot too, and take warning; but if there be no possession of part of his lot, nor *record* of a deed which would show him that the possession of another lot was covering his also, and making time against him, he has no warning, and does not sleep over any of his rights, and the possession could not in any sense be adverse to him.

Therefore the charge was error in the light of the facts in this record, and as it may have controlled the verdict, a new trial should have been granted; and on its refusal on this ground the judgment is reversed, the defendant having shown perfect title to the land from the state down, and the plaintiff's prescriptive claim being the only impediment to a verdict for him.

Judgment reversed.

McEwen *vs.* Springfield *et al.*

1. In a suit by a widow for damages for the homicide of her husband, the defendants are competent witnesses in their own behalf.
2. It having been sought to impeach a witness both by disproving facts testified to by him, and also by proof of contradictory statements, and to sustain him by evidence of good character, it was error to limit the effect of such sustaining evidence by charging that "if a fact or facts testified to by a witness be disproved to the satisfaction of the jury, then evidence of general good character should not be treated as re-establishing such disproved facts."
3. If two or more persons conspire together to do an unlawful act of violence on the body of another, and they embark in the execution of such purpose, the law would not protect each against the consequences of the other's not strictly observing the bargain; each must contemplate that before joining with his fellow to break the law, and each becomes responsible for the worst act done and the greatest damage caused by any of his fellows, if done in pursuance of the unlawful purpose.

Witness. Evidence. Before Judge McCutchen. Whitfield Superior Court. April Term, 1879.

To the report contained in the decision it is only necessary to add the following: The evidence for plaintiff tended to show the following facts: There was bad feeling between McEwen, the deceased, and the Springfields; the immediate quarrel arose in Springfield's grocery at night about buying some bitters; both of the Springfields advanced towards McEwen, and he went out of the door. Robert Springfield was held by a by-stander, the other defendants, except Horn, following McEwen; Horn came up with a knife, and told the by-stander to let Robert go, and when this was done, they too followed McEwen. In a few minutes he was killed, being both shot and cut with a knife. Horn was examined for the plaintiff by interrogatories; he stated that he heard the pistol shot and ran up to where the party was; that Hugh Springfield got up from a stooping position over the body and appeared to close a knife; that he heard them say that Bob Springfield had shot McEwen; that Hugh told Bob to go to his house and get his horse and leave, as he had killed McEwen, and he himself went and closed up his grocery.

The evidence for the defendants was to the effect that McEwen had been drinking, and that all of them were seeking to get him home and to prevent a difficulty, except Robert Springfield and Horn, the first of whom did the shooting and the latter the cutting.

WARNER, Chief Justice.

The plaintiff sued the defendants, Robert Springfield, Hugh Springfield, T. J. Smith, jr., Thomas S. Horn, and W. C. Quinn, to recover damages for the killing of her husband. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiff for $2,226.00 against Robert Springfield, and found in favor of the other defendants, except Horn, who had not been served. The plaintiff made a motion for a new trial on the following grounds:

1. Because the verdict is contrary to law, contrary to the evidence, strongly and decidedly against the weight of the evidence, and against the principles of equity and justice.

2. Because the court erred in ruling, over plaintiff's objection, that the defendants, Hugh Springfield, T. J. Smith, jr., and W. C. Quinn, might testify as to all that Mrs. McEwen, the plaintiff, had testified about, and permitted them to testify fully as to their version of the homicide as set out in the brief of the evidence—plaintiff objecting to all of said testimony.

3. Because the court, after charging the jury as to the right of a widow to recover for the homicide of her husband, and instructing them as to the measure of damages—to which no objection is made—charged as follows, viz: "If either or any of the defendants unlawfully and feloniously slew the deceased, then any or such of them as did the act, or participated in it, would be liable in damages according to the measure I have given you. Such of them, if any, as neither did the act, nor participated in and promoted it, would not be liable. And again, if such killing occurred in pursuance of such conspiracy, then all, or any such as had joined in or become parties to that conspiracy, would be liable in damages, according to the measure I have given you; but such of the defendants as did not join or become parties to such conspiracy would not be liable for consequences of the same. Conspiracy here referred to need not be such as expressly contemplated a killing of the deceased. If there was a conspiracy, and the purpose of it any unlawful attack on the person of McEwen of any kind, even if only an assault and battery, and from that all the way up to murder, this would be sufficient. The principle is this: If two or more persons conspire together to do an unlawful act of violence on the body of another, and they embark in the execution of such purpose, the law would not protect each against the consequences of the other's not strictly observing the bargain; each must look out for that before joining with his fellow to break the law, and each becomes

responsible for the worst act done, and for the greatest damage caused by any of his fellows, if done in pursuance of the unlawful purpose. The doctrine of conspiracy, as before stated, would only apply to those who conspired, and if there was no conspiracy, then the principle would not apply at all."

This is the entire charge given in relation to the several defendants being responsible for the acts of any of the others. This charge, as a whole, plaintiff says was erroneous, and a new trial should for this error be granted.

4. Because the court failed to give in charge as the law applicable to the facts of this case though he was not specially requested so to do, either orally or in writing, but plaintiff's counsel in his argument before the court and jury had insisted that such was the law, viz: That the killing of the plaintiff's husband was the joint action of two or more of the defendants, each would be liable who may have concurred in the act of the one killing. If the evidence shows that defendants, or any of them, acted in concert, either directly or indirectly in the commission of the trespass on McEwen, or contributed to such act, then all who so acted in concert, or contributed directly or indirectly thereto, would be liable in damages for the act done.

5. Because the court, after charging in substance sections 3872 to 3875 of the Code, added: "If a witness be impeached by both methods, that is by disproving the facts testified by him, and by proof of contradictory statements, and he be supported by other witnesses who testify to his general good character and that he is worthy to be believed, then the jury should understand such evidence as supporting him to be judged of by the jury. in respect to the contradictory statements, but that it is inapplicable as far as relates to the evidence by which a fact or facts he may testify to is disproved, if any. Or in other words, a witness impeached by proof of contradictory statements made by him, should be treated as having his credit restored by satisfactory proof

of general good character. But if a fact or facts testified to by a witness be disproved to the satisfaction of the jury, then evidence of general good character should not be treated as re-establishing such disproved facts. But the question as to whether there be any fact or facts disproved, and if so, what facts, is, like other similar matters, for the jury to determine, and you are to judge of the extent and the consequences of such discrepancy, if any, or of the explanation of the same, if any." This charge, as a whole, plaintiff insists was erroneous, and was calculated to mislead the jury, and such as should entitle her to a new trial.

6. Because the court erred in giving in charge this written request of defendants' counsel, viz: In the absence of proof of what the Texas law is, the presumption is that the common law prevails in Texas, and, by that law, there is no authority compelling a witness to answer interrogatories coming from another state. Horn could not have been compelled to answer these interrogatories.

7. Because when plaintiff's counsel, in his argument before the jury, was calling attention to the testimony of Dr. Cochran, taken by interrogatories, and returned into court 2d October, 1877, (being the second day of the term) in which testimony the doctor expressed the opinion that the cut on McEwen's neck was made immediately before or after the shot, and probably afterwards, because there was very little blood about this cut, and said counsel was arguing that this testimony corroborated Horn, and on this account the presentment against Horn, made at October term, 1877, was a movement on part of defendants to shift the blame of the cutting on Horn, who was absent, the court, at the instance of defendants' counsel, arrested plaintiff's argument and refused to permit him to argue anything on this account unfavorable to Hugh Springfield, as it did not appear by the evidence that he had anything to do with the presentment, but ruled that said counsel might argue this question so far as it might affect the defendants Smith and Quinn, because their names appeared

indorsed as witnesses on the presentment, but Hugh Springfield's did not. This restriction by the court of the range of argument of plaintiff's counsel, plaintiff insists was error, the more especially as plaintiff's testimony showed circumstances tending pretty clearly to prove that Hugh made the cut on McEwen's neck; and this was a point stoutly contested on both sides. Plaintiff insists that this conduct of the court was well calculated to impress the jury with the idea that the court thought Hugh not guilty of the cutting.

As to the complaint made in the seventh ground the judge says: There was nothing new in the testimony of Dr. Cochran relative to the absence of blood at the knife wound. The fact was known at the inquest, and to all the parties. When Mr. Shumate raised the point, the court looked at the Horn indictment, and not finding the name of Hugh Springfield marked on it either as witness or prosecutor, asked Judge Walker to call attention to any evidence either showing or tending to show that said Hugh instigated the Horn prosecution. He replied, there was not any. The court then remarked that nothing could be claimed unless there was some evidence to support it. The court made no intimation that Hugh did not do the cutting.

The motion for a new trial was overruled by the court, and the plaintiff excepted.

1. There was no error in allowing the witnesses Springfield, Smith, and Quinn, to testify in the case, as alleged in the second ground of the motion for a new trial. Mrs. McEwen, who was the plaintiff and solely interested as such, had testified in the case and had given her version of the homicide of her husband, whose estate was in no way interested in the issue or cause of action on trial. The plaintiff was in life to confront the witnesses who were called to testify against her, the only party plaintiff interested in the cause of action or the issue on trial.

2. In our judgment, the charge of the court, as alleged in the fifth ground of the motion, was error, especially the

following part of it: "But if a fact or facts testified to by a witness be disproved to the satisfaction of the jury, then evidence of general good character should not be treated as re-establishing such disproved facts." The testimony of Horn, a witness for the plaintiff, was material as to the participation of Hugh Springfield in the homicide of plaintiff's husband, and it was sought to impeach him on the ground that he had made contradictory statements in regard to it. This charge of the court, in view of the evidence in the record, was to nullify what it had previously charged as to the restoration of the credibility of the witness by proof of his general good character. The question made by the evidence in the record, was whether Horn had been impeached by having made contradictory statements in view of the testimony as to his general good character, and the effect of the charge was to tell the jury that proof of his general good character should not be treated as re establishing his credibility. A witness impeached by proof of contradictory statements may be sustained by proof of general good character, the effect of the evidence to be determined by the jury. Code, §3875.

3. We find no material error in the other grounds contained in the motion, but reverse the judgment for error in the fifth ground.

Let the judgment of the court below be reversed.

Cox *vs.* Weems.

1. When the complaint in the motion for a new trial is that "the court erred in allowing counsel for defendant, over the objection of complainant's counsel, to read the deposition of Mrs. Eliza Weems, wife of S. R. Weems, in detailing a conversation between herself and her husband, not had in presence of complainant, in which S. R. Weems claimed the land in controversy as his own property and not the property of complainant, the objection being based on the

ground that complainant was not present, and on the ground that the conversation was a confidential communication between husband and wife," and when the evidence of the witness, as contained in the record, is not confined to a single conversation but may be construed as referring to several, and consists of answers to five direct and four cross interrogatories, and it cannot be determined with certainty what particular language in the answers, or any of them, was objected to, the supreme court will not undertake to *locate* the motion for a new trial on this or that part of the testimony. When the evidence objected to is contained in answers to interrogatories, the obnoxious answer or answers ought to be designated in the motion for a new trial by number, or by quotation, or in some other way, so as to leave no uncertainty in respect to the subject-matter and range of the objection.

2. The motion for a new trial is a part of the pleadings, and has no business in the bill of exceptions; the contents of the motion as certified by the clerk in the transcript is, therefore, the appropriate evidence of what the motion contains, and where the bill of exceptions states the contents differently from the transcript the latter will govern. It follows that where the motion for a new trial as set out in the transcript represents that the court refused to charge that the marital rights of the complainant's husband would attach, such refusal to charge will be treated here as the matter complained of in the original motion, though the copy of the motion as contained in the bill of exceptions states the complaint to be the giving of the charge and not a refusal to give it.
3. The testator made his will in 1854, and died in 1855. The terms of the will, so far as they relate to the present controversy, were as follows: "I will and bequeath to my son, Samuel R. Weems, all my landed estate (describing it), provided, nevertheless, I reserve to my daughter, Peggy Ann Cox, a lease to continue during her lifetime or as long as she may see proper to live on it, seventy-five acres of land, more or less, of the above described tract (defining the boundaries of the reservation), and should my daughter cease to occupy said land, either from death or removal or otherwise, my said son, Samuel R. Weems, to possess and hold said leased tract of land as he does the balance of said land, to and for the benefit and behoof of himself and his heirs forever in fee simple. * * * I will and bequeath to my son, Samuel R. Weems, in trust for the use of my daughter, Peggy Ann Cox, during her natural lifetime, besides the lease in the land before mentioned, four negroes (describing them) together with their increase, and at the death of my said daughter said negroes, together with their increase, to go to my grandson Robert S. Cox, to him and his heirs forever. Also, one other negro (naming her) with her increase, in the same way; and at the death of my said daughter this girl, with her increase, to be divided equally

between the children of my said daughter, to-wit, Robert E. Cox and Mary E. Taylor. Also, one equal part with my other children of money arising out of my estate not disposed of in or by legacies by this my last will and testament; said money, should it not be made use of for the use and benefit of my said daughter during her lifetime, at her death to be equally divided between her two children aforesaid."

Held, first, that the will is for construction by the court, not the jury, there being no ambiguity:

Held, second, that the trust attached upon the so-called lease of the land, as well as upon the personalty:

Held, third, that as the land was intended to furnish Mrs. Cox personally with a home, she took a separate estate in it, unaffected by the marital rights of her husband:

Held, fourth, that it was competent for the trustee, he alone being interested in the remainder, to waive the condition of her occupying the land, and that such waiver, if made by him and acted on by her, would prevent non-occupation from working a termination of her estate at any time during her life.

Practice in the Supreme Court. New Trial. Practice in the Superior Court. Interrogatories. Wills. Trust. Husband and wife. Estates. Before Judge HILLYER. Henry Superior Court. April Term, 1879.

In September, 1874, Mrs. Cox filed her bill against Weems to recover the possession of the seventy-five acres of land the use of which for life was devised to her by her father, Samuel Weems, as stated in the third head-note, and mesne profits or rent for the time it had been possessed by defendant, the grandson of the testator, and his father. The great point of contest was as to whether the complainant had ever taken possession of the property at all under the will, and if she had, whether she had not lost her right thereto by removal to Mississippi. She alleged that she at one time occupied the land and moved to her father's house at his request, and lived with him until he died; that then, at the suggestion of Samuel R. Weems, the father of defendant, under whom he held, and the remainderman under the will, she moved to Mississippi, he agreeing to pay her rent for the property during her non-residence, to manage

and control the same for her, and thereafter paying her a portion of such rent. On the other hand, defendant alleged that said Samuel R. Weems put complainant upon distinct notice of what would be the effect of her removal, etc., denied emphatically that said Samuel R. had ever paid her any rent, and claimed the land as his as heir-at-law of his father.

The jury found for defendant.

The complainant moved for a new trial upon the following, among other grounds:

1. Reported fully in the first head-note.

2. Because the court erred in charging the jury that they must determine whether S. R. Weems was trustee of complainant from the will, the circumstances and testimony in that connection, instead of determining himself the proper construction of the will, and whether or not it made S. R. Weems trustee of complainant as to the land.

3. Reported fully in the second head-note.

4. Because the court erred in charging that if the jury believed from the testimony that S. R. Weems claimed the land as having been forfeited to him under the provisions of the will, and held it for seven years adversely, claiming it as his own, before the commencement of this suit, then complainant could not recover.

As to this ground the presiding judge says that he added a more elaborate explanation of what would constitute adverse possession, and the further condition that complainant must have had notice of the adverse holding before the seven years would begin to run against her.

5. Because the verdict was contrary to the following charge: "If you believe that complainant removed to Mississippi with an understanding with S. R. Weems that he would hold and manage the land for her during her absence, then she would be entitled to recover, because the provisions of the will do not require an actual personal occupancy, but she may hold and occupy by another so as to prevent a forfeiture."

6. Because the verdict was contrary to the charge of the court, law and evidence.

The motion was overruled, and complainant excepted.

Boynton & Dismuke; Beck & Beeks; H. C. Peeples, for plaintiff in error.

Stewart & Hall, for defendant.

Bleckley, Justice

1. The motion for a new trial is too loose in respect to the evidence of Mrs. Weems. There were several conversations, and the answers of the witness extend to five direct and four cross interrogatories. We cannot *locate* the motion on this or that part of the testimony. The obnoxious answers ought to have been pointed out by number or by quotation, or in some other way so as to leave no uncertainty as to the subject-matter and range of the objection.

2. The motion for a new trial is a part of the pleadings. 17 *Ga.*, 141; 55 *Ib.*, 464; 57 *Ib.*, 151. It does not belong to the bill of exceptions and has no business to appear in it. What is properly record is to be evidenced by the transcript duly certified, and as the clerk sets forth the motion in the transcript so it will be taken in the supreme court, and a different version given of it in the bill of exceptions will be disregarded. 44 *Ga.*, 620; 56 *Ib.*, 439; 59 *Ib.*, 840; 57 *Ib.*, 154. In this case if we take the transcript we are assured that the court refused to charge the jury that the marital rights would attach, and though what purports to be a copy of the motion for a new trial embodied in the bill of exceptions represents the matter differently, we treat the charge as refused, and so treating it, there was no error on that point.

3. We think the will free from ambiguity, and that its construction was alone for the court. The trust attached upon the so-called lease of the land, as well as upon the personalty. The purpose and intention were to furnish

Mrs. Cox personally with a home, and that being so, she took a separate estate in the home, unaffected by the marital rights of Cox, her husband. Inasmuch as the trustee, and he alone, was interested in the remainder, he could certainly waive the condition of her occupying the land. It is clear, too, that if such a waiver was made by him and acted on by her, it would prevent non-occupation from working a termination of her estate at any time during her life. The case ought to be tried over on the views of the law which we have announced. The facts are for the jury; and on them we express no opinion.

Judgment reversed.

Scales *vs.* Shackleford.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. The verdict is supported by enough evidence if no rule of law was violated.
2. Where plaintiff was interrogated on the stand by defendant touching certain admissions made in the presence of certain persons and at a certain time, and did not set up that what he said was in reference and with a view to a compromise of the case, but gave his version of the conversation, the defendant should be allowed to give his version of the same transaction by himself or the witnesses present, and such version of plaintiff's admissions should not be ruled out because made in reference to compromise.

New trial. Evidence. Before Judge Erwin. Gwinnett Superior Court. March Term, 1879.

To the report contained in the opinion, it is only necessary to add the following:

Plaintiff, on cross-examination, testified as follows in regard to admissions: "Defendant came to see witness about the safe afterwards; it was about sixty days after the sale;

T. W. Sexton, John Arnold and John Flowers were there. Witness did not admit in the presence of the parties in his store at the time Scales came to see him that he stated to defendant there were two keys to the outside door of the safe. Witness did not then admit that he agreed at time of sale to insure defendant a duplicate key to the door of the safe. At that interview witness did not go off up stairs to hunt the key."

In the testimony of Arnold was the following statements: "The conversation was, Scales wanted Shackleford to furnish another key, that the large one was missing. Plaintiff said there were two shelves belonging to the safe; that he had taken them out and had them in his store; that it would make a difference of fifteen dollars in the value of the safe. Plaintiff did admit that there was one key missing, and the shelves were also. Conversation took place in an attempt to compromise this case. The parties were trying to settle the matter amicably. Scales was insisting on a reduction and compromise." The court ruled out the admissions as being made with a view to a compromise, and this is complained of as error.

T. M. Peeples; H. C. Peeples, for plaintiff in error.

No appearance for defendant.

Jackson, Justice.

This was a suit in the justice court for the value of a safe sold by Shackleford to Scales. The plea was that it did not come up to contract in that two keys were not furnished as agreed, and shelves were wanting.

1. On that question the evidence was conflicting, and as there is enough in the record, we should not interfere with the refusal of the court to grant a new trial, because such is our uniform rule in cases of conflict of evidence. Let the jury and the presiding judge who saw the witnesses and heard the testimony as it fell fresh from the lips of the parties on examination settle such issues.

2. But the plaintiff in error, who was the defendant below, raises another and a legal question. He insists that material legal evidence for him was excluded by the ruling of the court. This evidence was to the effect that the plaintiff admitted in the presence of three men that he was to furnish two keys and certain shelves which were not furnished. The court rejected the evidence because the admissions were made "*with a view to a compromise.*" Code, §3789. We do not see sufficient evidence in the record that they were made with a view to a compromise. They seem rather to be independent statements of truth. If the latter, though made while the parties were trying to settle, they would seem to be admissible. 6 *Ga.*, 213; 13 *Ib.*, 406.

All that the witness says about the compromise is this: "Conversation took place in an attempt to compromise the case." And the party himself, when asked if he did not make the statement, did not object to the question on the ground of compromise or anything of the sort. This was asked with the view of contradicting and impeaching him, and that was his time to object to answer about any admissions then made, if so made.

When the admission was made it was not made as a concession to bring about a settlement, and was not claimed by the party on the trial so to have been made; nor was there any intimation at the time that it was for the sake of having a peaceable settlement of the case, or as our Code declares, "with a view to a compromise." The plaintiff says himself, that "defendant came to see witness about it; it was about sixty days after the sale; T. W. Sexton, John Arnold and John Flowers were there," but he says nothing about a compromise, and does not object to answering, but denies that he made the admissions. Under these facts we think the evidence admissible to attack the plaintiff's evidence, as well as because they were independent admissions, if made at all, and not made to advance or further a settlement. One admission, if true, was quite material, and that was to

the effect that the safe was not worth by fifteen dollars what it would have been worth if complete with both keys, one key being in other hands, and therefore the property unsafe as a safe.

On this ground, the rejection of these admissions, we reverse the judgment, putting our ruling on the ground that they seem not to have been made with a view to a compromise, and that the plaintiff, when interrogated about them, did not pretend that the conversation was about any compromise, but flatly denied the admissions.

Whether, therefore, our rule be broader than the common law rule or not, as said in 48 *Ga.*, 647, we think the facts here make a case where the party plaintiff himself gave to the jury his version of the conversation, and defendant was entitled to do so too, and to strengthen it by other witnesses.

Judgment reversed.

Rice *vs.* The Georgia National Bank.

[Blecklet, Justice, having been of counsel, did not preside. Judge Hillyer, of the Atlanta Circuit, was designated by the governor to preside in his place.]

1. Where the record contains no judgment on demurrer, this court will assume that there was no such judgment.
2. The declaration in this case is not so defective as that a verdict thereon would be necessarily illegal. Its defects are amendable and would be cured by verdict
3. Where a bank held demands, secured by collaterals, against its customer for loans and advances, part of which demands had been liquidated by note, and there had been a course of dealing between the parties, embracing these advances, and also deposits made with the bank from time to time by the customer, and where there was evidence tending to show an accounting between the parties, and an accord and settlement, in which the collateral securities were divided between them, the amount of collaterals falling to the bank credited on the gross sum of its demands, a new note taken for the balance, and the old notes all canceled and surrendered and entered paid on the discount book of the bank:

***Held*, *a*.** That this transaction on its face would operate as a payment and cancelation of the demands held by the bank against the customer except as to said balance for which the new note was taken. *b*. That if the bank allege the contrary the burden would be on the bank to prove it.
c. That if, in such case, the court so charge the jury as in terms or by reasonable implication to impose the burden of proof touching such point on the customer, a new trial should be granted.
d. Even if the burden of proof were on the debtor, a charge which submits to the jury, whether "the circumstances as demonstrated to them by the evidence is of such a nature as to raise the implication —the necessary implication that it was taken in payment," puts the case too strongly, and demands more than the law would require to overcome such burden of proof—mere preponderance of evidence would be sufficient.

Practice in the Supreme Court. Pleadings. Bank. Contracts. *Onus probandi.* Charge of Court. Before Judge CLARK. City Court of Atlanta. June Term, 1878.

Reported in the opinion.

JOHN L. HOPKINS, for plaintiff in error.

N. J. HAMMOND, by brief, for defendant.

HILLYER, Judge.

The declaration made substantially the following case: That the defendant, Rice, was indebted to the plaintiff, the Georgia National Bank, in the sum of $11,429.25, besides interest, for certain advances which before that time the bank had made to Rice, and that those advances were secured by certain collaterals, consisting of executive warrants and certified accounts against the treasury of the state for public printing, amounting to the sum of $17,295; that the bank entrusted those collaterals to Rice for the purpose of collection; that he was to obtain from the legislature an appropriation, and was to apply the proceeds, when collected, so far as necessary, to the payment of the debt owing by him to the bank; and that the legislature, instead of

appropriating the whole amount, $17,295, as claimed, appropriated only the sum of $12,772.15; that Rice, instead of paying over the amount of his debt to the bank in full, had paid in part only, leaving a large balance, amounting to five or six thousand dollars, with interest, still due the bank, and refused to pay or account for the same on demand.

On the trial, it appeared in evidence that the defendant, Rice, did originally owe the bank the amount claimed, mainly for advances made from time to time by the bank to S. W. Grubb, in his capacity of agent for Rice as proprietor of the New Era newspaper in doing the public printing, amounting to $12,000.00, or near that sum, and that as collateral security for this indebtedness, the bank held the above named claims against the state for public printing. A minor portion of these claims were in the form of certified accounts, the remainder in executive warrants, issued by Governor Bullock, but which treasurer Angier had refused to pay; that some time prior to the application to the legislature for the act of appropriation, there had been an accounting between Grubb, as agent, and Jones, cashier of the bank; that at the time of this accounting a part—much the greater part—of Rice's debt to the bank existed in the form of promissory notes, signed by Grubb as agent; and that in this accounting, these notes were all delivered up by the bank to Grubb as agent for Rice, and canceled, and marked paid on the discount books of the bank. That the collaterals were all divided out between the parties, and that deducting the amount of collaterals falling to the bank in this division, with other items not necessary to be specified, Grubb, as agent, gave a new note for the balance. The defendant contended that at the time the legislature met, when it became necessary to apply for the appropriation, the mattter of demands formally held by the Bank against him had all been settled in the above named accounting, and that the claims against the state for printing which fell to him in the division of collaterals passed to and were held by him in his own right, with no lien thereon in favor of

the bank, or obligation on his part to account for any part of the proceeds, and that the remainder of the collaterals held by the bank in like manner belonged to it in its own right; that some time after the above named division occured, those collaterals belonging to the bank had been handed back to him for convenience merely, and that they might be consolidated and passed upon by the legislature all in one appropriation, and that he was to make collection of the whole, and then to divide the proceeds between the two, and that when collection was made, not of the full amount claimed, viz: $17,295.00, but of the whole lesser amount actually appropriated, viz: $12,722,15, he had paid over to the bank its full *pro rata* share of the same.

There was no conflict in the evidence as to the original amount of the bank's demand against Rice, or as to the fact that the accounting had taken place; that the division of collaterals had been made, and that so much of the claim as had existed in the form of Grubb's notes as agent, had been delivered up, and canceled. and entered paid on the books of the bank, and that upon deducting the amount of collaterals falling to the bank in the division, with other items above named, from the gross amount of the bank's claim against Rice, Grubb, as Rice's agent, had given a new note for the balance.

But there was a conflict in the evidence as to whether this transaction was intended to operate as a payment and cancellation *pro tanto* of the bank's claim against Rice, or whether the whole demand was left open.

The testimony in favor of the defendant appears to preponderate, both in distinctness of recollection and statement, the number of witnesses and circumstances, in favor of the theory of payment and satisfaction. But the evidence of Jones, the cashier, was the other way. There was a verdict in favor of the plaintiff, and the defendant moved for a new trial on various grounds, which motion was overruled.

1. One of the grounds was that the court erred in overruling a demurrer by the defendant to the plaintiff's dec-

laration; and the bill of exceptions recites that there was such demurrer, and that the court overruled it, but on looking to the transcript of the record, we find in it no judgment on demurrer, and we are of the opinion that the judgment on demurrer is one of those things which must appear in the record. There are many occurrences of a trial which may be sufficiently authenticated by a recital in the bill of exceptions, but a judgment on demurrer is not one of them. If such judgment does not appear in the record, this court will assume that there was no judgment on demurrer, and no assignment of error can be based thereon.

2. It is insisted in the argument that the declaration was so far defective as that no legal verdict could, in any event, be rendered thereon, and that the same ground, that is, insuf ficiency of the declaration, was still in reach of the court, under the assignment of error contained in the bill of exceptions, that the verdict was illegal; but we think that whilst the declaration contains some unnecessary averments, and is more or less involved in its language, still, there is the substance, the frame-work of a legal cause of action set out in it as stated in the beginning of this opinion. If more of precision be desirable, it can be supplied by amendment, and any defect that is amendable would be cured by verdict.

3. 4. The case turned mainly, as it appears to us, on the question of whether when the accounting and alleged settlement took place between Grubb, as agent of Rice, and Jones, the cashier, and the division of collaterals occurred, and the cancellation of the notes took place as above stated, some months prior to the meeting of the legislature, this was *intended* to operate as a payment of so much of Rice's debt to the bank as was not embraced in the new note given; or whether it was merely a surrender by the bank of a part of the collaterals, with the relation of debtor and creditor between Rice and the bank, for the gross amount of his debt, remaining as before. The court, in charging the jury, seems to have gone on the idea that

under the state of facts set forth, the burden of proof was on the defendant to show that it was a payment; but we think that as matter of law, the transaction, on its face, constituted a payment, and if the bank alleged the contrary, the burden was on the bank to prove it; and this being a point so vital in the case as would likely have a very material influence, and po-sibly a controlling influence in determining the result, we are constrained to grant a new trial. 2 Gr'l'f on Ev., sections 527, 520, 523; 2 Parsons on Bills and Notes, 154, 155, 156; 31 *Ga.*, 564, 581.

Some distinction was sought to be drawn, and commented on in the argument, between that portion of the collaterals falling to the bank under the division, which consisted of an executive warrant amounting to $8,350.42, and certain certified accounts for printing, for which it would seem an executive warrant had never been issued, amounting to $1,450.08; and the question was mooted as to whether even though one of these were accepted as payment, still the transaction was not to be treated as payment so far as concerned the other; or whether, even if the certified accounts were not accepted as payment, still the loss as to that amount should be made to fall upon the bank, and not on Rice, on the ground of negligence of the bank in not presenting or taking steps to collect them. But as there is to be a new trial, we express no opinion as to these or other matters of fact, leaving the merits of the case to be passed on under such evidence as shall be adduced at another trial, under the charge of the court.

Judgment reversed.

Williams *vs.* The Griffin Banking Company.

1. A loan was made in 1873 at usurious interest. Two notes were given, both infected with usury, one payable in October, the the other in November, 1878. When they matured the usury laws had been repealed and had not been re-enacted The note first ma-

turing was paid at maturity, and when the other matured it was renewed (without purging) by a draft drawn and accepted by the debtor. In a suit upon the draft begun in 1877, the usury paid upon the note which was discharged was not matter of defense, either as payment or set-off. A like rule prevails as to usury upon a third note infected with usury, executed before but paid in 1873, after the usury laws were repealed.

2. Under the act of December 11th, 1871, where the contract made was for more than 10 per cent. interest, it was valid for that much.
3. Where counsel for defendant in error concedes error on a material point, and calls for no decision upon that point, the supreme court will reverse the judgment with appropriate directions.

Usury. Practice in the Supreme Court. Before Judge Simmons. Pike Superior Court. April Term, 1879.

Reported in the opinion.

Boynton & Dismuke, for plaintiff in error.

Stewart & Hall, for defendant.

Bleckley, Justice.

There were two suits by the bank against Williams, each upon a draft drawn and accepted by the debtor, and payable to the order of the creditor. The first suit was commenced on January 16th, and the second on March 20th, 1877; the former upon a draft for $378.85, dated December 21st, 1874, and due October 15th, 1875; and the latter upon a draft for $711.35, dated November 15th, 1873, and due October 15th, 1874. Each draft stipulated for interest at 25 per cent. until paid, in case of failure to pay at maturity. The elder and larger draft had upon it two credits; one for $200.00, dated October 9th, and the other for $211.35, dated October 19th, 1874.

There was a plea to the second suit, with a prayer that both suits be consolidated, and that this plea operate in both. It alleged usury, averring that on January 3d, 1873, defendant borrowed of plaintiff $850.00, and gave his two

notes therefor; one for $534,75, due October 15th, 1873, which included $85.42 of usury; and the other for $548.30, due November 15th, 1873, which latter included $96.40 of usury; that the former was paid in full, and the latter was renewed by executing the elder and larger draft now in suit; that this draft has in it, as part of the principal, $225.82 of usury; that on February 3d, 1873, the defendant borrowed of the plaintiff $250.00, giving his note for $307.70, due November 1st, 1873, in which was included $44.68 of usury, which note was paid in full. The plea presents as a set-off the usury paid on the two notes, and also resists for usury the elder and larger draft, claiming that after deducting the $411.35 credited on the draft, the $85.42 of usury paid on the first note, the $44.68 of usury paid on the second note, and the usury embraced in the draft itself, the amount of the draft will be more than exhausted. The excess or overplus is set up as a payment on the younger and smaller draft.

Both suits were referred to an auditor, whose report was adverse to allowing anything on account of usury paid on the notes, or of usury in either draft. The auditor, moreover, computed interest on both drafts from their maturity, at the rate of 25 per cent.

In the argument here, the debtor conceded that the younger and smaller of the two drafts was free from usury; and the creditor conceded that the elder and larger was subject to be reduced because the note in renewal of which it was given was not purged when the draft was executed. Of course there is no occasion for this court to express its opinion upon matters in which both parties are agreed. The questions which remain for decision are, first, whether the usury paid on the two notes met at maturity is available as payment or set-off in this litigation; and, secondly, how interest ought to be computed on the loan of Jannary 3d, 1873, in purging the note in place of which the draft was given by way of renewal, and how counted on the draft itself thus reduced in the principal sum.

1. Of the two usurious notes paid in full at maturity, one was dated January 3d, and the other February 3d, 1873; the former matured October 15, and the latter November 1st, 1873. They were both paid off more than three years before either of the present suits was begun, and both were paid voluntarily after the act of February 19th, 1873, went into effect. This act repealed all laws on the subject of usury; and a previous act of December 11th, 1871, had limited suits for the recovery back of the usury paid to six months from and after the payment. The act of 1873 remained in force until February 24th, 1875, when the rate of interest was again regulated and restricted, and a provision against usury re-introduced into the law. Observe now that the drafts sued upon in the two actions which we are considering were both executed between the passage and repeal of the act of 1873. The plaintiff, therefore, does not come into court upon illegal contracts, but upon contracts perfectly legal. To this effect we have ruled several times. In *Houser vs. The Planters' Bank of Fort Valley*, 57 *Ga.*, 95, we said, on page 99, "In this promise there was nothing illegal, because there was no law against usury when it was made." In *Broach vs. Barfield*, *Id.*, 601, we took the same view. And so in *Ballard vs. The People's Bank*, 61 *Ib.*, 458, and *Taylor vs. Thomas*, *Id.*, 472. And if we had never taken it before, how could we help taking it now? for no possible ingenuity of the human mind can make a contract illegal without some law to forbid it at the time it was executed? While all laws on the subject stood repealed, how could anybody violate the law by contracting to take usury? The plaintiff had made previous contracts to take usury which were illegal, but not one of these is brought into court as a ground of action. It is the defendant that attempts to bring them forward and use them as a means of defense, and this he does, as to two of them, more than three years after he had paid the usury which they embraced. In *Wilkinson vs. Wooten*, 59 *Ga.*, 584, the action was upon a contract made prior to the

act of 1873, and we held that if it, *the contract sued on*, was not infected, the notes given afterwards for usurious interest upon it would not taint it; but that if the plaintiff's suit was on a tainted contract he must account for subsequent payments no matter when made. And nothing to the contrary of what we ruled then and rule now appears either in *Candler vs. Corra*, 54 *Ga.*, 190, or *Archer vs. McCray*, 59 *Ib.*, 546. If the creditors' suits in these two cases were based on contracts made whilst the usury laws stood repealed, the reports do not show it; and so important a fact would most probably have been stated if it had existed. Most certainly if it did exist, it must have been overlooked in adjudicating the cases, for it is contrary to all principle to hold that a legal contract is subject to the same defenses on account of usury previously paid as if it were illegal because of usury. The rule that the taint passes down through all renewals and contaminates each and every one, must be confined to renewals which take place whilst some usury law or other is in existence. If this were not so, at least in the view of this court, some of its best considered rulings ought at once to be reversed or abandoned. A renewal contract, though itself legal, must have some valid consideration for an undertaking to pay interest at any rate whatever for the past use of money, and we have held in 61 *Ga.*, 472, *supra*, that future indulgence for a definite time upon a debt passed due is such consideration. Whether we regard consistency with ourselves or with principle, we see not how to avoid ruling that neither as set-off nor as payment can the usury paid upon the two notes be applied to either of the two drafts, and we decide accordingly. When the usury was paid there was no law against promising, paying or accepting it.

2. The next question is easy of solution. We have only to consider what would have been the process of purging the note if that had been attempted when the draft was given in renewal, and what interest the draft would have borne if the intent of the parties had been fully expressed

on the face of the draft after this reduction of the principal. To purge that part of the loan of January 3d, 1873, which was originally secured by the note afterwards renewed by one of the drafts now in suit, all the interest in or on the note must be remitted except the highest rate of conventional interest then (at the date of the loan) allowed by law, which was ten per cent. per annum; this rate counted on the cash for the loan of which the note was given, from the time of the loan till the time of the renewal, will fix the principal of the draft, with all usury cleaned off. The rate of interest specified by the draft itself is twenty-five per cent. per annum, and as there was no limit at all, except the will of the parties, when the draft was executed, that rate must govern from the date of the draft forward. The provisions of the act of December 11th, 1871, in respect to the rate of interest were, first, that a written contract to pay not exceeding ten per cent. per annum, shall be valid and binding, and may be enforced in the courts of this state; secondly, that when the contract is silent as to the rate, seven per cent. only can be collected; and, thirdly, "where a written contract is made to pay more than ten per cent. for the use of money borrowed, the lender shall not be entitled to recover more than ten per centum as interest on the sum lent." The words which we have put in quotation marks manifest, we think, by clear implication, a legislative intent not to cut down usury to the non-conventional rate, but only to the limit of the authorized conventional rate; and it is on this construction that the mode of computation above presented is based, the act of 1871 being the usury law in force from its date down to the repealing act of 1873. We are of opinion, also, that it makes no difference whether the usury is blended with the principal of the loan, with no actual expression of the rate charged, or whether the true principal is stated separately and the rate mentioned in so many words. See *Tribble vs. Anderson*, 63 *Ga.*, 32.

3. The defendant in error, as already mentioned, having

by its counsel conceded error in the amount of the draft, and not called for any decision on that point, the judgment of the court below is reversed with directions to purge the draft of all excess by the method of calculation pointed out in the judgment of this court, which is in conformity to what has been set forth in the foregoing head of this opinion.

Judgment reversed, with directions.

CHAMPION *vs.* WILSON & COMPANY.

1. A contract made and to be performed in New York, will be enforced by the courts of this state according to the legal status it would occupy in New York; and if illegal there, it will be held to be illegal here; but the law of that state must be put in evidence before it can be applied in this state, and unless in evidence before the superior court according to the record, the judgment of the superior court thereon will not be reviewed by this court.
2. Where certificates of stock in a corporation are deposited as collateral security, having an indorsement upon them importing a power to transfer, or of having a transfer made on the books of the company, and the transfer is actually made some time thereafter to the parties who held the certificates as collateral, and new certificates are issued to said parties, the same was not wrongful if it was such a transfer as the power authorized, but if it was not such as the power authorized, it was wrongful. If the terms of the power be ambiguous, or if the indorsement be blank, the true meaning may be ascertained by the assistance of all the surrounding circumstances.
3. Whilst, in order to make the custom of any trade or business binding, it must be of such universal practice as to justify the conclusion that it became, by implication, a part of the contract, yet it need not be absolutely universal without a single exception in the business or trade; it need not be so universal as to embrace every transaction of the sort; it is enough if it be so usual, so customary, so generally practiced by those engaged in the business, that exceptions here and there will only serve to establish the habit of the trade.
4. Where the defendant is sued as an individual, recovery cannot be had against him as a partner; and if he set up a contract with plaintiffs whereby they agreed, for a consideration, to relieve him from

liability and look to a partnership for payment of his indebtedness to them, it cannot be replied in a suit against him individually that he is a member of that partnership; and a charge to that effect is erroneous.

5. The evidence being conflicting, and not requiring the verdict independently of error in the charge, a new trial should be granted, especially in a voluminous case, involving the application of intricate and important legal principles to complicated facts.

Contracts. Laws. Collaterals. Stock. Evidence. Custom. Partnership. New trial. Before Judge SIMMONS. Bibb Superior Court. April Term, 1879.

Wilson & Company sued Champion on an account for money advanced by them for the purpose of purchasing "cotton futures" in New York for him, and for commissions due for making such contracts, etc.

Champion pleaded as follows:

1st. That it was a contract governed by the laws of New York, and was null and void under the laws of that state against betting, etc.

2d. That before the advances were all made, he deposited stock of the South Carolina Railroad Company with Wilson & Company, which was worth about $14,000.00 more than he owed them when their account fell due, and that, according to the general custom in New York, it was the duty of Wilson & Company to have sold said stock for their reimbursement within a reasonable time after said account became due; that the stock has now become worthless, or nearly so.

3d. That Wilson & Company did, in fact, without the knowledge of Champion, convert said stock by applying to the company and having new certificates of stock issued to them in their own name, and surrendering to the company the certificates belonging to and deposited by Champion, and that when this was done said stock was worth several thousand dollars more than Wilson & Company's claim against him.

4th. That some time after this account had matured, Wil-

son & Company (who held a similar claim for a much larger amount against W. L. Ellis & Brother) applied to him through Ellis & Brother to allow them to transfer his account to that of said Ellis & Brother, and to let them hold his stock as collateral security for the whole account so merged, they (Wilson & Company) looking to Ellis & Brother, and not to Champion, for the payment of the entire indebtedness. To this, for a special consideration agreed on between Champion and Ellis & Brother, Champion consented; that when this arrangement was proposed and agreed to, Champion's stock was worth some $12,000.00 or $14,000.00 more than his individual account amounted to, etc.

The evidence was conflicting on almost all the points in issue, especially in regard to the custom of New York brokers in connection with collaterals. It was also claimed by plaintiffs, and denied by defendant that he was a partner of Ellis & Brother in these transactions.

The jury found for plaintiffs. Defendant moved for a new trial on the following, among other grounds:

(1). Because the court refused to charge the following request: "The law of New York governing this case makes void a contract where a broker there was employed to purchase for another what are known as 'cotton futures,' provided the evidence satisfies the jury that such 'cotton futures' were known at the time by both parties as simply a wager or speculation on the rise and fall of the price of cotton."

(2). Because the court refused to charge the following request: "If plaintiffs, without the knowledge of the defendant, surrendered to the South Carolina Railroad Company certificates of the stock of that company which had been deposited with the plaintiffs as collateral, and applied for and obtained from said company new certificates for the same amount of stock in said company, issued to and in the name of said plaintiffs, this was a conversion of the stock so deposited, and charged the plaintiffs with the value of said

stock at the time said new certificates were issued to the plaintiffs, unless defendant, after knowing of said conversion, waived his right to charge the plaintiffs with the then value of said stock."

(3). Because the court charged as follows: "If you believe from the evidence that such was the universal custom (*i. e.* to sell collaterals to pay losses when they occurred), then it did enter into the contract, and plaintiffs should have sold to protect themselves. The custom must have been universal; it must have been the custom in every transaction of this sort in New York. If some merchant or broker in New York failed to carry out this custom, then it was not a universal custom. Universal means the whole—every one. It differs from the general custom. General means the majority or greater number. If you believe from the evidence that it was not a universal custom, then it did not enter into the contract, and the plaintiffs were not compelled to sell on the happening of the loss."

(4). Because the court charged as follows: "The plaintiffs say that if you believe that such a merger (of defendant's liability into that of Ellis & Brother) was agreed upon and carried into effect, that the defendant is still liable, for they say that he was either a partner of Ellis & Brother, or held himself out to them that he was a partner, or acted in such a way that he induced them to believe that he was a partner. You have heard the evidence in this case, and must say whether he was a partner or not, or whether he acted in such a way as to make them, the plaintiffs, believe that he was a partner. If you believe from the evidence that he was a partner, or acted so as to make plaintiffs believe that he was a partner, then if the merger of the account did take place, it does not relieve Champion from his liability, if he was originally liable."

(5). Because the verdict was contrary to law and the evidence.

The motion was overruled, and defendant excepted. For the other facts, see the opinion.

LANIER & ANDERSON, for plaintiff in error.

JNO. P. FORT; N. J. HAMMOND, for defendants.

JACKSON, Justice.

In this case Wilson & Company sued Champion for money expended by them for him in the purchase of cotton futures in the city of New York, where the contract was made and where it was to be executed. A verdict was rendered for the plaintiffs, a motion was made for a new trial on many grounds, it was overruled, and the defendant excepted.

There are many grounds set out in the motion, but all were abandoned or not urged here except a few which we proceed to consider.

1. The contract being made and to be carried out in New York, it is urged that New York and not Georgia law should prevail, Code, §8; 38 *Ga.*, 132; 40 *Ib.*, 553; but the defendant gave to the court below no evidence of any law of New York so far as the record discloses. In order to take a case out of our own law, there must be evidence before the court that tried the case of the law of the other state, and the record must show its introduction in evidence. It does not appear from this record to have been introduced as evidence at all. Probably the law of this state, if the contract had been made and was to be performed here, would uphold it. 45 *Ga.*, 501; 59 *Ib.*, 25. Possibly the facts here, as insisted upon by the defendant in his testimony, might make a case too strong and too much akin to betting for our own statute, and might take this case out of the principle controlling those. See Code, §2638. If it were an original question, one might well hesitate.

However this may be, the law of New York entered into this contract, as it was made and was to be executed there, and our courts will enforce it, whatever it may be; and this contract must stand or fall as the test of that law is applied to it. But as it was not before the superior court, we can not review any judgment of that court thereon. That court

said nothing about it—perhaps for this reason. 57 *Ga.*, 371.

This disposes of the requests to charge the New York law, and to apply it here. When so applied it becomes, as the law of the contract, Georgia law; and it matters not where it came from. For this case—*pro hac vice*—it is our own law. 38 *Ga.*, 129; 54 *Ib.*, 613. Still, to make it our law, it must be in evidence before the court.

2. But it is insisted further by the defendant, that he placed certain collaterals, consisting of railroad stock certificates, in the hands of the plaintiffs, and they changed the title and converted them to their own use, and are responsible for them at their value when converted. If the plaintiffs did convert them without authority, they are certainly responsible for their value at the date when they appropriated them. So that the question is, did they convert them?

The collaterals were certificates of stock in the South Carolina Railroad Company, issued to Zeilin & Company, who seem to have turned them over to defendant to be used with plaintiffs, to cover the margin for the purchase of cotton contracts for futures, and some sort of power or authority to transfer seems to have been indorsed in blank thereon. These certificates were given as collateral to plaintiffs in September, 1871, and in October, 1872, they were given up by them to the railroad company, the stock was transferred to plaintiffs, and new certificates were issued to them. This may have been done to guard against third persons acquiring rights without notice, and to protect the stock against such liens acquired by others; or it may have been an assertion of absolute title, as possibly the collaterals, as margin, were exhausted. There is some reason and authority perhaps justifying some such step to guard against loss—see People's Bank of Bloomington *vs.* Gridley, supreme court of Illinois, reported in Albany Law Journal, August 8, 1879, p 123. Ordinarily, however, between the parties themselves, the assignment and delivery of the certificates of stock alone would guard the rights of the pawnees. See 1 Am. Railway Cases, 110; Redfield on

Bailment, 659–674; Story Eq. Jur., 412–421, and note; 3 Hill, N. Y., 228; 5 Gray, 373; 21 Verm., 353; 6 Conn., 558; 42 N. H., 424; 29 Penn. St., 146; 13 Conn., 498; 49 Me., 315; 34 *Ib.*, 256; 9 Rh. I., 308; 12 Gray, 213; 17 Ill., 86; all cited in the Albany Journal case.

But it is impossible to adjudicate this point from the evidence in this record. The power to assign or transfer is not here. That is the instrument on the construction of which this point must turn. Did it authorize the plaintiffs to change the title on the books and to take the new certificates? It is not in evidence, nor is it described by its contents, so that we can see what authority it gave to plaintiffs. True, if ambiguous or blank, it ought to be construed in the light of all the facts of this case, but without the power itself we grope in the dark. It looks singular that the plaintiffs should have been content to have held the old certificates, with the indorsement thereon for over twelve months, and then make the change. Did they have the power by the indorsement or transfer on the old certificates? If the indorsement gave them the power so to act, the transfer on the books and the new certificates to themselves were not wrongful; if it did not, they were wrongful; if ambiguous or blank, then all the circumstances may aid. Did Champion know of its exercise? Was it done to secure themselves against third parties *bona fide* towards Champion, or to take absolute title as owners without regard to his rights? Why not have the transfer made and the new certificates made to them for the use of Champion or of Ellis & Brother, as their version is that the stock was always held for Ellis & Brother also? But the great question is, did they have the power? and without the instrument relied on to give it, we cannot move, for if they had it from Champion, his mouth is closed.

3. The charge was not right on custom. True, our Code says, par. 1, sec. 4, that "the custom of any business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became, by im-

plication, a part of the contract;" but this cannot mean, as the court charged, that it must have been followed "in every transaction of this sort in New York." For then one act of one broker would defeat a custom universal but for that act. Nor does it mean "the whole—*every one*," as the court reiterates; but it means, what it says, of such universal practice as to imply that the trade would understand that it went into the contract. It must be rather more than general—much more than the habit of a majority; but not absolutely unbroken by one single transaction of one tradesman. Such a rule would defeat every custom. The little word "such" before "universal" in the Code qualifies the former, and excludes from the section the meaning given by the judge. In this case, on this point, the evidence appears conflicting, and would hardly have established the custom contended for by defendant, even had the charge been right. Still, as the case will be tried again, and more light may shine upon the point, the defendant is entitled to the law of his case on this as on all the points he makes.

4. So too the court erred, we think, in charging on the subject of partnership. Champion was not sued as a partner, but individually, and there could not be a legal recovery against him as a partner. It matters not that the others who were alleged to be his partners were bankrupt; and that the recovery would come out of him in any event. The plaintiffs must sue him as he contracted with them, and recover accordingly. 43 *Ga.*, 587.

5. The evidence on some of these points is conflicting—sufficiently so to entitle the parties to have the law fully and accurately given to the jury; and as, in our view, that has not been done on every controverted point in the very protracted and complicated case the record makes, the ends of justice require a new trial.

We express no opinion whatever upon the weight of the evidence other than to say that it does not absolutely require the verdict without regard to the law given in charge;

and that law as given might have controlled the jury upon material points hotly contested. The judgment refusing the new trial is therefore reversed.

Judgment reversed.

Gilham & Brown *vs.* Wells *et al.*

1. The town authorities of Stone Mountain, though having power by charter to grant or withhold licenses to retail liquors, and to establish police regulations generally, cannot, after granting a license, and while retaining the fee paid for the same, pass and enforce an ordinance requiring all retailers (this grantee included) to close doors and forbear to sell whilst, and at all times when, "any denomination of Christian people" are holding divine service anywhere in the town, the ordinance being silent as to any and all other worshippers.
2. A stipulation in the bond of a retailer to abide by all ordinances which may be passed, does not bind him to a subsequent ordinance which the town authorities have no power to pass.

Jackson, Justice, dissented.

Municipal corporations. License. Contracts. *Ultra vires.* Estoppel. Ordinance. Before Judge Speer. DeKalb Superior Court. March Term, 1879.

Gilham & Brown brought case against Wells and others they being the mayor and a majority of the council of the town of Stone Mountain, who had voted for the ordinance recited in the opinion, for $1,000 00 damages, alleged to have been sustained by them on account of the enforcement of such ordinance, which they claimed to be illegal, *ultra vires*, and void. Plaintiffs alleged that on the 5th of January, 1878, the mayor and council of Stone Mountain granted them license to sell and retail spirituous liquors within the corporate limits of said town for the period of the next ensuing twelve months, they paying therefor $175.00, taking the oath and giving the bond required of

them. That on the fifteenth of the same month defendants passed the ordinance referred to, without authority of law, in excess of their chartered powers, and for the purpose, and with the malicious intent, of injuring, disturbing, and so far as they could, of depriving plaintiffs of the exercise of their said licensed privileges. The declaration then sets out how strictly the ordinance was enforced by the defendants, and shows the damage to the plaintiffs.

The defendants pleaded the general issue, and estoppel by reason of the terms of the bond executed by plaintiffs as a condition of obtaining license.

The jury found for the defendants. The plaintiffs moved for a new trial upon the following grounds:

1. Because the verdict was contrary to law, evidence, and the principles of justice and equity.

2. Because the court erred in charging the jury as follows: "The mayor and council had full power and authority under and by virtue of the charter granted to the town of Stone Mountain, to pass and enforce said ordinance recited in the declaration, and possessing such power they were not individually liable to the plaintiffs for any damage sustained by them by reason of the passage and enforcement of said ordinance."

3. Because the court erred in charging as follows: "If you believe, from the evidence, that at the time the plaintiffs procured license to retail in 1878, they entered into bond conditioned to keep the ordinances of the present mayor and council, and their successors in office, regulating the retailing of spirituous liquors, then the plaintiffs would, by the same act, be estopped from recovering damages of the defendants."

The motion was overruled, and plaintiffs excepted.

The facts, in addition to those above stated, so far as material, will be found in the opinion.

L. J. Winn, for plaintiffs in error.

Hulsey & McAfee, for defendants.

BLECKLEY, Justice.

It is impossible to ignore the evils of intemperance or the blessings of religion. No candid observer can fail to notice them or to be impressed by them. That the vocation of retailing spirituous liquors promotes intemperance is certain; nevertheless, a retailer is entitled to all his legal rights, and they cannot be denied to him in the interest of religion, great as it is, or in any other interest. No court can mould its decisions by a higher standard of morality than the morality of the law. Law is the measure of forensic justice. So far as I know, the court-house is the only place on earth where the vicious and the virtuous may contend upon perfectly equal terms, receive the same patient and impartial hearing, and have their respective dues, whatever they may be, meted out in the decision. It is this characteristic, more than any other, which entitles the court-house to be called a temple of justice.

1. By charter, the mayor and council of the town of Stone Mountain have power "to do and perform all things toward keeping the peace, preventing vagrancy, lewdness, violations of the sabbath, playing at cards, or at any other game or sport at which money is usually won or lost, take all means to cause the streets to be worked, nuisances to be removed, and to do all and every act they may think proper to preserve the morals, health and good order within the corporate limits of said town, as fully and as effectually as if a grant of power were hereby given them in every case which may arise, and power to grant or refuse license for peddlers, and to pass all laws, ordinances and by-laws for the government of the same, so as to enable them to do and perform all acts not inconsistent with the laws of the United States or the state of Georgia;" also, "to abate nuisances and enforce proper police laws;" also, "to impose such fines not exceeding fifty dollars, or imprisonment in the calaboose not exceeding twenty days, or both, for the violation of any of the laws or ordinances of said town within

its corporate limits;" also, "to grant or withhold, to any person or persons, license to retail and sell spirituous liquors within said limits, and in no case shall the license be for a larger sum than two hundred dollars for twelve months, and no license shall be granted for a less time, and the person receiving the same shall execute bond and security to said mayor and his successors in office, conditioned that he will not sell liquors on the sabbath-day, and shall also take an oath to observe and not violate the ordinances of said town; and for a violation of any of said ordinances, the party guilty thereof shall be liable to pay such fines as may be assessed by said mayor or any three members of council." Acts of 1872, p. 266.

Under these charter provisions, the mayor and council established by ordinance a fee of $175.00 for a license to retail spirituous liquors; and on the 5th of January, 1878, the plaintiffs in error paid the fee, gave the required bond, took the prescribed oath, and procured a license to retail for twelve months from that date. There is no dispute that they thus became entitled to retail within the town, and that they entered into business accordingly. Shortly afterwards, new incumbents were installed in the mayoralty and council, and the former board retired. The new board, of which the defendants were members, passed an ordinance in the following terms, and caused it to be enforced:

"Be it ordained that during the continuance of divine service at any time hereafter to be held by any denomination of Christian people within the corporate limits of Stone Mountain, the doors of all houses or rooms where intoxicating liquors are sold by retail shall be closed; and if any person sell or cause or permit to be sold, or in any manner furnish any intoxicating liquors, spirits, wines, or other intoxicating drinks during the time appropriated to such worship, he shall pay a fine of fifty dollars upon conviction for each offense. And it is further ordained that this prohibition shall cover the entire time appointed for such divine worship, from its commencement to its final close, that is,

it covers not only the time in which such services are being actually performed, but on all protracted occasions, it covers intermissions by day and night."

At the trial of the present case in the court below, the presiding judge charged the jury that the mayor and council had power, by virtue of the charter, to pass and enforce this ordinance. The jury were thus constrained to find against the plaintiffs on one of the main branches of the controversy.

a. The chartered power in respect to license is to grant or withhold, and the duration of the grant cannot be less than twelve months. Does the power to grant or withhold include or imply the power to grant, and after granting, to forbid the use for some indefinite or uncertain part of the twelve months, both by day and by night? Nothing is more manifest than that the validity of the ordinance cannot be made to rest on this provision of the charter.

b. The general police powers conferred by the charter are, however, very broad and comprehensive. May the ordinance stand upon them? Mark that the divine service or worship which the ordinance embraces is not confined to public service or worship in a church, meeting-house, or other defined or described place or places, but that the ordinance comprehends worship conducted anywhere in the town. By charter the area of the town is a circle having a radius of 1000 yards, and, of course, a diameter of 2000. Any denomination of Christians might assemble on any part of this area, at any time, by day or night, and when their services of devotion began the business of the plaintiffs had to be suspended and remain suspended until the services were over. The worshippers might take rests or intervals in their spiritual exercise, and during these, might return to their avocations and prosecute them, but the plaintiffs' doors were to remain closed until the final breaking up. By adjournment from day to day and from night to night, a religious meeting might be protracted indefinitely; and in a time of peculiar zeal and excitement, a few such pro-

tracted meetings by each of the Christian denominations, coming one after another, might exhaust a good part of the year. In neither place nor time does the ordinance lay down any limit. It leaves open the whole territory of the town to become the scene of protracted worship, and every day and every night, and each hour and minute of the day or night, the services may begin, continue or be resumed. And the Christians, not of the town only, the county, the state, the Union, the continent, but of the whole earth, are allowed at their pleasure to close the plaintiffs' doors and arrest their business on the sole condition of holding divine service somewhere, anywhere, in the town. The will of Christendom is thus made the arbiter of the plaintiffs' traffic, and the corporate will of the mayor and council determines nothing but the duty of submitting, and the penalty of disobedience. To compare this ordinance to one which requires retail establishments to be closed at a specified hour in the night (10 *Ga.*, 532), is like comparing an indefinite tract of forest to some certain, well-known tree in a city park. For the authorities of an incorporated town to license a business, and then by ordinance to expose it to indefinite suspension at the will of any and every assembly of Christians who may choose to engage in exercises of devotion anywhere within the corporate limits, seems to me unreasonable as a police measure, or in any other aspect.

c. But were it competent for the mayor and council to set up indirectly any will other than that of the corporation to regulate the time of closing and re-opening the plaintiffs' doors, and could they select for that purpose the devotional will of worshipping assemblies, it is contrary to the spirit and genius of our law to discriminate for or against any particular religion, faith or creed. There can be no monopoly of any privilege connected with worship or the protection of worship. If profane doors must close for one faith, they must for every faith. To readers of the constitution and the Code of Georgia, such a phrase as "any denomination of Christian people," is unfamiliar as a legal

expression, and the reason is, that the state treats all religions alike. I will cite some examples from the Code:

Buildings used for "public worship" exempt from taxation. §798, p. 4. "Church" may be incorporated. §1677. Conveyances to or for use of any "church or religious society" for the purpose of erecting "churches or meeting-houses," good and valid. §2343. Trustees subject to the authority of the "church or religious society" for which they hold in trust. §2344. Provisions for "religious" instruction or worship, proper matter of charity for equitable jurisdiction. §3157, p. 3. Nothing "religious" if licentious in tendency, or inconsistent with the peace and safety of the state. §3159. Every "church or religious society" authorized to fill up vacancies in its trust board. §2345. All criminal laws in force March 5th, 1856, for the protection of "religious societies," extended to all societies by whatsoever name called. §2346. Selling, or causing to be sold, any spirituous or intoxicating liquors, within one mile of any "church or meeting-house," or other place set apart or being used for "divine service," during the time appropriated to such worship (unless the same be within an incorporated city or town), declared a misdemeanor. §4575. Vending or exposing to sale anything whatever within one mile of a camp-ground, during a period of "divine worship," without written consent, made penal. §4576. Policemen may be appointed for any incorporated "church or camp ground," whose duty it is to arrest disturbers of the congregation assembled for "religious worship." §4577. Bathing on the sabbath day in view of any route to or from any "house of religious worship," declared a misdemeanor. §4581. The religious attitude of Georgia is that of a friend to religion generally, with no faith or creed of her own, and no preference for one over another. Her laws protect all equally and impartially, and she has conferred no authority on any local board or other body of magistracy to legislate in behalf of the "denominations of Christian people" and leave all others out. There is no "state" religion, and there cannot be a "town" religion.

2. In the bond which the plaintiffs gave when they obtained their license, they undertook to "abide and keep all ordinances of the present mayor and council and their successors in office, regulating the retail of spirituous liquors, and save harmless the present retiring mayor and council from any damages or responsibility that may grow out of issuing said license." The court, in charging the jury, treated this bond as estopping the plaintiffs from any recovery in their action. The previous instructions had already killed the case, and this slew the slain. The proper construction of "all ordinances" is, all legal ordinances—all that could be legally enacted. An ordinance which is *ultra vires*, or for any other reason void, is no ordinance at all. It is no more than blank paper. If a person contracts to obey all statutes passed by the legislature, must he therefore obey an unconstitutional act? Surely not.

The charge was erroneous, and there should be a new trial.

Judgment reversed.

WARNER, Chief Justice, concurring.

The seventh section of the charter of Stone Mountain declares "that the mayor and council of Stone Mountain shall have power to grant or withhold, to any person or persons, license to retail and sell spirituous liquors within said limits (one thousand yards in every direction from the Georgia Railroad depot), and in no case shall the license be for a larger sum than $200.00 for twelve months, and no license shall be granted for a less time, and the person receiving the same shall execute bond, etc." This section of the charter is exhaustive upon the question of retailing spirituous liquors within the limits of Stone Mountain, and confers no authority on the mayor and council to pass the ordinance complained of. The sole power granted in the charter in relation to the sale of spirituous liquors within the limits of the corporation, is the power to withhold or

to grant the license on the terms therein prescribed. If the mayor and council grant the license to retail for twelve months, and receive the money therefor, then, under the charter, with the money in its treasury, it had no power or authority to practically defeat the object of granting the license by the passage of the ordinance in the record. In other words, the mayor and council, under its charter, have no power delegated to it to serve "God and Mammon." If it desires to serve the former, then let it withhold the license; if the latter, then let it grant the license, take the money for it, and let the traffic go on, but don't undertake to run both schedules, especially when its charter does not authorize any such proceeding.

JACKSON, Justice, dissenting.

1. It is true that the constitution and laws of Georgia open the entire state to the free exercise of religious opinion and worship therein, so long as such worship does not embrace or encourage licentiousness or immorality; and Jew or Gentile, Christian or Pagan, are alike entitled to equal protection under our liberal and wise toleration of perfect freedom of religious thought, and equality of protection extended to religious worship. Nor do I suppose that it entered into the brain either of the counsel who advised, or the town authorities of Stone Mountain who enacted, the ordinance in question, that any preference was thereby given to Christians over other worshippers. It so happens that at Stone Mountain, as in most of Georgia villages, the only churches are Christian, and the only worshipping societies are believers in Christ as the Son of God. If there be a place of worship or any society of worshippers according to any other faith within the limits of Stone Mountain, the record does not disclose it, nor have I ever heard of such place of worship or society of worshippers therein. If such had been the case, doubtless the ordinance would have extended to them, as it should, equal protection

against the danger of riot or interruption from grog-sellers and grog-drinkers whilst the mind should be composed for the worship of the common Creator of all. Therefore, I do not think the ordinance void because it does not name other as well as Christian worshippers.

2. The charter of Stone Mountain gives to the town authorities power to grant or to withhold license to retail spirituous liquors. The power to grant, covers the terms on which license is granted, except in so far as the terms are prescribed and restricted in the legislative grant of the power. Therefore, the restriction that the retailer should not sell during religious meetings, whether stated or protracted, whether white or colored, is within the grant to license, that restriction not being forbidden by any words in the grant to license or in any other part of the charter.

A greater power includes the less over the same subject-matter; therefore the power to withhold license altogether includes the power to withhold unless it be accepted on terms, or to withhold for certain solemn occasions, or festive occasions, or on certain days. Therefore the power to put this restriction upon these retailers is clearly deducible from the very broad grant of power to withhold all license.

3. If it be argued that after this license was granted, the council could not curtail or restrict its unlimited exercise for one year, I answer that these plaintiffs, in order to obtain license, voluntarily agreed to take it subject to any *future* ordinance which might be passed by the council granting it, or by their successors. Therefore they stand precisely as if the ordinance had been passed prior to the issuance of the license. They not only so agreed, but came under bond with hands and seals thereunto affixed, to be controlled and regulated in their traffic by ordinances enacted in the future. This agreement and bond became part of the contract of license, as much so as if included in the same writing—and they are bound by their contract.

4. The plain facts, considered altogether, irrespective of any isolated views of law applicable to portions thereof,

show that there should be no recovery, and that the verdict is right.

The suit is brought to recover damages from the town authorities *as individuals*, for their conduct in the discharge of their public trusts. It is brought under the following state of facts. A wet and dry ticket were voted for for town authorities. Those in favor of the retail of spirituous liquors and those against it met in battle. There was an open field and a fair fight, and at the close of the day victory perched upon the hosts of temperance, and the dram-sellers were sorely discomfitted.

What should, what *could* they do? They hastened to the outgoing council, before the victors who had fairly won the field could be installed, and applied for license. Everybody loves fair play. It looked wrong even to the outgoing party to run counter to the policy of a majority of the people, and to forestall their contemplated stoppage of the traffic. So they finally concluded not altogether to disoblige their friends, the applicants, but to grant the license *sub modo*, on condition that they should be protected, and that the incoming administration should be permitted to do after license whatever they themselves could do before. Thereupon, on being installed a few days thereafter, the new council, naturally distrustful of those who thus procured license and anxious to do nothing without legal authority, took legal counsel and advised with Judge Floyd in respect to their powers under this state of facts and their charter. The judge advised them that they could not revoke the license, but that they could regulate how it should be used; and at their request drew up the ordinance in question which the council adopted. And this suit is brought by these plaintiffs, thus obtaining license against the will of the majority of the community in which they live, and thus under bond imposed by their own friends to abide the terms which should be imposed by the new council, against that council for their official conduct in passing the ordinance and enforcing it, on the ground that they acted ma-

liciously. It is sought to make these officers *individually* and *personally* liable for fines imposed and paid into the treasury of the town, and for profits on the liquors they could have sold whilst God was being worshipped, and in which the defendants had no personal or pecuniary interest whatever, notwithstanding the hot haste with which plaintiffs rushed to thwart the community, notwithstanding the contract they made and the bond they executed, and notwithstanding the prudent and considerate manner in which the defendants *officially* acted.

In my judgment there is neither law nor equity, nor good sense, nor good morals, in permitting plaintiffs to recover one cent; and I therefore dissent from the judgment of reversal—with entire respect, let me add, for my colleagues, and with regret that my own convictions are too strong to permit me to yield to their view of the law.

Lee *vs.* The State of Georgia.

Though, after committing larceny (stealing a horse) in an adjoining state, the thief brings the stolen property into this state, and here carries it from place to place in a county of Georgia, he does not commit simple larceny in this state.

Criminal law. Larceny. Before Judge McCutchen. Whitfield Superior Court. April Term, 1879.

Lee was indicted in the county of Whitfield for the larceny of a horse. The proof showed that if he was guilty of the theft, the act was perpetrated in the state of Tennessee; but also, that he had brought the horse into the county of Whitfield, had there endeavored to sell him, and had exercised other acts of ownership. The defendant was found guilty. He moved for a new trial, among other grounds, because the court erred in charging as follows:

"If a person fraudulently get the possession of personal

property from the owner of it in the state of Tennessee by a pretended hiring, and if the hiring be used by him simply as a fraudulent means to get the possession from the owner, and if his real motive and intent was, at the time he got possession, to steal the same and deprive the owner of his property; and such person, after thus fraudulently getting possession of property, brings it into Whitfield county, in the state of Georgia, and if he, after bringing the property to this county, moves it about in this county from place to place, and appropriates the same to his own use in this county, and if such asportation and appropriation in the county of Whitfield be all the time accompanied with the intent to steal and deprive the owner of his property, such asportation and appropriation in Whitfield county, if done with intent to steal, would amount to larceny under the laws of Georgia."

The motion was overruled, and defendant excepted.

W. C. GLENN; JOHNSON & MCCAMY, for plaintiff in error, cited 1 Chit. C. L., 178; 3 *Ib.*, 944; 1 Haywood, 100; 2 John., 477, 479; 5 Binney, 617; Ros. Crim. Ev., 657; 2 Vroom, 82; 4 Humphrey, 456–59; 15 Ind., 318; 14 La., 278.

A. T. HACKETT, solicitor-general, for the state.

BLECKLEY, Justice.

The accused stole a horse in the state of Tennessee. He brought the animal into this state, and here carried it from place to place in the border county of Whitfield. In that county he was indicted for the offense of simple larceny, and being convicted, moved for a new trial, which was refused.

Whether he was guilty or not, depends upon whether a fresh larceny was committed here. The doctrine that a larceny is repeated in every county of the same sovereignty in which any asportation of the stolen goods occurs, is

established; and to that extent the fiction is to be accepted in place of the orignal fact. Fiction ought to have no place in the law, and it is to be hoped that the time will come when it will be rooted out; but in so far as it has been incorporated into the law, it must, for the present, be treated as of equal potency with reality. We have adopted the common law of England, and with it the theory of *repetition larceny*, but in that country this theory would not embrace the present case; and that it would not there embrace it is a very sufficient reason for holding that it does not embrace it here. Ros. Cr. Ev., 646; 2 Russ. on Crimes, 119; 4 Bacon's Abr., Bouvier's Ed., 179. In this country the decisions are conflicting; see Whar. Cr. Law; Whar. Cr. Ev.; Bishop's Cr. Law; Rorer on Inter-State Law. We think the soundest decisions are those which least favor the doctrine of constructive crimes. The true legal relation of the accused to our state, is that of a fugitive from justice from the state of Tennessee.

Judgment reversed.

GILES, ordinary, for use, *vs.* SPINKS *et al.*

1. **The jurisdiction of the county court of Houston county at its monthly sessions is for all claims up to $100.00, and if the plaintiff in his declaration declare for that sum only, the jurisdiction will be maintained, though damages beyond that amount be proven and found by the jury.**
2. **He can only recover as much as he declares for—no more; therefore the verdict for more is illegal, but the surplus may be written off and the verdict may stand for the sum found within the jurisdiction.**
3. **A verdict is certain which can be made certain; and where the damages to plaintiff on a constable's bond for failure to levy is found to be two principal sums with interest up to a certain time and from a certain time at different rates on each principal sum, so as to calculate exactly how much damage the jury found, the verdict is sufficiently certain to predicate a judgment thereon, and the judgment should not be arrested because of the alleged uncertainty of such a verdict and impossibility to enter up judgment thereon.**

Giles, ordinary, for use, *vs.* Spinks *et al.*

Jurisdiction. Verdict. Damages. Practice in the Superior Court. Before Judge SIMMONS. Houston Superior Court. November Adjourned Term, 1878.

This was a suit by the ordinary for use of Jaques & Johnson against Spinks, constable, and the sureties on his bond. The case was brought in the county court of Houston county; the breach alleged was the failure to realize the amount of two *fi. fas.* placed in his hands, bearing interest as stated in them; the damages were laid at $100.00. The county judge rendered judgment for plaintiff for the principal sum of $97.79, and defendants appealed. On the appeal the jury found the following verdict: "We, the jury, find for plaintiffs $43.77, with interest from the 14th of December, 1873, at one and one-half per cent. per month; also the sum of §43.77, with interest at two and one-half per cent. per month from the 24th day of December, 1873, against H. N. Spinks, H. C. Harris and W. R. Brown, Jr., executor."

Defendants moved in arrest of judgment on the following, among other grounds:

(1.) Because the case was beyond the jurisdiction of the county court.

(2.) Because the verdict should have been for a fixed amount of damages, and no legal judgment could be entered on it as found.

The court sustained the motion, and plaintiff excepted.

W. E. COLLIER, for plaintiff in error.

A. L. MILLER, for defendants.

JACKSON, Justice.

The plaintiff sued, on a constable's bond, the constable and his sureties for damage arising from failure to levy, laying his damage at one hundred dollars in the declaration. The suit was brought in the county court of Houston

county returnable to its monthly session. The jurisdiction at these sessions of that court is one hundred dollars. The case was taken by appeal to the superior court, where verdict was had for more than one hundred dollars, and the judgment was arrested.

1. It is the amount of damages laid in the declaration that fixes the jurisdiction, and not the verdict of the jury. *Tyler Cotton Press Company vs. Chevalier*, 56 *Ga.*, 494; *Lee vs. Nelms*, 57 *Ib.*, 256.

2. Therefore the jurisdiction is maintainable; and if the verdict be over the jurisdiction, and more than the plaintiff claims, it may be written down to the sum laid in the declaration. It cannot be for more. *Harris vs. Dub*, 57 *Ga.*, 77; *Ansley vs. Jordan*, 61 *Ib.*, 488, 208; 15 *Ib.*, 554; 20 *Ib.*, 91; 45 *Ib.*, 94, and many others.

3. A verdict is certain which can be made certain by what itself contains or by the record. This verdict finds that plaintiff was damaged two certain principal sums on two notes reduced to judgment and interest at a certain per cent. on each. Though the interest be at different rates per centum, the damage found can be ascertained by a simple calculation in multiplication and addition which any school-boy can make. Therefore the verdict is for a certain sum. All over one hundred dollars is wrong. Let it be reduced to $100.00 and stand for that sum as damages with costs of suit; that is, costs in this case on the bond, and not costs in the actions on the notes. Code, §3561; 14 *Ga.*, 691; 57 *Ib.*, 304; 19 *Ib.*, 298; 24 *Ib.*, 591. Therefore the judgment on this verdict should not have been arrested.

Judgment reversed, with directions accordingly.

Mitchell *vs.* Word, guardian, *et al.*

1. While by comity the wife of a non-resident who died intestate may be allowed to sue in Georgia for her year's support, there being property here, especially if there are no debts against the intestate in the state of his residence, yet the amount of her recovery will be regulated by the law of the state of intestate's domicil.
2. By the statute law of Florida a widow is entitled to dower in her husband's personal property as well as his realty.
3. In a contest over a widow's dower and year's support, the jury found the following verdict: "We, the jury, find and decree $600.00 for one year's provision for the widow and the family; and also we, the jury, find the widow is entitled to one-third of the personal property of the deceased, and that the following notes shall be considered as part of the deceased's personal property: One note on J. N. Whitner for the sum of $1,200.00, also one note on Brantley for $3,500. And we further decree that all moneys furnished the said widow by the administrator shall be charged to her, except what she has received on her land dowry:"

Held, that by a reasonable construction of the verdict, the jury did not find that the acceptance of the notes barred the taking of dower, but that she was entitled to the notes as part of her dower, and left open the question whether, on final settlement, she would be entitled to more.

Jackson, Justice, dissented.

Year's support. Administrators and executors. Dower. Laws. Verdict. Before Judge Underwood. Floyd Superior Court. March Term, 1879.

Reported in the decision.

Wright & Featherston, for plaintiff in error.

D. S. Printup; Alexander & Wright, for defendants.

Warner, Chief Justice.

It appears from the record in this case that T. J. Word and others, the children of D. R. Mitchell, filed their bill in Floyd superior court against Mrs. C. A. Mitchell, the widow of D. R. Mitchell, and C. D. Forsyth, the administrator. Suit brought to the January term, 1878.

The bill alleges that D. R. Mitchell died intestate in November, 1876, domiciled in the state of Florida, where he left an estate worth about $12,000.00. Administrators had been appointed there. The intestate also left an estate in Floyd county, Georgia, consisting of lands valued at about $15,000.00, and personal property worth about $5,000.00. C. D. Forsyth had been appointed administrator in Georgia. The estate was considerably in debt in Georgia; owed nothing in Florida.

For some time prior to his death the intestate had been in very bad health, and seemed conscious of his liability to die at any time. A few weeks before his death he called his wife, Mrs. C. A. Mitchell, into the room where he was and told her that he was feeling badly or strangely, and that he might die before morning, and called for writing material which was furnished him, and he left alone. In a short while after he recalled his wife, and in the presence of her little daughter Carrie, (by a former husband,) offered her the following notes:

One note on B. F. Whitner of Orange county, Florida, for $1,185.00, dated January 1, 1876, and due January 1, 1880, with interest at 8 per cent., payable annually, with this indorsement:

"I do hereby give unto my dear wife, C. A. Mitchell, this note for her individual and separate use and benefit, and direct that payment be made to her, and the mortgage on which it is founded.

Witness my hand and seal, September 26, 1876.

D. R MITCHELL, [*Seal*]'

Also one note on J. N. Whitner for $1,200.00, dated January 1, 1876, and due January 1, 1878, with interest, indorsed as follows:

"I have given the above note to my dear wife, C. A. Mitchell, for her individual use and benefit, as part of her interest in my estate.

This 26th day of September, 1876. D. R. MITCHELL."

Also one other note on G. C. Brantley for $3,500.00, dated September 2, 1875, and due twelve months after, with interest at 10 per cent., indorsed as follows:

"I have and do hereby give the above note to my dear wife, C A. Mitchell, for her individual use and benefit, as part provision for her. Witness my hand and seal, this 26th of September, 1876.

D R. MITCHELL, [*Seal.*]"

The intestate stating to his wife at the time, if he should die she was provided for, handing the notes to Carrie and telling her to put them in her mother's trunk. Said notes are now held by Mrs. Mitchell, and are solvent.

That shortly after her husband's death Mrs Mitchell moved back to Rome Ga., the former home of both parties. She here applied to the ordinary for the assignment of a year's support, as provided by the laws of Georgia. On May 9th, 1877, commissioners appointed for that purpose assessed $2,000.00 "for her support and maintenance for twelve months from the death of D. R. Mitchell, including house-rent and furniture." Complainants filed various objections to this allowance, and at the ordinary's court in August, 1877, said objections were passed upon and overruled, except that the amount allowed was reduced to $1,500.00. From this judgment of the ordinary the complainants had appealed to the superior court, and that appeal was still pending. The ordinary then passed an order that the administrator furnish the widow necessaries for her support pending the appeal and complainants had appealed from this order also. They allege that the widow is not entitled to a year's support in Georgia, and the ordinary has no jurisdiction of the matter; also that the sum allowed was grossly excessive. That the note of B. F. Whitner, before described, was intended by the intestate as a provision in lieu of year's support; and that the notes of Brantley and J. N. Whitner were handed Mrs. Mitchell to be accounted for in the distribution of the estate, as shown by the circumstances of their delivery. These notes will more than cover all interest she may have in the estate, whether year's support or dower or both.

The prayer is for discovery; that the payment of anything towards year's support be enjoined, and her rights on

that subject settled in this case; that Mrs. Mitchell be enjoined from collecting anything on said notes, but be required to turn them over to the administrator, or else accept them in lieu of any interest she may have in the estate; and for general relief.

The complainants amended the foregoing bill by alleging that the before described notes on J. N. Whitner and G. C. Brantley, indorsed to Mrs. Mitchell as before stated, "were so written, indorsed and delivered to her by D. R. Mitchell in consideration of and for her entire interest as widow and heir at law in his entire estate, both real and personal, both as dower and distributive share of personalty;" and that the note on B. F. Whitner was given in lieu of year's support. And they pray that she may be enjoined from prosecuting her claim for dower in the lands.

The allegations in the bill are answered in detail, but the following only are material here:

The intestate, her husband, had been a citizen of Floyd county most of his life, as she herself had been. Only a short time before his death they moved to Florida. Immediately upon his death she came with his remains back to Georgia, where his body was interred in his family burying-ground here. She came back to live here permanently, and this has been her home ever since.

She admits the gift to her by the intestate of the three notes on the Whitners and Brantley, and sets forth copies of said notes and their indorsements. She was herself unwell at the time of the gift, and the intestate came to her room and handed the notes to her in bed, saying, "here are some notes which I have indorsed to you, you may need them." Respondent handed them back to him, requesting him to give them to her daughter, Carrie, to put in her trunk, which he did. He did not say, "If I should die you are provided for," nor anything to that effect.

She denies that either or any of said notes was or were given her in lieu of year's support, or for any other purpose than as stated in the written assignments thereon.

In her answer to the amendment she states that she knows of no fact or circumstance on which the complainants could base their allegation that said notes were given in lieu of her entire interest in the estate. There was no writing of any kind other than the indorsements conveying the notes to her, or pertaining to the transaction in any way. The intestate said, "Here are some notes I have indorsed to you, you may need them," or words of similar import; and that was all he ever said to her on the subject. He certainly did not say they were given in lieu of any claim she might have on his estate, and she did not so accept them. So far as she knows or has any reason to believe, and does believe, said gift was prompted purely by the generosity of her husband. He had a short time before given off to the complainants, his children, the bulk of his estate, the amount being, as estimated by him at the time, and as she alleges, $10,000.00 to each child or share, and which he then said was all he intended to give them; while he had not given, and did not in his lifetime give, to respondent anything but the notes aforesaid, except some present of trifling value. She therefore distinctly and expressly denies the allegation aforesaid.

By way of cross-bill Mrs. Mitchell alleges the advancements to the complainants by the intestate as before stated, and prays that they be brought into hotch-pot, etc.

She also states that the laws of Florida allow the widow a year's support for herself and family out of an intestate's estate; also, that by those laws the widow is entitled to one-third of the personal estate absolutely as part of her dower; and that if it shall be ascertained that the intestate was domiciled in Florida at the time of his death and the personal estate here is to be administered according to the laws of Florida, she prays that the court will allow her year's support and dower in the personalty as fixed by those laws.

By an amendment to this cross bill, she states that being satisfied from proofs produced by complainants on the

hearing of an application for injunction, that the intestate was domiciled in Florida at the time of his death, she joins the complainants in alleging that fact, and submits to the court that the personal estate here must therefore be administered according to the laws of that state. She details the laws of Florida upon the subject of her dower in the personal estate, and prays the court to ascertain and set apart the same to her, an inventory of the personal estate being set forth in the answer of the administrator.

Temporary injunctions were granted against the proceeding to set apart the year's support, and against the proceeding to assess money in lieu of dower in the lands. The latter injunction, however, had been by consent dissolved and the dower assessed before the trial.

The case was tried at the March term, 1879, and the jury rendered the following verdict:

"We, the jury, find and decree $600.00 for one year's provision for the widow and the family; and also we, the jury, find the widow is entitled to one-third of the personal property of the deceased, and that the following notes shall be considered as part of the deceased's personal property. One note on J. N. Whitner for the sum of $1,200.00, also one note on Brantley for the sum of $3,500.00. And we further decree that all moneys furnished the said widow by the administrator shall be charged to her, except what she has received on her land dowry."

Mrs. Mitchell moved for a new trial on the following grounds, the statement of facts and rulings in which are certified by the court below to be true:

1. That part of said verdict awarding six hundred dollars for year's support, is against the strong and decided weight of the evidence as to the proper amount which should be allowed for that purpose.

2. The court erred in charging the jury, and in ruling on the trial, that the widow of the intestate (the movant) was not entitled to the year's support (out of the estate) as allowed by the laws of this state, but that her right to

year's support was such only as the laws of the state of Florida allowed.

3. The court erred in charging the jury that by the laws of Florida the widow was allowed only a sufficient supply of provisions for herself and her family including her children and servants, for one year from the death of the intestate or grant of administration on the estate.

4. And in charging that in this case the widow could not have any allowance in lieu of the household goods authorized by the laws of Florida to be set apart to her, unless it appears from the evidence that she had been deprived by any one of her right to occupy and enjoy them as provided by said laws of Florida.

5. That part of said verdict which provides that the notes of J. N. Whitner and Brantley shall be considered as part of the personal estate of the intestate, in estimating the one-third of said personal estate awarded to the movant (the widow of the intestate), is contrary to law and to the charge of the court on that subject, and is without any evidence whatever to support it.

6. The court, after charging the jury that the laws of Florida extended the widow's dower to one-third of the personal property absolutely, besides her life estate in one-third of the lands, further charged that this was an interest cast upon the widow by operation of law, independently of any contract of the parties, and could not be defeated by any gift or provision made by the husband by deed or will, unless such provision was expressly in lieu of such dower, and the widow had elected so to accept the same. That the gift by the husband to the wife, in contemplation of death, of certain promissory notes, expressed by his written indorsements to be for her individual use and benefit, as part of her interest in his estate, and as part provision for her, would not defeat the widow's right to dower, unless the jury believe from the evidence that what was said by the parties at the time of the transfer and delivery of the notes shows that it was intended to be expressly in lieu of dower in the personal estate.

The movant complains that the last clause of said charge, beginning with the word *unless*, was error, it being incompetent, she submits, to prove by parol a provision in lieu of dower; and, further, there being no evidence on which to base such charge.

7. Said verdict, so far as it applies to the dower in the personalty, is imperfect and incomplete, in this that it does not specify and set apart the particular items or articles of personal property which shall constitute the movant's dower in the personalty, and does not specify the value of the said notes required to be estimated as part of the personal estate in ascertaining said dower, and does not cover the issue made by the pleadings on this subject.

8. It was distinctly admitted by counsel for the complainants in the progress of the trial, that they did not call upon this defendant to account for said notes as an advancement, and agreed with counsel for this defendant that the question of advancements was not involved in the case. And counsel for this defendant stated that not regarding the question of advancements as pertinent to the case they should not introduce evidence of the advancements made by the intestate to the complainants.

The movant, therefore, complains that the verdict in effect requiring her to account for said notes as an advancement was improper and illegal.

The evidence, apart from the answer of Mrs. Mitchell, was confined mostly to the question of the year's support. A schedule of the personal property in which she claimed dower, was put in evidence.

C. D. Forsyth, the administrator, testified that when he was appointed administrator, the entire estate here and in Florida, was estimated by the complainants at $40,000.00. The estate here was appraised at $20,000.00, though from sales made he thought it would fall short of that 25 per cent. The debts here will reach about $4,500.00, besides expenses of administration, about $1,500.00.

Mrs. C. A. Mitchell testified that she married the in-

testate in March, 1875, and soon after went with him to Florida. Returned here in the summer. Spent both summers here before his death, which was in November, 1876; the balance of the time at his place on Lake Jesup in Orange county, Florida. The house they lived in was a nice one, containing ten rooms, and handsomely furnished, surrounded by pleasant grounds and an orange grove. They lived well. Col. Mitchell furnished all they wanted. Had good servants. Two minor children by a former husband lived with her all the time, and were supported by Col. Mitchell as if his own. When Col. M. died she came back with his remains here, and has been living here ever since.

She never applied for year's support in Florida, and has received nothing from the Florida estate. Did not bring with her any of the household goods. The Florida administrator took possession of the house and everything in it, and told her she could not have anything. She has been living in Rome ever since and has not proposed or offered to occupy the house.

She had collected only $400.00 on the Brantley note. Mr. Brantley has lately died. The B. F. Whitner note she collected by giving a discount. J. N. Whitner is insolvent, and she does not know whether the land for which his note was given can be subjected to its payment or not. She fears that she will never get anything on that note.

W. F. Ayer, J. W. Rounsaville, R. T. Hargrove and J. G. Dailey, all testified that they were commissioners appointed by the ordinary to assess the year's support for Mrs. Mitchell. They assessed $2,000.00, and now consider that a reasonable and proper amount. In making this allowance they considered the amount of the estate, which they supposed to be $40,000.00 (though some of them would make no difference if the estate was $30,000.00); they also considered the value of one year's rent of such a house as the family occupied in Florida, furnished as it was; also the fact that Mrs. M. had two minor children, and that Col.

Mitchell married her with this incumbrance; and that this incumbrance still existing, it was proper to be considered in estimating what sum would be required to enable her to live in the same style she had lived before her husband's death.

Some of them stated that the intestate was a close man in money matters, but always lived well. Owned fine brick residence before the war, and handsome furniture. Kept a carriage, etc. Since the war and after the death of his first wife he occupied a small room adjoining his law office. Witness Hargrove was very intimate with him. Just before he left for Florida, he told witness he had given his children $10,000.00 apiece, and he intended to live at his ease on what he had left. Witness knows of his buying and taking with him a good supply of fine linen, table cutlery, etc.

R. S. Norton and J. C. Rawlins, witnesses for complainants, thought $600.00 or $800.00 a proper sum for a year's support. Board at Rawlin's hotel, including lodging and attendance of servants, would cost $25.00 to $30.00 per month. Wardlaw estimated $500.00 to $600.00, and Byrd $600.00, enough for year's support.

T. J. Word testified, he is a son-in-law of intestate. He was a close, economical man, too much so, though he did furnish his family with ample supplies and lived well at home. Witness thinks $600.00 ample for year's support.

L. T. Mitchell, complainant, lived in Florida when his father died. The house his father lived in there was a framed building with six rooms below and four attic rooms with dormer-windows above. The furniture was cheap—white pine painted nicely. The house was three-quarters of a mile from a landing on Lake Jesup, in a town his father had laid off called Tuscawilla. No other houses there then. One or two built since. A store and one or two other houses were at the landing. No other settlement nearer than twelve miles except by the river or lake. His father always close and saving, never extravagant.

But two questions were insisted on in the argument here. First, whether the widow of the intestate was entitled to her year's support out of his estate in accordance with the law of Georgia, or in accordance with the law of Florida, the place of his domicil at the time of his death? Second, was the widow of the intestate, under the law of Florida, entitled to dower in the personal estate of the intestate, and if so, did the acceptance of the notes, in the record mentioned, by her in the lifetime of her husband, bar her right to claim dower in his personal estate after his death?

1. As to the first question, it is true that the year's support of the widow of the intestate by the statute law of this state, is declared to be a part of the necessary expenses of administration, but the amount thereof is to be ascertained by what the law of Florida allowed her for a year's support in that state at the time of the intestate's death. The law of this state regulates the amount which the widows of deceased intestates shall receive for their year's support when the deceased intestate was domiciled in this state at the time of his death, but not the widows of deceased intestates who were domiciled in other states at the time of their death, although the widows of such intestates may remove into this state after the death of their intestate husbands. By comity, the courts of this state will allow a widow to sue here for her year's support, especially when the intestate owed no debts in the state in which he was domiciled at the time of his death, but the amount of her recovery will be regulated by the law of the state in which her deceased husband was domiciled at the time of his death, and not by the law of this state. There was no error in the charge of the court in relation to this question in the case.

2. By the statute law of Florida, the widow of the intestate was entitled to dower in his personal estate, as well as in his real estate, and the court so charged, and we find no material error in that charge of which the widow of the intestate can justly complain, in view of the evidence in the

[illegible]ord.

3. The jury found by their verdict that the widow was entitled to one-third of the personal property of the deceased, and that the two notes specified therein was a part of the deceased's personal property. The jury did not find by their verdict that the widow was barred of her right to dower in the intestate's personal property, but on the contrary, found that she was entitled to the same, and that the two notes which she held was part payment thereof, inasmuch as they found the same to be a part of the intestate's personal estate. The jury did not find by their verdict that the two notes was *all* that the widow was entitled to as dower out of the personal estate of her deceased husband (probably the unsettled condition of the estate did not authorize them to do that), but they did find that the two notes named in their verdict was a part of the deceased's personal property, and that she was entitled to that much of it as part of her dower, as provided by the Florida statute under which she claimed it. The verdict, as we construe it, gives the widow, unconditionally, the two notes named therein as a part of her dower in the intestate's personal estate; how much more she may be entitled to, if any, on the final settlement of the estate, does not appear. There was no error in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

Bleckley, Justice, concurred, but furnished no written opinion.

Jackson, Justice, dissented upon the ground that the year's support of the family under the law of Georgia—Code, §2571—is a part of the expenses of administration, and must therefore be regulated by the law of the forum where administration is had. Therefore, if administration be had in Georgia on the estate of a decedent who died in Florida, the amount of such support should be regulated by the law of the former state and not of the latter.

Expenses of administration in Florida have nothing to

do with expenses of administration in Georgia. What the fees of the ordinary are by the laws of Florida cannot regulate the fees of that officer in Georgia, nor can any other expenses which would be incurred by administration there on property there and be fixed by their law, control the expenses here on property here. If, therefore, the year's support be expenses of administration, and our statute so declares in plain words, Georgia law must regulate as well the value and amount of these expenses as of any other expenses of administration.

The ordinary or judge of probate of Florida, if his claim were interposed here for fees out of this property administered here, would not be entitled thereto. His claim might come in as a debt, but not as costs of administration. So Mrs. Mitchell's claim for a year's support, if it rested on Florida law, would give her no preference here—certainly none over everything in the way of debts and liens; yet it was set apart in preference to all other claims here. Why? Because it ranked under our law as expenses of administering the property here.

Support for the family is not dependent on the place where decedent died, or where he was domiciled when he died, under our statute of distribution; but goes to the widow as matter of right and as costs of administration if she lived in Georgia when the administration of the property is had.

This widow came with her husband's remains here and lives here, and her year's support must be taken out of the property administered here before its net proceeds can be otherwise disposed of. It is a claim which ranks with fees of officers and costs of administration; it ranks according to the laws of administration here; and its amount is as much fixed by that law as any other fee or costs of administration. Besides, there is no proof that she has received anything from the property in Florida; and as her domicil has been in Georgia ever since her husband's death, she will not be sent there for rent of homestead or year's sup-

port, or furniture, or aught else that she might sue for and possibly recover there. Living in Georgia before she married the decedent and at the time of the marriage, and having resided with her husband in Georgia part of every year of the marriage, it is not right to remit her to Florida for any part of her year's support, or to limit it by the narrower provisions of the laws of Florida—nor is it law.

Unquestionably the law is that the personal estate in Georgia will be distributed according to the laws of Florida, after the expenses of administration in Georgia are deducted, because the domicil of decedent was in Florida; but these expenses must be first deducted, and among these expenses our statute includes the year's support of the family of the decedent. Hence the law of the case, as he understood it, accorded with the right; and while distrustful of his judgment in view of differing with his colleagues as well as the court below, to his own mind the point seemed so clear that his duty required him to express his dissent.

McCauley *et al. vs.* Gordon.

If, on the purchase of partnership property, a promissory note due at a future day be given for the price and made payable to the order of one of the partners as an individual, the partnership having an established partnership name different from that of the payee of the note, the note (though partnership property) cannot be indorsed by another one of the partners in the name of the payee so as to pass the legal title, with the incidents of negotiable paper transferred before due, without more authority than that which results by operation of law from the partnership relation. An alteration of such a note by inserting therein the words "or bearer," is a material alteration.

Partnership. Negotiable instruments. Indorsement. Alteration. Before Judge McCutchen. Whitfield Superior Court. April Term, 1879.

Gordon brought suit in the justice's court of the 1049th

district, G. M., against McCauley and Ward, on the following note:

"SEPTEMBER 1st, 1877.

"Ninety days after date we promise to pay to the order of J. C. Williams, or bearer, one hundred dollars, value received.

Test, W. L. Headrick. C. C. McCAULEY.
W. WARD."

Indorsed, "J. C. Williams."

The defendants pleaded under oath, as follows: 1. *Non est factum.* 2. They purchased of the firm of Williams Bros. a sorghum mill and evaporator, which was warranted by J. C. Williams to be of good quality, he representing that it would grind and evaporate at the rate of sixty gallons a day. The representations have proved false, and the warranty has failed, as the mill and evaporator will not do half the work stated. Defendants intending to reserve the right to refuse to pay for the mill, etc., the price agreed upon if the warranty failed, or the representations proved false, declined to sign a note negotiable at all, or one payable to bearer, and signed the note sued on without the words "or bearer," which have been since fraudulently interlined in said note by J. C. Williams, or under his direction. This alteration is material, and voids the note as to these defendants. It was made by the holder fraudulently, without their knowledge or consent, and they would not have made a note with such words contained therein. 3. The note never was indorsed or assigned by J. C. Williams, the payee, or by his authority or consent, and the indorsement thereon is fraudulent, and a forgery.

The magistrate rendered judgment for the plaintiff and the defendants appealed to the superior court.

The evidence, so far as material, disclosed that J. C. Williams, G. W. Williams and B. A. Williams were partners, using the firm name of Williams Bros., in the manufacture and sale of sorghum mills and evaporators, and sold one of these machines to defendants. That the latter refused to sign a note therefor payable to the order of J. C. Williams "or bearer," and had a second note written with all nego-

tiable words, as they supposed, omitted, which is the one now sued on. They offered to show that they did not know that even the words "to the order of" were in the note signed, but this evidence was excluded by the court.

The evidence also showed that the name of J. C. Williams was indorsed on the note in the writing of G. W. Williams, without the knowledge or consent of the former, and that this was done before the interlineation of the words "or bearer." Also, that these words were interlined without the knowledge or consent of the makers.

The court charged, in substance, as follows: If the Williamses were partners, and the property for which the note was given belonged to the firm, and not to J. C. Williams individually, then either of the partners could sell it, and either of them would be authorized to indorse the name of the payee, and could do this without his assent or knowledge, and the effect would be to confer upon the holder the legal title. If George W. Williams had authority as partner to make the indorsement, and had written the name of J. C. Williams across the note before the words "or bearer" were inserted, then the insertion of such words was immaterial inasmuch as the note, by the indorsement, was in effect payable to bearer.

The jury found for the plaintiff.

The defendants excepted to the exclusion of defendants' testimony of ignorance of the fact of the words "to the order of" being in the note, and to the instructions to the jury. Error was assigned accordingly.

W. K. Moore, by brief, for plaintiffs in error, cited Story on Prom. Notes, §§120-125; Chit. on Bills, 226; 30 *Ga.*, 130; 24 Wend., 374; 19 John., 391.

Johnson & McCamy, for defendants, cited Code, §§1904, 1909, 2785, 2852; 2 Par. on Con., 226, n. 5; 15 Pick., 239; 20 Vermont, 219; 3 Ohio, 445; Story on Part., §142; 1 Denio, 472; 8 Barn. & Cress., 427.

BLECKLEY, Justice.

There can be no doubt that to tamper with a promissory note so far as to insert in it the words "or bearer," is grossly improper. It verges on forgery. The introduction of such words is a material alteration, for they go to modify the manner of negotiating the instrument. *Dudley R.*, 243. Without them, or words of similar import, the instrument is negotiable by indorsement only; with them, it is negotiably by bare delivery as well as by indorsement. It is said they were immaterial in the present case for the reason that the note was indorsed in blank before their insertion, and thereby the note had already become negotiable by delivery, the effect of indorsement in blank being to render it payable to any bearer. But the payee did not indorse, and the person who did indorse, though a partner of the payee, did not indorse in the partnership name or in his own name, but in the name of the payee; and this he did without any authority further than the general implied authority of the partnership relation. The partnership had an established partnership name, which was quite different from the name of the individual partner to whom the note was payable. The agency of a partner to sign for the partnership is generally restricted to signing in the established partnership name, where the partnership has such a name. Let it be conceded that the note was partnership property, and that the partner who transferred it had a right to transfer it, we think that, without some special authority from the payee, he could not indorse it in the name of the latter, and put it afloat with all the incidents of negotiable paper transferred before due; and if he could not do this, the words "or bearer," had they been genuine, would or might have varied the rights of the holder, and made these rights more comprehensive; and whatever would or might have had that effect cannot be treated as immaterial. There is a public policy to be subserved in guarding the purity and [illegible]rity of negotiable paper, and neither surreptitious in-

terpolations in the body of the instrument, nor the indorsement by one man with the name of another, ought to be countenanced as a strictly commercial transaction in. a doubtful case. On the face of the note is nothing whatever to indicate the connection of any partnership with it; and the operation of the indorsement in the name of the payee would be, *prima facie*, to render him, and him alone, liable upon the contract of indorsement. All interest of the partnership in the transaction depends upon evidence extrinsic of the note and of the indorsement, and this being so, the words "or bearer" have a material bearing upon the measure of evidence requisite to make a case for recovery by the holder against even the makers. As the note was not in fact indorsed by the payee, it is easy to see that the holder would be better off with the words "or bearer" in the terms of the instrument than if they were not there, since the want of them would place upon him the burden of proving that the indorsement was made with the payee's authority, the plea putting the genuineness of the indorsement in issue. In any and every view of the matter, the alteration was material. and the court erred in the instructions given to the jury.

Judgment reversed.

Burr & Company *vs.* The City of Atlanta.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. Merchants who ship bacon and corn from St. Louis to Atlanta, to an agent in Atlanta, who sells the goods so shipped by going about the city to engage it, and then delivering it from the cars or freight depot, and who has no store or warehouse, or other place of business in Atlanta, are, by their said agent, itinerant traders, and are liable to the city of Atlanta for taxes imposed upon that occupation or business
2. All other points in respect to constitutional objections to the ordinance imposing the tax are covered by the case of *Davis vs. The City of Macon*, decided at this term.

Tax. Municipal corporations. Constitutional law. Before Judge Hillyer. Fulton Superior Court. March Term, 1879.

Burr & Co. sought to enjoin the City of Atlanta from collecting from them a tax as itinerant traders, under the following ordinance:

"On each $100 00 of the amount of sales of goods, wares, merchandise, produce, shingles, lumber, and all other articles sold by itinerant traders, including those who ship their produce, goods, wares, etc., into the city and sell the same either from the cars or depots or go around the city and sell the same by sample, there shall be levied a tax of $1 50 (excepting those who raise their produce in the country adjacent)," etc.

Complainants alleged the following facts: They are provision dealers in St. Louis. About April 1, 1879, they sent one Sharp to Atlanta to sell to the merchants by the car-load corn and meat. He located at the Markham House, a public hotel. Complainants shipped car-loads of corn and meat to him, and he sold them from the cars to the merchants,—some of them came to the cars and bought without solicitation; others he solicited at their places of business and elsewhere. He did not carry around any of the goods nor samples thereof. For two car loads he did not find a market, and stored them with resident merchants. One has been sold, the other has been levied on under this tax *fi. fa.* They deny being itinerant traders, and claim that the ordinance is discriminating and unconstitutional.

Defendant's answer denied that Sharp made any sales at the Markham House, but alleged that he sold at the depot and on the streets to merchants and others; also that he sold in towns adjacent to Atlanta, as well as in that city.

The chancellor refused the injunction, and complainants excepted.

There was some question as to the amount of sales, etc., but it is not material here.

Mynatt & Howell, for plaintiffs in error.

W. T. NEWMAN, for defendant.

JACKSON, Justice

The plaintiffs in error applied for an injunction to restrain the City of Atlanta from collecting a tax imposed upon them as itinerant traders under the 12th section of the tax ordinance of the city for the year 1878, ending 30th of June, 1879. The chancellor refused the injunction, and they excepted.

The 31st section of the acts of incorporation confers on the city the power to levy and collect such tax from itinerant traders who by themselves *or others* sell any goods, wares or merchandise in the city, as to them shall seem proper; and therefore there can be no doubt of the grant of power to levy the tax, if the complainants be itinerant traders, and be not protected by some other law.

The facts make them, we think, itinerant traders in the city of Atlanta. They have no place of business here—no store or warehouse—but they ship corn and meat by the car-load to an agent here, who goes about the city and engages to deliver the meat and corn from the car or depot to buyers in the city. They would seem to be itinerant, whether we regard the principals, who are a firm in St. Louis, and journey a long way with their goods before it is sold, or the agent here who travels over the city to sell the goods to any who may buy. This case is clearly distinguishable from *Gould & Co. vs. City of Atlanta*, 55 *Ga.*, 678. They, Gould & Co., were not itinerant traders in any sense of these words—whether restricted to peddlers or to traders who journey about to sell in a larger sense than our ordinary idea of a peddler. They rented a house in the city, and there they sold and delivered their goods. But the complainants in the present case have no place of business. Their agent has none. The cars and the depot, open to all the public, is their place of deposit, and from this point their agent goes to and fro over the city, and sells to

whom he can. He is a man who goes about the city to trade, and does trade wherever he can make a bargain, and then delivers the quantity bought. In the large sense in which the word peddler is used in the opinion in the case in the 55 *Ga.*, 678, he peddles this corn and bacon over this city and is a peddler.

2. But it is said that because the ordinance excepts from the operation of this tax on itinerant traders those who raise their produce in the country adjacent, it conflicts with the uniformity and *ad valorem* clause of the constitution of 1877. The exception, we suppose, was intended to apply not to real itinerant traders, in the true sense of these words, but to farmers who brought in on wagons what they raised at home, and sold it out—whose business was not that either of a peddler or itinerant trader in any sense, but who were farmers, and came to town occasionally to sell what they made at home.

It seems to us that this exception merely separates more clearly from the class of itinerant traders people who never really belonged to that class, and is not repugnant to that clause of our constitution. Nor does it conflict with the rights of citizens of other states.

Indeed, we see nothing in the exception, as it stands, to conflict with anybody's rights. People who bring produce here from the country are not peddlers or itinerant traders, but farmers; and practically nobody will ever inquire whether the wagon came from DeKalb or from Greene, from Cobb county, Georgia, or from the state of Tennessee. Adjacent country are big words when used in an Atlanta ordinance. In the mind of our city fathers, the suburbs of Atlanta embrace many villages, and the *country adjacent* stretches indefinitely, and every farmer who wagons here what he makes at home from the soil need fear nothing from any discrimination against him in favor of those who live nearer to the city.

The tax is on business—the business of an itinerant trader; it embraces all such traders—whether by themselves

or agents trading—whether Georgians or Missourians—and the tax is uniform on all and exempts none.

The case is covered by that of *Davis vs. City of Macon*, decided at this term—however, and argument about it is superfluous.

Judgment affirmed.

The Mayor and Aldermen of Savannah *vs.* Brown.

1. A municipal corporation may enter an appeal in *forma pauperis* through its chief executive officer.
2. The mayor of Savannah can only try and dismiss a policeman in his judicial capacity as mayor, and an appeal to the mayor and aldermen in council will lie from his decision. The charge of the court to the contrary was error.

Appeal. Municipal corporations. Officers. City of Savannah. Before Judge Tompkins. Chatham Superior Court. October Term, 1878.

To the report contained in the decision, it is only necessary to add the following: Brown was a policeman in Savannah. He was arrested by order of the chief of police, who preferred charges against him to the mayor. The latter heard the case and dismissed Brown from the force. Brown sought to appeal to the mayor and aldermen in council. The mayor refused to recognize his right to appeal. Brown then sued for his wages.

The law in regard to the power of the mayor will appear from the Code of Georgia, §§4858, 4880, and the following citations from the briefs of counsel (City Code, pp. 369–374):

Ordinance 1860—City Code, 369 (2):

"That from and after the aforesaid first of February next, the police force shall consist of fifty-six privates, who shall be appointed by the mayor, subject to the approval of the council, for the term of three years from the date of their appointment, unless removed therefrom

for inefficiency or *improper conduct*, and whose pay shall be $900.00 per annum."

Ordinance 1860—City Code, 371 (13):

"The equipment, disposition and control and arrangement of the police force shall be entrusted to the chief of police, subject to the mayor and to such rules, regulations and ordinances as may, from time to time, be made by the mayor and aldermen of the city."

Same ordinance, p. 374 (23):

"If any member of the police force shall receive a bribe for liberating any person duly arrested for violation of the city ordinances, or the laws of the state, or if he shall be guilty of violent, injurious or improper conduct *whilst* on duty, to any person, or if he shall in any manner misbehave in or neglect his duties, the offender, if a private, may be fined or dismissed, or both at the discretion of the mayor or acting mayor, and his bond may also be put in suit. [illegible] case of an officer, a report required to be made to council). And if any policeman shall, without satisfactory cause, abandon his station or leave his division before the appointed hour, or if he shall neglect to inform against any person who may, within his knowledge, violate any of the ordinances of the city, he may, upon conviction, be *fined* in a sum not exceeding ten dollars, or be suspended or dismissed, at the discretion of the mayor or acting mayor."

Ordinance 1860—City Code, 374 (24):

"The mayor, as the head of the police department, shall have and exercise a general superintendence over the members of the police force, and may at any time appoint the mode and places in which the policemen shall be stationed, by written orders," etc.

W. D. Harden, for plaintiffs in error.

Rufus E. Lester, for defendant.

Warner, Chief Justice.

Brown, the plaintiff, sued the defendants in a justice court for his wages as a policeman, and an appeal was taken therefrom to the superior court. On the trial of the case in the latter court, the jury, under the charge of the court, found a verdict in favor of the plaintiff. A motion was made for a new trial on the grounds therein stated, which was overruled, and the defendants excepted.

1. The plaintiff also filed a bill of exceptions *pendente lite*

to the decision of the court in refusing to dismiss the appeal upon his motion on the ground that the defendants, as a municipal corporation, could not enter an appeal by filing a pauper affidavit sworn to by its mayor. The mayor was the executive officer of the corporation, and as such, it was competent for him to make and file the pauper affidavit in its behalf for the purpose of obtaining the appeal, and there was no error in the refusal of the court to dismiss it.

2. The court charged the jury, amongst other things, "that the mayor of the city of Savannah could dismiss a policeman from the force only when he, the mayor, was sitting as the presiding officer of the police court. That if he had tried Brown as such presiding officer, he had the power to dismiss him; but if he had tried him in his capacity as mayor only, his action was void and Brown never had been legally dismissed. That even if he had discharged him while in the capacity of presiding officer of the police court, the jury could inquire into the cause of discharge, and if they found it insufficient, could give the plaintiff his wages. That they had heard the evidence, and must determine in what capacity the mayor was acting when he discharged plaintiff."

This charge of the court was error, in view of the evidence in the record and the law applicable thereto. The mayor had no jurisdiction, under the law and ordinances of the city, to hear and determine the question of the discharge of the plaintiff as a policeman only in his judicial capacity as mayor (no matter in what capacity he may have considered himself to have been acting), and the court should have so instructed the jury, and not have left it to the jury to decide in what capacity the mayor was acting when he discharged the plaintiff as a policeman. There is no doubt that the mayor of the city of Savannah, in his judicial capacity as such mayor, under the law and ordinances of the city, did have the power and authority to dismiss the plaintiff as a policeman, and there is just as little doubt that the plaintiff had the legal right to have appealed from the de-

cision of the mayor to the mayor and aldermen of the city in council assembled, which appeal, as appears from the evidence in the record, was refused by the mayor on the ground that no appeal lay from his decision. The plain remedy for the plaintiff was then to have applied for a *mandamus*, or *certiorari*, to correct that error of the mayor, and to have enforced his legal rights in the premises, but failing to have done so, the question arises whether the plaintiff is not now concluded by that judgment of the mayor dismissing him as policeman from recovering any wages as such subsequent to his discharge. This view of the question was excluded by the charge of the court, and a new trial must be awarded.

Let the judgment of the court below be reversed.

Bates & Company *vs.* Forsyth, administrator.

Where the answer of the garnishee denied indebtedness to the defendant, and was traversed by an allegation of indebtedness in the sum of $500 00, and the traverse was amended setting out a state of facts whereby other indebtedness was substantially shown, though on a complicated state of facts, and the amendment was demurred to, and the whole traverse was stricken, and judgment rendered for the garnishee:
Held, that the court erred.

Garnishment. Practice in the Superior Court. Before Judge Underwood. Floyd Superior Court. March Term, 1879.

The case below grew out of a garnishment in Floyd superior court. In a suit pending in said court in favor of Bates & Co. *vs.* John Harkins, the plaintiffs, on June 23, 1875, sued out a garnishment, which was served on D. R. Mitchell, on June 28, 1875. Mitchell, at the next term, filed an answer denying any indebtedness to Harkins. This answer the plaintiffs traversed, alleging that the garnishee

owed defendant $500.00, and subsequently amended their traverse by alleging as follows: That Mitchell is indebted to Harkins on the following account, besides others, to-wit: On April 1, 1871, the said Mitchell being the owner of certain *fi. fas.* from Gordon superior court on which was due and collectable about the sum of $225.00, and being at the same time indebted to the firm of Colclough, Harkins & Glover, of Rome, Ga., something more than the said sum, did, on that day, in part payment of the said indebtedness, make the following assignment of said *fi. fas.*:

"I do hereby transfer to Colclough, Harkins & Glover all my right, title and interest in the above *fi. fas.*, without any liability on my part whatever, they paying and settling all fees and costs due on said *fi. fas.*
April 1, 1871. D. R. MITCHELL"

At that time the said *fi. fas.* were in the hands of Warren Akin as attorney for said Mitchell, for collection; it was represented to said transferees by Mitchell that there was in the hands of the sheriff of Gordon county a fund out of which said *fi. fas.*, being among the oldest, would be paid at least the amount of his indebtedness to said firm. And the plaintiffs show that the said Akin, as attorney as aforesaid, did about that time receive on said *fi. fas.* their share of said fund, to wit: $219.00, besides costs; but that the said Akin when called upon by the transferees for said fund, less his fee for collecting the same, refused to pay over any part of said fund, claiming that the said Mitchell was due him more than the amount thereof for professional services in other cases, and appropriating the same to such fees. The said transferees then came back upon said Mitchell for said amount, when he directed them to bring suit against Akin for said fund, denying his indebtedness to Akin for other fees, and the right of Akin to retain or appropriate said fund.

In pursuance of this direction of Mitchell, the transferees did bring suit in Bartow superior court against Akin for said fund, and upon the trial thereof the right of said Akin to retain it was sustained, and the transferees were cast in

the cost, to-wit: $13.00, besides their attorney's fees in the matter, to-wit: $25.00. Wherefore a right of action accrued to said transferees on the day of said assignment, to-wit, the 1st day of April, 1871, to have and recover of said Mitchell the said sum of $219.00, collected by his said attorney, less $20.00 fee of said attorney for collecting the same; and on the day of the termination of said suit against the said Akin, to-wit, January 1, 1875, to recover of Mitchell the said costs and attorney's fees, to-wit, $38.00. Which said claims and demands of Colclough, Harkins & Glover against said Mitchell were, on the dissolution of said firm, assigned to, and became the property of, the said John Harkins. Wherefore they pray judgment, etc.

By a further amendment plaintiffs alleged that the cause of action in favor of said firm against said Mitchell accrued at the termination of the suit brought against said Akin, instead of the date of the assignment of the *fi. fas.* And further, that if the cause of action accrued prior to said date, then the conduct of Mitchell amounted to a fraud by which the firm were prevented from bringing suit against him until the termination of said suit against Akin. And the plaintiffs further say that the claim against Mitchell became the property of Harkins by assignment long before the service of the summons of garnishment upon Mitchell.

Mitchell having died, his administrator, Forsyth, was made a party.

On demurrer, the court struck the traverse and ordered the garnishee to be discharged. Plaintiffs excepted.

Wright & Featherston, for plaintiffs in error.

Forsyth & Hoskinson; D. S. Printup, for defendant.

Jackson, Justice.

We are all of opinion that the court erred in striking the entire traverse of the plaintiffs. It appears to have been two-fold in its specifications denying the truth of the gar-

nishee's answer. First, it alleged indebtedness of garnishee to defendant to the amount of five hundred dollars. Upon this allegation it is clear that the plaintiff had the right to go to the jury and prove this indebtedness, if he could. Secondly, it was alleged in amendments to the traverse that Harkins, the defendant, had a claim on Mitchell arising out of a transfer which Mitchell made of certain *fi. fas.* from Gordon superior court in the hands of Warren Akin for collection—Mitchell representing that there was a fund in the hands of the sheriff to pay the *fi. fas.* This transfer was made without recourse on Mitchell to Colclough, Harkins & Glover, who, under instructions from Mitchell, sued Akin, who had collected and appropriated the money for fees due him from Mitchell, and they failed to recover. Before service of garnishment on Mitchell and on the dissolution of that firm they assigned their claim on Mitchell to Harkins. And it is this claim which makes the second traverse of indebtedness. On demurrer, the superior court held that this claim is not assignable and that it is barred by the statute of limitations.

My brethren think that the court erred in so holding, on the ground that Mitchell having instructed Colclough, Harkins & Glover to sue Akin, is estopped to set up the statute of limitations though the transfer of the executions and the representations of Mitchell were made in April, 1871, and the garnishment served in June, 1875, and that the real claim was assignable, being a chose in action arising *ex contractu.* They hold that Akin paid a debt which Mitchell owed him out of this fund which was due on the *fi. fas.* he transferred, and that Mitchell thus received through Akin, Colclough, Harkins & Glover's money, and an action for money had and received lies for it, and was assigned legally, so far as the traverse sets it out; and that thus Mitchell owes Harkins the money.

I rather agree with the court below myself. I think that no action at all could be brought on the transfer, because its express terms are "without any liability whatever"

on the part of Mitchell; and that the only right of action which could arise must spring from the false representations of Mitchell in respect to the money which was in the sheriff's hands to pay the *fi. fas.*—that is, an action of deceit, which being a tort is not assignable, the assignability of choses in action being confined to such as arise out of contract. Code, §§2958, 2244.

Moreover, it appears to me that the right of action accrued when the party discovered the fraud and deceit, and when that time was is nowhere alleged. I am not prepared to say, therefore, that, taking the case made by the pleader most strongly against him, the plaintiffs are not barred.

Besides, we all think, I believe, that such an assignment ought to be in writing. It is not alleged that it is assigned in writing; but as there was no special demurrer, on a general demurrer the traverse on this ground perhaps ought not to have been dismissed.

Of course this ruling will send the whole traverse to the jury, and the case must be passed upon by them on its merits. When the whole of the facts are brought out, clearer light may shine upon the case, and the court below and this court see the law of it more satisfactorily on the real point, the amended traverse; which was, we learn outside of the record, the point really ruled below on the demurrer.

Judgment reversed.

Lowrys *vs.* Candler, executor.

An agent not a party to a suit is a competent witness to show his agency, not disclosed at the time of the transaction in controversy, although his principal may be dead, and although the effect of establishing the agency may be to make the estate liable instead of the agent individually.

Witness. Evidence. Principal and agent. Before Judge Hillyer. Fulton Superior Court. September Term, 1878.

Reported in the decision.

E. N. Broyles; B. F. Abbott, for plaintiff in error.

Candler & Thomson, for defendant.

Warner, Chief Justice.

The plaintiffs brought their action against the defendant to recover damages in consequence of the alleged sale by the defendant to them of a bond purporting to be a bond of the state of Georgia for $1,000.00, representing the same to be a good, true and valid bond of said state, whereas said bond was a bad, spurious bond, and of no value whatever. On the trial of the case the jury found a verdict for the defendant. A motion was made for a new trial on the grounds therein stated, which was overruled, and the plaintiffs excepted.

It appears from the evidence in the record, that the bond was sold and delivered to the plaintiffs by one McCaslin as his own property so far as was known or disclosed at the time of the sale thereof, and that the money, $850.00, was paid to him by the plaintiffs therefor, and that sometime after the sale one of the plaintiffs went to McCaslin and said to him, "he would have to come back on him for that bond, that he had failed to sell it and that it was an illegal bond." The plaintiffs then proposed to prove by McCaslin "that I sold for T. W. J. Hill what purported to be a bond of the state of Georgia. Hill came to my store and told me that he had a state of Georgia gold bond and desired me to take the bond to W. M. and R. J. Lowry, and see what they would give for it, and for me to let him know what they would give for the bond, and not to tell them whose it was. I reported back to Hill and he told me to take the bond over to the Lowrys again and sell it to them, which I did, receiving for the bond $850.00 in currency, which amount I handed to said Hill at this time. Hill said nothing more to me respecting said bond. I gave the money to T. W.

J. Hill." This evidence was ruled out by the court on the ground that Hill was dead, and that is the main ground of error insisted on here.

The question presented in the record in this case is one which has never been decided by this court under the evidence act of 1866. Code, §3854. The precise question is, whether an agent having a mere naked authority to sell, is a competent witness to prove his agency after the death of his principal, when he failed to disclose his agency at the time of the sale? If an agent fails to disclose his principal, yet, when discovered, the person dealing with the agent may go directly upon the principal under the contract, as the plaintiffs have done in this case. Code, §2197. The agent is a competent witness either for or against his principal, his interest goes to his credit. Code, §2206. Thus stood the law at the time of the passage of the act of 1866. McCaslin, the agent, is not one of the original parties to the contract or cause of action in issue or on trial, he is not *the other party* to the contract or cause of action in issue or on trial, as contemplated by the statute; the plaintiffs are the other parties to the contract or cause of action in issue or on trial who are not admitted to testify in their own favor—Hill, the other party, being dead. But it is said that inasmuch as McCaslin, the agent, did not disclose his agency at the time he sold the bond to the plaintiffs, that the effect of his testimony will be to discharge himself from liability and cast the same on the estate of Hill, the dead man. The reply is, that the same result would have obtained under the law as it existed at the time of the passage of the act of 1866. The estate of the deceased testator is in no worse condition now by allowing the agent to prove his own agency than it would have been under the law as it existed prior to the act of 1866. Before the passage of that act the deceased testator could not, if living, have been a witness in his own favor, although the agent was a competent witness to prove his own agency as against him. The well settled rule of law which makes an agent a competent wit-

ness either for or against his principal, originated in the necessity of the case, and it is not repealed or abrogated by the death of the principal so as to render the agent an incompetent witness to prove his agency. The result therefore is that McCaslin was a competent witness to prove his own agency in the sale of the bond to the plaintiffs, as well as the acts done by him within the scope of his authority as such agent in connection therewith. The credibility of his evidence will be a question for the consideration of the jury.

Let the judgment of the court below be reversed.

JACKSON, Justice, concurred on the ground that McCaslin was the agent of the dead party, and by allowing him to testify both parties to the contract would be heard. Had he been the agent of the Lowrys, the living parties, he would have held the witness incompetent.

HAWKS *vs.* HAWKS, executrix.

The act of 1874 making the specific exemption of the Code liable for purchase money does not affect exemption which had been set apart before the act was passed. The facts of the present case entitle the family of the debtor to protection against the judgment for purchase money of the land in question.

Homestead. Before Judge POTTLE. Oglethorpe Superior Court. October Term, 1878.

In 1866, Warren and Thomas D. Hawks as administrators of Henry Hawks, Sr., sold 1000 acres of land to Henry Hawks, Jr. and James M. Smith, made them a deed and took their joint note and mortgage on the land. In 1867 Smith and said Henry, Jr., divided the land, Smith taking 400 acres, for which he paid, and Henry, Jr., 600. The latter then sold 294½ acres of the 600 to George F. Hawks and made him a deed. The administrators gave up the mort-

gage aforesaid, and said George F. and Henry, Jr., executed to them a joint note for the 600 acres and a joint mortgage thereon. The consideration to said George F. for his undertaking in the last-named note was the deed from Henry, Jr. for the 294½ acres. Said George F. had 207½ other acres of land he had bought from Henry, Sr. in 1855, and paid for, and May 22, 1869, he had a homestead set apart under the constitution of 1868, containing 418 acres, which was composed of the 294½ acres and part of the 207½ acres aforesaid. The mortgage of George F. and Henry, Jr. to the administrators was foreclosed and levied on the 600 acres. George F. filed a claim, as head of a family, alleging that 294½ acres of it were not subject, because included in said homestead of 418 acres. This court held in 46 *Ga.*, that the 294½ acres were subject, and after the case came back, *the whole* 418 *acres* were sold by the sheriff May 6, 1873, and bought by Warren Hawks, who resold to George F. for $1,500, taking note and giving bond for titles. This note was sued to judgment and levied on 380 acres of land, which was the 418, less a small part which Warren had sold and conveyed to one Farmer with the consent of George F. George F. then filed his claim, as head of a family, to 60 acres as the homestead allowed him by the Code, and the land was sold in October, 1877, subject to this claim. Before the sheriff's sale in May, 1873, to Warren Hawks, to-wit, April 28, 1873, said George F. filed his application with the ordinary in due form for the said homestead of 60 acres. Warren filed a *caveat* thereto May 3, 1873, and the application and *caveat* were pending at the time of the sale on the 6th, as Warren well knew. The surveyor returned the plat May 10, 1873, and it was duly allowed and recorded.

The jury found the land subject. The claimant moved for a new trial upon the ground, among others, that the court erred in charging the jury as follows:

"If you believe that the judgment and execution are founded on a debt for the purchase money of the land

levied on and claimed as a homestead in this case, and that the purchase money is unpaid, then I charge you that the claimant is not entitled to the homestead set apart in April, 1873, until the purchase money is paid."

The motion was overruled, and claimant excepted.

SAMUEL LUMPKIN, for plaintiff in error.

POPE BARROW, for defendant.

BLECKLEY, Justice.

There are so many Hawks in the facts of this case, that the air is a little darkened. Only two of them need fix our attention: these are George F. and Warren. George F. had title to certain land, and procured 418 acres of it to be set apart to him as a homestead under the constitution of 1868. Because it was under mortgage for purchase money or for the removal of incumbrances, he could not hold it all in that way; so, in 1873, he filed his application in due form for the small homestead allowed by section 2040 of the Code, claiming 60 acres of the 418 acres. The application was *caveated* by Warren, and while the *caveat* was pending, the mortgage *fi. fa.* brought the whole 418 acres to sale, and Warren became the purchaser. Shortly thereafter, and in the month of May, 1873, the litigation on the pending application for the 60 acre homestead came to an end, the application being allowed, and the proceedings going to record. Warren sold out his whole purchase, including, of course, such interest as he acquired in the 60 acre homestead, to George F., giving the latter a bond for title and taking his note for the agreed purchase money. Judgment was obtained upon this note, and levied upon the tract of 418 acres, less a small parcel which had been disposed of satisfactorily to both parties. As the levy covered the 60 acre homestead, Thomas F. interposed his claim to that, setting up title to it by virtue of its having been set apart in the manner above stated. In 1877 the land levied upon was all sold subject to the claim; and the question now is,

whether the 60 acre homestead was subject to be sold under this levy or not.

It is said that the mortgage sale was for purchase money, and therefore the title passed by that sale to Warren Hawks, notwithstanding he bought with notice of the pending application for the small homestead. But the provisions of section 2040 of the Code were in force at the time of that sale, unmodified by the subseqnent act of 1874, and until the latter act, there was, after the adoption of the Code of 1863, no distinction between debts for purchase money and any other debts, in reference to the small homestead. 41 *Ga.*, 180; 57 *Ga.*, 181. Certainly the act of 1874 could not aid a sale that was made before the act was passed; and, moreover, we think the act did not in any way affect exemptions which were set apart previously to its passage. Code, §§2047, 2048; 60 *Ga.*, 173. By his purchase at the mortgage sale, Warren Hawks acquired no title to the 60 acre homestead which could prevail against the homestead proceeding then pending, for the reason that he purchased with notice that the application was pending. 40 *Ga.*, 293; 44 *Ga.*, 603. Not only did he have notice of it, but he was a party to it, having himself filed a *caveat*. The date being within the interval between the adoption of the Code of 1863 and the passage of the act of 1874, the mortgage, though for purchase money, could not sell the small homestead. As it could sell the large one, the debtor had a right to abandon that and take the small one. 50 *Ga.*, 216, 584. And this was the course he pursued. The only very awkward fact in the whole case is that he now stands on the homestead right after having purchased from Warren Hawks without any express exception of the homestead from the terms of the purchase, the bond for titles which he took from Warren embracing the whole 418 acres comprehended in the first and larger homestead—the one which was abandoned. Holding Warren's bond to make title to the whole, and the debt created for purchase money when the bond was given being unpaid, he sets

up, in resistance of the collection of that debt, the small homestead as set apart under the proceedings which were pending when Warren bought at the mortgage sale. There is no doubt that if the adverse title which he now asserts was other than a homestead or trust title, it would not prevail; but in standing upon the homestead right in the present claim, he represents his family, not himself, and the case is therefore to be looked at as if the family were the party on the record instead of him. What he may have done to estop himself personally after their rights became vested, cannot be used to bar them. We think the facts of the case protect them, and that the court erred in charging the jury, and in not granting a new trial.

Judgment reversed.

BRACKEN & ELLSWORTH *vs.* DILLON & SONS.

1. Before the books of a merchant or other tradesman can be used to prove an account, it must appear that he has no higher evidence of its truth, and therefore that he had no clerk who sold the goods, or that the clerk, if he had one, is dead, beyond the jurisdiction, or otherwise inaccessible. If he had no clerk who sold the goods, or the clerk is inaccessible, then before he can introduce his books the book keeper, if accessible, must be produced to prove that it is the book of original entries, if he had none, or he is inaccessible, then he may prove that it is the book of original entries himself. Books are secondary evidence and only admissible *ex necessitate rei*.
2. The books will not establish considerable items for cash, nor accounts of third persons transferred to defendants; nor are they admissible at all to show the authority to make such transfer. They may be admitted to show that a transfer was made pursuant to previous authority.
3. In a suit against a firm in order to bind an incoming partner with the debts and liabilities of a private person or former firm, to which the defendants succeeded in the same business, plaintiffs must show some agreement on the part of the incoming partner, upon sufficient consideration, to assume such liabilities and pay such debts, before he can be bound, through the new firm, to pay the old indebtedness.
4. Ought the agreement to be in writing as a promise to pay the debt of a third person, *quære?*

5. Where the transfer is made by authority of the old debtor, it must clearly appear that knowledge thereof was brought home to the incoming partner, and that he acquiesced in it, before he can be bound thereby.
6. Over-payments may be recovered in a suit on an account, but before such recovery can be had, the over-payments must be specified and pleaded as a set-off, and with like particularity.
7. The court is always at liberty to open the case for new evidence before argument is closed; and unless abused, the discretion exercised will not be interfered with.

Evidence. Partnership. Contracts. Set-off. Practice in the Superior Court. Before Judge Marshon. Glynn Superior Court. May Term, 1879.

The following, taken in connection with the opinion, sufficiently reports this case:

Dillon & Sons, who were merchants, brought complaint on an open account against Bracken & Ellsworth, partners in a saw mill. The account embraced a variety of items; among others payments of drafts and accounts, and for cash, and also the following:

"Sept. 30, 1871	Amt. P J. Bracken account transferred		.	$1,371.81.
"	"	Bracken & Haslam,	do ...	283.34.
"	"	P. J. Bracken,	do ...	122.05."

Defendants pleaded the general issue, and also that they had made various payments to plaintiffs, which were not specifically described because they were made by drafts not now in the possession or control of the defendants; but they alleged that in all plaintiffs were over-paid, and they prayed judgment for whatever such excess might be.

On the trial, one of plaintiffs swore that the transfer of accounts stated above was authorized by Bracken, and known and assented to by Ellsworth. They swore to the contrary. Dillon, the senior partner of plaintiffs' firm, was the principal witness in their behalf. Among other things, he stated that plaintiffs had had two clerks, one of whom he had heard was dead, and the other was in Wayne county; also that they had two book-keepers in addition to plaintiffs

themselves. One of these was shown to be dead; the other was a witness in the case. It also appeared that Bracken & Ellsworth succeeded P. J. Bracken in business, who had succeeded Bracken & Haslam.

The jury found for plaintiffs $877.22 with interest. Defendants moved for a new trial on the following, among other grounds:

1. Because the court erred in admitting in evidence, over the objections of defendants' counsel, the books of the plaintiffs to prove the account, when the evidence showed that they were not the books of original entries, and that he had two clerks at the time said account was made, neither of whom was shown to be dead, beyond the jurisdiction of the court or otherwise inaccessible to the diligence of the plaintiffs. [The evidence showed that the clerks entered their sales in blotters at the time of making them; these blotters were then handed to the book-keeper, and from them he made up the books.]

2. Because the court erred in charging the jury as follows: "It is a suit upon an open account brought by Dillon & Sons against Bracken & Ellsworth, and in order to prove the account sued upon, the plaintiffs have introduced their books as proof. As proof they are legally to be admitted. The books that have been admitted in this case are introduced as books of original entries under the law. In the absence of better proof, they are to be considered by you. As to whether they are the books of original entries or not you have nothing to do with that question. That is a question for the court, and the court has decided they are. If they are not, it is the court's error and you are not responsible for it."

3. Because, after charging the following request, to wit: "Should you find from the plaintiffs' account that debts of third persons, to-wit: P. J. Bracken, Bracken & Haslam, and others, have been charged to the defendants by the plaintiffs, then before they could be made liable to pay said accounts or debts it must appear that the defendants

undertook and promised, in writing, to pay said accounts, [or if not in writing they must have promised to pay said accounts] upon some valuable consideration flowing from the plaintiffs to Bracken & Ellsworth, the defendants in this case," the court added the following qualification: "In connection with the sixth request to charge by the defendants' counsel, which I gave a moment ago, I charge this further—that if you find from the evidence in this case that Bracken & Ellsworth became the successors of P. J. Bracken in a subsisting business, and as a consequence of that change that Dillon & Sons, with whom they were dealing, were authorized to transfer the account of P. J. Bracken to the account of the successors, Bracken & Ellsworth, that the presumption would be that it was for a valuable consideration." (The words in brackets appear in the bill of exceptions, but not in the motion as set out in the record.)

4. Because the court erred in charging the jury the following request of plaintiffs' counsel: "Counsel request the court to charge the jury that the plea of set-off by the defendants cannot be considered by them, for the reason that the same is so loosely drawn that no recovery can be had thereon—§3465 of the Code: 'Every plea of set-off must set out the demand as plainly as if sued on.'"

5. Because the court erred in charging the jury as requested by plaintiffs' counsel as follows: "That where a new partner comes into a business, and said business continues, and is conducted without change as to the character of the business, and a balance was due by the old firm, it is competent for the new firm to assume the balance of indebtedness of the old firm, and such assumption, and the indebtedness of the old firm may be proved by testimony, and in some cases may even be implied from the transaction. If the evidence in this case discloses that Bracken & Haslam conducted a steam saw mill business on the Macon & Brunswick railroad; that P. J. Bracken continued the same business; that Bracken & Ellsworth became the suc-

cessors to the same business; that all these parties had dealings with Dillon & Sons; that Bracken & Ellsworth assumed sums due Dillon & Sons by Bracken & Haslam and P. J. Bracken, and authorized the transfer of said amounts to the account of Dillon & Sons against Bracken & Ellsworth, they are bound by it. As to such sums as Dillon & Sons are entitled to recover, you may look to all the circumstances surrounding the transaction for the purpose of determining the matter of said alleged transfer."

6. Because the court erred in the following practice: After counsel in said cause upon both sides had announced closed, the defendants introducing no testimony, C. Symmes, Esq., leading counsel for defendants, opened the argument, and during its progress insisted that the court should charge the jury that certain payments of money in the account by drafts and notes could not be proven by parol or the books, that the drafts and notes were themselves the highest evidence; upon which counsel for plaintiffs stated to the court that secondary evidence had been admitted (without objection) of the payment of these items; that the drafts and notes were in the court-house, and would have been introduced by counsel for plaintiffs if such objection had been made. Counsel for defendants insisted that they had made such objection; whereupon, under the misunderstanding aforesaid, counsel for plaintiffs moved to re-open the cause for the purpose of introducing said drafts and notes as evidence, which motion the court sustained, upon the ground that the justice of the cause required it.

The motion was overruled, and defendants excepted.

S. W. Hitch; Symmes & Atkinson; Ira E. Smith, for plaintiffs in error.

Goodyear & Harris, for defendants.

Jackson, Justice.

This suit was brought on an open account by the plaintiffs against the defendants as partners. These partners were

successors to Bracken, one of those now sued, and Bracken was successor to Bracken & Haslam. On the account sued on were items transferred from Bracken's account when alone and from Bracken & Haslam's account. Under the rulings and charge of the court, the jury found some eight or nine hundred dollars with interest for several years against the defendants, Bracken & Ellsworth, successors as aforesaid, and they moved for a new trial, which the court refused, and this refusal, on many grounds taken in the motion, is the error assigned.

1. It is claimed that the books were improperly admitted on behalf of the plaintiffs to prove anything at all. There were two clerks, alive and not inaccessible so far as was shown in the proof, who were the salesmen of the goods sold and delivered. Besides, there appears to have been two book-keepers, one of whom was dead, but the other accessible, being the son of the plaintiff who was sworn in the case. The question is whether these books of goods so sold, and the books so kept, were admissible in evidence, even to prove the account for the groceries and provisions sold by the plaintiffs in the line of their ordinary business.

Our law on this subject is plainly and fully presented in the Code—section 3777—and is as follows:

"The books of account of any merchant, shop-keeper, physician, blacksmith, or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts, upon the following conditions:

"1. That he kept no clerk, or else the clerk is dead, or otherwise inaccessible.

"2. Upon proof (the party's oath being sufficient) that the book tendered is his book of original entries.

"3. Upon proof (by his customers) that he usually kept correct books.

"4. Upon inspection by the court to see if the books are free from any suspicion of fraud."

This codification of the Georgia law upon this subject embodies the substance of the adjudications of this court from 1*st Kelly* to this day. 1 *Kelly*, 233; 5 *Ga.*, 239; 8 *Ib.*, 74; 13 *Ib.*, 496, 508; 17 *Ib.*, 65; 18 *Ib.*, 318, 457,

698; 20 *Ib.*, 365; 21 *Ib.*, 334; 23 *Ib.*, 582; 24 *Ib.*, 17; 27 *Ib.*, 366; 28 *Ib.*, 272; 30 *Ib.*, 121, 904; 31 *Ib.*, 346; 51 *Ib.*, 121, 57, 145; 61 *Ib.*, 30.

Nor does our law differ much—not at all except in some details—from the laws of the other states, and, indeed, of most of the civilized world, including the mother country. See 2 Phillips on Ev., note 491, p. 682 *et seq.*, and cases there cited, where the whole subject is discussed, and very similar conclusions to those summarized in our Code are reached.

From this summary, which is our law by our own statute embodied in our Code, whether supported or not by other authority (though it is so supported), it would seem clear that the evidence of books is secondary, and introduced only when no other evidence can be got—*ex necessitate rei.*

Therefore, if the sale clerks of the party who offers the books be alive and accessible, he cannot prove even an ordinary account by the books; because he has better evidence in the clerks who sold and delivered the goods. Moreover, if he had a book-keeper accessible, that book-keeper, not himself, must prove that the books are the books of original entry; because that book-keeper is a clerk, and his absence must be accounted for, his evidence being the test of the entries which he, the clerk or book-keeper, made.

From an examination of the evidence in the record, it appears that the clerks who sold the goods were both alive and not inaccessible—at least there was no proof of death or of their being beyond seas—or otherwise out of reach of process of the court. There appear also to have been two book-keepers, one was proven to be dead, but the other was not accounted for, yet the party was permitted to prove the books to be those of original entries, contrary to the ruling in 13 *Ga.*, 508, and when he himself appears not to have made a single entry therein. The evidence of the two salesmen was the best, 18 *Ga.*, 693; 20 *Ga.*, 365, and in

their absence, to admit the books, all the book-keepers who made the entries should have been sworn or accounted for, before the party himself could be sworn to the books—so as to admit them. Moreover, there appears to have been admitted in evidence, as well as we can ascertain from a confused record, not only the journal, but the ledger. The latter should not have been admitted, at any rate only to show a regular system of book-keeping, but in no event to prove the account or any part of it. To prove that, the book of original entries, the entries made, as a practice, daily, are alone proof or evidence. Mere temporary memorandum books, used by the salesmen, and transferred nightly from pencil entries of theirs to the permanent ink book of the daily sales are not the books of original entries, so as to exclude such permanent book; but the latter is the book contemplated by the statute.

2. But most assuredly these books were not proof of the legality of the transfer of the individual accounts of Bracken to the account of Bracken & Ellsworth.

The charge of the court seems so to regard them, and the judge nowhere called the attention of the jury to those items as not included in the proof which the books were competent to make, if competent at all. His entire charge is not in the record; but the extracts from it show no such exception. So in regard to cash payment of drafts, etc., which the books could not establish as due by the defendants to the plaintiffs. See 8 *Ga.*, 74; 57 *Ga.*, 145; Code, §3777.

3. To bind Ellsworth, who came into partnership after debts were due by his predecessors, Bracken, and Bracken & Haslam, for those debts so incurred by his predecessors, it was incumbent on plaintiffs to show some express agreement, or some agreement implied by his individual conduct, to assume that indebtedness. Some authority from him to transfer the old accounts or other indebtedness of the old firm, or prior parties, to the new firm of which he became a member, is essential. "A new partner is of course liable

for all the subsequent debts of the firm, in the same manner as any other partner; and it is equally obvious that he is not liable for the old debts, unless he assumes them for a consideration." Parsons on Part., 433. The author, Parsons, then goes on to discuss the consideration necessary to support the promise, and closes with this remark: "On the whole, we should say that the law of contracts and the law of partnership lead to the conclusion that the new partner is not bound to the old creditors, unless on a promise to them for a consideration; both of which might, of course, be indirect and implied by circumstances." And then the circumstances are indicated, such as paying interest on the old debt, or the knowledge without objection that the firm, of which he is a member, paid the interest. See also notes and cases cited. Parsons on Part., pp. 433-4-5-6.

On the whole, we think that the question in this case on this point was not submitted clearly and fully to the jury. It is, as appears from Parsons above cited, a question mixed of law and fact for court and jury; and we think that the court should have charged that Ellsworth could not be held liable for these debts of the old firms unless he had assumed them, and that the jury must be satisfied from the evidence that he did assume them as a member of the new firm—that he authorized the transfer, and considered the debt that of the new firm, of which he was a member—that this agreement could be established by circumstances as well as direct proof, such as payments made on the old accounts by the new firm, *with his knowledge and consent*, or other equivalent circumstances, if any, but always such as to bring home knowledge of what was being done to him.

4. Is such an agreement a promise to pay the debt of another, and within the statute of frauds? It would seem to be the debt of another. The new firm and the old firm are not the same person or being in law. The partnership is not a corporation, but it partakes somewhat of the nature of a corporation and has a sort of individuality. It is not strictly speaking a legal person, yet it has a certain degree

and measure of personality. The firm name, while suits may not be brought by or against it in that name without reference to those persons who compose it, is yet of enough personality and legal entity to render its use in pleading necessary; and, unquestionably, when one of a firm goes out and another comes in, the firm is changed—an old partnership dies and a new one is born. See Parsons on Part., pp. 267 *et seq.* Indeed, the law merchant recognizes them as *quasi* corporations. Parsons on Part., pp. 170-1 *et seq.* The promise to pay the debt of one partnership by another totally different partnership would clearly be the promise to pay the debt of a third person, and within the statute. How far the fact that the new firm is composed in part of the old, or that the new firm is grafted upon the individual stock of a private person, who is one of two members composing it, may change the rule, we do not decide. That is the case here. The firm of Bracken & Ellsworth was grafted upon what was the private business of Bracken in the matter of the milling business, and Bracken's private business, while he ran the mill, was grafted on that of Bracken & Haslam. It would seem that when Haslam went out, the first partnership died, and Bracken went on alone, until Ellsworth joined him in the business, and made an altogether new firm. Indeed, there was no partnership when he came in, but he made it by joining in with Bracken's private mill business. Even when a new man comes into an old partnership, it is a new partnership. Parsons on Part., p. 34. It would seem upon principle, therefore, that in this case it was a promise to pay the debt of another; but as the question was not argued fully before us, and as it does not appear what assets of the first firm of Bracken & Haslam, and of Bracken, their successor, went into the new firm, we leave the question open with the above remarks upon the general bearings of principle upon it.

5. It would seem dangerous in a case like this to hold the new firm bound upon slight circumstances. The accounts of Bracken were transferred—Dillon testifies—to

the new firm by his order. It is not said that Ellsworth had it done. Bracken was interested to have it done, and it is a case where Dillon should have conferred with Ellsworth to see that all was right. But both Bracken and Ellsworth deny it. The former, that he ordered it done or was authorized to do so; the latter, that he ever authorized it or ever agreed in any way to assume the debts. If Bracken had agreed with Dillon, and if parol evidence would bind Ellsworth, then the door would be wide open to fraud, unless from the circumstances Dillon ought to have suspected something was wrong, and to have got Ellsworth's sanction as the only party interested against the transaction. See, as bearing generally on this subject, Code, §§1911, 1912, 1913, 1917; 19 *Ga.*, 335; 31 *Ib.*, 688; 26 *Ib.*, 568; 36 *Ib.*, 108; 15 *Ib.*, 137, 252, 351; 21 *Ib.*, 238; 2 *Kelly*, 29.

6. The set-off should have been pleaded specifically, and itemized, to have authorized a recovery for over-payments by the defendants, if the plaintiffs' claim had been overpaid. When pleaded, it may be recovered. 57 *Ga.*, 145.

7. The court may open the case and let in new testimony before the argument is closed, when justice requires that it be done. The matter is much in the discretion of the presiding judge, and unless in some flagrant abuse of discretion, or clear injustice to one or the other side, this court will not control that discretion.

On the whole we are quite clear that the case should be tried over, and that the court erred in not granting the new trial. Therefore the judgment is reversed.

Judgment reversed.

Picquet *vs.* The City Council of Augusta *et al.*

One who seeks by bill to set aside a sale of property under a tax execution against him, must show that he has some title to or interest in the property. The allegations that he considered himself bound to pay all legal taxes on the house and lot, and that it had been sold under a tax execution issued against him by one defendant, and purchased by the other at the sale, are not sufficient to prevent a dismissal of the bill on demurrer.

Bleckley, Justice, dissented.

Equity. Pleadings. Taxes. Before Judge Snead. Richmond Superior Court. April Term, 1879.

Picquet filed his bill against the City Council of Augusta to enjoin the collection of certain municipal taxes for which *fi. fas.* had been levied on a house and lot in the city of Augusta, alleging various points of illegality not material here. In the bill he alleged that "while not the owner of any real estate, he has since the year 1861 considered himself bound to pay all just and lawful taxes, when legally demanded, on the house and lot then, and since 1861, occupied by your orator." Charging on the subject of overvaluation in taxing, complainant stated that if the house belonged to him "in fee simple," he would take $1,000.00 cash for it. The chancellor refused to grant a temporary injunction. Subsequently complainant amended his bill by striking out the words "while not the owner of any real estate," and alleging that if the property belonged to him "free from any incumbrances," etc., instead of "in fee simple." He also alleged that one Freeman has taken from the city a transfer of the tax *fi. fas.*, had caused the property to be sold under them, and himself became the purchaser. Complainant sought to cancel this deed.

On demurrer, the chancellor dismissed the bill, and complainant excepted.

A. D. Picquet, by brief, for plaintiff in error.

WILLIAM GIBSON; J. C. C. BLACK, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants, with a prayer for an injunction to restrain the collection of certain city tax *fi. fas.* which had been issued against him by the defendant, upon the allegations contained therein, and for other relief. The chancellor refused the injunction prayed for, and upon demurrer to the complainant's bill dismissed it. Whereupon the complainant excepted.

The main object of the complainant's bill as amended is to set aside the sale of a certain described house and lot in the city of Augusta, which had been levied on and sold under certain city tax *fi. fas.* issued against him, as his property, for the reasons alleged therein. When the complainant filed his original bill, he alleged that he was not the owner of any real estate, but considered himself bound to pay all just and lawful taxes on the house and lot in question. Afterwards, when the bill was demurred to, the complainant amended it by striking out the words "while not the owner of any real estate," so that the bill is now to be considered with these words stricken out, but there is no allegation in his bill that he ever was the *owner* of the house and lot which was sold for taxes, or that he had any interest whatever in the same either legal or equitable. It is a fundamental principle that a court of equity will not entertain a bill in favor of a party who shows no title or interest in the subject matter for which he seeks relief. Story's Equity Pleadings, sections 260, 261, 262. But it is insisted that inasmuch as the defendant issued the tax *fi. fas.* against the complainant for taxes due by him, and levied the same on the house and lot in question, and sold it as his property, the defendant, as well as the purchaser at the sale thereof, would be estopped from denying that it was his property; that might be so if the complainant had

alleged in his bill any interest in the property either legal or equitable, which would have authorized a court of equity to entertain it for his relief. The first thing for the complainant to have done was to allege such an interest in the property as would entitle him to relief in respect to that property; in other words, to have shown by his bill such an interest in the property as would entitle him to enter the court for relief and thus having legitimately got into court, he would then have been in a position to raise the question of estoppel, if the defendant had attempted to show he had no title to the property. But he fails to show such an interest in the property, the subject matter of relief, either legal or equitable, as would entitle him to enter into the court for obtaining the relief which he seeks by his bill. If the complainant had no interest in the property sold for taxes, and if he has alleged none, it is difficult to perceive how he has been injured by the sale of it.

Besides, the complainant did not offer to pay the taxes admitted to be legally due. There was no error in sustaining the demurrer to the complainant's bill.

Let the judgment of the court below be affirmed.

JACKSON, Justice, concurring.

This bill put in issue the validity of several hundred thousand dollars of bonds of the city of Augusta, and attacked the system of municipal taxation generally, as well as for the purpose of paying these bonds. Before any person will be heard by a court of equity on matters of so much gravity, he must show that he has some interest in those matters, and that he is not a mere amateur complainant. In his sworn bill this complainant first alleged that he *was not the owner of the real estate* about which he was complaining on account of its rate of taxation, and when the bill in this condition was demurred to, he amended by striking out the allegation that "he was not the owner," but he inserted no sort of interest in the house and lot in lieu of the words stricken. Whereupon the court, on demurrer to the bill as amended, dismissed it.

I think that the court did just what ought to have been done. Equity will interfere with reluctance in governmental matters, either state or municipal, even at the instance of one who is the owner of property and entitled to be heard because his property is taxable; it will not interfere at all at the prayer of one who comes with the acknowledgment that he does not own taxable property, and therefore seeks, as a sort of *amicus civitatis*, to have city matters managed according to his ideas of law.

The city of Augusta wishes to pay the bonds it owes on account of its great canal, and which those bonds built, and certainly nobody but a tax-payer who has property therein should be heard to counsel the repudiation of such a debt. Equity, therefore, will not hear the complainant, and I concur in affirming the judgment of the superior court.

BLECKLEY, Justice, dissenting.

I dissent from the ground upon which the court disposes of this case. The matter under review is the sustaining of the demurrer to the complainant's bill. I think that this court should go on and decide upon the merits of the bill, treating the allegation of the title in the complainant as sufficient. These parties defendant stand committed to the ownership of this property by the complainant, for the city council has issued execution against him for taxes, and the property has been levied upon as his property for taxes, and the other defendant in the bill has purchased it at the tax sale. These facts appear upon the face of the bill, and in my judgment afford complainant a presumptive case of title upon which he has a standing in court.

Without invoking the technical doctrine of estoppel, the allegations in the bill may be regarded as *prima facie* sufficient to enable the complainant to proceed to a hearing. I am quite confident that if this suit was anywhere else, in a contest with these parties that the mere showing that they held under this complainant would be sufficient evidence of title in him, and I do not see why it would not be sufficient

in a court of equity. The allegations in the bill might have been more specific. perhaps ought to have been, but I do not think a party ought to be expelled from court because he did not more particularly allege what the defendants must have conceded in order to hold the property against him.

I do not know that if the merits of the case were considered I would vote for a reversal of the judgment, but my dissent is based on the ground that, in my view of the bill, this court ought to go on and pronounce judgment on the matters of complaint that the bill makes against all the defendants.

Beard *vs.* Dean.

It is not obligatory upon the ordinary, or upon the superior court on appeal, to supersede the mother as natural guardian of a daughter over fourteen years of age, and appoint as guardian the person elected by the latter. And where the mother, though no longer a widow, desires the guardianship and offers bond and satisfactory security, and where she is not shown to be unfit morally, mentally, or otherwise, to bring up her own daughter and manage her estate, a judgment rejecting the nominee and appointing the mother will not be disturbed.

Guardian and ward. Before Judge Pottle. Madison Superior Court. March Term, 1879.

Ross Beard, a female minor nearly sixteen years of age, applied to the court of ordinary to be allowed to select her guardian, naming Skinner. Ross' mother, her father being dead, *caveated* the application, and asked that she be appointed. It was so ordered and Ross appealed to the superior court. Upon the trial there the evidence presented, in brief, the following facts:

Ross' father died before she was born. Her mother raised her until she was about seven years of age, when she went to her uncle Dean's to sow some peas, and had there

remained since; her mother had married again, and her (Ross') association with her step-father's children by a former marriage was not pleasant; she was happy where she was, had lived with her uncle for seven or eight years pleasantly, was treated kindly and as one of his own children, and preferred so to remain to returning to the care of her mother; Skinner would not interfere with this condition of affairs, whilst if her mother was appointed she would be compelled to return to her step-father's; she owned a small tract of land of the value of about $300.00.

There was testimony to show that either Skinner or her mother would make a proper and competent guardian.

The issue thus made was submitted to the court without the intervention of a jury. The mother prevailed, and Ross excepted.

G. NASH; J. B. ESTES; W. G. JOHNSON, for plaintiff in error.

J. M. MATHEWS; SAMUEL LUMPKIN, for defendant.

BLECKLEY, Justice.

There is certainly nothing in the record to warrant this court in the slightest interference with the discretion exercised by the court below in appointing the mother rather than the person selected by the ward, if that court had, by law, any discretion in the matter. The guardianship in controversy was not of the property alone, but of the person also. Indeed, it was the latter element that gave point to the whole proceeding. There are three sections of the Code which we find it necessary to compare and interpret. Section 1803 says that the father, if alive, is the natural guardian; if dead, the mother is the natural guardian; a guardian's bond has to be filed, and accepted by the ordinary, before the natural guardian can receive property, and if this is not done, the ordinary may appoint another guardian to receive the property. Section 1806 empowers

the ordinary to appoint for a minor "having no guardian," a guardian of person and property, or of either, and adds that if the ward is above the age of fourteen years before a guardian is appointed, the ward shall have the privilege of selecting, and if the selection be judicious, the ordinary shall appoint the person selected. Section 1808 is in these words: "In the appointment of guardians, the widowed mother shall have the preference upon complying with the law. Upon her marriage again the letters are revoked, though her husband shall be responsible to the ward as guardian, if no other guardian be appointed. Among collaterals applying for the guardianship, the nearest of kin by blood, if otherwise unobjectionable, shall be preferred—males being preferred to females. The ordinary, however, in every case may exercise his discretion according to the circumstances, and, if necessary, grant the letters to a stranger in blood." To harmonize all the provisions of these three sections, they must be read attentively. Natural guardianship, pure and simple, is of the person only, and is incident to the relation of parent. The ordinary has nothing to do with constituting the mother natural guardian any more than with constituting the father such. The mother succeeds the father by operation of law, and without any action whatever by the ordinary—no appointment, no letters of guardianship are contemplated. But for the mother, or the father either, to have guardianship of the child's property, the ordinary must be consulted; bond must be given, and by the ordinary accepted. When this is done the parent is guardian of both person and property. But suppose it is not done, what is the power of the ordinary? Merely to appoint some one else guardian to receive the property. Nothing is said of any authority to displace the parent as guardian of the person. For a minor having no guardian, the ordinary may appoint a guardian of person and property, or of either; but if the minor has a natural guardian, it certainly cannot be said in a broad sense that he or she has no guardian. In such case the

range of appointment is limited to guardianship of the property, for it is only as to property that there is no guardian. The right of a ward of the prescribed age to elect is limited in the same way; if a ward has a natural or other guardian of the person, the ordinary has no power to appoint a personal guardian, but only one of property, and the right of the ward to elect cannot extend beyond the scope of the ordinary's power of appointment. When both parents are dead and there is a vacancy in the entire field of guardianship, the right of election is unlimited. Does the mother cease to be natural guardian on the termination of her widowhood by marriage? We think not. As natural guardian proper, she does not hold by appointment, and has no letters to be revoked. The revocation which takes place on her marriage relates to her guardianship of property, and not to that of the person. After marriage, as before, she is, as mother, the most fit and proper of all persons to have the custody and training of her child—especially if the child be a daughter. There is no hint in the statute that she loses by marriage her position or authority as natural guardian. It is only what comes to her through the ordinary, or with his approval, that lapses when marriage takes place. We are not to be understood as deciding for or against the power of the ordinary to remove her, in a special case, from natural guardianship, but only as holding that it is not obligatory upon him or upon the superior court on appeal, to supersede her where she is not shown to be unfit morally, mentally or otherwise to bring up her child. We are certainly safe in this ruling where she makes the offer of bond and satisfactory security. If, in the case before us, the election of the ward and the application for letters had been restricted to guardianship of the property, it may be that the election ought to have prevailed; but as the real contest was over guardianship of the person, and nothing was shown against the mother's fitness to manage the property, we will not separate the two matters which the court below acted upon as a whole,

which action is excepted to here as a whole, and not otherwise. The new relation of married women to property, brought in by the act of 1866, may have some bearing on the power of a mother to continue in the guardianship of her child's property, notwithstanding her marriage. And even without that act, it is not certain that she could not, after marriage, be appointed guardian of property, or allowed to receive property as natural guardian, by giving bond and security. After the termination of her widowhood, she would have no right to be *preferred* as guardian of property, but that would not necessarily work an incapacity to serve if appointed. We, however, leave the property element of the controversy to stand, not on the theory that it was well decided in and of itself, but for the reason that the real contest was over guardianship of the person, and because the natural guardianship of the person was in the mother, and no conclusive reason for withdrawing it was shown, even if the power to withdraw existed. Putting the action of the court on the plain of discretion, it was not abused.

Judgment affirmed.

THE SOUTHERN STAR LIGHTNING ROD COMPANY *vs.* DUVALL.

1. When a person not a party to an execution nor the holder of any fund belonging to the defendant, advances his own money to obtain a transfer of the execution, with an intention at the time not to extinguish it, but to keep it open against the defendant until reimbursed for the outlay, the transaction (however it may be denominated afterwards by the witnesses) is not a payment but a purchase; and though the person receiving the money and making the transfer has power to collect, yet if he has no power to sell absolutely as against the plaintiff, and the plaintiff has never ratified by accepting the money or otherwise, there is no satisfaction, and his title remains unimpaired.
2. The attorney of record is empowered by law to transfer an execution, subject to ratification by his client, but whoever deals with the attorney or his transferee takes the risk of the client's failure or refusal to ratify.

JACKSON, Justice, dissented.

The Southern Star Lightning Rod Co. *vs* Duvall.

Executions. Levy and sale. Payment. Attorney and client. Before Judge UNDERWOOD. Floyd Superior Court. March Term, 1879.

On February 28, 1873, an execution in favor of the Lightning Rod Company against Ayer, Duvall & Turner, was issued from the clerk's office of Floyd superior court, for $135.00 principal, $11.85 interest, and costs. On it were credits amounting to $50.00; also the following entries:

"For value received the within *fi. fa.* is hereby controlled and transferred to A. P. McCord. August 28d, 1873.
(Signed) DUNLAP SCOTT,
Plff's Att'y."

"Satisfied in full, principal and interest.
(Signed) A. P. McCORD."

A levy being made upon the property of Duvall, he filed an affidavit of illegality setting up payment. An issue being formed as to the fact of payment, the plaintiff read in evidence the execution, with the entries thereon, and proved by Hooker, its business manager, that the plaintiff did put in Dunlap Scott's hands for collection an account for $135.00, but had never received from Scott any remittance thereon; that plaintiff had never authorized Scott to transfer the execution to any person, and had never ratified the transfer to McCord or to any one else.

Duvall, the defendant, testified, in brief, as follows: I got McCord to go to Scott, who was the attorney for the plaintiff and who was then pressing me on the *fi. fa.*, and pay it off for me. He advanced the money for me, as I did not have it at that time. I afterwards refunded to McCord what he had paid for me on the execution; also paid the clerk his costs. I know nothing about the transfer on the execution from Scott to McCord.

McCord testified that in the summer of 1873 Duvall got him to pay off an execution held by the plaintiff against him, in the hands of Dunlap Scott; that as a matter of

precaution he took a transfer of the execution to himself till Duvall should pay him back the money. That he paid the principal and interest of the claim, all of which Duvall refunded to him; that he did not make one cent on the transaction; that he did it as a matter of accommodation to Duvall and not as an investment.

Turner testified that he was present when McCord paid the execution to Scott for Duvall; that the latter did not have the money to pay the execution, and McCord was to pay it for him; that at the suggestion of witness, McCord, when he paid the money, took a transfer of the execution to keep it open for his protection.

The jury found the issue in favor of the defendant. Whereupon the plaintiff moved for a new trial because the verdict was contrary to evidence and to law, and because the court erred in charging the jury as follows: "If McCord paid the *fi. fa.* for Duvall, and did not purchase the *fi. fa.*, that would be a payment and satisfaction of the *fi. fa.*," there being no evidence to justify such instruction.

The motion was overruled, and plaintiff excepted.

C. A. Thornwell, for plaintiff in error.

Wright & Featherston; John H. Reese, for defendant.

Bleckley, Justice.

1. Did McCord pay the *fi. fa.*, or did he purchase it? He was not a party to it, nor did he have in hand any fund belonging to the defendant. The latter requested him to advance the money and pay off the *fi. fa.*, and this he promised to do; but did he do it? Did he not change his mind, and conclude to purchase the *fi. fa.* and keep it open against the defendant, so that he might, if necessary, enforce it for his reimbursement? It matters not how late he underwent this change of purpose, if he did in fact undergo it, and if he acted accordingly in his dealings with the plaintiff's attorney, at

the time of parting with his money. Grant that so acting would involve a breach of faith, he had incurred only the obligation which a bare promise imposes, not that which attaches to a binding contract, no consideration for the promise having passed. To violate even a naked promise deliberately made, is a moral delinquency more or less reprehensible; but the law does not charge itself with the enforcement of naked promises—leaving them to the voluntary decisions of private conscience. Moreover, it is not every deviation from the terms of a promise that amounts to a breach of it. The spirit of a promise is often as well kept by departing somewhat from the letter, as by the most literal performance. Regard is to be had to the benefit which was in contemplation when the promise was made, and if there is reasonable certainty that the benefit will equally follow from a free as from a close method of performance, either method may, in many instances, be adopted without the slightest infidelity to moral principle. On strictly ethical grounds, there is undoubtedly great danger in varying this or that detail in the mode of performance, and anything like a habitual practice of doing so would be pernicious; but a just recognition and observance of the correct general rule will not oblige us to treat the rule as one without exceptions. There are exceptions: and the explanation of McCord's conduct in the present case lies in the fact that he deemed himself at liberty to make this one of the number. Whether he judged rightly or not, there are unmistakable indications that he so judged. The evidence demonstrates that in aim and purpose he was true, throughout, to the object for which he undertook to advance the money and pay off the *fi. fa.* That object was to relieve the defendant from the pressure which the plaintiff's attorney was exerting upon the defendant for the money. It was in consequence of this pressure that the defendant applied to McCord to befriend him. No less conclusive is the evidence that McCord, after making the promise, and whilst engaged in the act of complying with it, embraced the

opinion that the object could be as well subserved by purchasing the *fi. fa.* as by paying it off. To this he was moved by the suggestion of the witness Turner, a suggestion that was accepted and acted upon in a way to leave no vestige of uncertainty that McCord and the attorney both intended that the *fi. fa.* should not be extinguished, but that it should remain open in the hands of McCord, as his property, to be enforced by him at his pleasure. No doubt McCord intended to indulge upon the *fi. fa.* to the same extent as he would have indulged upon an account for a loan of the money, if his original purpose of making a loan had been carried out. He supposed he was giving his friend all the substantial fruits of the promised accommodation, and at the same time securing himself for his outlay somewhat better than was thought of in the beginning. Most probably he had not the slightest doubt of his moral right to take a transfer of the *fi. fa.*, or of the attorney's legal authority to execute it. But the fact of transfer is indisputable, and that fact is controlling. In Harbeck *vs.* Vanderbilt, 20 N. Y., 395, the court said: "It is equally clear, that if the money be paid, not by one who is a party to the judgment and liable upon it, but by some third person, the judgment will be extinguished or not, according to the intention of the party paying. The taking of an assignment, whether valid or void, affords under all circumstances, unequivocal evidence of an intention not to satisfy the judgment." To intend a payment, strictly and properly, of any instrument, and to take a transfer of it at the same time, would be in the highest degree absurd. What could McCord possibly have wanted with the *fi. fa.* if it was a paid and extinct paper? The proper evidence of payment would have been a receipt from the attorney; and the attorney should not only have entered the satisfaction on the *fi. fa.* and returned the *fi. fa.* to the clerk's office from whence it issued, but, under the rules of court, he would have been subject to a fine if he failed to report the collection for entry on the execution docket, etc. See Rules of Superior

Court, "Attorneys." Nothing whatever was done on the line of payment, but every step taken was on the line of purchase; the last of which steps was the entry of satisfaction, signed by McCord, the transferee. This entry is without date, but there is no evidence that it was made before the actual payment of the *fi. fa.* by the defendant to McCord: the presumption is that it was made then, for the import of the entry is that the satisfaction was made to McCord, he being the person who acknowledges it. Though the payment made by McCord to the attorney is called by the witnesses a payment *of* the *fi. fa.*, it was really a payment *for* the *fi. fa.* on a contract of sale and purchase, which contract was reduced to writing, signed, and delivered with the *fi. fa.* itself. The misapplication of terms in the parol evidence cannot alter the facts, nor vary their legal significance or effect. 63 *Ga.*, 134 to 139; 62 *Ib.*, 82, 83.

Having thus seen that the true relation of McCord to the *fi. fa.* was that of purchaser and transferee, and that there was no exercise by the attorney of his power to collect the *fi. fa.* and extinguish it, the effect of the transaction turns upon the naked legal question whether the attorney could bind his client by the assignment for full value, the evidence being positive that he did not pay over the money, and that the client did not in any way ratify the assignment. An unauthorized sale of the client's property would not divest his title. 8 *Ga.*, 421; 12 *Ib.*, 337. And a payment by the debtor to the assignee, would be no satisfaction or discharge. Wilson *vs.* Wadleigh, 36 Me., 496.

2. The case last cited, as well as numerous others, among them Campbell's Appeal, 29 Penn. St., 401, are in point on the general proposition, that to assign an execution is not within the scope of the general authority of the plaintiff's attorney. Our Code, however, deals with the question and settles it for us in these terms: "The transfer of a judgment or execution by the attorney of record shall be good to pass the title thereto as against every person except the plaintiff or his assignee without notice. The ratification

by the plaintiff shall estop him also from denying the transfer. The receiving of the money shall be such a ratification." Code, §3598. There can be no rational construction of this language which does not hold that whoever deals with the attorney or with his assignee, takes the risk of the client's failure or refusal to ratify. That risk, in this case, was upon McCord in making the purchase, and upon Duvall, the defendant, in afterwards making payment to McCord. And as the plaintiff has never ratified, the verdict of the jury is contrary to law and evidence, and the superior court erred in not granting a new trial.

The hardship of the particular case is no reason for melting down the law. For the sake of fixedness and uniformity, law must be treated as a solid, not as a fluid. It must have, and always retain, a certain degree of hardness, to keep its outlines firm and constant. Water changes shape with every vessel into which it is poured; and a liquid law would vary with the mental conformation of judges, and become a synonym for vagueness and instability.

Judgment reversed.

WARNER, Chief Justice, concurred, but furnished no written opinion.

JACKSON, Justice, dissenting.

Duvall filed an affidavit of illegality to the plaintiff's *fi. fa.*, on the ground that it had been paid off by him. The jury found a verdict sustaining this affidavit, the plaintiff made a motion for a new trial, which was overruled and he excepted.

Fifty dollars was paid on the *fi. fa.* by Duvall in person, thirty in March and twenty in June, 1873. In August of the same year Duvall got McCord to pay for him the balance and have the *fi. fa.* satisfied. The balance was paid to Dunlap Scott, plaintiff's attorney of record, by McCord, to whom also the other payments were made by Duvall. But McCord took from Scott the following transfer, without the knowledge or consent of Duvall:

"For value received the within *fi. fa.* is hereby controlled and transferred to A. P. McCord, August 23, 1873. DUNLAP SCOTT, plaintiff's attorney;" and entered immediately under this transfer was the following: "Satisfied in full, principal and interest. A. P. McCORD." N ate is given to this satisfaction of the *fi. fa.* Scott died, failing to pay the money over to the plaintiff. Duvall paid McCord the advance he had made before the plaintiff moved against him.

Duvall swore that he got McCord to go to Dunlap Scott, who was pressing him *on the fi. fa., and pay the execution for him*, and afterwards paid him back.

McCord swore that Duvall got him to *pay off the fi. fa.* for him to Scott, which he did, and as matter of precaution took the transfer—but not as an investment.

Turner swore that he was present when McCord *paid the fi. fa. to Scott for Duvall.* The way of it was this, that Duvall did not have the money to pay the *fi. fa.*, McCord was *to pay the money for Duvall*, and at the suggestion of witness when he paid the money to Scott, took a transfer of the execution to himself to keep it open for his protection.

The jury found that the execution was paid by Duvall and sustained the illegality.

The court charged that "if McCord paid the *fi. fa.* for Duvall and did not purchase the *fi. fa.*, that would be a payment and satisfaction of the *fi. fa.*," and this, and that the verdict is against law and without evidence to support it, are the errors complained of.

While it is true that McCord could not purchase the *fi. fa.* from Scott, and Scott could not sell and transfer it to him so as to divest the title of the plaintiff in execution, Code, §3598, yet it is equally true that Duvall could pay it off to Scott, the attorney of record, and that would satisfy the *fi. fa.*, and what Duvall could do himself, he could do by another as his agent; and if his agent paid the *fi. fa.* for him, and was engaged to do that thing, and in doing so went beyond the scope of his authority and did with Scott an illegal thing in buying the *fi. fa.* and having it trans-

ferred, Duvall is not bound by the illegal part of the business. The effect, however, of McCord's evidence and that of the others present, is that he did not buy the execution but satisfied it as soon as Duvall paid him back his money, and that was before the plaintiff asserted dominion again over it and pressed it for collection. If Duvall or the plaintiff is to suffer from the failure of Scott to do his duty in not paying over the money and in transferring the execution, the plaintiff who made Scott his collecting officer, and put it in his power to do the wrong, ought to suffer rather than Duvall be made to pay the money twice.

Besides, who knows whether the plaintiff got the money and thereby ratified the act of Scott? Scott's mouth is closed in death; and the other party, his client, ought not to be heard to say, especially after such a lapse of time, that the money was not received. The plaintiff, a corporation, shows that it was not received only by a book-keeper, and that only to the best of the book-keeper's knowledge and belief. Payment to the attorney of record is payment to the plaintiff in *fi. fa.*, and the presumption is that the plaintiff got it, so far as third persons who deal with the attorney are concerned; and after Scott is dead and McCord has paid the execution off for Duvall, and Duvall has paid him back just what he paid for him, and after such a lapse of time—about six years—it is, in my judgment, inequitable to allow this recovery from Duvall and coerce him, under mere shadowy forms of law, without substance that I can see, to pay the debt twice, to the plaintiff's own attorney of record once, and to the plaintiff now.

I think that the true issue was presented substantially to the jury, to-wit, was this payment by McCord made for Duvall, or did he purchase the *fi. fa.* for himself; that the jury decided this issue of fact that it was paid for Duvall; that there is evidence to support the finding; that the presiding judge approved it; and that the verdict and judgment accord with the law, and all the equities of the case.

Therefore I dissent from the judgment of reversal.

Boyer *vs.* Ausburn *et al.*

A promise in writing to pay for a colt on the 1st of November thereafter, with a stipulation that the vendor retain title until paid for, and yet vendees were liable to pay "in the event said colt should die," is *prima facie* a promise to pay for the colt at that date, even if it die before payment and while title is in the vendor, and not a promise to pay only if the colt should die; and therefore a non suit because plaintiff did not prove that the colt was dead, was error.

Contracts. Promissory notes. Non-suit. Before Judge Pottle. Hancock Superior Court. April Term, 1879.

This was an appeal case. Boyer sued Ausburn *et al.* on the written instrument set out in the opinion. On the trial he introduced it, and closed. The court granted a non-suit, and he excepted.

J. T. Jordan; F. H. Neavy, for plaintiff in error.

Seaborn Reese, for defendants.

Jackson, Justice.

The sole question is, was the non-suit properly awarded? That turns on the construction of the contract sued. That contract is in these words:

"By the first day of November, 1878, we promise to pay Jasper J. Boyer or bearer sixty five dollars for one bay stallion colt, named Mark, about two years old, the title to said colt remaining in said Jasper J Boyer until the purchase money is paid in full, but our liability is to pay the above amount in the event said colt should die."

This paper being introduced, the court held that unless the plaintiff showed that the colt was dead, there could be no recovery, and non-suited the plaintiff.

Prima facie, the meaning of the paper is, that on the first day of November the money due should be paid, though the title was retained by the plaintiff to the colt, and to avoid trouble in the event the colt died before the

money was paid, and while title was still in the vendor, the vendees agreed to pay for him notwithstanding they had no title. The consideration of the promise was the delivery and present use of the colt, and the vendor at his option could recover the money on the 1st of November, whether the colt was dead or alive, or if alive, on refusal to pay for him at that date he could recover him in trover.

It is true that there may be some ambiguity in the paper, and if so it may be explained by parol; but on its face it seems to us to mean as indicated above, though awkwardly expressed. Whether ambiguous or not, as it means on its face a promise to pay for the colt, dead or alive, on the first of November, the court should not have granted the nonsuit; as the note itself was *prima facie*, at least, an absolute promise to pay on sufficient consideration.

Judgment reversed.

Neal *et al.* vs. The State of Georgia.

1. For one of the jurors to retire with leave of the court and guarded by a bailiff, to attend a call of nature, his fellows remaining in the box, and he being absent no longer than necessary, is not an illegal or irregular separation of the jury engaged in the trial of a capital felony.
2. When the prisoner's counsel and the presiding judge differ as to what was stated or omitted in charging the jury, the understanding and recollection of the judge must govern in the supreme court.
3. The verdict was warranted by the evidence.

Criminal law. Jury. Practice in the Superior Court. Practice in the Supreme Court. New trial. Before Judge Fleming. Bryan Superior Court. April Term, 1879.

Neal and Jackson were placed upon trial for the murder of one Houston, alleged to have been committed on February 2, 1879. They pleaded not guilty. The evidence presented, in substance, the following facts:

The defendants, deceased and other negroes, were at the store of Miller, Brady & Co., in Bryan county, on the night of February 1st, 1879. Neal was the nephew of Houston. One Snyder lost some money in the store, and deceased used language tending to impute the theft to Neal. This called forth angry language from Neal, and a slight altercation ensued, which was quickly settled. After the store was closed, Neal fired off two barrels of his pistol in close proximity to deceased, but with no intention of hitting him, but with the apparent purpose of frightening him. Deceased struck at Neal with his gun, and broke the barrel off. As the parties went away from the store Neal was heard to say to deceased "G—d d—n you, I will kill you to night," to which, one witness testified, deceased replied, "No, I have done nothing for you to kill me." Jackson was heard to say "he could whip all of these men, he had killed one man and would kill another." The defendants, deceased and a man named Bunion, were left together on the road, the other negroes going off to their various homes, but some of them heard two pistol shots after the separation, the sound coming from the direction of the spot where the body of the deceased was subsequently found.

Bunion testified, in brief, as follows: Going on in the road, Neal said to deceased, "do you say I stole Snyder's money?" Deceased replied, "yes." Neal then shot him in the head. "He shot four times, twice at the store and three times on the road. Jackson damned at deceased. They did not see me." Deceased had basket on his arm. Jackson took the gun and knocked deceased on the head. They both beat him until he was dead, and then went off. Witness was hid in the bushes. Neal fired five times.

The body of deceased was discovered at the point indicated by Bunion. He had been shot and badly beaten. There were evidences of a scuffle all around the place.

When about to be arrested Neal drew a pistol, and Jackson started to run. Blood was on Neal's shirt and five of the six barrels of his pistol had been discharged.

The jury found the defendants guilty. They moved for a new trial upon the following grounds, to-wit:

1. Because during the argument of defendants' counsel, the court permitted one of the jurors to leave the court-house without any other juror trying the case being with him.

2. Alleged error in charging the jury, but not certified by the presiding judge.

3. Because the verdict was contrary to law, evidence, and the charge of the court.

In reference to the first ground it was shown that the juror, by permission of the court, left the other members of the panel, in charge of a bailiff, for the purpose of responding to a call of nature; that he spoke to no one during his absence, the bailiff being all the time in close proximity to him; that the bailiff only spoke to him to caution him against speaking to any one.

The motion was overruled, and defendant excepted.

W. W. Fraser; J. A. Brannen, for plaintiff in error.

A. B. Smith, solicitor-general, for the state.

Bleckley, Justice.

1. In *Monroe vs. The State*, 5 *Ga.*, 86 (10), it was laid down and the rule has been followed in many subsequent cases, that where there has been an improper separation of the jury during the trial, the prisoner, if found guilty, is entitled to the benefit of the presumption that the irregularity was hurtful to him, the *onus* being upon the state to show, beyond a reasonable doubt, that it did him no injury. But must we therefore hold that a like presumption arises out of a proper separation—proper in time, manner and circumstances? Surely not. And what can be more fit than for the court to send out a juror, attended by a bailiff, when he is under a stress of nature which civilized man regards as a summons to retire? A comparison of the various possible methods of meeting and dealing with such

an exigency had better be left to silent meditation than discussed here with needless realism. It is enough if those who may become interested in the subject will form a mental picture of the situation, and contemplate it for themselves. It is inferable from the record that the absence of the juror was not for a longer time than was necessary, and he was under the immediate watch and guard of the bailiff all the while. The facts are altogether unlike those of any of the cases cited by the counsel for the plaintiffs in error, the citations being 10 *Ga.*, 512 (10); 41 *Ib.*, 527 (2); 45 *Ib.*, 225 (8); 47 *Ib.*, 598 (5), and 56 *Ib.*, 653. Compare 14 *Ga.*, 8 (4). The separation discussed in these authorities is improper separation, not a retirement rendered necessary by habits of decency, expressly authorized by the court, and guarded by a sworn officer.

2. The record shows a difference of understanding or recollection between the counsel and the presiding judge, as to the terms of the court's charge to the jury on the subject of circumstantial evidence. Upon such a question the judge is, of course, the better authority in this court.

3. The sufficiency of the evidence to uphold a conviction depends in a great degree upon the credibility of the witness, Bunion. On the facts in the record we cannot hold, as matter of law, that the jury had no right to believe him. We feel that there is no alternative but to let their finding prevail.

Judgment affirmed.

Waxelbaum & Brother *vs.* Paschal & Heidingsfelder.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

An affidavit to sue out attachment for purchase money, must so describe the property for which the debt was created, and in possession of the debtor, as to certify to the officer making the levy what property he is authorized to seize and sell.

Attachments. Before Judge CRAWFORD. Talbot Superior Court. March Term, 1879.

The only question in this case is upon the sufficiency of the following affidavit for attachment:

"GEORGIA—Talbot County:

"Joseph Waxelbaum, one of the firm of S. Waxelbaum & Brother, a firm composed of Solomon Waxelbaum & Joseph Waxelbaum, comes before the undersigned, and on oath saith that Paschal & Heidingsfelder, of said county, a firm composed of William D Paschal & Phillip Heidingsfelder, are indebted to deponent's firm in the sum of nine hundred and ninety-one $\frac{57}{100}$ dollars ($991 57). Said indebtedness was created by the purchase from deponent's firm by said Paschal & Heidingsfelder of goods and merchandise as shown by the annexed bills, marked from number one (1) to nine (9) inclusive. Said goods and merchandise are not paid for but the debt for the same is now due to deponent's firm, except $336 69, which will be due at an early date. Said goods and merchandise, except certain quantities of the same disposed of by said Paschal & Heidingsfelder, are now in the possession of said Paschal & Heidingsfelder. The goods and merchandise thus in the possession of said Paschal & Heidingsfelder constitute a large amount of the goods and merchandise set out in said bills numbered from 1 to 9, and are easily capable of identification by the proprietary marks and labels of deponent's firm, and deponent refers to said bills as a complete description of said goods and merchandise, and hereby makes them a part of this affidavit."

The bills referred to are annexed to the affidavit, embracing such items as: 1 B. F. R. yards, 10 a osnaburgs, 10 Prattville osnaburgs, etc., etc.

The attachment was levied on the goods thus described, and defendants replevied.

On the hearing the court dismissed the affidavit for want of sufficiency in the description of the goods in defendants' possession, to which plaintiffs excepted.

HILL & HARRIS, for plaintiffs in error.

WILLIS & WILLIS; J. M. MATHEWS, for defendants.

JACKSON, Justice.

The trouble with the plaintiffs' affidavit is that the description of the goods is not such as to enable the sheriff to

ascertain which his process authorizes him to seize and sell. The affidavit does not show what goods, liable to attachment, are in the possession of defendants, or were in their possession when the affidavit was made and the seizure by the sheriff directed. What particular goods was the officer empowered to seize and sell? There is a general enumeration of the goods sold by plaintiffs to defendants in certain exhibits, but these exhibits show nothing except the character of the goods which are in the exhibits and in nowise distinguishes them from the character of similar goods all over the country. It is true that the affidavit says that the goods are easily capable of identification "by the proprietary marks and labels of deponent's firm;" but what these marks and labels are does not appear; and when we look to the exhibits, there are no marks or labels of any sort on any of the goods therein exhibited. The court does not judicially take knowledge of what are the proprietary marks or labels of any firm of merchants, or of any merchant, even if something appeared on the goods, as exhibited and referred to "as a complete description of said goods and merchandise," purporting to be marks and labels, but nothing of the kind appears.

But if this were all right, a remnant only is embraced in the affidavit, and what that remnant is no man can tell, for it is not described. Whether it be one or another kind of the various merchandise sold, is not set out. It is simply said in the affidavit that "said goods and merchandise, except certain quantities of the same disposed of by said Paschal & Heidingsfelder, are now in the possession of said Paschal & Heidingsfelder;" but what has been disposed of, or what is left, is nowhere attempted to be described in character or nature, or mark or label of any sort, so that what the precept directs the officer to seize, as in the possession of defendants, is not described. This seems essential under the statute. The remedy of attachment for purchase money is only given "where the debtor who created such debt is in *the possession* of the property,"

Code, §3293; and the officer can levy "*only* on the property described in said affidavit." Code, §3295. What property for which this debt was created was in the possession of the defendants when this process was issued does not appear, and cannot be ascertained from this affidavit and the exhibits thereto—and the process refers to the affidavit for the description thereof.

It is clear, therefore, that no error was committed in dismissing the attachment. See also, *Joseph & Bro. vs. Stein*, 52 *Ga.*, 332; *Bruce vs. Conyers*, 54 *Ga.*, 678.

Judgment affirmed.

Sims, executor, *vs.* Henderson.

When the note sued upon recites that it was given for land sold and conveyed, without specifying the quantity, the terms of the conveyance, or at least their substance, must appear in order to make a case in behalf of the defendant for the apportionment of the price on account of an alleged fraudulent deficiency in the quantity of land. The conveyance referred to in the note must be introduced in evidence if practicable, and if not, the non-production of the instrument must be accounted for, and its contents established by secondary evidence. In this case, the evidence was not full enough to warrant the charge of the court or the verdict, neither the deed nor its contents being before the jury.

Vendor and purchaser. Contracts. Evidence. New trial. Before Judge Speer. Newton Superior Court. March Term, 1879.

Sims, as executor of Harris, brought complaint against Henderson on the following note:

"$1,500.00.

Due John Harris, or bearer, $1,500.00, value received, for land this day sold and conveyed by John Harris to John F. Henderson.

(Signed) J. F. Henderson.

December 14, 1877."

Credits thereon amounting to $900.00.

The defendant pleaded, in substance, that he had purchased the land referred to in the note from plaintiff's testator as containing one hundred and seventy acres, at $10.00 per acre. giving two notes therefor, one for $200.00 and the other for $1,500.00, that sued on; that he had paid the first in full, and made the payment credited on the second; that testator represented the land as being one hundred and seventy acres, and he purchased on the faith of such representation; that he had subsequently discovered, by survey, that there were but one hundred and twenty-seven and one-half acres in the tract, that therefore he did not get by forty-two and one-half acres as much land as he paid for. Whereupon he asks an apportionment of the price, and that a credit of $425.00 be entered on the note.

The testimony showed clearly the deficiency in the amount of land which defendant claimed he had bought, and the main point of contest was as to whether testator had sold by the tract or by the acre. Upon this the evidence was conflicting; also as to the repre-entations of area alleged to have been made by testator. Neither the deed to defendant was introduced, its absence accounted for, nor its contents proven.

The jury, by their verdict, allowed the defendant the credit asked. The plaintiff moved for a new trial upon the following, among other grounds:

1. Because the court erred in charging the jury as follows: "If you believe that testator wilfully and fraudulently represented to the defendant that there were one hundred and seventy acres in said tract or body of land, and sold it to defendant as such, and he knew at the time that there were not one hundred and seventy acres, but a much less quantity, then you will be authorized to apportion the deficiency, if there be a deficiency proven, and credit the note sued on, if you believe it was given for this land, at its date, with the amount of said deficiency."

2. Because the court erred in charging as follows: "So

if, in the absence of proof of wilful misrepresentation by the testator as to the number of acres, you believe the land was sold for one hundred and seventy acres, and you find, under the evidence, that the deficiency was so gross as to justify the suspicion of wilful deception, or mistake amounting to fraud, in this court the deficiency is apportionable, and you can allow the amount of the deficiency as a credit on said note, and find only the balance due with interest."

3. Because the verdict was contrary to law, evidence, etc.

The motion was overruled and plaintiff excepted.

Clark & Pace, for plaintiff in error.

Emmett Womack, for defendant.

Bleckley, Justice.

The note shows on its face that there was a conveyance. The complaint of the debtor, Henderson, is that he did not get as much land as he bought. As there was a conveyance, that is the highest and best evidence of what land was bought, and the description given of the premises in that instrument is too important not to receive attention in this controversy. It may be that the terms of the contract as reduced to writing in the deed will be found to correspond with the subsequent survey. The natural starting point of the whole investigation is to see what the deed says. There can be no proper trial of the case without putting the deed in evidence if practicable, or accounting duly for its non-production, and then proving its contents by secondary evidence. Until a showing is made to the contrary, the presumption is that the vendee has the deed and can produce it. In the absence of this instrument and of all evidence of its contents, there was not enough testimony before the jury to warrant the charge which the court gave on the subject of reducing the debt evidenced by the note, nor to justify the verdict which the jury rendered. The note and

the conveyance to which it refers ought to be brought together and looked at as related writings, and then there can be intelligent use made of the facts which rest in parol. There ought to be a new trial.

Judgment reversed.

Forsyth *vs.* Preer, Illges & Company.

(Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.)

The act of 1875, correctly construed, does not in any case extend the time for bringing cases to this court on writ of error beyond thirty days from the adjournment of the superior court, and a bill of exceptions not signed and certified within thirty days from the adjournment of the court will be dismissed.

Practice in the Supreme Court. September Term, 1879.

Reported in the opinion.

C. J. Thornton, for plaintiff in error.

Porter Ingram, for defendants.

Jackson, Justice.

On the 12th of February, 1879, the superior court of Muscogee county adjourned. On the 17th of March, 1879, this bill of exceptions was signed and certified, so that more than thirty days from the adjournment had elapsed before the certificate of the bill of exceptions by the judge of the superior court, and therefore, ordinarily, the bill of exceptions would be dismissed as the general law requires and as this court has very often ruled. It is sought, however, to take this case out of the general rule by force of the act of 1875, which requires the bill of exceptions to be certified within sixty days *from the*

date of the judgment complained of, where the court sits longer than thirty days, and in this case the court sat longer than thirty days and the bill of exceptions was certified within sixty days from the adjournment as well as from the refusal of the new trial. Sup. to Code, §25.

But the act of 1875 must be construed in harmony with the old law on the same subject and the general spirit of the constitution and laws in regard to expediting the trial of cases in this court. Its purpose was not to postpone the time of bringing writs of error here, but to expedite that time. If the court sits longer than thirty days, it declares substantially that the litigant shall not *wait* until the thirty days have expired after adjournment, but he shall move within sixty days from the date of the decision complained of, even if he has to move *within term or before the thirty days allowed by the old law has elapsed.*

But the legislature did not mean that if the court sat six months and on the last day of the session a judgment was rendered, the party complaining of it should have sixty days to move instead of thirty. The reason and spirit of the act of 1875, as well as the policy of expediting the final decision of suits to be found in the constitutions of this state, and in the act organizing this court, all militate against such a construction.

We hold, therefore, that in *all* cases the bill of exceptions must be tendered within thirty days of the adjournment of the lower court, to the judge thereof; and in cases where the session is protracted beyond thirty days from the date of its commencement, the party must move within sixty days from the date of that judgment of which he complains, even if he has to move during term or before the thirty days after adjournment have passed; but *in no case* is he permitted to wait longer than thirty days after the court adjourns.

The plaintiff in error here having waited longer than thirty days after the court had adjourned, the writ of error must be dismissed.

We remark further that thirty days is in all conscience long enough to require the circuit judge to keep the history of the case in his head so as to certify its facts, and if the law were altered at all in this respect, in our judgment, it would be better policy to curtail the time within which parties should be required to move to set aside verdicts and judgments and to appeal to higher tribunals, and thus procrastinate litigation, than to extend that time.

Writ of error dismissed.

Noyes vs. Ray.

When land incumbered by mortgage is sold by the mortgagor at full value, bond for titles given, and a negotiable note taken for the whole price, and a third person, with notice of all the facts, buys the note before due, at its value less the amount of the mortgage, and afterwards buys in the land at the mortgage sale, such third person cannot hold on to the land as his own and also collect the note, or the balance thereof after deducting what the land brought at the mortgage sale. He cannot do this although the bond for titles contained a direction from the obligor to the obligee to discharge the mortgage out of the price covered by the note, and although the obligee neither complied with this direction nor tendered payment of the note at maturity, nor afterwards, so as to supply a fund to protect the land. On the facts in evidence, the holder of the note is in no better situation than if he were himself the payee thereof, the mortgagor, the maker of the bond for titles and the purchaser at the mortgage sale.

Bond for title. Mortgage. Negotiable instruments. Before Judge Underwood. Polk Superior Court. February Term, 1879.

On November 29th, 1876, Mattie C. Carroll agreed to sell to Ray a lot of land for $500.00, took his negotiable note for that sum, due November 1st, 1877, bearing interest from date, and executed her bond for title containing the following provisions:

"Now if the said Mattie C. Carroll shall convey, or cause

to be conveyed, to the said Linton G. Ray, or to such uses and to such persons as he may appoint or direct, free from all mortgages or incumbrances, by such conveyance as the said Linton G. Ray may reasonably demand, upon the payment by the said Linton G. Ray of his promissory note, so given by him as aforesaid as the consideration for the purchase of said house and lot, then this bond to be void, else to remain of full force. I, the said Mattie C. Carroll, hereby direct that the said Linton G. Ray may first pay off and take up my promissory note given to A. Huntington, March 10th, 1876, for $150.00, and bearing interest at the rate of 12 per cent. per annum, due January 1st, 1877, said note being secured by mortgage deed executed on March 10th, 1876, for the better securing the payment of said note. Said mortgage covers the aforesaid described premises."

Whilst the note given by Ray for the land was held by Mrs. Carroll, the payee, he paid about $79.00 thereon. She then, on January 5th, 1877, transferred it to Noyes, he paying about $270.00 therefor, the amount of the credits and of the debt to Huntington, with interest, referred to in the bond, being deducted. He took with full notice of the mortgage, the bond and all its terms. Subsequently the mortgage was foreclosed, and the property sold, Noyes becoming the purchaser for $220.00. This amount he credited on the Ray note. The latter being dispossessed by the sale, declined to make any further payment, and Noyes brought suit for the balance. The jury found for the defendant. Noyes moved for a new trial because the verdict was contrary to the evidence and the law. The motion was overruled, and he excepted.

Blance & King, by E. N. Broyles, for plaintiff in error.

No appearance for defendant.

Bleckley, Justice.

Certain land belonged to Mrs. Carroll. Huntington held

a mortgage on it to secure a debt which she owed him. Mrs. Carroll sold the land for full value to Ray, taking his negotiable note for the price, and giving him her bond for titles. In the bond she referred to the mortgage and directed Ray to pay it off, giving the direction in a way to imply that so much of the price included in the note as was necessary to discharge the mortgage should or might be so applied by Ray. Mrs. Carroll sold and transferred the note to Noyes, who paid for it, not full value, but its value less the mortgage debt. Noyes bought with notice of the mortgage and of all the facts which control Ray's rights, whatever they are, as against Mrs. Carroll. The mortgage was not paid. It was foreclosed, and the land was sold under the judgment of foreclosure, Noyes being the purchaser. He, retaining the land thus acquired, brought suit against Ray upon the note, his claim being for the balance after deducting what the land sold for at the mortgage sale. The question is, can he recover?

He stands in Mrs. Carroll's shoes, having taken the note from her with notice of all the facts. The land was sold away from Ray, not as his property or to pay his debt, but as Mrs. Carroll's property and to pay her debt. Suppose she had not transferred the note, and had herself purchased the land when sold as her property at the mortgage sale, and then dispossessed Ray, could she have collected any part of the note without restoring the consideration for which it was given, that is, the land? Surely not. We can see no propriety in making the amount which the land brought at the sale the measure of Ray's credit on the note. If the land had been sold as his, under process against him, what it brought would have been his money; but as it was sold under a mortgage *fi. fa.* against Mrs. Carroll, as her property, what it brought was Mrs. Carroll's money, and there is no reason for treating that money as standing in lieu of the land, relatively to Ray. What he stipulated to get was the land, free from incumbrances, not the proceeds of a sale of the land under an incumbrance. The only

JACKSON, Justice.

The sole question in this case is, can the city of Marietta, since the adoption of the constitution of 1877, make a new debt except as provided for in that constitution? We think not, under the plain provisions of that fundamental law.

In the 7th section of the 7th article of the constitution of 1877, these words appear: "and no such county, municipality, or division, shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of the taxable property therein, *without the assent of two-thirds of the qualified voters thereof at an election for that purpose to be held as may be prescribed by law;* but any city, the debt of which does not exceed seven per cent. of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase, at any time, the amount of said debt three per centum upon such assessed valuation." It is not pretended that any law has been passed authorizing such increase of debt, or to hold such an election as is contemplated in the above cited section; and the election actually held did not comply with the constitution. So that it is an effort on the part of this city to make a new debt, incurred to procure a steam fire engine in the place of an old hand engine, at a considerable cost, without complying with that provision of our present constitution. It cannot be done.

The provision is inserted therein to stop, to dam up, this deluge of city and county debts which is flooding the country, and sinking the best interests of the people. It is made the duty of the judiciary to give the provision full effect. Section 4, par. 2, art. 1 of constitution 1877.

Citizens who must pay the taxes unconstitutionally laid, if not arrested, have the right to enjoin the collection, and the chancellor should have issued the writ at their prayer.

Judgment reversed.

Moreland *vs.* Stephens, sheriff, *et al.*

1. There being no provision of law for granting a new trial upon motion therefor, on a matter referred in term by consent of parties for decision by the judge without a jury in vacation, the denial of a new trial in such a case is not error.
2. When error is assigned upon the decision of the judge refusing a new trial, and there is no other assignment of error in the bill of exceptions, nothing is for review but the one point, and if for any reason the new trial was properly refused, the judgment will be sustained.

New trial. Courts. Vacation. Before Judge Buchanan. Heard County. At Chambers. January 27, 1879.

Moreland ruled Stephens, the sheriff, to show cause why he should not pay over to him certain moneys in his hands for distribution. Whitaker also claimed the fund upon an execution held by him. At the September term, 1878, an order was taken by consent, providing for the hearing of the issues thus formed by the judge in vacation. He adjudged that the sum in controversy be paid out *pro rata* to the two executions. Moreland moved for a new trial upon several grounds. It was overruled and he excepted, the sole error assigned being the refusal of such motion.

Speer & Speer, by brief, for plaintiff in error.

C. W. Mabry, for defendants.

Bleckley, Justice.

1. The remedy given by law to correct the error of a judge of the superior court "in any matter heard at chambers," is a bill of exceptions. Code, §4251. And a motion for a new trial is not appropriate. *Lester vs. Johnson*, this term.

2. In the present case, there was no writ of error directly upon the decision made by the judge at chambers disposing

of the money upon the rule against the sheriff; that decision was not excepted to and a bill of exceptions tendered and signed, but the dissatisfied party made a motion for a new trial, and the overruling of that motion is the subject matter of the writ of error now before us, and its only subject matter. No other error is assigned. Now, a motion for a new trial not being the remedy to reach any error which the judge may have committed in his judgment disposing of the money, it is certain that the refusal to grant a new trial was not erroneous. This being a sufficient reason for the decision of the judge now under review, it is needless to look for any other.

Judgment affirmed.

Curry *vs.* The Mayor and Aldermen of Savannah.

The property of a municipal corporation in the use of the municipality for the public, or held for future use for the public, is not subject to levy and sale under execution.

Municipal corporations. Levy and sale. Before Judge Tompkins. Chatham Superior Court. October Term, 1878.

Several justice court *fi. fas.* in favor of Curry against the Mayor, etc., of Savannah, were levied on a house and lot. Defendant filed an affidavit of illegality to each *fi. fa.*, one ground of illegality being that defendant is a municipal corporation "and owns the said property levied on in that capacity and in the performance of its functions in the administration of the powers of government delegated to it; and so the deponent says that the said land is not subject to levy and sale under execution." On the hearing before the magistrate, he rendered judgment for the plaintiff, and defendant appealed. In the superior court plaintiff filed a traverse to the affidavits, but it was dismissed as coming too late. All the cases were heard together. By

consent the affidavit of illegality was amended by adding that the property levied on "had been used for a place for keeping a fire-engine and apparatus under the ordinances of said city, and were at the date of levy held, and likely to be used, for such municipal purposes again, but were not in such actual use nor used in any manner at the moment of levy."

Plaintiff demurred to the amended affidavit; the demurrer was overruld, and the levies dismissed. Plaintiff excepted.

W. W. MONTGOMERY, by brief, for plaintiff in error, cited "Reporter," vol. VII, p. 500; Dillon on Mun. Corps., §§446, 615 *a*, and note, 686; 33 La. An., 61: 17 Wallace, 332–3–4; Code, §§4856, 4857.

W. D. HARDEN, for defendant, cited, Code, §§1672, 4856–7; Dillon on Mun. Corps, §§446, 100, 39, 64, 65 and note, 715; "Reporter," vol. VII., p. 500; 34 N. J., 131, 133.

JACKSON, Justice.

The sole question is, whether a certain lot and tenement formerly in use for a fire-engine by the city authorities and still held by them for future use in like manner and purpose, is liable to be levied upon and sold by the sheriff under a *fi. fa.* issued upon a common law judgment?

We think that all property held by the city authorities for the public use, health or enjoyment of the people of the city, is not so liable to levy and sale. Further, we are of the opinion that all property of every kind held by the municipality is presumptively for the public use, and whilst perhaps the presumption may be overcome on proof that the corporation is holding it for other purposes, as a mere investment to reap profits and save taxes, and with no ulterior purpose to apply the investment to the use or enjoyment of the public thereafter, yet the *onus* would be upon

the plaintiff in execution to make that proof. If made, then the property so held with no purpose to use it for the public at the time of the levy or thereafter, might be subjected to pay the debt by that process.

See *Adams et al. vs. City of Rome*, 59 *Ga.*, 765; *Fleishel & Kimsey et al. vs. Hightower et al.*, last term.

The Maryland case goes even further and exempts all property held by a municipality for any purpose. Darling *vs.* City of Baltimore, 48 Md., Law Reporter, vol. VII, p. 500.

Our opinion given above goes far enough on the same line for all practical purposes and is, we think, sound and reasonable.

Judgment affirmed.

Henderson *vs.* Hill.

After a claimant has litigated through a claim case and the property has been found subject, and a judgment of affirmance has been rendered by the supreme court, he is concluded as to the validity and binding force of the original judgment between the creditor and the debtor, on which the levy rested, and will not be heard to question the same by motion or otherwise.

Claim. Judgment. Before Judge Lester. Paulding Superior Court. August Adjourned Term, 1878.

Henderson, a purchaser of property from Roberts, against whom Hill held a judgment, moved to set aside the same upon the following grounds:

1. Because there was no verdict of a jury upon which to enter up any legal judgment for the plaintiff, a plea having been regularly filed at the March term, 1868, the appearance term.

2. Because there was no judgment rendered by the court as required by the constitution and laws of Georgia.

He also moved to set aside the verdict and judgment

finding the property subject in a claim case arising upon a levy of Hill's execution against Roberts upon the property purchased by him, and in which he was the claimant. This motion was based upon the following grounds:

1. Because the judgment upon which the plaintiff's execution issued was dormant and void, and was so before the levy was made.

2. Because a sale under said execution would not divest the title of the defendant.

Hill resisted these motions upon the following grounds:

1. Because the said verdict and judgment having been regularly rendered on the trial of the claim case on April 17th, 1876. and having been on February 7th, 1877, on claimant's motion for a new trial, sustained, which judgment was affirmed in the supreme court, and such affirmance made the judgment of this court, they cannot again be reviewed and inquired into.

2. Because on the trial of said claim on April 17th, 1876, said execution of plaintiff against Roberts, issued on February 14th, 1874, from a judgment rendered on February 3d, 1869, and levied on February 24th, 1874, upon the land claimed, was tendered to claimant's counsel, and was admitted in evidence without objection; hence said trial having resulted in a verdict and judgment finding the property subject, and the same having been sustained by this court, and affirmed in the supreme court, claimant cannot object to said *fi. fa.* on account of the clerical omission of the clerk to insert therein the day and term of the court when said judgment was rendered, and any other irregularity then patent on said *fi. fa.*

3. Because the judgment against Roberts is not dormant and void, and was not when the levy was made. Judgment was regularly rendered under an order of court on February 3d, 1869, the defendant having filed no issuable defense on oath, the suit being on a promissory note. Here follows a recital substantially as stated in the preceding ground.

The remaining grounds are covered by the above.

Evidence was introduced sustaining the facts as stated in the answer filed by Hill. The motions were overruled, and Henderson excepted.

IRWIN, MCCLATCHY & IRWIN, for plaintiff in error.

J. O. GARTRELL; DABNEY & FOUCHE, for defendant.

BLECKLEY, Justice.

The claim case was finally disposed of by a judgment of affirmance in this court. The case is reported in 59 *Ga.*, 595. To say nothing of the other obstacles to the success of the motion afterwards made to set aside the judgment in favor of Hill against Roberts, the motion came altogether too late; for Henderson, the movant, had litigated with Hill through the claim case, and that very judgment was at the bottom of the levy which that case involved. Whatever cause against its validity could now be shown, ought to have been shown then. 63 *Ga.*, 224.

The motion made to set aside the verdict and judgment finding the property subject, that is, the verdict and judgment in the claim case, is beset with the same difficulty. If indeed the plaintiff's judgment against Roberts was dormant and void when the levy was made, the time to urge it was when the claim case was upon trial. The finding of the property subject, and adjudging that the *fi. fa.* proceed, amounted to an adjudication that there was a living judgment, and that the property must be sold to satisfy it.

Judgment affirmed.

Lester *vs.* Johnson *et al.*

1. If the record shows that the judgment excepted to be right, it matters not on what ground the superior court rested the judgment.
2. Where it was ordered in term, by consent of counsel, that the cause be heard and determined by the presiding judge in vacation without the intervention of a jury, with right of exception to either party, as though tried by a jury, and where the case was so heard and determined in vacation, and entered on the minutes *nunc pro tunc* at the next term of the court, and counsel then filed a motion for a new trial made before the judge in vacation some time after the decision of the case though within thirty days thereafter, and the court dismissed the motion because it was too late:

Held, that the party complaining of the decision so made in vacation had no legal right to make a motion for a new trial of the case, but that his remedy was by bill of exceptions to this court from the judgment of the judge made in vacation, and that therefore the judgment dismissing the motion for a new trial is right.

Practice in the Supreme Court. Judgment. Practice in the Superior Court. New trial. Before Judge Speer. Spalding Superior Court. August Term, 1878.

The case was a rule against an attorney. At the February term, 1878, of Spalding superior court, an order was taken authorizing the presiding judge to hear and determine the law and facts in vacation, with right of exception as though tried by a jury in term time. On the 17th of May, 1878, the judge determined said case. Mrs. Lester's attorneys prepared their motion for a new trial and brief of evidence, and on the 7th of June, 1878, the evidence was agreed on and the attorneys for Lovett acknowledged service on the motion for new trial. On the 14th of June, 1878, the motion and agreed evidence were submitted to and approved by the presiding judge. On the second day of the next term (August 6th, 1878,), the motion was filed in the clerk's office of Spalding superior court, and during said term dismissed on motion without a hearing on its merits, on the ground that it was not made in time. Movant excepted.

S. C. McDaniel, for plaintiff in error.

Boynton & Dismuke; H. C. Peeples, for defendants.

Jackson, Justice.

1. The motion to dismiss the motion for a new trial was predicated upon a reason, and that reason is that the movant did not move in time; and the presiding judge seems to have based his judgment dismissing the new trial upon the same reason. But it is immaterial for what reason a judge grants an order or renders a judgment if the judgment itself be right—especially if the judgment finally disposes of the case by dismissing it. The judgment of the court in this case, for instance, dismissed the motion for a new trial, and thereby disposed of it forever. The court did so because the motion for a new trial was not made in time, but if the case was such an one that the motion could not be made at all—at no time—it is clear that the judge did right to dismiss it. And hence the propriety of the practice of this court to sustain a judgment that is right, no matter for what reason the court below rendered it. It is the judgment which is complained of, it is that act of the court which this court reviews—it is not the reasons, right or wrong, which are given below for the judgment. And so it has been very often ruled—see 55 *Ga.*, 572; 59 *Ga.*, 799, and many other cases.

2. There is no law that we know of which authorizes a motion for a new trial of a cause tried before a judge at chambers. The remedy is by exceptions to the judgment and rulings of the judge in such cases. That the law provides for; but it does not for the motion to hear the case again before the same judge at chambers, or before the superior court in term. The party may except and bring the case to this court on his exceptions within thirty days from the ruling in vacation, Code, §4251; but we are not aware of any law which empowers him to move the judge

at chambers for a new trial. The judge at chambers has no power to hear and determine such a motion, unless an order to that effect was passed in term; and no motion for a new trial can originate in vacation. In this case the party did not even make the motion when the judge heard the case or rendered the decision, but did so at another time—purely in vacation—and disconnected entirely from the order to hear and determine the case.

Such a proceeding is wholly without authority of law, and cannot stand at all. See Code, §§246, 247.

Even if the order in express terms had authorized the motion for a new trial to be made, it ought to have been made, if it could be made at all, within thirty days, for that is the time within which he could except; but that could not be done then in this case, perhaps, because it would originate in vacation; and if made and filed at the next term, as seems to have been afterwards attempted, it would be too late, as the judge held, by analogy to the time prescribed for bills of exceptions.

It is unnecessary, however, in this case to consider that view of the case, because there was no reservation of the right to move for a new trial, but only of the right to except. To except is one thing, to move for a new trial is another. It is true that the order for the hearing gives the right to except as before a jury, but that means to except to the rulings of the court in admitting or rejecting evidence, or deciding law points as if before a jury. It cannot mean to move for a new trial, because you can move for a new trial before another jury, for who ever heard of a jury before a judge of the superior court in vacation. It means the right to except and by bill of exceptions to bring the case here. And that gives the party excepting all his rights; for he can except to the judgment on the facts in such a case as this, where law and facts are submitted to the judge, as well as to the judgment on the law. See 45 *Ga.*, 167.

There being no authority of law for the motion for a

new trial of a judgment rendered by a judge of the superior court in vacation, the motion was properly dismissed, and the judgment dismissing it is affirmed.

Judgment affirmed.

Morton, guardian, *vs.* Sims.

1. In issuing a commission to examine a person alleged to be imbecile from old age or other cause, and incompetent to manage his estate, and in appointing a guardian for such imbecile person on the report of the commissioners, the ordinary exercises a special and limited jurisdiction. The proceedings are summary and must be construed strictly They should show on their face such facts, especially touching the giving of notice, as will authorize the judgment appointing a guardian.
2. If the nearest adult relatives of the alleged imbecile are themselves the petitioners for the appointment of a guardian, the ten days notice provided for in section 1855 of the Code, should be given to three of the next nearest, or if there be no adult relatives within this state except the petitioners, then, in order that the spirit of the section as well as of the general law may be observed, the ordinary should either require the ten days notice to be given to the alleged imbecile himself, or else designate by order a guardian *ad litem* to receive the notice for him.
3. A commission issued without the requisite notice, and neither preceded nor followed by the appointment of a guardian *ad litem*, is not aided by the presence of the imbecile and his representation by counsel, even where the counsel gives his consent to the judgment appointing the guardian, it appearing that the commission was executed on the next day after it was issued, and that the judgment followed immediately. The object of the notice is that there may be due warning to make objection for legal cause to the commission or any of the commissioners, as well as to prepare for adducing evidence on the main question.

Guardian and ward. Ordinary. Jurisdiction. Lunatic. Service. Judgment. Before Judge Pottle. Oglethorpe Superior Court. April Term, 1879.

On February 10, 1879, William H. Sims, of Lowndes county, Miss., and S. A. M. Morton and John B. Morton,

of Oglethorpe county, Georgia, filed their petition in the court of ordinary of the county last aforesaid, representing that James S. Sims, of said county, on account of imbecility from infirm health and old age was incapable of managing his estate, and liable under the laws of Georgia to have a guardian appointed in his behalf; that they were the three nearest adult relatives of said imbecile residing in this state to whom notice could be given under the statute. The premises considered, they prayed that a commission be issued to eighteen discreet and proper persons, one of whom should be a physician, requiring any twelve of them, including the physician, to examine by inspection said James S. Sims, and to examine witnesses on oath if necessary as to his condition and capacity to manage his estate, and to make their return touching said inquiry as required by law, and that upon such return being made in accord with the allegations of this petition, that the court would appoint said John B. Morton guardian, etc.

On the same day the ordinary issued a commission as prayed for. On the succeeding day the commissioners reported their finding to be in accordance with the allegations of the petition. Whereupon the ordinary passed an order reciting the foregoing report, and appointing John B. Morton guardian of the person and property of said James S. Sims, upon his giving bond and security in the sum of $20,000.00, and taking the oath required by law.

On March 5th thereafter, James S. Sims moved that the judgment appointing the guardian be set aside on the following grounds:

1. Because the movant was never served with a copy of the proceedings on which said judgment was based, nor did he waive service, or authorize any one to make such waiver for him.

2. Because the petition does not bear date ten days before the same was heard and determined.

3. Because no guardian *ad litem* was appointed by the court to represent movant, when the pleadings show that

his three nearest adult relatives were the petitioners, and as such proceeding against him.

4. Because the record does not show that the movant was examined by inspection as required by law, or in any other manner examined by the commission or court.

5. Because the order of the ordinary does not recite a compliance with the requisition of the law as to notice of the proceedings, nor does the record anywhere show such compliance.

Service of the motion was had, and by consent it was heard on April 14th following. At the hearing, petitioners prayed that the judgment rendered on February 11 past, be so amended as to state the fact that the said James S. Sims was then and there present at the trial, and represented by Samuel Lumpkin, an attorney of this court, as his counsel, and that said counsel consented to said judgment. The amendment was ordered over the objection of counsel for movant. The ordinary then overruled the motion to set aside the judgment appointing the guardian. From this decision James S. Sims appealed to the superior court. On the hearing in that tribunal, the judgment of the ordinary was reversed, and the appointment of the guardian ordered vacated. To this judgment Morton, guardian, excepted.

Samuel Lumpkin; W. G. Johnson; H. K. McCay, for plaintiff in error.

McWhorter Bros.; Jno. C. Reed; J. T. Oliver; Phil. Cook Jr., for defendant.

Bleckley, Justice.

1. The proceedings to put Dr. Sims under guardianship did not take place in the court of ordinary proper. In issuing the commission, and in appointing the guardian, the ordinary exercised a special and limited jurisdiction, regulated by sections 1855 and 1856 of the Code. The proceedings which these sections provide for are swift and summary,

and must therefore be construed strictly. They should show on their face such facts, especially touching the giving of notice, as will authorize the legal appointment of a guardian. This degree of strictness holds as to all courts of limited jurisdiction. 9 *Ga.*, 185; 12 *Ib.*, 424; 13 *Ib.*, 68. In ruling upon the motion to set aside the judgment appointing a guardian for Dr. Sims, the question is, whether upon the face of that judgment, reading it in connection with the balance of the record to which it belongs, enough appears to show that it was duly rendered. The trial is to be by inspection, and consists only in comparing the judgment and its preliminaries with the law.

2. After declaring that ordinaries may appoint guardians for idiots, lunatics, persons insane or deaf and dumb, habitual drunkards, and for "persons imbecile from old age or other cause, and incapable of managing their estates," the Code goes on to point out the mode of procedure as follows: §1855. "Upon the petition of any person on oath, setting forth that another is liable to have a guardian appointed under the provisions of this article, the ordinary, upon proof that ten days' notice of such application has been given to the three nearest adult relatives of such person, or that there is no such relative within this state, shall issue a commission directed to any eighteen discreet and proper persons, one of whom shall be a physician, requiring any twelve of them, including the physician, to examine by inspection the person for whom guardianship is sought, and to hear and examine witnesses on oath, if necessary, as to his condition and capacity to manage his estate, and to make return of such examination and inquiry to the said ordinary, specifying in said return under which of said classes they find him to come. Such commissioners shall be first sworn by a justice of the peace, 'well and truly to execute the said commission to the best of their skill and ability,' which oath shall be returned with their verdict." §1856. "Upon such return finding the person to be as alleged in the petition, or within either of said classes, the

ordinary shall appoint a guardian for him." There is to be a petition on oath, with proof of ten days' notice of the application to three of the nearest adult relatives, or proof that no adult relative of the alleged imbecile is within this state. The proof made was only that the petitioners themselves were the three nearest adult relatives residing in this state, to whom notice could be given under the statute. Of course, it would be absurd for the petitioners to give notice to themselves of their own application, and this being so, they are not the relatives appointed by the statute to receive notice. They are simply to be counted out, just as if they were not relatives at all, and the notice ought to have been given to the three next nearest relatives within the state, and the ordinary had no power to issue the commission without proof that it had been given, or else that there was here no adult relative to be notified. The scheme of the statute is to serve notice upon three, if that many are here, and if there be less than that many, upon two or one, as the case may be. If none is here, then according to the letter of the statute, the ordinary may proceed upon proof of that fact; but, we think, as matter of practice, and to comply with the spirit of the statute, as well as of the general law, it would be better for the ordinary to require the notice to be given to the alleged imbecile himself, or else designate by order a guardian *ad litem* to receive notice for him. It is, to say the least, doubtful whether the property of an adult citizen can be taken out of his custody and committed to guardianship without previous warning served either upon him or upon some person duly constituted by law or by some legal tribunal to be notified in his stead. "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." 6 *Ga.*, 483. "The truth is, that at the door of every temple of the laws in this broad

land, stands justice, with her preliminary requirement upon all administrators—'You shall condemn no man unheard.' The requirement is as old at least as *magna charta.* It is the most precious of all gifts of freedom, that no man be disseized of his property, or deprived of his liberty, or in any way injured, '*nisi per legale judicium parium suorum, vel per legem terrae.*'" 5 *Ga.*, 516. "It is a principle of natural justice which courts are never at liberty to dispense with, *unless under the mandate of positive law*, that no person shall be condemned unheard." 9 *Ga.*, 188. In the present case, however, the petitioners did not carry their proof far enough to enable the ordinary to issue the commission even on the letter of the statute, for they neither proved notice to any relative, nor that there was no relative to be notified. They treated themselves as representing both sides of the case because they were the nearest relatives, whereas, there is no hint in the statute that those whose duty it is to give notice are competent to receive it, or that it will be dispensed with because they would be the persons to be notified if others and not themselves were petitioners. Nothing is more certain than that there was a failure to comply with the statute in respect to the important step of notice, and for that defect in the proceedings the judgment appointing the guardian was properly set aside.

3. We think there was not any saving efficacy in the fact that Dr. Sims was present at the so-called trial, and was also represented by counsel, even if the counsel did consent to the judgment. The system of the statute is one of coercion, not of consent. If a man is really an imbecile he is incapable of consenting, and what he does by his counsel is no better than if he did it in person. Any consent of counsel is at bottom the consent of his client—nothing more. It is not pretended that either of them was before the ordinary when the commission was issued, or that there was any opportunity afforded to object to that part of the ordinary's action. The misstep was in issuing the commission, without

requiring the petitioners to comply with the law as to notice. The object of notice is that there may be due warning to make objection for legal cause to the commission or any of the commissioners, as well as to prepare for adducing evidence on the main question. The notice is to precede by ten days the issuing of the commission. Why is this, if not for both of the purposes which we have specified? There was too much haste. The commission issued one day, was executed the next, and the judgment appointing the guardian followed immediately. Action, trial and judgment in two days, and no previous notice! The surprise and shock of such swift inquisition into an old gentleman's wits might so confound him as to prepare him for consenting, through his counsel, to being adjudged an imbecile.

Judgment affirmed.

GERDING, surviving partner, *vs.* ANDERSON, STARR & COMPANY.

To require the superior court to consolidate three actions on three promissory notes into one, the defendant must make it appear to the court either that he has no defense, or that the defense is the same to all of the notes; and in the latter case he must aver what that defense is, so that the court may adjudge whether it be the same in all the cases.

Practice in the Superior Court. Before Judge LAWSON. Putnam Superior Court. March Term, 1879.

Gerding, surviving partner, was defendant in three suits brought on promissory notes in Putnam superior court by Anderson, Starr & Co. He moved to consolidate them, stating in his motion "that if there is any defense at all filed to said suits, it will be the same in each case, and petitioner therefore moves the court to allow said cases to be consolidated, in order to save petitioner expenses, costs, etc." He introduced no evidence in support of the motion.

Plaintiffs made a counter-showing, to the effect that when the notes were presented for payment, defendant said he would pay them in the fall; but if they were sued, he would remove the cases to the United States court, and thus gain time. Plaintiffs' counsel brought suit on each note separately, each one being under $500.00, but the aggregate being more than that amount. He urged that the motion to consolidate was really made for the purpose of obtaining a removal. The motion was overruled, and defendant excepted.

W. A. Reid; W. B. Wingfield, for plaintiff in error.

W. F. Jenkins, by brief, for defendants.

Jackson, Justice.

This was a motion to consolidate three suits on three notes into one action. There can be no doubt of the right of the defendant ordinarily to consolidate, if there be no detriment thereby to the plaintiff on the merits of the cases. To show that there will be no hurt to the plaintiff, defendant must show either that he has no defense, or that the same defense applies to all the cases, and in order to show the court the latter fact, he must disclose what that defense is. For it is for the court to decide whether the facts make the defense the same in each case. If the consolidation will work harm to the plaintiff, or if it would make the aggregate sum sued for so large as to oust the jurisdiction, and on the same principle, if it would make him try different issues on different pleas in one case to several notes, the consolidation will not be allowed. Code, §3261. 13 *Ga.*, 201; 35 *Ga.*, 82; 45 *Ga.*, 96, 124.

The defendant not having made it appear upon what defense he relied to defeat these notes, or each of them, so that the court could see the transaction, and judge of the propriety of the consolidation, this court will not reverse the judgment which refused the motion to consolidate.

Judgment affirmed.

Vickers, by next friend, *vs.* The Atlanta & West Point Railroad Company.

Where the law raises a presumption of negligence against the defendant by reason of the mere fact that the physical injury was inflicted by means of running its locomotive, and where, owing to special circumstances touching the conduct of the engineer towards the plaintiff a child of only ten years of age, it is not altogether certain that the presumption is rebutted; and where, on account of the plaintiff's tender years and his consequent immaturity of understanding, he is not amenable to so high a standard of diligence in regard to his own safety as that which adults are obliged to observe, the case made by the plaintiff's evidence is more properly one for the jury than for the court, and a motion for a non-suit should be denied.

Railroads. Non-suit. Before Judge Buchanan. Campbell Superior Court. February Term, 1879.

Vickers, by next friend, brought case against the railroad company for a personal injury, laying his damages at $20,000.00. He alleged, in brief, that he was a minor, about ten years of age; that the injury was caused by the negligence of defendant's agents in allowing the plaintiff and others to get on and jump off the cars while in motion; that the engineer who ran the engine that did the injury told the plaintiff to jump on the engine while in motion, and only one or two days before the injury occurred, said engineer put plaintiff on the engine while in motion, and then and there traded and carried on a traffic with plaintiff for ground-peas, and told him to come back on the day of the injury to get his pay, and it was in accordance with such request that plaintiff returned, and in jumping on the engine while in motion, fell, through which the train ran over his left leg, rendering amputation necessary; that by reason of his tender years he was unable to judge of the danger to himself from such course of conduct.

The facts as sworn to by the plaintiff, made, in substance, this case:

Plaintiff, a little boy between nine and ten years of age,

was in the habit of selling ground-peas, apples, etc., to the passengers and defendant's employes on trains as they passed through the town of Fairburn. Martin was passing through such town, running the engine of a train. He called to plaintiff, who was engaged in selling ground-peas. The train was running very fast, but plaintiff responded to his call, and when he reached the engine the brakeman or fireman took his basket up on the tender, and by the time he had climbed up on the engine they had the ground-peas measured out. Martin offered him his pay in large bills but did not have any small change. Said he would pay him the next time he came up. When the engine stopped plaintiff got off and returned to the cab. He went to the train the next morning, but Martin did not have the change, said he would bring it the next evening. At the appointed time plaintiff went to get up on the engine as it was moving, his foot slipped and he fell under it and was thus injured. The engine was running fifteen or twenty miles per hour when he sold the ground-peas to Martin, and about fifteen miles per hour when he was hurt. The train ran about one hundred yards after the injury before stopping Knows now that it is dangereus for boys or men to attempt to get on trains when running fifteen or twenty miles per hour, but did not know it then. He was so small that he did not know anything about the engine.

Much other testimony was introduced, principally as to extent of injury, amount of damage, etc., not deemed material here. On motion of defendant the court ordered a non-suit, and plaintiff excepted.

L. R. Ray; L. H. Featherston; W. F. Wright; L. S. Roan, for plaintiff in error.

N. J. Hammond; Thomas W. Latham, for defendant.

Bleckley, Justice.

Non-suit is a process of legal mechanics: the case is chopped off. Only in a clear, gross case is this mechanical

treatment proper. Where there is any doubt another method is to be used—a method involving a sort of mental chemistry; and the chemists of the law are the jury. They are supposed to be able to examine every molecule of the evidence, and to feel every shock and tremor of its probative force.

The present is not quite a case for non-suit, though its neighborhood to that class seems very near. In section 3033, the Code affirms that "a railroad company shall be liable for any damage done to persons, stock, or other property, by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment or service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence—the presumption in all cases being against the company." The next section provides that "no person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence; if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." Still another section, 2972, declares that "if the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover; but in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." Construing the three sections together, we discover that a presumption of negligence is raised against the company from the mere fact of inflicting the injury, and that on combining that presumption with the whole sum of the evidence, one of four results may follow: First, if the presumption is totally overcome, the verdict should be for the company; secondly, whether it is overcome or not, if the plaintiff either caused the injury by his own negligence or could by ordinary care have avoided it, the verdict should still be

for the company; thirdly, if the plaintiff was faultless, neither contributing to the injury nor omitting ordinary care to avoid it, the verdict should be against the company for full damages; and, fourthly, if the plaintiff contributed to the injury, but did not himself cause it, and could not have avoided it by ordinary care, the verdict should be against the company, not for full damages, but for the damages diminished in proportion to the default attributable to the plaintiff. The actual case under the evidence, is complicated with several special circumstances, such as the previous conduct of the engineer towards the plaintiff, the plaintiff's tender age, the degree of parental control exerted over him, etc. In 27 *Ga.*, 350, there was no statutory presumption to be rebutted, nor was the question of non-suit raised or discussed. In 56 *Ga.*, 72, the injury sued for was the homicide of an employe, and as in such a case any fault whatever on the part of the employe would defeat a recovery by reason of section 3036 of the Code, and as the contributory negligence was manifest, the non-suit was sustainable. The case at bar seems more in line with that reported in 59 *Ga.*, 593, and with various other authorities which we have examined; amongst them, 38 N. Y., 445; 60 *Ib.*, 326; 64 *Ib.*, 13; 67 *Ib.*, 417. The jury ought to deal with it.

Judgment reversed.

Hull *vs.* Harris.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

Upon breach of a bond to make title to land, where the purchaser buys up the outstanding title thereto, the measure of damages is what the outstanding title actually cost him; and on a suit by the vendor for the purchase money, such actual cost only can be set off against the note.

Damages. Title. Before Judge Hood. Worth Superior Court. April Term, 1879.

Reported in the opinion.

Warren & Hobbs, for plaintiff in error.

D. H. Pope, for defendant.

Jackson, Justice.

This suit was brought by Henry Hull to recover on a note given by defendant to John S. Linton for a tract of land for which Linton had executed a bond for title to the defendant. The defendant was in possession of the land sold him, but alleged that one of the lots had been previously mortgaged and sold by Linton, and that he had been forced to buy up the outstanding title to that lot. The jury found for the defendant.

The evidence is conflicting whether or not this lot was embraced in the prior conveyances of Linton; but even if it had been, there is no evidence to support the verdict. If the defendant was obliged to buy up the outstanding title to the lot, his measure of damages is what it cost him. Code, §2949; 17 *Ga.*, 602. There is no evidence what he did have to pay for it; therefore there is no evidence of his damages; therefore the verdict for the defendant allowing him the whole balance of the note is without any evidence to support it.

The rule is sound. A purchaser ought not to retain possession of land sold him, and buy up outstanding titles for little or nothing, and then have himself credited with the full value of what the land is worth.

The verdict being without evidence, a new trial must be granted.

Judgment reversed.

JACKSON & COMPANY *et al. vs.* RAINEY.

Where a widow entitled to dower is in possession of the dwelling-house, though the dower has not been assigned, she needs no injunction to restrain a creditor of the husband from causing a sale of the premises under execution, or to restrain the sheriff, before any sale has taken place, from turning her out and putting the purchaser in. She can give notice, at the sale, of her rights, and purchasers will buy subject thereto; and if they disturb her lawful possession it will be at their peril.

Injunction. Dower. Before Judge McCUTCHEN. Bartow County. At Chambers. November 19, 1879.

Mrs. Rainey filed her bill against certain judgment creditors of her deceased husband, and the sheriff of Bartow county, setting up her right to dower, though not yet assigned for reasons stated, her possession of the dwelling house, and praying that the defendants be enjoined from selling such house under execution, and interfering with her occupancy, etc.

The injunction was ordered, and the creditors excepted.

T. W. AKIN; BROYLES & JONES, for plaintiffs in error.

A. JOHNSON, by JACKSON & LUMPKIN, for defendant.

BLECKLEY, Justice.

The complainant either has or has not the dower right in the dwelling of her late husband, which she alleges in her bill. If, under the special circumstances, she has not the right, she is not entitled to any injunction; and if she has the right, she needs none. The Code, in section 1768, provides "that the widow is entitled to the possession of the dwelling-house from the death of her husband, and before dower is assigned." The complainant has possession, and if her theory of her rights be correct, she need not care whether the sheriff sells the property as that of her deceased

husband or not. She can give notice, at the sale, of her rights, and purchasers will buy subject thereto, and they cannot disturb her lawful possession but at the peril of answering as trespassers. It is not to be anticipated that they will attempt such a thing. Because the sheriff sells, it by no means follows that an entry will be made upon her, either with his assistance or without it If injunction ever should be necessary, certainly an application for it now is premature.

Judgment reversed.

STOKES *vs.* TIFT.

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. The evidence being conflicting but sufficient to uphold the verdict of the jury for either party, and the presiding judge having declined to set it aside, the rule of this court is inflexible not to interfere unless some error of the court on the trial is made to appear in the record.
2. If the proprietor of a toll-bridge knows of a defect therein, dangerous to passengers and likely to result in damage, and the dangerous defect is not exposed so that the passenger can also see it, and taking toll from the passenger, allows him to cross without warning, the proprietor is liable for damages; *aliter*, if the defect is not dangerous and likely to result in damage, but in the judgment of the proprietor slight and thought to have been safely repaired; and a request to charge which does not guard this distinction was properly refused. The proprietor of a bridge is only liable for ordinary care and diligence, and beyond this is not an insurer.

New trial. Roads and bridges. Damages. Negligence. Before Judge CRISP. Dougherty Superior Court. April Term, 1879.

Stokes sued Tift for injuries resulting to him from the falling in of a toll-bridge belonging to defendant, while he was crossing it. Plaintiff claimed that the bridge was defective and dangerous, and that the defendant knew of the defect.

Defendant claimed that prior to the accident the bridge appeared to have settled a little on one side; that he em-employed competent laborers and had them to make such repairs as seemed necessary, and that to all appearances the bridge was sound and in good condition at the time of the accident.

The jury found for the defendant. Plaintiff moved for a new trial which was refused, and he excepted.

For the other facts see the opinion.

D. P. Hill, for plaintiff in error.

D. H. Pope, for defendant.

Jackson, Justice.

1. The case was for damage received by plaintiff in person in crossing a toll-bridge of defendant. The verdict is for defendant. The evidence is conflicting, but is sufficient to enstain the verdict.

2. The error of law complained of is that the court declined to charge the jury that "when there is a defect in a toll-bridge which is not open and exposed to all, and the proprietor of the bridge knows of the defect, and allows persons to cross on the bridge and takes toll for crossing, then the proprietor is liable for damages resulting from said defect." We think that the charge requested is too broad. If the proprietor knew that the defect in the bridge was *dangerous* and likely to result in the damage, then we would hold him liable; but not for any defect, however slight, which, contrary to his expectations and belief, resulted in unforeseen and unexpected damage. He is only liable for ordinary care. 53 *Ga.*, 47, *Tift vs. Towns.* That case arose on the same state of facts as this, and covers this. It is presumed that the law was given in accordance with the ruling there, and the court there say that the evidence is sufficient to uphold a verdict for either party. Besides, the request is too broad in this that its language is "open and

exposed to all," whereas this plaintiff may have known as much about it as the proprietor did. See also the same case —*Tift vs. Towns*—decided this term—where we uphold the verdict for plaintiff in part on similar facts as here; and though it looks odd for juries to give different verdicts on similar facts, yet that is their business. Our rule, as a reviewing court, is one of law, and it is not to interfere with the jury on conflicting facts where the presiding judge declines to do so.

Judgment affirmed.

McEvoy *vs.* Hussey, president, etc.

1. The president of a corporation cannot maintain a possessory warrant in his own name to recover possession of corporate property of which he has had no prior possession either as an officer or an individual. In the present case, the corporation is not a party to the proceeding, and though the plaintiff in the warrant was president of the corporation, and described himself as such, the judgment awarding possession to him was erroneous.
2. Where a corporation, not the officer representing it, is the complaining party, the affidavit made to obtain the warrant must negative the consent of the corporation (not the consent of the officer) to the disappearance of the property, and allege that the corporation does in good faith claim, etc.

Possessory warrant. Corporation. Before Judge Tompkins. Chatham Superior Court. October Adjourned Term, 1878.

This case arose upon the following affidavit:

"State of Georgia—Chatham County.

"To any lawful constable to execute and return.

Personally came William Hussey, President of the St. Patrick's Total Abstinence and Beneficial Society, incorporated under the laws of this state, who on oath says, that on the 19th day of May, 1878, 1 minute-book, 1 roll book, 1 receipt-book, 1 voucher-book, 1 lot of voucher papers, 1 desk, 1 key, 1 secretary's regalia, 1 lot of letters and 1 lot of papers, having been recently in the quiet, peaceable and legally acquired possession of said society, was taken and carried away

from the possession of said society, without *his* consent, by fraud, violence, seduction and other means, and. as deponent believes, has been harbored, received or taken possession of by H. J. McEvoy, of said county, under some pretended claim or claims, without lawful warrant or authority, and *deponent bona fide* claims a title to, and possession of, said property above described. Sworn to and subscribed before me this 23d day of May, 1878.

WILLIAM HUSSEY, St Patrick's T. A. & B. Society.

ROBERT J. WADE, J. P.

A possessory warrant was issued and the property seized. The evidence developed, in brief, the following facts:

Hussey and McEvoy both claimed to be officers of the St. Patrick's Total Abstinence and Beneficial Society, a chartered body duly incorporated under the laws of Georgia. There was a schism in the body which divided it into about two equal parts. Hussey's election as president had been attacked, and he was kept out of the enjoyment of his office for more than one month, and was re-instated through *quo warranto* proceedings instituted against Father Cafferty, a Catholic priest, who then was acting as president. Having been reinstated he appointed one Hayes secretary, who demanded the books, papers, and other property belonging to the office from McEvoy, the former secretary. Hussey and his party claimed that the latter was no longer secretary, having been expelled from the society for causes unnecessary to be set forth. McEvoy had been in the quiet and peaceable possession of the property in controversy for years, as secretary. He still claimed to hold such office, denied the validity of his expulsion, and denied the authority of Hussey to appoint a secretary.

There was no evidence to show that Hussey had ever been in possession of the property in controversy.

The magistrate awarded "possession of the property claimed to William Hussey, the plaintiff in this case, and the president of said society, with costs of court against the defendant." On *certiorari* this judgment was affirmed by the superior court, and to this affirmance McEvoy excepted.

R. R. Richards; Foley & Foley, by brief, for plaintiff in error.

Rufus E. Lester, for defendant.

Bleckley, Justice.

In this case a possessory warrant was issued upon an affidavit made by Hussey as president of the St. Patrick's Association, a corporation. Looking to that affidavit for the purpose of determining who was the party complainant, we are of opinion that the corporation was not a party. Certainly the corporation is no party to the writ of error in this court. The case here is McEvoy *vs.* Hussey, describing him as president of the corporation, but the corporation is no party, and, we think, was not a party to the possessory warrant.

The affidavit made by Hussey is signed by him as president, and it describes him in the body of it as president of the corporation. It alleges that the corporation had possession of certain books, office furniture, files, and regalia of the secretary. It does not allege that Hussey ever had possession of these articles in any capacity, but that the corporation had a quiet, peaceable and legally acquired possession, and that the chattels disappeared without his, deponent's, consent, and that he in good faith claims a title to, and the possession of, the property. There is no allegation that the chattels disappeared without the consent of the corporation, or that the corporation claims any right to them whatever; so that we come to the conclusion that the writ of error properly presents the parties; that is, that it is a case between McEvoy and Hussey, was so originally, and that the corporation never was a party to the possessory warrant.

One of the objections made before the magistrate who issued and heard the warrant, was that the evidence did not make out any right in Hussey, as president, to get posses-

sion of this property, or to have possession of it. That, with various other questions, was made; and that question, we think, was decisive of this case.

On this warrant, under the evidence, there could be no award of possession to Hussey himself, nor to the society either, and therefore, we think, the magistrate erred, and that the *certiorari* ought to have been sustained upon that ground without reference to any other. The party that had had possession (Hussey had never had it) was not before the court, and is not here.

2. The 4032d section of the Code reads as follows:

> Upon complaint being made on oath by the party injured, his agent or attorney in fact, or at law, to any judge of the superior, judge of the county court, or justice of the peace of the county in which the property in controversy may be, that any personal chattel has been taken, enticed, or carried away, either by fraud, violence, seduction or other means, from the possession of the party complaining, or that such personal chattel, having recently been in the quiet, peaceable and legally acquired possession of such complaining party, has disappeared without his consent, and, as he believes, has been received or taken possession of by the party complained against, under some pretended claim, and without lawful warrant or authority, and that the party complaining does in good faith claim a title to or interest in the personal chattel, or the possession thereof, it shall be the duty of such judge or justice to issue a warrant, as well for the apprehension of the party against whom the complaint is made as for the seizure of the property in controversy, which warrant shall be directed to the sheriff, his deputy, or any lawful constable of the county aforesaid.

A comparison of the affidavit made by Hussey with the terms of the affidavit here laid down will show that what we have ruled above cannot be otherwise than correct.

Judgment reversed.

Brassell *vs.* The State of Georgia.

1. Exception to the entire charge will not be held good unless the whole charge be wrong.
2. Where no point is made in the argument before the jury, or insisted upon or contended before the court, that the case might be involuntary manslaughter, and such grade of homicide is not apparent at all from the evidence, the court need not charge thereon further than to read the sections of the Code which bear upon it, unless specially requested to do so.
3. Where no request is made to charge in respect to the prisoner's statement, and no injury seems to have been done defendant by the omission to charge in regard thereto, the omission will not require a new trial—especially where the evidence abundantly sustains, if it did not absolutely compel, the verdict.

Practice in the Supreme Court. Criminal law. Charge of Court. Before Judge Hillyer. Clayton Superior Court. March Term, 1879.

To the report contained in the opinion, it is only necessary to add that three grounds of the motion for new trial were as follows:

(1.) Because the verdict was contrary to law and the evidence.

(2.) Because the court failed to charge the law of involuntary manslaughter.

(3.) Because the court failed to charge the law touching the prisoner's statement.

J. D. Stewart; W. L. Waterson, by brief, for plaintiff in error.

B. H. Hill, solicitor-general, by brief, for the state.

Jackson, Justice.

The defendant was indicted for murder, he was found guilty of voluntary manslaughter, and moving for a new trial it was refused, and error is assigned here on that refusal.

Brassell *vs.* The State.

1. A general exception to the whole charge will not be considered unless the whole of it is wrong, and the motion for new trial must specify what is alleged to be erroneous, unless all of it be so. 60 *Ga.*, 82, 107; 14 *Ib.*, 404; Code, §4251.

2. Where no point is made that the facts make a case of involuntary manslaughter, either in argument before the court and jury or by request to charge the law thereon, the court need not instruct the jury touching that grade of homicide further than to read the sections of the Code thereon, unless the facts place such an issue prominently in the case. The facts of this case do not make this grade of homicide at all apparent. Where two have been engaged in a fight, and one turns off and the other strikes him with a pine-limb likely to produce death by hurling it at him, and making a large hole in the back of his head, killing him instantly, the intention to kill is clear, and the case is murder or voluntary manslaughter. 28 *Ga.*, 200.

3. No request was made to charge in respect to prisoner's statement in writing or orally, nor would it, if made, have benefited the defendant in all human probability. The statement scarcely varies the testimony at all. The facts as detailed by the witnesses are not materially changed or explained to the defendant's advantage, and the only thing in it of substance going to his benefit, is the assertion that he did not intend to kill the deceased. The jury would hardly have credited that against the fact that the pine-limb was hurled with such force at deceased, as he was walking off, as to cut a huge hole in the back of his head, and to kill him instantly.

The verdict might have been murder; the facts are ample to support that of voluntary manslaughter.

Judgment affirmed.

Latham et. McLain.

One who enters into the possession of land under a parol contract of purchase, but who has paid no part of the purchase money to the holder of the legal title, is not seized as against the latter and those claiming under him; and on the death of the person thus in possession, even after he has tendered the purchase money, his widow is not dowable of the land. Title to realty does not pass by purchase without an actual conveyance, so long as the agreed purchase money is unpaid. Tender is not payment.

Injunction. Dower. Tender. Before Judge Buchanan. Campbell county. At Chambers. September 29th, 1879.

Mrs. McLain filed her bill against Latham and the Atlanta & West Point Railroad Company, making, in brief, this case:

Her husband, lately deceased, on or about January 5, 1870, purchased from one Thompson, a lot in the town of Fairburn, with the improvements thereon, for $125.00. Thompson had never paid the railroad company for the lot. Such company owned many lots in the town of Fairburn, which it was anxious to dispose of. To facilitate the sale it appointed Cole its agent, with instructions to open a book, in which parties wishing lots might register their names, the description of the property and the price to be paid. On payment of such price the company agreed to make a deed. Thompson registered for the lot in controversy, the price named being $50.00. This was done in 1869. Thompson took possession and made valuable improvements, consisting of a livery stable worth $100.00, fencing $10.00, and also hauled logs for the purpose of erecting a house, of the value of $15.00. On the purchase by McLain, with the full knowledge and consent of the company, he took Thompson's place. He went into possession on or about January 5, 1870, and died on May 20th, following. Since his death, the lot and improvements have been set apart to complainant as a part of her dower, and the return of the commissioners has been made the judgment of the court. Her

husband, during his life, made a continuing tender of the purchase money to the company, but by neglect of the latter it failed to make a deed. Since his death complainant has made a continuing tender to the company and demanded a deed, but it declines to accept the money or to execute the deed, because Thompson has notified it that he claims the title. On July 31, 1874, the company executed a quit-claim deed to the lot and improvements to Thompson, and on the same day Thompson conveyed to Latham. The latter purchased with full notice of the right of her deceased husband and of her claim. Yet he has commenced his action for the lot and *mesne* profits against complainant, returnable to the February term, 1877, of Campbell superior court. This suit is unjust and vexatious, and should be enjoined. The deed made by the company to Thompson on July 31, 1874, is a cloud upon the title of the estate of her deceased husband and upon her title to her dower, and ought to be delivered up to be canceled. Thompson is insolvent. Prays that complainant's title may be established in accordance with the judgment of the court setting apart her dower; that Latham may be decreed to have no right to said lot; that the deed made by the company be ordered canceled, etc., and the action commenced by said Latham as aforesaid be enjoined.

On the hearing of the application for injunction the answer of Latham was read, affidavits, interrogatories and documentary evidence, all of which is omitted as irrelevant to the point decided.

The chancellor ordered the injunction to issue as prayed for. To this Latham excepted.

T. W. Latham, for plaintiff in error.

John S. Bigby, for defendant.

Bleckley, Justice.

In this state a widow is dowable of lands of which her husband died "seized and possessed." Code, §1763. The ordinary method of conveying land is by deed, signed by

the maker, etc. Code, §2690. Another method of acquiring legal seizin is by paying the purchase money in full, where a bond for titles or other written contract for sale and purchase has been entered into. So, title may be acquired by prescription. But entering into possession under a parol contract of purchase, without paying any part of the purchase money, will not give seizin as against the vendor and those claiming under him. And this is so, though the agreed purchase money be tendered. Mere tender of money does not operate as payment, nor work a transmutation of title. The money which the complainant's husband tendered to the railroad company remained his money, and if it was still on hand when he died, became assets of his estate. And if he owned the money at the time of his decease, he surely did not own the land also. The tender, together with the other facts, put him in a situation where he might have filed a bill for specific performance, and obliged the railroad company to invest him with title, but he did not pursue that course. He took no steps to strip off the title with which the company was clothed. The most that can be said is, that he died possessed of a right to become seized of the land by the appropriate proceeding in equity; and possibly, if the right were now actually enforced by his executors, administrators or heirs at law, so as to render the land the property of the estate, fully and completely, the widow might be dowable of it on the doctrine of relation. But nothing has been done on this line. The railroad company has not been coerced to perform its contract, express or implied, with her husband, and no representative of the estate is a party to the present bill, nor are the heirs at law parties to it. The widow simply stands upon her claim as dowager, and seeks to resist her assailants by the support which a court of equity can give to that alone. The great fact that the title to the land has never been in her husband or in his estate is decisive against her bill, and she is not entitled to an injunction. The chancellor erred in granting it.

Judgment reversed.

Coggins *vs.* Griswold.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. The grantee of an executor who shows an order from the court of ordinary to sell the real estate of testator need not introduce the will in evidence.
2. Wild land may be sold at private sale on leave therefor from the ordinary, and in the same application there may be a prayer to sell cultivated and wild land and personalty, and at the proper time an order may be passed granting leave to sell each. In the case of real estate, whether cultivated or wild, it is only of vital consequence that the citation be duly published, and where that is ordered to be done and return thereof to be made at the next term, and at the next term leave is granted to sell the wild land at private sale, the presumption is that the citation was in accordance with the law, and that the parties in interest all had legal notice. Minor irregularities will not vitiate the sale and defeat the title of the purchaser, especially as against a more squatter on the lot without any title.

Evidence. Administrators and executors. Title. Sales. Before Judge Lester. Gilmer Superior Court. May Term, 1879.

Griswold brought complaint for land against Coggins. Plaintiff claimed by virtue of a deed from the executors of Brown. The jury found for plaintiff. Defendant moved for a new trial. It was refused, and defendant excepted.

For the other facts, see the opinion.

Thos. F. Greer; W. T. Day, for plaintiff in error.

H. R. Foote, for defendant.

Jackson, Justice.

Two questions are made in this case: First, that the court erred in admitting in evidence the deed of executors of Brown and the letters testamentary without the will of

testator, and secondly that the court erred in admitting said deed, because there was no sufficient authority to sell the lot sued for from the court of ordinary of Baldwin county.

The suit was ejectment for the lot, and the title of plaintiff is perfect, if this link from the executors of Brown, deceased, to plaintiff be sound.

1. If the suit be by the executors to recover the land, we think they should show as well the will as their letters; because the will may have given the land to the defendant. But where the executors have sold the land to another under a valid order from the court of ordinary, the presumption is that the ordinary, being a court of general jurisdiction over such matters, 50 *Ga.*, 231, has granted the order circumspectly, and could not have done so, had anything in the will which was before him and of record in his court, been opposed to the grant of the order to sell.

2. So that the case turns on the validity of the order. The record shows that application was made to sell a certain tract in Baldwin county, and also this wild lot described as being in Cherokee, but proven to be the lot sued for in Gilmer county. The petition prays that the usual citation be published returnable to the October term, 1875, of the court of ordinary of Baldwin county, and at that term that an order be passed to sell the real estate of deceased testator, consisting of the tract in Baldwin and of a lot of wild land in Cherokee, containing 160 acres, and also the personal property if necessary—the sale to be for payment of debts and distribution among the legatees; and this petition was filed in office September 6, 1875.

Accordingly, at the same September term, 1875, an order was passed allowing the executors to sell the perishable property, and that the usual citation be published in the *Union and Recorder* for leave to sell the real estate, and be returnable to the October term, 1875.

Thereupon, at that October term, 1875, no person objecting, an order was passed granting leave to sell the Baldwin

tract, after duly advertising the same, at public outcry, and the wild lot in Cherokee "at private sale or otherwise as shall be to the best interest of said estate."

Whereupon, on the 11th day of April, 1877, a deed was made by the executors to the plaintiff, in which it is recited that at private sale on the first of April, 1877, the lot was put up and exposed to sale and knocked off to the plaintiff, who was the highest and best bidder.

Under the order the executors could have sold to the plaintiff without putting the lot up at auction; therefore, while it is irregular to have done so, we do not think that it is such an irregularity as makes void the deed so as not to pass the title.

So, too, in regard to the application for leave and the order to sell—the one not precisely following the other—whilst they might have been drawn with more accuracy, yet taking them and construing them together, it appears clear that the ordinary granted leave to sell the entire realty of testator—the cultivated land at public outcry according to law, and the wild land at private sale or otherwise as deemed best by the executors.

The defendant was a mere squatter with no written title at all, and therefore she did not hold adversely to the true owner, and it was unnecessary to recover possession before the executors could sell. Code, §2564. See also Code, §§2557, 2559, and 50 *Ga.*, 231, before cited.

We know no reason why the executors could not embrace in one application the grant of leave to sell cultivated and wild land—the one at public and the other at private sale—and publish the citation usual in each case; and this seems to have been done, nor was it necessary to describe the land. As it was done it was better to have been done accurately by number, etc., and as lying in Gilmer, originally Cherokee; but it does not, we think, make void the sale. The presumption is that the ordinary did his duty, and saw from proofs before him that it was to the interest of the estate to sell, and, nobody objecting, he granted the order.

Something was said about the seal of the court of ordinary of Baldwin county. It purports to be its seal in the record and is enough, we presume, to certify the letters testamentary—if indeed they were necessary to the case, when an order to sell was in evidence.

Judgment affirmed.

Bennett *et ux.* *vs.* Walker *et al.*, commissioners.

1. By express provision of the constitution of 1877, all suits by or against a county must be in the name thereof. It follows that when the county magistracy, such as commissioners, sue for land officially in their own names, no recovery can be had if they have had no actual possession, and if the title is not in them but in the county.
2. When the same persons or board constitute the corporate magistracy of a county and of a city, and, in complaint for land, they sue in the former character upon prescriptive title in the county, they cannot recover on proof of title in the city.
3. Acceptance of a deed from the ordinary, made by him officially, is a recognition by the purchaser of title in the county at the date of the deed, and whilst the purchaser is in possession under such deed he holds under the county. The deed of the ordinary does not pass title out of the county, he having no legal power to make it, but only to authorize it to be made by some one or more other persons as a commission. Such deed, however, if free from fraud, will be color of title on which to base a prescription; but if tainted with actual fraud affecting the conscience of the purchaser, possession under it will not avail. The jury may infer actual fraud from a false recital in the instrument as to the mode of sale, together with inadequate consideration, and the further fact that the sole consideration was a claim by the purchaser for insolvent costs due him as sheriff, to the payment of which the general revenue or the property of the county could not by law be appropriated, the claim being a legal charge only on fines and forfeitures.

County matters. Parties. Ejectment. Deed. Color of title. Prescription. Fraud. Before Judge Fleming. McIntosh Superior Court. May Term, 1879.

On September 19, 1878, the county commissioners of McIntosh county brought complaint against James R. Ben-

nett and his wife for a lot of land in the city of Darien and mesne profits.

On November 1st, 1878, the defendants pleaded the general issue, and on May 1st following, at the time of going to trial, amended by pleading title by prescription, by denying that the land had been of any profit, by alleging that Bennett purchased *bona fide*, and being in possession under a claim of right, substantial improvements were erected to the value of $800.00, praying compensation therefor in the event of recovery by plaintiffs of the land. The evidence for the plaintiffs presented, in brief, the following facts:

The old court-house was on the lot in controversy from 1829 to about 1864, when it was burned. It was not used in any way thereafter until about the year 1869, when the defendants took possession. The land comprised a reserved lot formerly belonging to the city of Darien, used as a place for shows, etc. At least twenty years before 1861 an arrangement was made between the city of Darien and the county of McIntosh under which the justices of the inferior court erected a court-house on the lot, and it then ceased to be used by the city in any way, and was always under the control and custody of the county. No deed was ever made from the city to the county. The latter never used the lot after the old court-house was burned. A new court-house was erected on a different lot after the war; that was burned in 1873; the present court-house was erected on the same spot in 1877.

Here the plaintiffs closed, and defendants moved for a non-suit. The motion was overruled, and they excepted.

The defendants introduced a deed to James R. Bennett, from the ordinary, conveying the property in dispute, commencing as follows:

"State of Georgia, McIntosh county:

"Whereas the honorable Lewis Jackson, ordinary of the county of McIntosh, in the state aforesaid, did pass an order on the 17th of August, 1869, to sell at public outcry, at the court-house door in the city of Darien, on Monday, the 23d of August, 1869, between the legal

hours of sale, the lot on which the former court-house stood; and whereas, on said 23d of August, 1869, in compliance with said order, the said lot was put up at public outcry as directed, when James R. Bennett became the highest and best bidder, and the same was knocked off to him, the said James R. Bennett, for $51.60: Now, this indenture, made the 23d of August, 1869, between the said Lewis Jackson, ordinary as aforesaid stated, of the first part, and the said James R. Bennett, of the county and state aforesaid, of the second part, witnesseth," etc.

Defendants further proved the value of the improvements, and closed.

Plaintiffs introduced Lewis Jackson, colored, who testified, in brief, as follows: Made the deed introduced by defendants. The lot was not sold at public outcry. Witness sold it to Bennett privately for an insolvent cost bill he held against the county as sheriff, for $51.60. Considered that he had the right to sell the lot to satisfy the claim. Witness made the order for the sale of the lot, as the deed recites, and the sale was fair and *bona fide* on both sides. Bennett receipted his claim against the county in full.

Much other testimony was introduced, not deemed material.

The jury found for the plaintiffs the premises in dispute. The defendants moved for a new trial upon the following, among other grounds:

1. Because the verdict is contrary to law, evidence, and the charge of the court.

2. Because the court refused to give in charge the following requests:

(a). "The deed of defendant upon the sale of the lot in question, at public or private sale, by the then ordinary of McIntosh county to defendant, James R. Bennett, for a debt legally due by the county to defendant for services regularly rendered, and for which the county was liable, is such color of title as can be shown by defendant, provided the purchase was *bona fide* and in good faith on the part of Bennett."

(b). Requested to give in charge §2683 of the Code.

(c). "The fact that the sale was irregular and improper on the part of the ordinary, cannot go to impeach the right and title of Bennett, if he purchased *bona fide*, for a valuable consideration, and has been in such possession for seven years before the bringing of this suit, as set forth in §2683 of the Code."

(d). Requested to give in charge §2906 of the Code.

(e). "The ripening of any prescription under §2683 of the Code, was not arrested because of the fact that no county commissioners were appointed until 1872."

3. Because the entire charge of the court, being substantially as follows, was calculated to mislead the jury:

"I charge you, gentlemen, that if the county was in the uninterrupted possession of the land in dispute for twenty years or more, then the county acquired a title, and the law presumes a grant from the state, and the plaintiffs have a right to recover. But the defendant also claims a title by prescription by reason of having been in possession of the lot seven years under the deed from the ordinary of the county. Now if the defendant has been in such possession, under such color of title, for seven years or more before the bringing of this suit, then he has a perfectly good title unless the deed was fraudulent. The question of fraud is one for the jury under the proof in the case. If the deed was made fraudulently then it conveyed no title to the defendant, and he has no right to the property. The whole point in the case is about the fraud. If there was no fraud then you should find for the defendant; if there was fraud then you should find for the plaintiffs."

4. Because the court refused the non-suit moved for on the close of the plaintiffs' testimony.

5. Because of newly discovered evidence to the effect that the sale under which defendants held was made at public outcry, as recited in the deed.

In support of this ground numerous affidavits were presented, which strongly indicated that the fact was as therein stated.

The motion was overruled, and the defendants excepted.

W. R. Gignilliatt; Tompkins & Denmark, for plaintiffs in error.

Rufus E. Lester, for defendants.

Bleckley, Justice.

1. The constitution of 1877 declares, in article 11th, section 1st, that "all suits by or against a county, shall be in the name thereof." The case at bar was commenced after this constitution went into effect, and was not in the name of the county, but in the names of certain persons describing themselves as county commissioners. By the local act applicable to the subject, these commissioners constituted the proper board of magistracy to bring the action, but under the provision of the constitution just cited, it cannot be regarded as a suit by the county, not being in the name of the county. Possibly, if the evidence showed that the commissioners had once had actual possession of the property sued for, and had been deprived thereof, the action in its present shape might be maintainable to re-establish their possession, but no such fact appears. And it is not pretended that as individuals or natural persons they have any title to the premises. However ample may be the title of the county, there can be no recovery on it, for the very conclusive reason that the county is not before the court as a suitor. The county can be neither plaintiff nor defendant otherwise than in its own name.

2. Taking together the body of the declaration and the abstract of title annexed to it, and it is manifest that the complaint is founded upon prescriptive title in the county of McIntosh, and not upon any alleged title in the city of Darien. It is also clear that the character in which the plaintiffs sue has no relation to their functions as representatives of the city, but that they sue only as official organs of the county. And though true is it that by the act cre-

ating the board of commissioners (see Acts of 1876, p. 283) the same persons constitute the corporate magistracy of both county and city, yet the two corporations are not thereby blended or confounded, but they remain distinct and separate entities. It follows that the present action can no more be treated as a suit by the city than it can be treated as a suit by the county, and that no recovery could take place on any title which the evidence may show to be, or to have been, in the city of Darien. In statutory complaint for land there is no fiction, and failure is inevitable where the party who brings the suit does not show in himself a right to the premises. The non-suit ought to have been granted on the defendant's motion.

3. If the county had been the party plaintiff in its own name, the result of the suit, under the facts in the record as a whole, should have turned upon the question of fraud or no fraud in the defendant's color of title—the deed from the ordinary under which the defendant took possession and held through the prescriptive term. That deed was made by the ordinary as representing the county, and by accepting it the purchaser recognized the county as owner of the premises at the time the conveyance was executed. So long as he held and occupied under the deed, he was in under the county as his acknowledged vendor. The deed would not operate as a conveyance of title out of the county, for the reason that the ordinary had no power to make it. In section 495 the Code declares, that "the ordinary has the control of all property belonging to the county, and may by order, to be entered on the minutes, direct the disposal of any real property which can lawfully be disposed of, and appoint a commission to make the titles thereto, and the conveyance of such commission in accordance with such order vests the grantee or vendee with the title of the county." For some reason, perhaps to prevent clandestine transactions injurious to the county, the ordinary is not permitted to execute any conveyance himself; he can only appoint a commission for that purpose. But even a void

deed, if believed to be valid, and taken in good faith, will serve as color of title on which to rest a prescription; though if tainted with actual fraud affecting the conscience of the purchaser, it will, of course, be unavailing. Code, §2683. There seems to have been some question of the mode of sale; and the recital of the deed on that subject was assailed as false. There was also a question touching the adequacy of the consideration; and there was evidence to the effect that the entire consideration was made up of insolvent costs which were a legal charge only on fines and forfeitures, and to the payment of which the general revenue or the property of the county could not lawfully be appropriated. No doubt these matters bore strongly against the good faith of the entire transaction, and would warrant a jury having convictions that way in finding fraud.

It follows from what we have said that the court erred both in refusing to grant a non-suit and in overruling the motion for a new trial.

Judgment reversed.

Parrott *et al.* vs. Edmondson.

1. The will of testatrix contained the following devise:
"I give and bequeath to my nephew, Sterling G. Barrow, and my niece, Mary Jane Barrow, wife of said Sterling G. Barrow, for and during their natural life, lot of land number 259, in the 18th district of Houston county, containing 202½ acres, with the right and privilege to sell the same if deemed proper by them to do so, and the proceeds thereof to invest in other lands or other property, and to use the same as before stated, and at their death the said lot of land, or the proceeds thereof, to be equally divided between the following children of the said Sterling G. and Mary Jane Barrow (naming them) and all others that may hereafter be born," etc. Sterling G. and Mary Jane were related in the same degree by blood to testatrix, were the principal and residuary legatees. Sterling G. was appointed executor on the 5th of May, 1856, and died 2d of December thereafter. Mary Jane survived until 19th of December, 1876. On the 31st of January, 1859, while survivor of her said husband, she conveyed for value

the one-half of said lot to her son James, and invested the proceeds in a negro man slave, with whose labor she cultivated the other half until 1863, and being possessed of but little other means, thus supported in good measure herself and the said children during that period. The children surviving her, being remaindermen under the will, brought suit at her death for the half lot sold by her (the proceeds having been invested as aforesaid by her) against the defendant who held under James and by virtue of title from Mary Jane Barrow, their mother, as survivor:

Held 1. Whether the wife, as survivor, could sell under the joint power, to herself and husband, depends upon whether she had an interest in the land—a power to two to sell, if coupled with an interest, survives to the survivor; if naked, it does not survive.

2. Under the law of England husband and wife took under this devise an entirety and not a severalty—not being under that law joint tenants, but each holding the entire estate as one person, and on the death of either, the survivor taking the whole.

3. If the statute of Georgia abolishing joint tenancy and converting that estate into tenancy in common and abolishing the survivorship in such an estate, be not applicable in reason and spirit to the law of the mother country in respect to the estate in entirety which husband and wife would take there, then the interest of the wife in the land is clear, because that law, unless repealed by our statute, is of force in this state; and the power being coupled with such interest, she, as survivor, could sell.

4. If this estate in entirety with survivorship in the case of husband and wife, was abolished by the statute before mentioned, still, at the death of testatrix, the wife, by our own repeated adjudications, had such an interest in property bequeathed to her during coverture that a court of equity would settle it upon her against the husband and his creditors, and free it from his control, by bill brought before he had reduced it to possession and his marital rights had attached; the power to sell is thus coupled with an equitable interest in the wife: and thus, in any view, this power to two to sell being coupled with an interest in each, survived to the wife.

5. So the title to this half lot passed from the surviving wife to her son James, thence by regular chain down to defendant, and the judgment of the superior court is right, and eminently equitable and just.

Wills. Estates. Husband and wife. Title. Before Judge Simmons. Houston Superior Court. May Term, 1879.

Reported in the head-notes and opinion.

DUNCAN & MILLER; S. HALL, for plaintiffs in error.

WARREN & GEICE; W. S. WALLACE, for defendant.

JACKSON, Justice.

This action was brought by plaintiffs in error as remaindermen, to recover a parcel of land sold by their mother while in life under a clause of a will which bequeathed the land to herself and husband, remainder to the plaintiffs, with joint power to sell. The defendant held under the mother, who sold after her husband's death, and the single question made is, did she, as survivor, have the right to sell so as to cut off the remainder?

The clause of the will is as follows: "I give and bequeath to my nephew, Sterling G. Barrow, and my niece, Mary Jane Barrow, wife of said Sterling G. Barrow, for and during their natural life, lot of land number 259, in the 13th district of Houston county, containing 202½ acres, with the right and privilege to sell the same, if deemed proper to do so, and the proceeds thereof to invest in other lands or other property and to use the same as before stated; and at their death the said lot of land, or the proceeds thereof, to be equally divided between the following children of the said Sterling G. and Mary Jane Barrow (naming them), and all others that may hereafter be born," etc.

The rule is that where a power to sell is entrusted to two persons. the survivor may sell, if the survivor has an interest in the thing to be sold. A mere naked power will not survive. Especially is this the case, that the power survives, where they are executors or trustees and act in a fiduciary capacity, and may sell to execute the trust. 4 Kent, 326; 2 Bouvier, 343 *et seq.* Here, though one only was executor, yet both were trustees to sell and reinvest for their own and their children's use. 1 Vesey, Sr., 306; 3 *Ib.*, 11; 2 Johnson Chan., 1, 20; 2 Peere Wm's, 102; 1 Caine's

Cases 15; 3 Salk., 277; 3 Atk., 714; 14 Johnson, 553; 15 *Ib.*, 345; 10 Peters, 563.

The question therefore is, did Mrs. Barrow have an interest in this land? We think that she did. Under the English law she certainly would have had an interest therein, because she and her husband took an entirety and not a severalty in this land under the devise above cited; they would not have been joint tenants, but each would have held the entire estate as one person, and on the death of either the survivor took the whole. 2 Chitty's Blackstone, side page 182; 5 Tenn. R., 654; Litt., 291; 2 Cru. Dig., 511; 5 *Ib.*, 448.

But perhaps the statute of this state, which turned estates by joint tenancy into tenancy in common, may, by a liberal construction, as it abolished the doctrine of survivorship in such estates, be held also to extend to estates to husband and wife, and to abolish survivorship in such estates as this, and thus to alter the English law as to this wife's interest as survivor in all this land. It does not in terms do so, but its spirit probably does, and so it has been intimated in some of the opinions of this court.

Be that as it may, it is certain that this wife had such an interest in this land, or her moiety of it at least—and a moiety is all she sold and all that is involved here—as that equity would protect it and settle it upon her against her husband and his creditors. 1 Kelly, 639; 3 *Ib.*, 192, 546; 29 *Ga.*, 117.

If it all had been left to her, it would have been secured to her; if her husband and herself were both legatees, why would not equity, on like principle, secure her half?

If it be said that she did not by bill apply for it until the husband's marital rights had attached, it may be answered that the husband died in a few months after the testatrix, before such bill could well have been filed, and whether or not he had reduced the estate to possession does not appear. Even if he had entered thereon, man and wife were one, and the entry was joint. Nowhere, clearly, did he ever set

up exclusive title or take several possession. 35 *Ga.*, 184. Besides it is clear that this power is fiduciary. As stated before there is coupled with it a trust to reinvest for the use of the life tenants, and the remaindermen. In no view is it a mere *naked* power.

Besides this legal view of the case, looking at it strictly in dry legal right, equity, in the broader sense of right, demands that the verdict for the defendant should stand, unless the law imperatively demanded its overthrow. The half of the lot was sold and a negro bought to work the other half. On it the widow and children lived, and the labor of the slave, bought according to the spirit of the will, to work this land, supplied these plaintiffs in error with subsistence during the war, and now, after the expiration of more than eighteen years since the sale by the widow, the title of a purchaser for value is sought to be disturbed. It ought not to be done, and we are gratified that the law does not constrain us to do it.

The law does not so force us, neither in a strictly legal nor strictly equitable view on settled principles of established rules of equity in the books. The power to two to sell was coupled with an interest in each—equitable interest is enough. The general intent of the power is clear, and to that general intent any narrow, particular view must yield. And a trust to reinvest for the use of others in remainder as well as themselves for life, is clearly in the power, and they are trustees *quoad hoc*, and the mere name of executors is nothing—see 11 Johnson, 168; 16 *Ib.*, 166, and authorities above cited

Judgment affirmed.

Allen *et al vs.* Meyerhardt.

Where the claimant of an existing private way has applied for the removal of obstructions under section 738 of the Code, and has accepted a conditional order instead of standing upon his right to have an absolute order, the question of whether he has complied with the condition or not is one of fact; and upon a further petition alleging compliance, and praying for a warrant to the sheriff, the sole question is whether he has complied or not, and the commissioners of roads and revenue should adjudge according to the evidence, and refuse or grant the warrant without more. And, on *certiorari*, this is the sole matter for review if the commissioners have confined themselves to the question. But if they have gone further and ordered the way closed, this is an excess of their authority, and the *certiorari*, as to that part of their order, should be sustained. As to the fact of compliance with the condition, the superior court should either affirm the judgment, or reverse it and order a new trial. Any direction as to locating the road or putting up gates, is not within the scope of the proceeding. The petition to the commissioners of roads and revenue is confined to the one object, and that is to obtain a warrant commanding the sheriff to remove the obstructions. The right to this depends upon whether the condition prescribed in the previous order has been performed.

County matters. Roads and bridges. Judgment. *Certiorari.* Before Judge Underwood. Floyd Superior Court. March Term, 1879.

Meyerhardt petitioned the commissioners of roads and revenue of the county of Floyd, substantially as follows: He is the owner of lot of land 45, in the 22d district and 3d section of said county. For fifteen or twenty years he has used a road or private way to his said farm running over land now owned by Allen and Jones. They have fenced or closed said road, the same being the only outlet from the petitioner's farm. He made complaint to the parties for closing the road, and allowed it to remain closed to the present time with a distinct understanding that they would remove the obstructions and open the road, which they have refused to do. Prayed that they may be required to show cause why said road should not be opened.

Cause was shown, a trial had, and on June 4, 1877, judgment as follows rendered: "Ordered that the petition be granted under the following conditions, to-wit: D. J. Meyerhardt shall be allowed ninety days from date to put the road from his farm to the Cedartown road in good order, said road to be of the width of twelve feet; the condition of said road to be passed upon and approved by the road commissioners of Barber's district; the same being done, the said Allen and Jones shall, within ten days after being notified of the approval of said road commissioners, construct and put up gates at the places of the obstructions, for the use of D. J. Meyerhardt. It is further ordered that if said Meyerhardt fails to comply with the terms of the above order, and does not have said road put in good condition in the time specified, then said private way shall be declared closed."

On June 27th following, the district road commissioners certified to the commissioners of roads, etc., that they had examined the road described in their order of the 4th of June, and find it in good traveling condition.

On September 14th following, Meyerhardt again petitioned the commissioners, setting forth a compliance with the provisions of their order of June 4th, notice to Allen and Jones, and that they had failed to erect the gates as ordered within the ten days. He therefore prayed that the sheriff be directed to remove the obstructions from the private way.

Allen and Jones showed for cause that it was not true that Meyerhardt had complied with the order of June 4th, but that he had laid out a new road over the land of respondents, in many places departing from the old road, and coming out into the public road at a different place from where the old road entered.

On November 5th the commissioners ordered, after hearing evidence and argument, that as the terms of the order of June 4th had not been complied with by Meyerhardt, that the road mentioned therein be closed.

On *certiorari* this order was set aside by the superior court, and on review by the supreme court, the judgment of that tribunal was also reversed. See 62 *Ga.*, 161. On a rehearing of the *certiorari* in the superior court, it was ordered that the judgment closing the road be set aside, and that the commissioners direct that said way be opened as a private way, with the right of defendants to erect gates where the fences now are; that if the road is not on the old road-bed, that Meyerhardt work it on the old road-bed within ninety days from their order following this judgment, as per terms of the order of June 4, 1877.

To this judgment Allen and Jones excepted upon the ground that it did not cover the case made by the *certiorari*, to-wit: whether Meyerhardt had complied with the terms of the order of June 4th, and extended to matters over which the court had no jurisdiction in such a proceeding.

Wright & Featherston, for plaintiffs in error.

Forsyth & Hoskinson, for defendant.

Bleckley, Justice.

The proceedings before the commissioners of roads and revenue were all under the 738th section of the Code. The section does not provide for a conditional order, but the applicant having chosen to accept such, instead of standing upon his right to have an absolute order, he must comply with the condition before he can obtain the assistance of the sheriff. Here the applicant took no exception to the kind of order that was granted in the first instance, as he might have done by *certiorari* if he had not pleased to acquiesce. That order was, by both parties, left to stand as it was, and the applicant proceeded to comply on his part with its terms. By his subsequent petition to the commissioners he alleged that he had complied; and the truth of this allegation was the disputed matter of fact, and the only one, which the petition presented for decision, the

adverse party not pretending that they had erected gates, or otherwise cleared away the obstructions complained of. After hearing evidence, the commissioners not only denied the prayer of the petition, but ordered peremptorily that the road be closed. The *certiorari*, be it observed, was sued out upon, and is to be confined to, the second order passed by the commissioners; it does not reach back to the original conditional order which we have mentioned. All that the second petition prayed for was a warrant directed to the sheriff, commanding him to remove the obstructions. To grant or refuse the warrant was the only judgment which the commissioners had power to render upon such a petition. Code, §738, *supra*. It is not insisted that the commissioners for Floyd county have any broader powers than could have been exercised by the ordinary if there had been no substitution, by special statute, of the former for the latter in respect to the supervision of roads within that county. If the evidence showed that the petitioner had complied with the condition which the previous order prescribed, the warrant to the sheriff should have issued; if, on the contrary, it failed to show such compliance, the warrant should have been denied. To supplement the denial of the warrant with an order to close the road, or that the road be closed, was to pass quite beyond the limits of the petition upon which the commissioners were acting. The petitioner asked for bread, and they gave him a stone; for a fish, and they gave him a serpent. That they went beyond their powers in the first order, and threatened a closing of the road in the contingency specified, did not justify them in consummating the matter by the second order. Acquiescence in a void part of the first order, did not bind the petitioner to a like acquiescence in a void appendix to the second. There can be no doubt that as to the final order to close the road, the *certiorari* is well founded and ought to be sustained. In respect to the finding of the commissioners upon the issue of fact which they tried, the superior court should either affirm it, or else re-

verse it and order a new trial. Any direction as to locating the road or putting up gates, is no more within the scope of the proceedings, in the stage at which they have arrived, than is the closing of the road. If the petition misrepresents the fact of compliance with the condition, the prayer for a warrant ought to fail for that reason; if it does not misrepresent the fact, the prayer ought to be granted. What can be plainer than that this is exhaustive of the whole controversy raised by that petition?

We reverse the judgment, with direction that the *certiorari* be sustained so far as closing the private way is concerned; and as to whether a warrant to the sheriff shall issue as prayed for, that the *certiorari* be sustained and a new trial ordered if the judge of the superior court shall hold that the finding of the commissioners was erroneous on the question of fact made by the petition of September 14, 1877; but if he shall hold that the evidence warranted the commissioners in finding the fact as they did, then that the *certiorari* be overruled as to that part of the case, and sustained as to closing the private way (with costs), but no more.

Judgment reversed.

COHEN & KAPLAN *vs.* DUNCAN & JOHNSTON.

Where defendants put in a plea that they had been adjudicated bankrupts, and prayed that the suit against them on promissory notes be stayed a reasonable time to await the action of the district court of the United States on the question of their final discharge, and were ready to verify their plea by exemplification from the district court legally certified, and the plea was stricken and final judgment rendered against them:

Held, that the proceedings in the state court should have been suspended, and that final judgment should not have been entered against defendants

Bankruptcy. Before Judge SNEAD. Burke Superior Court. November Adjourned Term, 1878.

Reported in the opinion.

H. H. Perry, by McCay & Abbott, for plaintiffs in error.

J. J. Jones, for defendants.

Jackson, Justice.

Duncan & Johnston sued Cohen & Kaplan on two promissory notes. The defendants filed a plea that they had been adjudicated bankrupts, and therefore the court could not enter judgment against them until the question of their final discharge was determined, there having been no unnecessary delay in the bankrupt proceedings.

They called the plea a plea to the jurisdiction; it should have been more properly styled a plea to stay the proceedings until the final discharge. The name, however, makes no difference.

The record discloses the fact that the defendants were ready to verify their plea, having in court an exemplication of their petition and adjudication in bankruptcy duly certified by the clerk and judge of the district court of the United States for the northern district of Georgia, yet the court, on motion, struck the plea and gave judgment for the plaintiffs.

The bankrupt act (Revised Statutes of United States, §5106) declares, in substance, that no creditor whose debt is provable in bankruptcy shall be allowed to prosecute to final judgment any suit in law or equity therefor against the bankrupt until the question of his discharge shall have been determined; but that such suit or proceeding shall be stayed, upon the application of the bankrupt, provided there be no unnecessary delay, etc. This was a debt provable in the bankrupt court; the defendants had been adjudicated bankrupts; they made application by plea to stay the proceedings until the question of their discharge was passed upon; the plaintiffs had no mortgage or other lien against them, but merely two promissory notes; the statute

of the United States in such a case clearly provides that the suit shall not be prosecuted to final judgment, but that it shall be stayed a reasonable time to await the final action of the bankrupt court on the question of discharge.

The court below, therefore, erred in giving a final judgment after striking defendants' plea.

In the case of *Steadman vs. Lee*, 61 *Ga.*, 58, no plea at all was filed, and no application of any sort was made to the state court to stay the proceeding, and judgment went against Steadman because it was not made known to the court that he had been adjudicated a bankrupt. So when he filed an affidavit of illegality to the execution issued on this judgment, this court held that the judgment was good, it being older than his discharge, though junior to his petition and adjudication; because by his own *laches* he had failed to make any plea or application of any sort to stay proceedings pending his petition and before his discharge. But in this case there is no *laches*. The plea was in; the exemplification from the federal court exhibited; and the act of congress in strict accordance with the constitution of the United States, and therefore authoritative over the state courts, prohibits final judgment, and declares that the suit shall be stayed on the application of the bankrupts.

Of course the statute means that the application shall be made to the court where the suit is pending.

We think that the court erred in striking the plea and entering final judgment, and the judgment is reversed.

Judgment reversed.

JACKSON *vs.* THE STATE OF GEORGIA.

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. An indictment is not demurrable for any matter *dehors* the pleadings and the record.
2. After the state has rebutted the prisoner's evidence and closed, it is too late for the prisoner, as matter of right, to introduce and examine a fresh witness on his general case, unless some good excuse is rendered for holding the witness back; and if no excuse be offered, the court may decline to hear the witness, except in sur-rebuttal of the state's rebutting evidence.
3. The charge of the court in respect to *alibi* was in conformity to 59 *Ga.*, 142; and in respect to the evidence of an accomplice, it was in conformity to Roscoe's Cr. Ev., 456, *et seq.*, and to 52 *Ga.*, 106, 398. As to threats, see 49 *Ga.*, 12, and 58 *Ib.*, 224; and as to *falsus in uno falsus in omnibus*, see 59 *Ga.*, 68; 53 *Ib.*, 365, and cases therein cited. On the impeachment of witnesses and their support by evidence of general character, the charge of the court was correct and sufficiently full.
4. It was not error against the prisoner to instruct the jury in terms of the act of December, 1878, on the relative powers of the court and jury over the punishment.
5. The jury had a right to convict the prisoner on the evidence in the record, the accomplice being corroborated indirectly on the main point by several circumstances of more or less weight; and the court did not err in overruling the motion for a new trial.

Criminal law. Demurrer. Evidence. Witness. Practice in the Superior Court. *Alibi*. Accomplice. Threats. Charge of Court. New trial. Before Judge CRISP. Lee Superior Court. March Term, 1879.

Jackson, Jones and Daniel were jointly indicted for the murder of Whitsett, alleged to have been committed on the 13th of October, 1878. The defendants severed and Jackson was first placed on trial. The evidence against him consisted mainly of the testimony of Daniel, an accomplice. Whitsett was undoubtedly assassinated by being shot through the window of his room with a load of buck-shot. Daniel swore positively that Jackson did the shooting; if

his testimony thus far be taken as true, he was undoubtedly an accomplice. He was corroborated by circumstances of more or less weight, which made a case proper for the determination of a jury. A verdict of guilty was returned, and Jackson moved for a new trial upon the following, among other grounds:

1. Because the court erred in sustaining the demurrer to the motion to quash the indictment upon the ground that the defendant was charged with the murder of Whitsett on October 13th, 1878, when said Whitsett was in life on that day and for many days thereafter.

2. Because the court erred in charging the jury as follows: "*Alibi*, as a defense, involves the impossibility of the prisoner's presence at the scene of the offense at the time of its commission, and to be successful the range of the evidence in respect to time and place ought to be such as to lay the foundation for reasonably inferring that the prisoner could not possibly have been present at the time and place of killing."

3. Because the court erred in charging as follows: "The corroboration ought to be sufficient to satisfy the jury of the truth of the evidence of the accomplice. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks the truth in other parts as to which there may be no confirmation; but the corroboration ought to be as to some fact or facts connecting the prisoner with the offense, the truth or falsehood of which would go to prove or disprove the offense charged against the prisoner."

4. Because the court erred in charging as follows: "A witness impeached by proof of his general bad character—that is by witnesses swearing that they would not believe him or her in a court of justice—may be sustained by similar proof of character, that is by witnesses swearing they would believe him or her on their oath. How far an

impeachment is successful is a question for the jury. You are the tribunal that is to pass upon that."

5. Because the court erred in charging as follows: "The punishment for persons convicted of murder shall be death —but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend, or if the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life. In the former case it is not discretionary with the judge, and in the latter it is."

6. Because the court erred in not permitting the introduction of Silas Wright as a witness for the defendant, who had been subpœnaed, notwithstanding the declaration of defendant's counsel that this witness had not been called by inadvertence, and that his testimony was material.

7. Because the verdict was contrary to evidence, law, and the charge of the court.

The court appended to the 6th ground the following note:

"Defendant proposed to introduce the witness after the state had closed, the defendant closed, and the state in rebuttal closed. The court declined to permit the witness to be examined except in rebuttal, counsel for defendant not stating that they had omitted examining him through inadvertence."

The motion was overruled, and defendant excepted.

Lewis Arnheim, for plaintiff in error.

C. B. Hudson, solicitor-general; D. H. Pope; Hawkins & Hawkins, for the state.

Bleckley, Justice.

1. A motion to quash an indictment is in the nature of a demurrer, and ought to be rested upon some matter apparent upon the face of the indictment or elsewhere in the record. 4 Halst., 293; 19 Conn., 477. Such a motion cannot bring to the attention of the court a fact disconnected

with the prior proceedings and the truth of which depends upon evidence *dehors* the record. The indictment alleged that the mortal wound was given on a certain specified day, and that on the same day the man died. The motion to quash set up that the man was in life on that day and for many days thereafter, and that the indictment ought, for this reason, to be quashed. The state demurred to the motion, the demurrer was sustained, and the motion went out. We can have no doubt that the motion was only an informal traverse of one of the allegations of the indictment, and that the issue it sought to raise was quite too narrow, and quite immaterial. Let the substance of the motion be regarded as a special plea, and it presents no sufficient answer to the indictment; for it is not essential that the date of the offense should be proved exactly as charged, the limits of proof being, on the one hand, the finding of the bill of indictment, and on the other, the earliest period not excluded by the statute of limitations. 4 *Ga.*, 341; 11 *Ib.*, 53; 13 *Ib.*, 396; 17 *Ib.*, 439; 18 *Ib.*, 736. True it is that the offense of murder is not complete until death has occurred, but if the death and the mortal wound fall upon the same day, it matters not that the day be subsequent to that laid in the indictment, provided it has elapsed when the indictment is found. To show simply that the deceased was alive after the time that the indictment alleges he died, is no ground for acquittal.

2. In reference to the restriction put by the court upon the examination of the witness Wright, it is to be noted that this witness was offered when the adducing of evidence was in what may be termed the fourth stage. The state had gone through its case; the defense had gone through its case; the state had rebutted; and the defense then brought up Wright and proposed to enter afresh on its general case, giving no excuse for the omission to introduce the witness at an earlier stage. The court required the examination to be restricted to matter in sur-rebuttal of the state's rebutting evidence. It was no doubt within the

discretion of the court to have allowed a wider range of examination, but we think the defense could not claim it as matter of right, nor do we see that the court abused its discretion in denying it. There has to be some order in submitting evidence, and the court but adhered to the usual order. Any departure from that order ought to be attended with something special in the given instance, either in the shape of excuse by the dilatory party, or some suggestion which the circumstances transpiring under the observation of the court make to the mind of the presiding judge. Surely it is not allowable for a party to cut up his evidence arbitrarily at his pleasure, and present it by installments, with no regard to the particular stage or stages at which its introduction is appropriate. The motion for a new trial affirms that the inadvertence of counsel was mentioned as an excuse for holding back the witness, but instead of verifying this statement, the presiding judge expressly contradicts it.

3. Several of the points made and argued may be grouped under one head, and disposed of by a mere reference to the authorities which control them. On the subject of *alibi* the court charged the jury conformably to the view expressed by this court in 59 *Ga.*, 142. And see 63 *Ga.*, 85. In reference to the evidence of an accomplice, the charge given will be found supported by Roscoe's Cr. Ev., 456, *et seq.*, and 52 *Ga.*, 106, 398. The effect of threats as evidence was a topic of argument here, and as to which see 49 *Ga.*, 12; 58 *Ib.*, 224. In so far as the charge of the court deals with the principle of *falsus in uno falsus in omnibus*, it is in line with the general tenor of the cases. 59 *Ga.*, 63; 53 *Ib.*, 365, and cited cases. The matter of impeaching and supporting witnesses by proof of general character, is treated by the Code, §§3871, 3873, 3874. We perceive no want of fulness or accuracy in that part of the charge on this subject which the motion for a new trial sets forth.

4. What the court charged on the relative powers of

the court and jury over the punishment, was in terms of the act of December, 1878. Grant that because that act was subsequent to the commission of this homicide its provisions would not be applicable, the only result would be that to apply it to the case would be an error in favor of the accused and not against him. If the act makes any change in the prior law, it undoubtedly softens it, and thus if the true rule was not administered it was put aside for one more mild and beneficent, and one which, prior to the trial, had received express legislative sanction.

5. On the evidence in the record it is quite impossible for us to say that the jury had no right to convict. The accomplice was corroborated indirectly on the main point in controversy by several circumstances of some degree of weight. Among them were recent threats made by the accused, his presence on the premises at the time the killing occurred, coupled with his anxiety to go as a messenger to report the killing to a neighbor, his following after the messenger without being sent, and his conduct, when search was made for tracks in the yard, in trying to keep in advance of the party, as if his purpose might be to obliterate or confuse the tracks, if any, before they were seen by others. While there is room for some slight apprehension that the jury may, perchance, have reached an erroneous conclusion, we feel sure that we render a more faithful obedience to law by leaving the verdict to stand, than we would by setting it aside. "Moral and reasonable certainty is all that can be expected in legal investigation." Code, §3749. The accused was fairly and legally tried, and his conviction was not unwarranted by the law and the evidence.

Judgment affirmed.

DuBose, administrator, *vs.* Ball.

I. A paper signed by the heirs at law of an estate authorizing the administrator to settle certain land sales of the intestate, was properly admitted in evidence to show authority in the administrator to receive from one of the purchasers the purchase price of that portion of which he was in possession and which he had improved, and thus to vest a perfect equity in him against that heir, being *sui juris*, to whom this part fell in the division of the estate.

2. Minors of the estate were not interested because the land had been divided, and this share fell to another who was *sui juris*, and the court was right to instruct the jury that if this party assented to the settlement by the administrator, she was estopped from setting up title against the settlement so made by her consent.

3. Where the plaintiff purchased and went into actual possession of four acres of land, and fenced in the same and erected a dwelling thereon, and paid the purchase money therefor to the administrator of the vendor by consent of the heir at law to whom it fell on division, he will acquire a perfect equity thereto against such heir at law and those acquiring title under her during his possession, and may recover thereon in ejectment.

Evidence. Contracts. Minor. Title. Ejectment. Equity. Before Judge Pottle. Wilkes Superior Court. May Term, 1879.

Reported in the opinion.

D. M. DuBose; W. M. & M. P. Reese; D. A. Vason, for plaintiff in error.

S. H. Hardeman; Sims & Shubrick, for defendant.

Jackson, Justice.

This was an action of ejectment brought by Ball, a colored man, against "The Sisters of the Order of St. Joseph, of Washington, Ga.," for the recovery of three acres of land in the town of Washington. The sisters called upon their grantor, Martha Andrews, to make good her title, who, in her turn, vouched the plaintiff in error, DuBose, or the estate

of Wylie which he represented, and they were made parties defendants.

Ball held under the estate of Wylie also, so that plaintiff and original defendants held under the same grantor, and the sole question is, did the plaintiff have title from the estate of Wylie or from Wylie?

The plaintiff showed no written title, but claims that he had a perfect equity which entitles him to recover in ejectment.

That equity consists of the possession of the land—four acres—which he bought from Wylie, and improved by fencing it in and building thereon the dwelling wherein he lived, and payment of the purchase money, to-wit: $100.00. The payment of this money was made to the former administrator of Wylie—after his death, of course, and the question is, does this payment, under the facts of this case, make such a perfect equity as will authorize a recovery in ejectment?

Perhaps there might be doubt whether the payment could be made to the administrator so as to vest the legal title without going into equity, and thus pass the title out of the estate, without the assent of the heirs, inasmuch as the title vested in the heirs at the death of Wylie; and the administrator could only administer the realty in the teeth of their title in order to pay debts. However that may be, the facts of this case take it without the difficulty suggested. Martha Andrews signed a paper which authorized the administrator to settle the claim of certain freedmen (of whom doubtless the plaintiff is one) who had bought land of the estate of Wylie, of which she was the only heir interested in this land. The lands left by Wylie were duly divided, and this part fell to her; and she sold to the Sisters land thus falling to her in the division, three acres of which the plaintiff had bargained for with Wylie, was in possession of, and afterwards, with her consent, arranged with the administrator by paying him for it. Her consent that the administrator have power to settle with the freedmen also

relieves the case of the difficulty suggested that Ball paid no interest. Whether interest was due or not does not appear, but if due, the administrator had the authority to settle from Martha Andrews, and his settlement binds her.

1. We think, therefore, that the court did not err in overruling the motion for a new trial. The agreement in writing was properly admitted in evidence, because it may well bear the construction that it authorized the administrator to settle with the plaintiff. It not only waived notice of any judicial proceeding which might be instituted in respect to defective title to the land, but it expressly "authorized the administrator to proceed and settle the same according to his judgment and the best interest of the estate." Therefore the court was right to admit the paper as against Mrs. Andrews.

2. The court was also right in charging to the effect that though the paper might not bind the minors of the Wylie estate, who signed by guardian, yet that it did bind Mrs. Andrews, who was *sui juris*, and estop her from setting up title against the plaintiff.

3. The facts show a perfect equity against Mrs. Andrews, as party made defendant and the grantor of the Sisters of St. Joseph, who bought during plaintiff's possession, and the verdict and judgment are right.

Judgment affirmed.

Cleveland *et al.* vs. Chamblin, guardian.

[Warner, Chief Justice, being engaged as presiding officer of the senate organized as a court of impeachment, did not sit in this case.]

1. Where there has been opportunity to raise a question as to the sufficiency of the notice of a motion for a new trial, and it has not been raised in the court below, nor ruled upon by the presiding judge, the question is not here for review.
2. A creditor of an insolvent estate who is under injunction not to sue the executor, has a good excuse for not obtaining judgment on his debt before proceeding by bill in equity to set aside a voluntary

conveyance made by the testator in his life-time; and if, during the pendency of the bill, a judgment or decree establishing the amount of the debt is obtained against the executor, the same may be brought into the bill by way of amendment, and may thus be used as effectively as if the adjudication had preceded the filing of the bill and had been alleged therein originally.

3. If one of several defendants to a bill brought by an executor to marshal assets, answers and turns his answer into a cross-bill against certain of his co-defendants, who are voluntary donees of property under the testator, (such cross-bill praying that the voluntary conveyances be set aside because void as to creditors,) one of the co-defendants to the executor's bill not made a party to the cross bill may, before decree on the cross-bill, file a separate and independent bill to accomplish the same object in his behalf which the cross-bill seeks to accomplish in behalf of the complainant therein, and the complainant in such independent bill will not be bound by the result of the litigation on the cross-bill, he being no party to the same though a party to the original bill with which the cross-bill is connected.
4. Where the bill attacks voluntary conveyances solely on the ground that the donor was insolvent, making no charge as to any actual fraudulent intent, such an intent apart from the alleged insolvency is not in question, and no instructions to the jury which do not look to insolvency as a necessary fact to be established are appropriate.
5. The amount of the donor's liabilities as compared with his resources at the time he executed the conveyances sought now to be set aside, being a vital point in the case, the allusion of the court to "bogus" debts or claims in charging the jury, with the use by the court of that epithet in connection with matter charged at the request of complainant's counsel, would seem objectionable; and a new trial having been granted below, the judgment granting it will not be reversed.

New trial. Practice in the Supreme Court. Equity. Administrators and executors. Judgments. Fraudulent conveyance. Charge of Court. Before Judge GRICE. Crawford County. At Chambers. July 11, 1878.

In February, 1875, Thomas E. Chambliss, as guardian of the minors of Israel J. Chambliss, deceased, filed his bill against Wilde C. Cleveland as executor of Washington C. Cleveland, deceased, and as trustee for Orleana A. and Oliver C. Cleveland, making, in brief, this case:

In 1858 complainant loaned to Washington C. Cleveland, principal, and E. T. Jordan, security, about $5,300.00, and to said Jordan, principal, and Cleveland, security, $2,000.00, taking their notes therefor. These notes were renewed in 1862. Suit was brought on that for $2,000.00 in Crawford superior court against Jordan alone. Cleveland having died, complainant was enjoined by the executor of his estate on a bill filed in September, 1869, to marshal assets, from commencing suit against such estate. Judgment was obtained against Jordan for $2,609.00 principal and interest. Shortly thereafter he was declared a bankrupt, and in 1874 was discharged, over the continued opposition of complainant. The master appointed on the bill to marshal assets reported over $12,000.00 in favor of complainant, and gave him preference over other creditors, except a few of equal dignity. The assets in the executor's hands, with the exception of property which he has not seen proper to appropriate to the payment of the debts of the estate, will not exceed $3,500.00. This other property, of the value of $9,000.00, ought to be made subject to the debts due complainant and other creditors of equal dignity. It consists of about eight or nine hundred acres of land, eight mules, farming utensils, etc., all of which, on or about November 20, 1868, was conveyed by testator in consideration of natural love and affection, to Wilde C. Cleveland in trust for testator's minor daughter and son, the said Orleana A. and Oliver C. At the time of this conveyance testator, Washington C. Cleveland, was indebted to complainant and others an amount equal to, if not greater than, the property he then owned. Prays that the aforesaid trust deed be declared void, the property subjected to complainant's claims, etc.

On June 5, 1877, complainant filed an amendment to his bill, setting forth that the conveyance in trust by testator for the use of his children, was as follows: One Johnson bought from one Letton five hundred and fifty acres of land of the value of $5,500.00. Johnson received a deed

and gave his notes for the purchase money with testator as security thereon. Johnson being unable to meet his notes, it was agreed between him and testator that the latter should pay them off, whilst Johnson should convey the land to Wilde C. Cleveland in trust for Oliver C. This was done on November 20, 1868. Testator also gave to his said son, Oliver C., by his will, farming utensils, stock, etc., of the value of $1,300.00, all of which went into the hands of his said trustee. In February, 1869, testator conveyed to Wilde C. in trust for his daughter, Orleana A., in consideration of natural love and affection, three hundred and fifty acres of land of the value of $3,500.00, and by will gave to her stock, farming utensils, etc., of the value of $1,000.00, and money and notes to the amount of $1,535.00, all of which passed into the hands of her trustee. Orleana subsequently married Lamar, who succeeded Wilde C. in the trust, and who complainant prays may be made a party defendant.

Complainant further alleged that the report of the master appointed on the bill filed by the executor to marshal the assets had, since the filing of his original bill, been confirmed by the verdict of a jury and decree, to-wit: at the September term, 1876, of Crawford superior court.

He also alleged that the value of the property which the executor improperly failed and refused to appropriate to the payment of debts of the estate, to-wit: that voluntarily conveyed to his children by testator, was $13,900.00.

Wilde C., the executor and trustee, answered that the indebtedness of testator at the time of the voluntary conveyances, did not exceed $9,000.00 on his own account, and $5,000.00 as security for others, whilst he had property to the amount of over $30,000.00, enumerating the items of which it consisted.

Lamar, trustee, answered, putting the value of the land conveyed to his wife at $1,200.00, the indebtedness of testator at the time of the conveyance at $14,000.00, and his property at $50,000.00. Denies that complainant holds any claim of $12,000.00 against testator, and alleges that if

testator ever owed him anything it was a debt contracted prior to June 1, 1865, and not having been sued before January 1, 1870, it was barred. In reference to the claim against Jordan, as principal, and testator, as security, he says it was contracted prior to June 1, 1865, and was not sued before January, 1, 1870, though Jordan was sued; that complainant released testator in his lifetime; that he has allowed Jordan to make way with property subject to the judgment, etc.

The evidence introduced upon the trial of the issues thus formed need not be reported except so far as to state that the record of the proceedings had on the bill to marshal assets filed by Wilde C. Cleveland, executor, shows that Mary Zeigler, as guardian *ad litem* for Octavia Zeigler, a defendant to such bill, answered the same and filed a cross-bill against the executor and trustee under the voluntary conveyances from testator, attacking the same upon substantially the same grounds as are presented in the bill of complainant, and alleging further that the money of the said Octavia paid for the land conveyed by Johnson to Wilde C., as trustee, under direction of testator, seeking to follow the fund, etc. Lamar, trustee, who was a party defendant to the bill to marshal assets, was also made a party to this cross-bill. Chamblies, guardian, the complainant, was not.

The precise date of the filing of this cross-bill does not appear, but service was acknowledged by opposing counsel on March 24, 1875.

The master reported adversely to this claim, and his finding was confirmed by verdict and decree at the September term, 1876.

The jury found for defendants. On January 19, 1878, counsel for complainant served counsel for defendants with the following notice:

"To the defendants and their solicitors:

"Whereas the judge of the superior court of the Macon circuit, Honorable Barnard Hill, presiding at the hearing of said cause when said verdict was rendered, suddenly died during said September term,

1877, on the day next to the rendition of said verdict, whilst complainant was preparing through his solicitors a motion for a new trial, and before the same was or could have been filed, and whereas the next March term of said superior court is and will be the first time when such a motion could be filed, the defendants are hereby notified that at said March term of the superior court of Crawford county, the complainant will make and file a motion for a new trial in said cause as an extraordinary case, and as authorized by law in such cases made and provided."

The grounds of the motion subsequently made at the time designated in the notice, were, in substance, as follows:

1. Because the verdict was contrary to law, evidence, and the principles of justice.

2. Because the court erred in refusing to charge the jury as follows:

(*a.*) "The law presumes that every man intends the necessary consequence of his act, and if the act necessarily delays, hinders, or defrauds his creditors, then the law presumes that it was done with a fraudulent intent.

(*b.*) "The law stamps a man's generosity with the name of fraud, and fraud arises and may exist without the imputation of moral turpitude, when the act prevents him from acting fairly towards his creditors.

(*c.*) "Fraud may be presumed when a gift is made by a debtor who is indebted so as to be embarrassed and approaching insolvency, and whereby a fall in prices or fluctuation in the value of what is retained would probably leave him unable to pay his creditors.

(*d.*) "Though a debtor may not be absolutely insolvent at the time of a gift, or may not be rendered absolutely insolvent by such gift, yet, if at the time of the gift he is so embarrassed by debts as to approach insolvency, so that a fall in prices or fluctuation in the value of what is retained by him would probably leave him unable to pay his debts, then fraud may be presumed and the gift set aside."

3. Because the court erred, after charging the following request: "On the question whether the debtor was insolvent or not at the time of the gift, or whether, under th

principles of law given you in charge, the presumption is that the gift was intended to delay or hinder creditors, the jury are to consider all debts proven whether they have since become enjoined or not, or barred or not, provided they existed at the time of the gift," in adding this qualification: "In considering whether they were debts or not at the time, you may take into consideration the conduct of the parties. If I claim to have a debt against the estate of Cleveland in 1868 or 1869 and he died, and the executor called upon me to prove my debt and I did not do it, the jury would have the right to consider my conduct as to whether I had a debt or not, or whether it was not bogus, or whether there was some reason why it was not a debt—but if it was a debt at the time of making these deeds, then you can consider whether it has been collected or not."

Complainant and his counsel made affidavit that the case was heard and the verdict rendered about six o'clock P. M. on Wednesday the 26th of September, 1877, and that on the next ensuing day at about the hour of six P. M. the Hon. Barnard Hill, the judge presiding at said term, suddenly expired during the session of court, thus ending the term before a motion for new trial could be prepared, etc.; that this fact constitutes such extraordinary ground as would support a motion made at the next succeeding term.

The recitals in the grounds of the motion were verified by the affidavits of complainant, his counsel and the stenographic reporter.

Judge Grice, the successor of Judge Hill, certified that upon evidence satisfactory submitted to him and of file with the motion, the recitals in the grounds were true.

A consent order was taken for the hearing of the motion in vacation. After argument, a new trial was ordered.

No exception seems to have been taken as to the notice of the motion or the verification of the recitals, etc.

To the judgment ordering a new trial, Oliver C. Cleveland, who had become of age and been made a party, and Lamar, trustee, defendants excepted.

HALL & SON; R. D. SMITH; BACON & RUTHERFORD; BLOUNT, SIMMONS & HARDEMAN, for plaintiffs in error.

J. S. PINCKARD; MCCAY & TRIPPE, for defendant.

BLECKLEY, Justice.

1. A point was made in the argument which was not presented below, and upon which the judge there presiding did not rule. We were urged to reverse the judgment granting a new trial, because the notice given of the intended motion did not specify any ground or grounds upon which the motion would be based. To show that the notice must embrace the grounds, and not merely an admonition of the intention to move, we were cited to 21 *Ga.*, 216; 30 *Ib.*, 677; and Code, §3721, compared with Cobb's Dig., 503. Let it be granted that the notice was defective for want of fulness, there was opportunity below to urge the defect, but instead of using the opportunity, the plaintiffs in error suffered the motion to be made and disposed of on its merits, without any effort to defeat it on account of the character of the notice. The point appears here in its virgin state, wearing all its maiden blushes, and is therefore out of place.

2. The proposition that equity will not aid a creditor to pursue assets with which the debtor has parted, until after the debt has been established by judgment, was pressed upon us, and the following authorities were cited: 4 *Ga.*, 319; 3 *Ib.*, 449; 42 *Ib.*, 124; 47 *Ib.*, 530; 56 *Ib.*, 144. But the facts of the present case are special. Here the creditor filed his bill whilst under an injunction not to sue the executor of his debtor; and after the executor's bill on which the injunction was granted resulted in a decree fixing the amount of the debt, that decree was pleaded by way of amendment to the bill of the creditor, and thus when the latter bill came to a final hearing, the creditor was in a situation to prove his claim, as against the executor, by conclu-

sive evidence. Add to this that the estate of the debtor was certainly insolvent, and we can see no reason for holding that the creditor ought to fail, on the theory that his bill was prematurely brought. We are not ruling upon a demurrer to the bill, but upon the sufficiency of the evidence adduced at the hearing; and even if the bill, as amended, had been demurred to, we see not why the injunction and the insolvency would not have furnished a sufficient excuse for not having a judgment to start with. Under the Code, §4181, the rendition of the decree in the executor's suit, pending the creditor's bill, was proper matter for amendment to the latter bill; and it seems to us that after being thus brought in, it could be used as effectively as if an adjudication of the debt had preceded the filing of the bill, and had been alleged as a part of the original case.

3. There were numerous defendants to the bill brought by the executor to marshal assets, among them the complainant in the present bill, the volunteers or donees whose title is now attacked, and one Mrs. Zeigler. Mrs. Zeigler engrafted upon her answer a cross-bill, which had for its object the overthrow of the title of these donees, and the bringing in of the property to pay the debts of the donor's estate—at least the debt which was due to her. The cross-bill failed, the result being a finding and decree against it. The plaintiffs in error urge that the result thus reached on Mrs. Zeigler's cross-bill, is binding upon the complainant in the present bill, and hence that the whole controversy is closed, for which reason the verdict was correct and should not have been set aside by the grant of a new trial. But the complainant in the present bill was not a party to the cross-bill, and the present bill was filed, if not before the cross-bill, certainly before the latter was heard and disposed of. Why did not the complainant in the independent bill have the same right to attack the conveyances to the donees, by that bill, as Mrs. Zeigler had to make a similar attack by the cross-bill? And why should the failure of her attack bind him, if the failure of his attack, had his bill been tried

first, would not have bound her? His relation to the cross-bill was precisely the same as hers to the independent bill, with one exception—he was a party to the original bill out of which the cross-bill sprang. Is a defendant to an original bill affected by the result of litigation between two or more of his co-defendants, on a cross-bill to which he is not a party? Upon principle, he is not, and if there is any authority to the contrary it is unknown to us. The able and industrious counsel who argued this case for the plaintiffs in error, failed to produce any.

4. The various requests to instruct the jury on the subject of actual fraud, were not in line with the charges of the bill. The bill proceeds on the sole ground that the donor was insolvent, or became so by the reduction of his fortune involved in making the gifts. No actual fraudulent intent is alleged—indeed, the bill seems unusually careful not to impute any such intent. As the bill stands, insolvency is an indispensable fact to be established, before the complainant will be entitled to a decree, and the court was right in treating as irrelevant any request for instructions which would or might leave that question undecided. Adherence to the pleadings is a prime virtue in trying a cause.

5. The fifth head-note presents all we desire to say on the epithet "bogus," and on the general result of our deliberations.

Judgment affirmed.

Bolden *et al.* *vs.* The State of Georgia.

Where three are indicted for riot in unlawfully assaulting, beating, wounding, and otherwise maltreating another in a violent and tumultuous manner, and the evidence is that two of the three struck and wounded that other by throwing rocks at and hitting him on the head, all acting in a violent and tumultuous manner:

Held, that the two were properly convicted of riot under the indictment; and though the testimony as to the persons who began the rocking is conflicting, yet there being enough to uphold the verdict, and the presiding judge approving it, this court will not interfere.

Criminal law. Riot. Verdict. Before Judge CLARK. City Court of Atlanta. June Term, 1879.

Reported in the opinion.

GARTRELL & WRIGHT, for plaintiffs in error.

HOWARD VAN EPPS, solicitor city court, for the state.

JACKSON, Justice.

The defendants were indicted together with one Green Bolden for a riot. All were found guilty, but a new trial was granted Green Bolden, and it being denied the defendants, they excepted. The sole question is, were the two men under the facts guilty of riot?

The Code declares, "if two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence, or any other act in a violent and tumultuous manner, such persons so offending shall be guilty of a riot." The allegation is that in a violent and tumultuous manner the defendants did unlawfully assault, beat, wound and otherwise maltreat Lem Wright. The evidence is that the three assembled at the house of Lem Wright and were violent and tumultuous, and that the two, each of them, threw rocks at Lem, and that he was badly wounded on the head by the rocks thrown by them. The difficulty arose out of the fact that Joe Wright and Green Bolden were fighting about the whipping of some children; Lem interposed to part them, when the rocks were thrown at him by plaintiffs in error and he was so struck and wounded. The facts make the two guilty of a riot under the law, and the allegation in the indictment was sustained by the state's testimony.

It was for the jury to decide on the conflict of evidence; but it is unquestionably true that rocks were thrown at Lem Wright by the plaintiffs in error, and that they assem-

bled at his house, and thus the trouble arose. The other defendant got off by the fact that he did not throw *at Lem Wright*, the unlawful act charged in the indictment. The new trial was properly refused as to the plaintiffs in error. 38 *Ga.*, 185.

Judgment affirmed.

WALKER *vs.* JOHNSON *et al.*

1. The defendant in *fi. fa.*, who claimed the fund as exempted by the ordinary, not having been served with the bill of exceptions, this court will not review the judgment of the superior court on the validity of that exemption.
2. The exemption of the fund being treated as valid, an unrecorded mortgage for purchase money will take in preference to one duly recorded to secure a debt not within any of the exceptions of the constitution rendering the exemption liable—both mortgages having been foreclosed, and the executions in the sheriff's hands.

Practice in the Supreme Court. Mortgage. Homestead. Before Judge LAWSON. Baldwin Superior Court. February Term, 1879.

Walker brought a rule against the sheriff of Baldwin county to cause him to apply to a mortgage *fi. fa.* of movant in his hands, the proceeds of the sale of two mules, the property of Huff, the defendant in *fi. fa.* Huff claimed the fund as having been set apart to him as an exemption. Johnson, the holder of another mortgage *fi. fa.*, also claimed the fund, and was made a party. The case was submitted to the court without a jury upon an agreed statement of facts, as follows:

"That John B. Wall, sheriff, on January 1st, 1874, levied the mortgage *fi. fa.* of Samuel Walker on two mules therein mentioned, and afterwards, to-wit: on the 10th day of January, 1874, levied the mortgage *fi. fa.* of Thomas Johnson, on said mules; and on the same day they were sold, and the

money held up for distribution, under a notice from Thomas Johnson. That the claim of Thomas Johnson was for purchase money of said mules, and was in the form of an unrecorded mortgage, given December 29th, 1872, due November 1st, 1873,and foreclosed January 9th, 1874; and that the claim of Samuel Walker was a mortgage regularly recorded, given June 10th, 1873, due November 1st, 1873, and recorded June 16th, 1873. That at said sale Thomas Johnson bought in said mules, and gave the sheriff, John B. Wall, his bond for the money, but never paid the same into his hands. That after said sale, to-wit: on the 30th day of January, 1874, John H. Huff applied to the ordinary of Baldwin county for homestead and exemption, including in his application 'money arising from the sale of two mules, and now in the hands of the sheriff—two hundred and fifty dollars,' without any prayer for the investment of the same. That the ordinary, on the 23d day of March, approved said homestead and exemption in the following words: 'Approved, this the 23d day of March, 1874, subject to such debts as are provided for by law. Signed, D. B. Sanford, ordinary,' without any order for the investment of said money or any disposition of, or re-investment of, the same. That upon the filing of the application the ordinary gave the sheriff notice in writing, and upon its approval, notified him of that fact in writing."

The court rendered two judgments, one headed "Samuel Walker, plaintiff in *fi. fa. vs.* J. H. Huff, defendant in *fi. fa.*, and John D. Wall, sheriff." In it he ordered costs and counsel fees to be paid on the *fi. fa.*, and the balance to be paid over to the ordinary for the benefit of Huff's family. The other order was headed, "Samuel Walker, plaintiff in *fi. fa.*, and Thomas Johnson, plaintiff in *fi. fa. vs.* J. H. Huff, defendant in *fi. fa.*, and J. B. Wall, sheriff, and J. H. Huff, claimant." In it he ordered the payment of costs and counsel fees on the Walker *fi. fa.*, and the payment of the balance to Johnson.

Walker excepted. Service of the bill of exceptions was

acknowledged by counsel for Johnson and the sheriff; no service upon Huff appears to have been made.

F. C. Furman, by brief, for plaintiff in error.

W. W. Williamson, by brief, for defendants.

Jackson, Justice.

A certain fund arising from the sale of certain mules was in the sheriff's hands. It was claimed by the defendant in *fi. fa.* as exempt by the judgment of the ordinary, for the use of his family, by the plaintiff in error, on a mortgage to secure goods sold defendant duly recorded, and before any other mortgage was recorded—and by defendant in error, on an unrecorded older mortgage for the purchase money of the mules. The court ruled that the exemption was valid, and that the *fi. fa.* issued on the purchase money mortgage would take the fund after payment of expenses of bringing the same into court. Whereupon plaintiff in error excepted.

1. There is no service upon the defendant in *fi. fa.* who claimed the exemption. If that judgment of the ordinary be assailed, he has a right to be heard, and should be a party to the case, as he was one in the court below; but he is not served with the bill of exceptions, and therefore he is not a party here.

Indeed, the two issues were tried separately, and separate judgments were pronounced—the one in the case of Walker *vs.* Huff, defendant in *fi. fa.*, and Wall, sheriff, and the other in the case of Walker and Johnson *vs.* Huff, defendant, Wall, sheriff, and Huff, claimant.

Therefore this court will not review the judgment of the superior court on the validity of the exemption as made by the ordinary.

2. Treating it then as valid, of course the mortgage for the purchase money will take the fund in preference to a

mortgage not for purchase money or any other thing that, by the constitution, could sell the homestead or exemption. Plaintiff in error could not have sold the mules under his *fi. fa.*, had they been set apart; no more can he claim the money they brought when it is set apart. But defendant in error could have sold the mules, though set apart; therefore he can claim what they sold for, though set apart.

The court below, then, ruled correctly in awarding the fund to the defendant in error, after paying expenses of bringing it into court.

See 54 *Ga.*, 569; Code, §§5135, 2002. Supplement to Code, §690.

Judgment affirmed.

Smith *vs.* Bryan.

Where there is no approval of the brief of evidence by the presiding judge and no reference thereto in the bill of exceptions, the writ of error must be dismissed, no error being assigned which could be determined without such evidence.

(a.) Had there been an approval of the brief of evidence, the verdict was not contrary to the weight thereof.

Practice in the Supreme Court. September Term, 1879.

A *fi. fa.* in favor of Bryan against Daniel was levied on certain land, which was claimed by Smith. The claimant insisted that he had been a security on an official bond for Daniel, and lost money therefrom; that Daniel offered to reimburse him by turning over to him a mule; that he did not want the mule, and Daniel then traded it to a third party for the land now in dispute, and had the title made to claimant for the purpose above stated. The plaintiff insisted that the deed was antedated, that it was made after his judgment was obtained, and was therefore a fraud on

him. The jury found the property subject. Claimant moved for a new trial on the ground that the verdict was contrary to law, evidence and the weight of the evidence. The motion was overruled, and he excepted. The brief of evidence in the record was not approved, nor was there any reference thereto in the bill of exceptions. The writ of error was therefore dismissed.

R. W. Carswell, by brief, for plaintiff in error.

No appearance for defendant.

Jackson, Justice.

This was a motion for a new trial. In such a case it is not necessary that the brief of evidence be embodied in the bill of exceptions, but it may come up in the record, if it be referred to in the bill of exceptions, so that the attention of the presiding judge is directed to it. Code, §4253. No reference is made to the brief of evidence in this bill of exceptions, nor does the record contain any approval thereof by the judge. The only grounds for the new trial are that the verdict is against law and evidence; therefore the evidence is absolutely necessary to review the case, and the writ of error must be dismissed. The plaintiff in error loses nothing, however, by the dismissal; for if what purports to be the evidence in the record be that which was before the superior court, and if the court charged the law correctly, (and there is no copy of the charge or exception thereto in the record, and the presumption is that the court did so charge correctly) the case made is one of fraud or no fraud, and in case of fraud a trust resulted in Smith, the grantee and claimant, for the benefit of Daniel, the defendand in *fi. fa.*, as Daniel's mule paid for the land, and it was properly subjected to the payment of his debt, the jury having found that issue of fraud in favor of the plaintiff in execution,—as must have been done if it was properly submitted by the charge. There is sufficient evidence, if that

which purports to be the evidence be correct, to sustain such finding; and thus in any event the judgment would have been affirmed. In order to preserve the uniformity of our decisions and the plain statute—Code, §4253—the bill of exceptions being defective, the writ of error is dismissed.

MITCHELL *vs.* TOMLIN.

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. Where it appears from the record that the case is still pending in the court below, the writ of error will be dismissed. (R).
2. A suggestion of diminution of the record must be on oath. (R).

Practice in the Supreme Court. September Term, 1879.

Reported in the opinion.

W. S. WALLACE; C. J. THORNTON, for plaintiff in error.

BLANDFORD & GARRARD, for defendant.

JACKSON, Justice.

A motion was made to dismiss this case on the ground that it was still pending in the court below, on a motion for a new trial, which had not been disposed of, the case before us being exceptions to the rulings of the court on the trial before the jury. Of course until the case is finally disposed of in the court below, it cannot be brought to this court, and the only question is, does the record show that it is still pending.

The following order and judgment appear in the transcript:

"R. S. TOMLIN
vs.
JOHN D. MITCHELL. } Verdict and judgment for plaintiff.

"The defendant having made a motion for a new trial in said case, on the grounds therein stated, and said grounds having been approved

by the court, and it appearing that it is impossible to make out and complete a brief of the testimony in said case before adjournment of court, it is considered and adjudged by the court that said motion stand continued until the 19th day of October, 1878, and that it be heard at chambers, and that defendant have until said day to make out and file a brief of testimony without prejudice."

"R. S. TOMLIN *vs.* JOHN D. MITCHELL.	Verdict and judgment for plaintiff, at October term, 1878, of Taylor superior court.

"The defendant being dissatisfied with the verdict and judgment in said case, comes, during said term of the court, and before the adjournment thereof, and moves the court for a new trial, upon the following grounds, to-wit:

1. Because the verdict of the jury is contrary to the evidence.
2. Because the verdict is contrary to the evidence and the principles of justice and equity.
3. Because the verdict is without evidence to support it.
4. Because the verdict of the jury is so far contrary to the evidence as to shock the moral sense.

"Whereupon he prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted him."

Signed by counsel and approved as correct grounds by the court, October 11th, 1878, signed Martin J. Crawford, J. S. C. C. C., and marked filed in office October 11th, 1878.

No further order appears concerning the motion. It seems therefore to be pending still in the superior court; it was pending then when this writ of error was sued out, and the record shows no disposition of it. Still pending, and not finally disposed of in that court, the case cannot be brought to this court. Code, §4250.

The writ of error must therefore be dismissed.

1. We are the less reluctant to dismiss it because an examination of the points excepted to shows that the judgment would not, in any event, have been reversed, the construction of the contract being right, in our judgment, and no error in the question of practice raised, or in the costs.

2. A suggestion of a diminution of the record was attempted, but counsel were unable to make oath that any part thereof was omitted, and this court has no power to make a new record for the court below.

Writ of error dismissed.

Shiels *vs.* Roberts.

[This case was argued at the last term and decision reserved.]

1. On the mere question of title by virtue of duration of possession, there being no issue of *mesne* profits and equitable set-off thereto by improvements erected on land sued for, the rejection of testimony to the effect that the improvements were of little or no value, and rotten or dilapidated, is not such error as will require the grant of a new trial.
2. Where defendant showed privity of estate between him and a long line of grantors to lot No. 17 in a ward of a city, and buildings thereon obtruding some feet over on lot 18 adjoining 17, continuity of possession for more than twenty years may be proven by parol between him and his grantors—his predecessors in the actual possession of the building thus extending over part of 18.
3. Actual possession of such strip of 18 for twenty years by the said buildings extending thereon without written title thereto, is good prescriptive title against all the world, except the state and persons not *sui juris*, unless such possession originated in fraud, and honest mistake of the true line is not fraud. The fact that the buildings stood so long over what may now be claimed to be the true line, is a conclusive presumption that the claim is not good, but that the old buildings mark the true line; especially against a purchaser who bought after twenty years occupancy, and one of whose grantors had knowledge of the buildings years before.

Evidence. Title. Prescription. Before Judge Tompkins. Chatham Superior Court. May Term, 1878.

To the report contained in the opinion it is only necessary to add the following:

Shiels brought ejectment against Roberts. The case turned upon the defense of prescriptive title by reason of twenty years' possession in himself and those under whom he claimed. The jury found for the defendant. Plaintiff moved for a new trial on the following, among other grounds:

(1). Because the court ruled out testimony showing that the structures on lot No. 18 claimed by defendant were dilapidated and of little or no value.

(2). Because the court admitted testimony tending to show that those under whom defendant claimed the title to

lot No. 17, had always occupied and used as belonging to them that part of the building which projected on to the adjoining lot No. 18.

(3). Because the court refused to charge that "possession originating in mistake is not adverse until discovered."

(4). Because the court refused to charge that "defendant must show possession in himself, and cannot tack to his the possession of another, unless he show deeds conveying the land so held."

(5). Because the verdict was contrary to law and evidence.

The motion was overruled, and plaintiff excepted.

JACKSON, LAWTON & BASINGER, for plaintiff in error.

R. FALLIGANT, for defendant.

JACKSON, Justice.

The plaintiff held perfect written title to city lot number 18 in Gilmerville ward, Savannah; the defendant, to number 17. Defendant and those from whom he derived possessory right continuously for some twenty-six years, occupied a certain building which covered some feet over the line between 18 and 17—as testified by the surveyor from the city map. The plaintiff sued for the part of 18 thus covered by these old buildings. The jury, under the charge of the court, found for the defendant, and a new trial being refused by the superior court, the plaintiff brings the case before us.

1. We do not think that plaintiff was hurt by the refusal of the court to admit evidence touching the dilapidated condition and value of the house erected on the land in dispute, because there was no issue touching *mesne* profits before the jury, or equitable plea to set off building against *mesne* profits.

In respect to title on paper, or by prescription from possession for twenty years, it was wholly immaterial whether

the house was worth a hundred or a thousand dollars. Did defendant have such *possessio pedis* as to work prescription, was the whole question in the case and the only issue decided by the jury.

2. The deeds to lot number 17 being in evidence, showing privity of estate between defendant and a long line of grantors to that lot, the court allowed the defendant to tack his possession of part of 18 by the buildings extending a few feet thereon, to the possession of his predecessors by parol proof that they all successively occupied the strip of 18 covered by the buildings. We do not see how otherwise the proof could be made that as each grantor left, his grantee entered, and continuity of possession—of actual possession—was preserved. A written transfer of the right to possess, could not show actual possession. The right to possess is one thing, and may be shown on paper; *possessio pedis* is another thing, and must be shown by parol evidence from some man who saw the actual entry and continuance thereof. And so this court has held.

3. Our Code declares that "actual adverse possession of lands by itself, for twenty years, shall give good title by prescription against every one, except the state or persons laboring under the disabilities hereinafter specified," which disabilities are those of married women, minors, etc.. etc. No scrap of paper or scratch of pen is necessary. Nothing but actual, *bona fide* possession. I say *bona fide*, because section 2673 declares that prescription cannot originate in fraud. Its language is "possession to be the foundation of a prescription must be in the right of the possessor and not of another; must not have originated in fraud; must be public, continuous, exclusive, uninterrupted and peaceable, and be accompanied by a claim of right."

This title in this case to the piece of land sued for, is clearly made out according to this statute. Every condition is complied with, and the only point left for debate is this, must all this possession have been after the Code? We think not. It was the law under a different name before

the Code. Possession of the sort prescribed in §2679 of the Code for twenty years always was a bar by the limitation laws, as held by our courts, to a suit in ejectment. Such is my own recollection of the practice before the Code, and the Chief Justice adds the weight of his longer experience to what I remember. This title by prescription is in the nature of a limitation law—a law to quiet men's estates where they have been long in possession.

The codifiers put in the Code the essence and spirit of Georgia law since 1767. Cobb's Digest, 560. He who made that Digest and its index, codified this part of our Code; and in the index to the Digest the act of 1767 is referred to in these emphatic words: "20 years possession good title." Index to Cobb's Digest, p. 1235. Therefore it is wholly immaterial that this possession started and continued sometime before the Code. Besides, it was competent for the legislature to take into account the past possession, and tack that to the future possession to make the twenty years. Just as they could enact a law that men must sue within a certain time, or right as well as remedy is gone; as they did by the limitation act of 1869. It is true these prescriptive titles are not exactly limitation laws as held by this court; but they are founded on the same principle, and identical in results.

If, as contended for by the counsel for plaintiff in error, we hold that no twenty years' possession could make a prescriptive title if it originated in mistake, we should have to add to our statute. It is true that some of our reports of decisions look that way in respect to seven years possession under written color of title. See 16 *Ga.*, 141; 20 *Ib.*, 190; 29 *Ib.*, 152; 34 *Ib.*, 290.

But no case has been found where the principle has been applied to twenty years' possession; and we do not mean so to extend the ruling.

It will never do to hold that an innocent mistake of a few feet of one's line, and the erection of costly buildings projecting over, and so standing and occupied by generations,

cannot be the origin of a prescription, but that it is so corrupt as to destroy the validity of the whole possession, and deprive families of firesides around which they sat at home for years upon years. Nothing but a corrupt origin, or corruption somewhere in the line of possession, ought to work the overthrow of such a sacred title. Fraud in the origin ought, but nothing else, and such is the law. The eloquent counsel for the plaintiff in error fixed the thought in the mind of this court in a remark not made to be forgotten: "It is neither the length nor the course of the stream—it is the fountain-head that gives character to its waters." Let the thought impressed on our minds by the strikingly beautiful figure be stereotyped on the pages of our reports, but let it be added that the character which an honest mistake gives to future events is not corrupt or fraudulent; whilst, as our own Code prescribes, fraud in the origin of the possession taints the entire sequence with its own impurity.

Considering the entire case in view of all the law and the facts, we conclude, after mature deliberation, that the judgment which protects the long possession of the defendant is right, and it is therefore affirmed.

Judgment affirmed.

Cox *vs.* The State of Georgia.

1. Upon a showing for a continuance of an indictment for murder, one month and a half after the occurrence of the homicide (the prisoner having been painfully wounded by the deceased in the rencounter), whether the excited state of the public mind is such as to prevent a fair and impartial trial, and also whether the prisoner's condition, physically and mentally, has been such as to fit him for communicating sufficiently with his counsel, and otherwise preparing for his defence, and whether it is such as to enable him to undergo, with needful strength, composure and vigilance, a trial for his life, are questions addressed to the sound discretion of the presiding judge: and mere strictness in the exercise of the discretion and in over-

ruling the showing, not amounting to abuse, will furnish no ground for a reviewing court to interfere.

2. Jury commissioners, in fact acting as such, and recognized by an order of court filling a vacancy in the board, though not naming its members, and also recognized by adopting in practice the list which they have prepared and filed, are commissioners *de facto* if not *de jure;* and that no order of their appointment appears on the minutes, will not, on a trial for felony, be cause of challenge to the array put upon the prisoner. Nor is it a cause for such challenge, that in selecting tales jurors, the sheriff consulted the list and took names therefrom in the alphabetical order in which they stand on the list, confining the selection first to names all beginning with one and the same letter. There is no statute putting on the sheriff any restriction as to what he shall take for a guide in fixing upon the particular persons whom he will summon as tales jurors, so that they be qualified to serve.
3. When a juror, after answering the prescribed statutory questions so as to appear *prima facie* competent, is put upon the presiding judge for further trial of his competency, the judge may decline to allow any other questions to be propounded to the juror, and may confine the investigation to evidence *aliunde* and its effect.
4. Though a witness may know that there was some indistinctness in his hearing as to the words or the sense of a particular statement, he may testify to its substance as he understood it, and his doubt as to whether he heard correctly will only detract from the force and value of his testimony, not render it incompetent as inferential rather than immediate and direct.
5. Stenographic notes of testimony taken down at the coroner's inquest, and afterwards written out in ordinary character, may, upon due proof that the writing is a correct minute of what the witness testified, be read to show contradictions between that testimony and the testimony detailed by the witness from the stand, he being first examined on the alleged discrepancies, and his attention called to the same. An objection to the introduction of the paper, or to the reading of its contents, on the ground that "it was not sufficiently shown that the said (witness) had sworn before the coroner as appeared from this written report of his evidence, and that he could not be impeached by such written report of his evidence," will not raise the question whether only certain parts of the contents, and not the whole, should have been submitted to the jury.
6. Where there is a mutual agreement to arm and fight, and the parties separate and arm with pistols, and they meet within an hour, and fight with the pistols, all pertinent acts and declarations of either in the interval belong to the *res gestæ* of the hostile enterprise.
7. Acts are pertinent if they are done pending the enterprise, and whilst it is in continuous progress to its catastrophe, and are of a nature to

promote or obstruct, advance or retard it, or to evince essential motive or purpose in reference to it; and declarations are pertinent if they are uttered contemporaneously with pertinent acts, and serve to account for, qualify or explain them, and are apparently natural and spontaneous.

8. Generally, when part of a conversation has been introduced in evidence, the rest of it may be brought out by the opposite party on cross-examination of the witness. The prisoner having proved that the deceased applied for the loan of a pistol, about twenty minutes before he was killed, together with a part of what he said at the time, the balance of what he said at the same time and place and in the same conversation was within the rule, and if not admissible on the principle of *res gestæ*, was admissible as the remnant of a conversation opened up in the direct examination of the witness.
9. Conceding that certain declarations made by the deceased whilst hostilities were pending, and within twenty minutes of the fatal collision, were so much in the nature of narrative, or mere recital, as to be of doubtful admissibility, or even inadmissible, on the principle of *res gestæ*, yet, where the same declarations in substance have been put in evidence as a part of a conversation into which the prisoner entered during the direct examination of his own witness, (the balance of such conversation coming out on the cross-examination), and where the prisoner has himself proved substantially the same declarations on the part of the deceased by another of his witnesses, or the state, without objection, so far as appears, has proved them by one of its witnesses, the subsequent admission of evidence to the same effect from another witness in behalf of the state is not necessarily cause for a new trial. If the jury already have before them doubtful or objectionable matter, and there is no motion to withdraw it, the repetition of it by another witness, though objected to, may be treated as not sufficiently material to require a new trial.
10. Where the evidence indicates that the homicide was the sequel to a concerted and pre-arranged scheme on the part of both combatants, to arm and meet for mortal combat, the court may, as a starting point for further instructions, charge the jury as to the legal consequences of such a combat resulting in death, though the evidence shows that after arming one of the parties ceased to intend, and the other ceased to expect a meeting at the place appointed, and though no meeting occurred at that place, and the scene of the rencounter was, without any express concert, shifted to another place in the same neighborhood.
11. In relation to whether there was not a consent of both wills, or a mental concurrence between the parties, in meeting when and where they did, though it was a little later than they had contemplated, and at a different place from that expressly agreed on, and conse

quently whether the actual collision was not in its nature the same as that which had been pre-arranged, with no change except in the scene and the precise time of the combat, the evidence admitted of two constructions: and for this reason, also, such a charge as that mentioned in the next preceding note was not inapplicable to the case. Where two views are fairly possible to be taken of the evidence, one that notwithstanding variations in time and place from the original scheme, and notwithstanding an apparent abandonment of the scheme itself, for a short interval, there was finally a return it, and an execution of it in its main elements; and the other, that the meeting, at the time it took place, was designed by one of the parties only, and the other did not desire or intend it, it is allowable to submit to the jury the law of each of these states of fact.

12. The charge of the court, like all other deliverances in human language, is to be construed together as one whole, and when one part of it plainly tempers and modifies another, and the ultimate sense and impression are correct, the true standard of practical sufficiency is attained. As long as jurors are sworn to render a true verdict, according to evidence, it cannot be error for the court to instruct them to do so; at the same time telling them to give such force to the prisoner's statement as they think proper. The statement may aid them in ascertaining what the true significance of the evidence is, but for the jury to render a verdict in conflict with the evidence because the statement conflicts with it, would be to lose sight of the terms of their oath.
13. The court committed no error in denying a continuance, no error in organizing the jury, no material error, if any at all, in admitting evidence. Nor did it commit any material error in charging the jury. The charge, as a whole, was sound in doctrine, clear and concise in statement, fair in tone and spirit, both to the state and the accused, applicable throughout to the facts in evidence, and accommodated to each and every theory of the prosecution or the defense which the testimony afforded any warrant for considering.
14. The verdict was justified by the law and the evidence, and was not contrary to either. There was no error in overruling the motion for a new trial.

WARNER, Chief Justice, dissented.

Criminal law. Murder. Continuance. Jury. Witness. Evidence. *Res gestæ.* Charge of Court. Prisoner's statement. New trial. Before Judge HILLYER. Fulton Superior Court. April Term, 1879.

Cox was placed on trial for the murder of Alston, alleged to have been committed on March 11, 1879. The indict-

ment was found on April 3d following, and the case called for trial on the 29th of the same month. The defendant moved in writing for a continuance, because he was advised and believed that he could not then obtain a fair and impartial trial, on account of the great excitement and prejudice against him in the public mind of the people of Fulton county; that this prejudice was engendered in the public mind, and still exists to an "increased extent," in consequence of partial and *ex parte* statements made in the public press in said county, which were exhibited to the court. That in consequence of the serious and dangerous wounds received by this defendant, and his close confinement in jail, and by reason of his great mental and bodily suffering, he has been unable to make the necessary corrections, and meet and overcome this undue prejudice and public excitement, and to confer with his counsel fully in relation to his defense.

Affidavits were filed both for and against the motion, from which it appeared that the excitement in the county did not extend beyond that which would be produced upon the unexpected homicide of any prominent citizen who had many warm personal friends in the community; that whilst defendant was wounded by a shot through the wrist, which also passed through his mouth, carrying away some of his teeth, and imbedding one of the teeth in his tongue, he was by no means in a dangerous condition, and in fact had had many and frequent consultations with his counsel, some of them lasting for hours. It was shown by two witnesses that more than a week before the trial he said he was well, and ready and anxious for trial, and did not want any delay.

The newspaper articles were mainly regrets on account of Alston's death, portraying his many good qualities of head and heart, his desire to avoid the difficulty, his gallant bearing when it was forced on him, and expressive of the deepest sympathy with his bereaved widow and children.

The motion was overruled. [1st ground of the motion for new trial.]

The defendant pleaded not guilty. When put upon him, he challenged the array of forty-eight jurors on the following grounds:

1st. Because there was no order of the judge of the superior court of this circuit appointing three commissioners to revise the jury list of the county, as required by the statute.

2d. That by the order of Judge Hillyer, entered on the minutes of the court, only one commissioner was appointed for the purpose aforesaid.

3d. That the jury list of said county not having been revised as required by law, the sheriff had no legal authority to summon said panel of jurors, and said array ought not to be put upon defendant.

4th. Because the sheriff did not summon said panel from the body of the citizens qualified and liable to jury duty, but took an alphabetical list of names from the jury list and served them alone.

In support of the challenge, the following order was read from the minutes:

"STATE OF GEORGIA—County of Fulton:

It appearing to the court that Clinton I. Brown has resigned his position as commissioner to revise the jury box of said county, and said resignation being duly accepted it is ordered that James R. Wylie be, and he is hereby, appointed as one of the commissioners to revise the jury list and boxes of the county aforesaid, and said James R. Wylie has appeared and duly sworn and qualified as required by law.

GEORGE HILLYER,
December 28, 1878. *Judge S. C. A. C.*"

Upon demurrer by the prosecution, the challenge was overruled. [2d ground of the motion for new trial.]

The evidence presented, in brief, the following facts:

The homicide occurred in the office of the treasurer of the state of Georgia, at the capitol building, in the city of Atlanta, at about half-past three o'clock on Tuesday afternoon, March 11, 1879. On the Saturday preceding, defendant received a letter from Calhoun, Alston's law partner, requesting him to come to Atlanta at once. He came

in response to this letter, arriving in the city on Monday morning. Defendant had rented a plantation from Gen. Gordon, in Taylor county, where he then was, the latter agreeing to furnish sixty convicts to cultivate it for the term of eight years, for which (the plantation and the convicts), defendant was to pay him annually fifty bales of cotton. Gordon wished to dispose of his interest in the lease of convicts, and to do so had to negotiate with Cox for the purpose of getting rid of his incumbrance. One Walters had been corresponding with Gordon in reference to buying his interest, and came to Atlanta about the same time that defendant did, for that purpose. He had written to Gordon that he would not buy at all subject to defendant's incumbrance. Gordon had telegraphed to him on the preceding Thursday, that deceased would leave Washington on Saturday to come to Atlanta, and that he had full authority to transfer his (Gordon's) interest. Walters came to Atlanta for the purpose of purchasing that interest. He arrived early Saturday morning, met Alston at the train later in the day, had a ten minutes' conference with him, and determined to remain over until Monday morning. All three, defendant, deceased and Walters, met in the office of Nelms, principal keeper of the penitentiary, on Monday morning at from nine to ten o'clock. They discussed the matter of the sale of Gordon's interest in a friendly way. Deceased disclaimed any intention of selling defendant out, but stated that he proposed to sell the Gordon interest subject to his incumbrance. On being asked by deceased whether he would not dispose of his interest, defendant replied that he would sell anything in the world he had except his wife and his children, and nobody wanted them. After some conversation the parties separated, and Walters commenced negotiating with defendant for his interest, desiring to purchase in order that he might trade with deceased. They finally came to an understanding and went off to find deceased, but when found, he said it was too late, as he had sold [redacted] for $4,000.00, subject to defendant's lease.

This was on Monday afternoon. That evening Walters employed D. P. Hill, Esq., to help him make the trade, and the next morning (Tuesday, the day of the homicide), Hill went to the office of deceased, and the latter said that if Howard did not raise the money by twelve o'clock Walters should have the contract. Defendant and deceased came into the city on the same train that morning, the former having boarded it at Decatur, and the latter at Kirkwood. They appeared perfectly friendly, were seen on the streets of Atlanta walking arm-in-arm, and there was no reason to suppose that there had been any interruption of the intimate relations which usually existed between them. About half-past two o'clock, defendant was in a saloon with some friends taking a drink, when deceased came in. Defendant asked him to join them. He declined to drink, but at the suggestion of defendant took a cigar. Defendant said to him that he wished to see him, and they walked out of the bar-room arm-in-arm, and went into the back room of a neighboring barber-shop, on Marietta street, 150 or 200 yards from the scene of the homicide.

Up to this time there was probably no ill-feeling on the part of defendant to deceased, but he seemed excited about the pending trade, fearful lest his interest should be prejudiced in some way, and possibly apprehensive lest what appeared to be an opportune occasion of selling out his lease of, or interest in, the convicts, should be lost.

What occurred in that back room of the barber-shop can only be known through the declarations of deceased and of defendant made in the interval before the homicide, not exceeding an hour, and probably less, the acts of the parties during that short period, and the statement of the defendant on his trial. One of the main grounds of controversy before this court was the admissibility of some of these declarations.

Deceased went from the barber-shop to the treasurer's office, and thence up stairs to Nelms' office, in the capitol, this office being on the second floor of the building. Nelms

upon his direct examination for the defense, testified as to what passed there, as follows: "It was probably three o'clock in the day that Col. Alston came in and asked me for a pistol, and I said mine was at home shot out, and I asked him what he wanted with it, and he said he had liked to have had a difficulty, and I said come in and tell me about it, and he came in and sat down. I asked him who it was with, and he said it was with Ed. Cox, and told me about it."

On cross-examination, when counsel for the prosecution asked witness, "What did he (Alston) say?" alluding to the conversation where it was left on the direct examination, it was objected that the declarations of Alston in the absence of the defendant were inadmissible, and also that the evidence sought to be introduced by the question propounded was but part of a conversation. The court allowed the question asked, and stated that the defense was entitled to all the conversation. [7th ground of the motion for new trial.]

The examining counsel then said to the witness, "state all that conversation," and the witness answered thus: Deceased said, "Why Nelms, he carried me in to take a drink with him. I took this cigar. (He had a cigar in his hand at the time.) And then he took me into the back-room of a barber-shop, shut the door, and said, 'Bob, I want to see that power of attorney you have to sell Gordon's interest,' and I said, 'I would not show it under compulsion,' and Cox said, 'I am going to see it before you leave this room,' and I said, 'Ain't you a nice great big rascal here with your knife, when I have not got a piece of steel on me, to try to force me to terms.' And he (Cox) said, 'Go arm yourself, and I will wait for you.' He is waiting for me now." He asked me again for a pistol, and witness said his pistol was at home. That was about all he said to me, and witness began to talk to him, and said, "Alston, there is no need of a difficulty between you and Cox, you are both friends, and let me attend to this matter, and be a mediator. You are

not here to interfere with Cox," and he said, "No!' But he has an idea that I am here to sell him out." Witness said, "You wait, and let me be a mediator," but he did not wait, and got up and started down to the treasurer's office.

As to what transpired in the barber-shop, substantially the same facts as testified to by Nelms, were subsequently proved, without objection, by Howard, a witness for the state, and by Gov. Colquitt, a witness for the defense, on examination by defendant's counsel.

At the treasurer's office, within not exceeding twenty minutes of the homicide, Murphy, from whom deceased borrowed a pistol, over the objection of defendant, testified to the following conversation: "I am certain I didn't notice Mr. Sams; I think most likely I was at the cash-drawer; I am frequently called to the cash-drawer. I occupy the middle room and Renfroe the rear room; I did not notice Sams when he came in. When I walked up Mr. Howard had got in, in the meantime, and Mr. Sams had delivered a message to Mr. Alston, and when I got back to them I heard Sams say he regretted very much to be the bearer of such a message, and he was in hopes very much that he should not be able to find Mr. Alston, then they had some other conversation that I did not understand. Mr. Howard arose from his seat and started to walk in the passage way out, and as he reached the middle door he said, 'don't let us let Alston go down there, Cox has sent after him, and don't let us let Alston go down there,' and I said, 'Of course not,' and he had agreed not to go, but I saw that Alston was excited. In the conversation before, he had sorter cooled off, and we called him and told him he ought not to go. I said, 'You have a family and Cox has one. You say Cox has got no cause for a difficulty, and let him cool off and he will see it.' He said, 'What shall I do?' and I said, 'Send him word that you have reconsidered the matter, and that you will not go, for him to go his way and you will go yours.' He went back and set down on a seat next to Forsyth street, and Sams was in a seat near Renfroe's room.

Alston said to him, 'You go back and tell Mr. Cox that I have reconsidered the matter, and am not coming down there. There is no cause for a difficulty between us; for him to go his way and I will go mine. He attend to his business and I will attend to mine.'"

Defendant's objection was that this was a conversation not in the hearing of the defendant, and in no way connected with the encounter between the deceased and defendant. [9th ground of the motion for new trial.]

The conversation between Sams and Alston, as testified to by Murphy, had already been proved by Howard and Renfroe, witnesses for the state, by the former without objection, and by the latter over objection on the part of defendant, and also by Sams, a witness for the defense, and whilst on the direct examination by defendant's counsel.

From the treasurer's office deceased went to Berron's saloon, about seventy-five or eighty yards from the capitol, on Forsyth street. The capitol is on the corner of Marietta and Forsyth streets, the main entrance thereto being on the latter. The treasurer's office is in the corner of the capital, (on the first floor) having windows opening on each of these streets. What transpired at Berron's will best appear from the testimony of Gov. Alfred H. Colquitt, a witness for the defense, and drawn out by defendant's counsel, as follows:

"I think I left home about three o'clock, or a minute or two after. On my return to the capitol I saw Cox crossing Forsyth street when I reached Berron's. I was seventy-five or eighty yards from him; it took me some four or five minutes to walk from my home to that place. Major Warren was with me when I saw Cox; Cox was walking rapidly in the direction of the entrance of the capitol on Forsyth street. He turned at the corner and went diagonally across the street; I did not see Cox go in; I did not see him any more after that that day. When I got to Berron's I met Alston there. I suppose I met him about the centre of the building; the front of the building I suppose is about forty feet; there are two doors to the building;

I don't know about the windows; he was coming up Forsyth street, I was coming down. There was nothing unusual in his manner; he was walking leisurely. Alston and I were standing there facing towards the capitol when I saw Cox crossing; Alston was standing with his back to the wall and addressing me rather at my side, his face was nearer to the right, towards Marietta street. Alston did not go back with me to the capitol. I left him there. I was detained there about two or three minutes by the conversation with Alston. When I met him he remarked that since he had seen me he had been subjected to a very severe trial. He said that he had met Mr. Cox and Cox had invited him to take a drink, which he declined; that he then invited him to take a cigar, which he accepted, and that they then walked out; I did not pay close attention to whether he said it was in the same room or not. That then they walked together into a back room of some saloon, and that when they went in there Cox closed the door and said to him 'Iwant you to show me that power of attorney from Gordon—have you the power of attorney?' Then he replied, 'I have,' and Cox said 'I want to see it, and I want you to sit down here and write a contract as I tell you under the power of attorney.' Then he replied that he would not be forced to do so. That he had already made some agreement about it and that he could not make any other without dishonoring himself, and certainly would not if such means were used forcibly. That then Cox drew a large knife and told him that he must make that contract. That he expostulated by saying 'you have taken the advantage of me, I am unarmed and you must let me out of this room,'and Cox replied 'I will do so if you will return here in ten minutes.' That the door was unlocked and he came out. That was the conversation he related as having occurred between him and Cox in the saloon. He then said 'I sent word to him that I had reconsidered it and would not go back;' he said he was in doubt what to do; he concluded he would not go and that he felt that he did not know but that it was

his duty to his family that he should take a double-barreled shot-gun and shoot him when he saw him. I told him may be he was regarding the matter in too serious a light; that I hardly thought there would be need of such apprehensions as he supposed. He said, 'No, I am not mistaken, he is bent upon taking my life;' I think he then remarked, I don't know in what connection, perhaps in connection with the using the double-barreled shot-gun, that he had a pistol but that he thought he ought to take a double-barreled shot-gun. He staid there at Berron's, and said, 'I have had no dinner, and came over here to get my dinner,' with a view to explaining why he was there I suppose. When he made this last remark, 'I think he is intent on taking my life,' he called my attention to Cox who was crossing the street, and said, 'there he is hunting for me now with his hand on his pistol.' I thought from my view and the way his arm was bent, that he had his hand on his back hip-pocket, that was all; and I said, 'you go in here and get your dinner and come on; I will go to the capitol and see what I can do about it.' Alston was outside when I left. I did not look back; we parted and I supposed he was going in. I got a glimpse of Cox after that as he passed across the room where the secretary staid up stairs; I went straight up to my office by the Forsyth street entrance, and did not stop anywhere; it was not very long before I saw Cox pass; first Mr. Warren and I parted and I turned into my office, and he into the secretary's office. I told him to tell Mr. Nelms to come to me, and walked into the office and put my hat and cane down, and as I turned I saw Cox pass from the door there and through that into the room of the warrant clerk. Nelms came to me; I told him that Cox had just passed down and I want you to overtake him and prevent any difficulty if there is one likely to occur. There is some quarrel between him and Alston, and I want you to look after that. He said there was a lady in his office with some matter she wanted to lay before me. I said that he must not delay, but go on and overtake Cox;

and he said he would get his hat and go, and went off rapidly. I saw him as he passed, four or five minutes afterwards. I heard the first shot. I went down after the shooting. When I met Alston in front of Berron's and we had the conversation about Cox, I told him to go in there so as to get time, and I wanted him to go in there so that he would feel that he went in there without any idea of dodging or getting out of the way for fear of any one."

Deceased went into Berron's, ate a cracker or two, went out and walked down to the treasurer's office.

Defendant went from the barber-shop to a neighboring saloon, endeavored to borrow a pistol from three different persons present, requested a friend to stand by him, as he was involved in a difficulty, went over to a gunsmith's shop in another portion of the city, bought a pistol, had it loaded and returned.

Woodward, a witness for the state, who was in the gunsmith's shop at the time, making some purchases, testified as follows: "He said something when he went out to the effect that he (Heinz, the gunsmith,) would hear from him soon. I can't be positive that he said these words, but if I had to swear what he said I would swear that he said these words rather than anything else; that is the substance of what he said. I would say that I did not hear distinctly enough, not that I did not recollect. He said, 'you will hear from me soon.' If he did not say that he said other words that amounted to the same thing. I say it is that rather than anything else."

Counsel for defendant moved to withdraw this evidence from the jury upon the ground that the witness had testified, not as to his recollection of what was said by the defendant, but as to his opinion of what he must have said.

The motion was overruled. [8th ground of the motion for new trial.]

On defendant's return from the gunsmith's shop, he met Hodgson and Sams, and one or both went with him to the back room of the barber-shop, where Sams remained but

two or three minutes. Then he went on the message to Alston, with the result as already detailed. In the meantime Nelms came to see defendant with the view of settling the matter in some way, but he declined in a polite way to have any conversation with him on the subject, stating that he was waiting to see a friend by appointment. Sams returned and delivered Alston's message to which defendant replied, "That is all right, but it does not suit me. I will go and see him." He then started towards the capitol. Sams endeavored to stop him, but he pulled away.

As he crossed Forsyth street he was seen by Governor Colquitt and deceased who were then standing in front of Berron's saloon. He went into the treasurer's office, walked rapidly out, and went up to the office of the principal keeper of the penitentiary where he found Nelms engaged with a lady. He said to Nelms that he wished to see him, asked where either Howard or Murphy was, took a seat by the window, and remained a few minutes. From that window he commanded a view of the crossing over which deceased passed on his return to the capitol from Berron's saloon. Nelms said to him that he was drunk, or something was the matter with him. He suddenly got up, went through the office of the private secretary of the governor, through that of the warrant clerk, and went down to the treasurer's office. The governor, who had just arrived at his office from Berron's, saw him pass, and sent his secretary immediately for Nelms, and told him to follow defendant and prevent a difficulty with deceased, as there was a quarrel pending between them. Nelms got his hat and followed him into the treasurer's office.

This office is composed of three rooms or subdivisions. The door by which one enters opens into a narrow passage with a high counter on the right and a partition wall on the left. Into this partition wall is a door opening into a water-closet. At the end of the passage-way is a glass door which closes itself by a spring unless hooked back. Passing through this door one enters a room 12x13 feet, with three

doors to it besides that of entrance, the first to the vault on the left; the second, immediately opposite to that of entrance, leading into another room, and the third to the right leading into the same back room near the Forsyth street wall. In the corner near this last door is the stove. The desk of the treasurer is located in the back room, so that from his seat in a revolving chair he can see through the last door; in fact, his chair is right at that door. Immediately opposite to his chair is the passage way behind the counter, to the money-drawer, etc. In the center room are chairs and a table, leaving but very little unoccupied space.

As defendant came down the steps towards the treasurer's office, deceased was seated in the middle room. He had a few minutes previously said to Renfroe, "This is an awful thing to have a man hounding you in this way." Renfroe said, "Did not you meet Cox?" He replied, "No! he has gone up-stairs hunting me." Then it was that Peter (a colored boy employed about the capitol) said, "Col. Alston, Cox is coming down the steps now," and deceased said, "Go and fasten that door," and Peter went to do so, and met Cox, who passed him and came into the room. (Renfroe had testified on cross-examination that when deceased came in he asked him if he did not meet Cox and he replied to him—here the witness stopped, and when examined in rebuttal by the state, gave the above conversation. Upon his direct examination, he being the first witness for the state, several times he was on the eve of giving this evidence, but on objection, counsel for the state did not then press the examination any further.)

Counsel for defendant objected to the above conversation between deceased and Renfroe because not in the presence of the defendant, and because had five or ten minutes before the rencounter. The objection was overruled. [6th ground of the motion for new trial.]

They also objected to the question propounded to Renfroe, which drew out the answer as to the sayings and actions of Peter, to-wit: "What was the reason that Colonel

Alston told Peter to shut the door?" on the ground that the answer would be a conclusion which could only be drawn by the jury after hearing the facts, and because this conversation between Peter and Alston was not in the hearing of the defendant.

The court said let the witness tell what he saw and heard, and the answer went in. [5th ground of motion for new trial.]

As defendant entered the middle door, with his right hand upon his pistol, which was so far drawn from his pocket as to be partially exposed to view, deceased rose from his chair and turned to meet him. Defendant said, "You promised to meet me down the street and settle this thing, why did not you do it?" Deceased replied, "Because I have reconsidered the matter and do not want to have any difficulty with you." Defendant said "I will brand you" something or other. Renfroe told them they could not have a difficulty there. Defendant answered, "very well," took hold of deceased's arm and said, "Come out and let us settle this difficulty outside." Deceased pulled back and would not go. Defendant moderated his tone and sat down in front of deceased. He said to deceased that he had wronged him; had not treated him right, and he was going to make him do so. Deceased said, putting his hands upon the lappels of defendant's coat, in almost a playful manner, "Cox, let us stop this; there is no use of having a difficulty; I don't want to have any difficulty with you; I don't want to kill you, and don't want you to kill me." Defendant said, "There is no danger of your killing me," rising from his seat and unlatching the hook which held open the middle door, and it swung to. He then said, "This thing has got to be settled here now." Renfroe put his hand on defendant and said he must have no fight in his office. Defendant quieted down again, and Renfroe sat down by his desk and commenced writing. Nelms then came rapidly into the room, and defendant again got up. Renfroe beckoned Nelms to him and said, "Don't let these men fight; they

have been quarreling." About the time of Nelms' entrance, defendant rose from his seat, and as Nelms walked back from Renfroe's chair, defendant turned and took hold of the door knob with his left hand, exposing to full view the cylinder of his pistol which he held in his right hand. Deceased said, "Cox, are you going to shoot me, are you going to shoot me now?" at the same time rising from his chair, unbuttoning his coat, and walking towards the door of the back room at which Renfroe was seated, as if to pass in. As he rose defendant drew his pistol entirely from his pocket and walked on a parallel line to that of deceased. This threw Nelms between them. As deceased passed Nelms he looked over towards defendant, wheeled, drew his pistol and fired. Defendant fired almost simultaneously. Deceased stepping to his right, continued firing with great rapidity, being armed with a Tranter self-cocking weapon, enabling him to shoot as rapidly as he could pull the trigger. Defendant seemed astonished at the rapidity of the shots, kept springing to his right, holding up his left arm and hand to protect his head. The fourth shot passed through his left wrist, into his mouth and out through the back portion of his cheek, carrying away some of his teeth, and imbedding one in his tongue. After deceased's fifth shot, defendant straightened himself up from his crouching attitude which he had occupied during the firing, extended his right arm at full length, and blew the brains out of deceased, who stood facing death with an empty pistol in his hand. As soon as the tragedy was thus completed, defendant dropped his pistol saying, we are both dead men, and sank down into a chair. Whilst two other bullets went through his clothes he was only wounded as above described.

The evidence in the case was voluminous, and sometimes conflicting as to minor details, but it is believed that the above report presents a fair view of the testimony, certainly the view that was taken of it by the jury.

The court charged the jury as follows:

"*Gentlemen of the Jury:*

"The court will now deliver to you the law for your guidance and direction in reaching a verdict according to the evidence. In the beginning, I carefully call your attention to the statement that the court neither desires nor intends to express or intimate any opinion touching the evidence or touching any alleged or contested fact in the case. The court will state certain legal propositions to you in the alternative form, that is, both ways, and it will be for you to say in which direction, or in what direction the evidence points. Should you deem in any expression dropping from the bench that you detect any leaning in the mind of the court one way or the other, know that you are mistaken. It is the duty of the court to deal with the law; forth from the conscience of the court the law goes to you. The facts you receive alone from the evidence. You judge of both the law and facts, and they lead you to the truth.

"I will presently read and deliver to you certain sections of the Code. They relate to the definition of crime, the question of intention, and the law of homicide. I shall read these sections through to the end, without stopping for explanation. After reading them the court will make some further comment. These sections are couched in language singularly terse, expressive and forcible. Every word is pregnant with meaning, and it may be doubted whether any attempt at explanation or comment would not rather obscure than brighten the meaning, and if you find that the court does not comment or enlarge on all or all parts of these sections, the court desires you to understand that such of them or such parts of them, if any, as are applicable to the case, but not further specially noticed in the charge, are thus omitted from further mention for the reason that the court deems them sufficiently clear and plain as I now read and deliver them to you.

"Sections 4292, 4293, 4319, 4320, 4321, 4322, 4323, as amended by act of 1878, 4324, 4325, 4327, 4330 to and including the words 'commit a felony on either,' 4331, 4333, 4334, 4335.

"If you find from the evidence that the prisoner at the bar did, in the peace of the state, in this county, on the occasion, with the weapon and in the manner described and set out in the indictment, with malice aforethought, either express or implied, unlawfully kill the deceased, Robert A. Alston, and if the prisoner was then and there a person of sound memory and discretion, the offense of murder would be made out; otherwise the offense of murder would not be made out.

"A person would be presumed to intend the natural consequences of his acts. A person would be presumed of sound memory and discretion unless the contrary appear.

(1.) "(If two persons have a dispute about a matter of business, the law would not sanction a deliberate, premeditated and intentional resort on the part of either of them, or both of them, to deadly weapons for the

mere purpose of prosecuting or settling such dispute; and if pending such difficulty between them they mutually agree to separate and procure arms and to again meet for the purpose of engaging in a fight with deadly weapons, and if they do separate and each seeks and procures a deadly weapon, and they accordingly and by such mutual and previous design again and intentionally meet to fight with such weapons, and in a rencounter thus brought on, if one of them kill the other, the law would not justify the slayer, no matter which of them was right or which was wrong originally in such business dispute, and no matter which of them made the first proposal so to arm for such hostile purpose, and no matter which fired the first shot or initiated the attack when the rencounter began; and it would be either murder or manslaughter in the slayer, according to the evidence, under the principles of law applicable thereto.)

(2.) "(It would be unlawful for two persons to deliberately conspire, or agree together to procure deadly weapons and meet again to fight therewith, and if in the heat of blood they do so agree, it would be the duty of both of them and each of them to heed the voice of reason and humanity if there was an interval sufficient for that voice to be heard, and to reconsider the matter and decline such hostile meeting, and if one of them does so reconsider and decline such meeting and the same be communicated to the other, it would be the duty of that other to acquiesce therein, and if that other refuse so to acquiesce and persists in an original hostile purpose, and if pursuant thereto, he, armed with a deadly weapon, seek his adversary with a deliberate intention of bringing on such difficulty and of using such weapon therein, notwithstanding the other's refusal, and if he does so bring on the contest, and in such difficulty he slay his opponent with that weapon, it would be murder in such slayer.)

(3.) "(If at the time of the rencounter the prisoner was armed with a deadly weapon, and was the aggressor and the assailant, and if he by his conduct made it necessary for the deceased to defend his own life, if the prisoner manifestly intended or endeavored then and there to commit a serious personal injury on the person of Alston amounting to felony, then the deceased would be justified in defending himself, and even in firing first if he could, and the prisoner could not plead any danger, no matter how imminent the peril he may have been placed in by such countervailing attack, for his justification. If the prisoner did thus, in his own wrong, unlawfully bring about a necessity for deceased to fire upon him, the principles of self-defense would not justify the prisoner in meeting that necessity by killing the deceased, but the law would attribute the killing to the original malice, and such killing would be murder.)

" But if upon a sudden occasion two persons fall out and presently fetch weapons and mutually willing and consenting, fight therewith, and one of them slay the other in such sudden rencounter, then if the

slayer acted without any mixture of deliberation whatever but under the influence of that sudden violent impulse of passion, supposed to be irresistible, then his offense would be voluntary manslaughter only, and not murder.

"Or if the prisoner did not intend originally, or had not entered into any such purpose to fight with deadly weapons or to attack deceased therewith, or even though having such purpose at the beginning, or at any time, if he had in good faith abandoned such intention, and was not seeking deceased for such purpose, and the parties were again brought together without hostile design on the part of prisoner, and the quarrel unexpectedly to prisoner renewed, and, upon some new provocation, they suddenly draw weapons and mutually engage in a fight therewith, each consenting and willing so to draw and suddenly fight, and each knowing that the other is so willing and consenting, and if in a rencounter thus brought on, the prisoner slew deceased, it would be voluntary manslaughter only, and not murder. But if prisoner did not act in the fatal crisis upon any sudden provocation, or cause of defense, but from a previous and deliberate intention to bring on a fight with deadly weapons, and amounting to malice as before explained, and prisoner killed deceased under the same, then the law would not thus grade the offense from murder down to manslaughter. I have read and submitted to you the law of involuntary manslaughter of both kinds, and you are authorized to consider and pass upon and be guided by the principles there laid down, if applicable, and so far as you find the same to be applicable under the evidence.

(4.) "(The law does not prescribe any particular duration of time in which an intention unlawfully to take life or to do a criminal act resulting in death shall subsist in the mind in order to constitute malice. There must be deliberation in order to make express malice, that is a succession in mental action—the unlawful intention—and then, following after the formation of that intention, the execution or carrying out of the same. If there was time for deliberation, if there was an interval between the assault or provocation given and the homicide, sufficient for the voice of reason and humanity to be heard, under the circumstances, in the conscience of a reasonable man, then it would be the duty of the prisoner to hear that voice; and if he had, and persisted in, an unlawful purpose to kill, through or during such an interval, there would be express malice; or, if no considerable provocation appear, and if all the circumstances of the killing show an abandoned and malignant heart, then malice would be implied. But if there was not such sufficient interval, there could be no express malice. If there was considerable provocation, or if all the circumstances do not show an abandoned and malignant heart, then malice could not be implied. The existence or non-existence of malice is, like all other such matters, a question for the jury to be judged of and determined by the evidence.

"If the prisoner was not actuated by such fixed purpose to engage in and bring on a fight with deadly weapons, as I before described, or though previously having such purpose, if he had abandoned it, and if the prisoner was not the aggressor or the assailant, or if he in reality made no attack on deceased, and yet the deceased made an attack on him, the prisoner, with a deadly weapon, when there was no necessity to do so, then the prisoner would be justified in defending himself, even by taking the life of the deceased, and he would be guilty of no offense, and must be acquitted.)

"At the hazard of repetition, the court extends or further explains some of these principles."

(The request to charge, made in writing by defendant's counsel, the court altered and amended, and delivered as follows :)

"First. Every homicide is not unlawful, and, as before stated, homicide is of three kinds, murder, manslaughter and justifiable homicide.

"Second. There can be no murder without malice, express or implied. One person may kill another against whom he entertains malice and yet not be guilty of murder, and whenever the circumstances of the killing would not amount to murder, the proof even of express malice would not make it a case of murder. It is in all cases for the jury to say whether all the elements necessary to make out guilt affirmatively appear in the evidence. If any of such essential elements be wanting, either malice or any other, an acquittal or reduction in the grade of offense must follow. If all be present a conviction would be the lawful result.

"Third. It would be justifiable homicide for one person to kill another 'in self defense or in defense of his person against one who manifestly intends or endeavors by violence or surprise to commit a felony on his person.'

"Fourth. To unlawfully discharge a loaded pistol at another within striking distance, and especially within a few feet, would be a felony, and that in this case, if the jury are satisfied from the evidence that Alston fired on the prisoner when he was under no necessity to do so for his own defense, and continued to fire at him (prisoner), then he, the prisoner, would have the right to return the fire, and to shoot and kill Alston to save his own life.

"Fifth. If the jury believe from the evidence that Alston fired upon Cox when it was unnecessary to do so for his, Alston's own defense, and if the circumstances attending the firing by Alston were such as to excite the fears of a reasonable man that the deceased was manifestly intending to shoot Cox, and if Cox, acting under the influence of those fears and not in a spirit of revenge, shot and killed Alston, it would be justifiable homicide, and he, prisoner, ought to be acquitted. But, as before stated, if the prisoner wrongfully provoked the difficulty, and wrongfully made it necessary for Alston to fire on him, and

if any necessity prisoner may have been placed under to kill deceased was a matter of (prisoner's) own wrongful creation, then the principles of self-defense should not justify prisoner.

"Sixth. Should the homicide appear to be justifiable, the law declares that the person indicted shall upon the trial be fully acquitted and discharged.

"The prisoner begins the trial with the presumption of innocence in his favor, and this presumption remains with him to the end or until overcome by proof. The burden of proof is on the state to prove every material allegation throughout and to the end of the case, and upon all disputed questions and issues in it. In criminal cases a higher degree of certainty in the evidence is required than in civil cases. In a criminal case mere preponderance of evidence would not be sufficient to carry conviction upon any contested fact or question in issue. The evidence must be sufficient to carry in the mind of the juror conviction beyond all reasonable doubt. But a moral and reasonable certainty up to this standard would be sufficient. If the presumptions of innocence, and in favor of the prisoner, be overcome by proof up to this standard, then the conclusions carried by such proof would prevail over such presumption or presumptions.

"If upon the whole case or any essential element necessary to carry the case or make out guilt against the prisoner, you have a reasonable doubt, the law requires that you give him the benefit of that doubt and acquit him or reduce the offense to some grade lower than murder, as the nature of such doubt may require. The doubt here referred to is not a fanciful doubt, such as the mind would have to strain at, but a reasonable doubt rising naturally in the rational mind; this would be the doubt of the law; nothing less would be.

"A writing relative to testimony alleged to have been given by the witness, Sams, on a former occasion was sent down to you not as original evidence, but only in connection with the testimony delivered on the stand here, and you will not look to that document as affording any inherent evidence of the truth of its own statements; but you look to it only so far as the evidence delivered orally here by Sams or other witnesses may bear on the question of whether that witness made any such contradictory statements, and in determining the effect of the same if there be such contradiction. But under the rules of law, as the writing itself does not properly go out with you to your jury-room, you charge your mind with it and remember it along with the other evidence in the case.

"It would be the duty of the jury to adopt any reasonable hypothesis that will explain and reconcile the testimony, so as not to impute intentional perjury to any witness. If in any particular or particulars the testimony may not be thus reconciled, you would give credence to that which most commends your belief in its truth.

"If a witness swear that which is false wilfully and knowingly, and

intending to speak that which is false, knowing it to be so, then his testimony ought to be discarded altogether, unless, or so far only, as corroborated by others and credible evidence, or by circumstances.

"The court does not say or intimate that any witness on either side has thus sworn falsely. All questions of conflict in the evidence and of weighing and passing upon the evidence, each witness in the case, the manner in which he testifies, the matter of his testimony, bias, prejudice, feeling, or the absence of these, are matters exclusively for the jury to inquire and pass upon under the testimony. In the testimony find the true facts and base your verdict on them.

(5.) "(A witness may be impeached by disproving the facts testified to by him, or by proof of contradictory statements previously made by him as to matters relevant to his testimony and to the case. A witness impeached by either method may be sustained by proof of general good character. The whole question whether any witness or witnesses be impeached or sustained, and the effect of the same, are, like all other questions of fact and of evidence, to be determined by the jury. There is nothing in this case but the law and the evidence. By these and these alone your verdict must be found. In the sacred precincts of the court house and the jury-box impartial justice must prevail. Take up this evidence, go through it all, fairly, calmly, without fear, favor, affection, reward, or the hope thereof, without bias or prejudice, with a mind open to the truth and willing to do right, and in that evidence alone under the law find the truth, and let your verdict be based on that truth only because it is the truth, and because both your oath and your duty require you to do so.)

(6.) "(The prisoner makes his statement before you not under oath. Such statement is not evidence to such extent as by itself would impeach the witnesses. If in any respect the statement conflict with the evidence, the statement should yield to the evidence. You judge of it in the light of reason, common sense, humanity and justice, considering the matter of such statement, the manner of its delivery in all its relations and in all his relations to the case and to the evidence. Reminding you that you have sworn to render a true verdict according to the evidence, the court distinctly tells you that the law vests you with a wide discretion in relation to the statement in question, and it would be your province to give the prisoner's statement just such weight, but such only, as you think right, be it never so much or never so little.)

"I read to you that clause of the Code regulating the punishment for murder as lately amended, and as it now stands in the law. Of course, if you do not find the prisoner guilty of murder, you will have no occasion to consider or pass upon the question of his punishment. But if you, under the law and the evidence, find the prisoner guilty of murder beyond any reasonable doubt, then it would be your province and your duty to say whether the punishment shall be by death or by confinement in the penitentiary for and during his natural life,

and the court will have no discretion in that matter after you have passed upon it. If you find in the case circumstances of mitigation not sufficient to bring the offense below murder and yet sufficient to lead you to the conclusion that such perpetual imprisonment would be an adequate punishment under the circumstances, and sufficient to vindicate the justice and sanction of the law, then you ought to make such recommendation, and thereby spare his life. But if you find no circumstances of mitigation, and further find it to be your duty to refuse such recommendation, then the law would leave the defendant to the penalty of death.

"If you convict the prisoner of murder, and further find it your duty to refuse such recommendation, then the form of your verdict would be: 'We, the jury, find the defendant guilty,' and that would mean guilty of murder—the highest offense charged in the bill of indictment, and the death penalty would follow. If you find the prisoner guilty of murder, and further find it your duty to fix upon the lesser penalty, then the form of your verdict would be: 'We, the jury, find the prisoner guilty and recommend that he be punished by confinement in the penitentiary for life,' and thereupon the court would give judgment according to that. If you find the prisoner not guilty of murder or guilty of that offense not made out beyond all reasonable doubt, you would acquit him of it, then you would pass upon the question of voluntary manslaughter, and if you find the prisoner guilty of that offense beyond all reasonable doubt, you would say: 'We, the jury, find the prisoner guilty of voluntary manslaughter.' Or if, either upon the evidence or the want of evidence, or upon a reasonable doubt, not guilty of manslaughter, and if you find the evidence requires it, you would be authorized to convict of involuntary manslaughter of either kind, and you would so express it in your verdict. If you find the prisoner not guilty, or guilt not made out beyond all reasonable doubt, then you would say: 'We, the jury, find the prisoner not guilty.' In either event let the verdict be written on the bill of indictment, date it, sign it by your foreman, and bring it into court."

The jury found the defendant guilty, and recommended that he be punished by imprisonment for life in the penitentiary. He moved for a new trial on the following grounds:

1. Because the court erred in overruling the written motion for a continuance.

2. Because the court erred in overruling the challenge to the array of jurors.

3. Because the court erred in refusing to allow defendant's

counsel to prove by Albert Howell, a juror put upon the defendant by the state, that he, the said juror, had formed and expressed an opinion, and still entertained a fixed opinion as to the guilt of the defendant from having read a report of the evidence taken before the coroner's inquest and published in the Atlanta *Constitution*, a newspaper published in the city of Atlanta, in said county, and other articles published in said paper in relation to the shooting of deceased by defendant, said juror having been put upon the court by the defendant to be tried as to his competency, said defendant being thus compelled to challenge said juror.

4. Because the court erred in refusing to allow defendant's counsel to prove by D. R. Morris, a juror put upon the defendant by the state, that he, from having read what was published as the sworn evidence had upon the coroner's inquest, in the Atlanta *Constitution*, a newspaper published in said county, formed and expressed an opinion as to the guilt of the defendant, and that he now entertained that fixed opinion, and refused, upon the request of counsel for the defendant, the court trying the competency of the juror, to ask of the juror any other question touching his competency than those prescribed by the statute.

5. Because the court erred in allowing counsel for the prosecution to ask Renfroe the question, "what was the reason that Col. Alston told Peter to shut the door?"

6. Because the court erred in admitting the evidence of Renfroe as to the conversation had with Alston immediately before the homicide.

7. Because the court erred in admitting the declarations of deceased to Nelms, as above reported.

8. Because the court erred in refusing to withdraw from the jury the evidence of Woodward.

9. Because the court erred in admitting the conversation between deceased and Murphy, and between deceased and Sams, as testified to by Murphy.

10. Because the court erred in allowing, over the objection of defendant's counsel, the state to read in evidence

what purported to be the evidence of M. W. Sams, a witness who had been sworn for the defendant, taken before the coroner's inquest upon the body of the deceased, R. A. Alston, the objection of defendant being that it was not sufficiently shown that the said M. W. Sams had sworn before the coroner as appeared from this written report of his evidence, and that he could not be impeached by such a written report of his evidence.

11 to 16. Because the court erred in instructing the jury as set forth in divisions marked (1), (2), (3), (4), (5) and (6) of the charge as above reported.

17. Because the verdict was contrary to law.

18. Because the verdict was contrary to the evidence, and decidedly and strongly against the weight of the evidence, and without sufficient evidence to support it.

The motion was overruled, and defendant excepted.

In certifying the bill of exceptions, the court commented upon the grounds in substance as follows:

At the time the motion for continuance was presented and argued, all of the prisoner's counsel of record were present. His, the prisoner's, appearance was that of reasonable health. The trial which ensued was protracted through six or seven days, and the court-room greatly crowded. The prisoner displayed activity when making his statement, and at no time showed, so far as the court saw or knew, manifestations of illness or fatigue. He occasionally, or his counsel for him, asked and obtained leave to retire a few minutes to a jury-room to apply a lotion or attend to his hurt in the mouth. This was the only complaint made. The witness, General J. B. Gordon, came into court at an early day in the trial, and was sworn with other witnesses, but not put on the stand. The court had these facts in mind when exercising discretion, and ruling on the first ground taken in the motion for new trial.

In connection with the challenge to the array, the defendant's counsel produced and read to the court the order of the presiding judge appointing James R. Wylie a jury com[illegible]

The jurors Howell and Morris answered all the statutory questions so as to make them competent, and were put upon the prisoner. The court permitted various questions to be asked them as to residence, who of kin to, whether one of them had an interest in the *Constitution* newspaper, etc. But on objection made the court ruled that the statutory questions were exhaustive as to any matters covered by them, and declined to ask or permit any other questions seeking further to sift the conscience of the jurors to be asked them. There was no formal attack made on either juror to prove their answers or either of them untrue. This was disclaimed. The offer was to put them respectively on the court as trier, and to ask, or have the court ask, the questions stated in the 3d and 4th grounds.

As to the matter in the 6th ground he refers to the brief of evidence for any needed correction as to the time, place, and circumstances under which this conversation took place.

As to the matter of the 7th ground, this was part of a conversation, the other portion of which had already been given in by defendant.

The 8th ground is to be considered in the light of Woodward's entire testimony.

As to the report of Sams' testimony before the coroner's inquest, the document was not read at the time formally. Parts of it were afterwards used and referred to in argument. Neither side made any request, or invoked any instruction to be given to the jury on the subject, but the court did instruct them as set out in the general charge. The writing itself was never delivered to the jury.

The court, of its own motion, charged in writing, which was filed with the record and the same made a part thereof, and those grounds of the motion which relate to the charge are to be taken and construed in the light of the same.

D. P. Hill & Son; Gartrell & Wright; Candler & Thomson; D. F. & W. R. Hammond; J. A. Billups; R. S. Jefferies; W. R. Hodgson, for plaintiff in error.

B. H. Hill, Jr., solicitor-general; Hopkins & Glenn; Patrick Calhoun; Duncan Twiggs; Sam. Hall; Hulsey & McAfee; Howard Van Epps, for the state.

Bleckley, Justice.

1. The motion for a continuance was in writing, and a copy of it is in the record. There were three grounds, two of which related to the absence of witnesses. Only the third was argued and insisted on here, the other two being abandoned. The matter of this third ground is fully set forth in the reporter's statement. There was no suggestion in the motion that at the time of submitting it, or at the time of entering upon the trial, the accused was unable to confer with his counsel, or to undergo the labor and excitement of conducting his defense. If he had wanted a continuance because of his then condition, physical or mental, he could have applied for it on that ground, and if he had done so, the court may have granted it. Certainly there was no abuse of discretion in not granting a continuance upon a ground not presented in the application. Had it been presented, we may be sure that the court would have exercised a sound and just discretion concerning it, and not ruled to trial a man whose condition was not such as to enable him to undergo the ordeal with needful strength, composure and vigilance. Nay, more; we may assume in favor of the humanity of the presiding judge, that if he had been aware, or even believed, that the accused was not in a fit condition to be tried, he would, without any motion whatever, have declined to bring on the trial so long as the unfitness lasted. The sole error complained of in the bill of exceptions is, that the court erred in overruling the motion for a new trial; and when we look to the motion for a new trial, we find in it no point touching the failure to continue, except upon the refusal of the court to grant the continuance on the motion for the same "submitted in writing." So far as appears, there was no ruling whatever made below on the then present fitness of the accused to be put on his

trial. The motion submitted in writing raised no such question, but was confined to the absence of certain witnesses, the existence and causes of excitement and prejudice in the community, and the alleged previous inability of the accused, in consequence of his wounds, his confinement in jail, and his bodily and mental suffering, to make the necessary corrections and meet and overcome the public excitement and prejudice and to confer fully with his counsel in relation to his defense. Not a word did the motion say or suggest as to his then inability or unfitness to do anything. It said "he has been unable," etc., not adding that he is still unable, or anything equivalent thereto. In this condition of the record, we are bound to presume that in so far as it was the duty of the court to see that the accused was in a fit state, bodily and mentally, to be tried for his life, that duty was faithfully performed.

With regard to public excitement and prejudice, we see nothing to take this case out of the general rule long since laid down here authoritatively, to the effect that these have ceased to be cause for a continuance. 24 *Ga.*, 297; 48 *Ga.*, 116; 60 *Ga.*, 257. It seems quite immaterial that the means of stirring up the excitement and prejudice were inflammatory newspaper articles. Why should the condition of the popular mind be treated as more dangerous to the accused when wrought up against him by the press, than when inflamed to an equal degree by any other agency? Is the press, as such, to be recognized as a power which can retard the trial of persons accused of crime? Newspapers are free to publish what they please, so that they keep clear of the law of libel, and if they succeed in impressing the public mind unduly against an alleged criminal, are the courts to wait for the storm they have raised to subside, though the presiding judge should be convinced that there is no real obstacle to obtaining an impartial jury and having a fair trial? Surely it is unsound to make any distinction, as matter of law, between excitement produced by the newspapers and that produced by other means. In a county

of forty thousand inhabitants, it is in a high degree improbable that an impartial jury cannot be had, one month and a half after a homicide has been committed, to try the perpetrator. And were a contingency of the kind to occur, the appropriate remedy for it would not be an ordinary continuance until the next term of the court, but a change of venue to another county.

Upon the subject of the prisoner's ability while in jail to confer fully with his counsel and prepare for trial, notwithstanding his injuries and his physical and mental suffering, the court below, on the counter-showing made by the state, was warranted in coming to the conclusion at which the judge arrived. To overrule the motion for a continuance, in so far as it rested on this branch of the showing, was strict practice, and we should have been better satisfied if the judge had been more liberal; but we must try his conduct by the law, and not by our personal feelings, and so doing, must remember that the application for a continuance was addressed to his sound discretion, and that he was in a better position than we are to discern the precise line upon which his discretion ought, in a doubtful case, to move. The question for us is not whether we should have exercised his discretion as he exercised it, but whether he abused it. Being of opinion that he did not, but that he only pursued a strict practice instead of the more liberal practice which we ourselves, if in his place, would have preferred, we, as a reviewing court, must decline to interfere. Code, §3531; 1 *Ga.*, 213; 10 *Ib.*, 86; 14 *Ib.*, 6; 26 *Ib.*, 276; 38 *Ib.*, 491; 46 *Ib.*, 209; 47 *Ib.*, 598.

2. For the reasons indicated in the second note of the syllabus the challenge of the accused to the array was properly overruled.

3. When acting strictly in the capacity of trier, there is no doubt that the presiding judge may decline to have the juror further examined as to his competency, and may look alone to the *aliunde* evidence that is adduced. Code, §4682; 9 *Ga.*, 121; 21 *Ib.*, 220, 227; 32 *Ib.*, 672.

4. The witness, Woodward, was not certain that he heard correctly what the accused said after buying the pistol, but he undertook to testify to the substance of the remark, and he gave his understanding of what it was. His evidence was not inference, but fact, and his doubt upon the distinctness of his hearing did not render his testimony inadmissible, but only detracted from its force and value. He drew upon his own mind, not for any conclusion which he had arrived at from the words used, but for the sense and substance of those words as his ear reported them to his mind. Trying his accuracy by other evidence which subsequently came in, there is great probability that he was mistaken, and that the observation really made was different from his version of it; but this was for the jury to deal with in weighing the evidence as a whole, and not for the court in ruling upon its admissibility.

5. The sole objection made to the written evidence of the witness, Sams, as given at the coroner's inquest, and written out from the stenographic notes, was that "it was not sufficiently shown that the said (witness) had sworn before the coroner as appeared from this written report of his evidence, and that he could not be impeached by such written report of his evidence." It was proved by the stenographic reporter that Sams did swear before the coroner as he was represented in the written report to have sworn, and Sams was duly examined upon the various contradictory passages before they were read to the jury to affect his credit. His attention was properly called to all the alleged discrepancies, and full opportunity was afforded him to explain. If the report was correct, as the reporter testified it was, we see not why it could not be used to impeach him. The argument made here against the admissibility of more of the writing, or its contents, than the particular passages which embraced the discrepant matters, is not within the scope of the objection which we have recited above, and is thus irrelevant. The objection did not raise the question of how much of the contents of the writing ought to have been submitted to the jury.

6, 7. Before proceeding to discuss the admissibility of the declarations and conversations referred to in the 5th, 6th, 7th and 9th grounds of the motion for a new trial, it is necessary to get a correct standpoint from which to consider them in reference to the question of whether or not they constituted a part of the *res gestæ*? To do this requires a survey of the hostile enterprise which had its inception during the private interview of the parties in the back room of the barber-shop, and of the several steps which each party took to advance or retard the collision which that enterprise contemplated. That there was a hostile enterprise admits of no doubt, and that it was of a criminal nature, involving a concerted and premeditated rencounter with deadly weapons, is equally clear. In his statement made to the jury on the trial, the accused gave this account of it, as a part of his recital of what occurred in the back room of the barber-shop: "Then I asked him, 'Come, Colonel, let us sit down here and settle up this matter between us and close up our business now.' He said no, but said, 'Will you go and arm yourself and fight me?' and I said 'yes, I would fight him any way he wanted to, but let us settle our business first.' He said, 'No, you have promised to fight me,' and I said 'if that was necessary I would fight him in any way he chose, and cut it out or shoot it out.' He said, 'Then go and arm yourself and I will do the same.' . . . . . Colonel Alston said, 'You have agreed to meet me here and fight me; now go;' and as he got to the door, he took out his watch, and with it in his hand he said, 'Meet me here in three minutes.' He went out; and I went out, and into Pause's saloon, thinking, as it was a bar-room, and knowing that they usually kept a pistol about such places, that I would get one there." This bar-room was two doors from the barber-shop, and there, according to the evidence of his own witnesses, he inquired for a pistol of three several persons; one of whom he took aside, and on being asked by him what he wanted with a pistol, he replied that he had to meet a man in two minutes. Being asked who it was,

he answered, "Bob." His friend saying, "You are not going to fight Bob Alston?" his reply was, "Get me a pistol, you are talking to a dead man." Failing to procure any pistol at the bar-room, he went to a gun-store, and there bought one and had it loaded. Having done this, he returned to the bar-room, and was heard to say to Hodgson, an old friend of his, "Now I am ready, let's go." He and Hodgson repaired together to the barber-shop and entered the back room, the same in which the hostile meeting had been agreed upon and in which it was to take place. A conversation at once ensued, which Hodgson details thus: "He said, 'I want you to stay right here.' I asked him what for, and he said he had a difficulty with Alston and he wanted me to stay there and see it. I asked him for some explanations, and he said he had no explanations to make, and he wanted me to stay and I would see; and I said, 'That is very strange, that you would bring a friend of yourself into a place to see a difficulty and never give him any explanations about it?' and he said for me to stay there and I would see—that Alston would be there after awhile." At this stage of the conversation, Sams, another witness for the defense, entered, and he too tried to find out what the trouble was, but apparently without success so far as Hodgson could understand. Hodgson proceeds: "I only heard that there was to be some settlement made, but not what it was. I learned from this conversation that Alston had been in there before, but I could not tell what the difficulty was about. I understood from him that Alston had told him, Cox, to meet him there in two minutes, he might have said ten, and he pulled out his watch and said, 'It's time now.' I saw he was excited, and I said, 'He will come, anyhow; that he was a man of his word, and if he said he would come he would do it.' I tried to get him to wait for him, say, ten minutes, and he noted the time, and told Sams to go and find Alston and tell him that he was there waiting for him according to agreement." Sams and Hodgson withdrew together, the former going out to bear the message to Alston, and the

latter stopping in the front room of the barber-shop. The accused remained in the back room. Presently, Nelms, (another of his witnesses) principal keeper of the penitentiary, entered the front room from the street, and called for an interview, which the accused declined, saying he was "waiting for a friend." After Nelms left, Sams returned, and reported Alston as having said he had reconsidered the matter and would not meet the accused, and that for the latter to attend to his business and he, Alston, would attend to his. On hearing this report, the accused departed to seek for Alston, saying something to the effect that it was all right, but it did not suit him, and that he would go and see him. He went directly to the capitol, looked in at the treasurer's office, was understood to inquire there for Murphy, who was a clerk in that office, went up-stairs to the office of Nelms, inquired there for Murphy or Howard, most probably for Howard, seated himself for a very brief time, then rose and hurriedly withdrew, and descended to the treasurer's office. There he found Alston, who had come in, for the last time, whilst the accused was upstairs. He accosted Alston with this language: "You promised to meet me down the street and settle this thing, why didn't you do it?" Alston answering that he had reconsidered the matter and did not want to have any difficulty, the accused rejoined, "I will brand you." Further conversation ensued, shots were exchanged, each party using the pistol which he had procured for the appointed meeting at the barber-shop. Alston was killed and the accused severely wounded. On the element of time, the evidence indicates that the homicide took place within forty-five or fifty minutes after the agreement to fight was entered into; there is scarcely a doubt that it was within an hour, and it is not very improbable that half an hour would cover the whole of the interval. The building in which the fight took place, and that in which it was to take place by appointment, are both upon Marietta Street, and are only about 150 or 200 yards apart.

Having, in the light of the evidence, traced the accused from the beginning to the ending of the criminal enterprise,

let us follow the deceased in the same way. After leaving the barber-shop he first appeared at the office of Nelms, and endeavored to borrow a pistol. There the conversation occurred to which Nelms testified, and the admission of which in evidence is complained of in the 7th ground of the motion for a new trial. From there (Nelms soon following) he went down stairs into the treasurer's office, where he met with Howard and Murphy, and where Renfroe, the treasurer, on his return from dinner, found him. Here he procured a pistol, and here he received, through Sams, the message which the accused sent from the barber-shop, and made his reply to it. A conversation in which Howard, Murphy and deceased participated resulted in shaping this reply, and in communicating it to Sams for oral repetition to the accused. It is this conversation as testified to by Murphy that is objected to in the 9th ground of the motion for a new trial. From the treasurer's office he went across Marietta street to Berron's on Forsyth street, and there met and conversed with Governor Colquitt. Whilst this conversation was in progress, the accused passed up Marietta street on his way from the barber-shop to the capitol. Separating from Governor Colquitt, the deceased went into Berron's, partook, during a stay of two or three minutes, of a slight lunch, and then returned to the treasurer's office and sat down. A brief conversation between him and Renfroe ensued, and this is the matter of complaint in the 6th ground of the motion for new trial. A step was heard approaching, and Peter McMichael, who was in the room, announced that it was Cox, and deceased ordered McMichael to fasten the door. These remarks, one made by McMichael, the other by deceased, and the question to the witness which drew them out on the stand, form the subject of the 5th ground of the motion for a new trial. The accused entered through the door before McMichael could close it, and when he entered, the deceased rose from his chair, and the final conversation between them began. The shooting followed and hostilities were at an end. The space of time extending from the arrival of deceased at the

office of Nelms and the commission of the homicide, was about twenty-three minutes. His stay at the office of Nelms was only two or three minutes, and from the time he left there until the firing began was about twenty minutes.

The difficulty of formulating a description of the *res gestæ* which will serve for all cases, seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a very numerous family. Eschewing anything so impracticable, and letting the present case sit for its own individual likeness, its *res gestæ* may be sketched in general language as follows: (1.) Where two persons consent to fight with deadly weapons, and by agreement separate to arm themselves, both intending to return presently and begin the combat, and they do in fact arm themselves and meet, though not at the place appointed, but near it, in the same city and on the same street, and only a little later than the time contemplated, and actually fight with the weapons thus prepared, and one of them is slain by the other, the *res gestæ* of the transaction comprehend all pertinent acts and declarations of the parties (either or both) which take place in the interval between the agreement to fight and the consummation of the homicide such interval being very brief. (2.) Acts are pertinent as a part of the *res gestæ* if they are done pending the hostile enterprise, and if they bear upon it, are performed whilst it is in continuous progress to its catastrophe, and are of a nature to promote or obstruct, advance or retard it, or to evince essential motive or purpose in reference to it; and declarations are pertinent if they are uttered contemporaneously with pertinent acts, and serve to account for, qualify, or explain them, and are apparently natural and spontaneous. See the works on evidence, and the cases they cite. Also the cases cited in Hopkin's Penal Laws, §§527, 528, 530. Code, §§3771, 3773.*

*Since this case was decided, useful articles touching declarations as a part of the *res gestæ* have appeared in 21 Alb. Law Journal, 484, 504; 22 *Ib.*, 4; 14 American Law Rev., 817; 15 *Ib.*, 1, 71.

The conversation with Nelms (7th ground of the motion for a new trial) was had contemporaneously with the effort of deceased to borrow a pistol. It opened with his application for a pistol, and the application was repeated whilst the conversation was in progress. He was on an expedition to arm himself—on a journey, as it were, after a pistol—and he explained the motive and occasion of his being out on such business. Be it remembered, too, that it was the accused, and not the state, that brought up this part of his conduct in evidence. Nelms was a witness for the defense, and on the direct examination he testified to the act and to a part of the declarations which accompanied it. The state but proceeded, on the cross-examination, to draw out the balance of the same conversation. So clearly was the evidence admissible for the latter reason, as will be seen under the next head of this opinion, that its relation to the *res gestæ* is utterly immaterial. Possibly, if it stood on that relation alone, so much of it as consisted of mere narrative or recital ought to be held incompetent, were that portion objected to separately and upon that ground.

In the order of time, the next conversation complained of is that to which Murphy testified (9th ground of the motion for a new trial). Though Murphy was a witness for the state, he was examined late in the trial, and, as will be seen hereafter, this conversation had already been touched upon by one of the prisoner's witnesses, Sams, and by two other witnesses for the state, Renfroe and Howard. It took place during the interview between Sams and the deceased in the treasurer's office, about twenty minutes before the homicide, at which interview the deceased received and answered the message which the accused had sent to him through Sams. Most certainly this exchange of messages was an important event in the occurrences of the day, and the whole of the conversation repeated by Murphy bore directly on the transaction then immediately in hand. A part of it went to the very shaping of the answer which Sams was directed to bear to the accused, and to the inspi-

ration of the pacific spirit by which the answer was pervaded.

The matter embraced in the 6th ground of the motion for a new trial followed immediately upon the return of the deceased from Berron's and his seating himself in the treasurer's office, and was succeeded immediately by the matter set forth in the 5th ground. The evidence complained of in these two grounds, when thrown together, reads thus: "He (Alston) stated to me, 'This is an awful thing to have a man hounding you in this way.' I asked him, 'Did you not meet Cox?' He said, 'No, he has gone up stairs hunting me'—and then it was that Peter made the remark that Cox was coming down stairs. Peter said, 'Col. Alston, Cox is coming down the steps now;' and Alston said, 'Go and fasten that door'—and Peter went to do so, and met Cox there, and Cox passed him and came into the room." Let it be borne in mind that it was from this very office that the deceased had sent his answer to the message of the accused received through Sams; that after receiving that answer the accused had set out from the barber-shop to seek him; that it was to this office that he first went on reaching the capital; that the deceased, while at Berron's in conversation with Governor Colquitt, had seen him on his way to the building, and that at the time the deceased returned from Berron's, he was in fact upstairs in the building, and it will be plain that neither of these parties had passed wholly out of the *res gestæ* of their pending difficulty. Both were still armed with the prepared weapons, and both *may* have desired and intended to use them. The return of deceased to the treasurer's office, and there stopping as if to remain, were acts of undoubted pertinency, and the state of mind in which they were performed—the motive and purpose which attended them—are of the utmost importance. If he went there to put himself in the way of the accused and bring on a collision, and if the accused went with a like object, it was essentially the meeting which had been pre-concerted in the barber-

shop, and the deceased had either never fully abandoned the hostile scheme, or had abandoned it but temporarily and then returned to it. If, on the other hand, he went to the office perplexed and undecided—doubtful, for the time, what course to pursue, and hoping, without seeming to retire, to have opportunity for further reflection, and perhaps to take counsel of a friend (for he had listened thereto counsel a few minutes before), his return was well nigh innocent, and not inconsistent with the change of mind which he had professed, and which he afterwards asserted in answering the first question which the accused so sharply propounded in the fatal interview. His exclamation to the witness, Renfroe, on coming in and sitting down, "This is an awful thing to have a man hounding you in this way," indicates mental torture of a bitterly regretful kind, and if he really felt the agony which his language would suggest, he was deprecating danger rather than desiring to encounter it. His answer to the question, "Did you not meet Cox?" namely, "No; he has gone up stairs hunting me," is to be looked at in its relation both to the exclamation which he had just uttered and to the order which he afterwards gave to fasten the door. Instantly. upon being told that Cox was coming, he ordered the door which was between them to be fastened. Taking, collectively, his three utterances they tend strongly to show the state of mind in which he was. They signify that he believed Cox was searching for him with a hostile intent; and that belief, most probably, induced the order to fasten the door. Under the circumstances, the order was equivalent to an attempt by the deceased himself to fasten the door, and if he had made the attempt, can there be a doubt that the preceding observations would have cast light on his motive for the action? In the same way, they cast light on his motive for giving the order. The entire conversation is thus within the atmosphere of the *res gestæ*. Considering that the deceased had returned to the treasurer's office knowing that the accused was in the building, and that both were still armed, the return was

an ambiguous act, with rather more of a hostile than of a pacific look. His remaining there was also ambiguous; it might mean war or it might mean peace. What he said and did in the brief interval between his return and the entry of Cox, tended to explain his presence on what proved to be the scene of the rencounter, and to show whether he was there for action or inaction—whether to meet his adversary or to avoid him. It was competent evidence. The question by which some of it was drawn out was not in the best form, but the court gave the witness to understand that his answer was to be restricted to what he saw and heard, and it was restricted accordingly. The witness simply detailed the facts, offering no opinion or conclusion of his own.

9. Returning to the conversation proved by Nelms, (7th ground of the motion for a new trial) the true ground upon which the admissibility of the otherwise doubtful matters of that conversation stands, is that they constituted a part of the same conversation into which the witness entered on his direct examination by the accused, and were drawn out on cross-examination. Upon the direct examination the witness testified: "It was probaby three o'clock in the day that Col. Alston came in and asked me for a pistol, and I said mine was at home shot out, and I asked him what he wanted with it, and he said he had liked to have had a difficulty, and I said, come in and tell me about it, and he came in and sat down. I asked him who it was with, and he said it was with Ed. Cox, and told me about it." In the cross-examination, the witness was directed to state all the conversation, and he proceeded through it from where he had left off. Not to look further for authority, this was clearly proper under several decisions of this court. 10 Ga., 145 (text of opinion; 12 *Ib.* 505; 22 *Ib.* 40; 26 *Ib.* 172.

Furthermore, by turning back to the reporter's statement, it will be seen that a very similar conversation, in so far as it embraced recitals or narrative by the deceased, was put in evidence by the accused in the testimony of Governor Colquitt. The state also afterwards, and without any objec-

tion, so far as appears, proved a conversation between the deceased and Howard, detailed in evidence by Howard as follows: "He said that Cox had taken him into a room and told him if he did not rescind the trade he would kill him. I said, he certainly did not say that. He said he did, and he let me out and told me to heel myself and come back in ten minutes. He said he thought he ought to take a double-barreled shot gun, load it with slugs and go and kill him." Were the evidence of Nelms, so far as objected to, eliminated as illegal (but as above said, it was entirely legal), a new trial would not necessarily follow, much the same sort of matter being before the jury through these other two witnesses.

Adverting again to the 9th ground of the motion for a new trial (Murphy's evidence), Howard was examined before Murphy, and testified without objection thus: "I took Mr. Murphy aside and told him let us stop this, and we persuaded Alston to stay in that part of town, and he did so, though he did not like to be bullied that way. Then directly he said, 'Here is a man who has come with a message from Cox for me to come down there and settle it like a man;' and I said to the man, 'did he send that message?' and he said, 'yes, and I am sorry to bring it.' That was Mr. Sams, and I said to him, 'you go and tell Cox to stop this and wait; I will be down there directly and give him some advice, and he will thank me for it the balance of his life.' And Alston said, 'Go and tell him I have reconsidered the matter and will not come—that I don't want to kill him and don't want him to kill me.'" Before Howard testified, the accused had proved by Sams a part of what was said at this interview; and, first of all, Renfroe had gone into it, the accused it seems objecting, but not carrying forward the objection into the motion for a new trial. If Murphy's evidence was doubtful or even inadmissible as a part of the *res gestæ* (but it was neither), it would not, considering what was already before the jury when it came in, and remained before them, be sufficiently material to require a new trial. In substance

it was but little more than Howard had testified without objection; and at no time was there any motion to withdraw this testimony of Howard. However, the correctness of classifying Murphy's evidence with the *res gestæ*, as we have done above, is indubitable.

10. 11. 12. 13. 14. As the entire charge of the court is set out in the report, it can be studied by every reader for himself, and to remark upon it further than has been done in the head-notes would be superfluous. It is a very able and admirable charge.

On both sides the case was argued before us with unusual thoroughness and remarkable ability. The result of the argument and of a careful examination of the record, has been to satisfy a majority of this court that there was no error in overruling the motion for a new trial.

Judgment affirmed.

JACKSON, Justice, concurring.

The exhaustive opinion of my able colleague, who announced the judgment of the majority of the court, leaves me nothing to say. Complying with the law, however, which requires me to state my reasons for concurring in the judgment, I wish to say that those reasons are to be found at length in the opinion of my colleague, and to add that on the point in which the venerable Chief Justice differs from us my views very briefly are these:

1. While as a circuit judge presiding in this case, I might have ruled differently on the motion for a continuance, yet I cannot say that the court abused his discretion in the ruling he made. He had the defendant before him and saw his condition; he could judge of all the surroundings; he heard the evidence *pro* and *con*; in the light of all the facts, he made his ruling, and I cannot say that he erred.

2. The meaning of *res gesta* is the thing carried on. To show the thing carried on, its beginning is as essential as its ending. An enterprise is carried on by acts and words. In-

deed, whenever the internal operations of the mind are involved, words become verbal acts, and are admissible upon the same ground as acts. This thing, this enterprise was begun in the barber-shop; it was carried on all through the interval before the final meeting; it was carried on in that final meeting; it was carried on in the arming of each and what each then said; it was carried on in each shot that was fired; it was carried on until Alston lay weltering in his blood. Every act, every word, from the beginning to the end, which carried on the thing, the enterprise, formed a part of the *res gesta*. The intention of both parties was a leading question in the case. The state of their minds was involved. That state appeared by acts and by words, which took place while the difficulty was in progress; and the verbal acts of the parties were admissible like their other acts. But even if this view should not be conclusive—if as well the plain meaning of *res gesta*—the transaction—the thing as carried on from inception to conclusion—from the agreement to fight to its close in the homicide—as the well understood rules of law governing the introduction of testimony in respect to *res gesta*, be not applicable to all this transaction as developed by this evidence—then it will be seen that the defense either opened the door and entered on the investigation which admitted the other side also to go in, or by their own examination of their own witnesses proved substantially the same occurrences which were but amplified or more fully explained by the state.

Not only as *res gestæ*, but on the principles last mentioned, all the testimony was, in my judgment, admissible.

The entire charge is fair and legal—the evidence sustains the verdict—and my sense of duty demands that I affirm it. Most gladly would I restore the living to freedom and family—the dead to life and family, if I could; but these I cannot do.

It remains that I administer the law impartially as I understand it, and that leads me clearly to the conclusion that the defendant has had a fair trial—that he has been legally convicted, and that the judgment should stand.

WARNER, Chief Justice, dissenting.

Whilst public excitement alone would not have been sufficient to authorize the continuance of the case, still, when that public excitement is aggravated by inflammatory newspaper publications calculated to prejudice the public mind against the defendant, as set forth in the record, coupled with the fact of the defendant's physical condition resulting from wounds received in the then recent difficulty, as established by his attending physician, and not denied, to-wit: having received a pistol-shot wound in his mouth, knocking out three upper jaw teeth and four lower jaw teeth, and indenting one of his teeth in his tongue, and had another pistol shot wound in his left hand and wrist; his tongue so lacerated and swollen that the saliva was constantly oozing from his mouth, and in the opinion of the doctor he was unable to confer with his counsel fully and prepare his case for trial. By the constitution of the state the defendant was entitled to a trial by an *impartial* jury, and was entitled to defend his own case in the court in person, by attorney, or both. From the evidence in the record it is manifestly apparent that the defendant was not in a condition to exercise his constitutional right to defend his own case, and by forcing him to trial in that condition deprived him of that right, for it was his undoubted constitutional right to defend his own case in person, by attorney, or both. The spirit of the constitution, as well as the ends of justice, required a continuance of the case.

In my judgment the court erred in admitting the declarations of Alston, the deceased, to Renfroe and Nelms, as contained in the 6th and 7th grounds of the motion for a new trial, in so far as the same related to the acts and sayings of the defendant, in his absence, said grounds being as follows:

6th. Because the court erred in allowing J. W. Renfroe, a witness for the prosecution, in answer to questions by the state, and over objection of defendant's counsel, to testify to a conversation had with the deceased from five to ten

minutes before the difficulty, ending in the death of Alston, commenced, and not in the hearing of the defendant, as follows: 'He (Alston) stated to me, 'This is an awful thing to have a man hounding you in this way.' 'I asked him did you not meet Cox?" "He said 'No, he is gone up-stairs hunting me.'"

7th. Because the court erred in admitting in evidence, over the objection of defendant's counsel, a conversation between J. W. Nelms and the deceased, which occurred twenty minutes before the killing, in a different part of the building and in the absence of Cox, as follows: "Alston told me he had like to have had a difficulty and wanted a pistol. I told him to come and sit down and tell me about it. I asked him who he was about to have a difficulty with; he said with Cox. Said he 'Nelms, he carried me in to take a drink with him and I would not drink with him, and took this cigar (had a cigar in his hand) and then he took me into a back room of a barber-shop and shut the door and said, 'Bob, I want to see that power of attorney you have to sell Gordon's interest.' And I said I would not show it under compulsion, and Cox said, 'I am going to see it before you leave this room.' And that he (Alston) said, 'aint you a nice great big rascal here with your knife when I have not got a piece of steel on me, to try and force me to terms.' And he said, 'go and arm yourself and I will wait for you, and, he said he is waiting for me now; and he asked me again for a pistol, and I said my pistol was at home."

The illegal part of Renfroe's testimony was in proving by Alston's mere declaration "that the defendant had gone up-stairs hunting him." The defendant had a perfect right to go up-stairs in the capitol building, and there is not a particle of evidence in the record, either by word or act on the part of the defendant himself, going to show that he had gone up-stairs hunting Alston, and surely he ought to be judged by, and held responsible for, his own acts and declarations, and not by the acts and declarations of other people made behind his back, the more especially as in this

case Alston was not in the capitol-building when the defendant entered it, but was standing at Berron's in full view of the defendant as he passed along the street, going into the capitol-building where it was said he was hunting him. Is the law so unreasonable as to make one man responsible for what another man may say he is doing, or going to do, behind his back, when he has no opportunity to deny or contradict the statement? Such has not heretofore been my understanding of it. The hunting of the deceased by the defendant was a most damaging fact against him on his trial, and how was that damaging fact proved? It was proved by the mere declaration of the deceased to Renfroe behind his back when he had no opportunity to deny or contradict it; and the same remarks are applicable to the declarations made by the deceased to Nelms in regard to the acts and sayings of the defendant at the barber-shop. But it is said this evidence was admissible as *res gestæ*. What is *res gestæ* as defined by the law of this state? "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestæ*." Code, §3773. The declarations of Alston when he applied to Nelms for his pistol would be admissible in his favor in explanation of that act, and perhaps his declarations to Renfroe might be admissible in his favor in explanation of his own acts and conduct at the time as part of the *res gestæ*, but how Cox, the defendant, can be made responsible by Alston's declarations made to Renfroe and Nelms behind his back, and be used in evidence to injuriously affect the defendant as part of the *res gestæ* accompanying any *act of his*, or connected therewith when the declarations were made, is more than I can understand. In my judgment it was a total misapplication of the doctrine of *res gestæ* to admit the evidence complained of in the 6th and 7th grounds of the motion as against the defendant.

The court charged the jury amongst other things: "It would be unlawful for two persons to deliberately conspire

or agree together to procure deadly weapons and meet again to fight therewith, and if in the heat of blood they do so agree, it would be the duty of both of them and each of them to heed the voice of reason and humanity if there was an interval sufficient for that voice to be heard, and to reconsider the matter and decline such hostile meeting, and if one of them does so reconsider and decline such meeting, and the same be communicated to the other, it would be the duty of that other to acquiesce therein; and if that other refuse so to acquiesce and persists in an original hostile purpose, and if, pursuant thereto, he, armed with a deadly weapon, seek his adversary with a deliberate intention of bringing on such difficulty and of using such weapon therein, notwithstanding the other's refusal, and if he does so bring on the contest, and in such difficulty he slay his opponent with that weapon, it would be murder in such slayer."

This charge of the court was error in view of the evidence in the record, inasmuch as it did not present the defendant's theory of his defense for the consideration of the jury. The evidence shows that the agreement to meet and fight at the barber-shop had been abandoned. The deceased had however procured one of the best self-cocking pistols in the city, and while standing at Berrons' talking with Governor Colquitt, saw the defendant go into the capitol-building, and said that he did not know but that it was his duty to his family to take a double-barreled shot-gun and shoot him when he saw him; said he had a pistol then. Shortly thereafter the deceased went into the capitol-building where he had just seen Cox, the defendant, go, and went into the treasurer's office where the difficulty occurred—Alston firing the first shot, having Nelms between him and defendant at the time. Although the deceased had sent the defendant word that he would not meet and fight him at the barber-shop, but whether he was willing to meet and fight the defendant in the treasurer's office, and was seeking him for that purpose where his friend Murphy, who had

furnished him with the pistol, and his other friends were, depended upon the acts and conduct of the deceased as disclosed by the evidence. The defendant's theory from this evidence was, that although the deceased had declined to meet and fight the defendant at the barber-shop, still he was willing to meet and fight him in the treasurer' office where his friends were, and was seeking Cox with a hostile intent for that purpose; that being a lawyer as the evidence shows, his declaration to Renfroe that "this was an awful thing to have a man hounding yon in this way; he is gone up stairs hunting me," was made so as to justify himself in case he should meet Cox and should kill him in the rencounter; that he was apparently seeking Cox by following him into the capitol-building where he had just seen him go. Whether this theory was true or not, the defendant was entitled to have it submitted to the jury for their consideration under the evidence in the case. The deceased evidently was not endeavoring to avoid Cox when he followed him into the same building he had just before seen him enter, instead of getting his dinner as Governor Colquitt advised him to do. It is quite certain that if Alston had not followed Cox into the capitol-building, into which had just before seen him enter, armed with his self-cocking pistol, the fatal difficulty in the treasurer's office would not have occurred. What was Alston's intention in following Cox into the capitol-building just after he had seen him enter it, might have been inferred by the jury from Governor Colquitt's evidence, under a proper charge of the court in relation to the defendant's theory of the case—that evidence is, that Alston said a very short time before the parties met in the treasurer's office, that he did not know but it was his duty to his family to take a double-barreled shot-gun and shoot him (Cox) when he saw him. This declaration of the deceased clearly shows what was the state of his feelings toward the defendant at the time and in a few minutes thereafter. When he did next see him it was in the treasurer's office in the capitol-building, and in the rencounter which took place there between the

parties, the deceased fired the first shot. This is in substance the evidence in support of the theory of the defense—his side of the case—which he was entitled to have had submitted to the jury in the charge of the court. The defendant may or may not be guilty, but whether he is or not, he was entitled to a fair, impartial trial as provided by the constitution and laws of his country; and not believing, according to my best judment, that he has had such a trial, there is no power on earth that can extort from me as a judicial officer a judgment affirming his conviction.

DeGive *vs.* Seltzer.

The obstruction of any part of a twenty-foot alley dedicated to the use of the grantees of the lots adjoining the said alley by a common grantor, who divided the block lying between four public streets by said alley for the convenience of all the grantees, by the erection of two privies thereon projecting two feet and four inches into the alley, and each six feet wide, is a nuisance; and a court of equity, at the instance of one of said grantees, the windows of some of the bed rooms of whose private residence overlook said alley, will restrain another grantee from the erection of said privies upon the alley, to the unobstructed use of the whole of which alley both grantees are tenants in common. The city council has no legal authority to authorize said obstruction to be made, and from the nature of the case, if the buildings were finished the damage could not be estimated in money, and injunction is the only adequate remedy.

Equity. Injunction. Nuisance. Municipal corporations. Before Judge Hillyer. Fulton County. At Chambers. October 21, 1879.

In 1862 one Lewis owned a block in the city of Atlanta. In order to sell it to the best advantage, he laid out an alley running through the block, and sold the land in lots, the deeds specifying that the lots extended to the alley, but saying nothing of the uses to which it was dedicated. Whether it was a public or private alley was somewhat in dispute; Lewis and the real estate agent who laid out the alley swore that it was laid out solely for the benefit of

those who purchased the lots; while, on the other hand, it appears that the city of Atlanta had laid sewers in the alley and exercised other like control over it. DeGive owned buildings on one side of the alley, Seltzer on the other. DeGive began the erection of two privies in the rear of his buildings, having first obtained permission from the city council of Atlanta to erect them temporarily until the sewer near by should be lowered, as it was the intention of the city that it should be; then he intended removing the privies to the basement of the buildings, the sewer not being low enough for that purpose until changed. These privies were so constructed as to extend about two and a half feet into the alley, and were six feet wide. Seltzer filed his bill to enjoin their erection, alleging that they would be a nuisance to himself and family, who lived diagonally across the alley. DeGive answered, denying that they would be a nuisance to Seltzer or his family, and setting up the permission obtained from council, and that the construction of the privies would be such as not to be offensive in any way. Defendant also alleged that there were several other privies as near or nearer to complainant's house; likewise a fire-engine house and stable, and a cow-stall belonging to complainant.

On the question of whether the privies were so located as to be a nuisance, of necessity, to complainant and his family, the bill, answer and affidavits were somewhat conflicting.

The chancellor granted the injunction, and defendant excepted.

D. F. & W. R. Hammond, for plaintiff in error.

Hopkins & Glenn, for defendant.

Jackson, Justice.

This seems to have been a naked attempt on the part of the plaintiff in error to appropriate to his individual use an alley common to all the owners of lots in the block which

the alley divided. Defendant in error applied for an injunction on the ground that the appropriation of the common alley to the erection of two privies therein six feet long and some two and a half feet deep, was a nuisance to himself and family, some of the bed-rooms of whose dwelling overlooked the alley, and would render the privies a standing nuisance if completed. The chancellor enjoined the erection of the privies. We think that he was clearly right. It matters not how beautifully or neatly erected, nor how soon they might be superseded by privies in basements hid from view, the very sight of such a building is distasteful, and when put up in an alley common to others, is a nuisance to one situated as the complainant is. If defendant had put up the privies on his own land which he held in severalty, then the beauty of the temples and the absence of disagreeable odors might draw the sting of the obnoxious view; but when he undertook to put them up in an alley dedicated by the common grantor to his neighbor's use as well as his own, a right of just complaint, and a remedy to vindicate that right, must be afforded to the injured tenant in common. The only adequate remedy is by bill in equity and injunction, because damages could not well be ascertained in money, and so long as the nuisance remained, actions at law would have to be brought continuously, and thus multiplied into many suits. It is unnecessary, therefore, to go into the learning on the subject of what is or is not a nuisance on a public street or alley; or how far the city authorities might authorize such erections as these privies are, jutting out on public streets or public alleys—though even in such cases the nuisance, it is believed, would be quickly restrained by a court of chancery, though sanctioned by the city.

In this case the rights are those of private property. The alley belongs to the proprietors of the lots on the block. Its joint use is theirs. Every foot of it each is entitled to use, and the city has no power to give the use to one foot of it to one to the exclusion of another. Espe-

cially has it no shadow of authority to give it, or any part of it, to one to put up a standing affront to the eyes or the taste, however fastidious that taste, of another of the common grantees.

The chancellor not only did not abuse his discretion in granting the injunction, but would have abused it, in our judgment, had he permitted such encroachments to stand in the alley which belonged to complainant as well as to defendant.

Judgment affirmed.

MORGAN *vs.* TWITTY *et al.*

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. Affidavits used on the hearing of an application for injunction constitute no part of the record. To bring them to this court, they should be incorporated in the bill of exceptions and followed by the judge's certificate, or attached as exhibits and identified as the identical affidavits used on the hearing by the judge's signature on each. (R.)
2. If it were possible to identify the affidavits as being in the record, the bill of exceptions in this case was signed June 19, and the record certified July 1, so that there would not be any identification. (R.)

Practice in the Supreme Court. September Term, 1879.

Reported in the opinion.

C. O. DAVIS; F. T. CULLINS; DUPONT GUERRY, for plaintiff in error.

JAS. H. SPENCE; JAS. H. SCAIFE; I. A. BUSH, by JACKSON & LUMPKIN, for defendants.

JACKSON, Justice.

The bill of exceptions brings up the refusal of the chancellor to grant an injunction. It appears therein that the

chancellor had before him in addition to answers of the defendants certain affidavits. These affidavits are referred to in the bill of exceptions in the following language, as the evidence which the chancellor had before him, to-wit: "The bill filed in said case by complainant and amendment thereto, with the affidavits of E. H. Shackelford, W. H. Brimbury, H. C. Dasher, James Morgan, and transcript of city council record of Camilla, Georgia, and the answers and affidavits attached thereto of the defendants, which bill, amendment, answers and affidavits compose the record in this case, and are hereby referred to and made part of this bill of exceptions." The certificate of the chancellor is dated June 13, 1879, and that of the clerk to the record July 1, 1879.

1. According to the ruling of this court in *Colquitt, governor, vs. Solomon*, 61 *Ga.*, 492, and the case of *City of Atlanta vs. Glover*, *1b.*, 337, the writ of error must be dismissed. These affidavits constitute no part of the record of the case, and should have been exhibited to the bill of exceptions, and identified by the judge's signature on each of them as the identical affidavits which were before him, or incorporated in the bill of exceptions with the certificate of the judge after them, or, at all events, should have borne his signature when filed in the clerk's office.

2. Moreover, if the record could be referred to in order to identify the affidavits, the record appears to have been made up on the 1st of July, whilst the bill of exceptions is dated the 19th of June; so that when the judge signed the bill of exceptions, it cannot be inferred that he referred to the transcript sent up here in this case, and the case of *The City of Atlanta vs. Glover*, before cited, covers this in that respect.

This court cannot review the decision of the chancellor unless it has all the evidence before it which he had, and it must appear from the bill of exceptions incorporated therein, or exhibits thereto with the sign manual of the judge

thereon, what identical evidence was before him in the form of affidavits when he pronounced judgment for or against the application for injunction. See also *Woolbright vs. Wall*, 60 *Ga.*, 595.

The writ of error is dismissed.

Dismuke *vs.* Trammell.

1. The judgment in the record not being dated, but providing for a stay of execution to November 15, 1878, and the bill of exceptions, which was certified January 17, 1879, stating that it was tendered within thirty days from the decision, the clerk of the superior court was ordered, under the act of 1877, to certify and send up the date of the decision as appeared from the minutes. (R.)
2. Where the bill of exceptions and the record differ as to matters which form a part of the record, the latter will control. (R.)
3. In the absence of any statement to show delay by the presiding judge in certifying a bill of exceptions after its tender, the date of the certificate will be taken as the date of tender, and if beyond the time allowed by law the case will be dismissed. (R.)

Practice in the Supreme Court. September Term, 1879.

Reported in the decision.

Jas. S. Boynton; Samuel Hall, for plaintiff in error.

Hunt & Johnson, for defendant.

Jackson, Justice.

It appeared from the record in this case that the superior court of Spalding county was in session more than thirty days, beginning in August, 1878, and adjourning in January thereafter, and that the judgment excepted to had been rendered prior to the 15th of November, 1878, as it provided for a stay of execution to that date, whilst the bill of exceptions was signed and certified on the 17th of January,

1879. It seemed, therefore, from the record that the judgment excepted to was rendered more than sixty days before the bill of exceptions was signed and certified, and, if that were true, that this court had no jurisdiction under the statute to review the judgment. Yet the judge certified that the bill of exceptions was tendered within thirty days from the judgment. To arrive at the truth, under the authority of the act of 1877, we directed the clerk of the superior court of Spalding county to certify and send up the date of the judgment as it appeared on the minutes of the superior court of Spalding county, which has been accordingly transmitted to us. And from that transcript it appears that the judgment was rendered on the 17th day of August, 1878, some five months before the bill of exceptions was signed and certified.

We have held that unless the judge certified that for some reason he retained the bill of exceptions after it had been tendered to him, the date of his certificate will be considered the day it was tendered to him. *Monticello vs. Lawrence & Pope*, February 3, 1879.

Where the bill of exceptions and record, properly applied, differ, the former, so far as relates to matters of record, must yield. Indeed, it may be amended so as to conform to the latter. 60 *Ga.*, 450; 59 *Ib.*, 459. Code, §4288. Therefore this bill of exceptions was not tendered in time, and we have no jurisdiction to review the judgment complained of. It should have been tendered within sixty days from the time it was rendered, as Spalding court was held more than thirty days.

We have no option in the premises, but the law which gives us our only authority to hear and review any case, requires us not to hear but to dismiss this case. And it is so ordered. Supplement to Code, §25.

Writ of error dismissed.

Brown *vs.* Lathrop & Company.

[Warner, Chief Justice, did not preside in this case.]

1. A suggestion of a diminution of the record must describe or set out the missing record to such an extent that counsel for the opposing party may agree thereto and demand that the case proceed. A mere statement that there was a motion for a new trial and a brief of evidence, which the clerk had failed to send up, was not sufficient. (R.)
2. The suggestion of a diminution of the record in this case being insufficient, and neither it nor the record containing any final judgment, the writ of error must be dismissed. (R.)
3. The argument of this case having been postponed until after the circuit to which it belonged had been concluded, no further postponement to complete the record will be allowed under the act of 1877. (R.)

Practice in the Supreme Court. September Term, 1879.

In this case O. G. Gurley, Esq., the counsel who brought the case up by writ of error, made an affidavit in which he stated that "the clerk of Miller superior court has failed to send up in said record the motion of plaintiff in error and brief of evidence, which affiant avers were both made out and filed in said clerk's office in terms of the law," and suggested a diminution of the record on account of the absence of those papers. This affidavit and suggestion were left with E. C. Bower, Esq., who represented Mr. Gurley in his absence. During the call of the cases on the Pataula circuit, Mr. Bower was engaged, as a member of the state senate, in the impeachment trial of John W. Renfroe, treasurer. The case was therefore set at the heel of the Chattahoochee circuit. When it was called he presented the suggestion of diminution. Counsel for defendants in error moved to dismiss the case because there was no motion for new trial or brief of evidence in the record, and none set out in the suggestion of diminution so as to be agreed to under Code, §4282, and because there was no

final judgment either in the record or stated in the suggestion of diminution. Counsel for plaintiff in error asked for a postponement of the case under the act of 1877. Counsel for defendants resisted this on the ground that the Pataula circuit was concluded. The court ruled as set out in the opinion.

O. G. GURLEY, by E. C. BOWER, for plaintiff in error.

I. A. BUSH, by JACKSON & LUMPKIN, for defendants.

JACKSON, Justice.

In this case a diminution of the record was suggested by plaintiff in error on account of the absence of the motion for a new trial and brief of evidence, but the suggestion contained no statement in substance or otherwise of the said motion and brief, so as to enable the defendants in error to admit the same and have the case heard; and defendants moved to dismiss the writ of error because there was no brief of evidence either in the bill of exceptions or in the record, and no final judgment on the motion for new trial, even in the diminution as suggested.

Without the evidence we cannot pass upon the case intelligently. The court below refers to it in his certificate of the bill of exceptions as necessary to be had for the hearing, and it is conceded to be essential. Without a final judgment the case is pending in the superior court now, and has no place in this court. The suggestion did not remedy the defect, and was itself defective in that it was so framed as not to permit the facts left out of the record to be admitted by the defendants, and the case to be tried at this term, which is always their right, and the policy of the law which put this court in operation. Both sides have rights; the one to suggest what is missing from the record, the other to admit its truth and go on to trial. The first would continue the case unless admitted; the last—the admission—would expedite it; and to expedite it is the

policy of our entire system of writs of error to this court. See Code, §§4250, 4282, 5087; Supplement to Code, §613.

The act of 1877 does not relieve the plaintiff in error. The record cannot be now got here within the call of the Pataula circuit. There has been ample time to have obtained it, and to obtain the benefit of that very liberal act, the party invoking it must be without fault. He has been indulged for some weeks owing to the peculiar situation of the counsel who represents the absent counsel of plaintiff in error, and the day of grace is now ended in every view of the law. See Supplement to Code, §§26, 27.

Writ of error dismissed.

ZIMMERMAN *et al. vs.* TUCKER.

1. When a decree has been rendered against certain realty held in trust, declaring it to be subject to pay a given debt contracted by a former owner who created the trust, and declaring a lien upon the specific property to satisfy the decree, and the trustee was a party to the bill and had his day in court, the beneficiaries of the trust cannot arrest the sale by interposing a claim. They have no more right to obstruct the execution of the decree in that mere statutory method, than has the trustee who represented them as a party before the court when the decree was rendered.
2. One who is not properly in court as a claimant, cannot rest equitable or other pleadings on his claim case, and by that means carry on an attack against the validity or the *bona fides* of the plaintiff's judgment.

Trust. Judgments. Claim. Before H. K. McCAY, Esq., Judge *pro hac vice*. Fulton Superior Court. April Term, 1879.

Numerous issues were made upon the trial of this case which, in view of the decision rendered, have become entirely irrelevant. The following facts are sufficient to an understanding of the decision:

Tucker filed a bill against Plumb, as trustee for Mrs.

Zimmerman and her son George, to subject certain trust property to the payment of a debt held by him against the firm of Zimmerman & Verdery, the senior member of which was the grantor to the trustee, and the husband and father of complainants. The grounds of attack upon the trust deed were mainly that it was subsequent to the creation of the debt, that the grantor was insolvent at the time of its execution, and that its consideration was purely voluntary. A verdict was rendered subjecting the property, a decree entered in accordance therewith, and execution issued and was levied. The *cestui que trusts* claimed, and upon the first trial of the issue thus formed the court held that as the *cestui que trusts* were not parties to the aforesaid bill, they were not bound by the decree, and the validity of their title under the trust deed was an open question; that the failure to make them parties could not be remedied by parol proof that Mrs. Zimmerman assisted in the defense of the bill, employed counsel, and finally consented to the decree which was rendered, more especially as Mrs. Z. was, and still is, a married woman.

This ruling resulted in a dismissal of the levy, and Tucker excepted. A reversal was had, on review, the supreme court holding that in the litigation arising upon such bill the *cestui que trusts* were represented by the trustee, were not themselves necessary parties, and were bound by the decree. See 61 *Ga.*, 599.

Claimants then filed an equitable plea attacking the above mentioned decree upon numerous grounds. Upon the trial the court ruled and charged that they could not accomplish by such a proceeding that which the trustee was estopped to attempt; that he had had his day in court, and was absolutely bound by the decree, and that in his fall, through an adverse verdict, the present claimants, whom he represented, fell also.

To the rulings of the court which resulted from this view of the law, claimants excepted.

GEO. T. FRY; E. N. BROYLES; A. C. KING, for plaintiffs in error.

JOHN T. GLENN, for defendant.

BLECKLEY, Justice.

1. The claimants derive their title, and their only title, through the very deed of trust which was litigated and decreed upon in the equity cause. In that litigation they were, as we have held in 61 *Ga.*, 599, represented by their trustee. The decree rendered against the trustee declared a lien upon the specific property in controversy for a certain sum of money, and it is the enforcement of that lien by a sale under the decree which is attempted by the creditor (the plaintiff in the decree), and which the claimants, the beneficiaries of the trust, resist by claim. The statutory remedy of claim (Code, §3725) is not given to any person who is a party to the execution under which the levy is made. It is clear, therefore, that the trustee, as such, could not arrest a sale under this decree by the interposition of a claim, and if he could not do it, we see not how those he represented when the decree was rendered can do it. They are as much bound by the decree as he is, if there was no fraud or collusion, and certainly fraud or collusion will not be presumed. The identical title which he failed upon is the one which they assert, and the decree was a direct adjudication upon the subordination of that title to the lien which the decree established and declared. In equity they were heard through their trustee, and the result of that hearing was that the property was adjudged subject to the creditor's debt; they now seek, whilst the decree stands in full force, to prevent a sale of the property under the decree by interposing a claim founded on the trust title. The claim laws, as we construe them, make no provision for any such proceeding.

2. It was a part of the ruling in 61 *Ga.*, 599, *supra*, that

the deeree is subject to be impeached for fraud or collusion, bnt it does not follow that a standing in court for this purpose can be obtained by interposing an ordinary statutory claim. Could a defendant in *fi. fa.* claim the property levied upon, in the statutory method, and from his position as claimant commence and carry on an attack against the judgment as fraudulent and void? Surely not. When the present claim was interposed, the decree stood open and unimpeached, and was, *prima facie*, as binding upon these claimants, so far as this property is concerned, as is an ordinary judgment upon the defendant. This being so, they could not and did not properly enter court by means of their claim, and having thus no valid claim case, they could not engraft upon it any equitable or other pleadings by which to test the *bona fides* of the decree. Claim is a substitute for other due process of law only where the claim laws can be applied to inaugurate the proceeding. Once in court according to these laws, the claimant can raise issues, legal or equitable, to maintain his standing; but if he comes by claim when he ought to come by process proper, he has no right to remain and build, however abundant may be his building materials.

Judgment affirmed.

Brown *vs.* Wylie & Company.

Where, on a money rule against the sheriff for the distribution of funds in his hands amongst executions against a defendant in *fi. fa.*, the court orders payment to some to the exclusion of others, the sheriff is a necessary party defendant to a bill of exceptions filed to such judgment. *Bird, adm'x, vs. Harris, ex'r*, 63 *Ga.*, 433.

Parties. Practice in the Supreme Court. September Term, 1879.

Kennedy, sheriff of Bartow county, under order, brought into court $140.18, the proceeds of property of Daniels, de-

fendant in *fi. fa.*, for distribution. Brown and Wylie & Co. claimed the fund, the former under a mortgage *fi. fa.*, and the latter under justice court executions. The court gave precedence to the latter, and Brown excepted. The bill of exceptions was served only on Wylie & Co. When the case was called in this court, a motion was made to dismiss the writ of error because the sheriff, Kennedy, was a necessary party and had not been served. The motion was sustained, as indicated in the head-note.

G. H. Bates; Julius L. Brown, for plaintiff in error.

Akin & Akin, for defendants.

Sewell *vs.* Conkle.

The writ of error must contain an assignment of the errors complained of; otherwise, it will be dismissed. (R.)

Practice in the Supreme Court. September Term, 1879.

The bill of exceptions in this case recited the proceedings had in the court below and the judgment rendered thereon. It then concluded thus: "Plaintiff, Sewell, tenders this his bill of exceptions, and prays that the same may be certified as true." Counsel for defendant in error moved to dismiss the writ for want of any assignment of error. The court granted the motion, announcing the principle stated in the head-note.

J. T. Spence, for plaintiff in error.

L. S. Roan, for defendant.

*Heyman *vs.* The State of Georgia.

[Warner, Chief Justice, being engaged as presiding officer of the senate organized as a court of impeachment, did not sit in this case.]

This case is ruled by the case of *Newman vs. The State*, decided at this term.

Jackson, Justice.

Holleman *vs.* Holleman.

The affidavits *pro* and *con* being conflicting, the discretion of the chancellor exercised in granting the injunction will not be controlled.

Warner, Chief Justice.

Sparks *vs.* Noyes; The City of Atlanta *vs.* Champe *et al.*; Elliott, executor, *et al. vs.* The Sav. & Og. Can. Co.; The Scofield Rol. M. Co. *et al. vs.* The State.

The first grant of a new trial will not be reversed by this court unless the plaintiff in error makes it appear from the record that the judge abused his discretion in granting it, and that the law and facts require the verdict, notwithstanding the judgment of the presiding judge. The principle ruled in the case of *Merriam vs. The City of Atlanta*, 61 *Ga.*, 222, covers this case.

Dykes *vs.* The State of Georgia.

1. There was no material error in the charge of the court.
2. Where the defendant was convicted of an assault with intent to rape, and was sentenced to twenty years' confinement in the penitentiary, as the term was within the limit prescribed by the statute, this court will not interfere on the ground that it was excessive.

Warner, Chief Justice.

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*No reports or opinions are published in the following cases under the provisions of act of March 2, 1875. (R.)

The Georgia & Alabama Steamboat Company *vs.* McCartney & Ayers *et al.*; Couch *vs.* The State; Austin *vs.* The State; Griffeth *vs.* The State; Dykes *vs.* The State.

The verdict in each of the cases herein decided was supported by the evidence.

Lindsay *vs.* Lowe.

An affidavit to foreclose a laborer's special lien on the products of his labor in substance alleged, that on the 17th day of September, 1877, he went into the employ of the hirer to work on his farm (describing it) in making a crop; that the contract was for twelve months from date of contract at eleven dollars and sixty-six and two-thirds cents per months; that he has fully completed and worked out that time; that the employer is now due him one hundred and twenty-eight dollars and eighty cents for his labor on said farm; that he made a crop of wheat and corn thereon under the contract, which the employer has in possession on said land; that no demand has been made on him since the debt became due for the reason that the employer was absent from the county when the contract was completed and the debt became due, and is still absent and likely to be for some time from his residence in said county; that he raised by his labor the corn grown this year on the land described aforesaid, and also the wheat, to-wit: about fifty-four bushels in said employer's possession, and that he claims a special lien on the same for the payment of said debt, and that the foreclosure of the lien is within twelve months from the time the debt became due, the affidavit being dated the 9th of November, 1878:

Held, 1. That the affidavit makes a sufficient allegation that the contract of labor was completed by the affiant.

2. That the excuse for not making demand for payment alleged is sufficient.

3. That the allegation is sufficient to show that the wheat was raised under the contract and during the time employed.

4. That the demurrer thereto was properly overruled. Code, §§1975, 1991.

Jackson, Justice.

Smith *vs.* The State of Georgia.

During the term of the court wherein he was found guilty, the defendant made a motion for a new trial, with brief of evidence agreed upon by the counsel, which motion the court refused to entertain in the following words: "I refuse to approve the above brief of evidence or entertain the motion for a new trial, because at the time defendant was found guilty his counsel asked for a suspension of the sentence to enable him to make a motion for a new trial, and when the time given for that purpose had elapsed, the counsel asking the suspension and who defended the defendant on the trial, abandoned his motion, to-wit: F. W. Robert, Esq., of Robert & Mallard, and asked the leniency of the court in passing sentence, and the defendant himself produced a certificate in writing of the jury who found the verdict that they intended to recommend him to the mercy of the court, and himself asked the leniency of the court, and as matters thus stood submitted to his sentence; and now, after all that has occurred, and I shaped my sentence accordingly, supposing that to be the last of the case, defendant has employed *other* counsel to move for a new trial, which is such trifling with the court by him as I will not tolerate, unless ordered by the supreme court. As I regard the defendant a bad man, and the evidence showed he had been and was then engaged in a serious difference with many citizens of Stone Mountain, Georgia, I should have put upon him a severer penalty but for the promise of his counsel that he would discontinue that quarrel:"

Held, 1. That the defendant is entitled of right to make a motion for a new trial at any time during the term at which he is tried, on complying with the provisions of law in regard thereto.

2. That this right is not forfeited by the fact that sentence has been passed upon him.

3. That if dissatisfied for any reason with the counsel who defended him before the jury or before the court at the time sentence was rendered against him, he may employ other counsel to move for a new trial.

4. That the sentence of the court ought not to be modified by any arrangement between defendant or his counsel and the court, looking to his abandonment of the right to move for a new trial, and if so modified the defendant will not be estopped from his right to move therefor during the time allowed by law.

5. That defendant's appeal for leniency and production of the certificate of the jury who tried him that they intended to recommend him to mercy, did not forfeit the right to move for a new trial and have the motion considered.

6. That the city court of Atlanta, in passing sentence for assault and

battery within the city, should not consider any serious difference the defendant was then engaged in with many citizens of Stone Mountain, and impose a heavier penalty unless a quarrel at Stone Mountain was discontinued.

7. That the reasons given by the city court, considered separately or together, are insufficient in law to debar defendant from the exercise of his clear legal right to have his motion for a new trial considered and the brief of evidence corrected, if necessary, by the court, and approved according to law.

JACKSON, Justice.

JENKINS *vs.* HARRIS, executor.

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

Where the bill alleged that complainant bought from defendant's testator certain lands at a certain price, and gave a mortgage to secure the purchase money, which was foreclosed and judgment had on the mortgage and general judgment on the notes, and that various credits should be entered on said judgments, some for moneys paid before, and other credits for money paid since judgment, and that complainant was entitled to set off a certain sum as legatee under the will of the testator, and where the answer denied the credits and all other allegations in the bill, and depositions were read, some sustaining the bill and others the answer, and the will showed only a trifling legacy to complainant, and where the only excuse for not making defense to the cause before judgment is sworn off in the answer, and an agreement in writing in regard to the judgment since its rendition is exhibited contrary to the allegation that the credits would pay off the real debt due on the judgment, and the whole aspect of the case made shows gross laches and little, if any, equity in the complainant:

Held, that the chancellor was right to refuse the injunction to stay execution levied on the lands for balance of purchase money, though there may have been slight irregularity in the petition and rule *nisi* to foreclose the mortgage.

JACKSON, Justice.

McAdam *vs.* The Weikel & Smith Spice Company.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

Where one party seeks to introduce secondary evidence of the contents of a letter sent to the other by mail, and has neither given notice to produce the original, nor inquired for it, calling attention to its date or its subject matter, the secondary evidence should be excluded, even though the other party resides beyond the limits of the state, and has answered interrogatories propounded by his own counsel requesting the production of all letters, generally, touching the cause of action, and has failed to produce or mention the particular one which the adversary wants, and sending forward others, testifying that they are all. Notice under sections 3508 and 3509 of the Code is the appropriate means of procuring the primary evidence, or of laying the foundation for secondary evidence.

Bleckley, Justice.

Head *et al. vs.* Aycock, administrator, *et al.*

This bill was brought by the heirs at law of Allen Dykes against the administrator of B. B. Dykes and Westbrook and others, creditors of B. B. Dyke, to restrain the said administrator from selling a certain tract of land, which complainants allege that B. B. Dykes bought from Allen Dykes in 1857, and has not paid therefor. The asserted equity of the bill is, that the land is subject to the vendor's lien; and that the administrator cannot sell it to pay Westbrook and other creditors of B. B. Dykes, because those creditors are postponed to Allen Dykes, the vendor, by virtue of his vendor's lien, which was in force in 1857; and if the administrator should sell it the complainants could not bid, being poor, the land would bring nothing scarcely, and they, as heirs of the vendor and entitled to the lien, would virtually lose it.

Passing by the fact that the administrator, if he sold, would apply the proceeds according to priority of lien of creditors, and that the poverty of complainants is their misfortune but would hardly give them any equity; and the further fact that the demand is stale and the statute of limitations of 1869 would seem to be in the way;—on the case presented, the creditors of B. B. Dykes, who are not charged with notice of the vendor's lien in the complainants' bill, nor is the allegation made in the bill that they were creditors prior to the sale

of the lands from Allen Dykes to B B. Dykes, have the superior right to be paid out of the lands over the vendor's lien; and consequently the administrator should not be restrained from selling to pay them. Mounce *vs.* Byars *et al.*, 11 *Ga.*, 180; Chance *vs.* McWhorter *et al.*, 26 *Ga.*, 315, 322.

JACKSON, Justice.

MITCHELL *vs.* STETSON.

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

Two years' reservation of the use and possession of land sold a few weeks before judgment by an insolvent debtor destroys the validity of the conveyance so far as such judgment creditor is concerned. 59 *Ga.*, 448.

JACKSON, Justice.

JOHNSON *vs.* THE STATE OF GEORGIA.

After suspension of sentence and several continuances thereof to allow time to prepare a motion for a new trial, on the day to which the cause was last continued, the recognizance of defendant was forfeited. Afterwards, during the term, defendant came in and was sentenced. Thereupon the following motion was made: "And now comes the defendant and moves the court to set aside the forfeiture of the bond given by defendant in said case on the following grounds, to-wit Because after the verdict of guilty in said case, defendant's counsel prepared a motion for a new trial, and defendant has been in attendance on said court several times ready to respond to and abide any order or judgment of the court on the disposition of said motion for a new trial except on the 21st day of January, 1879, when defendant was sick in bed and unable to attend court, and on which day the bond in said case was forfeited," which was overruled, and defendant excepted.

Held, 1. That the judgment overruling the motion to set aside the judgment forfeiting the recognizance is the only judgment excepted to and for consideration in this court, and not the refusal to hear the motion for a new trial. *Moreland vs Stephens*, decided this term.

2. That *scire facias* may never issue upon the judgment *nisi* to forfeit the recognizance, as the party appeared and was sentenced and

that appearance and sentence would be a complete reply thereto should it be issued, so far as respects the final forfeiture of the recognizance; and in respect to the costs, if the payment thereof can be avoided by showing that defendant was prevented from attending by sickness, the time for making the showing is when some motion is made, or other proceeding is had, to charge him with the costs.

JACKSON, Justice.

CROSS *vs.* THE STATE OF GEORGIA.

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. Evidence to the effect that a hog was heard to squeal, that the witness ran to him, that defendant ran off from him, that the hog was dead, being knocked in the head, is enough to show the taking and carrying away with intent to steal. *Lundy vs. The State* 60 *Ga.*, 143; *Williams vs. The State*, *Ib.*, 367.
2. The *allegata* and *probata* sufficiently agree where the hog is described as black spotted and weighing twenty five pounds, and proven to be of that weight and having black spots, though sandy colored generally. It makes no difference that the special presentment charges that the hog's mark was unknown, and the proof is that he was in mark of the witness, who owned and identified him.
3. The fact that a grand juror's name is on the minutes of the court as properly drawn, is a sufficient reply to an exception to the indictment that his name was not in the jury box.

JACKSON, Justice.

TISON *vs.* MYRICK, *et al.*

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

Where the judge presiding certifies that he declined to pass upon the merits of a motion for new trial in a case tried before another judge, because the brief of evidence was not approved by said judge at the time agreed upon by counsel, and no *rule nisi* was granted by said judge, and where the facts are verified by the record, and the presiding judge

refused the new trial for the above reasons, this court has no option but to affirm the judgment, there being no motion for a rule *nisi* or to perfect the brief of evidence. The plaintiff in error must show error, and to that end he must have the brief of evidence and motion for new trial duly verified, so that the court below may pass intelligently upon his case and this court intelligently review it.

JACKSON, Justice.

HOLLIS *et al. vs.* SAULSBURY, RESPESS & COMPANY.

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

The sheriff levied a mortgage *fi. fa.* upon corn of defendant, having in his hands no other execution against defendant; it was sold as perishable property by order of the ordinary under section 3648 of the Code, and bid in by the defendant in *fi. fa.*, and knocked off to him. An agreement was then made between defendant and the sheriff, that if defendant would pay up the principal, interest, and costs on the mortgage *fi. fa.*, he should have the corn, otherwise the agent of plaintiffs in the mortgage execution who was the next highest bidder, was to have it at his bid; defendant paid off the mortgage *fi. fa.* and took the corn. On a rule against the sheriff by the plaintiffs in the mortgage *fi. fa.*, which was returnable to Sumter superior court and to a term not yet held, older executions claimed the proceeds of the corn in the sheriff's hands:

Held, 1. That the court of the county of the sheriff had jurisdiction to rule him, though the mortgage *fi. fa.* was returnable to a subsequent term of another county.

2. That the lien of the older judgments not in the sheriff's hands was not divested by the sale and agreement between the sheriff and the defendant in execution; that the corn was still liable to be sold at their instance, and that the money was properly paid to the mortgage *fi. fa.* 56 *Ga.*, 383; 17 *Ib.*, 187.

JACKSON, Justice.

WILLIAMS *vs.* MCMICHAEL.

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

On the 12th day of January, 1877, Mrs. McMichael rented to Williams a certain described lot of land for the year 1877, he promising in writing to pay her as rent one fourth of all crops produced on the premises. He entered under the contract, and occupied until the middle of May, 1877, when his father-in-law (one Rogers) proceeded against him by affidavit (Code, §4072) as an intruder. Williams filed no counter-affidavit, nor did he give any notice to his landlady, but to the officer who came to evict him he acknowledged himself the tenant of Rogers. On these terms the officer agreed not to expel him, and did not in fact expel him, but made return on the affidavit that he had executed it by dispossessing him. Afterwards Williams rented the premises from Rogers.

On the 17th of April, 1878, Mrs. McMichael sued out a distress warrant against Williams for the rent, claiming one-fourth of the crops, according to the terms of the written contract, and fixing the value thereof at three hundred dollars. The warrant was levied and thereupon Wiliams made affidavit that the amount claimed was not due, in whole or in part. At the trial of this issue the facts above recited appeared in evidence, and the actual value of one-fourth of the crops was proved to be $189.07, the tenant himself being the only witness. The court charged the jury "that such an eviction as shown was not such an eviction as would release the defendant from the payment of the rent due to the plaintiff." The jury found for the plaintiff $189.07, the amount which the defendant himself testified that the one-fourth of the crop was worth.

Held, 1. That without defending his possession or giving his landlady notice that it was attacked, the tenant could not treat himself as evicted, and attorn to another.

Held, 2. That, in a civil case, where upon the widest and most favorable view that can be taken of the evidence, it presents no legal defense, the court may so instruct the jury as matter of law. So to charge is not to express or intimate an opinion as to what has or has not been proved, but to declare the legal effect of all that the defendant has attempted to prove, considering the whole as successfully established.

BLECKLEY, Justice.

Pritchard *vs.* Ward.

Homestead in realty, under section 2040 of the Code, and the following sections, must be laid off and the plat returned to the ordinary and recorded, in order to vest the title in the head of the family free from his debts, unless the quantity of land owned is not more than that exempted. In this case the quantity owned being eighty-six acres, and that exempted being sixty acres, it was essential that it be laid off and the plat returned in order to show what part had been set apart, so as to determine whether or not a trespass was committed on the land so set apart as homestead.

Jackson, Justice.

Dugan *et al. vs.* McGlaun *et al.*

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

Where the court has passed a final judgment for the distribution of money, and, during the same term of the court, some of the parties to the proceeding petition for a rule *nisi* requiring the others to show cause why the judgment should not be set aside or rescinded because of a mistake made by counsel in the calculation, and where there is no verification, by affidavit or otherwise, of the facts alleged in the petition, the rule should not be granted, no mistake appearing on the face of the former adjudication.

Bleckley, Justice.

Jones, assignee, *vs.* The Mobile & Girard Railroad; Powell *vs.* Boutell.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

The defendant in error moved to dismiss this case on the ground that there can be no writ of error to a voluntary *non-suit*.

Such appears to be the law. 7 *Ga.*, 79, 227; 9 *Ga.*, 207; 33 *Ga.*, 205; 60 *Ga.*, 117; 10 Wendell, 169; 8 Howard, Miss., 332, cited by defendant in error.

The precise language of the *non-suit* is as follows: "At this term of the court comes the said plaintiff and *takes* a *non-suit* of said cause *without prejudice and with leave to except to any errors.*" The only question is this, does the reservation alter the principle ruled in the above stated cases? We do not see how a right never possessed can be reserved, and without the production of some authority taking the case out of the general rule by reason of this reservation, the case must be dismissed on the strength of the authorities cited.

A motion was made by leave of the court to reinstate this case on the production of authority, and 5 *Ga.*, 171, and 61 *Ga.*, 460, were cited, but we do not think that those cases take this without the general rule.

Writ of error dismissed.

JACKSON, Justice.

THE MAYOR, ETC., OF AMERICUS *vs.* ALEXANDER.

[WARNER, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. Where a contractor who had engaged for a year to work the streets of a city "according to plans, specifications and stipulations of an ordinance of council," was discharged before the year expired, and afterwards brought suit against the city for damages resulting from such discharge, evidence was admissible in his behalf, on the trial of the action, tending to show that he worked the streets in a proper manner.
2. It does not appear that the finding of the jury was contrary to the law or evidence, or that the amount of the verdict was excessive, except as to the sum written off in conformity to the ruling of the presiding judge on the motion for a new trial.

BLECKLEY, Justice.

THE ATLANTA & WEST POINT RAILROAD COMPANY *vs.* JOHNSON.

To charge upon a question not warranted by the testimony was error.

WARNER, Chief Justice.

Maddox *vs.* Heard *et al.*

The condition prescribed by the 3533d section of the Code in the bond of plaintiff in garnishment proceedings at common law after judgment, is "to pay said defendant all costs and damages that he may sustain in consequence of suing out said garnishment in the event it should appear that the amount sworn to be due on such judgment was not due." The condition of the bond given in this case is as follows: "Now, if there is no such judgment as aforesaid, this bond is to be good and valid against the said J. Maddox and his security, in favor of the said Lewis Morrison, the defendant in said judgment; otherwise to be of no force and effect."

Held, that the variance is fatal, and the garnishment was properly dismissed at plaintiff's cost.

Jackson, Justice.

Mitchell *vs.* The State of Georgia.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

An order for one dollar, payable to the prisoner, and written in pencil, the amount being expressed in a figure one with two noughts, thus, $1.00, was delivered to him in payment of a debt for that sum, which was all that the drawer owed him. He presented it to the drawee for payment, and it then had a figure eight in place of the figure one, and he received payment accordingly:

Held, that with these facts and the order before them, the jury were justified in finding that the one had been altered to an eight, though a witness, using a microscope, testified that he could discern no trace of any alteration:

Held, also, that the jury could infer that the alteration was made by the prisoner, there being evidence that he could write, and no evidence to implicate any other person.

Bleckley, Justice.

Shannon *vs.* Daniel.

On *certiorari* from the county court, where the judgment is reversed, the case should be remanded for a new trial if questions of fact are involved.

Warner, Chief Justice.

Moore *vs.* The State of Georgia.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

1. Where a nurse left the home of a child two years old with the child, and on her return with it the child bore marks on its person of having been severely whipped, the child being sound and well and free from all such marks when carried out by the nurse, the evidence to the effect above stated is sufficient to support a verdict of guilty of assault and battery against the nurse, and the charge of the court having presented the law of circumstantial evidence fully and correctly to the jury, that verdict will be upheld.
2. In such a case a request to charge "that the absence of a motive for the commission of the crime charged upon the part of defendant is a circumstance that the jury may consider as favorable to defendant in determining her guilt or innocence," was properly refused, especially as the court fully charged the presumption of innocence and the burden upon the state fully to make out the case beyond a reasonable doubt and with evidence so strong as to exclude every other reasonable hypothesis but the guilt of defendant.

Jackson, Justice.

Crenshaw *vs.* The State of Georgia.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

The indictment charged the stealing of "one blue hog, to-wit, a sow weighing about one hundred and forty pounds, and having the marks following, to-wit, a swallow fork in the right ear and a smooth crop in the left ear." The description proved at the trial differed from the foregoing in two respects; first, the sow, though blue, had a narrow white list around her; and, secondly, the left ear bore the swallow fork, and the right ear the smooth crop.

Held, that the narrow white list did not conflict with the general description as to color given in the indictment; but that the ear-marks proved varied materially from those alleged, and for this reason the prisoner was improperly convicted. Though it was unnecessary to have described the animal by the ear-marks, yet the descriptive terms of the indictment having gone to this extent, the burden was assumed of proving the specific marks alleged. Ros. Cr. Ev., 192; 2 Russ. on Crimes, 788; 15 Me., 476; 50 *Ga.*, 591.

Bleckley, Justice.

Jones *vs.* The State of Georgia.

On the trial of a defendant charged with the offense of shooting at another, it is error to charge that if defendant pointed a pistol at another and fired, it would be unnecessary to show that it was loaded with ball or shot, but the presumption of law would be that it was so loaded. See 45 *Ga.*, 477.

Warner, Chief Justice.

The Marietta Paper Manufacturing Company *vs.* Faw.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

The bill of exceptions was certified by the presiding judge on the 25th of April, 1879. Service of the same was acknowledged by defendant's counsel in the following words, on the 6th of May, 1879: "Due and legal service acknowledged on the within bill of exceptions, and copy and all further service hereby waived."

A motion was made to dismiss the bill of exceptions because service was not acknowledged within ten days. The bill of exceptions must be dismissed. The question is not an open one. 50 *Ga.*, 358; Code, §4259. The act of 1877 does not cure the defect. That act is intended to cure want of sufficient service where the party not only waives the defect but consents to try the case, and such is its language.

Writ of error dismissed.

Jackson, Justice.

McKinney, administrator, *vs.* Wells & Avera; McKinney, administrator, *vs.* Avera.

[Warner, Chief Justice, being engaged in presiding over the senate organized as a court of impeachment, did not sit in this case.]

The first item of a testator's will was as follows: "I have sold the stock of goods now owned by me to my brother, D. G. Avera, he to pay my executor the cost price of the same, and my brother is to

have the use of the store-house as long as he wants it." Subsequent provisions of the will directed that the testator's wife keep his property together, and use her discretion in renting it out from year to year, for the benefit of herself and the children, who were to be reared and educated out of the rents and profits, and out of collections on the testator's notes and accounts. The property was to be kept together until the youngest child became of age, and then was to be sold or divided, the wife and each of the children to have an equal share. The wife and the said brother of the testator were appointed executors of the will and guardians of the children, bond and security being dispensed with.

Held, that the use of the store-house was bequeathed to the brother, and that it was his as matter of right, to occupy during pleasure without paying rent, and that such occupation might be with or without a partner in his business.

BLECKLEY, Justice.

THE MANHATTAN FIRE INSURANCE COMPANY *vs.* TUMLIN.

On May 4th attorneys in Atlanta mailed a letter to an attorney in Cuthbert, retaining him for the representation of a case which the writers had brought in Randolph superior court. Had the letter been received by due course of mail, the case would have been represented; but it was miscarried, and did not reach its proper destination until May 14th. In the meantime, court met on May 6th, and the case was called and dismissed for want of representation on May 10th:

Held, that this court will not interfere with the discretion of the court below in refusing to re-instate the case. As a general rule parties who transmit papers by mail take the risk of the same being received in time.

WARNER, Chief Justice.

*In the Matter of Rest.

1. Rest for hand and brow and breast,
   For fingers, heart and brain!
Rest and peace! a long release
   From labor and from pain:
Pain of doubt, fatigue, despair—
Pain of darkness everywhere,
   And seeking light in vain!

2. Peace and rest! Are they the best
   For mortals here below?
Is soft repose from work and woes
   A bliss for men to know?
Bliss of time is bliss of toil:
No bliss but this, from sun and soil,
   Does God permit to grow.

Bleckley, Justice.

*Justice Bleckley having resigned, at the conclusion of his last opinion, read from the bench the above exquisite little poem, which was ordered spread upon the minutes by the court. It constitutes a fit close to the judicial career of one whose opinions in these reports show him not only to have been the profound lawyer, but also the accomplished scholar. (R.)

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA.

FEBRUARY TERM, 1880.

PRESENT—HIRAM WARNER..... ...CHIEF JUSTICE.
JAMES JACKSON.....ASSOCIATE "
MARTIN J. CRAWFORD..... " "

HILL *vs.* STATE OF GEORGIA.

1. Remarks made by a juror before he had been impaneled indicating bias, may be explained by him, and if made simply for the purpose of avoiding jury duty, the fact that he was taken upon the jury which convicted defendant will not necessitate a new trial.

(*a.*) That one of the jurors in a criminal case conversed with his wife apart from the others, is no ground for new trial, where it appears that the conversation had no reference to the case, and was had with consent of defendant's counsel.

(*b.*) Objections to a juror *propter defectum* are too late after verdict.

(*c.*) A juror on being polled replied to the question "Is that your verdict?" "I agreed to it." This answer was objected to and the court again propounded it, when he said, "I agreed to it, I suppose." The court said that the juror was not asked for a supposition but for what the juror knows, "Is this your verdict or is it not?" The answer was "I suppose it is, if that is a proper answer to your question." "You are an intelligent man, Mr. Randall, please answer me?" "Yes, sir, I agreed to it," was then the answer. Thereupon the verdict was received over defendant's objection:

Held, that the verdict was properly received. Nor can the juror impeach it by subsequent affidavit.

2. The idea of prevention or defense against an impending or progressing wrong must enter into all cases of justifiable homicide. To deliberately kill in revenge for a past injury, however heinous, after reason has had time to resume its sway, cannot be justifiable.

(*a.*) The court charged that if Hill came upon Simmons suddenly and without premeditation, and his passions were aroused thereby, and in his (Hill's) belief, Simmons had a pistol, and enraged on seeing the adulterer for the first time after his knowledge of his guilt, he shot him and killed him, then the offense would not be murder, but manslaughter; but if the attack was premeditated and deliberate, and not upon a sudden burst of uncontrollable passion, then it would be murder.

Held, that the charge was right and warranted by the evidence.

(*b.*) As to the comparative weight of the evidence and the prisoner's statement, this case is controlled by the ruling in *Cox vs. State*, last term.

(*c.*) The charge was not argumentative or partial.

(*d.*) The constitution of 1877 does not alter the law in regard to the jury being judges of the law and fact in criminal cases. It simply re-enacts the provisions of the Code as they already stood, and emphasizes them by insertion in the fundamental law.

3. Newly discovered evidence which is merely cumulative to that introduced on the trial, not ground for new trial.

(*a.*) Insanity was not pleaded. Had it been the record does not show that the plea would have been sustained. If the defendant deliberately slew the deceased in revenge for adultery with his wife, he would not be protected by the fact that he labored under a delusion as to her character for virtue. If he is now a lunatic he can be removed to the asylum on proper proceedings had therefor.

4. The verdict is supported by the evidence.

Criminal law. Jury. Practice in the Superior Court. Charge of Court. Constitutional law. Husband and wife. Insanity. New trial. Before Judge HILLYER. Fulton Superior Court. March Term, 1879.

To the report contained in the decision it is only necessary to add the following:

Samuel H. Hill was tried for the murder of John R. Simmons. The evidence showed that Simmons was shaved in the barber-shop of the National Hotel, in Atlanta, and from there passed into the adjoining bar-room; that he took a drink of liquor, and while paying for it Hill came

up with a pistol, and with an oath which caused Simmons to turn, fired upon him; that Simmons died from the wound within a few hours, almost his last expression being that he was shot "for nothing in the world; he (Hill) shot me without saying a word." As to the exact expression used by Hill before he fired, the testimony and statement of the prisoner do not coincide exactly; as stated by him, Simmons placed his hand upon his hip, and Hill said, "Pull here, damn you, you've got to do it," and fired.

Thus far the conflict in the evidence amounts to little, but at this point the real contest begins. The defendant sought to show that Simmons was the seducer of his wife, and certainly established that he was a paramour of hers. It appears from the evidence that in December, 1878, she left home with Simmons, and remained from Saturday night until Monday afternoon at a bawdy-house; that Hill made diligent search for her, and at last recovered her through the instrumentality of a lewd woman, who communicated with Simmons, and through him caused her to return; that Hill condoned this offense, and removed her to a place some miles in the country; that on January 16th, 1879, Simmons was seen to pass and re-pass this place in a buggy, and about the same time a note was received by her, claimed to have been written by Simmons in a disguised hand; that she wrote an urgent letter to her husband telling him to come to her, but assigning no reason; that he went, and about the end of January the homicide occurred. There was much evidence for the defense to show the anguish of Hill, his excitement, and that he made numerous inquiries about his wife, Simmons, etc.

The state replied and supported its position with the testimony of numerous witnesses, that Mrs. Hill had left the path of virtue long before she met Simmons; that she met him in the company of harlots under the assumed name of "Miss Effie Etheridge," and received his attentions as such; that she visited balls and houses of bad character both with Simmons and other men; and that in most if not all

respects her actions were those of a common woman of loose character. It appears that Simmons discovered that she was a married woman, but at what time does not appear.

There was some testimony tending to show that before the homicide Simmons anticipated a difficulty, and was prepared for it, or at least had spoken of being armed for such an emergency.

Of Hill's love for his wife and the genuineness of his anguish at her fall there seems to be no doubt. How far his knowledge of her real degradation extended before the killing was a point in contest. One witness for the state indicated that he knew of her immorality, others that he was informed of her attendance at improper balls with other men than Simmons, but the main reliance of the state on this subject was the following portion of defendant's statement: "John Simmons accomplished what he had before, and this is what she tells me of it; has told me all the time, and it is John Simmons all the time. G. tried to do so himself, but Simmons told her G. was diseased, and he would have accomplished his purpose but for that; and I state this to show you what he done, and that he was not so much to blame, and that is the reason I didn't kill him."

The court delivered the following charge:

"*Gentlemen of the Jury:*

"The court will now deliver to you the law for your guidance and direction in reaching a verdict according to the evidence.

"The court will not express or intimate any opinion touching the evidence or facts in issue. The court delivers to you the law with care and upon great consideration, and you may safely rely upon its correctness as the court delivers it. It is your exclusive province to find the facts in the evidence. You judge the law and the facts, and they lead you to the truth.

"I now read you certain sections of the Code pertinent to the case, and to which I invite your careful attention.

"Sections 4292, 4293, 4319, 4320, 4321, 4322, 4323, as amended by act of 1878, 4324, 4325, 4327, 4330, 4331, 4332, 4333, 4334, 4335.

"If you find from the evidence that the prisoner at the bar did, in the peace of the state, in this county, on the occasion, with the weapon

and in the manner described and set out in the indictment, with malice aforethought, either express or implied, unlawfully kill the deceased, John R. Simmons, and if the prisoner was then and there a person of sound memory and discretion, the offense of murder would be made out; otherwise the offense of murder would not be made out.

"A person would be presumed to intend the natural consequences of his acts. A person would be presumed of sound memory and discretion unless the contrary appear.

"By our law homicide is of three kinds—murder, manslaughter and justifiable homicide—and it is not every killing of another that is unlawful. But if it appear that the prisoner was the slayer, then the law would cast on him the burden of proof to show that such killing was justifiable; he must show clearly that there was an actual necessity for the killing in order to prevent some grievous injury, such as those expressly laid down in the Code, or such other or others as may in the opinion of the jury stand on the same footing of reason and justice as those enumerated.

"To constitute either murder or manslaughter the killing must have been unlawful, for if the killing is justified the law of our state declares that the person accused shall on his trial be fully acquitted and discharged.

"If a man and his wife be living together in the holy bonds of matrimony, and in virtue and in peace, and another man should become the seducer of such woman, or an adulterer with her, or should attempt to do so, her husband would have the right to defend her and to defend himself from such injury, and to use just so much force as under the circumstances was necessary for that defense, and to make it effectual and complete. The penal Code enumerates certain instances of justifiable homicide, and then in section 4334 sets forth this general provision: 'All other instances which stand on the same footing of reason and justice as those enumerated, shall be justifiable homicide.' You notice in listening to these various sections of the Code read in your hearing, that one of the principles of reason and justice on which a homicide can be justified is this: that such homicide was committed as a defense against an injury—to prevent an injury of the serious kind described—or to stay its progress. There is no principle of reason or justice enumerated in the Code by which, after an injury shall have been consummated, no matter how great and no matter how grievous that injury may be, the party injured would be justified in taking vengeance into his own hands and in deliberately seeking out the wrong-doer and slaying him. The law would continually thunder its imperative command in the ears of the one thus outraged and tempted: 'Thou shalt not commit murder!' One of the very reasons why the law visits such terrible punishment on the crime of murder is because of the greatness of the temptation, the provocation, and the passions which sometimes lead to its commission. Punishment is in-

tended to overcome such passions and deter men from the crime; and the existence of such temptations, provocations, or passions, if such there be, might be looked to for ascertaining motives, or to inquire whether the killing was intential or malicious, but would afford no justification for the killing if perpetrated for the mere purpose of vengeance, punishment, or vindication.

"A man would have the right, nay it would be his duty, to protect and defend his wife against any assault upon her virtue by either a seducer or an adulterer. In this state the husband is the head of the family; the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately either for her own protection or for her benefit, or for the preservation of public order—Code, section 1753. And it would be the duty of a wife to conform to any reasonable and just regulations the husband may lay down for guiding her conduct or choosing her associates—and it would be the duty of all other persons to acquiesce in the husband's authority or directions, so far as known in respect thereto, and if any man should violate this principle for the purpose of adultery, or seduction, and by open force or deceit, or fraud, come between husband and wife, the husband would have a right immediately and swiftly to resort to force for the expulsion of such intruder, and, as before stated, to use just so much force as was necessary, and even to slay the aggressor, if such killing should be actually necessary in order to protect and defend his wife. But if a man's wife be permitted to go, or does go, into haunts or walks of vice, and becomes an adulteress with one man, or more than one man, and though her husband knew nothing of such misconduct, yet when he finds it out, if he goes to her rescue, seeks and accomplishes her complete restoration to him and condones her offense, and there is no further necessity for violence in her defense, or in his defense, he would have no right afterwards deliberately, and with premeditation, to arm himself with a deadly weapon and seek out her paramour, if there was but one, or to select among them, if more than one, and to slay him with that weapon, and if he do so after the lapse of cooling time, that is, after the lapse of an interval sufficient for the voice of reason and humanity to be heard, his offense would be murder. The party injured would not be justified in taking the law into his own hands, and, in the chambers of his own mind, judge and condemn such offender to punishment by death, and then deliberately become also his excutioner. The law provides other and juster means for putting men on trial, and for condemning and punishing offenders. And any man who should thus take the law into his own hands, and with such purpose and intent, slay another, would thereby become a murderer.

"Look to the evidence and see what was the state of things when the killing occurred. If at that time the prisoner's wife was in safety some miles distant at her home in another county, in the society of her

friends, and the deceased was then and at that time engaged in making no attack of any kind on her, either by open force or fraud or deceit, or even though deceased had some days or a few weeks previously endeavored to persuade her to meet him by writing her a note, or sending her a message, or otherwise, still, if practically she was on that day and at that time in safety, and there was no necessity pressing upon the prisoner to adopt then and there so dreadful an expedient as taking away life in order to defend either himself or her, then no motive of vengeance or anger, nor any other motive based on such past offenses, would justify the killing. No matter how badly the deceased and others may have acted days or weeks before, and no matter how just the prisoner's anger may have been for previous injury or grievances; still, if that anger rested exclusively on past occurrences; if at that time the deceased was saying nothing and doing nothing in furtherance of any criminal project, such past occurrences would afford no justification; nor would a bare fear of any repetition of offenses, or of an attempt thereat, justify the killing. The prisoner would have a right, if he chose so to do, to condone her offenses and to continue to live with her, and the law would protect him and her therein; and if he apprehended any further invasion of his peace, he would have the right to take precautionary measures and be on the alert, and if such further attempt should be made, to meet it with any force reasonably needful to repel and to overcome such invasion or to cut it short. But if, disregarding his duty and deaf to the voice of reason and humanity, he, after an interval of time sufficient for that voice to be heard, take the law into his own hands and slay the deceased through mere anger for past offenses, this would come within the definition of deliberate revenge, and would constitute express malice.

"The supreme court has never decided that such a killing would be justified. That court has held, just as this court now holds, that a man may in good faith defend his wife's person and his wife's virtue on the same principles of reason and justice as he may defend his own person; but that he may not take the law in his own hands and deliberately avenge unto death a past and accomplished adultery in the manner or after the time claimed in the argument.

"The court states to you the law clearly. You are plain, honest men, seeking the truth and desiring to do right. The court is your safe and reliable constitutional adviser as touching the law. You have the right to receive the law as the practiced and trained mind of a sworn judge knows it to be, and I would be unfaithful if I fail to deliver it plainly.

"Take no heed of anything read or spoken to you to the contrary hereof. Courts and juries cannot—nay, dare not—swerve from the truth in the law any more than in the facts. If any other jury has ever found, as in your hearing claimed, that in any case a man has the right to take the law into his own hands and be justified to execute

vengeance unto death, this would rather cause such juries to be noted for their weakness or their wickedness, but would be no precedent or example for you.

"So far as anything may have been said in your hearing to the contrary of what the court announces to you on the point in question, when reduced to its ultimate analysis it simply amounts to the proposition that the law is wrong. The law is not wrong. But if it was wrong, neither you nor the court could change it.

"The course taken in the argument renders it proper for the court to remind you that the law lays down general rules applicable to all. The law is made for the whole state, white and black, old and young, good and bad, all alike. What would justify one in the court-house would under the same circumstances and motives justify another. Courts and juries can be no respecters of persons, and if there be that of right reason, which makes it proper to withhold punishment in any particular case where the letter of the law has been violated, the wise and humane provisions of the constitution and laws of our state would not therefore ask a court and jury to swerve from the truth in the law, but would authorize application to that power in the state capital, where is vested the right to grant reprieves and pardons. I caution you carefully that you must not convict or move one iota towards consenting to a conviction or any idea or supposition relative to pardon, but I mention it to you merely to disabuse your minds and to let you see how you may justly and wisely discriminate between such logic and argument as may aid in leading you to the truth in the law, and such appeals to feeling or based on any alleged exceptional nature of the case as are out of place when addressed to you, but should be addressed, if need be, to another department of the state government, having a wider discretion than any which exists in the judicial department.

"If the jury should be satisfied, after a careful consideration of all the evidence, that the deceased, John R. Simmons, had had, without defendant's knowledge, criminal intercourse with defendant's wife, and after this fact came to defendant's knowledge he should casually meet the deceased, without having sought him, and without any purpose to attack him with a deadly weapon, but being brought unexpectedly face to face with him, and believing that deceased was armed and expecting to fight him, the prisoner's passion should be aroused anew and was sudden, violent and ungovernable, and without any mixture of deliberation whatever, and if under the influence of such passion and upon such sudden occasion the prisoner fired on deceased, his offense would be voluntary manslaughter, and not murder. But you will observe, as before stated, that if there was premeditation and cooling time, and if the prisoner had sought and found deceased with an intention to kill him or with a preconceived intention to bring on a fight with deadly weapons, the law would not thus grade such offense from murder down to manslaughter.

"If the prisoner killed the deceased in self defense, or if the prisoner killed the deceased in defense of his wife's virtue against an attempt then and there being made on the same, and actually in progress, and under such circumstances as that such killing was actually and absolutely necessary to prevent such injury, and under such circumstances as to constitute an instance standing on the same footing of reason and justice as those of justifiable homicide, enumerated in the Code, you would be authorized to find him justifiable, and should acquit him. But, as before stated, if at that time his wife was in a place of safety, and was actually safe, the prisoner would not be thus justified; or if you should find, in view of all the evidence, that such killing does not constitute an instance standing on the same footing of reason and justice as those of justifiable homicide enumerated in the Code, he would not be justifiable.

. . . . . .

"Whether there was an interval sufficient for the voice of reason and humanity to be heard, is a question for you to determine. Each case depends on its own peculiar facts, and it is for you to say whether, under the peculiar facts of this case, there was here an interval sufficient for the voice of reason and humanity to be heard.

"The greatness of a provocation and other circumstances are to be duly considered in determining the question, but the principle should not be unreasonably extended.

"The law does not prescribe any particular duration of time in which an intention unlawfully to take life, or to do a criminal act resulting in death, shall subsist in the mind in order to constitute malice. There must be deliberation in order to make express malice—that is, a succession in mental action, the unlawful intention—and then following after the formation of that intention, the execution or carrying out of the same. If there was time for deliberation; if there was an interval between the assault or provocation given and the homicide sufficient for the voice of reason and humanity to be heard, under the circumstances, in the conscience of a reasonable man, then it would be the duty of the prisoner to hear that voice; and if he had, and persisted in, an unlawful purpose to kill through or during such an interval, there would be express malice; but if there was not such sufficient interval, there could be no express malice.

"The effect of an absence of express malice or cooling time, if all the other conditions of guilt appear or be made out in proof, would be, not to justify the prisoner, but to reduce the offense to manslaughter."

. . . . . .

The judge then charged in the usual terms upon the questions of reasonable doubt, impeachment of witnesses, the prisoner's statement, and the form of the verdict.

The jury found the defendant guilty of murder, and recommended that he be imprisoned for life. He moved for a new trial, which was refused, and he excepted.

In connection with the second division of the decision, subdivision (*d*), it is only necessary to add that the court refused to charge, at the request of defendant's counsel, that "by virtue of the constitution of 1877, the jury in this case are the judges of the law as well as of the facts."

In connection with the third division, subdivision (*a*), of the decision, it may be stated that one of the grounds of the motion for new trial was because the defendant was insane at the time of the killing, and had been so ever since. This ground was supported by affidavits tending to show emotional insanity; that the especial form in which this insanity exhibited itself was in his social relations, and particularly in his absolute belief in the purity of his wife and in the fact that she had been greatly wronged—and that, too, after hearing all the evidence in the case.

For the other facts see the decision.

GARTRELL & WRIGHT; R. S. JEFFERIES; HOPKINS & GLENN; W. BRAY; W. T. MOYERS, for plaintiff in error.

B. H. HILL, Jr., solicitor general; HOKE SMITH; J. C. JONES; E. ROCH, for the state.

JACKSON, Justice.

The defendant was indicted for the murder of John R. Simmons in the city of Atlanta on the 29th day of January, 1879; he was found guilty, and made a motion for a new trial; the presiding judge overruled the motion on all the grounds therein stated, and error is assigned in this court on each of these grounds.

The question before us is, did the presiding judge so err on any of these grounds as to authorize this court to set aside the verdict of the jury and order a new trial, notwithstanding the approval by the judge who tried the case of the verdict rendered by the jury? This is a court of law. The questions made by this record are pure questions of law. With the policy of the law we have nothing to do. It is our duty to enforce it as we find it written. Sympa-

thy for the dead, slain in the flower of youth, and sentiment for the living, who slew him under circumstances which appeal to all hearts for kindness and consideration, must both be repressed, and impartial justice according to law must reign here, and reign alone.

Anxious to guard every right of the defendant on the one hand, and to vindicate the serene and sober majesty of law on the other, we have scrutinized closely every line of this voluminous record of more than five hundred pages, and have examined the entire case with that care and deliberation which its importance to the defendant and to society demands. The conclusions reached are the result of much time devoted to the case and much anxiety to discover truth and to apply the principles of law to the truth disclosed by the evidence set out in the record. Questions in dispute in regard to the law are to be found in the motion for a new trial, and to the consideration of these questions we address ourselves.

When analyzed, the grounds taken in the motion for a new trial may be classified under four heads: first, alleged errors of the court below in respect to the jury; secondly, in the charge to the jury; thirdly, in regard to newly discovered testimony; and fourthly, in upholding the verdict as authorized by the law and the evidence.

1. In respect to errors of the court in overruling the motion for a new trial on the several grounds touching the conduct of the jury, it is assigned as error first, that a new trial should have been granted because Myers, one of the jury, had formed and expressed an opinion on the guilt of the defendant prior to the trial, and was thereby disqualified.

This assignment of error rests on the following affidavit of J. B. Redwine, Esq.: " . . . I asked him where he was going. He answered he was summoned as a juror in the Hill case to be called that day, but added that they wouldn't take him, or that he knew he wouldn't serve, as he had already made up his mind as to what he would do.

I then asked him how his mind was made up, for or against Hill; he refused to answer. I then put the substance of the statutory questions, and he said he could not answer all of them rightly. I inferred he was prejudiced one way or the other. I was engaged at the time and do not recollect distinctly all that occurred after this. I know I asked him if he knew John R. Simmons and Sam. Hill. I know he replied he knew one and not the other; which one he knew I cannot distinctly recollect, but the impression on my mind now is, and has since been, that he knew Simmons and not Hill. From his manner and from what he said (of course I cannot recollect all) I received the impression that he was prejudiced against Hill. William M. Turner, my office boy, was present at the time."

If this affidavit had not been explained, it would be too vague and uncertain to predicate a reversal of the judgment upon it; but it is answered by the juror in a deposition made by him, who swears positively that the conversation had with Redwine was to induce the impression that he had made up his mind so as to get out the report and enable him to keep off the jury, and further, that he had made up no opinion whatever but was perfectly impartial. Besides, it further appears from the record that this juror was one of the last two to concur in the verdict, and has made a deposition in behalf of defendant on which newly discovered testimony is predicated; 59 *Ga.*, 308, covers the point completely.

(*a.*. It is also insisted that Rich, one of the jurors, conversed with his wife apart from the other jurors pending the trial; but that conversation had no reference at all to the case as shown by the depositions of Rich, the juror, and of the bailiffs in charge of the jury. Moreover, it seems that counsel for the defendant assented to the permission given by the court that such conversation should be had, and so the judge distinctly certifies. 45 *Ga.*, 282; 47 *Ib.*, 598.

(*b*). Further, it is objected that since the verdict it has been ascertained that Rich is an unnaturalized foreigner.

There is no doubt that Rich was born in Hungary. Whether ever naturalized or not appears somewhat doubtful from the record. The *onus* is on the defendant to show that he is not a citizen, especially after verdict. Rich thought that he was naturalized in Albany, and took an oath there on which he voted some years ago. He has been in the United States ever since he was thirteen years of age, and his father ever since 1868. He may or may not have been naturalized; possibly he was. Revised Code U. S., §2167.

Be that as it may, the objection comes too late. In *Cortz vs. The State*, 19 *Ga.*, 628, a case of homicide, this principle was ruled, and also in *Epps vs. The State*, 19 *Ga.*, 102 It is a challenge *propter defectum*, and must be taken before verdict. See also 40 *Ga.*, 253; 3d Blacks. Com., 361; 20 *Ga.*, 752; 28 *Ga*, 439; 33 *Ga.*, 403; 39 *Ga.*, 118; 47 *Ga.*, 538; 53 *Ga.*, 428; 57 *Ga.*, 329; 60 *Ga.*, 55, cited by defendant in error.

(*c.*) It is also objected that Randall, one of the jurors, when that body was polled, did not signify his assent to the verdict as required by law. Randall replied to the question, "is that your verdict?" "I agreed to it." This answer was objected to, and the court again propounded it, when he said, "I agreed to it, I suppose." The court said that the juror was not asked for a supposition, but for what the juror knows. "Is this your verdict or is it not?" The answer was, "I suppose it is, if that is a proper answer to your question." "You are an intelligent man, Mr. Randall; please answer me?" "Yes, sir, I agreed to it," was the answer. And thereupon the verdict was received over defendant's objection.

The practice is not uniform in the United States on polling the jury. In some states it is not allowed; in others it rests in the discretion of the judge, and at common law it seems to have existed in another form—2 Hale's P. C., 299; Bishop's Crim. Pro., 830; 1 Chitty, 635. In this state the right is recognized, the object being to ascertain before the

public and prisoner whether the verdict agreed on in the jury room is still the unanimous verdict of the jury—31 *Ga.*, 611-661; *Campbell & Jones vs. Murray*, August 7, 1878, not yet reported. The question is, did the juror still assent thereto? From the narrative above given, the presiding judge held that he did, and we think that, whilst the juror hesitated, yet he then and there assented and recognized the verdict as his.

The affidavit afterwards taken by him cannot be considered—Bishop's Crim. Pro., 830. He cannot impeach the verdict after its record—17 *Ga.*, 146; 9 *Ga.*, 121; 49 *Ga.*, 622; 59 *Ga.*, 309.

Indeed, the first answer of the juror, if not sufficient of itself to show present assent, without any other questions or answers, was made plain by the last "yes, sir, I agreed to it;" as much as to say, "yes, sir, it is my verdict, for I agreed to it." The case in 6 Wisconsin, cited by plaintiff in error, is much stronger than this. It shows almost conclusively dissent to the verdict.

2. We come now to consider the errors assigned upon the charge and refusals to charge.

The portions of the charge excepted to seem to have been cut in segments from the body of the charge. Without stopping, however, to see whether the whole segment embodies more than one point, and whether in that view any of them can be reviewed under the rulings of this court in similar cases if strictly applied, let us analyze them to see what real points are relied on, as well as we may, from the wholesale manner in which they are presented.

The main point made, as it strikes us, is that the court did not fairly submit to the jury section 4,334 of the Code, which enacts that "all other instances which stand on the same footing of reason and justice as those enumerated, shall be justifiable homicide." Defendant insists that the court should have turned the jury loose upon this section, and should have instructed them that, "where a man kills another for having criminal intercourse with his wife, it is

for the jury to decide whether the killing stands upon the same grounds of reason and justice as those enumerated in the Code, and if they so believe, it would be a case of justifiable homicide." The judge declined to give this request, but instructed the jury that "there is no principle of reason or justice enumerated in the Code by which, after an injury shall have been consummated, no matter how great and no matter how grievous that injury may be, the party injured would be justified in taking vengeance into his own hands and in deliberately seeking out the wrong doer and slaying him;" that "the existence of such temptations, provocations or passions, might be looked to for ascertaining motives, or to inquire whether the killing was intentional or malicious, but would afford no justification for the killing if perpetrated for the mere purpose of vengeance, punishment, or vindication;" that "one of the principles of reason and justice on which a homicide can be justified is this: that such homicide was committed as a defense against an injury, to prevent an injury of the serious kind described, or to stay its progress."

So that the issue is plainly presented, whether homicide to be justifiable must be in defense of wrong or to prevent its consummation—in the language of the judge, "to stay its progress"—and whether if committed for a past wrong, distant enough for prisoner to, cool—even adultery with the slayer's wife—the killing is justifiable in law.

The question turns on our Code. What are the previous sections referred to in section 4334? They are sections 4330, 4331, 4332 and 4333; and so far as at all applicable here they read as follows in giving the instances of justifiable homicide: "In self-defense, or in defense of habitation, person or property, against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony on either; or against any persons who manifestly intend and endeavor, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being

therein. A bare fear of any of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears and not in a spirit of revenge. If, after persuasion, remonstrance, or other gentle measures used, a forcible attack and invasion on the property or habitation of another cannot be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading the property or habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended, or might accrue to the person, property or family of the person killing. If a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing, that in order to save his own life, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given."

These are the enumerated instances where one may kill another and be justified in doing so; and the legal question is, does the principle of defense, defense of some sort, enter into them all? and can any case stand on the same footing of reason and justice as these enumerated cases do, unless defense of some sort—the prevention of some impending and pressing wrong—enters as an element therein? Judge Hillyer charged that defense against some urgent and pressing danger must have operated on the mind of the defendant, or he was not justifiable; or, to put the question on the case at bar, he charged, in effect, that defendant must have killed Simmons to prevent him from attempting or consummating an impending adultery with his wife, and not to avenge a past adultery with her, in order to justify the killing. Mark, the question now is not the reduction

of the crime from murder to manslaughter, but the absolute and unconditional justification of the killing; in other words, that such killing is no offense at all.

It will be seen by merely glancing at the quotations from the Code of the enumerated cases of justifiable homicide, that each of them contemplates defense against immediate and pressing danger. It is defense of self; it is defense of habitation, property or person; it is defense against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either; it is defense against a mob violently and riotously intending and endeavoring to enter one's house to assault or wrong some person therein; it is defense against real, imminent, impending danger; a mere fear of any offense, to prevent which the killing is done, shall not justify it; the circumstances must be such as to excite reasonable fears in a rational mind, and the person killing must act under the influence of such fears, and not in a spirit of revenge; not only must it be in defense, but it must be absolutely necessary to prevent the attack or invasion; and even in self-defense, the strongest of all defenses, the danger must be so urgent and pressing at the time of the killing, that in order to save one's own life, the killing was absolutely necessary.

So that our law broadly separates the act of deliberately seeking another and slaying him for past wrongs, however heinous they may be, from the act of slaying another to prevent his doing a present wrong, or future wrong imminently impending. Whenever done to avenge the past, it is not justifiable; when done under pressing necessity to defend life, or limb, or wife, or child, or habitation, or property, against felonious attack on either, it is justifiable.

Therefore, our law, in common with the laws of all civilized states with which we are acquainted, forbids vengeance for the past, but permits defense against the present and the immediate and pressing future; and therefore the presiding judge did not err in the refusal of the request to charge, or in the charge given on this point.

(*a*). And this, we think, disposes of the eight first grounds of this motion. Some criticism is made in regard to the allusion in the charge to the pardoning power and where it is lodged, to the caution of the judge to the jury not to take law from counsel in the teeth of the exposition given by the court, to the allusion to man and wife living in virtue and peace, to the argumentative tendency of the charge, and to other such matters; but in the eight grounds reviewed, we see no substantial errors in matters of that sort, or in other respects.

In one of them, exception is taken to the judge's exposition of the law of manslaughter as contradistinguished from murder, and the application of that law to this case. The court told the jury, substantially, that if Hill came upon Simmons suddenly and without premeditation, and his passions were aroused thereby, and in his (Hill's) belief Simmons had a pistol, and enraged on seeing the adulterer for the first time, after his knowledge of his guilt, he shot him and killed him, then the offense would not be murder, but manslaughter; but if the attack was premeditated and deliberate, and not upon a sudden burst of uncontrollable passion, then it would be murder. Such we understand to be the law; and as Hill's exclamation when he shot implied that he thought Simmons had a pistol, the allusion to the prisoner's belief that he did have one is not without evidence to support it.

(*b*). In respect to the comparative weight of the evidence and the statement, the charge is identical with that given in the case of *Cox vs. The State*, decided last term, and is controlled thereby. So the ninth ground is not good.

(*c*). Nor do we think that the charge is partial, or argumentative, or that it intimated any opinion on the facts. It is forcible and strong, clear and to the point; it gave the law of the case to the jury, but only the law. More it did not do; less it ought not to have done. The tenth ground is not, therefore, sound.

(*d*). The constitution of 1877 does not alter the law in

regard to the right of the jury to be the judges of it independently of the instructions of the court thereon. It simply re-enacts, in identical language, the provisions of the Code thereon. It emphasizes it by inserting it in the constitution; but it put it there subject to the construction which had been put on the same words in the Code. Had the convention of 1877 intended to change the construction of those words, it would have altered them. On the contrary, as we understand it, it expressly declined to do so.

Therefore the court was right to refuse the request embodied in the twelfth ground, and the eleventh was passed upon with the first eight grounds.

3. So we come to the newly discovered testimony, or the grounds set out in the amendment to the motion. That in regard to the competency of Rich as a juror has been already considered. That of Myers in respect to the letter written to Mrs. Hill and its authorship by Simmons, is merely cumulative, and would not probably change the verdict if the law is administered, because, if Simmons did write it, it was nearly two weeks prior to the killing, and did not, and could not, take the case without the rule that to reduce the homicide from murder to manslaughter, there must not be time for passion to cool and reason to resume her sway over hot anger and sudden fury.

(*a.*) The counsel on the trial before the jury differed in respect to putting in evidence of insanity, and decided not to do so. The plea, if it had been put in, would not have been supported by the evidence. If the defendant rested under a delusion in regard to his wife's virtue, and therefore slew the deceased, it would not protect him in the commission of the crime—31 *Ga.*, 479.

If he be now a lunatic, he cannot be hurt. He ought to be, and will be, removed from the penitentiary to the asylum. The same lunacy might induce him to slay others for a like offense with that for which Simmons lies in his grave. Confinement somewhere may be essential to prevent the repetition of the deed on another.

4. Is this verdict supported by the evidence and is the defendant guilty of murder? The evidence shows deliberate revenge. The wrong was a grievous wrong, but the vengeance therefor was conned over and calculated for weeks. The prisoner's statement alone, stripped of all inferiority to evidence, and admitted to be the whole truth, shows a case of deliberate murder. Hence the last refuge of counsel, the change of base, the desire to set up the plea of insanity on a new hearing.

But what are the facts? The wife of Hill was introduced to Simmons as a lewd woman, and in company with lewd women; as a single woman and not a married woman; as Miss Etheridge and not Mrs. Hill. She was introduced without his seeking her. One of her companions in sin sent for him. He took her for a woman of the town, and so he had cause to believe her to be from her company and conduct. The record shows that she had been enticed from allegiance to her husband—if indeed her own disposition needed seductive influences to lead her astray—weeks, if not months, before Simmons knew her. He met her thereafter at balls where virtuous women did not go, and at places to name which chastity would blush. He did discover that she was a married woman and was Hill's wife, but at what point of time during their intimacy the record does not show. When he made that discovery, he should have stopped that wild career of sin, which he seems to have entered under the lead of married men; but he did not. On the 8th of December, 1878, in company with another man and with Simmons, she left home, and her husband, about whose affection for her and anguish at her departure there can be no doubt, recovered her within three days through the instrumentality of a lewd woman and her knowledge that Simmons knew her lodging, and who seems to have induced her return to Hill.

Her husband condoned the past guilt of his wife, as he had the right to do, and restored her to his home. He moved her to the country, eight miles from Atlanta, and

about the 16th of January, Simmons was seen to pass and repass once that country place in a buggy, and about the same time a note was received by her said to be written by him, but in a disguised hand, and Hill received a letter from her begging him to come to her, but without stating any particular reason. Thenceforward Hill seems to have deliberately intended to wipe out his wrongs in the blood of Simmons, and thirteen days thereafter, on the 29th of January, just after Simmons had been shaved in the barber's shop of the National Hotel, and was at the counter of the bar-room, about to settle for a drink he had taken, Hill stepped up behind him, and with some profane or vulgar exclamation prefixed to the remark, "shoot, you've got it to do," as Simmons turned to see what or who it was, shot him through the face and head, and about the last exclamation of the dying man was, "he shot me for nothing!"

The dead man had no chance for his life. Hill may have thought Simmons was armed and from his exclamation it seems that he did think so; but Simmons had no weapon drawn and was allowed no time to draw one if he had it. If this be not murder what can make a case of murder, wherever in the past there has been great provocation? Hill in his statement admits the killing for revenge and puts his defense there. He says that he would have killed another paramour of his wife, but that he was not so guilty as Simmons. The legal question, and with that question only it is our duty to deal, is narrowed, therefore, to this: Is a man justifiable in deliberately hunting down another who committed adultery with his wife nearly two months before the homicide, and thirteen days before rode past the house where she was and wrote to her about the same time, and in deliberately shooting him down without a moment's time for defense, when he knew at the time of the killing that the wife had left his home and that others were guilty also, though not so much so in his opinion? or do these facts reduce the homicide to voluntary manslaughter?

There cannot be found a case in any law book with

which we are familiar that approximates such a conclusion. It is only where the danger is so imminent and immediate that one cannot appeal to the law for help, that in civilized society he can help himself.

It is true that where virtuous wives or sisters or daughters are insulted, jurors are slow to convict the avenger of the affront, though time enough had elapsed to put passion under the sway of reason; but even in such cases no court has ever held or can hold, without becoming instead of expounders makers of the law, that such verdicts are in accordance with the law. The Augusta case of shooting at another, in our own reports, is wholly unlike this. There no breath of suspicion soiled the purity of the wife. The very evening before, the affront was given; and the insulter, the very next morning at breakfast, had the audacity to take his seat at the same table and immediately in front of the insulted woman and the guardian of her virtue; and it was in that case that this court ruled that the jury might consider whether it stood on the same ground of reason as the cases enumerated in the Code. The wife was not only pure, but present; passion, just kindled the night before, flamed up beyond control at the sight of the aggressor, who was not hunted down to be slain, but who obtruded his presence before those he had wronged.

In this case Mrs. Hill was safe eight miles in the country; and while thus safe, Simmons was sought, was found, and was slain without a moment's warning.

We forbear to detail further the facts of this case made by this record. We would not unveil the folly and frailty of the unhappy woman, whose conduct has robbed her husband of home and of liberty, and one of her paramours of life; nor would we expose the haunts of vice uncovered by this evidence, and the men who frequent them. We add but a single remark: If men will take the law into their own hands, become themselves the judges of their own cases, and their own sheriff to execute the sentence they themselves pronounce, they must be certain that they judge the

case according to law and execute the sentence which that law pronounces, or they must suffer the consequences of their mistake of the law. Homicide for revenge of past offenses, however heinous, deliberately planned and premeditated, and carried into execution after reason has had time to assert her supremacy over passion, is murder; and he who judges that in his own case it is not, and executes sentence in such a case on a fellow-being, must suffer the penalty which the law imposes upon the murderer.

Let the judgment be affirmed.

The Central Railroad Company *vs.* Brinson, by next friend.

1. A minor, being damaged in his person, may bring suit to recover for any permanent injury which he has sustained reaching beyond his majority, whilst the father may sue for any trespass done or damage sustained whereby he loses the services of the child, as also for any expense incurred resulting from such injury.
2. Although one railroad may be leased to and operated by another, by which the latter makes itself responsible for acts done on the road leased, yet neither loses its identity, and any tort committed upon the line of the one or the other should be so alleged and proved. Especially is this true where both roads are constructed through the territory of the same county.
3. Where an injury is committed by a railroad, the presumption is always against the road, yet it may rebut that presumption by showing that its agents have exercised all ordinary and reasonable care and diligence to avoid the injury; or that the damage was caused by the plaintiff's own negligence; or that the plaintiff, by ordinary care, could have avoided the injury to himself, although caused by the road's negligence. If both the plaintiff and the road are at fault, the damages are to be diminished in proportion to the fault attributable to the plaintiff.

Torts. Railroads. Minors. Parent and child. Damages. Before Judge Snead. Burke Superior Court. November Adjourned Term, 1878.

Reported in the decision.

A. R. LAWTON; J. J. JONES, for plaintiff in error.

H. C. GLISSON; E. L. BRINSON; A. M. RODGERS; WM. GIBSON; M. P. CARROLL, for defendant.

CRAWFORD, Justice.

The Central Railroad and Banking Company was sued by James Brinson, as next friend of Jefferson Brinson, to recover damages for the careless running of its train of cars over him, whereby he lost his right foot. To this suit was filed the plea of the *general issue* of *not guilty*, and a special plea in bar which was, that James Brinson, the father of the plaintiff, had brought his individual suit for the same cause of action, and for the same injury which was then pending and undetermined in the same court. On motion of plaintiff's counsel, this special plea was stricken and the cause was tried under the general issue alone. Upon the trial the jury returned a verdict for the plaintiff for the sum of ten thousand dollars; a new trial was moved upon various grounds set out in the record, which was refused by the court, and the defendant excepted.

The first ground in the defendant's motion was "because the court erred in striking out, on motion of plaintiff's counsel, the plea of defendant which set up as a defense to this suit, the pendency in this court of another suit by James Brinson, the plaintiff, for the same injury and for the same cause of action against the same defendant."

1. A minor, being damaged in his person, may bring suit to recover for any *permanent* injury which he has sustained reaching beyond his majority, whilst the father may sue for any trespass done or damage sustained whereby he loses the services of the child, as also for any expense incurred in and about the healing and restoring of the said child to health. The striking out of the special plea, therefore, was not error. Reeves' Dom. Rel., 423–4–5; 31 Penn., 372; 15 *Ga.*, 349.

2. The second ground of error complained of was the refusal of the court to charge as follows: "If the proof satisfies you that this accident happened on the line of the Augusta and Savannah Railroad, plaintiff cannot recover on his declaration in this case, which alleges that the injuries were done on the road of the Central Railroad and Banking Company of Georgia, the two corporations being separate and distinct."

The declaration of the plaintiff alleged that the Central Railroad and Banking Company, by the careless and negligent manner of running a certain engine and train of cars *over their road in said county*, did run over and crush the foot of the plaintiff, thereby causing him to lose the same. The proof clearly established the fact to be that it was not done on the Central Railroad, but on the Augusta and Savannah Road. These railroads are two separate and distinct legal entities, passing over and occupying different parts of the territory of the county of Burke, and suits against them should recognise that fact. Although the one may be leased to and operated by the other, thereby making itself responsible for acts done upon the road which is leased, yet neither loses its identity, and any tort committed on the one or the other should be so alleged and proved. This becomes the more necessary in view of the fact that to allege that the injury done was done upon the Central Railroad "*in said county*," without other or further description of the particular locality, would not be, by the record, a bar to another action for the same injury committed on the Augusta and Savannah Railroad. This request, therefore, was one which the defendant had a right to ask, and which should have been given by the court; the effect of which would have been but an amendment to the declaration thereby harmonizing the pleadings with the proof.

3. The other grounds upon which the plaintiff in error rests its motion for a new trial, consist in charges given and charges refused, upon the different theories of the respective parties as to the law governing the case, two of which need only be cited here.

The counsel for the defendant below requested the following charge in writing, which was refused by the court: "If the railroad company or its agents were negligent, or failed to do all that they ought to have done on that day and on that train, yet if the plaintiff, Brinson, could have avoided the accident to himself caused by this negligence, by ordinary care on his part, he cannot recover."

The court, upon the request of counsel for the plaintiff below, gave the following charge to the jury: "If the plaintiff was not free from fault, yet if defendant, in the exercise of due care, could have prevented the injury, they are responsible for all damages that accrued to plaintiff."

The first question here presented to this court is, was the defendant below entitled to the charge which it asked? and the second, should not the court have refused the charge given at the request of the plaintiff?

Railroad companies are liable for injuries done by them to persons and to property, and whenever one has been shown to have been committed, the presumption of the law is against them, and the burden is on the particular company to show that its agents have exercised all ordinary and reasonable care and diligence to have avoided that injury. This liability, however, has been guarded by qualifications which are in the highest degree important to these companies, and in the absence of which oftentimes they might suffer great injustice.

The first of these qualifications is, that "No person shall recover damages for an injury to himself, or his property, where the same is done by his consent, or is caused by his own negligence."

The second is, that "If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." Upon the subject of the liability, and the presumption of the law being against the railroads wherever damages are shown, see Code, §3033. As to the qualifying clauses, see Code, §§3034, 2972.

Thus it will be seen that, although the presumption is

always against the company, yet it may rebut that presumption and relieve itself of damages by showing that its agents have exercised all ordinary and reasonable care and diligence to avoid the injury; or it may show that the damage was caused by the plaintiff's own negligence; or it may further show that the plaintiff, by ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence. Upon either of these grounds the defendant may rest his defense.

But these rules of law will not cover the facts of every case, for it may be that both the plaintiff and the agents of defendant are at fault, and when they are, then, whilst damages may be recovered, they are to be diminished by the jury in proportion to the default attributable to the plaintiff for his want of ordinary care in avoiding the injury to himself.

The defendant in this case sought to rest its defense upon the qualifications provided by law for its relief from damages, where the injury resulted from the plaintiff's own negligence, and all of which he might have avoided by ordinary care. Under the facts as shown by the proof, we are of the opinion that the request by the defendant should have been given to the jury, and that the court erred in not doing so. As to the charge which was given at the request of counsel for the plaintiff, it necessarily follows that if the former should have been given, the latter should have been refused.

The ruling of this court upon these questions has been very decided, and may be found in 38 *Ga.*, 409, 431; 42 *Ib.*, 327; 53 *Ib.*, 12; 60 *Ib.*, 667.

It was insisted upon by the counsel for the defendant in error that these rules of law were given in the charge of the judge to the jury. Whilst the charge does contain the general legal instructions applicable to the matters involved, the requests given and rejected were not in harmony therewith, and the defendant was entitled to have the clear and naked legal qualifications upon its liability put before the

jury, that the facts when applied thereto would have enabled them the better to understand the relative rights of the respective parties, as defined and prescribed law.

Judgment reversed.

Oliver *vs.* The State of Georgia.

[This case was argued at the last term, but was ordered re-argued at the present term.]

Where an execution has on it a levy on sufficient personalty to satisfy it, and no disposition thereof appears, the presumption is that the *fi. fa.* was satisfied.

Levy and sale. Executions. Presumptions. Before Judge Wright. Decatur Superior Court. November Adjourned Term, 1878.

Reported in the decision.

Fleming & Russell; Jno. E. Donaldson; Gurley & Thomas, for plaintiff in error.

Bower & Crawford, for defendant.

Warner, Chief Justice.

This case arose in a contest between Oliver and the state over a sum of money brought into court by Oliver, under a *fi. fa.* owned by him, raised by sale of the property of Thomas F. Hampton.

Oliver's *fi. fa.* against Hampton is dated 10th January, 1859, but is based on a judgment dated 3d of December, 1857.

The state's *fi. fa.* is dated 14th April, 1874, issued by comptroller-general against W. E. Griffin, tax collector, and Hampton *et al.*, as securities on tax collector's bond, dated 21st January, 1873.

The money being in court, the state, by its counsel, moved that the money be paid to the state as a prior lien.

Oliver, in answer to the motion, set up, as reasons why the money should be awarded to him on his *fi. fa.*, the following:

1. That the money was raised by him out of Hampton's property, under his *fi. fa.*, which was the oldest and the prior lien.

2. Because the state's *fi. fa.* is not for taxes due the state, but was for default of W. E. Griffin, tax collector, in failing to settle his accounts with the comptroller-general as required by section 909 of the Code.

3. Because the state's *fi. fa.* is not for taxes due the state by Hampton, but was against him as a mere security for W. E. Griffin, tax collector.

4. Because on the 21st January, 1873, at the time Hampton signed the bond, he was clerk of the superior court of Decatur county, and for that reason it is, as to him, illegal and void.

5. Because Hampton signed the bond with the understanding and agreement with his principal, Griffin, that R. H. Whitely should also sign it, before it should be filed and approved, which was known to the ordinary approving it, and that Whitely did not so sign it as a co-security.

The presiding judge struck the last ground on demurrer, and upon hearing all the other grounds on the motion and answer untraversed, awarded the whole of the fund in court to the state. Whereupon Oliver excepted, and alleges all of said rulings as error.

The defendant in error insisted, on the argument here, that the judgment of the court below was right, whatever view might be taken of the other questions in the case, because it appears on the face of Oliver's *fi. fa.*, which was claiming the money, that it had been levied on personal property of one of the defendants therein of sufficient value to satisfy the same, which had not been accounted for.

The *fi. fa.* is for the sum of $374.24 besides interest. It

appears from the *fi. fa.* in the record which was in evidence before the court claiming the money, that it was, on the 5th of August, 1874, levied on twenty bales of cotton as the property of one of the defendants therein, which levy is not accounted for by any evidence in the record. The legal presumption therefore is (in the absence of any evidence to the contrary), that the execution was satisfied and not entitled to claim the money in court, and we affirm the judgment of the court upon this ground, inasmuch as we are not all satisfied as to the proper construction to be given to the statutes in regard to the state's priority of lien, on the statement of facts as disclosed in this record.

Let the judgment of the court below be affirmed.

Alston vs. Wilson.

1. The lien of a landlord on the crop made for rent, is superior to an agreement between the tenant and one who cultivated the premises with him on shares, that the latter should have all the cotton raised thereon.
2. The issue, upon the trial of a claim, is whether or not the property is subject. It is immaterial whether there is other property subject or not.

Landlord and tenant. Contracts. Lien. Claim. Evidence. Before Judge Wright. Webster Superior Court. April Term, 1879.

To the report contained in the decision it is only necessary to add the following: Claimant offered to prove that the sheriff levied on this cotton by direction of the landlord; that the defendant in the *fi. fa.* stated to the sheriff that he had no interest in the cotton, and offered to point out other property which was subject; and that the sheriff refused to levy on such property, but seized this cotton. The court held this irrelevant to the issue in a claim case, and error is assigned on such ruling.

J R. Worrill, for plaintiff in error.

Simmons & Simmons, for defendant.

Jackson, Justice.

A distress warrant was levied on three bales of cotton on the premises rented by Alston, Sr., from Wilson. Alston, Jr., claimed them and the jury found the property subject. The evidence is to the effect that the two Alstons cultivated the place on shares, and the claimant was to have the cotton raised on it, of which there were six bales in all, three of which were levied on.

The lien for rent, on the proceeds of the farm rented especially, is superior to any agreement between the parties, and the proof is satisfactory that the cotton was the product of the rented premises, neither defendant in the warrant nor claimant, both of whom testified, having pretended that it was not, and the cotton being at the gin-house, two hundred yards from the dwelling where both Alstons lived together.

The sheriff was right to levy on the cotton pointed out by the landlord, and if he had been wrong, it could not affect the issue on trial, which was simply this: Is the cotton subject or not to the distress warrant? Therefore it was wholly immaterial on the trial of that issue whether other property could have been levied on, or was subject, or pointed out for levy.

No claim was made for damages in this case and therefore we award none.

Judgment affirmed.

Collier, assignee, *vs.* Barnes.

1. Though a note be payable to an assignee in bankruptcy, or bearer, and though sued in his representative capacity, yet the courts of the state have jurisdiction thereof. Any person in possession could have maintained such suit, and the formal language describing the representative capacity of plaintiff may be treated as surplusage.
2. Even if the above principle be incorrect, yet the plaintiff was proceeding by authority of an order of the United States court passed under the act of congress of June 22, 1874, and had so alleged in an amendment to his declaration.

Bankrupt. Jurisdiction. Before Judge Simmons. Crawford Superior Court. March Term, 1879.

Reported in the opinion.

Hall & Son, for plaintiff in error.

W. C. Winslow, by brief, for defendant.

Crawford, Justice.

The plaintiff in error, who was the plaintiff in the court below, brought suit against Aden H. Barnes for the recovery of two promissory notes payable to himself for the sum of $102.00 each, of which the following is a copy of the first:

"$102.00. By the first day of July next I promise to pay W. E. Collier, as assignee of B. B. Barnes, bankrupt, or bearer, one hundred and two dollars for value received, with interest from date at seven per cent. per annum. Fort Valley, Ga., February 10, 1875.

(Signed) Aden H. Barnes."

The second note only differs in the time of its maturity; otherwise it is the same. Suit began against the defendant to the March term, 1876, and, after lingering upon the dockets until the March term, 1879, it came up for trial, when counsel for defendant moved to dismiss it upon the ground that the superior court had no jurisdiction to try it, as exclusive jurisdiction in such cases had been given to the

courts of the United States. The court dismissed the suit after argument had thereon, and the plaintiff excepted.

1. The only question, therefore, presented for our consideration is, whether, under the facts stated, the superior court of Crawford county had jurisdiction over the subject matter of this suit?

We think that it did, and to have dismissed it for that reason was error. It will be observed that this case does not fall within the ruling in *Dodd vs. Hammond*, 59 *Ga.*, 403, for that was a suit by the assignee to recover property from an adverse claimant, and of which he had never had possession. He was proceeding in that case to collect, as he claimed, the assets to carry them in the bankrupt court for distribution, and under the law of the United States, which may be seen in §711 of the Revised Statutes, "exclusive jurisdiction vests in courts of the United States of all matters and proceedings in bankruptcy."

Can such a suit as this be considered, in any legal sense, a matter or a proceeding *in bankruptcy?* These were notes given to the plaintiff in error, payable to him or to bearer; they could have been sued by him, or by any one else who held the legal title, and a recovery had in the state courts. But it may be said that they were made payable to him as the assignee, and for that reason they were alone suable in the courts of the United States. We hold that those words did not change the character of the contract any more than a note payable to an administrator, as such, would force him to sue as such administrator before he could recover.

"If a note is taken payable to an administrator as such, it is only a description of the person; he may sue upon it in his own name, and if he sue on it as administrator, that is only a description personal, and may be rejected as surplusage. A judgment recovered by an administrator is a debt due to him in his personal character, upon which suit may be brought in his own name." 5 *Ga.*, 56.

2. Even if this should be insufficient authority to have entitled the plaintiff to maintain his suit in the superior

court, then under an act of congress of June 22, 1874, he was authorized to ask an order of the court having charge of the estate of the bankrupt to grant him leave to sue for and recover any of the legal assets or debts of the bankrupt, as contra-distinguished from equitable demands, when such debt does not exceed the sum of $500.00, in the courts of the state where such bankrupt resides, having jurisdiction of claims of such nature and amount.

If, therefore, it should be claimed that this note was a part of the assets of the bankrupt, still the plaintiff had before the court at the time of the dismissal of his action such an order from the district court of the United States, and his declaration had been amended, setting forth this order for two or more terms without any objection, by demurrer or otherwise, having been made thereto. We think, therefore, that the ruling of the court was error, and that the judgment should be reversed.

Judgment reversed.

Clark, trustee, *vs.* Bryce.

1. Where one signs a note as security upon condition that another should also sign, and the principal delivers the paper to the payee without such additional name and without notifying him of the condition, and obtains money thereon, the surety signing is not discharged.
2. Indulgence to the principal for a valuable consideration, without the consent of the surety, discharges the latter. If the surety ratifies the delivery of the note without the additional name, or the indulgence, of course he would still be bound.
3. Although the evidence was conflicting, there is sufficient to sustain the verdict.

Charge of Court. New trial. Before Judge Speer. DeKalb Superior Court. March Term, 1879.

To the report contained in the decision it is only necessary to add that the court charged in substance as follows:

That unless Morrison notified Thomas C. Howard at the time he delivered the note and received the money, that Bryce had signed the note on condition that Alston would sign also, and that it was not to take effect until Alston did so sign, Bryce could not be discharged on that ground.

That, although Bryce may have signed the note on condition that Alston should also sign, and Howard had notice of this at said time, and there may have been a new contract entered into between Morrison and Howard after the maturity of the note without Bryce's knowledge or consent at the time it was made, whereby indulgence was given to Morrison for a year or more for a valuable consideration, yet if afterwards the knowledge came to Bryce that the note was delivered to Howard on the receipt of the money by Morrison without the signature of Alston, and the knowledge also came to him afterwards of the terms of the indulgence to Morrison for a valuable consideration, and the jury is satisfied from the evidence that Bryce either expressly or impliedly ratified both of said acts, Bryce would be liable to plaintiff; but if said knowledge and acts of Bryce did not amount to a ratification, then they are circumstances for the jury to consider in coming to a conclusion as to whether or not it is true that Bryce signed only on condition that Alston should also sign, and which was communicated to Howard at said time, and whether or not it is true that there was any new contract for a valuable consideration to give Morrison indulgence.

That if after the note became due Morrison made with Howard a new agreement to extend the time for the payment of the note, and he received for it a valuable consideration—received money for it—without the consent of Bryce, it would release the security.

WARNER, Chief Justice.

This was an action brought by the plaintiff against J. J. Morrison, Hattie H. Morrison and John Bryce, on a joint promissory note for the sum of $300.00, dated 16th July, 1874, and due 25th of December next after date. The de-

fendant, John Bryce, pleaded that he was security only on said note, that he signed the same with the understanding with plaintiff s agent, who negotiated the loan of money for which the note was given, that R. A. Alston should also sign said note as security with him, and that after said defendant had signed said note, said plaintiff's agent undertook and agreed to procure the signature of said Alston thereto, which he failed to do. The defendant, Bryce, also pleaded that plaintiff's *cestui que trust*, who had said note in her possession, for a valuable consideration, agreed with J. J. Morrison, the principal in said note, after it became due, to indulge him thereon for twelve months, etc. On the trial of the case the jury, under the charge of the court, found a verdict in favor of Bryce, the security. A motion was made for a new trial on the grounds therein stated, which was overruled and the plaintiff excepted.

We find no error in the charge of the court to the jury in view of the evidence in the record; it was quite as favorable to the plaintiff as he had any right to claim, and the only remaining question in the case is, whether there was sufficient evidence to support the verdict under the law applicable thereto. The 2154th section of the Code declares "that any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk, or exposes him to greater liability, will discharge him; a mere failure by the creditor to sue as soon as the law allows, or negligence to prosecute with vigor his legal remedies unless for a consideration, will not release the surety." It appears from the evidence in the record that the money loaned to Morrison, the principal debtor, belonged to Mrs. Howard, the *cestui que trust*, and that the loan of it was negotiated by her husband, Thos. C. Howard. Bryce testified that he signed the note as security upon condition that Alston would also sign it before it was delivered to Howard. Morrison also testified that Alston had promised to sign the note, and so told Bryce, when he signed it, and that he would procure his signature to it the next day in the city, but when he got the money from Howard in

Atlanta, expected to find Alston there, but he was absent; told Howard that Alston was to sign the note, and had consented to do so, and Howard promised him that he would procure Alston's signature to it when he returned home and let him have the money—witness agreeing to pay two per cent. a month interest for the use of it, and gave his separate individual notes for the interest, payable monthly, about which Bryce knew nothing. Morrison also testified that about a month after the note became due he made an agreement with Mr. and Mrs. Howard to wait with him a year or more if he would continue to pay the same rate of interest on the note he had been paying, two per cent. a month at the end of each month. Witness paid her $6.00, the first month's interest due on the new contract, and was to continue to pay the same amount at the end of each and every month, having paid the notes given for the interest prior to the maturity of the note sued on; that Bryce, the security, knew nothing about the new contract for indulgence. Cox testified that in the fall of the year 1876, he had a conversation with Howard and his wife, in which they stated that they had collected from Morrison the interest due on the note, and had agreed with him to extend the time of payment of the principal of the note. Bryce also testified that the agreement made with Morrison for an extension of the time of payment of the note was made without his knowledge or consent. Such is, in substance, the evidence for the defendant in support of the verdict. It is true that the evidence of the plaintiff was in conflict with that of the defendant upon some material points in the case, but that was a question for the jury, and they thought proper to believe the defendant's witnesses, as it was their province to do, and there being sufficient evidence to support their finding, and the presiding judge who tried the case being satisfied therewith, this court cannot interfere and set aside the verdict without overruling at least fifty decisions heretofore made by this court in similar cases, which it does not feel authorized to do.

Let the judgment of the court below be affirmed.

WOODWARD & COMPANY *vs.* GOURDINS, YOUNG & FROST.

In view of the fact that the failure of the defendant to deliver such cotton as they bargained to the extent of seventy-six bales, and that some of the seventy-six bales were almost worthless, caused the controversy, and of the further fact that the court below was not satisfied with the verdict, the grant of a new trial will not be controlled.

New trial. Before Judge CLARK. City Court of Atlanta. June Term, 1879.

Reported in the decision.

HOPKINS & GLENN, for plaintiffs in error.

JACKSON & LUMPKIN, for defendants.

JACKSON, Justice.

Gourdins, Young & Frost, of Savannah, bought of Butler Woodward & Co., of Atlanta, one hundred bales of cotton of a certain grade at a certain price. Twenty-four bales came up to the standard stipulated for when received in Savannah; seventy-six did not. This fact was settled after much correspondence, by arbitration. Porter & King, of Savannah, acted as agents for the Atlanta firm and managed their business in the city of Savannah. After the arbitration and the rejection of the said seventy-six bales of cotton, Porter & King wrote to Butler Woodward & Co. to the effect that most of the rejected cotton could be sold to one Rauers at a certain price, and thereupon Butler Woodward & Co. sent Porter & King the following telegram: "Sell to Rauers, get off all can, then sell balance, pay proceeds to Gourdins, we will remit exchange for difference due him on receipt of statement." Accordingly the seventy-six bales were sold, proceeds paid, and suit was brought for the difference due on an account between Gourdins, Young & Frost and Butler Woodward & Co.,

by the former against the latter. The jury found for the defendants, Butler Woodward & Co. The plaintiffs moved for a new trial on many grounds, among them one that the verdict was against the weight of the testimony and contrary to law. The court granted the motion on that ground and in the following words: "Upon argument had it is ordered that a new trial be granted on the ground that the jury found contrary to law and evidence on account of the telegram to Porter & King, as that telegram changed the arbitration by defendants; or if not, that was the only reasonable construction of it upon which plaintiffs acted, and by which defendants should be bound, and the motion is overruled on the other grounds." To this judgment defendants excepted.

It appears from the testimony, which consists in the main of a very lengthy and voluminous correspondence between these parties, among themselves and through Porter & King, that the defendants claimed the right to substitute the seventy-six rejected bales with seventy-six other bales coming up to the standard agreed upon in the sale, and the question was, did this telegram preclude them from setting up this claim?

We do not well see what it can mean if it does not mean, in the absence of explanation at least, that defendants were satisfied with the price their agents wrote that they could get from Rauers for the rejected cotton, and not being able to buy, or not desiring to be troubled with buying, other cotton of the standard agreed upon in the contract, they would pay the difference in money or rather in exchange. Be that as it may, this court has repeatedly ruled that the first grant of a new trial, since appeals to special juries have been abolished, will not be closely scrutinized. Especially is this the rule where the grant is made on the general ground that the court below is not satisfied with the verdict, because the evidence does not sustain it, and it is in its judgment against law.

The presiding judge certainly has not abused his discre-

tion in the grant of this new trial. In view of the facts that the failure of defendants to deliver such cotton as they bargained to deliver, to the extent of seventy-six out of one hundred bales, and that some of the seventy-six was almost worthless caused all the difficulty between the parties, it would seem that a closer examination of the merits of the case will operate in furtherance of justice, independently of the reason on which the court rested its judgment setting aside the verdict and granting the plaintiffs another hearing.

The judgment is therefore affirmed.

The Georgia Southern Railroad *vs.* Reeves.

Where the grantor, in consideration of $25.00, and of the building of the railroad, conveyed to a company, its successors or assigns forever, in fee simple, the right of way through his land, and added in the deed the following words: "It is hereby agreed and understood a depot and station is to be located and given to said Osborne Reeves, on the land or strip above conveyed, to be permanently located for the benefit of said Osborne Reeves and his assigns, and to be used for the general purposes of the railroad company," the grantee, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land and became obligatory upon any second company which became the purchaser, under proper legal direction, of all the rights, privileges, franchises and property of the former.

Deeds. Contracts. Covenant. Before Judge McCutchen. Gordon Superior Court. August Term, 1879.

Reported in the decision.

Shumate & Williamson, for plaintiff in error.

W. K. Moore, by brief, for defendant.

Crawford, Justice.

Osborne Reeves conveyed to the Selma, Rome and Dalton Railroad Company, their successors and assigns, the right of

way through his land, of sufficient width to build said railroad, as well as all side-tracks and turnouts, not to exceed 50 feet from the centre of the main line, together with all the rights and appurtenances thereunto appertaining. The said company was to build the road, pay the said Reeves $25.00 in money; and it was further provided in the said deed of conveyance, that a depot and station was to be located and given to him on the land so conveyed, to be permanently located for his benefit and that of his assigns, to be used also for the general purposes of said railroad company. Under that conveyance the company proceeded to enter upon, locate, grade and construct their railroad, but failed and neglected to comply with their contract in building the said depot, and establishing a station as was agreed by them, until the said company became insolvent. Under proper legal direction all its rights, privileges, franchises and property were sold to, and became the property of, and is now owned by, the Georgia Southern Railroad Company, which said company has succeeded to all the rights of the said Selma, Rome and Dalton Railroad Company.

This company having also failed to locate and build said depot and establish said station, the said Reeves has brought suit against the said company for its failure to comply with the agreement above specified.

He alleges that being the successors and assigns of the said original company, that they are liable to him just as the original company was, and therefore he prays that they be required to build the depot and establish the station upon the said land, if they hold under his said deed of conveyance, and if they do not so hold, that then they be required to pay him the value of the right of way, or upon failure thereof that he may recover the possession of the same. The defendant filed a demurrer to the plaintiff's declaration: 1st, because it was a contract with the Selma, Rome and Dalton Railroad Company, and that it was not alleged that they had failed to do anything which they had obligated themselves to do *in consideration of the conveyance.* 2nd. The building

of the depot and station was a separate undertaking, and was without consideration; but if ever there was a consideration, then there is no right of action against the defendant. 3. That the deed passes a good title to the defendant without condition, and that no right of action is set out in plaintiff's declaration. This demurrer was overruled by the court and the defendant assigned error thereon.

The whole question of whether or not this judgment was error, depends upon the construction of the deed and the relative rights of the parties thereunder.

The grantor, in consideration that the Selma, Rome and Dalton Company should build this railroad, and in consideration of the sum of $25.00 then paid, granted, bargained and conveyed to the said company, *their successors or assigns, forever* in fee simple, a strip of land 100 feet in width through lots of land, 293, 320 and 484, in Gordon county, upon which to build the said railroad, its side-tracks and turnouts, as well as the right to cut all trees which by falling might encumber the track thereof. Immediately after these words in the deed occurs the following clause: "It is hereby agreed and understood, a depot and station is to be located and given to said Osborne Reeves, *on the land or strip above conveyed*, to be permanently located for the benefit of said Osborne Reeves and his assigns, and to be used for the general purposes of said railroad company." It can hardly be insisted that these words, occurring as they do in this deed, are to be ignored, or construed in such way as to deprive this grantor of a clear, palpable benefit which he intended by their insertion.

They present two practical questions, the first is, whether they constitute a covenant? and, secondly, if so, is it a covenant running with the land?

"A covenant is an agreement between two or more persons, by an instrument under seal, to do or not to do some particular thing. It can only be created by deed, but may be by a deed poll (the party named in the deed) as well as by indenture; but where lands are conveyed by indenture

to a person who does not seal the deed, yet if he enters upon the land, and accepts the deed in other matters, he will be bound by the covenants contained in it." Taylor's Landlord and Tenant, §245.

Testing then this clause in the deed by the law, it is an agreement under seal between Reeves, the grantor, and the railroad company, the grantee, that the latter, having the right to build its road upon, and use, occupy and possess 100 feet in width through the land, is to locate a station and build a depot thereon for the benefit of Reeves, the grantor, and his assigns. And even though the instrument is not signed by the company, yet they have entered upon the land, accepted the benefits arising therefrom, and must assume the burdens. It was insisted upon in the argument that this not having been declared to be a part of the *consideration* for the grant of the land by Reeves, created no obligation upon the company to do anything more than it did. The same authority just quoted lays down the rule to be that, "No precise or technical language is necessary, it may be in the form of a condition, an exception, or even a recital, for whenever the intention of the parties can be collected out of the instrument amounting to an agreement, it is sufficient to create a covenant." *Ibid* §246.

Believing, then, and holding, as we do, that this clause in the deed is a covenant, does it run with the land? It is agreed and understood, says the deed, that a depot and station is *to be located on the land conveyed and permanently located* for the benefit of the said Reeves and *his assigns*. The thing to be done is connected directly with the land conveyed, and not confined to the personal use and benefit of the grantor alone, but to him and his assigns. Personal covenants have no relation to the land conveyed; but this relates directly to the land and continues upon it so long as the grantor or his assigns might insist upon it.

When, therefore, the Selma, Rome and Dalton Railroad was sold, the purchaser took it with all its rights, privileges and franchises, and therewith such obligations as were

necessarily incident to, and legally coupled with, the enjoyment of those rights. Where a covenant is entered into and it is for the benefit of the purchaser, the seller gets an enhanced price for his land; and if he reserve or require a benefit for himself and his assigns he gets less present value therefor. In either case the covenant becomes in effect a part of the estate itself; and whoever takes the estate in one case should have the benefit, and in the other should bear the burden." Washburne's Real Property, Vol. 2, pp. 263–4.

The seller in this case required a benefit for himself and his assigns, and no doubt got less for his land at the time of its conveyance; the buyers, in consideration of that "less present value," covenanted to give him a depot and station, and not only bound *themselves* thereto but their *successors* and *assigns*; it was so written in the conveyance, so accepted by the purchasers, so enjoyed and appropriated by them, and the Georgia Southern Railroad Company are the successors in fact and assigns in law of the Selma, Rome and Dalton Railroad Company, and are as much bound as the original company.

It is a well settled rule, says this court in 54 *Ga.*, 170, that a party is charged with notice of recitals in any deed under which he claims title, and Jumel *vs.* Jumel, 7 Paige, 591; Moore *vs.* Bennett, 2 Chan. Cas., 246, and other authorities are cited to support the rule. The demurrer, therefore, was properly overruled, and the judgment is affirmed.

Judgment affirmed.

Plumb, trustee, *vs.* Tucker.

A motion made March 31st, 1879, to set aside a decree rendered in 1871, was, on its face, barred by the provisions of the act of February 15th, 1876, and was demurrable.

Statute of limitations. Before H. K. McCay, Esq., Judge *pro hac vice*. Fulton Superior Court. March Term, 1879.

Reported in the decision.

E. N. Broyles; A. C. King; Geo. T. Fry, for plaintiff in error.

Jno. T. Glenn, for defendant.

Warner, Chief Justice.

This was a motion to set aside a decree in equity in Fulton superior court on the grounds therein stated. A demurrer was filed thereto, which was sustained by the court, and the movant excepted. It appears from the record that the decree was rendered on the 9th day of June, 1871, and that the motion to set it aside was filed on the 31st day of March, 1879. On the 15th day of February, 1876, the general assembly enacted that from and after the passage of this act, all proceedings of every kind in any court of this state to set aside judgments or decrees of the courts, must be made within three years from the rendering of said judgments or decrees, and repealed all conflicting laws. More than three years having elapsed from the date of the above recited act before the motion to set aside the decree in this case was made, it was barred by the statute of limitations, and there was no error in sustaining the demurrer to the movant's motion.

Let the judgment of the court below be affirmed.

Spann *et al. vs.* The Board of Commissioners, etc., of Webster County.

1. Prior to the constitution of 1877, where one hundred per cent. of a county tax of one hundred and forty-two and one-half per cent. on the state tax was recommended by the grand jury, and items amounting to fifty-five per cent. or more, needed no recommendation, the whole would stand.
2. Under the constitution of 1877, a county cannot levy a tax for "incidental expenses," nor to buy a safe, without the assent of two-thirds of the voters at an election held for that purpose. An assessment for "expenses of jail" is equivalent to a levy "to maintain and support prisoners," and is constitutional.

Tax. Constitutional law. Before Judge Crisp. Webster County. At Chambers. December 6, 1879.

Reported in the decision.

George Thornton; D. B. Harrell; Hawkins & Hawkins, for plaintiffs in error.

Guerry & Son; B. P. Hollis; J. B. Hudson, for defendants.

Jackson, Justice.

The commissioners of roads and revenues of the county of Webster levied a tax of one hundred and forty-two and one-half per cent. upon the state tax for county purposes for the year 1879, and complainants brought this bill in equity to enjoin its collection; the chancellor refused the writ of injunction prayed for, and on this judgment of refusal error is assigned in this court. The assessment of taxes levied is for expenses superior court, thirty-five per cent.; for repair of bridges, fifty-five per cent.; for payment for iron safes for the county, twenty-two per cent.; for paupers, twelve and one-half per cent.; for expenses of jail, six per cent.; for incidental expenses, twelve per cent.

On the item of six per cent. for the jail, twelve per cent. for incidental expenses, and twenty-two per cent. for iron safes, special error is assigned as being each illegal, and to the entire levy as being over one hundred per cent., which was the limit of the recommendation of the grand jury.

1. Many of the items did not need the recommendation of the grand jury to legalize them, and if one hundred per centum was recommended and the excess needed no recommendation, then, according to the decision in *Arnett vs. Griffin*, 60 *Ga.*, 349, the entire levy would stand as the law was at the date of that ruling. Here fifty-five per centum for bridges did not need any recommendation, according to the decision in the same case, and without considering other items which did not require the recommendation of the grand jury, this alone reduces the total levy needing recommendation below one hundred per centum, and the tax is valid according to *Arnett vs. Griffin*.

2. But the plaintiffs in error insist that the constitution of 1877 has changed the law, and that under that constitution the three items of six per centum for the jail, twelve per centum for incidental expenses, and twenty-two per centum for iron safes, are all unconstitutional and void.

The second paragraph of the sixth section of the seventh article of that constitution is in these words: "The general assembly shall not have power to delegate to any county the right to levy a tax for any purpose, except for educational purposes in instructing children in the elementary branches of an English education only; to build and repair the public buildings and bridges; to maintain and support prisoners; to pay jurors and coroners, and for litigation, quarantine, roads, and expenses of courts; to support paupers and pay debts *heretofore existing*."

Paragraph one of section seven of the same article is as follows: "The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this constitution provided for, shall never exceed seven per centum of the assessed value of all the

taxable property therein, and no such county, municipality or division shall incur any new debt except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase at any time the amount of said debt three per centum upon such assessed valuation."

The tax for expenses of jail is equivalent to a levy "to maintain and support prisoners," and is authorized by the second paragraph of the sixth section of article seven of the constitution of 1877 above cited.

The tax for incidental expenses is not authorized by either of the paragraphs cited, nor by any other clause of the constitution of 1877 of which we are aware, or to which our attention has been directed; it is a very loosely worded item, under which many expenses, incident to *what* is not specified, and is impossible to be ascertained from the language used, might be incurred and paid against the spirit of the present constitution by taxation, which the legislature, since the adoption of the constitution of 1877, could not delegate to any county; and which, therefore, as all taxing power must flow from the general assembly, no county can now impose. Code, §§516, 518.

The levy of twenty-two per centum for iron safes is not mentioned in the purposes enumerated in said second paragraph of the sixth section and seventh article; nor are there words therein which, without much latitude of construction, can be construed to authorize the tax. Besides, the purchase of these safes is the creation of a new debt since the adoption of the constitution of 1877, and expressly prohibited by the first paragraph of the seventh section of article seven, "without the assent of two-thirds of the qualified

voters of the county at an election for that purpose, to be held as may be prescribed by law." No such election has been held, and a new debt, without its sanction as a condition precedent, cannot be imposed.

The prohibition is emphatic: "And no such county, municipality or division shall incur *any new debt*, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein," without the sanction of such a vote.

At the last term, in the case of *Hudson et al. vs. Mayor, etc., of Marietta*, this construction was given to this paragraph of the constitution, and the city of Marietta was enjoined from incurring a new debt, since the adoption of the constitution of 1877, for the purchase of a steam fire engine for city purposes. That case covers this item of taxation in this case, and the principle ruled then by two justices of this court is affirmed by a full bench.

It was the purpose of the framers of that constitution to tap the root of that system of indebtedness by counties, cities and towns,.which was growing into immense proportions and spreading mildew and blight everywhere over the land; and it is made our duty by the same constitution to declare all laws in violation of its provisions and prohibitions to be null and void. Par. 2, sec. 4, art. 1, const. 1877.

These safes might have been bought on a credit and a debt incurred therefor prior to this constitution, Code, §§497–502; and they may be bought still, if the county should have surplus funds from any source to pay cash for them, Code, §528; or if the debt be incurred with the assent of two-thirds of the voters of the county, but not otherwise. We think, therefore, that the injunction should be granted to stay the collection of the tax for incidental expenses and for the iron safes.

Judgment reversed.

Colbert *vs.* Moore, administrator.

A purchaser of property at administrator's sale cannot repudiate his bid because of a defective title, or no title at all in the intestate, when there is no fraud or misrepresentation by the administrator. An administrator cannot bind the estate by warranty in any conveyance or contract made by him.

Administrators and executors. Judicial sales. Before Judge Simmons. Crawford Superior Court. March Term, 1879.

Moore was the successor of Smith as administrator upon the estate of Culverhouse. The case is sufficiently reported in the opinion.

J. H. Hall, by brief, for plaintiff in error.

R. D. Smith, by Bacon & Rutherford, for defendant.

Crawford, Justice.

K. P. Smith, as the administrator of G. P. Culverhouse, filed a bill to marshal the assets of his intestate—was granted an interlocutory order directing the sale of the real estate of the deceased, at which sale John G. Colbert became the purchaser of certain lands so exposed to sale, and refusing to pay the purchase money, was sued therefor.

He pleaded the general issue, and further that the plaintiff could show no title in the intestate, and that he was ready to pay if the administrator could make good and valid title.

Under the charge of the court and the evidence submitted, the jury found a verdict for the plaintiff, and the defendant being dissatisfied therewith, moved a new trial upon several grounds. Those which must control this case are:

1. That the court erred in refusing to charge as requested

in writing, "That if Smith sold the land, and Colbert afterwards found that Smith had no title and could make him none, then Colbert was not bound to comply with the bid, that is, if Colbert demanded a title of Smith."

2. Because the court erred in charging further, "That an administrator cannot bind the estate he represents by any warranty; Smith, as the administrator, could not bind the estate of Culverhouse by warranting this property, even if he had attempted to do so. In all judicial sales the purchaser must look to the soundness of the title for himself. In sheriffs', executors' and administrators' sales the purchaser is bound to look for himself, not only as to the soundness of the property, but as to the title, and to see if the party had the right to sell."

3. Because the court erred in charging as follows: "Did Smith make any false representations as to quantity, quality or title to the land? did his crier make any, and was Colbert misled by them, acted on them? then he is not bound. But if neither Smith nor his agent who cried the property, or if Colbert was not misled by them, he is bound by his bid and you should so find."

The request to charge, which was refused, and the charges given, bring us directly to the question in this case, which is, whether a purchaser of property at administrator's sale can repudiate his bid because of a defective title, or no title at all in the intestate, where there is no fraud or misrepresentation by the administrator. Section 2622 of the Code declares, "The purchaser must look for himself as to the title and soundness of all property sold under judicial process. Actual fraud or misrepresentations by the officer or his agents may bind personally." These principles were ruled in 8 *Ga.*, 236 and 300; 11 *Ib.*, 1; 18 *Ib.*, 553, and incorporated into the Code therefrom, and are now the fixed and settled law of this state. "An administrator cannot bind the estate by any warranty in any conveyance or contract made by him, nor is he personally bound by such contract unless the personal liability is dis-

tinctly expressed." Code, §2568. Recognizing therefore the principles given in the charge as being sound law, we affirm the judgment.

Judgment affirmed.

Buhler *vs* The State of Georgia.

B. was indicted for stealing a cow from H.; was tried and acquitted. He was again indicted for stealing a cow from H., the description being different from that in the first indictment. He pleaded *autre fois acquit*. On the trial, it appeared that H. never had but one cow, and it was for the stealing of that cow that B. was indicted, and concerning it H. testified in both cases:

Held, that a verdict of guilty was contrary to law.

Criminal law. Verdict. Before Judge Hillyer. Fulton Superior Court. March Term, 1879.

Reported in the decision.

S. B. Spencer, for plaintiff in error.

B. H. Hill, Jr., solicitor general; J. McAfee, solicitor *pro tem.*, for the state.

Warner, Chief Justice.

The defendant was indicted for the offense of "simple larceny," and charged with stealing one brindle cow, with one horn knocked off about two inches from the point of the horn, white spot in her forehead, and white on her tail from the butt about a foot, of the value of $10.00, the property of Peter Howell. On the trial of the case the jury found the defendant guilty. A motion was made for a new trial on the grounds therein stated, which was overruled, and the defendant excepted. It appears from the record and bill of exceptions that at the same term of the court a bill of indictment had been found against the defendant for the

offense of simple larceny, charging him with having stolen a small red cow, with cloven hoofs and horns, of the value of $7.00, the property of Peter Howell; and that upon this last mentioned bill of indictment the defendant was put upon his trial, and a verdict of not guilty was found by the jury. Then the first mentioned bill of indictment was found against him, and when put upon his trial upon that indictment, the defendant pleaded in bar his former jeopardy and acquittal upon the indictment first found against him. The court overruled the defendant's plea in bar, but allowed evidence to be introduced for the purpose of showing whether or not the offense charged in the second indictment was the same transaction as that charged in the first indictment, in accordance with the rulings of this court in *Roberts & Copenhaven vs. The State*, 14 *Ga.*, 8, and *Holt vs. The State*, 38 *Ga.*, 187. The court charged the jury in relation to this point in the case, that if they found from the evidence that the defendant had been already tried for the same offense, and if the matter wherewith he was then put in jeopardy was the same transaction as that on which he is now sought to be tried, and the state now seeks to try or convict him again, it would be a complete bar to this prosecution, no matter what its merits might otherwise be. But if you do not find that it is the same transaction, it would not be a bar. There was no conflict in the evidence that the defendant was indicted for the same transaction in both cases, to-wit: for stealing Peter Howell's cow. The evidence was that he did not have but one cow, never lost but one cow, and that he testified on both trials in relation to the same cow having been stolen from him, and never prosecuted the defendant for stealing but the one cow; so that the stealing of Peter Howell's only cow was the same transaction for which the defendant was indicted in both cases, according to the undisputed evidence in the record. The verdict of the jury was contrary to the charge of the court, and was therefore contrary to the law, and it was error in not granting a new trial upon that ground.

Let the judgment of the court below be reversed.

Scott *vs.* Taylor.

1. A bill filed by a sister against a brother to compel the conveyance to her of certain property, the title to which had been taken in him under a purchase made by her, to secure the payment of the notes for the purchase money which had been given by him, and upon a verbal agreement to convey to her for life with remainder to her children, on the payment by her of said notes, which payment she alleged had been made, is not a proceeding to change the deed to the brother from a fee simple to a conditional title. Evidence of such agreement and payment was admissible, without infringing the rule that it is not competent to engraft an express trust upon a written deed by parol proof.
2. The verdict for the complainant is supported by the evidence, except in a small matter of calculation, which is ordered corrected.

Trusts. Deed. Evidence. New trial. Before Judge Speer. Rockdale Superior Court. August Term, 1879.

Report unnecessary.

Clark & Pace; G. W. Gleaton, for plaintiff in error.

J. J. Floyd, for defendant.

Crawford, Justice.

S. F. Scott brought ejectment against Alfred Taylor for a house and lot. Pending this action the wife of Taylor filed a bill for injunction and relief against Scott. She alleged that she made an arrangement in 1858 to purchase this house and lot through her brother, S. F. Scott, and Archa Scott, her father; the same was to be held to her use for life, with remainder over to her children; that the price paid was $332.17, for which amount her brother gave small notes, with her father as security, taking the title to himself, which he was to hold until the purchase money was paid back to him, and meanwhile she was to have possession. When the purchase money was paid and he saved harmless, then the deed was to be made to her for life, and after her

death to her children. That the notes for the purchase money were traded to one Denard, who sued them to judgment, and afterwards agreed to take one-half of the principal in payment therefor, which sum she paid, and thereby saved the said S. F. Scott harmless. She prays, therefore, that he be compelled to make conveyance unto her according to said arrangement and understanding.

The defendant by his answer denied that she bought the house and lot as alleged, but set up that he bought for himself and for his own use in fee; that he gave in payment therefor eight promissory notes, three of which were for $110.00, or $111.00, and due December, 1859; the other five were for $221.00, and due in December, 1860; that the first three were traded to John Bostwick and paid off by him; the other five were traded to Washington Denard, who sued them, and that he had himself paid up the same at the rate of fifty cents in the dollar after they were in execution.

Upon the trial the jury returned a verdict for the complainant, finding that she recover the property in dispute, and that she pay to the defendant, by 1st of May, 1880, $75.00, with interest from 1868, and upon such payment that title be made to her to the said property for life, and in remainder to her children, and that the suit in ejectment be perpetually enjoined.

To this finding the defendant excepted, and moved the court to grant him a new trial, which the court refused, and thus the case is before us for review.

The plaintiff in error relies mainly upon two grounds for the grant of a new trial:

1st. That the court erred in admitting parol proof to engraft a trust on the deed to S. F. Scott, in that by the bill complainant seeks to change the deed from a fee simple to a conditional title.

2d. That the verdict is contrary to the evidence and the weight of evidence.

1. If we concurred with the plaintiff in error in his

premises, then we should also concur with him in the principles of law which he invokes to sustain his objections to the ruling of the court. There is no effort on the part of the complainant to change the deed made to Samuel F. Scott by Bennett Almand. It was made just as she claims, according to the agreement, it was to have been made. Her husband being insolvent, Scott, her brother, was to take it in his own name, give his notes with her father as security for the purchase money, and when they were paid by her he was to convey the title to her for life and to her children after her death. So that, both by agreement and by the payment of the purchase money, if she paid it, it became a resulting trust, and he was in equity and good conscience bound to execute to her the title.

The principle is well settled by the elementary writers, and numerous adjudicated cases, that when the purchase money is paid by one, and the legal title taken in the name of another the person named in the conveyance is but a trustee of him who paid the consideration. "This rule," says Perry on Trusts, "has its foundations in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money, intends the purchase to be for his own benefit, and not for another, is a matter of convenience and arrangement between the parties for collateral purposes, and this rule is vindicated by the experience of mankind." This same doctrine will be found in Story's Eq. Jur., sec. 1201.

If, then, Mrs. Taylor paid this purchase money, and it was agreed that when she did this Scott was to make her a title, we cannot see that proof to establish those facts was illegal, or that it would be allowing parol proof to engraft an express trust upon a written deed. The testimony upon this matter of the trust is painfully conflicting, the brother and sister testifying in direct contradiction to each other, and so with other members of the family. The jury, under oath, have said that the truth was with the complainant: the judge who also heard the evidence would not disturb their

finding, and, after a close and thorough investigation, we find ample testimony to authorize the conclusion so reached.

2. Was the verdict contrary to the evidence as to the amount of money paid for the land, or the amount paid by Mrs. Taylor to Denard for the executions? Alfred Taylor and Harriet Taylor both swear that *she* bought the land through her brother, and that the purchase price was three hundred and thirty-two dollars and seventeen cents. S. F. Scott and his brother, A. T. Scott, testify, the former that he gave his notes for $110.00 or $111.00 over the $332.17 taken up by Mrs. Taylor, and the latter that he paid off such notes indorsed by Almand for his brother, S. F. Scott, but he does not swear that they were given for the land. This is the direct testimony of the witnesses on this subject, but an examination of the deed from Almand to Scott shows that the consideration expressed therein was $332.17, and which, added to the testimony of Mr. and Mrs. Taylor, and their occupancy of the premises for fifteen or sixteen years, was quite sufficient to authorize the jury in finding as they did.

On the second question, however, we discover that they did find contrary to the evidence as to the amount paid by Scott to aid in taking up the *fi. fas.* There is no dispute as to the payment by him of the $75.00 to Mrs. Taylor, and there is no one who swears that he did not pay back to Mann the $15.00 loaned by him to Mrs. Taylor, whilst the two Taylors, Scott and Mann all swear that he did, so that he was entitled to the sum of $90.00, instead of the $75.00 which was allowed him.

It is therefore ordered and directed that the decree now of file in this case, in the court below, be made to conform to this ruling, and that when the judgment of this court is made the judgment of that court, that the decree stand affirmed in all matters and things therein contained, and be observed and performed by the parties thereto.

Affirmed with directions.

Finney *vs.* Brumby, trustee.

1. To complaint for land in 1879, a defendant pleaded as follows: Defendant's husband owed plaintiff $1,400.00. He went into bankruptcy, and she claimed a homestead in the property in controversy; this claim was contested by plaintiff. A settlement was had by which the assignee sold the property free from liens, plaintiff bid it in and gave defendant bond to convey title to her on payment of the amount of his bid with interest at twelve per cent. The payment was to be in installments. Part of them had been paid, others had not. On the $1,400.00 defendant's husband had paid interest at the rate of two and one-half per cent per month—the usury paid from January 2d, 1873, to August 1st, 1875, amounting to $513.92. The defendant sought to set this off against the amount still due plaintiff and also claimed that the assignee's deed was void because made to secure the payment of this usurious debt:

Held, that the pleas of usury were barred by the statute of limitations and were properly stricken on motion.

2. A plea to complaint for land that the sheriff had previously levied on the interest of both plaintiff and defendant under a justice court *fi. fa.*, had sold and conveyed the same to a third party, who still held paramount legal title, that plaintiff acquiesced therein, but defendant had filed her bill to set aside the sale, which was still pending, was properly stricken, there being no allegation as to the grounds for setting aside such sale.

3. Under the facts there was no error in allowing the verdict to stand.

Interest and usury. Pleadings. Verdict. Before Judge Hillyer. Fulton Superior Court. September Term, 1879.

To the report contained in the decision it is only necessary to add the following:

Brumby, trustee, brought complaint for land against Mrs. Finney, claiming title under a deed from the assignee in bankruptcy of Finney, defendant's husband. She filed the pleas set out in the decision, in 1879. On motion the court struck the last three. Plaintiff's counsel then admitted the facts stated in the second plea, and took a verdict accordingly. Defendant excepted.

[illegible]. A. Wimpy; E. N. Broyles, for plaintiff in error.

W. I. Heyward, for defendant.

Warner, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover the possession of a tract of land therein described. The defendant filed the following pleas, to-wit:

(1.) For plea defendant says she is not guilty of the trespasses alleged against her, and of this she puts herself upon the country.

(2.) For further plea defendant says the land in dispute formerly was owned by A. T. Finney, her husband, and he was indebted to plaintiff the sum of $1,400.00 for borrowed money, besides interest; that said A. T. Finney, being a resident of the county of Fulton in said state and a head of a family, was put into bankruptcy in the bankrupt court; defendant was urging her claim for a homestead in the property in dispute or from the proceeds of the sale thereof, and this claim was disputed by said plaintiff. In this condition it was agreed between plaintiff and defendant and the assignee of said A. T. Finney in bankruptcy, that the property in dispute be sold by said assignee, free from all liens and incumbrances, and that plaintiff should buy in the same and then let the defendant have it at the price bid in by plaintiff. Said property was sold accordingly and bid in by plaintiff for the sum of $2,650.00, and then defendant took bond for title to the property in dispute from plaintiff and promised him to pay him said sum in several installments, bearing interest at twelve per cent. per annum. Some of said installments are due and unpaid, and some are not due. In pursuance of said purchase defendant paid plaintiff a part of the principal of said purchase money to-wit, $600.00, and interest on the whole sum for some two years. There is still due on said purchase the sum of $2,800.00, or about that sum. The property sued for is well worth the sum of $4,000.00. Defendant has found

herself unable from her poverty to meet promptly said purchase money. Defendant therefore prays the court to restrain plaintiff from recovering and taking possession of the property in dispute, and that a decree be rendered directing the sale of said property, and that out of the proceeds of said sale the debt due plaintiff be paid first, and the residue turned over to defendant, and that such other relief be granted defendant in the premises as shall be right and equitable, and defendant will ever pray, etc.

(3.) Defendant further says A. T. Finney paid for the use of said sum of $1,400.00, so by him borrowed from plaintiff, under agreement to that effect, interest at the rate of two and a half per cent. per month for nineteen months, beginning January 2d, 1873, and continuing till August, 1875, being $513.92 more than legal interest, and which sum was never credited on said claim, and to secure the payment of said claim uncredited by said sum of $513.92, as defendant is advised and believes should, in contemplation of law, have been done, the arrangement aforesaid was made between plaintiff, defendant, A. T. Finney, and the assignee in bankruptcy, to formally sell the property in dispute, and the sale be made to plaintiff, and defendant insists that the amount due plaintiff should be reduced by the said sum of $513.92—as if credited August 1st, 1875.

(4.) Defendant further pleads the facts set forth in the former plea and its amendments, and says the deed made by the assignee in bankruptcy of A. T. Finney to plaintiff for the property in dispute, is void by reason of said facts, and as the same was made to secure the payment of a usurious debt as aforesaid.

(5.) For further plea defendant pleads that on or about June 1st, 1879, the sheriff of Fulton county, under and by virtue of a justice court *fi. fa.*, levied on and sold said property in dispute, to-wit, all the interest of defendant and plaintiff in said property, to one W. I. Heyward, and made him a deed to the same, and in enforcement of his right said Heywood was proceeding to have the sheriff turn defendant

out of possession of said property, and defendant was compelled to file a bill in equity to restrain said sheriff from turning defendant out of possession of said property, and to seek a decree to set aside said sale. Said suit is still pending in the superior court of Fulton county, and the paramount legal title is still in said Heyward and not in plaintiff, and defendant says plaintiff consented to, and still acquiesces in, said sheriff's sale; and this the defendant is ready to verify.

On motion of plaintiff's attorney the pleas filed in the above case were stricken, with the exception of the first and second pleas.

The jury returned the following verdict on the second plea:

"We, the jury, find that there is due to the plaintiff on account of purchase money of the premises in dispute, the sum of two thousand eight hundred dollars; and we find that the defendant be allowed thirty days within which to pay the same, and that in default of such payment the said property be sold, and out of the proceeds of said sale the said sum of two thousand eight hundred dollars be paid to the plaintiff (in full satisfaction of all demands for purchase money, tax and insurance), and the balance, after paying costs of this suit and of said sale, be paid to the defendant.

1. The pleas in regard to the usury come within the principle ruled by this court in *Everett vs. The Planters Bank*, 61 *Ga.*, 38, and are controlled by it.

2. The fifth plea is defective because it does not allege the ground upon which the complainant in her bill seeks to set aside the sale of the land. If she seeks to set it aside on the ground that the sale was void, then there was no outstanding title in Heyward which would defeat the plaintiff's recovery. There was no error in striking the third, fourth and fifth pleas of the defendant.

3. Under the statement of facts disclosed in the record there was no error in allowing the verdict to stand.

Let the judgment of the court below be affirmed.

Felker *vs.* Calhoun, executor.

Calhoun purchased mill property, the dam attached to which is alleged to have caused damage by flooding land above it. No request was made for him to lower the dam. He leased to Chase, who repaired the dam, and the land was flooded. There was evidence on which the jury could properly find that Calhoun did not increase the capacity of the dam while he was in possesson.

***Held*, that on a suit against both, a verdict in favor of Calhoun was right.**

Nuisance. Actions. Damages. Before Judge McCutchen. Catoosa Superior Court. August Term, 1879.

Felker sued Chase and Calhoun, (now represented by Calhoun, executor,) for damages caused by the overflow of plaintiff's land, resulting from a mill dam. On the trial the evidence was, in brief, as follows: Some time between 1840 and 1850, one Jobe and his brother first built the dam by cutting down two trees on opposite sides of a creek, and piling on stones, dirt, etc. This did not prove very stable, and would be so washed by spring freshets as to reqnire frequent building upon it. Calhoun became possessed of the mill property in 1862, through a line of vendors running back to Jobe. It seems that the dam was kept up until 1864, when the federal forces destroyed the mill, and the dam was washed away. It was rebuilt in 1866. In 1870, Calhoun leased the property to Chase, guaranteeing the use of the head of water at that time. Chase repaired the dam, and plaintiff insists increased the flooding of the land. The evidence as to what was the head of water at different times was not very clear. The jury found for defendants. Plaintiff moved for a new trial. The court refused it as to Calhoun, executor, because the jury could properly find from the evidence that his testator had not increased the flooding while he was in possession, and because no request to abate was shown. He granted the new trial as to Chase, because of evidence that he had increased the flooding.

A. T. Hackett; R. J. McCamy, for plaintiff in error.

W. K. Moore; W. H. Payne; T. R. Jones, for defendant.

Jackson, Justice.

This suit was brought for backing water on Felker's land by him against Chase and Calhoun, and the verdict was for both defendants. Whereupon a motion was made by plaintiff for a new trial, which was granted as to Chase, but refused as to Calhoun, and thereupon Felker excepted to the judgment refusing a new trial as to Calhoun.

Chase was the lessee of Calhoun, and the latter guaranteed to the former the right to keep the water at a certain height, which the presiding judge thought that the evidence was sufficient to show the jury did not raise the water beyond the height it had attained when he, the defendant Calhoun, bought the mill and water-power; though Chase, the lessee, had tightened the dam, and thereby raised the water higher. No request to abate the nuisance, or, in other words, to lower the dam, had been made to Calhoun, the alienee of the grantor from whom he bought, and, therefore, the court refused a new trial as to him, under section 3001 of the Code. That section, in part, is in these words: * * * "The alienee of the property causing the nuisance is responsible for a continuance of the same. In the latter case [that is, where the alienee is sued] there must be a request to abate before action is brought."

To the same point is the case of *Bonner vs. Wellborn*, 7 *Ga.*, 296, and that was an action for overflowing land.

So the court was right to refuse the new trial as to Calhoun on this ground; and as there is no pretense that any request to abate the nuisance was ever given to him, this point will conclude this case so far as he is concerned, and he only is concerned in this bill of exceptions which the plaintiff brings here. It is unnecessary, therefore, to consider the

other grounds of the motion, especially as the ruling of the court is put on this, and none other was ruled by the judge.

Judgment affirmed.

Picquet *vs.* The City Council of Augusta *et al.*

1. Where a bill is filed to set aside a deed made under a tax sale, the amount of taxes admitted to be due must be tendered. It is insufficient to offer to allow the city to retain a sufficient amount out of the proceeds of the sale, for this would result in the taxes being paid out of the purchaser's money whilst his deed would be canceled if the litigation resulted in favor of complainant.
2. After a judgment sustaining a demurrer to a bill in equity has been affirmed by this court, the complainant cannot amend unless the proposed amendment makes a case for equitable relief beyond a reasonable doubt; nor even then, if there has been apparently needless delay, or if the complainant has had his day in court thereon.

Equity. Tax. Amendment. Before Judge Snead. Richmond Superior Court. October Term, 1879.

Reported in the opinion.

A. D. Picquet, *in propria persona*; F. H. Miller; J. S. & W. T. Davidson, for plaintiff in error.

Wm. Gibson; S. F. Webb, for defendants.

Crawford, Justice.

The plaintiff in error was in arrears, as appears by the record, for his municipal taxes due the defendant in error for the years 1875, 1876, 1877, 1878 and for which *fi. fas.* were issued in each of those years, and finally levied, November 29th, 1878, upon a house and lot as the property of the said plaintiff in error, which was advertised for sale January 7th, 1879, but to which an affidavit of illegality was filed, and the sale postponed to the 1st of April next there-

after, and then sold, and bought by William I. Freeman, at three hundred dollars, to whom the city sheriff made a deed.

On the 6th of January, 1879, plaintiff in error presented his bill in equity to the chancellor, praying an injunction restraining the sale of said house and lot, and for relief against the tax *fi. fas.* then proceeding against him, which application for injunction was refused. The bill was filed regularly in the superior court, and subpœna issued, after which a supplemental bill making Freeman the purchaser a party, and certain amendments were made thereto. To all of which a demurrer was filed at the first term of the court upon three grounds:

1. That complainant disclaimed having any title in himself.

2. That the grievances complained of were cognizable and relievable in a court of law.

3. That no tender of the amount admitted to be due for taxes was made, nor offer made to pay the same.

The complainant then amended his bill by striking out the words, "while not the owner of any real estate in fee simple," and also alleging that he had personal property sufficient to satisfy the said executions. The defendants demurred to the bill as amended, because there was still no equity in the same, which demurrer was sustained and the bill dismissed. A writ of error brought that ruling to this court where the same was affirmed. Pamphlet decisions September term, 1879—p. 62.

Before the remititur was made the judgment of the court below, the plaintiff in error again amended his bill by alleging that he *was* the owner of the property, and attached a copy of his deed as an exhibit thereto. He further offered, by way of additional amendment to meet the second ground of demurrer, to allow certain sums to be retained by said city council out of the sale of his property to meet whatever amount might be found to be due, and in that way tendered that much of the said fund, on a fair assessment

to be made of the house and lot, which is alleged to be worth only one thousand dollars and not the assessed value. Upon considering these amendments they were held by the court insufficient to entitle the complainant to the relief prayed, and he refused to allow the same, and dismissed the bill, to which judgment of the court the complainant excepted and assigned the same as error.

1. The question therefore before this court is whether the judge committed error in refusing the amendments for insufficiency, and also in dismissing the bill.

The original bill was dismissed because complainant sought to set aside the sale of a certain house and lot which had been sold for taxes, part of which he claimed to be legal, and a part illegal, and by the allegations of his bill he disclaimed the ownership of the property; and also, because he failed to make a tender of the amount admitted to be due for taxes thereon.

Admitting that the amendment as to title is sufficient, without explanation as to the conflicting allegations made by the complainant, who seeks the aid of a court of chancery, does he make any tender of payment of the taxes due upon the property sold? The offer is that the city retain of the *purchaser's money* enough to pay the amount found to be due, whilst the whole of that sum must be refunded to the purchaser himself, if the sale were set aside as prayed for. So that no payment or offer of payment is made by the complainant, as he, if his prayer were granted on the hearing, would have his house and lot back, and the taxes paid out of the purchaser's, Freeman's, money.

2. Besides, there is nothing set up either in the first or second amendment except matters existing and well known to complainant before the demurrer was sustained, and therefore some accompanying allegation explanatory thereof should be required. After a demurrer has been sustained by this court on a writ of error, the superior court will not allow a complainant to amend his original bill unless the amendment proposed makes a case for equitable relief be

yond all reasonable doubt, nor even then if there has been apparently needless delay in filing his amendment, or he has had his day in court thereon. 58 *Ga.*, 293; 61 *Ga.*, 616.

We therefore hold that no error was committed by the chancellor in refusing the amendments and in dismissing the bill. This is done the less reluctantly since an examination of the bill itself does not show that the complainant has such equities against the defendant as entitle him to the relief prayed.

Judgment affirmed.

SHEALY, guardian, *vs.* TOOLE; SHEALY *vs.* TOOLE *et al.*

1. Where land had been levied on as the property of the defendant, under a *fi. fa.* for a balance of purchase money due therefor, and had been claimed by the defendant as guardian of a minor, an equitable plea to the effect that he had wrongfully used money belonging to his ward in paying part of the purchase money for the land which had been bought by him individually, which fact was known to the plaintiff; that the plaintiff is insolvent, and that the ward is equitably entitled to have the land, or that it be sold and the ward repaid the amount of his funds which was used in the purchase, with a prayer that the sale of the land be enjoined until a proper decree can be rendered, was demurrable, especially as there was no offer to pay the balance due.
2. The amendment making a *prochein ami* for the ward the party claimant instead of the guardian, was properly disallowed, as it sought to introduce a new and distinct party.

Claim. Pleading. Parties. Guardian and ward. Equity. Before Judge CRISP. Sumter Superior Court. October Adjourned Term, 1878.

A *fi. fa.* in favor of Toole against Shealy was levied on certain land, which Shealy claimed as guardian of Susan V. Shealy. He filed the equitable plea set out in the decision, which the court struck. It was then proposed to make the minor, by Elbert A. Shealy as next friend, the party claimant in lieu of the original claimant, and thus assert her

equitable rights. This the court refused to allow. The jury found the property subject. Claimant excepted, and assigned error on the above rulings.

JNO. R. WORRILL, for plaintiff in error.

ALLEN FORT; HAWKINS & HAWKINS, for defendant.

WARNER, Chief Justice.

This was a claim case, on the trial of which the jury found the property subject to the *fi. fa.* levied thereon.

1. The main ground of error insisted on here, which this court can consider in the state of the record before us, is whether the court erred in sustaining the demurrer to the claimant's equitable plea filed in the case, the substance of which is, that the claimant purchased a tract of land from the plaintiff in *fi. fa.*, and that the plaintiff has obtained a judgment against him for the balance of the purchase money due therefor, and had the land levied on to satisfy the same; that he, the claimant, took $1,070.00 of his ward's money and paid it to the plaintiff in part payment of his own debt for the land, and that the plaintiff knew that it was his ward's money when he received it in part payment of the claimant's individual debt for the land; that the plaintiff is insolvent, and that his ward is equitably entitled to have the land, or that it be sold and his ward be paid the $1,070.00 out of the proceeds thereof, with a prayer that the court enjoin the sale of the land as his property, under the *fi. fa.* issued against him for his individual debt, until a proper decree can be had in the case. There was no error in sustaining the demurrer to the claimant's equitable plea, inasmuch as he seeks to prevent the sale of his own land by interposing a claim therefor as guardian for his ward, who had no title to the land, on the ground that he had committed a breach of trust as such guardian, by appropriating $1,070.00 of his ward's money in his hands to the payment of his individual debt due to Toole, in part

payment for the land claimed, without offering to pay the balance of the purchase money due therefor, for which the judgment was obtained now being enforced against it.

2. There was no error in the refusal of the court to allow the claim case to be amended by making Susan V. Shealy, by her next friend, Elbert A. Shealy, a party claimant in lieu of Martin L. Shealy, in accordance with his petition for that purpose. Code, §3480.

Let the judgment of the court below be affirmed.

RHETT, trustee, *vs.* THE GEORGIA LAND AND COTTON COMPANY.

1. A defendant cannot waive the absence of jurisdiction of his person so as to affect the rights of third persons.
2. Notice of the rights of a complainant in respect to land, by reason of the pendency of his bill seeking to trace trust funds, cannot affect a purchaser's title more than if a decree had already been rendered in favor of complainant. If the decree would not have bound the property in the hands of a third person, certainly notice of the pendency of the bill would not.
3. One who buys land at administrator's sale, takes it free from the lien of judgments. The exception where a levy has been made before the sale (58 *Ga.*, 451,) will not include a mere imaginary or constructive levy by reason of the filing of a bill to subject the land.

Jurisdiction. Waiver. Notice. *Lis pendens.* Administrators and executors. Judgment. Lien. Title. Before Judge WRIGHT. Dougherty Superior Court. October Term, 1879.

To the report contained in the decision it is only necessary to add that the decree under which this levy was made, specified that the amount recovered was a charge on the land, and that it be seized and sold to pay the same.

C. B. WOOTEN; B. H. Hill, for plaintiff in error.

D. A. VASON; WARREN & HOBBS, for defendant.

Jackson, Justice.

An execution, issued on a decree from Troup superior court, was levied on a tract of land in Dougherty county, and the land was claimed. The execution and decree were in favor of Rhett, as trustee of Mrs. Barnard, against John D. Barnard, administrator on the estate of her deceased husband, to recover large sums due the wife as her separate property from that estate, which the decedent had invested in property in this state, and particularly in this land levied on in this case. The bill on which this decree was based was brought in 1860; and after the bill was brought, but before the decree was rendered, the land was administered and sold as the property of Barnard, the deed having been made to him, and the title, to all appearances, being in him; at this sale, one Wetter bought the land and took possession, and afterwards sold and conveyed it to the claimant; all questions of law and fact were submitted to the judge by agreement of the parties, and he held that the land was not subject, and to this judgment in favor of the claimant the plaintiff in execution excepted, and the question is this: Is this land subject to this decree in behalf of the wife, because her money bought it, notwithstanding the administration of the land, and its regular sale by the administrator, and the purchase thereof at that sale by the grantor of the claimant?

1. Counsel for plaintiff in error put the case upon the doctrine of *lis pendens*, and the notice which, by construction, the purchaser at the administrator's sale had of the equity of the wife in this land bought with her separate estate. No actual notice is pretended to have been given. The facts, too, seem to make it doubtful whether the administrator resided in Troup, where the bill was brought, or in Clark: and though it appears that he consented to the jurisdiction of the chancery court of Troup county, such assent could not bind third persons—14 *Ga.*, 589. There was no jurisdiction of the subject matter in Troup—it being

land in Dougherty county—and the only thing which could give jurisdiction in Troup, was the residence there of defendant, or his waiver of jurisdiction; and that waiver could not affect this claimant.

2. But be this as it may, it is quite clear that notice by the pendency of the bill in equity could not do more towards subjecting the land than the lien of the decree could, if rendered prior to the sale by the administrator. If the sale by the administrator operated to divest the lien of the decree, even if it had been rendered before the sale, surely constructive notice that the party was trying to obtain a decree, could not prevent the sale from divesting any inchoate lien, or effort to get a future lien. If, then, it be the law that the administrator's sale gave to the purchaser at it a good title over all judgments actually rendered before the sale, even in the lifetime of the intestate, this purchaser got a good title to this land, notwithstanding the fact that he bought it at the sale while the bill to assert the wife's equity and get a decree thereon to subject the land, was pending; for a decree will not bind the property of the debtor any more than a judgment would bind it.

In 45 *Ga.*, 585, 46 *Ga.*, 389, 49 *Ga.*, 274, and 58 *Ga.*, 451, it is ruled that the purchaser at such sale does get a good title over any judgment lien, especially where the estate is insolvent, even over a judgment obtained in the lifetime of the intestate; and that the lien is transferred from the property sold to the proceeds in the hands of the administrator. And in 59 *Ga.*, 516, the same rule is applied to the specific lien of a mortgage. So that it seems clear, that even if this were a case where notice from *lis pendens* would apply to this purchaser, who had no actual notice, and bought the land under regular administrator's sale in another county where it was administered, and title regularly conveyed to him, the decree being rendered in a county foreign to the administration of the estate, and where the land is not located, and defendant's residence therein being doubtful, still this regular and fair sale, under an

order of the court of ordinary to sell this land for the purpose of paying the debts and administering the estate of the intestate, gave the purchaser a better title than is the wife's equity, even if the decree had been rendered before the sale.

3. The counsel for plaintiff in error, seeing this result, cited 2 Wallace, 249, and 7 Dana, 110, to show that the bill operated as an equitable levy—with a view to put this case within *Carlton vs. Davant et al., executors*, 58 *Ga*., 451, where it was held that if the land was levied on at the time of sale the lien would not be divested. But those cases seem to rest on the fact that the bill was brought to subject the property where it was located, to a pre existing judgment at law—the case in 2 Wallace being a mere reference to 7 Dana. In 58 *Ga*. there was an actual levy—a seizure by the sheriff; and the reasoning there would not consist with a mere constructive or imaginary levy.

On the whole the judgment, we think, is right, and it must be affirmed.

THE MAYOR, ETC., OF AMERICUS *vs.* ELDRIDGE.

1. When a municipal corporation is vested with power to open streets, to construct sidewalks, to levy taxes, etc., it necessarily implies the right to insert a sewer in the sidewalk to carry off the surface water, instead of an open ditch.
2. An adjacent property owner is not entitled to an injunction upon the ground that the sewer which, in the discretion of the municipal authorities, is about to be inserted, may be too small for the volume of water which, at times, will necessarily pass through it, thus flooding his lot, causing sickness, and otherwise damaging him

Injunction. Municipal corporations. Streets. Before Judge CRISP. Sumter County. At Chambers. February 17, 1880.

Reported in the opinion.

& HAWKINS, for plaintiff in error.

N. A. SMITH, for defendant.

CRAWFORD, Justice.

The controversy in this suit arose out of the size and location of a sewer by the plaintiff in error, at the intersection of Taylor with Lee street, and which was immediately in front of the residence of the defendant in error, who was complainant in the court below. His allegations were, that the diameter of the sewer was only two feet, whilst it should be three to carry off the water in the heaviest rains. That this want of size will, at such times, cause the water to run over the sidewalk into the yard, cellar, and back-lot, and that this flooding of his premises, especially under his house, would be very likely to produce sickness, besides otherwise damaging his lot by washing off the soil. That when he improved his lot, he, by the consent of the then city council, turned the water slightly, and carried it into a ditch, in which it has passed ever since. That the cost to the city would only be the difference between a two and a three foot sewer for the distance of some ten or twelve feet. Upon these allegations he prayed an injunction against the city council to restrain it from putting in this sewer across and underneath the sidewalk.

In obedience to an order *nisi* the defendant appeared, and as its showing against the granting of the injunction, filed objections in the nature of a demurrer, which were:

1. That the city had power under its charter to open streets, construct sidewalks and sewers.

2. That the city council was not liable to an action for failing to provide sewerage, nor for the deflection or the size thereof.

3. That there was no equity in the bill.

The chancellor, declining to pass upon the bill and the objections alone, heard the answer and the affidavits, and thereupon granted the injunction, to which the defendant excepted.

There are but two questions involved in this case. The first is, whether the city council under the power "to open and lay out streets for the good of the city, to direct and have sidewalks kept in order, and to levy a street tax" for working the same, is authorized to put in a sewer to conduct the surface water along its streets instead of allowing it to pass in an open ditch.

The second, whether or not an injunction will lie by an adjacent property owner to restrain the city authorities from exercising such control over the public streets and sidewalks as in their judgment will make them most suitable for the public safety and convenience.

1. Whenever there is a power granted to a municipal corporation to do certain specified things, such as opening and laying out streets, constructing sidewalks, coupled with authority to levy taxes for repairs to the same, it necessarily implies the right to do all things which may be required for a proper execution of the power.

The complainant built his house at a low point fronting Taylor street; there is a sharp and steep declivity on this street facing his house, down which the water runs, and is carried away by means of an open ditch, and the city proposes to convey that water through a sewer inserted therein upon the sidewalk, and in no wise encroaching upon the lot of complainant. The power to repair the streets and direct the keeping of the sidewalks, implies the power to provide for the flowing of the water in such way as to do the least damage, and to give safe transit over them to the public.

We think that this principle has been too long settled to need further comment here. 1 Dillon Mun. Cor., §58: 20 Howard, 147.

2. The second question as to the right of the adjacent property owners to ask an injunction to restrain the exercise of such a power, as well as the right to an action at law for damages, have been frequently before the courts. It will be found upon examination that in the matter of overflow

ing the lands of another, there is a recognized difference between natural streams, passing within well defined and actual banks, and surface water caused by rain or melting snow. The obligation to keep the streets in repair involves the right to make changes in the surface of the ground, and although such changes affect the adjacent owners injuriously, where the power is not exceeded there is no liability. Neither is the municipality bound to protect one from the surface water who owns land below the level of the street.

A municipal corporation is not liable to an action for consequential damages to private property or persons when the act done is pursuant to a power conferred, and whether wise or unwise cannot be judicially revised or corrected. 1 Dillon Mun. Cor., §59; 2 *Ib.*, §781, 798, 799.

We are unable to recognize any difference in principle between damages sustained whilst exercising a clear legal right, by reason of cutting away the earth and leaving the property of an owner inaccessible from its elevation, and the case under consideration; each bought and improved with the knowledge that the right existed in the city over the streets to work, to raise, to grade, to drain, and unless that legal right was exceeded, it would be but a case of *damnum absque injuria*. The case of a private or a public nuisance is not to be confounded with those enumerated.

To suspend by injunction the *legally authorized acts* of a municipal corporation upon its public streets, for the safe condition of which it is responsible, by adjacent owners upon an apprehension of future injuries, would be to allow the judgment of these private owners to arrest and set aside *that of the constituted authorities* charged and entrusted with the performance of these especial duties. To authorize such interference the acts complained of must be *ultra vires*. 1 Denio, 595; 20 Howard, 135; 8 Allen, 129; 13 Gray, 601; 43 *Ga.*, 67; 34 *Ib.*, 326; 28 *Ib.*, 46; 23 *Ib.*, 402.

It follows, therefore, that the injunction was improperly granted, and the judgment must be reversed.

Dendy vs. Gamble & Copeland.

An indigent sister and her children, though mainly dependent on the applicant for support, do not constitute a family for whose benefit he can take a homestead. To constitute one head of a family within the meaning of the homestead clause of the constitution of 1868, there must be some legal obligation on him to support its members.

Homestead. Before Judge Crawford. Harris Superior Court. October Term, 1879.

Reported in the decision.

Blanford & Garrard, for plaintiff in error.

Blount & Cameron; John Peabody, for defendants.

Warner, Chief Justice.

This case came before the court below on an appeal from the ordinary of Harris county, allowing to the applicant a homestead exemption under the constitution of 1868. The applicant in his petition alleged that he was the head of a family consisting of his sister, a widow about thirty-eight years old, and her three children, aged seventeen, fifteen and seven years old, respectively, who are indigent and mainly dependent upon petitioner for support. The creditors of the applicant demurred to his petition for a homestead on the ground that it did not show him to be such a "head of a family" as the law contemplates, to entitle him to a homestead. The court sustained the demurrer and dismissed the application, whereupon the applicant excepted.

The applicant was under no legal obligation to support the persons whom he claimed to be his family, and therefore he was not entitled to a homestead as the head of such family. 40 *Ga.*, 173; 41 *Ga.*, 153; 42 *Ga.*, 405. If the applicant could obtain a homestead as the head of a family

of persons whom he was not legally bound to support, then he might enjoy it for his own benefit exclusively, and refuse, with impunity, to support those for whose benefit he claimed to have obtained it.

Let the judgment of the court below be affirmed.

Hill, administrator, for use, *vs.* Sheibley.

1. "To constitute a valid gift, there must be the intention to give by the donor, acceptance by the donee, and delivery of the article given, or some act accepted by law in lieu thereof." Code, §2657. Delivery of a non-negotiable written instrument, without more, is not sufficient to prove a gift.
2. There was no abuse of discretion in granting a new trial in this case.

Promissory notes. Gift. Title. New trial. Before Judge Underwood. Floyd Superior Court. September Adjourned Term, 1879.

Hill, as administrator of Joseph A. Davis, deceased, brought complaint for the use of Elizabeth Davis, against Sheibley, on the following written instrument:

"Received, Rome, August 13, 1866, of Dr. Joseph Davis, five hundred dollars, to be appropriated on joint account to buying property in the city of Rome, or in case of no investment to be returned.

(Signed) P. M. Sheibley."

Defendant filed the following pleas:

1. The general issue.
2. That the plaintiff is not the owner of the paper sued on; that the paper was sold by Hill, as administrator, and bought by one Goodwin for defendant.
3. Discharge in bankruptcy.
4. That the debt had been paid in tobacco.

The usee claimed by reason of the following state of facts, which the evidence in her behalf tended to show: That Joseph A. Davis gave the instrument to his father, who failed to collect it. Whether it was an absolute gift

seems somewhat doubtful. On this point the testimony of the father was as follows: "He gave it to me to collect the money on from Sheibley. . . . . I can't say whether my son gave it to me for my own use or not, as he gave it without saying anything, but I think it was his intention to give it to me for my own use." After the son's death the father gave it to the widow. Her own testimony on this subject is as follows: "I am the owner of said receipt. I got it from William Davis, father of Dr. Joseph A. Davis, my husband, on or about the 20th or 21st day of October, in the year 1867. Dr. J. A. Davis died on the 18th of October, 1867. His father, William Davis, did not reach Atlanta until the next day, and after his corpse had been sent off for interment. Mr. William Davis had the receipt in his possession; claimed it as his own; said Dr. Joseph A. Davis had given it to him some time previous; but as Dr. J. A. Davis was now dead, and had left witness, his widow, and one little child, he, Mr. William Davis, did not think it was right for him to keep it, and that he would give it to witness. Accordingly he then and there, in the house of witness in Atlanta, at or about the time above mentioned, and in the presence of Mrs. William Taylor, of Macon, Georgia, delivered said receipt to witness as her property, and there and then transferred to witness all the right and title which he had and held to said receipt by virtue of the previous gift of the same by Dr. J. A. Davis to him. * * *

"Said receipt was for a short time in the possession of D. P. Hill, administrator. It came about in this way: When William Davis gave said receipt to witness, within a day or two after her husband's death, she had no place to keep anything of the kind, and she naturally, as women similarly situated would do, placed said receipt among her husband's papers. When an administration was granted and an inventory and appraisement took place, Mr. D. P. Hill took possession of all the papers belonging to the estate, and among the rest got into his possession the receipt of P.

M. Sheibley. As soon as witness found that Mr. D. P. Hill, the administrator, had possession of said receipt and claimed the same as the property of the estate, witness went to him and claimed the same as her property, and upon a statement in substance as above to him, he, as administrator, delivered the same to witness, and it has been in possession of herself or of her counsel ever since."

Defendant, on the other hand, claimed that one Goodwin, for defendant's use, had bought this claim at administrator's sale from Hill, administrator. The evidence showed that Hill did offer at his sale what sometimes is called by the witnesses "a note" and sometimes "a claim;" that this instrument or claim was on P. M. Sheibley, bore date August 13th, 1866, and was for $500.00; that Hill did not have it at the sale, but told Goodwin, the purchaser, that he would deliver it. He says the delivery was to be "when he found it," and that he had never found it. Goodwin says that Hill told him to call at his office for the paper, which he did several times, but failed to get it. It also appeared that Goodwin's purchase was made for Sheibley.

As to the other pleas the evidence was conflicting.

The jury found for plaintiff $500.00 principal, besides interest. Defendant moved for a new trial, which was granted, and plaintiff excepted.

R. D. Harvey; Forsyth & Hoskinson, for plaintiff in error.

Joel Branham, for defendant.

Jackson, Justice.

This case was before this court in 57 *Ga.*, 232, when a new trial was awarded by this court. On a review of the last trial, now before us again for review, the judge granted the motion to set aside the verdict and award a new trial himself, and the plaintiff excepted thereto.

1. From the evidence disclosed by this record we cannot

say that the judge abused his discretion in having the whole case tried again. Its general countenance, to use Judge Bleckley's simile, did not please him, and he granted the new trial generally, putting the grant of it on no special ground.

Passing by the question of law made as to the nature of this debt, whether fiduciary or not in the sense of that word as used in the bankrupt act, under the construction recently placed upon the word by the supreme court of the United States in 5 Otto, 704–708, we hardly think that the title to this receipt in the plaintiff in error through the alleged gift by her husband to her father, is sufficiently established by proof according to the requisitions of the law. Code, §§2657–2663; 1 *Ga.*, 601; 3 *Ga.*, 520; 31 *Ga.*, 71-108; Code, §2776; 41 Md., 466; 57 Mo., 427.

2. However this may be, it is manifest that in this case there is no abuse of discretion in granting a new trial and again investigating the questions made in the light of such additional testimony as may be adduced. The discretion is in the superior court, lodged there by the law, and it cannot be taken from that court by this court according to law, unless that legal discretion be abused so as to become illegal in its abuse. This court sits only to review errors of law; and it is only when the grant of, or refusal to grant, a new trial becomes an error of law that this court can legally correct the error.

Judgment affirmed.

Wright *et al.* *vs.* James.

1. Where a party, in August, 1856, was arrested under a *ca. sa.*, filed his schedule of property liable to sale, and it was sold, and he discharged under the act for the relief of honest debtors, leaving him in possession of fifty acres of land, which he held until the death of his wife, and the arrival at age of his children, it was no longer under the operation of the exemption law of 1822 and the amendments thereto.
2. A subsequent marriage of such a party would not re-establish the exemption so as to inure to the use and benefit of the second wife; to be enjoyed it must be renewed. Therefore, a deed by the husband and the wife of the same to secure a debt contracted in 1875, was a valid agreement, and the debt must be paid before any equitable rights therein can accrue to the grantors, and poverty and age alone, distressing as they are, cannot create an equity in such grantors sufficient to defeat their deed.

Injunction. Homestead. Contracts. Deed. Before Judge Speer. Henry County. At Chambers. February 12th, 1880.

Reported in the opinion.

Boynton & Hammond, by brief, for plaintiffs in error.

Stewart & Hall, by brief, for defendant.

Crawford, Justice.

In 1875 William L. Wright and Mary B. Wright made a deed to David James to certain land therein named, to secure the payment of a debt. Wright rented the land in 1876, '77, '78, and, refusing to give possession in 1879, James sued out a warrant against him as a tenant holding over, to which a counter affidavit was filed, and upon the trial the issue was found in favor of James. When Wright was about to be dispossessed, he and his wife filed a bill setting up as their equity in the land, that the same was a homestead, and had been exempted from levy and sale in August, 1856, and therefore could not be sold by them; that the

deed to James was tainted with usury and void; that Mary B. Wright was the beneficiary of the homestead, and no act or deed of Wright's could affect her claim; that the debt had about been paid, and that their rights, under the homestead, had not been passed upon in the trial had to oust them. They prayed that their deed to James may be declared void, and if it should be made to appear that Wright is still indebted to James, and that the land is subject thereto, that it be sold to pay the same. They further pray for general relief and injunction against their being removed. The defendant answered complainants' bill, denying that the land was ever set apart as homestead, but says that in August, 1856, W. L. Wright, having been arrested under a *ca. sa.*, filed his schedule under the act for the relief of honest debtors then of force, and that an order was taken for the sale of such of his property as was liable, but nothing further was done by the said Wright or the court, except to discharge the said defendant from imprisonment. Defendant admitted suing out the warrant against him, to which a counter affidavit was filed and a trial had in April, 1879, in which the issues arising under this bill were passed upon and found in defendant's favor, but that he allowed the complainants to remain in possession for the balance of the said year, 1879. That Mary B. Wright was present and sworn as a witness at the trial, and that the question of the deed's being tainted with usury was also passed upon, and found in defendant's favor. Defendant further set up the fact that the family of the said Wm. L. Wright, as it existed in 1856, was dissolved by the death of his wife, and the children having attained their majority, and that the present wife has no claims upon the homestead set apart in 1856, even if any had been set apart, as she had intermarried with the said William L. in the year 1870.

The judge, upon considering the bill, answer and affidavits, refused the injunction, and the complainants excepted.

An examination of this record brings us to the same conclusion reached by the judge below, that the complain-

ants were not entitled to the injunction prayed for, and that no error was committed in refusing it.

1. Where a party in, August 1856, was arrested under a *ca. sa.*, filed his schedule of property liable to sale, and it was sold, and he discharged under the act for the relief of honest debtors, leaving him in possession of fifty acres of land, which he held until the death of his wife, and the arrival at age of his children, it was no longer under the operation of the exemption law of 1822, and the amendments thereto.

2. A subsequent marriage of such a party would not re-establish the exemption so as to inure to the use and benefit of the second wife; to be enjoyed it must be renewed; a deed, therefore, by the husband and wife of the same to secure a debt contracted in 1875, was a valid and binding agreement, and the debt must be paid before any equitable rights therein can accrue to the grantors, and poverty and age alone, distressing as they are, cannot create an equity in such grantors sufficient to defeat their deed.

Judgment affirmed.

In re Bradley.

A judgment was rendered on January 27th, 1875, disbarring an attorney from the courts of this state. On February 15th, 1876, an act was passed providing that "all proceedings of every kind in any court of this state, to set aside judgment and decrees of the courts, must be made within three years from the rendition of said judgments or decrees." On May 24th, 1879, a motion was made to set aside the order of removal:

Held, that the motion was barred by the statute. If injustice has been done the movant, his own *laches* prevents this court from granting him relief.

Statute of limitations. Motions. Attorneys. Before Judge Fleming. Chatham Superior Court. May Term, 1879.

Reported in the decision.

A. A. Bradley, in *propria persona*, for plaintiff in error.

H. B. Tompkins, by S. B. Adams, *contra*.

WARNER, Chief Justice.

This was a motion made in the court below to set aside a judgment removing the plaintiff in error as a practising lawyer in the courts of this state. The court refused the motion, and the movant excepted. It appears from the record that the judgment of removal was rendered on the 27th of January, 1875. The motion to set aside and vacate the judgment was made on the 24th of May, 1879, more than three years after its rendition, and more than three years after the passage of the act, February 15th, 1876, which declares, that from and after its passage "all proceedings of every kind in any court of this state, to set aside judgments and decrees of the courts, must be made within three years from the rendition of said judgments or decrees." The plaintiff in error insists that the judgment of removal was illegal, and did him great injustice. However that may have been, it is now too late for us to relieve him in view of the express provisions of the act of 1876, which absolutely barred his remedy to set the judgment aside before he made his motion for that purpose. If the plaintiff in error has had injustice done him, we can only regret that his own *laches*, under the stern provisions of the act of 1876, will prevent this court from affording him any relief, however willingly we would otherwise have done so. The statute of the state speaks like a tyrant, and courts and people are bound to obey it.

Let the judgment of the court below be affirmed.

Ford *vs.* Kennedy.

1. Where suit was brought against defendants as partners, and one having died, it proceeded against the other as surviving partner, the plaintiff was not competent to testify concerning transactions between himself and the deceased in the absence of the survivor. If the interrogatories of the decedent were in court, the attention of the presiding judge should have been called to the fact.
2. The mere belief of a witness as to facts not in his knowledge is inadmissible.
3. On an issue of partnership or no partnership, the sayings of one who admitted himself to be a partner, were not admissible to prove that another, who denied being a partner, was in fact such.
4. Admissions of one who denies being a partner are admissible to prove him such.
5. The mere general understanding of a witness, not based on facts, is inadmissible.
6. An admission of evidence, which, if error at all, was so slight as to be harmless, is not ground for a new trial.
7. Where suit was brought on an open account, to which the statute of limitations was pleaded, and certain items were relied on to take the whole account from under the bar, they must not only be pleaded but also proved.
8. It was not error for the court to refuse to charge that admissions, when clearly proved, became evidence of a high character. The jury should determine the weight to be given to evidence. "All admissions should be scanned with care."
9. The verdict is not contrary to law or evidence.

Witness. Evidence. Partnership. Charge of Court. Statute of limitations. Verdict. Before Judge McCutchen. Catoosa Superior Court. September Term, 1879.

To the report contained in the decision it is only necessary to add that the following were among the grounds of the motion for new trial:

(1.) Because the verdict is contrary to law, contrary to evidence, strongly and decidedly against the weight of the evidence, and against the principles of equity and justice.

(2.) Because the court ruled that plaintiff was not competent to testify as to transactions and conversations between him and John D. Gray, not in presence of Kennedy, said

Gray being admitted to be dead. The interrogatories of John D. Gray were in court, and taken at the instance of himself.

Note by the judge: "The court's attention was in no way, during the trial, called to the fact that John D. Gray's testimony had been taken, and was in court, and no point was made to the court about it in any way."

(3.) Because the court erred in admitting, over plaintiff's objections, the ninth interrogatory and the answer thereto of Allen Kennedy, as follows: Interrogatory ninth: "State whether or not you frequently spoke of John D. Gray to others as your old partner, and whether or not John D. Gray frequently spoke of and introduced you to others as his old partner." Answer to ninth interrogatory: "I have; he did."

(4.) Because the court, on defendant's objection, ruled out the following of the answers of Homer Blackman: "He has heard said Gray say repeatedly that all of them (meaning Gray, Kennedy & Chamberlin) were partners in said contract, and jointly interested therein." * * * * "He has heard said Gray say several times that they were partners in said contract, (that is, said Gray, said Kennedy and said Chamberlin)."

(5.) Because the court ruled out that portion of the answer of B. E. Wells to the fifth direct interrogatory, as follows: "The whole transaction was for J. D. Gray & Co., as I then believed, and now believe, from what Gray told me, and from my knowledge of the business of J. D. Gray & Co. upon the railroad of which I had charge."

(6.) Because the court erred in not permitting all of B. E. Well's answer to fifth direct interrogatory to be read without striking out any part of it, to-wit: "At the time J. D. Gray made me the offer as stated in answer to fourth interrogatory, he stated that himself, Allen Kennedy and said Mr. Chamberlin, whose given name I don't remember, composed the firm of J. D. Gray & Co. This was before Gray & Co. borrowed the money as aforesaid. It was

when the work was first commenced. (Mr. Chamberlin also told me the same thing at that time, and afterwards, I think.) About the time J. D. Gray & Co. commenced work on their contract near Troy, Ala., Allen Kennedy and myself traveled in a stage coach together from Linwood to Troy, Alabama. On that trip we had a conversation about Gray & Co.'s contract. In that conversation, as I now remember it, Kennedy told me he was a partner in the contract with Gray. Kennedy was present upon the work about the time it was commenced—remained about one month. (It was generally understood—I understood it—that Kennedy was Gray's partner in this grading contract, which is the contract I have alluded to in my previous answers as the contract of J. D. Gray & Co.)." The court ruled out the portions enclosed in brackets, allowing the balance to be read.

(7.) Because the court erred in admitting, over plaintiff's objections, the following portion of Charles Chamberlin's answers to interrogatories: "In the limited interviews I had with Mr. Ford, he always spoke as a partner interested. * * * * In all the conversations I had with Ford, he always spoke of Gray as being the principal partner."

(8.) Because the court, after having charged that "all admissions should be scanned with care," erred in refusing to give in addition this request of plaintiff's counsel, that "while admissions should be scanned with care, yet, when clearly proved, they become evidence of a high character."

(9.) Because, after charging that an entire account is not barred until four years from the date of the last item, added "which is proved. This doctrine applies only when there are mutual accounts and dealings between the parties."

D. A. Walker; J. E. Shumate, for plaintiff in error.

R. J. McCamy, for defendant.

Jackson, Justice.

Ford brought suit on an account against Gray, Kennedy & Chamberlin, as co-partners engaged in work on the Mobile and Girard Railroad, in the state of Alabama, under the alleged name and style of Gray & Co. Chamberlin was not served, Gray died pending the suit, and the contest narrowed to a single-handed fight between Ford and Kennedy as the only surviving partner sued and served. The jury found for Kennedy; Ford moved for a new trial, it was refused, and he excepted.

The issues are, was Kennedy a partner in the company of Gray & Co.? If not, did he virtually become one as to third persons by holding himself out as a partner, so that credit was given Gray thereby on account of Kennedy having been considered a partner? and especially, did he so act as to authorize Ford to consider him responsible as a partner? and if Kennedy was a partner or held himself out as such, was not Ford also a partner of the same firm and, therefore, not entitled to recover from the firm, the debts to third persons not having been paid? and, if all these issues be decided for Ford and against Kennedy, is not the account barred by the statute of limitations?

On the trial of these issues Ford alleges in his motion that the court erred in admitting and rejecting evidence, in charging the jury and, in overruling the motion and sustaining the verdict, though against the evidence and the law.

1. First, as to the ruling of the court on the testimony. Gray being dead, was Ford competent as a witness under the Code, section 3854? Gray had been a party actually served. The suit went on against the surviving partner, and a judgment would bind the partnership assets in which Gray's estate was interested. To the transactions between Gray, the deceased partner, and Ford, in the absence of the other partner, Ford was therefore incompetent, Gray being dead and his mouth shut. Mark, the attention of the

presiding judge was not called to the fact that Gray's interrogatories had been taken and that the answers were in court. Under the facts disclosed in this record, the presiding judge did not err in restricting the testimony of Ford as he did, that is, in permitting him to testify (about what passed between him and Gray touching the partnership) only to conversations in Kennedy's presence. *McGhee vs. Jones et al.*, 41 *Ga.*, 123; 42 *Ga.*, 120; 44 *Ga.*, 46. And all sayings of Gray, in the absence of Kennedy, were properly ruled out.

2. The mere belief of Wells was also properly ruled out.

3. The sayings of Chamberlin about Kennedy being a partner, were inadmissible in Kennedy's absence. The issue was whether Kennedy was or was not a partner, and that fact being in dispute, what others who acknowledged themselves to be partners merely said about it, is hearsay.

4. What Ford said about his, Ford's, being a partner was admissible, just as what Kennedy said about his, Kennedy's, being a partner, was admissible; but what others said in their absence was hearsay.

5. The mere general understanding of a witness, not based on facts, is inadmissible.

6. Testimony was in that Gray had introduced Kennedy as his partner, and this was denied by Kennedy, who said that on the occasion referred to he was introduced as his old partner—they having been partners in a former venture. On this state of facts, the court allowed Kennedy to testify further that it was the habit of Gray and himself to introduce each other as "my *old* partner," and this is assigned as erroneous. It threw light, we think, on a point in dispute. Besides, Kennedy had positively sworn that he was not so introduced, and if the jury believed that, the other did not hurt—at all events, if error, it is so slight as to be considered harmless. These views will cover the exceptions as to testimony.

7. In respect to exceptions to the charge, we think that the court was right to tell the jury that the items of an ac-

count relied upon to take the whole account without the statute of limitations, must be *proven* as well as charged on paper—otherwise one might keep an account without the statute forever, by the mere addition of items without proof of their reality.

8. Nor do we think that it was the duty of the court to tell the jury that admissions, when clearly proven, became evidence of a high character. It was for the jury to weigh the testimony, and to give it that character to which its weight entitled it. Our statute declares, in respect to the weight of such testimony, that "all admissions should be scanned with care, and confessions of guilt should be received with great caution"—Code, §3792. The court charged the first clause of that section in respect to admissions, and there left it. We see no impropriety in his having done so.

The exception to the charge in respect to the statute of limitations, was not insisted on here.

9. So we are brought to the ground that the verdict is contrary to the law and the evidence, for the grounds that it is against the charge are merged in the higher ground that it is against law.

While several witnesses testify to facts and circumstances and admissions going to show that Kennedy was a partner of Gray, yet Kennedy is sustained in his own sworn testimony by the contract between Gray and Blackman, which was in writing, and could not lie. That sets him out repeatedly as a mere surety, and supports his version of his relation to the contract. That bound him to see to it that Gray performed his contract with the railroad company, but not to pay this debt which Gray owed Ford for supplies. So in regard to his holding himself out as a partner to Ford the testimony is conflicting, as well as in respect to the plea of defendant that Ford was himself a partner of Gray, and to the statute of limitations.

We think that the jury had evidence enough to sustain the finding as legal, and no material error of law being made

by the presiding judge, and the verdict being approved by him, it is not contrary to law, and the judgment overruling the motion for a new trial is affirmed.

Judgment affirmed.

Spence *et al. vs.* Cox.

A widow entitled to dower in certain lands levied on, though not yet assigned, needs no injunction to restrain a creditor of the deceased husband and the sheriff from causing a sale under the execution. She can give notice at the sale of her rights; purchasers will buy subject thereto, and if they disturb her lawful possession it will be at their peril.

Injunction. Dower. Before Judge Wright. Mitchell county. At Chambers. April 16th, 1880.

Report unnecessary.

Bush & Lyon, by Jackson & Lumpkin, for plaintiffs in error.

No appearance for defendant.

Crawford, Justice.

Mrs. Cox filed her bill against Spence and the sheriff of Mitchell county. She alleged that Spence had become possessed, by transfer, of a certain *fi. fa.* against her deceased husband, that it had been compromised or settled in the hands of a former owner, but no entry to that effect made, and that Spence took with notice, and was proceeding to enforce it against certain lands left by her husband at his death; that she had filed an application for dower in these lands, which was still pending on objections to the return of the commissioners. She charges that if the *fi. fa.* was allowed to proceed, she would be irreparably damaged, and the title to her dower lands clouded. She prayed that

the *fi. fa.* be canceled, and Spence and the sheriff be enjoined from enforcing it.

The answer denied the leading allegations of the bill.

After hearing the bill and answer, and evidence in support of each, the chancellor granted the injunction, and Spence excepted.

This case is controlled by the ruling in *Jackson & Co. vs. Rainey*, September term, 1879, pamphlet p. 94, and in accordance therewith the judgment is reversed.

Judgment reversed.

Wilcox, Gibbs & Company *vs.* Aultman.

When the maker of a negotiable draft or note pays it to one who has not the possession of the paper at the time of such payment so as to enable him to take it up, but, instead thereof, takes a receipt for the money so paid, such receipt will not protect him from the payment of the draft or note when sued by the *bona fide* holder thereof before due.

Promissory notes. Contracts. Before Judge Simmons. Crawford Superior Court. March Term, 1879.

Reported in the decision.

W. E. Collier, by brief, for plaintiffs in error.

R. D. Smith; M. D. Stroud; J. C. Rutherford, for defendant.

Warner, Chief Justice.

This was an action brought by the plaintiffs against the defendant on a draft drawn by him upon Messrs. Adams & Bazemore, payable to his own order, and indorsed by himself, for the sum of $88.70, dated 20th January, 1870, and due on the 6th day of November thereafter, with a crop lien annexed thereto. The defendant pleaded pay-

ment. On the trial of the case the jury, under the charge of the court, found a verdict in favor of the defendant. A motion was made for a new trial on the grounds therein stated, which was overruled, and the plaintiffs excepted.

It appears from the evidence in the record, that the plaintiffs became the *bona fide* holders of the draft before its maturity for a valuable consideration, to-wit: in the month of August, 1870, receiving the same from Loyd & Sons. The defendant testified that the draft was given by him for one ton of Frank Coe's guano, purchased by him from Bateman, who was the agent of Loyd & Sons, that in the fall of the year 1870 he paid the draft to Loyd & Sons; who told him that they did not have it, but would get it and send it to him in three days, and gave defendant a receipt in full payment of the draft. The defendant proved the payment of the money to Loyd & Sons, and the taking of their receipt therefor by another witness, so that the question is, whether the payment of the money by the defendant to Loyd & Sons, who did not have the draft at the time, was a good payment in law as against the plaintiffs, who, as the evidence shows, were then the *bona fide* holders of the draft. When the maker of a negotiable draft or note pays it to one who has not the possession of the paper at the time of such payment, so as to enable him to take it up, but takes a receipt for the money so paid instead of taking up his draft or note, such receipt will not protect him from the payment of the draft or note when sued by the *bona fide* holder thereof before due. 54 *Ga.*, 52. In view of the evidence in the record, the verdict of the jury was contrary to law, and it was error in not granting a new trial upon that ground.

Let the judgment of the court below be reversed.

Williams *vs.* English.

1. Sayings of one party in the absence of the other, tending to establish his version of the contract, and which form no part of the *res gestæ*, are not admissible in his own behalf.
2. Where the bill set up a parol sale of land by defendant to complainant, which the answer denied, alleging that complainant was wrongfully in possession of defendant's land, and asking the writ of possession, a verdict for the defendant, directing that the writ issue. covers all the questions made.

Evidence. Verdict. Before Judge Crisp. Macon Superior Court. December Term, 1879.

Williams filed his bill against English, alleging, in brief, as follows: Allen Williams, the father of complainant, died on January 29th, 1867, seized of a certain described lot. After his death his widow, Annie Williams, remained in possession. In February, 1874, the lot was sold at sheriff's sale, and English, who was the son-in-law of Mrs. Williams, bought it. He threatened to dispossess her unless she paid him $147.00, the amount paid by him. This she was unable to do, and complainant, who was her son, in order to secure a home for her for life and for himself after her death, contracted with defendant in parol to take the lot at $147.00. One hundred dollars was paid, and no definite time fixed for the payment of the balance. He moved on to the place and took possession with his mother. Subsequently all of the purchase money was paid, except $9.50, which complainant is ready and anxious to pay; but Mrs. Williams having died, defendant refuses to receive it, and threatens to sell to other parties. The object of the bill was to compel specific performance.

Defendant filed his answer in the nature of a cross-bill. He admitted that Allen Williams died, leaving his widow in possession of the lot. As to the other facts the cross-bill gives the following account: Williams was in debt before his death, and his family were left in needy circum-

stances. Prior to his death defendant had loaned him $90.00, and after his death defendant stood security for Mrs. Williams and complainant to enable them to obtain the necessaries of life. This debt he had to pay. His only chance of repayment was from the crop planted on this place. Before it was gathered the land was levied on, and he bought it at $147.00. He never threatened to dispossess Mrs. Williams. On the contrary he informed her that he only bought it to secure himself, that she could remain on the premises as long as she lived, and that if she could repay him what he had paid for the place, together with what the estate owed him and what he had paid on the security debt, he would make her a deed. He denied ever making any contract or trade with complainant or that the latter obtained possession with his knowledge or consent. It is true that complainant handed him $100.00 (which was all that had been paid) but it was paid for Mrs. Williams and as her money, and the use of the property was worth more than that amount.

The cross-bill prayed for delivery of possession.

Under the cross-bill, Greer, administrator of Mrs. Williams, was made a party.

Complainant answered the cross-bill denying all the material allegations.

The jury found for defendant and that the writ of possession issue in his favor against complainant. Complainant moved for a new trial, which was refused, and he excepted.

For the other facts see the decision.

J. R. Worrill, for plaintiff in error.

W. H. Fish; T. P. Lloyd; B. P. Hollis, for defendant.

Jackson, Justice.

Fort Williams filed a bill against English to compel the specific performance of a contract for the sale of a piece of

land, of which complainant was in possession. The jury, on the hearing, found for the defendant and the court decreed accordingly, and the answer in the nature of a cross-bill asking it, having been filed, it was further decreed that defendant be put in possession of the land. The contract set up in the bill rested entirely on parol evidence, there being no scrape of a pen about it, and the evidence being conflicting, very conflicting, we have no power legally to set aside the verdict and overrule the presiding judge who sustained it, unless the court committed some error of law complained of in the motion for a new trial.

Only two errors are assigned in addition to the ground that the court erred in overruling the motion because the verdict is contrary to law and the weight of evidence, the second ground not being certified to be true.

1. The first is that the court should have admitted the sayings of complainant when he alleges that he sold a mule to one Smith to get one hundred dollars to pay on the land, the defendant not being present. The testimony was inadmissible, being the sayings of one party to a stranger to the suit in the absence of the other party, and no part of the *res gestæ* in this case, to-wit, the transaction between complainant and defendant. Besides, there was other evidence that the mule was sold for the purpose, and nothing in conflict therewith; and the presumption, from the facts in the case, is that Mrs. Williams paid complainant for it, as his brother, who paid defendant the said $100.00, took back an agreement or bond to make titles to Mrs. Williams by the defendant, and not to make them to the complainant. The complainant was not hurt by not getting in this hearsay testimony.

2. The other ground is that the verdict does not cover all the issues made by the pleadings. It does cover all. The only issues made are between complainant and defendant, Greer, the administrator of Mrs. Williams, making none whatever. The bill of complainant and answer in the nature of a cross-bill of defendant, make the only issues. The

bill asserts a parol contract for the sale of the land by defendant to complainant; the answer denies it flatly, and avers that complainant is in possession of defendant's land wrongfully, and without the slightest title or agreement to make title of any sort to complainant, and prays a decree for a writ of possession—alleging that defendant did agree to convey the land to Mrs. Williams, complainant's mother and defendant's mother-in-law, when she paid him certain sums, which she had not paid, except the $100.00, and that this sum of $100.00 did not even pay the value of the rent of the land which defendant allowed her to occupy till her death.

These issues are all that the pleadings make, the verdict for defendant covers them fully, and the decree thereon is right.

Judgment affirmed.

Hamlin *et al.* *vs.* Fletcher, executor.

1. Under the constitution of 1868 and the act of 1869, the distinction theretofore existing between grand and petit jurors was destroyed. The names of jurors, whether grand or petit, were drawn from the same box, and the presiding judge might send litigants before the twenty-four petit or the twenty-three grand jurors in his discretion. but there was no provision that if either should fail to furnish a complete legal panel, he might supplement from the other. Under the constitution of 1877 the distinction is re-established, and whilst the grand jurors may be called upon in certain cases to do traverse jury service, yet where all but fifteen of the grand jury have been stricken for cause, there is no law to authorize the completing of the panel to twenty-four from the list of traverse jurors.
2. The judge has not the power to indicate who shall be placed upon a panel as jurors to complete it. Where the grand jury does not furnish a full panel of competent persons, he has no power to direct the clerk to supplement from the first names upon the list of traverse jurors. These additions were talesmen selected by the judge, and taken from a different class of persons from those whom he had determined should try the case.
2. The attestation of a will must be made at a time and place where the testator can see that he is not imposed upon, and can have cogni

zance of the persons and the act. There must be no obstruction to prevent his seeing it; his position must be such as to enable him, without change of situation—not position—to see the witnesses subscribing the will, by looking in that direction and bringing within the scope of his vision the *factum* of the attestation.

Constitutional law. Jurors. Practice in the Superior Court. Wills. Attestation. Before Judge HILLYER. Monroe Superior Court. February Term, 1879.

Reported in the opinion.

J. S. PINCKARD; BACON & RUTHERFORD; STONE & TURNER; BERNER & TURNER, for plaintiffs in error.

J. D. STEWART; A. D. HAMMOND; T. B. CABANISS; HENRY C. PEEPLES, for defendant.

CRAWFORD, Justice.

The defendant in error offered for probate in the court of ordinary of Monroe county a paper writing, which he he undertook to propound as the last will and testament of Roderick Rutland, deceased, a caveat was filed thereto upon several grounds, and the issue thus formed was carrried to the appeal by consent.

When the case was called for trial in the superior court, it was announced from the bench that the same would be tried by a special jury selected from the list of grand jurors. After some objections, which we consider immaterial, that body was brought into court, and, upon the request of counsel for caveators, each member was put upon his *voir dire*, and all but fifteen disqualified themselves.

The judge instructed the clerk to proceed under the *voir dire*, calling the list of traverse jurors, and in that way twenty-four were provided and the trial proceeded. A verdict was rendered for the propounder. Caveators submitted a motion for a new trial upon several grounds, one of which was the manner in which the jury was selected. The court refused the motion, and caveators excepted.

It will be conceded that if the jury which tried this case was an illegal jury, that their finding was also illegal, and that a new trial must be granted.

There are two objections to the formation of this jury; the first is, that under no law, and under no practice known to us in this state can a special jury be composed of one-half the members of a grand jury, and the other half of the members of the petit juries. And the second is, that under no law and no practice can a judge, when ascertaining that any number of the jurors called to sit in a case are disqualified, can select, indicate or direct, either through the clerk or the sheriff, particular persons who shall be called to complete the panel.

1. Prior to the constitution of 1868 jurors were divided into two classes, and their names drawn from separate boxes. The grand and the petit jurors of the same term could in no case serve together; petit jurors never served upon appeal causes, nor grand jurors of the term in criminal causes. Their oaths were different; the petit juror was to try a case according to the evidence, the grand juror according to equity and the opinion he entertained of the evidence.

In 1868, however, the distinction was broken down by the constitution; and, under a law of 1869, the names of competent persons were placed in the same box, and drawn therefrom indiscriminately, to serve either as grand or petit jurors, the latter of whom were to try all civil cases, unless the judge, in the exercise of his discretion, should call for a special jury to be chosen from the grand jury. So that it will be seen that the judge might send the parties litigant before the twenty-four petit or the twentry-three grand jurors. But no provisision was made by which if the one or the other should fail to furnish a complete legal panel, he could call in the other and supplement it therefrom, but he was remanded to the regular mode provided by law for filling up his juries by talesmen.

But it is said that the constitution of 1877 authorizes

and allows this mode to be adopted, and in effect, if not in words, repeals the act of 1869. In art. 6, sec. 18, par. 2, the constitution declares that "The general assembly shall provide by law for the selection of the most experienced, intelligent and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors." It will be observed that the distinction between them is re-established, although the grand juror may be called to do traverse jury service. In what way may this be done? evidently in that way which was, or might be, provided by law. It was known to the framers of the constitution, that persons in the grand jury box were liable to serve as traverse jurors in criminal cases, and in such civil ones as the judge in his discretion should require of them the performance of that duty, and the concluding words of the clause quoted were evidently put there to cover the two instances mentioned, as well as to prevent their competency being questioned.

We are wholly unable to see how the judge had upon this trial any new power vested in him, either by the constitution or the law made to carry it into effect. When he sounded this case upon his docket, what power had he as to the juries? Simply to direct that the jury be chosen in one or the other of the modes provided by law, and when he had done this, he had exhausted his judicial discretion—was held to his election, without power to return, after he had secured fifteen qualified jurors, and adopt the other mode which he had rejected. Having ordered the jury to be chosen from the grand jury, when he found that he had only fifteen, he should have selected them just as he would have done if, upon the organization of the body, only that number of the original panel had appeared. The only argument against our view of this question was, that the law of 1869 was repealed by the constitution of 1877. If this be true, then the answer to it is found in the fact, that if repealed the judge was wholly unauthorized by any law to

have the issue tried by a special jury taken from the grand jury.

2. The second objection which we have named is as conclusively error upon the part of the judge as is the first, and if exercised would lead to infinitely worse consequences. The right of trial by jury is to remain inviolate, and this right extends not only to the mode and manner of declaring who shall compose the juries, but also as to the mode and manner in which they shall be selected to try each particular case. It would be a most dangerous power with which to clothe a judge, to say that he, upon the failure of a panel, might indicate even in the remotest manner who should be called to complete it.

In this case the judge finding himself in want of eight jurors, directed the clerk to call the first names upon the list of traverse jurors. In a legal sense who were they at that time and in that connection? They were nothing but talesmen selected by the judge to try this case, and not taken either from the same class of persons, whom he in his discretion had determined should sit in this case—they lacked one of the essential elements necessary to qualify them equally with their new fellow-jurors. If he could have had the first twelve called, he could have had the last called, or any part thereof, and put them upon the parties. It is no reply to say that the exercise of an unlawful power saves time or lessens expense; time, expense and convenience must yield to law.

3. Complaints were made to the charge of the judge upon the manner in which he presented the law governing the attestation of the paper offered as the will of the deceased, and as there is to be a new trial, and the same questions passed upon, we rule upon the subject as it appears in this record. There is no unvarying and universal rule which can be laid down; each case must be determined by its own circumstances. That the will shall be signed in the presence of the testator, was to prevent a fraud's being perpetrated upon him by substituting another for the true will. Therefore the attestation must be made at a time and

place where the testator can see that he is not imposed upon, and have cognizance of the persons and the act. The *general* 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;" 6th *Ga.*, 539, and authorities there cited.

The attestation must be in the presence of the testator—that is where he may see it—there must be no obstruction to prevent his seeing it, his *position* must be such as to enable him without change of *situation*—not *position*—to see the witnesses subscribing the will by looking in that direction, and bringing within the scope of his vision the *factum* of the attestation.

Judgment reversed.

Smith *vs.* Danielly.

Where suit was brought on a note payable to plaintiff for the use of certain children against their father, an equitable plea setting up that defendant was their natural guardian, that plaintiff is insolvent, and if permitted to collect the money will appropriate it to his own use, and praying that upon defendant's giving bond for the faithful management of the fund the note be decreed satisfied, should not be stricken on demurrer.

Promissory notes. Equity. Pleading. Before Judge Simmons. Crawford Superior Court. March Term, 1879.

Reported in the decision.

R. D. Smith; Bacon & Rutherford, for plaintiff in error.

M. D. Stroud; Miller & Collier, for defendant.

Warner, Chief Justice.

This was a suit by the plaintiff against the defendant founded on an attachment, in which the plaintiff declared

upon three separate promissory notes—one of which, on the face thereof, was payable to the plaintiff for the benefit of two Pasmore children, and three Smith children, to be equally divided between them. The other two notes were payable to the plaintiff or bearer, and not for the benefit of any one else. On the trial of the case the jury found a verdict in favor of the plaintiff for the sum of $640.00, besides interest. A motion was made for a new trial, which was overruled, and the defendant excepted.

One of the errors complained of in the motion was the striking the defendant's equitable plea on motion of plaintiff's counsel. The defendant alleged in his equitable plea, that the three Smith children mentioned in said note are his own minor children; that at the time said arrangement was made he was living in this state, but has since removed to the state of Mississippi, and has with him said three Smith children, and has all the burden to bear of maintaining and educating them, and that their interest will be better cared for and protected by him as their natural guardian than any one else, and that since the giving of said note and creating said trust for the benefit of his said children, the plaintiff has become insolvent, and if he is permitted to collect the money due defendant's children, that he will waste the same, and appropriate it to his own use, and thereby deprive his children of their interest in said note, and that he has never given any security as guardian or trustee of said children; therefore he prayed that the verdict in said case be so moulded that the plaintiff recover against him the amount due the Pasmore children, and that the balance due on said note be decreed satisfied, upon defendant, as natural guardian, giving bond with good security, conditioned for the faithful management and control of that part of the money due to the defendant's children upon their coming of age, or to pay over said amount to any other lawfully appointed guardian or trustee, and that upon his complying with these conditions the money coming to his children be allowed to remain in the defendant's

hands, etc. In view of the allegations contained in the defendant's equitable plea, especially in regard to the plaintiff's insolvency, it was error in the court to strike it.

Let the judgment of the court below be reversed.

The Northwestern Mutual Life Insurance Company vs. Wilcoxon, administrator.

The constitution of 1877, which provides that in a county where there is a city court, the judge thereof and of the superior court may preside in the courts of each other in cases where the judge of either is disqualified to preside," does not give the right to the judge of a city court to exercise chancery powers and to grant or refuse injunctions in vacation, no order being taken in term time for the determination of the case in vacation. Rulings so made by him are mere nullities.

Jurisdiction. Courts. Injunction. Before Judge Lester. Fulton County. At Chambers. January 26th, 1880.

Wilcoxon, administrator, filed his bill to marshal the assets of the estate, and for injunction against the sheriff of Fulton county, and the Northwestern Mutual Life Insurance Company and others. The immediate purpose was to enjoin the sheriff from selling certain real estate under a mortgage *fi. fa.* in favor of the Northwestern Mutual Life Insurance Company against complainant's intestate. Judge Hillyer, of the Atlanta circuit, being disqualified, the bill was presented to Judge Grice, of the Macon circuit, who sanctioned it, and granted a temporary restraining order until the application for injunction could be heard. The defendant, the insurance company, answered the bill. The case was heard before Judge Richard H Clark, of the city court of Atlanta, and the injunction denied.

The hearing was had during the term of Fulton superior court, but no decision rendered until vacation, when, by request of both parties, it was delivered.

The sheriff proceeded to sell. Wilcoxon, administrator, then applied to Judge George N. Lester, of the Blue Ridge circuit (Judge Hillyer being disqualified), for an injunction against said sheriff and the Northwestern Mutual Life Insurance Company, setting up in his said bill that the temporary restraining order granted by Judge Grice had never been dissolved, or the case determined by any qualified judge of said state having jurisdiction. Judge Lester sanctioned the bill, and granted a temporary restraining order until the application for injunction could be heard. The defendant answered the bill, setting up Judge Clark's refusal to grant the injunction. Upon the hearing Judge Lester granted the injunction prayed for, holding that Judge Clark had no jurisdiction to render his judgment in said case in vacation. The insurance company excepted.

B. H. Hill & Son, for plaintiff in error.

John A. Wimpy; Hopkins & Glenn, for defendant.

Jackson, Justice.

The sole question is whether the judge of the city court of Atlanta had the power, under the constitution of 1877, to grant an injunction when the judge of the superior court was disqualified, and when the superior court was not in session, and when the judge of the city court consequently was not presiding therein, and when no order had been taken in term, when the city judge did preside, to hear and determine the case in vacation?

The question must be settled by the words of the fifth section of the sixth article of the constitution of 1877, which are as follows: "In any county within which there is, or hereafter may be, a city court, the judge of said court, and of the superior court, may preside in the courts of each other, in cases where the judge of either is disqualified to preside." Supplement to Code, §627. No act of the legis-

lature has been passed to carry this clause into effect, and it must be construed by its own words. Those words only grant the power to the judge of the city court to preside when the judge of the superior court is disqualified, and they cannot be fairly construed to give the city judge all the chancery powers of the superior court judge, at chambers, without extending their import and plain meaning beyond what they will bear. He may preside in the superior court when the judge of that is disqualified; he may sit and hear any such case, ripe for hearing, in term; he may, while presiding in such case, pass any order which the judge of the superior court could pass in term; he becomes the impersonation of the superior court for that case during the term, and may exercise the powers of that court then and there while sitting on that bench; but when that court adjourns, or he is not presiding therein, he becomes merely a city court judge, and the chancery powers of a superior court judge have passed from him. The judge of the superior court was right, therefore, to disregard the ruling made by him at chambers, and the judgment is affirmed.

Judgment affirmed.

Harrison & Company *vs.* The Hall Safe and Lock Company.

1. Where neither the judge who presided at the trial, nor the one who passed on the motion for a new trial, revised and approved the brief of evidence, and no legal reason is given for such failure, this court cannot hear the case except as to such assignments of error as do not depend upon the evidence for their decision.
2. The judges of the superior courts of this state may alternate and preside for each other, although neither one be disqualified to sit in the cases tried. When the superior court of Fulton county was regularly convened by Judge Hillyer, of the Atlanta circuit, who thereupon announced that Judge Tompkins, of the eastern circuit, would preside for him, and retired, Judge Tompkins was clothed

with full judicial authority to hold that court, whatever might be held as to the judicial tribunal set up by Judge Hillyer in another room in the same building.

Practice in the Supreme Court. New trial. Judge. Practice in the Superior Court. Before Judge HILLYER. Fulton Superior Court. October Term, 1878.

Reported in the opinion.

Z. D. HARRISON, for plaintiff in error.

D. F. & W. R. HAMMOND, for defendant.

CRAWFORD, Justice.

1. A motion was made by defendant's counsel to dismiss the writ of error in this case, because there was no approval of the brief of evidence by the judge.

Upon looking into the record we find that it was agreed to by the counsel, but it nowhere appears that the presiding judge who tried the case revised or approved it. "In every application for a new trial, a brief of the testimony in the cause shall be filed by the party applying for such new trial, under the revision and approval of the court." No. 49, Rules Superior Court. Code, §4253.

We are referred by counsel for plaintiff in error, to an agreement entered into by the counsel, and approved by the court, and which is in the following words: "It is agreed that the original papers recited in the foregoing motion, and mentioned in brief of evidence attached to said motion, may be used for all the purposes of this motion, and that copies thereof need not be included in said brief of evidence unless the case should be carried to the supreme court, in which event copies thereof shall be attached to said brief by the clerk.

"It is further agreed that the facts stated in said motion are true, subject to be modified or amended by such proof in reference thereto as may be offered on the trial of said motion."

Thereupon are entered by the judge, these words: "The foregoing agreement approved, and the facts stated in said motion for a new trial are certified to be true, subject to the condition stated in said agreement." It will be seen that the agreement of counsel referred to three distinct matters: 1st, that the *original papers* recited in the motion and mentioned in the brief of evidence attached, may be used for the purpose of the motion; 2d, that copies need not be included unless the case should be carried to the supreme court; and 3d, that the facts stated in the motion were true.

The entry of Judge Hillyer simply is—that the agreement is approved, and the facts stated in the motion are true, but nowhere does he say that he approves the brief of evidence.

Besides, it is shown in the record that Judge Hillyer did not preside on the trial, but that it was Judge Tompkins who presided, and there is no approval by him, and no reason shown why it was not done.

Where neither the judge who presided at the trial, nor the one who passed on the motion for a new trial, revised and approved the brief of evidence, and no legal reason is given for such failure, this court cannot hear the case except as to such assignments of error as do not depend upon the evidence for their decision. This court in the case of *Porter vs. The State*, 56 *Ga.*, 530, says that "the brief of evidence used on the motion for a new trial must have been approved by the presiding judge, notwithstanding the fact that it has been agreed upon by counsel, and this approval must affirmatively appear either in the bill of exceptions or in the record." See also 60 *Ga.*, 322; 55 *Ib.*, 584, and the authorities there cited.

2. There is but one ground, therefore, for our adjudication in this record, and that is whether Hon. H. B. Tompkins, who presided as judge on the trial of the case, was without legal authority to do so, unless the judge of the circuit was himself disqualified, and, also, because he at the same time was trying another case in another room of the court-house of said county.

It appears that on the 25th day of November 1878, the superior court for Fulton county was in regular session, and was duly opened on that day, with Hon. George Hillyer presiding, whereupon, after announcing that the Hon. H. B. Tompkins, judge of the eastern circuit, would preside for him during that day, and in his place and stead, he retired from the bench, and Judge Tompkins assumed its duties, and proceeded to the trial of this cause.

We are very clear that under the facts stated the superior court of Fulton county was in legal session under Judge Tompkins, whatever might be held as to the judicial tribunal set up by Judge Hillyer in some other part of the building. "The jurisdiction of the judges of the superior courts is co-extensive with the limits of this state, but they are not compelled to alternate, unless required by law." Code, §242. That the judges of this state may alternate and preside for each other, although neither one be disqualified to sit in the cases tried, we have no doubt.

To alternate where one only was disqualified to try cases in his court, has been uniformly done—and we hardly think that it will be claimed that the presiding judge of the other court would be without legal authority to hold it.

It is true that there are certain writs, such as *certiorari*, *mandamus*, *habeas corpus*, injunction and *quia timet*, as also certain specified powers which each judge must grant or exercise in his own circuit, and no non-resident judge is permitted to do so, except in the absence, sickness, or disqualification of the judge of the circuit.

In such a case, therefore, as is presented by this record, we are compelled to hold that the trial was legal, in so far as the authority of the judge was concerned, and that its judgment must be affirmed.

Gaskill *vs.* The State of Georgia.

An act provided that "no suit begun under this act shall be in any manner settled, or compromised, or dismissed, without the consent and written order of the judge entered on the minutes." In a suit under this act, an order was taken in open court, both parties being either present or represented by counsel, sanctioning a compromise agreed upon. This order was signed by counsel for the state, and was entered on the minutes, which were approved and signed by the judge on the same day:

***Held*, that if not conclusive, the minutes furnish at least the strongest presumptive evidence of the consent and written order of the court sanctioning the compromise.**

Courts. Evidence. Judgments. Presumptions. Practice in the Superior Court. Before Judge Hillyer. Fulton Superior Court. September Term, 1879.

A *fi. fa.* in favor of the state *vs.* Gaskill was levied on certain property, which was claimed by Gaskill *et al.* On the trial claimants moved to dismiss the levy because of defects in the *fi. fa.*; the motion was sustained and the levy dismissed. Counsel for the state then moved to amend the *fi. fa.* so as to make it conform to the judgment. Defendant's counsel resisted this motion on the ground that there was no legal judgment to amend by. It appeared that the suit was originally brought by the state, on the information of C. P. McCalla, against Gaskill, to recover $15,000.00 under the act of December 15th, 1871, in relation to the recovery of money, etc., stolen or unlawfully or fraudulently converted or detained from the state. This act provided that no suit brought under it should be settled, or compromised, or dismissed, "without the consent and written order of the judge entered on the minutes." A compromise was agreed upon between the parties, and both being present or represented, an order was taken in open court in accordance with the terms agreed upon. This order, after stating the nature of the compromise, closed thus: "By the court. (Signed) John T.

Glenn, Solicitor General." It was entered upon the minutes, which were approved and signed by the court. The question was whether the compromise was legal under the act of 1871, so as to form the basis of an execution. The court held that it was, and defendant excepted.

JNO. A. WIMPY; MCCAY & ABBOTT, for plaintiff in error.

R. N. ELY, attorney-general; COLLIER & COLLIER; MYNATT & HOWELL, for the state.

WARNER, Chief Justice.

The only question presented by the record and the bill of exceptions in this case is whether the compromise and settlement of the case, as it appears in the record, was made with the consent and written order of the judge, as required by the 11th section of the act of 1871, which declares that "No suit begun under this act shall be in any manner settled, or compromised, or dismissed, without the consent and written order of the judge entered on the minutes." It appears from the record that an order was taken in open court, both parties being either present or represented by counsel, sanctioning the compromise, which order was entered on the minutes of the court; and it further appears that said minutes of the court were examined and approved by the presiding judge the same day the order of compromise was entered thereon. The minutes of the court, if not conclusive evidence of the consent and written order of the court sanctioning the compromise, furnish the strongest sort of presumptive evidence of that fact, if the public records of the courts are presumed to speak the truth. In our judgment the record furnishes sufficient evidence that the compromise of the suit received the consent and approval of the judge and the court, in accordance with the provisions of the act of 1871.

Let the judgment of the court below be affirmed.

Rosser *vs.* Cheney *et al.*

1. Where an action of ejectment has been brought and a bill is filed by defendant therein to enjoin the ejectment case, the court cannot, over the objection of either party, order the common law and equity case to be tried together.
2. Although the court erred in ordering the two cases to be tried together, yet under the previous rulings of this court, the verdict could not be other than it was, and the judgment is affirmed.

Practice in the Superior Court. Verdict. Before Judge Speer. Rockdale Superior Court. August Term, 1879.

To the report contained in the decision it is only necessary to add that the court ordered the ejectment case of Cheney *et al. vs.* Rosser and the equity case of Rosser *vs.* Cheney *et al.*, brought to enjoin the ejectment case, to be tried together, over the objection of defendant in ejectment, and this is one of the errors complained of.

J. J. Floyd; J. C. Barton, for plaintiff in error.

Clark & Pace, for defendants.

Jackson, Justice.

This case was before this court as reported in 54 *Ga.*, 168, when it was held that the purchaser, Rosser, was affected with notice of the recitals in the deed from Cheney and wife to Russell, under whom Rosser held; and that those recitals showed that the property bought was homestead for the family, and the conveyance by husband and wife without the assent of the ordinary passed no title. That decision in the 54th fixed the law of the case in ejectment on the facts thereof. Subsequently the defendant in ejectment brought a bill in equity enjoining the suit in ejectment, and that bill was tried and the case again brought to this court and is reported in 59 *Ga.*, 861, where the former ruling, as reported in the 54th *supra*, is virtually held to conclude the parties, and the judgment for complainant in

equity was reversed on that ground, and it is there held that this land is the homestead of this family, at least so long as the original homestead in Jasper county is not reclaimed by, or restored to, the family. It was again tried, the jury found the same verdict, and the court below granted a new trial on the ground that the verdict was against the law of the case applicable to the facts thereof, and in 61 *Ga.*, 468, that grant of a new trial for that reason was affirmed. The equity and common law cases were again tried *together against the objection of Rosser's counsel*, when the verdict was at last rendered for the homestead in Cheney's family, and Rosser excepted, and the case is again before us.

We know of no law which empowers the superior court to try an equity and common law case at the same time and before the same jury against the protest and without the consent of either party; and the practice being without law is, in our judgment, wrong, and ordinarily would constrain us to grant a new trial; but the law of this case on its facts has been so often adjudicated by this court, and as the verdict must be repeated if tried again, law and facts as three times ruled demanding it, it would be productive of no practical benefit, but a mere consumption of time and expense to the county to try it over, therefore in this case we shall not send it back, though the two cases at equity and law were tried together wrongfully, but we shall settle the litigation by affirming the judgment.

Judgment affirmed.

Greene *vs.* Oliphant & Hannah.

1. Where there was service, jurisdiction in the court of the amount and person, as well as judgment against the defendant, although such judgment may not have been founded on sufficient evidence, or rendered by default, it is conclusive as against an affidavit of illegality based on causes anterior thereto.
2. The re-opening of the court by the magistrate and allowing the plaintiffs to prove the account, and thereafter entering a second judgment upon the papers, was without legal effect.

Illegality. Judgments. Justice Courts. Before Judge Simmons. Upson Superior Court. November Term, 1879.

Report unnecessary.

J. Y. Allen, by brief, for plaintiff in error.

J. A. Cotten, by brief, for defendant.

Crawford, Justice.

A *fi. fa.* in favor of defendants in error was levied upon certain cotton as the property of C. H. Greene, who filed his affidavit alleging that the same was proceeding illegally, because there was no judgment rendered by said court upon which to base said execution, and because the suit against him being on open account, and he served by leaving a copy summons at his house, no judgment by default could be rendered against him; and further, because after the entry of the judgment by default, and the court had adjourned, one of the plaintiffs appeared, proved the account, and a judgment was entered on the papers.

1. Whenever an execution issues which does not follow the judgment upon which it is based, or following it, is proceeding after it has been satisfied, or after it has lost its legal effect, for any cause arising subsequent to the judgment, then it may be arrested by affidavit of illegality. The office of such affidavit is only to stay the progress of the execution until the defendant can be heard in the court from whence it issued, and then only upon some matter not reaching behind the judgment. The only exception to this general rule is where there was no service upon the defendant, or he has not had his day in court.

Applying, then, the law to this case, the defendant shows by his own oath that he was served; that he did not appear or plead; that he suffered judgment to go against him both by default and by proof; that he entered no appeal; applied for no *certiorari;* makes no defense against the jus-

tice of the claim; and after the lapse of eight months files illegality to the *fi. fa.*, setting up nothing subsequent to the date of the judgment as a ground for its arrest.

The record shows service, jurisdiction of amount and person, as well as judgment against the defendant, and although it may not have been founded upon sufficient evidence, or even by default, it is conclusive as against an affidavit of illegality for causes anterior thereto. *Hood vs. Parker*, September Term 1879, not yet reported; 7 *Ga.*, 204; 8 *Ib.*, 143; 11 *Ib.*, 137–220; Code, §3671.

2. The re opening of the court by the magistrate, and allowing the plaintiffs to prove the account, and thereafter entering judgment upon the *papers* was without legal effect. It is the duty of magistrates to keep a docket of all cases brought before them, in which must be entered the names of the parties, the returns of the officer, and the entry of the judgment, specifying its amount and the day of its rendition. The entry of the judgment in this case on the papers after it was regularly entered upon the docket and disposed of by the court, was a nullity, and cannot therefore affect that judgment entered as directed by law. Code, §457.

Judgment affirmed.

Mulligan *vs.* Perry, administrator.

1. The question of the sale of certain property being submitted to arbitration, a part of it being in the possession of the vendee, an award that the vendor "retain all the property, both real and personal, sold by him," includes a re-delivery of that already delivered to the vendee. In a suit under the award for the amount awarded to the vendee, property retained by him is a proper deduction, the burden of proof being on defendant.
2. The award itself is the best evidence of its meaning. The testimony of one of the arbitrators as to what was intended, and his construction thereof, was not admissible.

3. An award which provides that the vendor retain the property sold and pay to the vendee $1,800.00, does not make re-delivery of property in the hands of the vendee a condition precedent to recovering the amount awarded to him. The value of property retained by the vendee would be a proper deduction from such amount in a suit therefor.

Arbitrament and award. Evidence. Set-off. Before Judge Crisp. Early Superior Court. October Adjourned Term, 1879.

Reported in the decision.

Arthur Hood, Jr.; Bacon & Rutherford, for plaintiff in error.

E. C. Bower, for defendant.

Warner, Chief Justice.

The plaintiff sued the defendant's intestate to recover the sum of $1,800.00, which he claimed to be due him on an award. On the trial of the case the jury, under the charge of the court, found a verdict in favor of the defendant. A motion was made for a new trial on various grounds, which was overruled, and the plaintiff excepted. It appears from the evidence in the record that Mulligan and B. W. Keaton, by his agent, B. O. Keaton, submitted certain matters in dispute between them to the award of arbitrators, a copy of which submission and award is as follows:

"State of Georgia—County of Early.

"Whereas, there is a certain matter of controversy between John B. Mulligan of the one part, and Benjamin W. Keaton of the other part, which is proposed to be submitted to arbitration in said county.

"Now, the said John B. Mulligan and Benj. W. Keaton, by his attorney in fact, Benj. O. Keaton, do hereby agree, promise and bind themselves, heirs and assigns, to abide and perform the award of the following named arbitrators and umpire, in the penal sum of twenty thousand dollars, to be collected out of either of said parties who may

refuse to abide by and perform their respective liabilities made in award of said arbitrators and umpire, should there be one.

"The arbitrators selected and agreed upon by the parties are G. W. Holmes and A. R. Ransome, of said county, who are authorized, should they fail to agree, to call in an umpire. The points submitted are, 1st, the said John B. Mulligan claims to have bought in good faith two thousand acres of land, more or less, with the stock of every description, and provisions of every description on said plantation in Early county, excepting a portion of household furniture, a carriage and two mules, for the sum of $12,000 in specie, which the said Keaton denies, but claims such sale was made by a representative to said Mulligan, that his father advised such a sale. Subsequent to the sale, as claimed to have been made, both of the said parties agreed, after a misunderstanding between them, to submit all the matters in controversy between them to arbitration

"Now, the said parties do agree and bind themselves as aforesaid, to submit all the matters in controversy between them, both the said purchase and sale, and services of said Mulligan as said Keaton's agent prior to such trade.

"In witness whereof, both of the said parties have hereunto set their hands and seals this 19th day of February, 1866.

"Signed, sealed and delivered in presence of G. W. Holmes and A. R. Ransome.

JOHN B. MULLIGAN,
BENJ. O. KEATON."

RETURN OF REFEREES.

"JOHN B. MULLIGAN }
vs.
"BENJ. W. KEATON }

"In the matter of controversy referred to us by the said parties, we have, after hearing evidence and a due consideration of the same, concluded and agreed that it is fair and equitable for B. W. Keaton to retain all the property, both real and personal, sold by him to John B. Mulligan, and that the said Keaton pay to said Mulligan the sum of eighteen hundred dollars in currency.

"This we have mutually agreed upon as our award between the said parties.

"Witness our hands and seals this February 20th, 1866.

"Signed within the presence of

A. R. RANSOME,
G. W. HOLMES."

The defendant pleaded that he had offered to pay the plaintiff the $1,800.00, provided the plaintiff would comply with the award on his part, and return the property, or

account therefor, which the plaintiff refused to do, and attached to his plea a bill of particulars, specifying the property and the value thereof.

1. The fair and legal interpretation of the award, in view of the submission, is that the plaintiff should surrender the possession of the property purchased by him, so as enable the defendant to retain all of the property which the plaintiff claimed had been sold to him, and that the defendant should pay to the plaintiff $1,800.00. If the plaintiff has not surrendered the possession of the property to the defendant, as specified in his plea, nor properly accounted for it (the same being a part of the property sold) then, upon proof thereof by the defendant, and the value of the property not so surrendered nor accounted for, it may be deducted from the plaintiff's claim of $1,800.00; but the burden of proof is on the defendant to prove the allegations in his plea. Until the contrary appears, the presumption is that every man performs all his legal and social duties, and, therefore, the plaintiff will be presumed to have performed his legal duty under the award until the contrary is shown.

2. One of the errors complained of in the motion was the admission of the testimony of Holmes, one of the arbitrators, over plaintiff's objection, explaining what was the meaning of the award. The award itself was the highest and best evidence of its meaning, and the construction thereof was a question for the court, and it was error to admit the evidence of Holmes, one of the arbitrators, as to *his* construction of it.

3. The court charged the jury to the effect that *before* the plaintiff could recover the $1,800.00, the amount of the award, it must appear that he had complied with the condition of the award, and that if any of the property of B. W. Keaton went into plaintiff's possession, it must appear, *before the plaintiff can recover*, that he had delivered all of said property to the defendant, or accounted for the value thereof. This charge of the court was error in view of the

terms of the award. The award gave to the plaintiff $1,800.00 unconditionally; that became his legal right under it. The defendant's legal right under the award was to have and retain the property which had been sold to the plaintiff, or the value thereof. If the plaintiff has not accorded to the defendant his legal right under the award, by turning over the property to him, or accounting for its value as alleged in the defendant's plea, then the defendant would be entitled to have the proven value of such property deducted from the plaintiff's demand of $1,800.00, in a suit between themselves, the burden of proof being on the defendant to sustain the allegations in his plea, and that was the legal effect of the ruling of this court in this same case in 58 *Ga.*, 483, where we said "that if Mulligan had not made a clean delivery of the property, or payment of money, that the jury ought to deduct the deficiency from his $1,800.00, and in case the deficiency amounted to $1,800.00, then they ought to find for defendant." In our judgment the court erred in overruling the defendant's motion for a new trial.

Let the judgment of the court below be reversed.

Ellis *vs.* The United States Fertilizing and Chemical Company.

1. That a verdict for the plaintiff is too small is not good ground of exception by defendant.
2. Where a father and son lived together, the latter cultivating a part of the former's land and attending to the entire farm, and the son went with his father's wagons and teams to purchase guano, it was admissible to show that in making the purchase he stated that the guano was for the use of both of them. This formed a part of the contract. The effect which it would have on the father would depend on proof of the agency of the son.
3. Where one of two parties must suffer by reason of the fraudulent conduct of a third, he who places it in the power of the latter to perpetrate such fraud must lose rather than the other.
4. Where a son obtained guano on a credit by fraudulent representations that he was purchasing for himself and father jointly, and on

discovery of the fraud, the agent of the vendor demanded a return of the guano, and was referred to the father, who agreed to take it and use it if a specified reduction should be made in the price, which was assented to, he thereby became liable as an original contractor.

5. The verdict is supported by the evidence.

Practice in the Supreme Court. Verdict. Evidence. Fraud. Contract. Before Judge BUCHANAN. Spalding Superior Court. August Term, 1879.

Reported in the decision.

S. C. MCDANIEL, for plaintiff in error.

D. N. MARTIN; STEWART & HALL, for defendant.

JACKSON, Justice.

This company, through its agent, Cole, sued W. A. Ellis and the plaintiff in error, J. T. Ellis, for the sum of two hundred and eighty-five dollars, as alleged in the complaint, but the bill of particulars shows two hundred and seventy-five dollars. The jury found two hundred and fifty dollars, with interest from the sale. A motion was made for a new trial by J. T. Ellis on various grounds; the court overruled the motion on each of them, and on that judgment error is assigned here by him.

1. The first ground of the motion is that the verdict is too small. That cannot hurt the plaintiff in error, if true, and we do not deem it necessary to make the calculation over again for the jury. If the party complaining of its being too little be aggrieved by it, let him pay what he thinks is the precise overplus that the jury did not find, and doubtless the plaintiff in the court below will accept it.

2. The second ground is that the court admitted the evidence of Cole, the plaintiff's agent, as to what the defendant, W. A. Ellis, said when he made the contract for the fertilizer, contending that it was not admissible against J. T. Ellis. The facts, as set up and sworn to on the part of the company, are that the two Ellises are father and son, the

son living with his father; that he attended to the farm for his father, having the privilege to cultivate some of the land for himself; that he got the fertilizer from Cole when he had the father's wagons and teams, and Cole let him have it, charging it to both, and when he did so let him have it, W. A. Ellis said that it was for both, and such was therefore the contract made between the agent of the company and W. A. Ellis. To the latter part of this evidence, to-wit, what W. A. Ellis said as to the parties for whom he bought it, the objection was made, and that evidence being admitted, error is assigned upon it. The court did right to let the evidence in. It was the contract between these two men, and what each said made it; and Cole had the right to give his recollection and version of it as well as W. A. Ellis, and the company was not restricted to W. A. Ellis as the only witness, because he was a competent witness. As to what effect it should have on J. T. Ellis, depended upon all the facts and circumstances of the case tending to show agency in the son for the father, one of which is the fact that he lived with him, managed his planting for him, and had his wagons and teams, and with them hauled the fertilizer home.

3. Error is also assigned that the court charged to the effect that where one man puts it in the power of another to cheat a third, the man thus giving the opportunity to the second must suffer rather than the third innocent man. This is the law. It is applicable to this case, if, from all the circumstances, the jury should believe that the conduct of J. T. Ellis, in allowing his son to control his teams and wagons, and manage his planting interests that year, though he did have the right to cultivate a part of the place for himself, and subsequent circumstances in regard to J. T. Ellis' ratification of the contract made by his son on terms, if this conduct, in the judgment of the jury, enabled the son to cheat the company, then the charge is not without evidence, and is not hypothetical, but has basis on which to rest. It makes no difference whether J. T. Ellis intended

the fraudulent use of his conduct towards his son, by the son or not, if by that conduct the innocent party was led to part with goods he would not have sold but for the advantage the son got over him by reason of the conduct of the father. Code, §3174.

4. Another ground on which the motion is based, is that the court charged to the effect that fraud would annul the title in W. A. Ellis, and if Cole was taking steps to get back the fertilizer, and pending efforts that way, J. T. Ellis promised to use it and pay for it if the price was put $2.50 less per ton, then J. T. Ellis would be liable as an original contractor. We think that this is law, and the charge is based on evidence enough to support it. Fraud certainly operated to make the sale void. Code, §§2633, 2751, therefore no title passed, and Cole, for the company, could have recovered the manure in an action of trover. There is evidence that he did say to W. A. Ellis that he wanted it back, that he was referred to his father, that afterwards, at the drug store, the father agreed to take it and use it, and therefore there is evidence to support the charge.

5. The other specific grounds of the motion were abandoned here, leaving the general allegations that the verdict is contrary to the charge, to the law, and to the evidence. The charge gave the law substantially to the jury, and the law of the case was administered, if there be evidence to sustain the verdict.

What is the evidence, looking to the company's side, which the jury believed, and had a right to believe to be the truth? As made by the seller the case is this: W. T. Ellis owned a farm; three sons lived with him; W. A. Ellis, about 27 or 28 years old, cultivated for himself a part of his father's land, and managed the rest the year the fertilizer was used, his father being in bad health; he contracted for the fertilizer, with his father's wagons and teams in his possession, and used them to haul it to his father's home; the quanity bought by him far exceeded any amount that he himself could have used on the few acres he culti-

vated for himself, and, being hauled home to his father's, must have been designed for the father's farm, and the father must have known it was too much for the son's use; Cole's suspicions seem to have been aroused by W. A. Ellis' dealings with other dealers in fertilizers in Griffin, and he went to the farm to try and recover the fertilizer W. A. Ellis had got; at his, W. A.'s instance, he drew a note for J. T. Ellis, the father, to sign; J. T. declined to sign when it was presented to him by W. A.; Cole saw him about it at a drug store, when he agreed to take, use and pay for it at a reduced price; this both refused to do, and suit was brought for the manure at the reduced price; it was used on the farm of J. T., the father, and for his cotton crop, and no complaint is made that it proved to be bad, or was not fertilizing, and did not add to the crop; J. T.'s, the father's defense, is that he bought it from W. A., his son; gave a buggy and horse for it; another buggy got back into the father's hands, and the horse into a younger brother's hands, who was under twenty-one years of age; and these facts being believed by the jury, the question is, do they furnish evidence sufficient to sustain a verdict which made father and son both liable? In our view the question is one of fraud or no fraud, and the jury found that the facts authorized them to find such fraud in all the circumstances considered together, as to connect father and son in the joint purchase and use of the fertilizer, and in a joint effort to fix up the transaction so as not to pay for it, after it was used successfully in increasing the cotton crop of the father. Our Code, §2751; declares that "fraud voids all contracts. Fraud may not be presumed, but being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence." And questions of fact, especially in respect to fraud, are for the jury.

In this case it may have existed, the circumstances point to its existence, the plaintiff has not been paid for his goods, they were used by, and they have benefitted, the very defendant who brings the case here; he must have known that his son had not paid for the guano when he says he bought

it from him, and subtle as the fraud may be in this case, the jury have ferreted it out, the presiding judge has approved their finding, and there being evidence enough to support the verdict, though the testimony is quite conflicting, we are prevented from interfering by our well-settled rule in such cases, even if we did not ourselves approve the verdict. It is in this case clearly authorized by all the circumstances in proof.

Judgment affirmed.

The Star Glass Company *vs.* Longley & Robinson.

1. Where the return of the magistrate to a writ of *certiorari* accepts the statement of counsel in the petition, and certifies the same as a fair representation of what transpired as far as he claims to remember it, the return is defective, but the *certiorari* should not be dismissed. The remedy is by filing exceptions.
2. This case having been called at the first term, out of its order, exceptions then filed were not too late.
3. Where a mixed question of law and fact is involved, in a case brought before the superior court by *certiorari*, and where it is remanded for a new trial, instructions as to the law should be given for the guidance of the magistrate.
4. If the plaintiff priced its goods to defendants, who ordered at that price, and the plaintiff delivered them to a common carrier consigned to the defendants, that was such a delivery to them as to make the sale complete at the price named.

(*a*). If the plaintiff afterwards notified defendants that there was a mistake in the price, and not to use the goods except at a larger price, this would not change in any way the rights of the parties although they may have been used, unless the defendants assumed to pay the additional amount claimed.

Certiorari. Practice in the Superior Court. Sales. Delivery. Before Judge Hillyer. Fulton Superior Court. October Term, 1879.

Reported in the opinion.

Z. D. Harrison; S. N. Connally, for plaintiff in error.

D. F. & W. R. Hammond, for defendants.

CRAWFORD, Justice.

The bill of exceptions in this case, sets out three grounds of error as having been committed by the judge below upon the hearing of the *certiorari*, which he sustained and remanded for a new trial before the justice.

1. That the *certiorari* should have been dismissed because the evidence was not sufficiently verified by the magistrate to authorize the superior court to pass on the case.

This *objection* was well taken, because the magistrate had accepted the statement of the counsel in his petition for *certiorari* as his return, and had certified the same up as being a fair representation of what transpired before him as far as he claimed to remember it. The court did not dismiss, but called on the opposite counsel to respond to the *objection*, who proceeded to file exceptions to this imperfect return, which was allowed by the court, and the defendant in the *certiorari* excepted because it was too late, the case being in order for trial, as claimed by defendant.

2. The law is clear that such exceptions shall be filed in writing, specifying the defects, and that notice shall be given to the opposite party before the case is called in its order for hearing. This, therefore, would have concluded the right of the party to file the exceptions but for the fact that the judge certifies "that the case was not reached and sounded in its order for trial or hearing, on any regular call of the *certiorari* docket," as well as the further fact that it also appears that it was at the first or return term of the *certiorari*. Where the answer of the magistrate does not reply specifically to the allegations set out in the petition, or fails to certify and send up the whole of the proceedings had before him, a motion to dismiss is not the proper motion to submit, but exceptions should be filed, and if sustained, the court will order the magistrate to perfect and send up his answer. Code, §4062.

3. In this case the answer having been held to be defec-

tive, the same was amended, and when the *certiorari* was again called, argument was had thereon, and it was sustained by the court and the cause remanded for a new trial, to all of which the defendant excepted.

It is claimed that the testimony being before the superior court, the judge should have decided the case.

Wherever the error set out in the *certiorari* is one of law which must finally govern the case, and the court is satisfied that no question of fact is involved, then it is the duty of the judge to make a final decision. Code, §4067.

Where there is a mixed question of law and fact, and of which complaint is made in the *certiorari*, and the case is remanded for a new trial, it should be done with instructions as to the law for the guidance of the magistrate in the rehearing ordered.

4. In this case, if the testimony shows that the plaintiff, upon inquiry, priced its goods to the defendants, and thereupon the defendants ordered at that price, and that the plaintiff then delivered them to a common carrier, consigned to the defendants, that was such a delivery to them as to make the sale complete, and at the price named.

If it should further appear, that afterwards plaintiff notified defendants that there was a mistake in the price, and not to use the goods except at a later and larger invoice price, this would not change in any way the rights of the parties, although they may have been used, unless the defendants assumed to pay the additional amount claimed. The acceptance of a draft for the disputed sum, and the payment thereof, would be evidence quite sufficient, nothing else appearing, to defeat a set-off of this excess when filed to another suit between the same parties, but such testimony would not be absolutely conclusive against them, and other satisfactory proof might be offered to overcome it.

These matters of fact made it proper in the judge below to order a new trial, and his judgment is affirmed.

Usry *vs.* Usry *et al.*

Where, on a bill to cancel a deed and recover land conveyed by it, the jury found for the complainant four hundred acres of the land "by his refunding to the defendant $987.50," such refunding was a condition precedent to an absolute recovery, and until it took place no lien in favor of complainant's attorneys could attach to the land.

Attorney and client. Lien. Verdict. Before R. W. Carswell, Esq., Judge *pro hac vice*. Glasscock Superior Court. August Term, 1879.

Reported in the decision.

James Whitehead, by brief, for plaintiff in error.

Charles S. DuBose; H. D. D. Twiggs, by brief, for defendants.

Warner, Chief Justice.

On the first of September, 1872, Samuel H. Usry filed his bill in equity, in Glasscock superior court, *vs.* Peter Usry. Said bill prayed the cancellation of a deed dated November 10th, 1868, conveying a certain tract of land from the said Samuel H. Usry to the said Peter Usry. The bill alleged that said deed was void and ought to be canceled.

1. Because of the minority of the said Samuel H. Usry at the date of its execution.

2. Because of gross inadequacy of consideration—the allegation being that the said Samuel H. Usry received only three hundred and five dollars for said land, which amount was tendered back to said Peter Usry.

3. Because of fraud in the procurement of said conveyance.

Peter Usry, by plea and answer, defended upon the following grounds:

1. The failure of the said Samuel H. Usry to disaffirm

his contract within a reasonable time after attaining his majority, even if he was a minor when said deed was executed, which fact the answer denied.

2. His answer denied all *fraud* in the procurement of said deed, or that the price was *inadequate*, and averred that the said Samuel H. Usry had received from him for said land between six and seven hundred dollars.

Said cause was tried at the August Term, 1875, of Glascock superior court, and the following verdict returned: "We, the jury, find for plaintiff four hundred acres of land unimproved of the eight hundred acre tract of land, *by his refunding to the defendant nine hundred and eighty-seven* 50-100 *dollars*, also the defendant pay costs." No decree was entered upon this verdict.

Peter Usry filed his bill *vs.* Samuel H. Usry to February term, 1876, of said court, wherein he prayed that the time be fixed within which said Samuel H. Usry should have the privilege of redeeming said land.

Hon. E. H. Pottle, Chas. S. DuBose, Esq., and H. D. D. Twiggs, Esq., were, on their motion, made parties defendant, and filed an answer claiming that as solicitors of Samuel H. Usry in the previous equity case for cancellation of deed, they had a lien on said land for fees. It was admitted that said attorneys were the solicitors of Samuel H. Usry, and that their services were worth two hundred dollars.

The evidence showed that the condition of the verdict *had not been complied with by Samuel H. Usry*, he never having refunded to Peter Usry, or offered to do so, the nine hundred and eighty-seven 50-100 dollars, or any part thereof, as required by the verdict. Among other directions, the court charged the jury as follows:

"That the legal effect and result of the verdict of the jury in the equity cause previously tried, was a finding for the complainant, and a recovery for him of the land in dispute, and the creation of a claim or lien on the land to Peter Usry for the sum of nine hundred and eighty-seven 50-100 dollars; also, by operation of law, a lien, called an

attorney's lien, attached to this land in favor of the defendants here, who were the attorneys at law of Samuel H. Usry, for their services rendered in the equity case previously tried, by reason of which the recovery of the land was had, so the status of the case is this: Peter Usry is the occupant of the land, which is subject to two claims and liens. The attorneys' lien, which is paramount and superior, for their fees for services rendered in the recovery of the land, and the claim and lien of Peter Usry for $987.50, established and created by the verdict."

Under this charge of the court the jury found a verdict that the defendant Samuel H. Usry, should have until the 25th of December, 1879, to refund the $987.50, and also found that the attorneys of Samuel H. had a lien on the land for their fees to the amount of $200.00. A motion was made for a new trial, on the ground of error in the charge of t court, and because the verdict was contrary to law, which was overruled, and the complainant Peter Usry excepted.

The 1989th section of the Code declares that attorneys at law shall have a lien for their fees upon all suits for the recovery of real property as well as on the property recovered, and provides for the enforcement of the same. The attorneys at law of Samuel H. Usry had no lien for their fees on the land of Peter Usry, and the land is his until Samuel H. pays the $987.50; in other words, Samuel H. has not recovered the land so as to give his attorneys a lien upon it for their fees as contemplated by the statute, and will not be entitled to recover the possession of it until he pays the $987.50. When he becomes entitled to the possession of the land then his attorneys will be entitled to a lien thereon for their fees. It may be that Samuel H. will never comply with the condition so as to entitle him to recover the possession of the land from Peter Usry, and it will hardly be contended in that event that Samuel H. Usry's attorneys would have a lien on Peter's land for their fees due them by Samuel H.

Let the judgment of the court below be reversed.

HARDIN, executor, *vs.* ALMAND.

1. Where parties to a pending case referred the matters in dispute to arbitrators, without any order of court for that purpose, and an award was made and returned into court, and exceptions filed thereto, on the trial of the issue so formed it was not error to allow the award to be introduced in evidence without being proved.
2. Parties to a pending case may refer the matters involved to arbitration without an order of court.
   (*a.*) An exception to an award which alleges a mere error of judgment in the arbitrators in giving weight to certain parts of the evidence, or in failing to give proper weight to other parts, is demurrable.
3. Exceptions to an award do not bring the whole case up *de novo*. New evidence is admissible to show that the award is the result of fraud, accident or mistake, that there was a reference to chance, or that it is otherwise illegal, but not for the purpose of merely strengthening the case made before the arbitrators.
4. A judgment in favor of a party can be no ground of exception by him.
5. If an exception to an award on the ground that it is contrary to and against the evidence be sufficient to be considered at all, it is for the jury, not the judge.
6. The charge of the court in this case, taken as a whole, is sufficiently full.
7. One who seeks to set aside an award on the ground that it is the result of mistake, must show that mistake; nor is it sufficient to infer a mistake because the weight of the evidence was against the award.
8. Where the case is fully covered by the general charge, the failure to instruct the jury on a particular branch of it is not error in the absence of a request. The failure to charge here complained of was not error, as there was no evidence to warrant it.
9. There being evidence to support the verdict, and the presiding judge approving the finding, we will not interfere.

Arbitrament and award. Evidence. Practice in the Supreme Court. Charge of Court. New trial. Before Judge SPEER. Newton Superior Court. September Term, 1879.

In 1864 Green B. Almand died testate. His will, among other things, provided as follows: "The whole of my es-

tate, of every kind, I direct to be left in the possession of my wife, the income accruing thereon to be by her used for the support of herself and my only son, during her natural life, widowhood, or until my son becomes of age; and in the event of my said wife's marriage, I direct that *one-third* of all my property be allowed her by my executors hereinafter appointed; and the residue of my estate, after such division, I direct to be held by my said executors for my only son until he becomes of age, and in the event of her death before marriage, then my whole estate to be given to my only son, and if my wife and son should survive until my said son becomes of age, then my wife to have one-third and my son the other two-thirds."

Hardin qualified as executor. The widow retained possession up to her marriage in 1877. In the same year Almand, the son, cited Hardin, the executor, to appear before the ordinary for a final settlement. On the trial, the ordinary rendered judgment against the executor for $7.61, and plaintiff entered an appeal. After the adjournment of the term of the superior court to which the appeal was returned, the parties signed the following agreement to submit to arbitration:

"Whereas certain disputes exist between the parties, and that the same is now in litigation in Newton superior court, on appeal from the court of ordinary of Newton county, said suit arising from the actings and doings of the said John F. Hardin, executor of G. B. Almand, the said M. W. Almand being a legatee under the will of said G. B. Almand. Now it is agreed by and between the plaintiff and defendant in the above stated suit that said case be referred to the arbitrament and award of John J. Stephenson and Capers Dickson, Esqs., both of said county, as arbitrators, and E. F. Edwards, as umpire; that they have power to look into and investigate all matters touching the actings and doings of the said John F. Hardin as executor of G. B. Almand, and make a full and fair settlement between the parties. That they may receive and hear such evidence as may be offered by each of the parties, and after hearing the same make an award in writing, signed and sealed; which said award shall be final and forever conclusive upon the parties in regard to the final settlement of said executor with said legatee, M. W. Almand. It is agreed that said arbitrators may meet this day and dispose of said case, and when said

award is made, then returned to the adjourned term of Newton superior court, or other term, and be made the judgment thereof. In witness whereof we have hereto set our hands and seals, this day and year above written."

The principal points of dispute seem to be whether the claims in the hands of the executor were insolvent, or whether he could have collected them; and also whether certain *fi. fas.* held by him against one Osborn should have been collected, or whether they had been paid off by the testator to protect certain land which he bought from Osborn, and formed a part of the consideration paid for the land. The specific claims which were thus contested, and the evidence in regard to them, *pro* and *con*, are not necessary to an understanding of the points decided. The other facts are set out in the decision.

J. J. Floyd, for plaintiff in error.

A. B. Simms; Clark & Pace, for defendant.

Jackson, Justice.

Pending a suit in Newton superior court, the parties, without an order of court, submitted their differences to arbitration, the arbitrators made an award, and on the motion to make that award the judgment of the court, exceptions thereto were filed by Hardin; the jury sustained the award except as to fees of the arbitrators, and Hardin moved for a new trial; that motion was overruled and he excepted.

The arbitrators and umpire made the following award:

"The undersigned, to whom was referred the matter in dispute between John F. Hardin, executor of G. B. Almand, deceased, and M. W. Almand, both of the county of Rockdale, respecting the actings and doings of the said John F. Hardin, executor of G. B. Almand, upon and by virtue of an application made to the court of ordinary of said county, on the 13th day of March, 1877, by M. W. Almand, a legatee under the will of the said G. B. Almand, asking for a final settlement between himself as legatee as aforesaid and John F. Hardin, executor of G. B. Almand, deceased, which application was heard and determined by the court of ordinary on the 19th day of April, 1877; and on the 21st day of the same month, an appeal was entered to the superior court of said county by M. W. Almand, legatee as aforesaid;

and on the 24th day of October, 1877, articles of agreement and submission were made and entered into between the parties at issue, referring the whole matter of final settlement to the arbitrament of the undersigned. And it was then and there agreed by the parties, that the said arbitrators and umpire have full power to look into and investigate all matters touching the actings and doings of the said John F. Hardin as executor of G. B. Almand, and to make a full and fair settlement between the parties. And in obedience to said submission and agreement, said arbitrators and umpire proceeded to hear the matters in dispute, having met for that purpose in the court-house, in the city of Covington in said county, on the 30th day of October, 1877, that day having been agreed on by the parties, they having due notice of the same, when a portion of the evidence and mattters in dispute was submitted, to-wit: plaintiff introduced an exemplification from the records of the court of ordinary of said county, showing the returns, vouchers, etc., of John F. Hardin as executor of G. B. Almand, as well as the amount of money that came into the executor's hands; what the estate was appraised at, etc.; which exemplification also showed certain *fi. fas.* that had been returned by the executor to the court of ordinary as good, and further showed the actings and doings of the said John F. Hardin as executor, from the date of his qualification in 1866, to his last returns to the court of ordinary, which was in July, 1877.

The defendant then showed that nearly all the notes appraised as belonging to the said estate were utterly insolvent and worthless with but five exceptions. Defendant also stated that the Osborn *fi. fas.* had been paid off in payment for land bought of Elias Osborn by the said G. B. Almand, that, at least, was his understanding, and admitted that he had made no effort to collect them, and that they came into his hands as property of the estate of G. B. Almand, and had been by him so returned to the court of ordinary; that he had collected $32.55 on one of said *fi. fas.* from Elias Osborn, some six months after the consummation of the land purchased by G. B. Almand of the said Elias Osborn, which credit also appears on the back of said *fi. fa.* The *fi. fas.* showed they had been paid off by G. B. Almand to various parties, and by them transferred to and controlled by G. B. Almand against Elias Osborn. The hearing of the case was then continued until November the 7th, 1877, when defendant introduced further testimony in regard to the worthlessness of the notes as being barred by the statute of limitations, the insolvency of the parties, etc. Plaintiff showed that in two or three cases, where the executor held small notes against parties, that he never called on them for pay, and they swear they were ready to have paid him at any time. Plaintiff also put in evidence the record of deeds showing the date of the sale of land by Osborn to Geiger, that it was subsequent to the date of the judgment against Osborn, and, therefore, the land was bound for the money and the same could have been made on the *fi. fas.* after Geiger's purchase.

"After argument of counsel on both sides, the whole matter in dispute in regard to a final settlement between the said John F. Hardin, executor as aforesaid, and M. W. Almand, legatee under the will of Green B. Almand, deceased, was left in our hands as arbitrators and umpire as aforesaid. We therefore find and award that twenty-six hundred and twenty-four dollars and ninty-five cents, of good money, came into the hands of John F. Hardin as executor of Green B. Almand, deceased, during the years 1867 and 1868, and after allowing him the expenses of administration, and expenses of ward, as shown by his returns to the court of ordinary of said county, up to July 1877, and computing interest at the rate of seven per cent. per annum, to January 1st, 1874, against the said executor, and then compounding at six per cent. to date, upon said amounts, and allowing him interest at seven per cent. on all disbursements to date, we find due M. W. Almand, legatee as aforesaid, from the executor, up to date, on said amount, the sum of two hundred and six dollars and eighty-two and a half cents. We also find and award, that the *fi. fas.* against Elias Osborn, amounting to eight hundred and thirty five dollars and twenty-eight cents, came into the hands of John F. Hardin as exccutor as afore said, and that they were not satisfied or paid off, and the money could have been made on said *fi. fas.* by the executor out of the property of the said Elias Osborn. Computing interest on the said amount of *fi. fas.* at seven per cent. per annum, from 1st of January, 1868, to date, we find due M. W. Almand, legatee as aforesaid, from John F. Hardin as executor of G. B. Almand, deceased, the sum of fourteen hundred and eleven dollars and eighty-five cents. We further find and award, that four small notes and one receipt from D. T White, J. P., for collection of a note put in White's hands, amounting in the aggregate to about forty-four dollars as principal, should be charged up against the executor, with interest to date in favor of the ward. We find, therefore, due M. W. Almand, legatee as aforesaid, from this source, from John F. Hardin, executor of G. B. Almand, deceased, the sum of eighty-eight dollars and fifty cents, making the aggregate that we find and award due M. W. Almand, legatee, as aforesaid, from John F. Hardin, executor of G. B. Almand, deceased, upon final settlement between the parties at issue, up to date, the sum of seventeen hundred and seven dollars and seventeen and a half cents, ($1,707.17½.)

"We further find and award, that the cost already accrued, and that may hereafter accrue in this case, be paid by the said John F. Hardin, executor of G. B. Almand, deceased. We further find and award, that the sum of one hundred dollars be paid the said arbitrators and umpire in the above case, as a fee. The payment of the same to be equally shared by the said John F. Hardin, executor as aforesaid, and the said M. W. Almand.

"Witness our hands and seals this 17th day of November, 1877."

(Signed by the arbitrators and umpire.)

A copy of the said award was served on J. W. B. Summers, as attorney for John F. Hardin, on the 27th day of November, 1877, by E. F. Edwards, umpire.

At September adjourned term, 1877, held the first week in December, 1877, a motion was made to approve the said award, and to make it the judgment of the court. Objections were regularly filed to the said award, and the said motion stood over on the docket unheard until the regular September term, 1879. Many objections were filed to the said award, but all were abandoned except the following, viz:

First. Because the arbitrators made a mistake in making the amount due to the said M. W. Almand from John F. Hardin, to be the sum of $1,707.17½, when a fair calculation shows only the sum of $7.61 to be due him.

Second. Because the arbitrators erred in making the said John F. Hardin liable for the Osborn *fi. fas.*, as mentioned in the inventory of G. B. Almand's estate, the evidence showing that the said *fi. fas.* against Osborn were a part of the consideration for a tract of land purchased by G. B. Almand from said Osborn, and that G. B. Almand took control of said *fi. fas.* to protect his title to the said land.

Third. Because the said arbitrators erred in making the whole of said *fi. fas.*, or the amount apparently due thereon, to be the property of M. W. Almand, whilst the said M. W. Almand is entitled only to two-thirds thereof under the will of G. B. Almand.

Fourth. Because the finding of the arbitrators of four small notes and one receipt from D. T. White, J. P., for collection of a note in White's hands, amounting in the aggregate to about forty-four dollars, principal, should be charged up against the executor, is too vague and uncertain, there being no person mentioned in the award as to who these notes were against; and the testimony before the arbitrators showing that all the notes in the schedule (inventory) were insolvent, and that the executor had made efforts to

collect the money on White's receipt, but was informed by White that it could not be collected.

Fifth. Because the award does not contain an itemized account and settlement between the parties—merely the aggregate result being stated from data given, as the various amounts entering into the calculations, and their action thereon.

Sixth. Because the arbitrators erred in fixing their fees at $100.00 as compensation for their services, without the consent of the parties to said arbitration.

Seventh. Because of newly discovered evidence of the fact that the entry of a credit of $32.55 on the Osborn *fi. fa.* was made by mistake, and the money was collected by the daughter of the defendant (Mrs. Almand) on a note held by her against D. T. White and others, and entered on the *fi. fa.* through mistake, and should have been entered as a credit on said note, which was one of the notes included in the inventory, and which was put in suit but no recovery had thereon.

Eighth. That defendant avers that the said *fi. fas.* against Osborn were paid off by the said Almand in Confederate money to the said plaintiff therein, and held by the said Almand for the purpose of protecting the title to the land purchased by him from the said Osborn, and the same being part of the purchase money for the said land.

Ninth. That said defendant did not swear before the arbitrators that he had collected $32.55 on the Osborn *fi. fas.*

Tenth. That the said submission was not fairly made, in this, that it was induced by the suggestion of the party, M. W. Almand, without the knowledge or consent of counsel for defendant, and in the absence of defendant's counsel, to refer the said case to arbitration; the agreement was made and signed on the 24th day of October, 1877, after the adjournment of the regular September term, 1877, and before the adjourned term, to be held in December, 1877; the agreement was entered into and the trial commenced on the same day and concluded on the 27th of No-

vember, 1877. Defendant had no notice of the adjournment of said arbitrators, and was not present at all after the 24th of October, 1877.

Eleventh. The defendant and plaintiff agreed that the executions against Osborn should not be counted against him, and that said arbitrators should simply revise the calculations of the ordinary, and should not review his decision on any item of credit allowed by him to defendant.

Twelfth. Because there was no order of the court allowing said cause to be submitted to arbitration. (This exception was ruled out by the court.)

Thirteenth. Because the interest was improperly compounded against defendant, and was not compounded in his favor.

Fourteenth. Because the arbitrators erred in determining that John F. Hardin was liable for the debt against Elias Osborn, because the said claim was not in his hands for control, except for appraisement, up to the time of the marriage of Elizabeth Almand, widow of said deceased, and in and at the time, and long before that time, the said Elias Osborn was insolvent, and in 1868 took homestead.

The grounds of the motion for a new trial are as follows:

First. Because the court erred in refusing to hear the exception filed by defendant to the said award, as follows: This suit was pending on appeal from the court of ordinary to the superior court, and the said superior court having jurisdiction of the said cause, could not be ousted of that jurisdiction but by an order of said court, and the consent of the parties. There was no order of the said court authorizing a reference of this case to arbitration. The court ordered this ground to be stricken out for the reason that it came too late.

Second. Because the court erred in ordering the following exception to be stricken out of the list of defendant's objections to the award, to-wit: The arbitrators erred in determining that John F. Hardin, as executor, was liable for the debt against Elias Osborn (by the evidence it was

shown them that the said claim was not in his control from the time of the death of his testator, except for the purpose of appraisement,) up to the time of the marriage of Mrs. Elizabeth Almand, widow of deceased, to-wit: 1867; and at that time, and before that time, the said Elias Osborn was insolvent, and took homestead in 1868, and in refusing to hear and admit any evidence to support that objection.

Third. Because the court erred in rejecting the testimony of Elias Osborn that he was utterly insolvent long before Green B. Almand ever got control of the said executions against him, and in rejecting Osborn's homestead.

Fourth. Because the court erred in stating before the jury, during the progress of the trial, that any evidence which would illustrate any issue before the arbitrators, was competent in this court, and afterwards ruling that he was wrong in that decision, and then ruled that no evidence was competent before this court that was not in evidence before the arbitrators, and ruling out all the evidence that conflicted with this last ruling.

When the motion for a new trial was presented to the court for his approval, he struck out this ground by running his pen across it, and writing across it, "This ground is error;" and writing in the margin as follows: "The court decided that any evidence was admissible and competent for the jury that would show, or tend to show, that the award made by the arbitrators was the result of either fraud, accident or mistake, or otherwise illegal; but that it was not competent by evidence to make a new case here, that was not made before the arbitrators and by that means set aside the award."

Fifth. Because the court erred in holding and deciding that he was bound by the decision of Judge Hall in overruling the demurrer to the exceptions, and that he was bound to send down to the jury all the exceptions covered by the demurrer. In approving this ground the judge wrote in the margin as follows, viz.: "The defendant relied

on an order of Judge Hall overruling the demurrer to his (defendant's) exceptions to the award; and I held that this judgment was binding on the court. I cannot see why defendant should complain of a decision invoked by him."

Sixth. Because the court erred in sending to the jury that exception which charges that the said award was contrary to and against the evidence, that being a question exclusively for the court and not for the jury.

Seventh. Because the court erred in charging the jury that a mere error of judgment upon the part of the arbitrators, or a mere difference of opinion as to the effect of the evidence, or as to a doubtful question of law, are not grounds for setting aside an award, without explaining to them what kind of a mistake on the part of the arbitrators would be sufficient to set aside an award.

Eighth. Because the court erred in charging the jury, "that in reviewing this award, because you should differ with the arbitrators in the result to which they in their judgment arrived, is not, of itself, a sufficient ground to set it aside; nor because you would differ with these arbitrators in your opinion as to the effect of the evidence submitted to them, is that sufficient ground to set aside the award. It must appear to your satisfaction that the award is the result, the consequence, of a mistake made by the arbitrators. Neither can it be set aside because it may be contrary to evidence, if there is evidence to sustain it." This part of the charge is too vague and indefinite.

Ninth. Because the court erred in charging the jury "that where a party attacks an award upon the ground that the same was made under mistake of the arbitrators, the general merits of the controversy are not in issue, and it falls upon the party attacking the award to show the fact of the mistake; and it is not enough to show that the weight of the testimony is against the award, and thence infer a mistake."

Tenth. Because the court erred in failing to charge the jury as requested, that if the plaintiff failed to prove be-

fore the arbitrators that the mother of plaintiff was dead or married, or that plaintiff was of full age, then the plaintiff was not to have an award for any amount.

Eleventh. Because the court failed to instruct the jury as to the mode of computing interest in this case.

Twelfth. Because the verdict of the jury is contrary to evidence, and without evidence to support it, and against the charge of the court.

Which said motion was overruled by the court, and defendant excepted on all the grounds taken for new trial.

1. On the tender in testimony of the award to the jury, objection was made that it had not been proven, which was overruled, and this is excepted to. We see no error which can warrant a new trial. The case was pending on exceptions to the award, it was returned to court as an award, and the exceptions recognized it as what the arbitrators had done by excepting to the conclusions thereof.

2. There was no error in striking out the twelfth and fourteenth exceptions. It was not necessary before the parties could arbitrate to take an order of court therefor, though the cause was pending in court. Code, §§2283, 4225; 15 *Ga.*, 473; 61 *Ga.*, 162. This disposes of the twelfth exception. The fourteenth exception does not allege any mistake in the arbitrators but merely error of judgment on contested facts, and nothing that could set aside the award if true. 61 *Ga.*, 515. This disposes of the first and second grounds of the motion for a new trial.

3. An award is very different from a verdict. Exceptions to the first are not tried as an appeal is from the second. To set aside an award the law is not the same in respect to the rules of evidence or the sufficiency thereof to maintain the finding. To set aside an award there must be evidence of clear mistake of law or fact, or a reference to chance or lot, or fraud in the arbitrators, or in the opposing party, or accident, or that the award is otherwise illegal. The courts favor awards and it is quite a difficult undertaking to set them aside. Code, §§2892–2893–4243; 34

Ga., 560; 8 *Ga.*, 8, etc. Therefore the third and fourth grounds of the motion as corrected and certified by the judge, to-wit, that he decided "that any evidence was admissible and competent for the jury that would show or tend to show that the award made by the arbitrators was the result of either fraud, accident or mistake, or otherwise illegal; but that it was not competent by evidence to make a new case here that was not made before the arbitrators, and by that means to set aside the award," were properly overruled by the court. The true intent and meaning of this ruling of the court, as applied to the facts in this case and the testimony offered and rejected, is that when parties arbitrate their difficulties and disagreements, they must introduce before the arbitrators all their testimony on the points in dispute then and there; otherwise they will be concluded upon the questions in litigation, and not permitted to have a new trial of the case, as in appeals, or, as the judge termed it, to make a new case—try *de novo* as in new trials, but that new testimony is admissible to show accident, or mistake, or fraud, or other illegality in the parties or arbitrators or the proceedings. So understanding the ruling, it is approved and affirmed.

4. It is difficult to see how the judgment overruling the demurrer of defendant in error to the exceptions to the award made by plaintiff in error, could possibly hurt the plaintiff in error. Did he wish his own exceptions stricken, and no hearing to be had upon them? We suppose not. Therefore the fifth ground of the motion for a new trial was properly overruled.

5. If the exception to the award, in the language of the sixth ground of the motion, to-wit, "that the said award was contrary to and against the evidence," without further allegations of mistake or other thing which would vitiate it, should have been considered at all, it was proper to have the jury to pass upon it; and therefore the 6th ground should have been overruled.

6. The seventh and eighth grounds are exceptions to the

charge, based upon the idea that the judge was not careful in telling the jury what kind of mistake as to law or evidence would vitiate an award, after telling them that mere error of judgment on law or testimony would not authorize them to set it aside. The charge is set out in full in the record, and, taken altogether, seems to be sufficiently full on the subject of the difference between a clear mistake of a fact, or of the law, or mere difference of opinion between the arbitrators and the jury on a given subject.

7. There was no error in overruling the motion on the ninth ground. The party seeking to set aside the award *must* show the fact of the mistake, if he seeks to set it aside on that ground; and the mere weight of testimony is *not sufficient* for the jury to infer mistake and set aside the award.

8. If the plaintiff in error desired a charge to the effect that there was no proof that the mother of defendant in error was married, he should have requested it in writing, or at all events in some form; but it seems that she was married from evidence in the record—all over it.

9. There is evidence to support the verdict, and such being the case, and the presiding judge approving the finding, we adhere to the rule not to interfere. Interest appears to have been correctly computed under Code, §2603, at seven per per centum for six years, without compounding, and then six per centum, annually compounding thereon; but counting it at seven per centum without compounding, and the difference is scarcely material.

On the whole we see no legal ground upon which we can base a judgment overruling that of the court below. The exceptions are rather loosely pleaded. There is no distinct allegation of fraud, accident or mistake, in a legal sense, made or proven, as set out in the bill of exceptions and error thereon assigned, and the judgment must be affirmed. 40 *Ga.*, 674; 41 *Ga.*. 20, 548; 38 *Ga.*, 137; 61 *Ga.*, 162, 515.

Judgment affirmed.

McMath *vs.* Teel, administrator.

1. Where it appeared that a bond for title was produced under notice to the defendant, and that, on his death, his widow, by consent, was made a party in his stead, and stood as an heir at law claiming a benefit under the paper, it was properly admitted without proof of execution, but subject to be excluded if it subsequently appeared that she had a legal claim to the land independently of the bond.
2. The other party to the cause of action being dead, the defendant was incompetent to show that her possession was not under the bond to her husband but in her own right, that her entry was by the dead plaintiff's consent, or under a verbal gift from him, or even under a writing from him, then lost.
3. A letter is inadmissible to bind a third person in the absence of proof of authority from him to the writer to make the statements and admissions therein contained.
4. When the husband and wife enter into possession of land together in 1858, and the former subsequently, in 1870, gave his note to the plaintiff's intestate and took a bond for title from him, and held under such bond until his death, the husband during life, and his widow after his death, in the absence of any written title, was estopped from setting up an adverse title by possession even though for twenty years.

Production of papers. Evidence. Witness. Estoppel. Husband and wife. Prescription. Before Judge Crisp. Sumter Superior Court. October Adjourned Term, 1878.

Reported in the opinion.

Hawkins & Hawkins, for plaintiff in error.

B. P. Hollis; Guerry & Son, for defendant.

Crawford, Justice.

This was an action of ejectment brought by John Teel against John L. McMath; pending the suit both parties died; Alexander Teel, the administrator of the plaintiff, and Mrs. McMath, the wife of the defendant, were made parties, and the cause proceeded. After the evidence had been submitted, the jury, under the charge of the court,

retired and returned with a verdict for the plaintiff, whereupon the defendant asked for a new trial, which was refused, and she excepted.

The principal grounds relied upon for a new trial were:

1. That the court erred in admitting a bond for titles, there being two subscribing witnesses thereto, without proof of its execution, it having been brought into court under a notice served upon John H. McMath, the first defendant, before Mrs. McMath was made a party.

2. In not allowing Mrs. McMath, the defendant, to testify that she never held possession under the bond for titles, nor under her husband.

3. In not allowing a letter of October, 1875, to Mrs. McMath, to be read in evidence, upon her testifying that she received it by due course of mail, that it was the handwriting of her sister, who lived with her father, who was old and infirm, and also that of J. W. Finch, a brother-in-law of Louisa Teel, the writer, who said that according to the best of witness' opinion it was her handwriting.

4. That the court erred in charging the jury, that if the defendant was a married woman and entered the possession with her husband, she could not, without written title, set up possession in herself. And although they went in possession over twenty years ago, if afterwards her husband took a bond for titles, *he* is estopped from denying plaintiff's title, and *she* is estopped as the possession of the husband is the possession of the wife.

5. That if McMath took a bond for titles from Teel, although he was then in possession, his possession afterwards was under the bond, and so was hers, and they were both estopped.

6. That if McMath was estopped, and he and his wife entered without written title, and McMath took a bond for titles from Teel, then he is estopped and she is estopped, and if these facts appear you ought to find for the plaintiff.

1. The error complained of in the first ground, that the bond was illegally admitted in evidence, does not fall within

the very letter of section 3836 of the Code. That section provides that the production of the paper by the *opposite party*, dispenses with the proof of execution if he claims a benefit under it. In this case the paper was produced under a notice to the husband, John L. McMath, before Mrs. McMath was substituted as the defendant on account of his death, and if he had still been the defendant instead of his wife, no question would have been raised as to its admissibility.

When the bond for titles was offered, and the statement made as to the manner in which it was brought into court, nothing appeared to the judge except that it came from the hands of the defendant McMath; and that, by consent, Mrs. McMath had come in after his death, was made a party in his place and stead, and stood as an heir at law claiming a benefit under the bond which her husband had produced under a legal notice.

We think that as the case stood at that time, the bond was admissible, subject to be ruled out if afterwards it should be made to appear that she had a legal claim to the land outside of, and independently of, his bond for titles.

No such title being shown afterwards, the bond remained in evidence properly for the consideration of the jury.

2. Was Mrs. McMath, the defendant, a competent witness to testify as to any matter of fact affecting the title of John Teel, the original plaintiff, and who was then dead? She desired to set up title in herself by showing twenty years possession adverse to his title, that her possession was not under the bond for titles to her husband but in her own right. To have allowed her to have shown that her entry was by his consent, or under a verbal gift, or even under a paper writing from him, then lost, would have been allowing her to testify in her own behalf, when the other party to the contract and cause of action was dead, and squarely in the very face of the evidence act of 1866. She was properly excluded from the stand. 42d *Ga.*, 120; 44 *Ib.*, 51.

3. In the matter of the ruling upon the admissibility of

the letter offered, the ground of exclusion no doubt was, not because the handwriting of Louisa Teel was not sufficiently proven, but because there was no proof of her authority from him to write as she did in reference to this land. To have bound him by a letter, which it was not claimed that he wrote, made it indispensable that his authority therefor should have been shown; in its absence, therefore, the court was clearly right on the law in holding it inadmissible. 47 *Ga.*, 99.

4, 5, 6. These grounds all involve the same legal questions in effect, and therefore may be considered together. Admitting the facts to be that John L. McMath and his wife, the defendant, went into the possession of this land together in 1858, and so remained until 1870, and then that McMath gave his note for $750.00 and took a bond for titles from John Teel, which is the undisputed testimony in the record, was the charge of the judge wrong?

The husband in this state is the head of the family, the wife's legal existence is merged in his, except for her protection or benefit, or for the preservation of public order. Code, §1753. When these parties therefore entered upon this land and took possession of it, nothing else appearing, the wife was utterly unknown to the law in the matter of the possession; and being in 1858, if the father had said or done anything towards making her a gift of it, unless it was in writing, and the marital rights of the husband excluded, they would have attached and the possession would have been his.

Therefore, where the instructions given by the court to the jury were, that she could not, without some written title, set up possession in herself, even though she might have gone in twenty years ago; that if afterwards, in 1870, her husband took a bond for titles and gave his note for the land, then they were both estopped; that although he may have been in possession before that time, yet if he took the bond and remained in afterwards under it, then he was estopped; that if he were estopped, and she entered with him without

a title, that she too was estopped, and if those facts were made to appear, then they ought to find for the plaintiff, we think that they were such instructions as the law and the evidence justified and should have been given.

Judgment affirmed.

Fuller *vs.* Arnold *et ux.*

1. Where a motion to dismiss a *certiorari* was made and overruled, but no order was entered on the minutes, and at a subsequent term the same ground was again urged on a new motion to dismiss, there was no error in allowing the order to be entered *nunc pro tunc* and holding that ground to be *res adjudicata*, no exception having been taken to the ruling at the time when it was made.
2. It is not necessary to attach to a petition for *certiorari* a certificate of the magistrate that costs have been paid and security given before the sanction of the judge can be obtained.
3. Before a writ of *certiorari* can be legally issued by the clerk of the superior court, there must be filed in his office, within three months from the decision, both the petition, sanctioned by the judge, and also a certificate of the magistrate that all costs have been paid and bond and security given, or a pauper affidavit in lieu thereof. Where the magistrate did not sign such a certificate within three months from the decision, the *certiorari* should have been dismissed.

Certiorari. Res adjudicata. Practice in the Superior Court. Before Judge Speer. Pike Superior Court. October Term, 1879.

Reported in the decision.

S. D. Irvin, by Jas. H. Walker, for plaintiff in error.

J. A. Hunt, for defendants.

Warner, Chief Justice.

This case comes before this court on a bill of exceptions to the judgment of the court below in overruling a motion to dismiss a *certiorari* on the grounds therein stated.

1. It appears from the bill of exceptions that the first ground in the motion had been overruled by the court at a previous term thereof, and no exception taken thereto, but the order overruling it was not entered on the minutes; the court, however, upon satisfactory evidence before it, allowed the order to be entered on the minutes *nunc pro tunc*, and held that this ground of the motion was *res adjudicata*, and for that reason overruled it. There was no error in overruling the first ground of the motion to dismiss the *certiorari* on the statement of facts contained in the record.

2. There was no error in overruling the second ground of the motion to dismiss, because there was no certificate of the justice attached to the petition for *certiorari* that all costs had been paid and bond and security given when it was sanctioned by the judge, inasmuch as the law does not now require that to be done before the judge sanctions a *certiorari*.

3. In our judgment, the court erred in not dismissing the *certiorari* on the third ground as set forth in the motion. When a party seeks to obtain a *certiorari* of the judgment of a justice court, he must present his petition therefor to the judge of the superior court and obtain his sanction thereon, and also obtain a certificate of the justice that bond and security has been given for the eventual condemnation money, and that all costs have been paid, or make a pauper affidavit, all of which must be filed in the clerk's office of the superior court within three months after the decision complained of before the clerk can legally issue the writ of *certiorari*. See Code, sections 4052, 4054, 4056, 4057. It appears from the record before us that the judgment was rendered by the justice on the 8th of December, 1877, and it is agreed by the parties that the justice did not sign the certificate that the bond and security had been given and the cost paid until after the 10th of March, 1878, which was more than three months after the rendition of the judgment; consequently *his* certificate that the costs had been paid and bond and security given, could not have been

filed in the clerk's office within three months after the judgment of the justice was rendered, inasmuch as it could not be filed as *his* certificate until he had first signed it, and he did not sign it until after the expiration of three months; therefore the writ of *certiorari* was illegally issued by the clerk and should have been dismissed.

Let the judgment of the court below be reversed.

Wilcox, Gibbs & Company *vs.* Owens.

1. A guano note which contains the clause "guano sold and guaranteed under analysis of Dr. Means, inspector, Savannah, which analysis has been submitted to me," does not by implication exclude the defense that the fertilizer is not reasonably suited to the purposes for which it was sold.
2. If a contract is of doubtful meaning, it is to be construed against the party who drew it.

Contracts. Promissory notes. Before Judge Crisp. Schley Superior Court. October Term, 1878.

Reported in the opinion.

W. A. Hawkins; J. A. Ansley; J. N. Hudson, for plaintiffs in error.

Guerry & Son, for defendant.

Jackson, Justice.

Suit was brought by the plaintiffs against the defendant on the following contract:

"Savannah, Ga., January 4th, 1876.

"$71.00."

"On or before the 1st day of November after date, I promise to pay Wilcox, Gibbs & Co., or bearer, seventy-one dollars, and in case legal means are taken to collect the same, I agree to pay all costs and expenses, including ten per cent. counsel fees and ten per cent. interest from maturity, and I hereby waive all right of exemption of home-

stead and personalty as to this debt, for value received, being for guano and expenses on same, with option of paying for same in cotton delivered at Americus depot, on the basis of seventeen cents per pound for middlings, provided it is so delivered on or before first of November 1876. Guano sold and guaranteed under analysis of Dr. A. Means, inspector, Savannah, which analysis has been submitted to me."

The defendant pleaded that the fertilizer was not reasonably suited to the purpose for which it was sold and bought, and was utterly worthless, and offered evidence to prove those facts, to which evidence plaintiffs objected on the ground that they warranted the guano or fertilizer only to come up to the analysis of Dr. Means, and that this excluded the implied warranty of its fitness or suitableness as a fertilizer, and the right to set up the defense that it was worthless.

The court admitted the evidence, and the jury found for the defendant, and the plaintiffs excepted.

The uniform ruling of this court in all the cases which have been brought here on the subject of fertilizers has been to hold all parties strictly to the contract, and to permit no defense to be made to the claim for payment of fertilizers purchased by planters where they had contracted to make none. If, therefore, by this contract, construed according to the rules of law applicable to all contracts, this defendant has agreed to make no defense except that this fertilizer did not come up to Dr. Means' analysis, he can make no other. Has he done so? The contract is devised and written, perhaps printed, by the dealers in this fertilizer, and where the meaning is doubtful the doubt must be resolved against them.

In section 2651 of our Code these words are found: "the seller, however, in all cases (unless expressly or from the nature of the transaction excepted) warrants—1. That he has a valid title and right to sell. 2. That the article sold is merchantable, and reasonably suited to the use intended." Therefore in this case the sellers warranted that this fertilizer was merchantable, and reasonably suited to the use intended, unless this warranty be expressly excepted from

this contract, or unless it is excepted therefrom from the nature of the transaction.

It is not pretended that the warranty of the title is excluded by this guaranty; is the other implied warranty excluded? There are no words in this contract that expressly except this warranty which the law also puts in it; and the nature of the transaction does not except it, because the thing sold was known by both parties to be for fertilizing the soil, that was the use intended, and that use and its adaptation to it are of the very essence of the contract.

It can hardly be said to be of doubtful construction; but if so it would be construed against those who prepared and put out the paper.

The guarantee that the article comes up to Dr. Means' analysis, does not expressly exclude the warranty that it is merchantable and reasonably suited to the use intended—to-wit, the manuring the land and increasing the crop. The purchaser had a right to stipulate for both, and not to buy unless both were in the contract, and both might well consist without the overthrow of either. The one the law gave the purchaser; the other the express contract gave him. Now if in the express contract it had been covenanted that only this guaranty or warranty should be considered given, that none other was intended, or that any other was excluded, or that the only defense to the note should be that the thing sold did not fill the standard of Dr. Means' analysis, or any words to any such effect were in the express agreement, then this implied warranty of our Code would be excluded, but not otherwise. And on this line are the decisions of this court uniformly, so far as we recall them. In the case in 61 *Ga.*, 392, *Jackson vs. Langston & Crane*, cited by plaintiffs in error, the express warranty necessarily excluded the implied warranty of the Code. The words in that contract are: "It is expressly agreed and understood that I buy said commercial manure for my own use, to be used on lands cultivated by or for me, and it is guaranteed to me as to its effect on crops *only*

as to the analysis of the state inspector, as evidenced by his brand on each and every package. and I hereby accept the said analysis, as evidenced by said brand, as a correct estimate of the commercial value of said fertilizer." Of course these words are utterly inconsistent with any other warranty of its commercial value or fitness for the use intended, and excluded most clearly the implied warranty of the Code.

The case at bar is more like the case in 60 *Ga.*, 521, where the words are, "this fertilizer is sold under the inspection and analysis of Dr. A. Means, inspector at Savannah, and the department of agriculture at Atlanta;" and in that case this court said: "There is certainly no express stipulation that the purchaser of the fertilizer would rely solely on the inspection and analysis referred to, and a stipulation to that effect is not a necessary implication. The language seems to be a mere affirmation of a fact, with no indication that the one fact is intended to render all other facts immaterial. Suppose it were true that the article had been inspected and analyzed by the aggregate scientific skill of the universe, and that, nevertheless, it was not a fertilizer, had no fertilizing property, and was wholly worthless, would the inspection and analysis make the article "merchantable and reasonably suited to the use intended?"

And the proof was allowed to show that the article was not reasonably suited for fertilizing purposes, and was worthless, and the defense was held good. That case covers this. See also 61 *Ga.*, 67, 364–8–9; 60 *Ga.*, 288.

Judgment affirmed.

Smith *vs.* The State of Georgia.

1. Arson can seldom be established by positive testimony. The character of the offense makes it necessarily dependent for conviction upon confessions and corroborating circumstances. The force to be given to the corroboration must be left to an upright and intelligent jury.
2. The law of the case was fairly submitted to the jury by the charge.
3. Whether the out-house burnt be in a city, town or village, or not, does not affect the legal character of the offense. It affects the punishment only. Hence the court properly refused to exclude the testimony because the indictment failed to allege that the out-house was not in a city, town or village.

Criminal law. Arson. Confessions. New trial. Before Judge Speer. Monroe Superior Court. September Term, 1879.

Reported in the opinion.

C. A. Turner; J. A. Hunt, by Robert Berner, for plaintiff in error.

F. D. Dismuke, solicitor-general, by James S. Boynton for the state.

Crawford, Justice.

Wiley Smith was indicted for the offense of arson and found guilty; he moved for a new trial, which the court refused, and he excepted.

The grounds on which the defendant rested his motion for a new trial were:

(1). Because the verdict was contrary to law, contrary to evidence, and without evidence to support it.

(2). Because the charge of the court was based upon a hypothesis founded on the circumstances narrated in the evidence on the side of guilt, and not in also giving in charge that the circumstances, if consistent with his innocence, should be construed in his favor.

(3). Because the court allowed the state's witnesses to testify that the burning occurred in the country, and in not ruling out the same after it was shown that the house burned was not in a city, town or village.

1. The verdict of the jury was evidently based on the confessions made by the prisoner, and because it was also clearly made to appear that the corn-crib of John Dye, the prosecutor, was in ashes, and that it was laid in ashes *just* about the time the prisoner says he passed through the lot, and at which time he was known to have been there.

He *said* he burnt it—*said it* repeatedly, and to different people; and said it, as appears from this record, freely and voluntarily, and said he confessed it because he was sorry for it.

His confession was made seventeen days after the burning, and when there seems to have been no excitement about it, and no reason for it, except the burden of guilt resting upon his conscience.

A confession alone, however, being insufficient to convict, makes other evidence in corroboration necessary. No definite rule has been laid down as to how far, or in what particulars, the confession must be corroborated. "Each case," says this court in 45 *Ga.*, 44, "must stand on its own footing, the jury being the judges. And if they convict on a confession which is corroborated by one circumstance, the rule is complied with; the strength of that circumstance is to be judged of by the jury, according to the case."

In the case before us, the defendant came *through the lot*, which was about seventy five yards from the dwelling; passed within thirty steps of the crib; came to the door of the dwelling and knocked upon it heavily and rapidly, calling louder than he ever had, and as fast as he could as though he wanted it opened quickly, which was done; and the person opening the door walked into the passage; saw the light of the fire shining on the front gate and gave the alarm; whilst the defendant, who had pushed open the door, went to the hearth and squatted down, denied seeing the crib

on fire, did not return to the door of the house to see the fire, nor go to it until called several times. The fire was burning out at the top when the person at the house gave the alarm, and it was about daybreak in the morning. The crib was only ten or fifteen steps from where defendant had to get the wood with which to build the fire in the house, and though it was his business to build the fire, and he came for that purpose, he did not bring the wood.

If it required positive testimony to convict in cases of arson, it would be next to impossible ever to procure a conviction, for it is a crime committed under cover of darkness, and when there is no human eye to see; therefore, circumstances and confessions are the only evidence usually obtained; and, whilst they should be received with great caution, yet, if they are such as to convince the mind and satisfy the judgment of the upright and intelligent juror, this is all that the law requires. In this case they have so said, and we cannot say that it was contrary to the evidence.

2. The second ground of error arises under the charge of the court, and upon an examination of the whole charge, we think that the judge submitted the law of the case under the evidence fairly to the jury.

3. The indictment charged the defendant with having maliciously and wilfully burned the corn-house of the prosecutor, the same being an out-house. The defendant's counsel moved to rule out all the testimony given in under the indictment, because it was not alleged that the house burned was not in a town, city or village. The distinction between the burning of an out-house of another on a farm, or plantation, or elsewhere, not in a city, town or village, is confined by the Code to the punishment, and not to the legal offense. There was no error, therefore, in refusing to rule out the testimony on that ground.

Judgment affirmed.

Hearn *vs.* Adamson.

It is the duty of a garnishee in a justice court to answer a summons of garnishment served upon him within ten days. This duty is imposed upon him by law, whether the summons specifies that he shall answer within that time or not.

Garnishment. Before Judge Buchanan. Carroll Superior Court. October Term, 1879.

Adamson was a judgment creditor of one Snow. On December 2nd, 1878, he sued out summons of garnishment, which was served on Hearn the same day. This summons called upon Hearn to answer at the December term of the justice court. At the bottom of the summons was a "P. S.," without date or signature, notifying the garnishee to answer in ten days. The December term was on December 14th. On that day Hearn answered "not indebted." Plaintiff moved to take judgment against him by default, because he did not answer in ten days. The motion was granted. On appeal to a jury they found for the garnishee. Plaintiff sued out a writ of *certiorari*. On the hearing it was sustained, and the garnishee excepted.

Oscar Reese; N. Shellnutt, by brief, for plaintiff in error, cited Code §§4139, 4161, 3536, 4162; 15 *Ga.*, 186; 50 *Ib.*, 575; 55 *Ib.*, 410; 53 *Ib.*, 28; 60 *Ib.*, 554.

Grow & Adamson, by H. C. Peeples, for defendant, cited Code, §4161; 55 *Ga.*, 410.

Warner, Chief Justice.

This case came before the court below on a *certiorari* from a justice court, on the hearing of which the court sustained the *certiorari*, and the defendant therein excepted.

It appears from the record that the defendant in the *cer-*

tiorari had been served with a summons of garnishment in a justice court, but did not answer the same until after the expiration of ten days from the date of the service upon him, the summons not specifically requiring him to answer within ten days, though there was a postscript to the summons that he must answer in ten days, which was without date or signature. On the appeal trial in the justice court the jury found a verdict in favor of the garnishee. The court sustained the *certiorari* on the ground that the verdict discharging the garnishee was contrary to law and the evidence.

There was no error in this ruling of the court. When the garnishee was served with the summons, the law made it his duty to answer it within ten days from the date of such service, and it was not necessary to state in the summons that he should answer within ten days. The mandate of the law was sufficient for that purpose, of which he was bound to take notice, and be governed by it. See Code, §4161.

Let the judgment of the court below be affirmed.

The Planters' Bank of Fort Valley *vs.* Prater *et al.*

1. M. & Co. took from a trustee an absolute conveyance to certain land, and gave a bond to re-convey on payment of certain individual notes of the trustee, payable to their order, having full knowledge that the land was bought with trust funds. The notes were transferred to a bank by delivery, and without indorsement:

Held, that such delivery did not convey the title to the land to the bank. At best, it would only be subrogated to the rights of M. & Co., and affected by the notice to them.

2. Where a trustee wrongfully conveyed land in which he had invested funds of the trust estate, for the purpose of securing an individual debt, to one who took with full notice thereof, the *cestu que trusts* could follow the funds, and take the land bought with their money, or enforce their lien thereon. A sale of the land having been ordered, the claim of the *cestui que trusts* for the principal and interest of their fund should be satisfied before that of the creditor.

Contracts. Lien. Assignment. Trust. Equity. Notice. Before Judge Simmons. Crawford Superior Court. March Term, 1879.

This was a bill filed by the children of one W. G. Prater against him, the bank, and the sheriff of Crawford county. It alleged that Prater, as executor of their grandfather, and as their guardian, had received certain funds in trust for them, and had invested it in certain lands known as the Ross place, in Crawford county, taking title to himself, being 1,800 acres; that 600 of the same had been conveyed by Prater to J. W. Mathews Co. by defeasible deed signed by Prater and wife, under §1969 of the Code, to secure certain notes held by J. W. Mathews & Co. on him, taking bond to re-convey, and these papers had been traded to the bank, with full notice to all parties of their rights. The prayer was for injunction, sale of land and payment of their trust claim from proceeds, etc.

The bank answered, denying the existence of the trust fund, and setting up that they had purchased the notes and deed as mercantile paper before due, and without any notice of the trust, if any there was; that they had sued the notes to judgment, in name of Mathews & Co., for use of bank, and had had Mathews & Co. make a deed back to Prater, and filed it, and had had executions levied on the 600 acres—all strictly according to the statute.

The only question submitted to the jury was the amount complainants' claim, and the jury found $1,444.48 principal, with $826.00 interest to April 1st, 1879.

The other questions were left, by agreement, to the presiding judge. He decided as follows:

1. That there being no written transfer from Mathews & Co. to the bank, the latter took subject to all the equities between the former and complainants, and was affected by notice to Mathews & Co.

2. That notice to one of the directors, who took no part in the transaction, was notice to the bank, and bound it.

3. That the complainants be paid in full their principal and interest, and the balance, if any, after paying costs, be paid to the bank.

Finally he decreed that the entire tract be sold, and the proceeds applied as above.

The bank moved for a new trial, which was refused, and it excepted.

DUNCAN & MILLER; S. HALL, for plaintiff in error.

R. D. SMITH; W. S. WALLACE, for defendants.

JACKSON, Justice.

Sarah J. Prater *et al.*, children of W. G. Prater, brought their bill against W. G. Prater, their father and trustee, and the Planters' Bank of Fort Valley, for a perpetual injunction against the bank, prohibiting it from enforcing a judgment against W. G. Prater, on certain lands which were purchased with their money by their father and trustee. Part of these lands had been conveyed to Mathews & Co. by Prater absolutely, Mrs. Prater signing the deed with her husband, and Mathews & Co. obligating themselves to reconvey on Prater's paying them certain notes, payable to their order. These notes were transferred by delivery to the bank, and were sued to judgment in the name of Mathews & Co. for its use. Execution issued on this judgment was levied on the land so conveyed to Mathews & Co., that firm having re-conveyed it to Prater for the purpose of selling it under the execution. To stay this sale, and to have the title assured to them, and for general relief, the *cestui que trusts* filed this bill.

The equities arising upon these facts were submitted to the court, and the decree was in favor of the complainants, directing that *all* the lands be sold, and complainants be paid the principal and interest of their fund which went into the lands, and balance, if any, to the bank. To this decree the bank excepted, and it makes three points. First,

that the court erred in holding that the transfer of the deed from Mathews & Co. to the bank should have been in writing; secondly, in holding that notice to one of the directors of the bank, who took no part in the negotiation with Mathews & Co., was notice to the bank, and thirdly, that the decree was wrong in ordering the proceeds of the sale *first* to be applied to the payment of complainants.

1. In regard to the first point, it will be remarked that the note itself was only transferred by delivery to the bank, though payable to the order of Mathews & Co., and therefore that the question does not arise whether the transfer of the legal title to the note carried with it in equity the conveyance of the land as a security. It might well be doubted that if it had been indorsed it would carry an absolute deed to the land, such as this transaction is made by our statute, over to the indorsee. Code, §§1969, 1970. And even if the transaction made a mortgage, it would seem that under the act of 1873—acts of 1873, pp, 42, 47—Code, §1996—the assignment must be in writing to be valid; inasmuch as the twenty-first section of that act declares "that all liens herein provided for, may be assigned by writing *and not otherwise*," and mortgages are provided for in that act.

But this case is one where neither the note, though payable to order, nor the conveyance, has been assigned in writing, by indorsement or otherwise, to the bank. The legal title is in Mathews & Co.; they had full notice of the equities of complainants, and they held, and hold it, subject to those equities. To make the best case possible for the bank, it only had an equity in the land through the transfer of Mathews & Co. to it by delivery of note and deeds, and complainants had also an equity—well known to Mathews & Co., because they knew, according to evidence, all about the money of complainants having gone into the land and participated in the misconduct of the trustee. Code, §3151; 19 *Ga.*, 130.

So that it makes no difference whether the bank had or

had not notice of the trust; and the point that notice to a director who did not participate in the transaction or negotiation, is not notice to the bank, need not be considered.

2. If it be true that the money of complainants bought the land, then they had the right to follow it into the land, and take the land bought with the proceeds of what their grandfather bequeathed to them, or assert and enforce their lien thereon. 19 *Ga.*, 66. If so, it is clear that the court did not err in ruling that their claim be first paid; for if they could have held the land at their election, they would be entitled to be paid out of its proceeds when sold, at least to the extent of their money which went into it with interest, and such is the decree.

The truth seems to be that the bank never bought these notes before due. It got no title—legal title—to them. They were payable to order and not indorsed. So that it cannot claim that the deed was carried to it with the title to the notes; nor did the deed pass by any writing. Mathews & Co. held the legal title to the land levied on with full notice of the trust, and whatever right the bank has is dependent on their legal title. The bank is therefore affected with notice to Mathews & Co.

The entire transaction—notes and conveyance, with defeasance or bond to re-convey—make a chose in action, and such must be assigned to vest title in the assignee, Code, §2244; and such assignment must be in writing, under the construction given "assignment," as used in that section of the Code, in the case of *Turk vs. Cook*, decided last term. Therefore, in any view we can take, the judgment is right and must be affirmed.

Judgment affirmed.

Story & Brother *vs.* Walker.

1. When a guardian, who was also the husband of his ward, transferred an execution in his favor as guardian to certain creditors as collateral security for supplies, and they collected money thereon, the remedies of the wife were twofold: First. Those of a ward to call her guardian to an account. Second. Those of a wife, to recover from a creditor who knowingly receives, in payment of his debt, money belonging to his debtor's wife.
2. Where the action belongs to the latter class, it is competent for the defendants to show that the money was received in payment of the debt of the wife: that though these goods were charged to the husband, yet the quanity sold to and used on the wife's place amounted to more than the sum received on the execution, and this after her consent to the transfer; that the husband was insolvent, and credit was refused him.

Husband and wife. Contracts. Trust. Before Judge Lawson. Greene Superior Court. March Adjourned Term, 1879.

Reported in the opinion.

McWhorter Bros., for plaintiffs in error.

M. W. Lewis & Son, for defendant.

Crawford, Justice.

Mrs. Mary L. Walker brought suit against J. M. Story & Brother to recover the sum of $339.50, with interest thereon, which she alleged that they had collected upon an execution in favor of E. T. Walker, guardian of Mary L. Walker, *vs.* John E. Jackson, she being the ward mentioned in said *fi. fa.*

It appears from the record that E. T. Walker was not only the guardian but the husband of this ward, and that he had transferred the *fi. fa.* to J. M. Story & Brother as collateral security for supplies on the 4th day of May, 1876, and that on the 1st day of November, 1876, the said

transfer was approved by the written consent of the said Mary L. Walker. The sum alleged to have been collected was shown by the receipt of the defendants. Having arrived at full age she commenced this suit in her own name to recover back the money.

The defendants pleaded the *general issue* and an equitable plea, in which they set up the fact that E. T. Walker, in 1875 and 1876, was running two plantations, one for himself and one for his ward-wife. That the amount of goods sold for and used on her own plantation exceeded the sum paid to them on the execution transferred, all of which had been to and for her use and benefit on her said plantation.

Upon the trial of the issues thus made up, under the testimony admitted and the charge of the court, the jury returned a verdict for the plaintiff for the full amount of money collected on the *fi. fa.* aforesaid. A new trial was moved for, because:

1. The court erred in charging the jury that if they believed that E. T. Walker held an execution as guardian of his wife, and that he transferred it as guardian to the defendants, to be credited on an account of his own, then they should find for the plaintiff.

2. The court ruled out the testimony of J. M. Story, which was that in 1876 his firm furnished Walker with supplies to run his own and Mrs. Walker's plantations, and while all the goods were charged to him, the quantity sold to and used on her place was more than the sum which they had collected.

3. The court ruled out the testimony of J. M. Story, that the aggregate amount of goods sold to Walker and used on his wife's plantation after the 4th of May, 1876, to the time of collecting the money on the execution, was more than the amount of the same.

4. The court erred in refusing to allow defendants to prove that the aggregate amount of goods in said account used on Mrs. Walker's plantation, after her assent to the transfer, was more than the amount received by them,

although charged on the books to him, yet they were used in making a crop on her place and for her benefit.

5. The court refused to allow defendants to show that Walker was insolvent.

6. The court refused to allow defendants to show that Walker had a good and valid bond as the guardian of his wife.

It is needless to take up separately and adjudge the various grounds relied upon in this motion for a new trial. The pleadings in every cause should clearly define the law which is to control it, and therewith the theories relied upon to justify or defeat a recovery; and when they are technically framed, if the law be questionable, it may be settled on demurrer, if not, then on evidence the case must turn. It is very manifest in this case that the plaintiff, being at the time of the commencement of this suit *sui juris*, relied upon the fact for a recovery, that her husband had appropriated her money to his own use, with the knowledge of the defendants that it was hers.

The defense was put on two grounds: First. That Walker, the guardian, had the right to collect the execution himself, or that he could legally transfer it to another who might also collect it, and that the ward's remedy was to look to him and his bondsmen for payment, if the same were not accounted for. Second. That having received the benefit of the money herself, in the acceptance and use of the supplies, which had been furnished her for the running of her own plantation, gave them an equitable plea against her right to a recovery.

The court construed the law of the case to be with the plaintiff, and so ruled the evidence and so charged the jury.

Our view upon the facts, as shown by the record, is that her remedies were twofold: those of *a ward*, as such, to call her guardian to account for her estate in his hands, and those of *a wife*, to sue for and recover from a creditor who receives in payment of his debt money belonging to his debtor's wife, knowing it to be her separate estate. The

plaintiff chose the latter remedy, and rested her right to recover upon the ground that the defendants acquired no title to the money received. The defendants joined issue by their pleas, and sought to prove that the money was not received in payment of a debt of her husband, but one of her own.

They further offered to prove that although the goods bought in 1876 were charged to him, yet the quantity sold to and used on her place was more than the sum received upon the execution. They proposed to show by additional proof that credit was refused him; that he was insolvent; that the amount of goods furnished for her use, after her written assent to the transfer of the execution, was more than they received upon it, and that these supplies were used upon her place in making a crop for her benefit. All the testimony thus offered was ruled out by the judge, and we think improperly. If she had received value for this money, and it had gone for the benefit of her estate, it would be unjust that under any technical rule of law she should recover it a second time; it would be wrong, and that which is wrong is not law.

Judgment reversed.

Moore *vs.* McCown.

Whether monthly wages of a painter were liable to garnishment for medical services depended upon the date of such services. If they were while the act of February 24th, 1875, was of force, the wages would be liable; otherwise not. That act was not retroactive, so as to apply to services rendered before its passage.

Garnishment. Contracts. Before Judge Clark. City Court of Atlanta. December Term, 1879.

In 1879 Moore sued out a garnishment against McCown, which was served on the Western & Atlantic Railroad. The affidavit stated that the amount was due "for medical

services rendered prior to February 7th, 1875, upon a note; that he has commenced suit thereon," etc.. The garnishee answered that it owed defendant $94.60 as wages. Defendant made a motion in writing to dismiss the garnishment on the following grounds:

(1.) Because the money in the hands of the garnishee is due defendant as monthly wages for painting.

(2.) Because the note sued on was given in renewal of a note made by defendant to W. L. Sterling on October 1st, 1873, and the consideration of that note was medical services rendered by said Sterling in 1869.

(3.) Because the consideration of the note was not board or provisions, nor medical services rendered between February 24th, 1875 and February 7th, 1876.

The court granted a rule *nisi* against the plaintiff to show cause why the garnishment should not be dismissed; and upon the return and hearing he dismissed it. [In his certificate to the bill of exceptions, the presiding judge states that, in addition to the grounds for dismissal on account of matters outside the record, it was also urged that the record did not show that the medical services were rendered at a time when defendant's wages would be subject to garnishment therefor.] To the judgment dismissing the garnishment plaintiff excepted.

Hoke Smith; Jno. L. Tye, for plaintiff in error.

Hulsey & McAfee, for defendant.

Warner, Chief Justice.

This was a summons of garnishment founded upon a renewed note given for medical services rendered in 1869. The defendant made a motion in writing to dismiss it on the ground, amongst others, that the money in the hands of the garnishee was due to him for his monthly wages as a laborer for painting, and that the plaintiff's debt was for medical services in the year 1869, and that no part of it

was for board, or provisions furnished himself or his family, nor for medical services rendered him or his family between the 24th day of February, 1875, and the 7th day of February, 1876, for which his daily, weekly or monthly wages would be subject to garnishment. To this motion of the defendant the plaintiff demurred. The court overruled the demurrer, and dismissed the garnishment; whereupon the plaintiff excepted.

When the contract was made in 1869 the defendant's wages were not subject to garnishment for medical services. See Code, §3554, and the contract for the medical services not having been made whilst the act of 1875 was of force, it is not embraced within the provisions of that act, but is controlled by the law of force at the time the contract was made in 1869, and such was the true intent and meaning of the proviso to the act of 1876, so far as that act is concerned.

Let the judgment of the court below be affirmed.

The Georgia Railroad and Banking Company *vs.* Cox.

Where the evidence as to the diligence used by the employees of a railroad was conflicting, the presumption of negligence being in all cases against the company, and the jury find for the plaintiff, and the presiding judge is satisfied with the verdict, this court will not interfere.

New trial. Before Judge Speer. Newton Superior Court. September Term, 1879.

Reported in the decision.

Clark & Pace, for plaintiff in error.

J. J. Floyd; E. F. Edwards, for defendant.

Jackson, Justice.

This suit was brought by a colored man against the Georgia Railroad and Banking Company for killing a mule be-

longing to the plaintiff. The jury found a verdict for the plaintiff for one hundred dollars and interest. A motion was made for a new trial on the ground that the verdict was contrary to the evidence and the principles of equity and justice, which was overruled and defendant excepted.

If the evidence sustains the verdict, it is not contrary to the principles of equity and justice, but is legal and right. So that the question is simply this: Is there evidence enough to support the verdict?

By the Code, section 3033, it is enacted that a railroad company shall be liable for killing stock by the running of their engines and cars, "unless the company shall make it appear that their agents have exercised all reasonable and ordinary care and diligence—the presumption being in all cases against the company."

There is no doubt that the mule was killed by the company's train, and that being so, the law raises the presumption that the agents of the company did not use ordinary and reasonable care and diligence, and the company must overcome this legal presumption and take the burden of making it appear that they did use ordinary care and diligence. Ordinary care and diligence is that the engineer and fireman shall keep a lookout ahead to see stock on the track, and to stop the train or try to do so. The fireman swears that the first he saw of the mule was its head flying up, and he was keeping watch; the engineer, that the engine was almost upon the mule when he saw her first—that she tried to cross the track from behind a hedge-row after a horse which did cross there, and he was so close upon her that he could not check up the train; and both swear that they were diligent and could not prevent the catastrophe. On the other hand, two witnesses for the plaintiff swear that the mule must have got on the track at a crossing some fifty or seventy yards from the place where she lay dead—that they were there immediately after the killing—that the track was soft from rain the night before—that the tracks of the mule showed where she got on and showed that she was running—that there were no signs of the tracks

of a horse at all, and none of the mule's having attempted to cross where she was dead, the track being there on an embankment six or seven feet high—witness examined for tracks to see if she got on the track there and found none. She was lying dead about twenty feet from the hedge-row where the engineer swore she got on the track, and on the right of the track on which side the engineer testified that she came on the track from behind the hedge-row. One of the witnesses also testified that the horse came home before the train came along, and shortly after the train came and the mule was killed. So that the evidence is conflicting on the point whether the fireman and engineer were diligent in looking out for stock on the road ahead of them; for they could have seen the mule according to plaintiff's testimony, if they were, and might possibly have checked up so that it might have escaped. Possibly, perhaps probably, the verdict should have been that the killing was an unavoidable accident and therefore for the defendant, but it is out of the range of possibility that the account given by the engineer and fireman, and that given by the witnesses for plaintiff of the transaction can both be true. The presumption being against the company, and the testimony of its agents going to show reasonable diligence, being in conflict with the account given by other witnesses of the occurrence, we have no option but to hold that the presiding judge has not abused his discretion in upholding the verdict. With the policy of the law and the heaviness with which it bears on railroad companies, we have nothing to do; our business is to expound and enforce it as we find it on the statute books.

Judgment affirmed.

McAllister *vs.* The Singer Manufacturing Company.

1. A plea to a suit on a foreign judgment which appertains wholly to matters occurring anterior to such judgment, and which, with the exemplification of the record, shows great negligence in failing to set up such defense to the original action, was properly dismissed on demurrer; especially where the facts pleaded would have constituted no defense.
2. Since May, 1790, the records and judicial proceedings of the courts of any of the states are admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, together with the certificate of the judge that the attestation is in due form.
3. The verdict is contrary to law in being for seventy-four dollars and eighty cents more than is authorized by the exemplification of the record of the foreign judgment; a reversal must therefore be had unless this amount be written off.

Judgments. Pleadings. Evidence. Exemplification. New trial. Before Judge Speer. Rockdale Superior Court. August Term, 1879.

Report unnecessary.

J. N. Glenn; A. M. Helms, for plaintiff in error.

Clark & Pace, for defendant.

Crawford, Justice.

This suit was brought upon a foreign judgment rendered in the circuit court of Alabama, to the October term, 1877, of Rockdale superior court. To which suit defendant filed the plea of the general issue; a special plea which went to the merits of the contract, the bad faith of the plaintiff and the fraudulent conduct of its agents and attorneys anterior to the judgment, and a plea of set-off.

On demurrer, the pleas except the general issue were stricken, and defendant excepted.

Upon the trial the certificate and exemplification of the record from the state of Alabama were offered in evidence,

to the admission of which defendant objected for the want of the great seal of the state being thereto attached. which objection was overruled, and defendant excepted.

The jury found a verdict for the plaintiff, to which finding defendant excepted, because the same was contrary to law.

1. The first question for our review is as to the judgment of the court below on the demurrer to defendant's pleas By his special plea it was alleged that the first note which was given by the defendant on the 6th day of October, 1874, was obtained by fraud, because he was not then indebted as claimed, and, having faith in the company, he gave it. When he gave the second note on the 18th day of August, 1875, that was also obtained by fraud in this, that they presented him with an aggregate account of his indebtedness, and he, having full faith in their honesty, gave it. He kept no books or memoranda of his dealings with the plaintiff, but, relying on the company, supposed that it kept correct books and all proper debits and credits; has learned since the bringing of the suit in Alabama that he was not indebted on a full and fair settlement; that he was entitled to credits not allowed him, and by their fraudulent representations he was deceived into the making of the note. He alleged further that the *judgment* was obtained by fraud in this, that plaintiff's attorney induced him to believe that suit was brought to *force* a settlement; and that the same would not be pressed until he had full time to investigate all of his accounts, and to set up his cross demands which he claimed would defeat plaintiff, and give him a judgment against the company; that the judgment now sued upon was obtained contrary to this express agreement of indefinite continuance that the defendant might ascertain the true condition of the accounts between himself and plaintiff; that it prevented him from making any defense; and was continued twice with that view, and therefore the taking of the said judgment was a fraud upon defendant. It will be observed that this plea appertains

wholly to matters occurring anterior to the judgment, and we apprehend, with the record before the presiding judge who tried the case in Alabama, would have been stricken there for its manifest want of legal defense against the plaintiff's demand, *a fortiori* would it be stricken here, where the suit was brought upon the judgment. The plea showed that the first note was given October 6th, 1874; the second, August 18th, 1875; that suit was brought September 29th, 1875; the case continued by the plaintiff at the May term, 1876; and by the exemplification of the record it is shown that at the November term, 1876, it was continued by the defendant; by the plea again, that at the spring term, 1877, "the defendant saying nothing," judgment was rendered against him.

Thus it will be seen that the judgment was rendered two years and a half from the giving of the first note, and one year and eight months from the giving of the second, to say nothing of the two continuances giving him twelve months, besides six months before that, in which to plead. Such negligence would weaken if not destroy a meritorious defense.

As to the set-off pleaded, it only contained the claims of the defendant arising out of, and confined to, the subject matter which entered into the consideration of the notes themselves, the giving of which was an admission on the part of the payer that the payee was not indebted to him for any matter or thing appertaining thereto.

2. The second assignment of error is that the certificate and exemplification of the record from Alabama was not authenticated by the great seal of the state. Since May, 1790, the records and judicial proceedings of the courts of any of the states are admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, together with the certificate of the judge that the attestation is in due form.

3. The third assignment of error is that the verdict of the jury is contrary to law.

Under this ground of error we have examined the exemplification of the record accompanying the judgment, and there find that according to the pleadings of the plaintiff as so exemplified, that the verdict which the jury rendered, and of which complaint is here made, is contrary to law in this, that they have found seventy-four dollars and eighty cents more than is there authorized. By article four, section one of the constitution of the United States, we are to give full faith and credit in this state to the records and judicial proceedings of every other state when the same are brought before us properly authenticated under the law. We therefore reverse the judgment, unless the said sum so stated in the record be written off, and then direct that the same stand affirmed.

Judgment reversed.

The Mayor etc., of Griffin *vs.* Powell.

An ordinance of the city of Griffin provided that "no person or persons shall keep a livery or sale stable, or let out horses or mules or other stock, carriages, buggies or other vehicles * * without first obtaining a license * * * provided, that nothing in this section shall be so construed as to allow any person to run a dray for hire." Another section provided that "no person shall run a dray, cart or other carriage in the city of Griffin for the purpose of hauling for the public, goods, produce, wares or merchandise of any description" without a license:

Held, that one who had taken a license as the keeper of a livery stable might hire out a two-horse wagon by the day for the purpose of hauling lumber without obtaining a license to run a dray.

License. Laws. Municipal corporations. Before Judge Buchanan. Spalding Superior Court. August Term, 1879.

Reported in the decision.

Hunt & Johnson, for plaintiff in error.

Stewart & Hall, for defendant.

WARNER, Chief Justice.

It appears from the record that W. H. Powell was cited to appear before the mayor and council of Griffin, on the 24th day of September, 1878, to show cause why he should not be dealt with for running a dray without license, in said city, on the 17th day of September, 1876, and other times in that year.

On the hearing of said cause, R. F. Stephenson testified before council, that in the month of April last and several times since, he had hired from Powell a two-horse wagon to haul lumber from the depot in said city to witness' place of business; that he paid Powell at the rate of four dollars per day for said wagon, mules and driver; that it was not a dray but a two-horse wagon; that the mules were kept in the livery stable of Powell, and the wagon also; that the wagon was not hired to haul by the load, but by the day. Powell is a livery stable keeper. Stephenson also testified that Powell knew that he, Stephenson, hired said wagon to transport lumber in the city.

The ordinance of the city of Griffin read as follows:

"Be it enacted that no person or persons shall keep a livery or sale stable, or let out for hire, horses or mules or other stock, carriages, buggies or other vehicles, within the corporate limits of the city of Griffin, without first having obtained a license from the clerk and treasurer of the city of Griffin, for which he shall pay the sum of forty dollars.

"*Provided*, that nothing in this section shall be construed as to allow any person to run a dray for hire."

Section 4th of said ordinance read as follows:

"Be it further enacted that no person shall run a dray, cart or other carriage in the city of Griffin for the purpose of hauling for the public, goods, produce, wares or merchandise of any description, whatever, without first having obtained a license therefor, for which he shall pay the sum of twenty-five dollars for a one-horse dray, and fifty dollars for a two-horse dray or carriage.

"*Provided*, that this section shall not be so construed as to allow any person taking out this license to transport persons to and from, and [illegible] city for hire, and provided further, that this section shall be

so construed as to not allow any person or persons who hire a dray temporarily for the purpose of hauling for themselves or others, to use the same without license."

Section 15, imposes a fine in double the amount of the license for a violation of the above ordinance.

After hearing the above evidence and argument of counsel, an order was passed by the mayor and council of the city of Griffin, that it appearing that defendant had violated the said ordinance, an execution should issue against said Powell for the sum of one hundred dollars, same being double the amount of the license for running a dray.

Powell sued out a *certiorari* and on hearing the same (the above facts being the case made), the court sustained the *certiorari*, and reversed the decision of the mayor and council, whereupon the defendant excepted.

It was admitted that Powell had a regular license from the city as a sale and livery stable keeper for that year, and the question is whether, under the statement of facts disclosed in the record, he was liable to the penalty imposed on him by the city council for running a dray? Powell, under his license as the keeper of a "livery or sale stable," had the right, under the ordinance of the city, to let out for hire, horses, mules or other stock, carriages, buggies or other vehicles, except a dray, for hire. The word vehicles would certainly include wagons and possibly drays also, but for the proviso to the city ordinance. The proviso in the ordinance used the word "dray" in its common and popular sense, as contra-distinguished from a wagon in its common and popular sense—and should be so construed. Therefore, as Powell did not run a dray for hire, as contemplated in the proviso to the ordinance, there was no error in sustaining the *certiorari*.

Let the judgment of the court below be affirmed.

Black *vs.* Peters.

The county court of Rockdale county being governed by the same law in respect to appeals as justice courts, an appeal therein must be entered within four days from the decision. It is not sufficient that it be within four days from the adjournment of the court at which the decision was rendered.

Appeals. County Courts. Before Judge Speer. Rockdale Superior Court. August Term, 1879.

Reported in the decision.

A. A. Zachry; A. M. Helms, for plaintiff in error.

A. C. McCalla, for defendant.

Jackson, Justice.

This was a suit for the recovery of the price of a fertilizer, brought in the county court of Rockdale by the defendant in error against the plaintiff in error. In the county court the judgment was for the defendant in that suit, who is the plaintiff in error here, and an appeal was taken to the superior court. When the case was there called, a motion was made to dismiss the appeal because not taken within four days from the rendition of the judgment in the county court though within four days of the adjournment of that court; and the court overruling the motion to dismiss, the case was tried and a verdict was rendered for the plaintiff for the price of the fertilizer. A motion was made for a new trial on various grounds, and among them the overruling the motion to dismiss the appeal. Should it have been dismissed?

The county court of Rockdale county is a local court, created specially for that county by statute and dependent for its powers and the rights of suitors therein upon the statute creating it.

That statute declares "said party may enter an appeal

from such judgment within four days *under the same rules and regulations now governing in appeals from justice courts of this state.*" Acts of 1874, section 6, p. 75.

The Code, section 4157 declares: "either party being dissatisfied with the judgment of the justice of the peace or notary public, and upon all confessions of judgment, provided the amount claimed in said suit is over fifty dollars may, as a matter of right, enter an appeal from said judgment, within four days (exclusive of Sundays) *after the rendition of said judgment*," etc.

The local law creating the county court of Rockdale, having put that court in respect to appeals therefrom on the same footing as justice courts as constituted in 1874 when the local law was passed, any party to a case tried therein who wished to appeal was bound to do so, as in the justice courts, within four days from the rendition of the judgment, and not from the adjournment of the court. The local act contemplated that said county court should be held and have jurisdiction as a sort of county justice court. It could be held at any time and place for the trial of any one case, and the defendant was notified by summons to be there then, and it does not seem to have been constituted a court to sit at stated places and times. See 4th section of the act, acts of 1874, p. 74. Its jurisdiction was to be the same as justices of the peace, except that its powers ran all over the county. Sec. 111. And the intention of the legislature was that appeals therefrom should be within four days from the day the court adjourned, so far as that case was concerned, that is, from the day final judgment therein was rendered. Therefore we are of the opinion that the court erred in not dismissing the appeal, and inasmuch as this point controls and disposes of the case, it is unnecessary to consider other points made in the record.

Judgment reversed.

Kinard *vs.* Sanford.

1. A plea of set-off should state the defendant's demand as distinctly as though he were the plaintiff, and when filed to a suit on a negotiable instrument, not in the hands of the payee, it must appear that the paper was received under dishonor, that the set-off grew out of, or was in some way connected with, the contract sued on, that there was mutuality of obligation between the original parties thereto, and that the defendant is the proper party to assert the claim.
2. Whenever a right to recoup exists, it must be exercised by the party or parties who would be authorized to maintain a suit for damages under the contract, or some sufficient reason be alleged to take it out of the legal rule in such cases.

Pleadings. Set-off. Recoupment. Before Judge Underwood. Floyd Superior Court. September Term, 1879.

Reported in the decision.

Forsyth & Reese, by J. H. Hoskinson, for plaintiff in error

Hamilton Yancey, by J. Branham, for defendant.

Crawford, Justice.

W. S. Sanford, as bearer, sued M. F. Kinard on a negotiable promissory note, made by himself and one F. F. Finley, to which the said Kinard filed pleas of set-off and recoupment against C. L. Webb, who was the payee of said note. To which pleas the plaintiff, Sanford, demurred; the demurrer was sustained by the court, and he excepted.

The plea of set-off, as appears from the record, alleged that at and before the time the said note went into the hands of the said plaintiff, C. L. Webb, the payee, was indebted to the defendant and Finley in the sum of one hundred and seventy-five dollars, which he pleads as a set-off to plaintiff's action.

The plea of recoupment alleged that on the 4th day of

November, 1870, they, the defendant and Finley, bought parts of lots of land 220 and 221, Floyd county, together with certain wool-carding and mill machinery, with the right to enter into possession at once and operate the machinery, there being a large amonnt of wool in the factory to be carded, which the said Finley and defendant had a right to card under the contract, the toll from which was of the value of $200.00, or other large sum; but the said Webb remained in possession of said machinery until he had worked up the material on hand, and the fair average income of the machinery amounted to $200.00, or more, a bond for title being given, and the words, this day possession given, notes being made for the purchase money, $1,-800.00, which have been paid, except the amount sued for.

1. The plea of set-off being a cross action brought by the defendant against the plaintiff, it should set out his demand as fully and distinctly as though he were the plaintiff, and when filed to a suit on a negotiable instrument, not in the hands of the payee, it must appear by the allegations that the paper was received under dishonor, and that the set-off grew out of, or was in some way connected with, the contract sued upon, as well as a mutuality of obligations arising out of the contract between the original parties thereto, and who, in the pending case, can assert it. A set-off pleaded to a note traded after due, cannot be upon *any mutual demand* that defendant had at the commencement of the suit against the payee, but must be confined to the contract on which the plaintiff sues.

This plea it will be seen was fatally defective when tested by the law. A good plea is one that presents a clear and distinct legal issue without drawing from another, and must stand or fall by itself.

2. The plea of recoupment, too, is in all cases confined to the original contract sued upon, and must, like a set-off, be mutual as to those parties. That is to say, whenever a right exists to recoup, that right must be exercised by those who would be authorized to maintain a suit therefor. In

this case the original contract was made as alleged between Webb on one side, and Kinard and Finley on the other, so that if Kinard could maintain an individual suit to recover their joint damages, then in an action against him alone he might recoup, but without some allegation to take it out of the legal rule in such cases, he could not plead it even as against Webb, if he were the plaintiff.

The plea is otherwise demurrable, the contract is not sufficiently set out, the damages claimed appear to be contingent and speculative, and, as pleaded, if in a suit brought by both the defendant and Finley, could not be maintained, to say nothing of the statute of limitations, which apparently bars their right of action. The demurrer should have been sustained, and the pleas stricken.

Judgment affirmed.

Burk *vs.* Burk.

A conveyance of one's interest in certain land, "said interest containing eighty-three and one third acres, more or less," with a general warranty of title against the claims of all persons, includes in itself covenants of a right to sell, of quiet enjoyment, and of freedom from incumbrances.

Title. Warranty. Covenant. Contracts. Before Judge McCutchen. Whitfield Superior Court. October Adjourned Term, 1878.

To the report contained in the decision it is only necessary to add that H. H. Burk sued William Burk on a covenant of warranty against the claims of all persons, contained in a deed. The breach alleged was that the land had been received by defendant under his father's will, and was subject to the payment of certain legacies to other children, that plaintiff had been compelled to pay out $600.00 to prevent a sale to satisfy such legacies, that defendant and another had brought ejectment against him for the land,

and that defendant could not sell to him free from incumbrances. On the issue formed under this declaration, the court charged as set out in the decision, and defendant excepted.

SHUMATE & WILLIAMSON; D. A. WALKER, for plaintiff in error.

W. K. MOORE, by brief, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover damages for an alleged breach of covenant contained in the following deed executed by the defendant:

"GEORGIA, WHITFIELD COUNTY.

"This indenture made 14th day of October, 1863, between William Burk of the county and state aforesaid, of the one part, and Hugh H. Burk of the same place, of the other part, witnesseth that the said William Burk, for and in consideration of the sum of four hundred dollars to him in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed unto the said Hugh H. Burk, heirs and assigns, the interest of said William Burk in and to lots of land, Nos. 295, 296 and 297, in the 11th district and third section in said county, said interest containing eighty-three and one-third acres, more or less, to have and to hold said interest unto him the said Hugh H. Burk, his heirs and assigns forever in fee simple. And the said William Burk, for himself, his heirs, executors and administrators, the said bargained premises unto the said Hugh H. Burk, his heirs and assigns, will warrant and forever defend the right and title against the claims of all other persons whatever. In testimony whereof said William Burk hath hereunto set his hand and affixed his seal, the day and year above written."

The court charged the jury amongst other things, as follows: "A general warranty of title against the claims of all persons includes in itself covenants of a right to sell, and of quiet enjoyment, and of freedom from incumbrances; that this claim of warranty has a definite and fixed legal meaning, including in itself the true covenant named in the section of the Code I have read, one of which is

that the property sold was free from incumbrances, and this warranty is to be construed as though it had said in express terms that there was at the time of the sale no incumbrances on the property sold. In other words, this warranty amounts to a covenant that there were no incumbrances on the interest of William Burk in said lands, which was sold and conveyed by said deed, whatever that interest was. And if there were at the time of the making of the deed any incumbrances thereon, and if the evidence shows that the plaintiff has sustained damages thereby, by being forced to pay off such incumbrances, this would constitute a breach of the warranty.

"In the face of this covenant the defendant's counsel claim that he simply warranted the title to the interest sold, subject to such incumbrances as might exist thereon, for this would change the plain meaning of the words used in the clause of warranty by interpolating an exception contrary to and inconsistent with that meaning."

The foregoing charge was given without qualification, notwithstanding that defendant's counsel had insisted in argument that all that was sold and conveyed in the deed was William Burk's residuary interest in said lands under the will of his father, and that the deed shows a contract to convey not any specified amount of interest either divided or undivided, but simply such interest as defendant derived under the will as residuary legatee.

The defendant excepted to this charge of the court, and alleges the same as error. The jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of $145.25. There was no error in the charge of the court, as to the legal effect of the warranty contained in the deed set forth in the record. Code, §2793.

Let the judgment of the court below be affirmed.

The Central Railroad and Banking Company *vs.* Roach.

1. In a suit by a widow against a railroad company for the homicide of her husband, who was an engineer in its employment, two things are necessary to a recovery: First, absence of negligence on his part contributing to the occasion or cause of his death; and second, negligence on the part of the company or some other agent or employé. When it is shown that the deceased was without fault, the presumption of negligence on the part of the road arises. It may, however, be rebutted by proof. If neither the company nor the employés were negligent, there can be no recovery.
2. An engineer having jumped from his engine and been killed, and the question being whether or not he was without fault, the necessity for jumping, his ability to jump, and the safety with which he could do so, are all for the consideration of the jury, and it was error for the judge to charge that "the fact that he jumped is proof that he thought jumping the safest course."
3. The court charged as follows: "The pecuniary damages to the wife from the homicide are to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband as they existed at his death, and as they may be reasonably expected to exist in view of his character, habits, occupation and prospects in life; and when the annual money value of that support has been found, to give as damages its present worth, according to the expectation of the life of the deceased, as ascertained by the mortuary tables of well established reputation:"

Held, that under the facts of this case, the court should have amplified this charge, and the attention of the jury should have been called to the declining years of the deceased and the probable decrease year by year of his capacity to labor at his calling.

4. In a suit by the wife of an engineer against a railroad company for his homicide, the jury should consider the age of the deceased and if old, his consequent incapacity to labor long.
5. As to the negligence of the engineer of the train immediately preceding that on which the deceased was, it does not depend on his incapacity, by reason of fits or otherwise, to properly handle his train, but on whether, under the facts and circumstances surrounding him at the time of the injury, he was negligent in stopping at the curve.

Railroads. Damages. Negligence. Master and servant. Charge of Court. New Trial. Before Judge Fleming. Chatham Superior Court. May Term, 1879.

To the report contained in the decision, it is only necessary to add the following:

Mrs. Roach sued the company for the homicide of her husband. He was an engineer in the employment of defendant. On the night of January 28th, 1878, three freight trains started from Macon to Savannah, on defendant's road. Roach was the engineer on the last train; one Greenlaw was engineer on the train next in front of him. While going round a curve, Greenlaw checked the speed of his engine, and continued to check it for some time, saying he saw a light in front; the conductor sent a man back to stop the rear train, and signaled to Greenlaw to go on, which he finally did. In the meantime the rear train came up. Roach seeing the train going with comparative slowness in front of him, blew on brakes, reversed his engine, told another employé on the engine to jump off, and then jumped himself. He was injured so that he died from the effects. The train ran on and just came in contact with the one in front before stopping; but the collision was not serious enough to injure any one on either train. As to the prudence of Roach in jumping, or the apparent necessity for doing so, and also as to the diligence of the company, the evidence was somewhat conflicting. There was a good deal of evidence in regard to Greenlaw's being afflicted with epileptic fits, and as to whether the company was chargeable with notice thereof—all of which is immaterial here. Roach was nearly sixty-one years of age at his death. According to the mortuary tables his expectancy of life was nearly fourteen years.

The jury found for the plaintiff $5,000.00. Defendant moved for a new trial, which was refused, and it excepted. The grounds of error necessary to an understanding of the decision are as follows:

1. Because the court erred in refu ing to charge the jury when requested by defendant's counsel, as follows: "If the jury be satisfied that the plaintiff's husband was himself wholly without fault or negligence in connection with the incidents, or any one of them, which directly contributed to the cause of his death; and should be further satisfied that by no effort of his own could he have avoided the loss

of his life, but should find, on the other hand, that the railroad company was not guilty of negligence, or of failure in the discharge of ordinary duty by the defendant, or either of its employés, which caused his death, still the plaintiff cannot recover."

2. Because the court erred in refusing to charge the jury when requested by defendant's counsel, as follows: "If the jury find that the capacity of plaintiff's husband to spring from an engine under the circumstances, with safety to himself, had been impaired by advanced age, or by any other cause, it was his duty to take notice of this fact; and if he failed to be mindful of it, and thereby incurred a greater risk than he would have been exposed to had he remained upon the engine, the plaintiff cannot recover."

[In connection with the refusal to charge as requested by defendant's counsel, the court charged as follows: "This fourth request calls upon me to charge you as law that if Roach, by pursuing any other course than the one actually pursued. would or might have saved his life, the plaintiff cannot recover. To give you this charge would be virtually to charge you to find a verdict for defendant, if you found the fact that if he had remained on the engine he would not have been killed. If this be so, Roach could not have known it. The fact that he jumped, if you find that he did jump, is proof that he thought jumping the safest course. If the fact now appears that another course was safer, it does not follow that he was in fault for jumping. His obligation was to pursue that course which under the circumstances was reasonable and proper. * * * * I think an old man has as much right to jump as a young man, to avoid the consequences of an impending collision."]

3. Because the court erred in charging the jury as follows, as to the rule of damages: "First determine what amount per annum you will give the plaintiff; then calculate the present worth of that amount for each year separately, add these present worths together and find the aggregate amount *in solido*. This you must do for the number

of years you find, under the testimony, that Roach would have lived but for the accident."

4. Because the court erred in this: That after having charged the jury in full, and refused to give other charges as requested, and after the jury had retired to their room for a half hour or more, without any request from the jury and against the objection of defendant's counsel, he re-called the jury from their room into the court and read to them from 38 *Ga.*, 410, as follows: "The pecuniary damages to the wife from the homicide is to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband, as they existed at his death, and as they may be reasonably expected to exist, in view of his character, habits, occupation, and prospects in life; and when the annual money value of that support has been found, to give as damages its present worth, according to the expectation of the life of the deceased, as ascertained by the mortuary tables of well-established reputation."

[On the last two points the court certified as follows: "I further certify that the charge as to the rule for estimating damages, given when the jury was recalled, was in the place and stead of the charge on this point as originally given; I therefore submit that the original charge is no part of my charge to the jury."]

5. Because the damages were excessive.

6. Because the verdict was contrary to law and evidence

A. R. Lawton; W. S. Basinger, for plaintiff in error, cited 50 *Ga.*, 465; 55 *Ib.*, 133; 58 *Ib.*, 485, 107; 119 Mass., 412; 122 *Ib.*, 251; Am. Law Rev., 1880, pp. 295, 302, 304.

R. E. Lester, for defendant, cited Code, §§3033, 2983, 2202, 2067; 59 *Ga.*, 441; 2 Campbell, 69; 3 Pet., 181; 9 Met., 1; 18 N. Y., 543; Ang. on Carriers, (4 Ed.) 568, top 497; 8 Cent. L. J., 12; 7 *Ib.*, 222; 16 How., 469; *Chase*

...rd vs. Ga. R. R. (Feb. T., 1879); Aug. on Corps. (4 Ed.), 540-1; 58 *Ga.*, 216; 15 Wallace, 649; Code, §§2961, 2972, 1680; 46 N. Y., 23; 15 Wal., 649; 56 N. Y., 295; 7 Me., 202; 14 How., 468; Shér. & Red. on Neg., 19; 3 Hurl. & C., 596; 20 *Ga.*, 146; 45 *Ib.*, 509; 56 *Ib.*, 588; 58 *Ib.*, 485; 59 *Ib.*, 436; 38 *Ib.*, 409; *C. R. R. vs. Richards*, (Feb. T. '79); Sher. & Red. on Neg., §§28, 282.

JACKSON, Justice.

Mrs. Roach, the widow of a locomotive engineer on the Central Railroad, in charge of the engine on one of three freight trains thereon, running at night, sued the railroad company for the homicide of her husband; the jury found for her $5,000.00 damages, the company made a motion for a new trial on various grounds, it was overruled on all, and the company excepted to the judgment overruling its motion.

We think that the motion should have been granted on some of the grounds therein stated.

1. The first ground is that the court declined to give in charge the following request: "If the jury be satisfied that the plaintiff's husband was himself wholly without fault or negligence in connection with the incidents, or any one of them, which directly contributed to the cause of his death; and should be further satisfied that by no effort of his own could he have avoided the loss of his life, but should find on the other hand that the company was not guilty of negligence, or of failure in the discharge of ordinary duty by the defendant, or either of its employés, which caused his death, still the plaintiff cannot recover."

Two things are essential to enable the plaintiff to recover. First, no fault on the part of her husband contributing to the occasion or cause of his death, and secondly, negligence or fault in the company, or some other agent or employé thereof, which did so contribute. The plaintiff's husband may not have at all been at fault, and yet she cannot recover unless the company, through other employés, was at

fault. Such a case would be an unavoidable accident—with nobody to blame, and, therefore, no recoverable damage to anybody. It is true that the moment the plaintiff's husband is shown without fault, the presumption is that the company was at fault through other employes; but this may be rebutted, and it is for the jury to say whether it is or is not rebutted. Therefore, it is for them to say on the whole case made by all the proof that plaintiff's husband is without fault, and that the company is at fault; and they must say that both things are true, before the plaintiff can recover. The request is awkwardly worded, but it means that these two things must concur before there can be a recovery; and so understanding it we think that it or its substance should have been given to the jury. Although something akin to its substance, as we understand it, was given in the general charge, yet as the judge told the jury that he declined to give this, they may have been misled. Code, §§2962, 3036, 3033.

2. In regard to the fault of the plaintiff's husband and the refusal to charge thereon, as requested in the second ground of the motion, in relation to his jumping from the engine, and the remarks of the judge thereon, we think there was error.

Whilst abstractly speaking an old man has the right to jump as well as a young man, yet we hardly think that the judge ought to have said to the jury that he had such a right, and "that the fact that he jumped is proof that he thought jumping the safest course." Such remarks would seem to intimate an opinion on the evidence and may have been so understood. The prudence of jumping or not jumping—whether it put the engineer in fault or not—depends much on his ability to jump, and the safety with which he could jump, and the imminence of the danger threatening at the time. All these are matters for the jury to pass upon without intimations from the court, and if permitted even to be made it is hardly reasonable to say or intimate that an old man of sixty years of age could safely jump where a young man of twenty might do so with ease

and safety. Moreover, a passenger might be justifiable in jumping from a train, when an engineer would not be in abandoning his engine. The passenger has only himself to care for; the engineer has lives and property of others at stake. The first is unskilled in the running of cars and the imminence of the danger; the other should know from experience of the risk of collisions from the distance between trains in danger of colliding; and what would be no fault in the passenger might be grave error in the officer of the company. All these are matters for the jury to consider without let or hindrance or intimations from the bench. We do not rule that the engineer must never leave his engine; but he must be sure that an emergency is upon him —imminent and impending—before it can be said that he is without fault in doing so. In this case had he not left the engine, he would now be alive; was it prudent in him, under all the facts as an officer—a man of the years he had attained—with the distance between trains—with the danger to remain, and the danger to leap—all considered, was it prudent to risk the leap? and was he without fault in doing so? The jury must answer without intimations of opinion from the court.

3. The measure of damages first given by the court is as follows: "First determine what amount *per annum* you will give the plaintiff, then calculate the present worth of that amount for each year separately, add their present worths together, and find the aggregate amount *in solido*. This you must do for the number of years you find under the testimony that Roach would have lived but for the accident."

After the jury had retired, that body was recalled, and the following charge was given: "The pecuniary damages to the wife from the homicide are to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband as they existed at his death, and as they may be reasonably expected to exist in view of his character, habits, occupation and prospects

in life, and when the annual money value of that support has been found, to give as damages its present worth, according to the expectation of the life of deceased, as ascertained by the mortuary tables of well established reputation."

The judge certifies that this was in lieu of that previously given. If so, it being the rule laid down in 38 *Ga.*, 410, and the jury being told that this was in lieu of that first given, it would be clearly wrong, we think, to reverse the judge for giving in charge the rule prescribed by this court. Yet in this case the attention of the jury should be called to the declining years of the plaintiff's husband, and the apparent decrease year by year of capacity to labor, especially in his business of a locomotive engineer. It is true that this idea may be conveyed by the words "prospects in life" in the rule given in the 38th *Ga.;* but in a case where the plaintiff's husband's capacity to support her is dependent on his business, which business requires vigor of bone and muscle, and where he was some sixty years old when killed, and the expectation of life was to run to seventy-three years of age, and where, therefore, it is hardly reasonable to calculate that he could be similarly employed and equally paid as to wages, the rule should be expounded and amplified with some more particularity than merely to read it from the report of that opinion.

4. We lay the more stress upon this point for the reason that complaint is made that the damages are excessive. As the case is to be tried again, we are loth to express an opinion thereon further than to say that the declining age of the plaintiff's husband, and consequent incapacity to labor long as a locomotive engineer, especially on a night train, and his consequent insecurity to be continued for a long time in that employment, ought to be weighed and considered well by the jury. It is the support which he could have probably made for her for the remainder of his life—strength and consequent ability all the while decreasing—it is that support only which is the basis on which she

is entitled to rest a recovery against the company, if their agents killed him by their neglect when he was without fault; and therefore the pith of the case is his prospects to continue in that or other business and thus make her this support.

5. In respect to the question of negligence by the company's agent—the locomotive engineer on the train in front of that run by the plaintiff's husband—we think that it does not depend on the incapacity by the reason of fits or otherwise of that engineer, but on the fact whether or not he was negligent that night. If he stopped at that curve without good reason when he could have gone on, and by reason of his stopping there without good cause the accident happened, he was at fault and not reasonably diligent but negligent, and plaintiff, if he did not himself by his own fault, by jumping without good reason under all the circumstances from his place on the engine, contribute to the injury might recover if hurt, and so may his widow if he was killed.

The case, we consider on the broad view of it as a whole, has not been as fully tried and the damages as clearly ascertained by the jury as should have been done, or rather as might be done on a new hearing, and therefore a new trial is awarded.

Judgment reversed.

Akin *vs.* Peck & Allen.

Where a levy is made upon the mill, engine, boiler, etc., under an execution based upon the foreclosure of a saw-mill lien, and a claim filed, the case thus made must be returned for trial to the county of the residence of the defendant in *fi. fa.*

Levy and sale. Claim. Lien. Before Judge Simmons. Polk Superior Court. August Term, 1879.

Reported in the opinion.

TIDWELL & THOMPSON, for plaintiff in error.

A. T. WILLIAMSON; BROYLES & JONES, for defendants.

CRAWFORD, Justice.

The plaintiff in error foreclosed a lien against L. H. Hall & Co., whom he alleged to be citizens of the county of Fulton, in this state, as the owners of a certain saw-mill located in the county of Polk, and to whom, as such owners, he had furnished logs amounting in value to the sum of $1,074.79. The affidavit for foreclosure was made before the ordinary of the said county of Polk, who ordered and adjudged that the clerk of the superior court of said county should issue execution therefor, to be levied on the said mill, engine, boiler and fixtures.

In obedience to said order the *fi. fa.* was issued as directed, and made returnable to the superior court of the county of Fulton. A levy was made on the saw-mill, engine, boilers and fixtures, when Peck & Allen filed a claim thereto, which was returned by the sheriff to the superior court of the county of Polk, as the proper tribunal for the trial of the said claim. When the said case came on to be heard, it was, on motion of claimant's counsel, dismissed for want of jurisdiction in the said superior court to hear and determine the same; and to which ruling and judgment the plaintiffs in error excepted.

The single question made by this record is whether the superior court of Polk county had the jurisdiction to hear and determine the claim which had been returned thereto?

By the constitution of 1877, article VI., section XVI., paragraph 6, all civil cases excepting those of divorce, titles to land, joint obligors, joint promissors, copartners, or joint trespassers residing in different counties, shall be brought in the county where the defendant resides. The same provision is to be found in the constitution of 1868. Code, §5123.

This being a suit against L. H. Hall & Co., must be made returnable to the county of Fulton where they reside, although the foreclosure of the lien may have been legally made in the county of Polk. 52 *Ga.*, 79. So, too, if a claim be filed by any person not a party to the said *fi. fa.*, to any property levied upon, the same not being real estate, it must be returned to the same court to which the *fi. fa.* is made returnable, and there tried as other cases of claims. 49 *Ga.*, 596; 52 *Ib.*, 79–80.

Judgment affirmed.

Lewis *et al.* *vs.* Armstrong, administrator.

1. Where an issue of fact as to the passage of an order is involved in a motion to enter it *nunc pro tunc*, the court should decide such issue without the intervention of a jury.
2. An indorser was seeking to be discharged on the ground that the plaintiff (the holder of the notes) had dismissed his suit on appeal, after security had been given, thereby increasing the risk of the indorser, etc. The records showed no order of dismissal; he therefore moved to enter an order *nunc pro tunc*, showing dismissal "upon motion of plaintiffs' counsel." On the hearing he moved to strike out the words "of plaintiffs'." Held, that there was no error in refusing to allow the amendment, because with such words stricken out the order *nunc pro tunc* would be pointless.
3. The evidence being conflicting as to the original passage of the order, this court will not control the discretion of the court below in refusing to allow its entry *nunc pro tunc.*

Practice in the Superior Court. Principal and security. Amendment. New trial. Before Judge Crisp. Sumter Superior Court. October Adjourned Term, 1878.

Reported in the decision and head-notes.

S. Hall; Hawkins & Hawkins, for plaintiffs in error.

N. A. Smith; Jos. Armstrong; D. A. Vason, for defendant.

WARNER, Chief Justice.

This was a motion in the court below to enter upon the records of the Sumter superior court a *nunc pro tunc* order of the court dismissing the case of James W. Armstrong against David Bailey, Columbus W. Hand, makers, John B. Lewis, indorser, and J. W. C. Horne, security on appeal. Lewis had filed a bill against Armstrong claiming his discharge from liability to pay the aforesaid debt sued on as security, upon the ground that Armstrong, by his counsel in 1869, had voluntarily dismissed his suit pending on the appeal, which dismissal increased his risk and discharged him. When that bill was before this court at the August term, 1878, (there being no evidence on the records of the court that the case had been dismissed) it was held that the primary evidence of the dismissal of the case was an entry on the proper docket or on the minutes of the court, and that such entry, if omitted at the right time, might be made *nunc pro tunc* under an order granted by the court for that purpose, and it was in pursuance of that ruling of this court that the motion to enter the order of dismissal on the records of the court below was made.

Upon the hearing of that motion to enter the order of dismissal *nunc pro tunc* upon the records, the court, after considering the evidence offered by the respective parties, refused to grant it, and also refused to submit the question to a jury, or to allow the order to be amended by striking out the words "of plaintiffs," whereupon the movant excepted.

1. 2. Three questions were decided in that case when it was here before. First, that the evidence of an order dismissing the case must appear on the records of the court, either by a *nunc pro tunc* order, or otherwise. Second, that the dockets, minutes and records of a court of record must be kept so as to represent the true state of its business, and from them the court, without the aid of a

jury, must be able to ascertain what cases are pending, and what are not pending therein. Third, that in order to discharge the surety, it must be made to appear by competent evidence that the suit was not only dismissed, but that the dismissal was by the creditor, or by the court at the creditor's instance. See *Armstrong vs. Lewis*, 61 *Ga.*, 680. It follows, therefore, that under the rulings of this court in that same case, it was not error in the court below to refuse to submit the question of the dismissal of the case to a jury, nor in refusing the amendment proposed to the order by striking out the words "of plaintiff." If the case was not dismissed by the plaintiff, who was the creditor, or by the court at his instance, it would not discharge the surety, and that was the object sought to be obtained by the entry of the order of dismissal.

3. There was a good deal of evidence on both sides as to whether the case was dismissed by the court in 1869 or not, which evidence is conflicting, and it is somewhat difficult to say from that evidence what is the exact truth in regard to it. The question is not whether if we had been presiding in the court below, and had charge of its records, we should have decided differently, but the question for us to decide as a reviewing court, is whether the judgment of the court below, having charge of its own records, is without evidence, or is so far unsupported by the evidence as to make that judgment illegal, and thus authorize this court to interfere with it, and set it aside on the ground that it is contrary to law. The court below heard the evidence as to the dismissal of the case in its own court in view of its own records, and in view of the lapse of time since 1869, and decided that the case had not been dismissed, and this court cannot say, under its repeated rulings heretofore made, that the judgment of the court below was illegal on the statement of facts disclosed in the record.

Let the judgment of the court below be affirmed.

ADAMS *et al. vs.* CLARK.

1. A justice of the peace, on a trial before a jury in his court, may or may not give the law in charge to the jury, at his option. If he does so, and charges the law correctly, it will not be ground for a new trial.
2. The verdict is supported by the evidence in this case.

Justice Courts. Verdict. Before Judge SPEER. Pike Superior Court. October Term, 1879.

Reported in the decision.

S. D. IRVIN; JAMES H. WALKER, for plaintiffs in error.

J. A. HUNT, for defendant.

JACKSON, Justice.

The suit in the justice court was for twenty-five dollars, on a note for the hire of a horse for a year for farm work. The defense was that the horse was worthless, and could not and did not do the work, but broke down and died after some three weeks of very inefficient work.

On the trial before the jury, after a charge by the justice of the peace, the jury found for defendant, and the plaintiffs carried the case to the superior court by *certiorari* on the ground that the justice of the peace charged the jury at all, and that the verdict is without evidence and against law. The *certiorari* was dismissed and the judgment affirmed, and error is assigned here therefor.

1. The justice of the peace may or may not give the law in charge to the jury, at his option. He is not bound to do so, but to do so if it pleases him to give the charge, and if the law as given in charge be correct, is not error which would demand and necessitate the setting aside of the verdict and the grant of a new trial. 21 *Ga.*, 192.

2. The evidence is that the horse did utterly fail—died in three weeks—must have been diseased when hired, and it is ample to sustain the verdict.

Judgment affirmed.

The Western & Atlantic Railroad *vs.* Main.

Where the evidence disclosed that the plaintiff's cow was killed between the signal post erected under §708 of the Code and the crossing, it was not error to charge the provisions of that section as to checking the speed of the train, adding thereto that the company would not be liable simply because at the time the injury happened the train might be running in a manner forbidden by law, but the failure to comply with the law must operate as a cause of the injury.

Railroads. Roads and bridges. Before Judge McCutchen. Whitfield Superior Court. October Term, 1879.

Reported in the decision.

Johnson & McCamy, for plaintiff in error.

Shumate & Williamson; T. R. Jones, for defendant.

Crawford, Justice.

This case was brought to recover damages for the killing of two cows by the trains of the plaintiff in error, and upon the trial of which a verdict was rendered for the plaintiff below, and the defendant being dissatisfied therewith moved for a new trial, which was refused, and to reverse that decision the case is brought to this court.

The ground relied upon for a reversal of the judgment is that the court erred in the following instructions given to the jury: "Our statute makes it the duty of those in charge of a railroad train approaching a public road crossing, when the train arrives within four hundred yards thereof, to check the speed of the train, and to continue to check the same so that it may be stopped in time, should any person or thing be crossing the track of the railroad at such pu lic crossing. This statute applies only to public road crossings, and not to any trail crossing the railroad, or other crossing not established by authority of law.

"Where a statute imposesa duty on a railroad company

in relation to the running of its trains, if it violates that duty and an injury results from such violation, then the company would be liable for the damages caused thereby. You must not misunderstand me here, a railroad company would not be liable for an injury simply because at the time the injury happened the train might be running or handled in a manner forbidden by law. But to make the company liable in such case the failure to comply with the law must operate as a cause of the injury. In other words, if the injury would not have occurred but for such violation of law then the company would be liable, otherwise it would not."

The occasion of this charge touching the requirement of the statute, was the fact appearing in the evidence that one of the plaintiff's cows was killed between the signal posts and the crossing, but was some two hundred yards from the latter place, and therefore that the charge was illegal because it was inapplicable to the case.

Railroad companies are entitled to every right given to them by law, and it is to be enjoyed and exercised by them to its fullest extent, but if there is a duty coupled with the enjoyment of this right, then the performance of that duty is to be as strictly observed as the right is to be enjoyed, and the courts should give protection to the one and enforcement to the other in equal degree. The object of this statute was to prevent damage being done to persons or things at these public crossings, and the means to be used were the blowing of the whistle of the locomotive, and to check, and keep checking, the speed of the train so as to stop in time to prevent any injury being done at those places. The engineer should not misconceive his duty, nor neglect any part of it; he must give the signal of warning, and besides this, he must check the speed of his train, and continue to do so until the danger is over.

Why was it error to give this law in charge to the jury? Why confine the judge to that law of ordinary care and reasonable diligence existing at all other points except these

crossings? The law governing the running of trains is co-extensive with its lines, and if there be higher degrees of diligence, greater caution, unusual alarm signals, and less speed required at some points than at others, and the testimony shows that the damage complained of was within the limits of points thus protected, it would be error in the judge not to give the whole law in charge to the jury. The charge being in conformity to our view of the law, and the evidence being ample to sustain the verdict, the judgment is affirmed.

Judgment affirmed.

Carter *et al.* *vs.* Gunn.

Instruments which recite "that this deed witnesseth that to secure unto Jno. McK. Gunn (naming amount) which I justly owe him, I have hereby sold and conveyed unto him and his heirs and assigns at the stipulated price of (naming amount of debt)" certain described property, and concluding with *habendum* and *tenendum* and warranty clauses, are not mere mortgages, but, under the act of 1871, carry title, with right to have reconveyance on payment of debt.

Jackson, Justice, concurred, holding that such was the law independent of the act of 1871.

Title. Deed. Mortgage. Before Judge Wright. Randolph Superior Court. November Term, 1879.

Reported in the decision.

Kennon & Hood; Fielder & Chastain, for plaintiffs in error.

Jno. T. Clarke & Son, for defendant.

Warner, Chief Justice.

This was an action brought by the plaintiff against the defendants in the statutory form, to recover the possession of certain described tracts of land. On the trial of the

case the jury found a verdict for the plaintiff. A motion was made for a new trial on the grounds therein stated, which was overruled, and the defendants excepted.

The plaintiff offered the following instruments in writing as evidence of title to the land sued for, which had been duly probated and recorded:

$767.74. "CUTHBERT, GA., February 1st, 1880.

"On November 1st after date, we promise to pay to Jno. McK. Gunn, or bearer, seven hundred and sixty-seven dollars and seventy-four cents, value received, with interest at the rate of twelve per cent. from maturity until paid.

"I waive all statutory exemptions that now exist in me, my wife, children or friends, to prevent the payment of this note.

his
JNO. A. ⋈ CARTER,
mark.
RICHARD V. CARTER."

"Attest;
H. H. COBB,
W. E. LANDRUM.

"GEORGIA—Randolph County.

"This deed witnesseth, that to secure unto John McK. Gunn seven hundred and sixty-seven dollars and seventy-four cents, which I justly owe him, I have hereby sold and conveyed unto him and his heirs and assigns, at the stipulated price of seven hundred and sixty-seven dollars and seventy-four cents, lots of land numbers (68) sixty-eight and (84) eighty-four, containing each, say two hundred and two acres, more or less, making amount of land sold to said Gunn, say four hundred and four acres; both of said lots of land are contained in the sixth district, said county, said state, and numbered as above-mentioned, with all the members and appurtenances thereunto belonging. To have and to hold unto him and his heirs forever. The title to which property I warrant and will forever defend.

Witness my hand and seal this 26th day of February, 1875.

Signed, sealed and delivered before

H. H. COBB,
W. E. LANDRUM.

his
JNO. A. ⋈ CARTER,
mark.
RICHARD V. CARTER."

$400.00. "CUTHBERT, GA., February 4th, 1873.

"On November 1st after date, I promise to pay to the order of John McK. Gunn, four hundred dollars, with interest at ten per cent. after maturity.

JNO. A. CARTER,
RICHARD V. CARTER."

"GEORGIA—Randolph County.

"This deed witnesseth, that to secure unto John McK. Gunn four hundred dollars, which I justly owe him, I have hereby sold and conveyed unto him and his heirs and assigns at the stipulated price of four hundred dollars, three mules, as follows: Aleck, a black horse mule; Julia, a bay mare mule, and Beck, a mouse-colored mare mule; also the following lot of land, number (85) eighty-five, in the sixth district of Randolph county, state of Georgia; also my entire interest in my cotton crop that I am now preparing to make during the present year, with all the rights, members and appurtenances thereunto belonging. To have and to hold unto him and his heirs forever; the title to which property I warrant and will forever defend.

"Witness my hand and seal, this 4th day of February, 1873.

Signed, sealed and delivered before

JNO. A. CARTER, [SEAL.]

R. B. PHILLIPS, R. V. CARTER, [SEAL.]"

B. F. COBB.

The main controlling question in this case is whether the foregoing written instruments are to be constrned as deeds conveying the title to the land therein described, from the grantors to the grantee, or whether the same shall be held to be mortgages only. Prior to the passage of the act of 1871, these instruments, according to the rulings of this court, would have been considered mortgages only. Since the passage of that act such instruments are to be constrned as deeds vesting the title to the land conveyed in the grantee as security for the debts until the same are paid, and not as mortgages, the grantors having the right to have the land reconveyed to them on the payment of the debts for which the deeds were given to secure. (See acts 1871, page 44.) The question raised by the plaintiffs in error as to the legal effect of the two instruments set forth in the record, is not now an open question in this court. See 54 *Ga.*, 45; 55 *Ib.*, 383, 650 and 691; 60 *Ib.*, 588, and 61 *Ib.*, 398.

Let the judgment of the court below be affirmed.

JACKSON, Justice, concurring.

In my judgment this case does not rest on the act of 1871, Code, §1969, but is independent of that act, and not

at all controlled by it. The case in 54 *Ga.*, 45, construed an equitable mortgage to be a conveyance that passed title, and on which there could be recovery in ejectment, indefensible, too, except by paying up the debt to secure which it was made, and by filing an equitable plea to that effect, and that case rested on the construction of a conveyance made in 1868, and which could not have been affected by the act of 1871, enacted three years thereafter. The subsequent cases cited by the chief justice followed that leading case, until it has now become settled that a debtor may convey the absolute title to land, on which the creditor may recover in ejectment, where the consideration of the conveyance is solely to secure a debt, and cannot be forced into equity proper to foreclose the conveyance as an equitable mortgage. The defendant having passed the legal title, and having nothing but an equity, must himself file his equitable plea and pay the debt or give up possession of the land, according to his bargain. The only cases where the mortgagee must foreclose, in order to have his debt paid, are those which arise upon statutory mortgages, regularly executed and recorded as such. In all cases where the aid of equity has to be invoked to turn a deed, absolute on its face, into a mortgage, that absolute deed gives such title as will eject the maker by action of ejectment at law, unless he do equity by paying the debt he agreed to pay, and to secure which he gave the legal title.

And, as I understand the principle applied in those cases, it is wholly immaterial to insure a recovery in ejectment, whether the act of 1871 be followed or not; whether bond to reconvey be given or not, or the wife's assent be had or not, these two conditions being prescribed by that act; it is enough if the debtor, in order to secure the creditor, actually passed the legal title to the creditor; in that event the creditor can recover in injectment, unless the debtor shall file his equitable plea that he has paid the debt, and on the hearing shall prove that he has paid it.

It may be troublesome to reconcile the ruling in 54 *Ga.*, 45, and subsequently, with some former decisions of this

court; but I cannot see how the act of 1871 can be invoked to reconcile them, except in cases to which that act applies and where it is followed; that is to say, where the bond to reconvey has been given, and the wife's consent be had, if there be a wife. See, also, *West vs. Bennett*, 59 *Ga.*, 507. I concur, therefore, in the judgment, but not in the reference to the act of 1871, as having changed at all the character of these conveyances sued on in this case.

We all agree, however, that it is now settled law that the legal title may pass to secure a debt without following the act of 1871, and in every case where it clearly appears that the security required and granted was not a statutory mortgage merely, but the actual and absolute title to the land passed, and was intended to pass, the debtor must pay the debt or give up the possession of the land. And why should it not be so, if he made a contract that it should be so?

Considering that such was the contract made in this case, and that the debtor has not complied with it, and paid the debt, I concur in the judgment which evicted him from the lands he had sold and conveyed absolutely to the creditor in order to secure the debt.

McBride, administrator, *vs.* Hunter.

1. A payment and entry thereof on a note by the principal does not prevent the bar of the statute of limitations from attaching in favor of his security. Nor can the administrator of one who signed a note only as security, relieve it from the bar of the statute so far as primary creditors may be affected thereby. Especially is this the case where the note was barred before the death of the security.
2. Where certain creditors of an estate by note received payments thereon and agreed to release the administrator from personal liability on account of a previous improper payment of a note barred by the statute of limitations, in a subsequent suit by a creditor by account against the administrator, such notes were not admissible to show outstanding debts of higher dignity than plaintiff's.

(*a.*) Accounts of no greater dignity than plaintiff's, which the admin-

istrator had paid in full, were not admissible to show a full administration of the estate, nothing having been paid to plaintiff.

3. Where an administrator had not made annual returns, and no order had been granted allowing him commissions, he was not entitled thereto on an issue of *plene administravit*.

4. The plaintiff in error does not show error. In strictness he is not entitled to except, having consented to the entering of a verdict against him, even though he may have reserved the right.

Evidence. Principal and security. Administrators and executors. Verdict. Practice in the Superior Court. Practice in the Supreme Court. Before Judge JOHNSON. Jefferson Superior Court. November Adjourned Term, 1879.

To the report contained in the decision, it is only necessary to add that the defendant moved for a new trial on the following grounds:

(1.) Because the court erred in holding that the note made by Thomas A. McBride, principal, and R. B. McBride, security, was barred as against the security by the statute of limitations when the payment was made thereon by defendant, and in ruling out said note and the receipt for said payment as evidence before the jury.

(2.) Because the court erred in ruling as follows: Defendant by his counsel offered in evidence to the jury his return and vouchers, and the original notes upon which he had made payments, when counsel for plaintiff objected to their admission as evidence to the jury, which objection was sustained by the court as to accounts not of preferred dignity (the defendant having testified that at the time of his decedent's death there were outstanding notes against him sufficient to absorb all the assets of his estate)—the court holding that the payment by defendant of a portion of said accounts against said estate was an act of maladministration which inured to the benefit of plaintiff and other account creditors, and that the amount so paid on accounts by defendant is a fund still in his hands for administration, and which should be divided *pro rata* by defendant.

(3.) Because the court erred in ruling that it would not allow defendant his commissions, and that he must be made liable for them.

(4.) Because the court erred in ruling that the account of Bothwell & Brother could not be admitted to share *pro rata* in the funds paid on accounts.

(5.) Because the verdict was contrary to law and evidence.

The motion was overruled, and defendant excepted.

R. W. Carswell, for plaintiff in error.

Edward Hunter, by brief, for defendant.

Jackson, Justice.

This case came before the superior court on an appeal from the county court, when the jury, under the charge of the presiding judge, returned a verdict for the plaintiff for the amount of the account sued on. The defendant was sued as administrator of his father's estate on an account against the decedent in his lifetime, and the parties went to trial on the issue made by the plea of *plene administravit* filed by the defendant; and the motion for a new trial is grounded on complaints made in respect to the rulings of the court.

The following summary of the facts and rulings of the court made by the counsel for the defendant in error when compared with the record of the cause are found to be substantially correct, and cover the points made in the motion for a new trial:

Thomas A. McBride, administrator, on March 10th, 1876, paid A. R. Roberts $157.19 on a note of which the following is a copy. See voucher No. 26.

"One day after date we or either of us promise to pay to A. R. Roberts, the sum of two hundred and thirty-two dollars for value re-received.

January 1st, 1866.

T. A. McBride,
R. B. McBride, *Security.*"

Credit. "Received on the within note $51.09 by account from Samuel J. Gordan, administrator of T. A. McBride, deceased. January 1st, 1872. A. R. Roberts."

A. R. Roberts gave the following receipt, to-wit:

"Received of T. A. McBride, administrator of estate of R. B. McBride, deceased, one hundred and fifty-seven dollars, nineteen and three-fifths cents on the original note of which the above is a copy, and said administrator is hereby acquitted of all personal liability to me on account of said demand against said estate. This March 10th, 1876. Carswell & Denny,
Attorneys for A. R. Roberts."

When plaintiff in error offered this note and receipt in evidence, the defendant in error objected to them on the ground that the note was barred by the statute of limitations and the administrator had no right to make the payment. The court sustained the objection and ruled out the evidence, when plaintiff in error excepted.

The plaintiff in error offered in evidence the following notes and receipts, to-wit:

Voucher No. 22. "One day after date I promise to pay to James Gordan, or bearer, the sum of four hundred and twenty-three dollars and thirteen cents for value received. This 1st day of January, 1872. R. B. McBride."

Credit. "Paid on within note one hundred and forty dollars. January 1st, 1876."

Receipt. "Received of T. A. McBride, administrator of R. B. McBride, deceased, two hundred and forty-six dollars, eighty-two and three-fifths cents on the original note of which the above is a copy, and said administrator is hereby acquitted of all personal liability to me on account of said demand against said estate. This March 9th, 1876. James Gordan."

Voucher No. 27.

"Augusta, Ga., February 20th, 1873.

"$225.00. On the first day of January next I promise to pay Bothwell Brothers, or order, two hundred and twenty-five dollars for value received. R. B. McBride."

"Louisville, Ga., March 16th, 1876.

"Received of T. A. McBride, administrator of the estate of R. B. McBride, one hundred and eighteen dollars and six cents on the original note of which the above is a copy, and the said T. A. McBride is hereby acquitted personally and as administrator of all liability to me

on account of said demand against said estate, so far as any and all assets which are now, or may have heretofore, passed into his hands, reserving to ourselves, however, the right to recover the balance that may be due on said note, and the account that we hold against said estate, from any assets of said estate that may hereafter pass into his hands, or to which said estate may be entitled by reason of the reversionary interest in the widow's dower.

THOMAS S. BOTHWELL,
Attorney for Bothwell Brothers."

Voucher No. 29.

"On or before the first day of November next, I promise to pay to F. A. Sinquefield & Co., or order, two hundred and fifty-six dollars and sixty-four cents, for value received. April 17th, 1874.

R. B. MCBRIDE."

"Received on within note, October 23d, 1874, twenty-six dollars."

"Received on the within note sixty-seven dollars and six cents. December 10th, 1874."

"Received of T. A. McBride, administrator of R. B. McBride, deceased, thirty-nine dollars and seventeen cents on the original note of which the above is a copy; and said administrator is hereby acquitted of all personal liability to me on account of said demand against said estate. March 10th, 1876. F. A. SINQUEFIELD."

Voucher No. 30.

"One day after date I promise to pay to Sarah A. Mountain two hundred and eighty-eight dollars for value received. January 1st, 1861. R. B. MCBRIDE."

Credit. "Paid on within note one hundred dollars. February 15th, 1870."

"Received of T. A. McBride, administrator of R. B. McBride, deceased, one hundred and nineteen dollars and forty-seven cents on the original note of which the above is a copy; and said administrator is hereby acquitted of all personal liability to me on account of said demand against said estate. March 10th, 1876.

S. A. MOUNTAIN."

The defendant in error objected to the admission of these notes in evidence to show outstanding notes against said estate, on the ground that said note creditors were estopped by their receipts to the administrator, so far as other *bona fide* creditors were concerned. The court sustained the objection and the plaintiff in error excepted.

The plaintiff in error offered the following vouchers for money paid by him on accounts not of preferred dignity, to-wit:

L. E. Wood & Co., No. 14,. ..... $ 46 01
J. H. Wilkins, No. 15,..... 206 94
W. H. Fay, No. 16,..... 9 50
Hopkins & Little, No. 17,..... 9 10
G. H. Harrell (exclusive of coffin), No. 19,... 20 35
Bothwell Brothers, No. 20..... 10 00

Defendant in error objected to the above vouchers (except as to $118.50 of No. 15, amount of cotton of negro man, as explained by administrator) on the ground that they were not legal vouchers as against his account, it being of equal dignity with them and entitled to *pro rata* with them in the payments on accounts. The court sustained the objection and plaintiff in error excepted.

The administrator qualified in the winter of 1874. His first and only return was filed in the ordinary's office November 13, 1877. This return was never approved by the ordinary, nor had the ordinary passed an order allowing the administrator his commissions. Therefore defendant in error objected to the items of commissions in the administrator's return going in evidence. The court sustained the objection and plaintiff in error excepted.

The administrator proved an outstanding note against the estate for about $30.00, in favor of J. A. Leaptrot, who had not given the administrator a release.

Plaintiff in error offered in evidence an unpaid account against the estate in favor of Bothwell Brothers for $140.00, and claimed it should be allowed to *pro rata* with account of defendant in error. The defendant in error objected on the ground that Bothwell Brothers were estopped by their release to the administrator in voucher No. 27. The court sustained the objection, and plaintiff in error excepted.

The total amount of money received by the administrator, as shown by his return, was $2,082.39; amount legally expended, $1,635.80; balance on hand for distribution, $446.59. Under the ruling of the court plaintiff in error consented to give a verdict for the amount of claim of defendant in error.

1. There was no error in ruling out the Roberts' note as

barred by the statute of limitations. The defendant's intestate was the surety thereon, and it was barred unless revived by the receipt from the principal thereon. This did not put new life in it as against the surety. Code, §§2157, 2938; 30 *Ga.*, 479; 32 *Ga.*, 28. Nor do we think that the administrator can at his option relieve a note from the bar of the statute under section 2542, when the note is only signed as security, so far as primary creditors may be affected thereby. It would be unjust to those creditors, if not strictly an unjust debt itself. Besides, it appears to have been barred in the lifetime of the intestate, unless the receipt from the principal kept it alive, which, under the sections of the Code and 30 and 32 *Ga.*, *supra*, that receipt could not do.

2. The court was right to rule as to the notes which the administrator had paid that they could not be preferred to the plaintiff's account sued on, because of the receipt given by these creditors whereby they had released the administrator from all liability on account of his illegal conduct in paying a note barred by the statute and on which the intestate was only surety, and open accounts in full, of equal dignity with plaintiff's claim and not preferred thereto, and inferior to their notes. So too in reference to accounts which were paid by the administrator in full, while the plaintiff's account was paid nothing.

3. The administrator was not entitled to commissions. The ordinary had not allowed him commissions and he had not made regular returns. Section 2596 of the Code settles the point. 60 *Ga.*, 316 is also directly in point. He made but one return and no commissions were allowed by any order of the ordinary.

4. The plaintiff in error does not show error. The burden is on him to do so. Besides he consented, it seems to the verdict, and has no right in strictness to a writ of error. His consent would conclude him, perhaps, if he had even reserved the right to except. See *Jones vs. Mobile & Girard Railroad*, last term.

Judgment affirmed.

Clark *vs.* Cassidy, administrator.

1. Two verdicts finding proofs to authorize a total divorce, with no decree thereon, as ruled when this case was here before, 62 *Ga.*, 407, do not render the parties thereto competent to enter into another contract of marriage.
2. The proceedings of courts of record are to be ascertained from the minutes kept by the clerks thereof, signed and approved by the judge. Parol evidence is therefore inadmissible to establish that a certain decree was rendered when collaterally in question in the court of its rendition; much more so in another and different tribunal.
3. The act of 1868 providing that in all cases where a divorce *a vinculo matrimonii* has been pronounced, and by decree only one of the parties is authorized to marry again, and the other party has nevertheless married, such contracts shall be legal, can have no applicability to this case, whether constitutional or not, on account of the absence of the decree above referred to.
4. Since 1864, to render a marriage valid in this state, it is not necessary that license should be granted, or the banns of the marriage published; if the other mode is adopted, the *factum* of such marriage must be clearly established, that is to say, that act by which a man and woman unite for life, with mutual intent to observe towards society and each other those duties which result from the relation of husband and wife, coupled with cohabitation and the performance of those duties, precisely as they would be fulfilled if solemnized under the other forms of marriage.
5. In charging as to the burden of proof, the court should state what testimony would shift the *onus* rather than when it would be changed. The latter would intimate an opinion on the sufficiency of the proof, whilst the former would simply instruct as to what evidence, when submitted, would be sufficient.
6. Where more than one plea was filed, and the verdict fails to disclose upon which it was based, the jury should be remanded to their room to fix that fact, if counsel so request or the pleas are contradictory. As the pleas in this case set up various defenses, the omission of the court to instruct upon this point justifies the grant of a new trial.

Divorce. Decree. Judgments. Evidence. Husband and wife. Marriage. Contracts. Charge of Court. Pleadings. Verdict. Practice in the City Court. Before Judge Harden. City Court of Savannah. November Term, 1879.

Reported in the opinion.

R. R. RICHARDS, for plaintiff in error.

A. P. & S. R. ADAMS, for defendant.

CRAWFORD, Justice.

A woman who was living with Charles Clark, the plaintiff in error, died, leaving personal property said to be in her own right, and of which he took possession. Cassidy, the defendant in error, who had intermarried with a niece of this woman, by virtue of his wife's relationship, applied for and obtained letters of administration upon the estate of the deceased, and then brought an action of trover against Clark to recover the property for distribution. The defendant pleaded the *general issue*, that the property sued for was the defendant's, that the property sued for was not the plaintiff's nor that of his intestate; that the plaintiff was not administrator upon the intestate's estate; that for more than four years defendant has been in possession of the property under a claim of right, and that if plaintiff had cause of action the same was barred.

Upon the trial of the case the jury returned a verdict for the defendant. A new trial was moved for by the plaintiff on numerous grounds named in the record, which was granted by the court, and the defendant excepted. The defendant also requested the court to give certain charges, submitted in writing, to the jury, which were refused, and said refusal has herewith been assigned as error.

We propose to deal with the questions made by this record so as to settle all the points of law arising therein as far as the same may be practicable.

The theory of the plaintiff below was that the woman Mary C. *Shaffer or Clark*, was an unmarried female, and that at her death her property descended to, and was inherited by, Mrs. Cassidy, the wife of the administrator. The theory of the defense was, that she was the wife of Charles

Clark, the defendant, and that being his wife he inherited from her all her estate. The issue being thus made up, the plaintiff sought to show that Clark and herself were living in a state of illicit intercourse, whilst the defendant endeavored to prove that she was his lawful wife, not by the records of the court of ordinary, but by showing an informal marriage as recognized under the statute laws of Georgia, that is to say, ability to contract, actually contracting, and the consummation of that contract. To this the plaintiff replied, incompetency upon the part of the woman by reason of a former marriage with one John A. Shaffer, who was still in life, to which it was rejoined a divorce *a vinculo matrimonii* had been decreed.

1. Under the investigation made necessary to establish competency on the part of Mary C. Shaffer a question of law arose as to the legal effect of two verdicts finding sufficient proofs to authorize a total divorce, but upon which no decree carrying out and perfecting the same could be produced. It was ruled when this same case was before us, February Term, 1879, that such decree was necessary to give effect to such verdicts, which ruling we now re-affirm, and hold that without it the bonds of matrimony were not legally dissolved.

2. Upon failure to find a record of such decree its absence was allowed to be supplied by the introduction of parol proof. This testimony having been admitted, it formed the basis of part of the instructions given to the jury and is relied upon as one of the grounds for a new trial.

The proceedings of courts of record are to be ascertained from the minutes kept by the clerks thereof, signed and approved by the judge; and by the recording of all matters judicially considered, and disposed of by the order or judgment of the court. Whatever, therefore, of judgments or decrees of courts of record which do not legally appear do not legally exist. Hence, in this case the admission of parol testimony to establish a decree was illegal and should

have been excluded. This would be the rule in courts where the trial was pending in the same court in which the decree was claimed to have been rendered, and with stronger reason should it be rejected in another and different tribunal, as was the case here. Whilst this error would of itself be sufficient to authorize the affirmance of the grant of a new trial, there remain other points upon which the ruling of this court is made necessary.

3. In direct connection with the question just disposed of, comes the inquiry as to the legal effect of the act of 1868, which provides that in all cases where a divorce *a vinculo matrimonii* has been pronounced, and by a decree of the court only one of the parties is authorized to marry again, and the other party has nevertheless married, all such as have occurred before the adoption of the constitution of 1868, are legalized and the parties thereto relieved of all pains and penalties.

The constitutionality of this act is denied, upon the ground that it is an interference by the legislature with the judicial powers exclusively conferred upon the courts. However this may be, the want of any such decree in the case at bar, makes it unnecessary to declare what was the legislative right upon this subject. The party upon whose rights and disabilities we are passing, not falling within the class of persons named, no one can claim a benefit under its provisions even admitting its constitutionality.

The question of the marriage between the deceased and John A. Shaffer was a question of fact to be ascertained by proofs; if found to be so, then no subsequent marriage could legally take place between herself and Clark, during the life of Shaffer, unless a divorce was granted her, or him with the removal of her disabilities. It is therefore wholly immaterial, in the absence of such proofs, to inquire whether there was a contract of marriage *per verba de futuro*, or *per verba de presenti*, for the want of ability to contract the marriage precludes its possibility either by license, the publication of banns, or actual consummated contract.

But if it should be found that there was no marriage between them, or if there were and she was relieved from that tie, then her subsequent marriage was a subject matter of proof, and the questions would be, ability to contract, an actual contract, and a legal consummation thereof. In such investigation the evidence should show that both parties were free to make the contract and that they did so.

Since 1864, to render a marriage valid in this state, it is not necessary that license should be granted, or the banns of the marriage published in a neighboring church, but if the other mode is adopted, and it ever becomes a matter of proof, the *factum* of such marriage must be clearly established, that is to say, that *act* by which a man and woman unite for life, with mutual intent to observe towards society and each other those duties which result from the relation of husband and wife, and actually enter upon and fulfill those duties precisely as they would be fulfilled if solemnized under the other forms of marriage. In the ascertainment of the truth as to such marriages, the jury should be well satisfied that all the elements named in such marriage actually existed, and that it was not merely an illicit and adulterous cohabitation. It was contended on the argument that where parties live together as husband and wife, that the law presumes their relations legal. The law presumes that every man performs all his legal and social duties, and that he is innocent of any violation of the penal laws of the land. But marriage arises and exists in contract, and it needs to be proved, as other civil contracts where property rights are involved and dependent upon it. This rule is relaxed and presumptions do arise in favor of marriage where parties have lived together in such apparent relation, and after a great lapse of time the offspring thereof are likely to be bastardized. If, however, it should be shown that such relations had their origin in illicit intercourse, no such presumption arises, and to show that it was not continuous requires proof of actual marriage, as before defined.

5. Counsel for plaintiff in error complains that the judge did not instruct the jury as to such testimony as would be sufficient to shift the *onus* of proof. This case, like most others, as presented at different times, put the burden of proof upon the one, and then upon the other of the parties. The burden generally lies on the party who asserts or affirms a fact, and sometimes a negative affirmation is essential, and when it is so, the proof of such negative rests on the party affirming it. The judge must always decide what amount of evidence will change the *onus* and put the burden of proof upon the other side; this however is to be done in such way as not to indicate what has or has not been proved, or to give any expression as to the weight thereof. The objections made seem to be that the judge did not instruct the jury *when* the burden was changed, rather than *what* would be sufficient. The one would intimate an opinion as to the sufficiency of the evidence, whilst the other would instruct as to what evidence, when submitted, would be sufficient.

6. The grounds upon which the court granted a new trial were quite sufficient to have authorized it. Under §3560 of the Code requiring verdicts for the defendant to specify under which plea, if there be more than one, that the same was rendered is imperative, and if the jury find alone upon one, it should so appear; if upon all, it should also appear. Upon a failure so to find they should be remanded to their room to show on what pleas, at the request of counsel, or where the verdict cannot be general on account of the pleas being contradictory, or where they have been misdirected as to their finding. The pleas in this case setting up various defenses, and the omission of the court to instruct, justifies the judge in his grant of a new trial, and particularly so when he has, as he says, upon other and very material questions gone further than is warranted by law, and in which, by our judgment herein set out, we have concurred.

Judgment affirmed.

Pounds *vs.* Hanson.

1. On October 14th, 1879, counsel for both parties to a motion for new trial in Pike superior court, signed the following agreement: "We agree that the within is a correct brief of the oral evidence submitted to the court and jury on the trial of the above stated case, and consent that we use the original interrogatories on the hearing of the motion for new trial; also consent that the original indictment and warrant for assault with intent to murder against John H. Pounds, used in evidence on the trial, be used without attaching copies of the same hereto." On October 16th the judge signed a certificate in these words: "Within brief of evidence approved," and the evidence so approved was filed the same day. The motion was overruled December 8th, at Griffin. In the record, and interspersed with the oral evidence, are what appear to be copies of interrogatories, and of the indictment and warrant:

Held, that such interrogatories and indictment and warrant were not authenticated as part of the evidence, and the writ of error will be dismissed.

2. The 10th rule of the supreme court requires a brief of the oral and a copy of the written testimony to be approved and sent up. It does not contemplate the use of original papers.

Practice in the Supreme Court. February Term, 1880.

The facts are sufficiently reported in the head-notes and decision.

J. F. Redding; E. W. Hammond; W. S. Whitaker; J. S. Boynton, for plaintiff in error.

Stewart & Hall, for defendant.

Warner, Chief Justice.

When this case was called on the docket for a hearing here, a motion was made to dismiss it on the ground that all of the evidence contained in the record had not been approved by the presiding judge, and filed according to the requirement of the law in motions for new trial.

1. It appears from the record that on the 14th day of

October, 1879, the counsel for both parties signed the following agreement: "We agree that the within is a correct brief of the oral evidence submitted to the court and jury on the trial of the above stated case, and consent that we use the original interrogatories on the hearing of the motion for new trial; also consent that the original indictment and warrant for assault with intent to murder against John H. Pounds, used in evidence on the trial, be used without attaching copies of the same hereto." The brief of the oral evidence thus agreed to, was approved by the judge on the 16th day of October, 1879, and filed in the clerk's office of Pike superior court, where the case was tried on the same day. The motion was heard and overruled at chambers, in Griffin, on the 8th of December, 1879. The objection raised here, was that the evidence contained in the original interrogatories as well as the original indictment and warrant, read in evidence on the trial of the case, had not been approved by the judge, although what purported to be copies thereof were in the record sent up by the clerk. Whether any part of the original interrogatories were ruled out or not at the trial, we do not know, nor do we know whether the indictment and warrant contained in the record are the same as those read in evidence at the trial with the same entries thereon, and cannot know, without the approval of the judge to verify the evidence in the record that was read and admitted on the trial of the case.

2. The 10th rule of this court requires that a brief of the oral and a *copy* of the written testimony shall be presented to the judge for his approval, so as to make it a part of the record as provided by the 4253 section of the Code. The rule does not contemplate that the original papers which properly belong to the clerk's office, shall be taken from the files thereof, and carried about the country to be used on the hearing of motions for new trials, thereby exposing the same to destruction and loss, but on the contrary the rule requires that *copies* thereof shall be made out and presented to the judge for his approval, leaving the originals

in the clerk's office, where the law requires them to be kept. The effort here is to inject evidence which has not been approved by the presiding judge, into the belly of a brief of evidence that has been approved by him. Inasmuch, therefore, as it does not affirmatively appear that the presiding judge approved the evidence contained in the original interrogatories and the other written evidence contained in the record, the writ of error must be dismissed—and it is so ordered.

Dean, executor, *vs.* The Central Cotton Press Company.

1. A will provided first for the payment of the debts of the testator, then for the payment of certain specific bequests, then that the balance of his estate should go to his son for life, with remainder to the children of such son, if any, and if none, then to certain other relatives. It also provided that the son should not be allowed to control the property until he should become of age; and that the executors should see to his religious and secular education. The son became of age in 1854, and died in 1860, leaving a child born in 1855. On an *ex parte* proceeding in equity in 1843, filed less than thirty days before the term, the court of chancery of the county where the executor lived, and in which he obtained letters of administration, rendered a decree, founded on the verdict of a jury, allowing him to sell certain realty in order to pay a debt and to make the distribution required by the will, and the sale took place accordingly:

Held, that though the proceeding was irregular, the court was not without jurisdiction to render the decree, and not being void, it cannot be collaterally attacked. The executory devisee was not then born, and the executor represented her interest so far as it could have a representative.

2. Prescriptive title which is good as against the executor of an estate, is also good as against the executory devisee born thereafter, and whose interest was represented by such executor.

Estates. Equity. Jurisdiction. Administrators and executors. Devise. Legacies. Title. Prescription. Before Judge Fleming. Chatham Superior Court. December Term, 1879.

Reported in the decision.

JAMES ATKINS; JNO. G. CLARKE, for plaintiff in error.

GEORGE A. MERCER, for defendant.

JACKSON, Justice.

Dean, as executor of the will of Louise O'Byrne, brought suit to recover a city lot in Savannah against The Central Cotton Press Company. The title of Miss O'Byrne, the plaintiff's testatrix, rested on the will of her grandfather, Lawrence O'Byrne. He died in 1836, and another executor having ceased to act, Porter took charge of the estate left by the will in 1838. In 1843 he applied by bill in equity to the superior court to sell a part of the real estate in order to pay a debt and certain monied legacies, and by a decree in chancery, he was directed so to sell, and did sell; and the defendant holds under that sale, so that plaintiff and defendant both claim through Lawrence O'Byrne, and hold their titles under his will, which is as follows:

"1st Item.—In the first place I charge my estate with the payment of all my just debts.

"2d Item.—I give unto my immediate relatives the sum of five thousand dollars, to be equally divided among them, that is to say, unto my father, John O'Byrne, my brothers, Moses, Michael, John and James, and my sister Mary, of the Township Chapel, county of Wexford, Ireland, and in case of the death of either of the above named persons, the amount or proportion of the above named five thousand dollars, which has been bequeathed him or her shall be equally divided among the survivors. I charge my executors to pay over the above named legacy within two years from the date of my death. The lease of the store next to the City Hotel, in the city of Savannah, now in my possession, and leased by me from the estate of Guerard, shall be transferred to Michael Oliver Dillon for the balance of the unexpired term of said lease, he paying rent for the same on the terms which I have rented it for.

"3d Item.—I give and bequeath unto the vestrymen or trustees of the Roman Catholic Church, of Savannah, the sum of four hundred dollars, the same to be applied to the building of the new Catholic Church, or towards extinguishing its debts, if any there be.

"4th Item.—I give and bequeath unto the Reverend Jeremiah F. O'Neil the sum of two hundred dollars.

"5th Item.—I give and bequeath unto my son, James Jeremiah (after paying the above named legacies), the whole of my real and personal estate, consisting of houses, lands, tenements, negroes, etc., as will appear by deeds and titles in my possession, to have and to hold the same for his use as specified in the following, viz: to receive all the proceeds of the rents, interest, etc., which may accrue from the property for his own and special use, after deducting the necessary expenses on the same property—but in no case whatsoever shall he be allowed, until he shall have arrived at the age of twenty-one years, the control or management of the said property or estate, but allowed such sums as my executors may deem necessary for his education and maintenance. I further command that my son, James Jeremiah, shall not have the power of disposing or selling the above property during his natural life, his possession or benefit of the same being but for his natural life, but in case of any lawful issue by him, then the same shall descend to his child or children for their use and benefit, and to be used or disposed of as they may think proper or fit. But in the event of no lawful issue from him, the above named property shall be equally divided among my relatives named in this will.

"6th Item.—I request of my executors to pay particular attention to the education of my son, James Jeremiah, to see that he is properly instructed in the faith of the Roman Catholic Church, and to receive a finished education in some Catholic college in the United States.

"7th Item.—*And lastly*, I do ordain and appoint Anthony Porter and Michael Oliver Dillon my executors to this my last will and testament.

* * * * * * * * *

L. O'Byrne."

"Dated January 16, 1886."

It will be observed that by the first item of the will, the entire estate is charged with the payment of the testator's debts; that by the second item, a legacy of five thousand dollars is left to certain relatives in Ireland, to be paid them within two years from his death; and that by the 5th item, *after payment of the legacies*, the whole estate is given to James Jeremiah, his son, for life, with directions that he is not to control the property until twenty-one, even as life tenant, and in the event of issue by him, "then the same shall descend to his child or children for their use and benefit, and to be used or disposed of as they may think proper or fit," and in the event that he leaves no child, then the property to go to the Irish relations named in the second

item. By the sixth item the executors are entrusted with the education of James Jeremiah, with his instruction in the faith of the Roman Catholic Church, and his secular education is to be a *finished* education, and in some Catholic college in the United States.

James Jeremiah became of age in 1854, and died in 1860, leaving one child, born in December, 1855, and died in July, 1876, still in her minority; she left a will, with plaintiff as executor, and he sues for this property as her land at the date of her death.

The defendant defends on two grounds: First, regular title through Porter's sale, under the decree in 1843, and secondly, prescriptive title, under the deed made by Porter as color, with more than seven years possession thereunder. The jury, under the charge of the court, found for the defendant, and a new trial being refused, the plaintiff here and below excepted, and the question is, do the facts put the legal title in the plaintiff or in the defendant?

1. So that the first question is, did the court of equity of Chatham county have jurisdiction to decree the sale of this city lot so as to divest the title of Louise O'Byrne, in 1843, twelve years before her birth? It was an *ex parte* bill—it was not filed in office thirty days before court--neither the Irish relatives nor James Jeremiah, through a guardian *ad litem* or otherwise, were made parties, or served with notice of any sort; and the proceeding thus appears irregular in some respects. But a regular trial by jury was had, a decretal verdict was rendered, the verdict regularly entered on the minutes of the court, and those minutes signed by the judge of the court—the chancellor who presided on the trial. Was the court without jurisdiction, and the decree, therefore, void? or were the proceedings merely irregular, and, therefore, good, unless set aside by a proceeding instituted regularly in the court which authorized the trial and sanctioned the proceedings? If not void, it could not be collaterally attacked. Code, §§3593, 3594. So that it appears plain from the above cited sections

of our Code, that if the court had jurisdiction, the decree is not void, and could only be attacked where rendered; for unquestionably it is of equal force with a judgment. Code, §§4212, 4217, 4219.

Did the chancery court have jurisdiction? It has ever been held in Georgia, so far as we know or are advised, that the jurisdiction of chancery was co-ordidate with the ordinary's on the matters of distribution of estates. Indeed, the exclusive jurisdiction given to the ordinaries touching administration is first found in the Code; Prince's Dig., 243; Cobb's Digest, 319, 323. And now, even after such jurisdiction is given, it does not oust the jurisdiction of equity in matters of distribution. Code, §§2600, 3144, 3145. Such has ever been the law in this state and elsewhere where English equity powers and practice prevail. Story's Eq. Ju., §530 to 534, 542–543; Adams' Eq., 250, n. 1; 14 *Ga.*, 323; 23 *Ib.*, 35; Wait's Actions and Defenses, 207; 19 Ala., 438; 52 *Ga.*, 153.

The court, therefore, had jurisdiction of the subject matter. Did it have jurisdiction of the person? Certainly it had of this executor; for he lived in Chatham and obtained letters there. It had of the plaintiff's testatrix; for she could be represented only by this executor. The petition or bill was filed and the decree had twelve years before her birth; therefore, it would be folly to have a guardian *ad litem* appointed for one unborn. Service on her then infant father would have been none on her, and in no sense could she have been represented by him; for she did not hold by descent, but purchase. She held under her grandfather's will, and not by descent from her father. There is no privity of estate between them—nor could she have been represented by the Irish legatees or devisees in contingent remainder or by executory devise; for her birth annihilated their estate, and she was born to their destruction. No privity was ever between them. So if her father had been made a party, or the Irish relatives parties, still she would not have been concluded because they were parties; for neither

was her ancestor as to this property. She must, therefore, have been represented by the executor; for no other living being could have acted for her; and if he could not and did not act for her, and represent her, there could have been no execution of this will by the sale of land charged to pay the debts and legacies. But he did represent her—61 *Ga.*, 384–2; 5 Paige's Chan., 215; 48 *Ga.*, 342. Therefore, the court had jurisdiction of the person of the executor, and of the unborn infant; and therefore the decree is not void for want of jurisdiction, and therefore it cannot be attacked collaterally. Code, §§3593–4.

Besides all this, the case peculiarly required chancery interposition. The estate owed a debt secured by mortgage —the executor had borrowed money to pay it—eighteen hundred dollars was due thereon—the five thousand dollar legacy was unpaid and could not be paid without the sale of real estate, the life interest in that real estate belonged to a ward in chancery—an infant—the remainder interest might be in the Irish devisees, and probably was there as a bare fee—subject to be destroyed by the birth of a child to this infant in years to come—all the land was charged to pay debts and legacies, and it would seem from this review that equity alone had full power over the premises. It is conceded that if the ordinary had granted leave to sell, the infant unborn would have been bound by his order; if, then, equity had even concurrent jurisdiction, the unborn child was also bound.

It is conceded, too, that equity would in England have jurisdiction over personalty situated as this estate was; if so, the act of 1821 having put realty and personalty on the same footing for distribution in Georgia, equity here would have jurisdiction to decree the sale in question. Cobb's Dig., 293.

But the truth is, that this plaintiff's testatrix was, by the will, but a residuary devisee—she took only what was left after the payment of all debts, and of these legatees, and of the expenses of the support and finished Catholic education of

her father; and the whole estate was bound for the first two objects at least, and the entire income was her father's for life. The title was in the executor to the entire property, for certain great trusts, until her birth. See 46 *Ga.*, 247, where this principle seems to have been distinctly recognized in a case somewhat analogous. And it must be so to carry out the will. It is folly to charge land with the payment of debts and legacies, and yet give no power to the executor—vest no title in him—to carry out the will, and pay the debts and legacies. The life tenant took subject to this charge, and makes no complaint; the legatees in Ireland took a contingent remainder or base fee, subject to be divested by the birth of James Jeremiah's child, less this charge to pay their own legacies, which they got and could not complain, had their estate never been destroyed by the contingency of the birth of Louise; and when she was born what she got was subject to, and the residue left after, payment of these debts and legacies—and she cannot complain. We hold, therefore, that the title of the defendant is good to this lot of land against her and her executor, and that the verdict and judgment are right on the first ground set up by defendant, that absolute title passed to it and its grantors by the sale under the decree in 1843.

2. This makes it unnecessary to elaborate the other defense—the title by prescription. That is equally good. For if the purchaser held adversely to the executor, he held adversely to the infant whom that executor represented; for he represented all who took under this will until the remainder was determined by the birth of plaintiff's testatrix, and he assented to the devise. Code, §2451. This *dictum* must have sprung from the act of 1821, for the reason is that realty, as well as personalty, is assets to pay debts. Where the title at law is in the infant, the statute does not run against her; but if in the trustee, it runs against him, and, therefore, against her—8 *Ga.*, 1—and following cases down to 61 *Ga.*, 54.

The title was in this trustee and must have been in order

to execute the will—to see to the education, religious and secular, of James Jeremiah—to pay the debts and legacies —to divide the legacies among survivors to determine who were the survivors to take the absolute fee in remainder if James Jeremiah died without children—and to preserve the estate until these questions were settled by the birth of Louise, the plaintiff's testatrix. We are clear, therefore, that the court was right on both defenses, and the judgment is affirmed.

See 3 *Kelly*, 256; 10 *Ga.*, 361; 55 *Ib.*, 28; 23 *Ib.*, 31; 61 *Ib.*, 77.

Judgment affirmed.

SMITH, county treasurer, *vs.* OUTLAW, sheriff.

1. Under §337, par. 7, §553, par. 1, and §563 of the Code, the ordinary has jurisdiction to cite the county treasurer to appear before him for a settlement of his accounts, as well as to order that moneys in his hands be paid out by him to the proper persons, and upon his failure to pay, to issue execution for such default.
2. When an execution was levied upon "one house and one half of lot No. 12 in the town of Wrightsville, adjoining T. W. Kent and Streets," the description was sufficiently accurate.
3. Where no costs were taxed against the defendant, so far as the record discloses, the fact that the judgment and the execution based thereon do not contain itemized bill, is no ground of illegality.

Ordinary. Judgments. County Matters. Illegality. Before Judge JOHNSON. Johnson Superior Court. September Term, 1879.

Reported in the decision.

JAMES K. HINES, by Z. D. HARRISON, for plaintiff in error.

JOHN M. STUBBS, for defendant.

CRAWFORD, Justice.

The defendant in error, as the sheriff of Johnson county, filed his petition to the ordinary of said county setting forth that as such officer he had collected and paid over to the county treasurer in money and county orders at various times, and in different amounts, $969.48, and that out of the said sum so paid over there was due to him, as sheriff, $90.08, which the said county treasurer refused to pay; the said ordinary thereupon issued a rule *nisi* calling upon the said treasurer to appear and show cause why an order should not be granted requiring him to settle and pay over the said sum so due and owing from him, as such treasurer, to the said sheriff. No sufficient answer having been shown, and an examination of the accounts of the treasurer showing the fact to be as set out in the petition, it was considered and adjudged that the said sheriff recover the sum of money so due and withheld by the said Smith, treasurer of the said county.

Upon this order and judgment a *fi. fa.* was issued and levied upon a house and lot of the said Smith, and thereupon he filed an affidavit of illegality on the following grounds:

1. There was no judgment on which to issue said execution.

2. Because the ordinary had no jurisdiction to give and render the judgment on which the execution issued.

3. Because the *fi. fa.* was illegal and void.

4. Because the ordinary had no power to issue the rule *nisi*, and therefore the whole proceeding was illegal and void.

5. Because the property levied upon is insufficiently described.

6. Because there is no itemized bill of costs.

This affidavit was heard upon these several grounds, and dismissed by the judge below because the defendant had had his day in court. To this ruling the defendant ex-

cepted, and now assigns error thereon. The questions made in this record for our adjudication are as to the jurisdiction of the ordinary; his legal right to issue this *fi. fa.*; whether the levy sufficiently describes the property; and should there have been an itemized bill of costs upon the execution.

1. The ordinary when sitting for county purposes has original and exclusive jurisdiction to examine and audit the accounts of all officers having the care, keeping, collection or disbursement of money belonging to the county, and of bringing such officers to a settlement. Code, §337, sub. div. 7. By §553, sub. div. 1, it is made the duty of the county treasurer to diligently collect from all officers and others all county dues; and, by sub. div. 3, to pay without delay when in funds all orders according to their date *or other debts due;* by sub. div. 8, to appear before the ordinary to render an account of his actings and doings.

By §563 of the Code it is provided "where the county treasurer at any time fails to pay any order which is entitled to payment, *or other legal demand upon him*, or any balance that may be in his hands to his successor, *or to the person entitled to receive it*, the ordinary may issue execution against him and his sureties for the amount due as against a defaulting tax collector."

These clauses, in our judgment, give ample jurisdiction to the ordinary to cite the county treasurer to appear before him for a settlement of his accounts for whatsoever may be in his hands and paid over to him as such county treasurer, as well as to order that the same be paid out by him to the proper person having the right thereto, and upon failure so to pay, then to issue an execution against him for such default.

2. The levy is upon one house and one-half of lot No. 12 in the town of Wrightsville, adjoining T. W. Kent and Streets; and one house and one-half of lot 12 in Wrightsville, which half of the lot is that next to Kent and Streets, describes the lot sufficiently accurate to make it certain,

exactly what part is levied upon for sale, and that is all which is required by law.

3. The last ground of this illegality is that there is no itemized bill of costs. This objection we do not appreciate, as upon examination we find no amount of costs taxed at all against the defendant, and if there be none set out and no judgment for any, that would not make the proceeding of the *fi. fa.* illegal.

Judgment affirmed.

Connon *vs.* Dunlap.

Where an attachment is sued out against one partner on a partnership account under §3276 of the Code, the declaration in attachment need not be against both partners, but only against him who is thus subject to summary process.

Attachment. Partnership. Before Judge Speer. Bibb Superior Court. October Term, 1879.

To the report contained in the decision, it is only necessary to add the following:

Dunlap sued out an attachment against Connon, as a non-resident member of the firm of McGrath & Connon. His declaration in attachment was also against Connon alone, as a member of said firm. The account attached to the declaration was against the firm. Defendant moved to dismiss the declaration, to rule out evidence, and for a non-suit, each motion being based on the non-joinder of McGrath in the suit. Each was overruled. The jury found for plaintiff. Defendant moved for a new trial. It was refused, and he excepted.

Washington Dessau; Lanier & Anderson, for plaintiff in error.

Blount & Hardeman; N. E. Harris, for defendant.

WARNER, Chief Justice.

This was an attachment sued out by the plaintiff against the defendant as one of the partners of the firm of McGrath & Connon (alleging that Connon resided out of the state) under the provisions of the 3276th section of the Code, and was levied upon the individual property of Connon. The only question made by the record in this case, is whether, as the attachment was founded upon a copartnership debt, the plaintiff should not be required in his declaration to declare against both partners jointly, inasmuch as the attachment is founded upon a joint contract. The plaintiff in error insists that the declaration should be against both partners jointly. The reply is that Connon, one of the partners, resides out of the state and the statute declares that in such cases the proceedings against copartners shall be in all respects as in other cases of attachment, except the attachment shall be levied only upon the separate property of such copartner, which was done in this case. The only difficulty in the way of the legal theory of the plaintiff in error is the statute embraced in the 3276th section of the Code, providing for just such cases as the one in the record before us. The mandate of a statute is like that of a tyrant; it speaks to be obeyed.

Let the judgment of the court below be affirmed.

PITTS *vs.* FLOURNOY & EPPING *et al.*

A bill filed by Flournoy & Epping alleged as follows: Pitts had a *fi. fa.* against Kimbrough. Flournoy & Epping had two *fi. fas.* against him, one older, the other younger than Pitts', but the younger founded on a mortgage containing a waiver of homestead. All were levied on certain cotton. To defeat Pitts Kimbrough had the cotton set apart as an exemption and filed a claim with Flournoy & Epping as securities. The mortgage *fi. fa.* was proceeding; Kimbrough appealed to Flournoy & Epping not to sacrifice the cotton at sheriff's sale at Lumpkin, but to take it at a fair valuation of

$400.00, carry it to Columbus, where it could be sold, and if it brought more than that to give his family the benefit of it; this they agreed to do, and have made the sale accordingly. The claim of Kimbrough under the Pitts *fi. fa.* was dismissed without a trial, and Kimbrough refuses to interpose another claim. He and Pitts are kinsmen, and have colluded, etc.; both are insolvent. Pitts has notified them to produce the cotton, and they will be subjected to suit on their bond. Discovery was waived. Defendant's answer denied collusion with Kimbrough, and charged that the claim itself was the result of fraudulent collusion between Kimbrough and Flournoy & Epping to delay him:

Held, that under these facts the chancellor did not err in granting an injunction to restrain Pitts from proceeding until the final hearing.

Equity. Injunction. Before Judge Butt. Muscogee County. At Chambers. February 25th, 1880.

To the report contained in the decision, it is only necessary to add that the bill waived discovery.

Blandford & Garrard, for plaintiff in error.

Sam'l B. Hatcher; Henry R. Goetchius, for defendants.

Jackson, Justice.

The plaintiff in error obtained a judgment and *fi. fa.* against J. W. Kimbrough in June, 1877, which, in November thereafter, was levied upon fifteen bales of his cotton. Two *fi. fas.* in favor of Flournoy & Epping, one a common law *fi. fa.* of older date than Pitts', the other a mortgage *fi. fa.*, younger, but with a waiver of homestead and exemption, were also levied on the same cotton. Kimbrough, to defeat the collection of the Pitts' *fi. fa.*, had an exemption of personalty granted him on the cotton, and as trustee for his wife and children claimed it, with Flournoy & Epping as his securities. The sheriff returned the Pitts *fi. fa.* with the entry thereon of "homestead taken," and the claim papers arising on the same, back to the court.

The homestead and exemption of personalty having been waived in the mortgage of Flournoy & Epping, their *fi. fa.* was proceeding to sell the cotton, when Kimbrough, as is alleged, appealed to them not to sacrifice his cotton in the town of Lumpkin, which was not a cotton market, but to take it on their *fi. fa.* at the price of $400.00, which was its value there, and bring it to Columbus where it would sell to better advantage. It is further alleged that being kindly disposed towards said Kimbrough and his family they agreed to do so, and that if it brought any more than the $400.00 his family should have the benefit of it. When the claim case came on to be heard it was dismissed without a trial, thus leaving the Pitts *fi. fa.* to proceed under its former levy on the fifteen bales of cotton, though they had been brought to Columbus and sold under the agreement entered into with Kimbrough by Flournoy & Epping.

The complainants allege that Kimbrough and Pitts are related; that notwithstanding his, Kimbrough's, agreement with complainants he refuses to interpose another claim; that Pitts has advertised the cotton for sale; that Kimbrough, combining and conspiring with Pitts to defraud them, and in answer to his strange and unjust proceedings, says that he and the said Pitts understand each other; that Pitts has notified them to produce the cotton at the sale; that they, Pitts and Kimbrough, are both insolvent; that a continuance of this fraudulent conduct on the part of Pitts and Kimbrough will subject them to a suit on their bond where they cannot make defense as adequately as they can in a court of equity; that their bill will prevent a multiplicity of suits, terminate endless litigation, place at rest the title to said property, and settle the equities between all parties. Therefore they pray for an injunction against the said Pitts until all the equities can be heard and determined.

Upon the hearing of this application for injunction the same was granted by the chancellor, and Pitts, by his counsel, excepted.

The defendant, Pitts, denies all combination with Kimbrough, and charges that complainants procured the claim of Kimbrough, and became his securities with the fraudulent intent and illegal purpose to hinder, delay and defeat him in the collection of his debt.

We think that the allegations in complainants' bill, and the denials and charges set up in the defendant's answer, make such a case as should be passed on by a jury, and that the chancellor committed no error in granting the injunction.

Judgment affirmed.

Howard *vs.* Chamberlin, Boynton & Company.

1. Exceptions *pendente lite* should be tendered, filed, ordered to be recorded, and recorded at the term when the rulings complained of were made. A failure to comply with any of these requirements during the term will prevent a consideration of the exceptions. This case is not governed by *Walsh vs. Colquitt, governor*, 62 *Ga.*, 384, where a party excepted prematurely, and where this court granted an order allowing the exceptions to be filed *pendente lite* after the term because they believed it to be consistent with justice and law, as provided by the Code, §4284.
2. Where suits were brought in a justice court each month, the ground of which was that plaintiff had been employed for a year at $50.00 per month, and had been discharged pending the term, interest necessarily accrued, and the plaintiff could not waive or remit interest so as to leave each amount even $50.00 and prevent appeals.
3. Suits between the same parties, arising under the same contract, involving the same pleas, and upon which the same verdict must be rendered, are properly consolidated.
4. Where a party to a cause makes himself a witness in his own behalf, he should be held to answer strictly and minutely every interrogatory of which he has knowledge, and if he neglects so to answer, or answers evasively, such testimony should be rejected.
5. In a suit by one as a discharged employé, the issue being whether or not he was discharged, statements made by him after the time when notice of discharge was alleged to have been given, and before the time when it was to take effect, were admissible to show preference by him of other service.

6. Howard sued Chamberlin, Boynton & Co. as a discharged employé; one plea was that he had accepted employment with Akers, and had not been injured. It appeared that plaintiff traveled for Akers and sold fruit trees, taking notes therefor; he was to get a commission on what was collected from these sales. Books containing notes were offered in evidence on the testimony of Akers that they had been received from plaintiff; also a book compiled from these notes by Akers and plaintiff containing a schedule of the makers and amounts with marks of payments where made:

Held, that they were admissible.

(*a.*) It being admitted that plaintiff was employed by defendants for a year, and that the employment terminated before the end of the year, the issue being whether the termination was by discharge or rescission, evidence was not admissible to show that plaintiff left a more lucrative position in order to obtain a year's employment with defendants.

7. There was no error in the charges or refusals to charge as shown by the record.

Practice in the Supreme Court. Practice in the Superior Court. Contracts. Interest. Waiver. Appeal. Evidence. Charge of Court. Before Judge HILLYER. Fulton Superior Court. September Term, 1879.

On May 2d, 1878, Howard brought two suits in the justice court 1026, D. G. M., against Chamberlin, Boynton & Co., each on open account. The first was as follows:

"ATLANTA, GA., May 1, 1878.

"Chamberlin, Boynton & Co. to Warren Howard, Dr.

"To amount due for the month of March, 1878, under contract of services as clerk for 1878, at $50.00 per month.....$50.00."

The other account was the same, except that it was for "the month of April, 1878." On the trial the justice rendered judgment for plaintiff in each case, and defendants entered appeals. Subsequently Howard brought eight other suits, being respectively for the months from May to December inclusive, one suit for each month. The accounts sued on were similar to the above, except the last two. The ninth suit (for November) was on the following account:

"ATLANTA, GA., January 20, 1879.

"Chamberlin, Boynton & Co. to Warren Howard, Dr.

"To amount due *to date* for the month of November, 1878, under contract of services as clerk at $50.00 for each month in 1878, $50.00."

The tenth account was as follows:

"ATLANTA, GA., February 25, 1879.

"Chamberlin, Boynton & Co. to Warren Howard, Dr.

"To amount due to date for services as clerk for the month of December, 1878.....$50.00."

On each of these suits the justice rendered judgment for the plaintiff, and defendants appealed. The judgments in the suits for June and July, 1878, were for $50.00 even; the first judgment (for March) had an interlineation of interest, which the court held to be a nullity, thus leaving it also for $50.00. The remainder of the judgments included interest.

At the fall term, 1878, of Fulton superior court, five of these appeals (suits from March to July inclusive,) had been sent up. Plaintiff moved to dismiss them on two grounds:

(1.) Each of them on the ground that the amount claimed was not such as to render the case appealable.

(2.) To dismiss the appeals in cases for June and July because the appeal bonds given did not correspond with or describe the judgments in those cases.

The bonds described the judgments as being "in 1026th district, G. M., of Fulton county, Georgia, for $50.00, principal, and forty-five cents interest;" whereas the judgments for those months were each for $50.00 and costs. Counsel for defendants stated that the bonds were so drawn because he had understood from the magistrate that interest would be included, but plaintiff's counsel objected to interest, and it was not included.

The court overruled the motion to dismiss, and plaintiff excepted *pendente lite*.

At the September term, 1879, of the court all the appeals had been sent up, and were called for trial. Plaintiff's counsel

moved to dismiss each of the last five (being appeals of suits from August to December inclusive,) on the ground that the amount claimed was not such as to render the cases appealable. Counsel stated in his place that plaintiff did not claim interest, nor had he ever claimed it, but had always been willing to write off interest, and that these five judgments in the justice court only included it because in taking judgment in one of these cases the defendants' counsel claimed that interest was obliged to be inserted, and the justice ruled that such position was correct, although plaintiff's counsel objected; and that afterwards judgment by default was entered in each subsequent case, including interest, plaintiff's counsel consenting to avoid going through a trial in each case in the justice court, each involving like questions. Plaintiff's counsel offered to write off all interest, and disavow any claim thereto. The court held that the records showed that the amounts sued for were liquidated, and by law must bear interest, and that interest could not be waived or disclaimed. He thereupon overruled the motion.

The court then ordered the cases to be consolidated and tried together, over objection of plaintiff.

A set of interrogatories was sued out by plaintiff's counsel for him, and executed in November, 1878, before the close of the year involved in the suits. The court held them improperly taken, because the fourth cross-interrogatory was not fully answered. This interrogatory and answer were as follows:

"Fourth cross-interrogatory—Are you not now in the employment of Mr. Akers? Did you not make a contract with him in the month of February, 1878, to commence work with him on the 1st of March, 1878? If you did, what was that contract? State fully and particularly. If it was in writing, attach it or a copy of it to this answer. Have you done so? If it was not in writing state fully its terms. Where were you during the months of March, April, May, June, July, August, September and October, 1878?

What were you doing, and what did you receive for your work, or what are you to receive if you have not been paid for the months above mentioned? If you say that you received a commission, state what your commissions for each of the named months amount to? and if you say you have not received them, why not? State fully and particularly what your commissions amount to for March, April, May, June, July, August, September and October, 1878, whether you have collected them or not? If you state you worked for Mr. Akers on commission, state the amount of your sales for each of the above named months? What were you to receive out of said sales? What have you received of said amounts? What are you to receive? What amount is good and collectible? What amount is bad? State fully and particularly. What was the aggregate amount you received or will receive on account of service rendered to Mr. Akers from 1st of March to 1st of November, 1878? State fully."

"To the fourth cross-interrogatory he answers: I am. In the latter part of February, after having been notified of my discharge by defendants, Mr. Akers asked me if I would like to work for him. I told him I would, and asked him what he would give me. He said he would give me thirty per cent. of all the money I collected from the sale of fruit trees sold by myself, or would give me $50.00 per month, and allow me a sum for expenses, these expenses not to exceed ten dollars per month in money, and wherever I could pay my expenses by promising fruit trees in the fall, I could do so, and if less than ten dollars in cash was used I was entitled to only the actual amount used. All of this was dependent entirely upon my collections. The payment of $50.00 per month depended upon my collecting that amount from sales I had made. That agreement was reduced to writing on the 10th or 11th of February; it is not in my possession. I have given the language as near as I can remember it. I misplaced the contract, and don't know where it is. I have not decided which of these offers

I will accept, as both of them depend upon my collecting the different amounts. I was going through the country selling fruit trees; I was in Atlanta at different periods during that time; I remember specially in May and October. I cannot give the exact amount of sales for each of these months; but I was to receive nothing on sales, but I was to receive thirty per cent. of collections. I have not received a cent for any of these months; I am to receive thirty per cent. of what I collect if I see fit to do so. It is impossible to state what amount is good or what amount is bad; I cannot tell, for it depends entirely upon collections. I have not received one cent for these months from John W. Akers on account of collections."

On the trial it was admitted that Howard was employed by defendants for the year 1878, at $50.00 per month, and that one of defendants went to him about the last of January or first of February, told him that they would not need his services after the first of March, and requested him to get another place; and it was shown that some time in March plaintiff went to work for J. W. Akers, that he continued with him through the year, selling fruit trees, that the contract was that he should receive 30 per cent. on what was collected from sales made by him, that he realized some $460.00 therefrom, and that he was sick for some weeks during the summer. Defendants insisted (1.) That plaintiff was not discharged, but voluntarily agreed to a rescission of the contract. On this subject the evidence was in direct conflict. (2.) That he had made nearly, if not quite, as much working for Akers as if he had remained with them. (3.) That he had been sick a portion of the time and unable to work.

J. H. Wood was a witness for defendants. He testified that in the month of February, 1878, he had a conversation with plaintiff, in which the latter said he had gotten another place with Akers, hoped to make more, and he would not stay with defendants if they would increase his salary to $100.00 a month. On cross examination he testi-

fied that plaintiff stated that he had been notified that he would have to leave after March 1st, and witness and others were regretting that he was going to leave when the declaration was made, which is set out above. Plaintiff objected to the statement that he would not stay with defendants, etc., as being made after the discharge, and therefore irrelevant. The court admitted the evidence.

Testimony of Akers touching the amount made by plaintiff in his employment was objected to by plaintiff's counsel, because it appeared that his information was derived from letters, memoranda, etc.; it was admitted over objections, and plaintiff excepted; but the memoranda, etc., were subsequently accounted for, and the ground not relied on by counsel for plaintiff in argument.

Certain books were offered in evidence by defendants and objected to by plaintiff. It appeared from the evidence of Akers that after plaintiff went into his employment, the latter traveled through the country selling fruit trees for him. Plaintiff would take notes or written orders for the trees, payable on delivery in the fall. Three of the books offered Akers testified had been sent to him by plaintiff as containing these notes. The fourth was a tabulated statement of the other three, and of other like books sent by other agents. It was made by Akers, and plaintiff assisted him in the work; then compared it with the books from which it was made up, were satisfied of the correctness of it. It contained the names of purchasers of trees, and the amounts of their purchases; opposite each sale was the initial of the agent who made it; and opposite some of these was entered "pd" or "paid," indicating payment. Plaintiff objected to the three books of notes on the ground that no execution of them was proved; and to the fourth, because of irrelevancy, and because the entries were secondary evidence—especially so as to payments made. They were admitted.

The point being directly in controversy whether plaintiff agreed to give up his situation with defendants, or was dis-

charged, plaintiff's counsel offered to show by R. A. Hemphill that plaintiff had a situation with witness which paid him $60.00 per month, and which he gave up to accept a year's employment with defendants. The court rejected this. The court refused to give each of the following requests of plaintiff's counsel in charge:

(1.) "The *onus* is upon defendants to show a rescission of their contract with plaintiff." On the contrary he charged as follows: (After stating to the jury that it was admitted that plaintiff was employed for the year 1878 by defendants, and that the employment terminated before the end of the year by reason of something which passed between defendants and plaintiff, charged) "that the *onus* was upon the plaintiff to show by a preponderance of evidence that he was discharged."

(2.) "If plaintiff was employed by defendants for the year 1878, and before the year was finished they went to plaintiff and used to him such language as, from its natural and reasonable import, led him to believe that he was discharged, and therefore to leave their employment, such action on the part of defendants would amount to a discharge of plaintiff whether the word 'discharge' was used or not."

The court charged as follows: "If plaintiff was sick during 1878, the time he was sick would be taken into consideration and deducted by you in fixing the amount due by defendants, if any, unless the evidence showed that he would not have been sick had he remained in their employment; if this has been made to appear from the evidence, then you would not deduct anything on account of such sickness."

After verdict for defendants, plaintiff excepted and assigned error on each of the above rulings.

When the case was called in the supreme court, counsel for defendants in error moved to disregard the assignments based on the exceptions *pendente lite*, because the rulings complained of were made at the fall term, 1878, of Fulton

superior court, the exceptions *pendente lite* were tendered to the judge at that term, but were not filed in the clerk's office until April 1st, 1879, the second day of the next term. Counsel for plaintiff in error responded as follows: Exceptions *pendente lite* are part of record, and will be considered unless *filing* at first term is essential to validity under statute; if so, no order of court can modify statute. But exceptions were allowed filed after term in *Walsh vs. Colquitt, governor*, 62 *Ga.*, 384.

The facts in regard to these exceptions appear from the record as follows: Exceptions *pendente lite* were tendered to the court. They recited the refusal of the court to dismiss appeals and holding interrogatories insufficient (at the fall term, 1878), set out in the first part of this report, and concluded thus: "And now during the term at which said rulings and decisions were made, comes plaintiff and tenders this his bill of exceptions *pendente lite*, and prays that it may be certified and ordered of record as by law provided."

Upon this the judge signed the following order:

"I certify, that the above bill of exceptions (with the qualification, etc.) tendered *pendente lite* is true, and contains all the evidence necessary to a clear understanding of the errors complained of, and it is ordered that the same be placed on record to wait the final termination of the case, as by statute provided. This January 10th, 1879.

(Signed) GEO. HILLYER,
Judge S. C. A. C."

Upon this was indorsed this entry:

"Filed in office this 1st day of April, 1879.

(Signed) J. S. HOLLIDAY, C. S. C."

Nothing more appears concerning the exceptions, except that they are in the record, and are followed by the usual clerk's certificate.

In the record, in advance of the exceptions *pendente lite*, appears this order:

"WARREN HOWARD,
vs.
CHAMBERLIN, BOYNTON & Co. } Appeals Fulton Superior Court.

"On motion of plaintiff's attorney to strike from the first three judgments in the justice court an interlineation of interest, on the

ground that the same was made after the judgments were rendered, it appearing that in the first judgment the interlineation was made by the justice after the entry of judgment, though later on the same day, and that the other interlineations were made at the time of entering judgment, it is ordered that the first be considered and deemed a nullity, and as if no interlineation had been made. As to the others the motion is overruled. On motion of the plaintiff's attorney to dismiss each of the first five appeals, it is ordered that the same be overruled and refused.

"Spring Term, 1879.

(Signed) GEO. HILLYER, Judge, etc."

"It appearing to the court that the order as above was taken at the last term of the court, but omitted to be entered on the minutes by accident, it is ordered to be entered *nunc pro tunc.*

"Fall Term, 1879.

(Signed) GEO. HILLYER, Judge, etc."

It is to this order that the opinion refers when it speaks of the order for recording being at the third term:

JACKSON & LUMPKIN, for plaintiff in error, cited as follows: Tendering at term, not filing, essential to exceptions *pendente lite*, Code, §§4250, 4254; *Walsh vs. Colquitt*, governor 62 *Ga.*, 384; 40 *Ib.*, 309, 322–3, 581. Plaintiff fixes claim, and can waive interest, *Cherokee Lodge vs. White* (September term, 1879); *Dykes vs. Wolsey* (February term, 1879); 51 *Ga.*, 194; 46 *Ib.*, 41; 58 *Ib.*, 77 (1); *Giles*, ordinary, *vs. Johnson* (September term, 1879); 36 *Ga.*, 599. Interest, in such case, damages, and may be waived, 2 *Ga.*, 376; 1 *Ib.*, 469; 18 *Ib.*, 176; 1 *Ib.*, 40; 2 *Ib.* 18; Bac. Abr. "Damages," D., 1; 2 Tuck. Com., 160; 2 Saund. Pl. and Ev., 250; 3 Bing., 353, 358; 9 Price, 134; 2 Salk., 623; 61 *Ga.*, 623. Contrast 58 *Ga.*, 406. Interrogatories sufficient, 41 *Ga.*, 117; 26 *Ib.*, 332; 45 *Ib.*, 416. Rescission of contract, Code, §§2859, 2860, 2758; 42 *Ga.*, 283. Misleading by language, Code, §2756. *Onus* as to sickness, 61 *Ga.*, 482 (1).

T. P. WESTMORELAND, for defendants, cited as follows: Filing at term essential to exceptions, Code, §§4250, 4254; 40 *Ga.*, 422, 423; *Trustees Masonic Hall vs. Merchants'*,

etc., *Bank* (February term, 1879). The amount to be paid was fixed, interest must be added, and could not be waived, Code, §§3570, 2056; 56 *Ga.*, 350; 61 *Ib.*, 482; Decision February term, 1879, pam., p. 27; 46 *Ga.*, 41; 2 *Ib.*, 312. Cannot remit to give or deny jurisdiction, Code, §3760; 56 *Ga.*, 494; R. M. Charlton, 298; 58 *Ga.*, 77, 406. Appealable irrespective of judgments, Code, §4157. Consolidation right, 45 *Ga.*, 124.

CRAWFORD, Justice.

1. The first question made before us in this case is whether a bill of exceptions *pendente lite* can be considered here, when the same was neither filed nor entered of record at the term of the court at which the exceptions were taken.

Section 4250 of the Code provides that at any stage of the cause either party may file his exceptions, and if certified and allowed, they shall be entered of record.

Section 4254 further provides that the judge shall certify them to be true, and order them to be placed on the record, and that they shall be tendered during the term. Thus it will be seen that the first of these sections simply gives *the right*, and prescribes the *manner* in which it is to be exercised; the second declares *the time when* they are to be tendered, and that is during the term. In this case the record shows that the judge certified the exceptions at the September term, 1878, but that they were not filed until the spring term, 1879, and further, that they were not ordered to be recorded until the fall term of the court for the year 1879, thus carrying them over to the third term after they had been made.

We think that the proper construction of these sections of the Code is, that exceptions *pendente lite* should be tendered during the term, certified to be true by the judge, filed by the party, ordered to and entered of record at that term, and there await the final trial, and if brought to this court for alleged errors, then to be sent up and heard.

And this we understand to be the ruling of this court in the case of *The Nacoochee Hydraulic Mining Company vs. Davis*, 40 *Ga.*, 322, 323. Nor is it at all inconsistent with that of *Walsh vs. Colquitt, governor*, decided at the February term, 1879, where the writ of error was dismissed because prematurely brought, with leave to the defendant to file the same bill of exceptions *pendente lite* to be heard as provided by law in such cases. The real question considered by the court in that case being, whether he was not premature with his exceptions, and not one where the party had failed to avail himself of a remedy which he sought to follow. But in that case the court, under section 4284 of the Code, gave that order and direction therein, because they believed it to be consistent with justice and law, as provided by said section.

2. The other questions made by the record in this case, arise upon the trial had between the parties at the September term, 1879, of ten cases which had been appealed from a justice to the superior court of Fulton county. Five of those cases were returned to the September term, 1878, and it was as to those cases that the bill of exceptions *pendente lite* related, and which we cannot consider here for the reasons above given. The whole number coming on to be heard, plaintiff's counsel moved to dismiss each of the last five, upon the ground that the amount claimed being but $50.00 and the interest, which he disclaimed, they were not such cases as to render them appealable. The court overruled the motion to dismiss, and the plaintiff excepted.

The suits were founded upon a contract made by Howard with Chamberlin, Boynton & Co. to clerk for them during the year 1878, at $50.00 a month. He only remained with them January and February, and in March went into the employ of J. W. Akers. The contract was not disputed either as to the time or the amount to be paid; it was for $50.00 a month and for twelve months. Suits were brought after the expiration of each month, and for the contract sum of $50.00 as the amount due. The only

question in issue seems to have been whether Howard was discharged, or consented upon request to find other and new employment, judgment was given in each suit by the justice for the plaintiff in the sum of $50.00; on the question of interest the parties disagreed, the plaintiff disclaiming any, defendant denying his right to disclaim. The magistrate decided that under the contract interest was due and rendered his judgment accordingly.

The question therefore made to dismiss the appeals depended upon the right of the plaintiff to remit the interest, thereby making the sum claimed only $50.00, and thus enabling him to defeat the defendants' right to an appeal.

All demands where by agreement or otherwise the sum to be paid is fixed or certain, bear interest from the time the party becomes liable and bound to pay them. Code, §2056. This being a demand where by agreement the sum to be paid was fixed and certain, bore interest; and it was as much a part of the claim as the principal, and could no more be stricken therefrom to defeat a right of the other party than the principal itself could be lessened to accomplish the same object. Had the suit been for damages for a breach of the contract that would have been a different case; but the suits were on the special contract, and the interest was attached to and inseparably connected therewith. The plaintiff came into court electing to ask its enforcement, and he could not escape its legitimate consequences. 22 *Ga.*, 312; 58 *Ib.*, 406.

3. Another ground of exception to the ruling of the court was the order consolidating these separate suits. All the cases being between the same parties, arising under the same contract, involving the same pleas, and upon which the same verdict must be rendered, were properly consolidated.

4. The court on objection suppressed a set of interrogatories sued out by the plaintiff for himself, upon the ground that one of the cross-interrogatories had not been fully answered. An examination of the questions and answers thereto shows the objection well taken. The inter-

rogatory contained a series of questions, but they were upon the same subject matter, and though put in different forms sought the same information, and that which was necessarily within the knowledge of the party, and should have been fully answered.

Where the party to a cause makes himself a witness in his own behalf, he should be held to answer strictly and minutely every interrogatory put to him of which he has knowledge; and if he neglects so to answer, or answers evasively, such testimony should be rejected.

5. Exception was taken to the admission of Howard's declarations to the witness Wood, wherein he said that he would not stay with defendants if they would give him $100.00 a month. It having been made in February before he left their employ, it was certainly very proper testimony to show that he preferred service to others rather than to defendants, and that he was not forced to leave them.

6. The exceptions made to the admission of the evidence of Akers, and the books mentioned, as also to the rejection of the testimony of Hemphill, we think are not well taken, and that the court committed no error in the rulings therein complained of.

7. In view of the evidence as far as the same appears in the record, the charge of the court and his refusal to charge show no error, and the case must therefore be affirmed.

Judgment affirmed.

Jones *vs.* The State of Georgia.

1. The conviction of one charged with a crime as principal in the second degree is contrary to law where there is no evidence of the guilt of the principal in the first degree.
2. When the judge of the superior court has approved the brief of evidence and signed the bill of exceptions, he has exhausted his powers in respect to the testimony. He cannot, by a certificate subsequently made, alter the brief of evidence as approved.

Criminal law. Practice in the Superior Court. Practice in the Supreme Court. Before Judge Crisp. Lee Superior Court. March Term, 1879.

Reported in the decision.

Fred H. West; Warren & Freeman, for plaintiff in error.

C. B. Hudson, solicitor-general; D. H. Pope; Hawkins & Hawkins, for the state.

Warner, Chief Justice.

The defendant was indicted for the offense of murder, and charged in the indictment as principal in the second degree, Jackson Sellers being charged in the same indictment as principal in the first degree. The defendant, Jones, was tried separately, and was found guilty as principal in the second degree. A motion was made for a new trial on several grounds, which was overruled, and the defendant excepted.

One of the grounds of the motion was that the verdict was contrary to law and contrary to the evidence. Upon looking through the entire evidence in the record as approved by the court on the 26th of April, 1879, it does not appear therefrom that there was any evidence of the guilt of the principal in the first degree, either by the introduction of the record of his conviction in evidence, or otherwise, upon the trial of the defendant as principal in the second degree, nor does it appear from the evidence in the record that the principal in the first degree was guilty of the offense as charged in the indictment. The counsel for the state discovering that defect in the brief of the evidence as contained in the record here, sought to remedy it by obtaining from Judge Crisp a supplementary certificate, dated the 5th of January, 1880, in which the judge certifies that the bill of indictment against Sellers, the principal in the first degree,

with the verdict of guilty thereon, was in evidence before the jury on the the trial of the defendant, Jones, the principal in the second degree. When the judge signed and certified the bill of exceptions, and approved the brief of the evidence, he had exhausted the power conferred on him by law over the same, and could not, eight or nine months afterwards, when the case was pending in this court, supplement his original certificate in the manner sought to be done in this case It not appearing from the bill of exceptions, nor from the brief of the evidence as originally signed, certified and approved by the presiding judge, and duly transmitted to this court, that there was any evidence before the jury proving the guilt of the principal in the first degree, the verdict against the principal in the second degree was contrary to law.

Let the judgment of the court below be reversed.

The Commissioners of Bartow County *vs.* Newell.

1. The Confederate congress was the legislative department of a *de facto* government recognized by all of the courts of Georgia while it lasted; and acts published by authority of that government, while in dominion of the territory of this state, will be recognized by its courts whenever they are necessary to throw light upon any litigation therein. The government being overthrown, and there being no records by which to establish such acts, parol testimony of a witness that he was a member of the Confederate congress, that as such he became possessed of certain pamphlets which contained the acts of that body, and that they were genuine, was sufficient to admit the printed acts in evidence. Especially was such admission not ground for new trial, where it does not appear that the complaining party was hurt thereby.
2. Bonds issued by a county in 1862 for the purpose of raising money for the support of the indigent families of the soldiers of the Confederate States were not in aid of the rebellion.
3. Where one who was a citizen of another state but was residing in Georgia, and who moved north in 1862, left money consisting of bills of local banks, in the hands of an agent for investment, and the latter invested in county bonds, such a transaction was not ille-

gal within the meaning of the act of congress of 1861, which prohibited commercial intercourse between citizens of insurgent states and those of other parts of the United States.

Evidence. Confederate States. Laws. Bonds. County Matters. Contracts. Before Judge McCutchen. Bartow Superior Court. July Term, 1879.

In 1862 Newell was residing in Georgia, though he claimed Illinois as his home, and went to that state during the said year. When he went away from Georgia, he left some money, consisting of bills of the Central Railroad & Banking Company and the Georgia Railroad & Banking Company in the hands of one Howard, as his agent, for investment. In 1863 the county of Bartow issued bonds in order to raise money for the support of the indigent and needy families of the soldiers of the Confederate army, who could not support themselves. It appears that there was an ordinary pauper fund in the county raised by taxation, but it became inadequate, owing to the increase of poor families resulting from the absence or death of men in the war, and this means was adopted of providing for such families. Howard, as agent for Newell, purchased two of the bonds so issued. On these Newell brought suit. On the trial, Warren Akin, Esq., testified that he had been a member of the Confederate congress, that as such he became possessed of certain pamphlets (tendered to him) and that they contained the acts of that congress, and were genuine. Upon this showing, two of the acts were allowed to be read, dated April 16th, 1862, and September 27th, 1862, respectively authorizing the president of the Confederacy to call out for military service men between the ages of 18 and 35 years, and between 35 and 45. This ruling was excepted to.

The jury found for plaintiff $226.47-100 principal. Defendants moved for a new trial, which was refused, and they excepted.

For the other facts see the decision.

A. JOHNSON, for plaintiffs in error.

WARREN AKIN, for defendant.

JACKSON, Justice.

Certain bonds were issued by the county of Bartow during the war between the Confederate and the United States, in 1862, and this suit was brought against the county on two of them; the jury found for the plaintiff, and the defendants excepted to the refusal of the court to grant a new trial. The bonds were issued to support the poor families of soldiers in the Confederate army, and the widows and orphans of those who had died in the service.

Three points are made in the motion for a new trial—first, that the court erred in admitting in evidence pamphlets purporting to be acts of the Confederate congress without sufficient proof; secondly, that the bonds are illegal because given in aid of the Confederacy; and thirdly, because the plaintiff, as a citizen of Illinois, was prohibited from commercial intercourse with the insurrectionary or insurgent states by the act of congress of 1861, codified in revised statutes of the United States, §5301, and the contract was therefore illegal as to his right to recover on the bonds.

1. Mr. Warren Akin testified that the pamphlets contained the acts of the Confederate congress, that he had been a member thereof and got them as such, and knew that the printed pamphlets were genuine. It is not shown in the record what parts of these laws injured the plaintiff, or in what manner the defendants were affected or hurt by them under the ruling in 54 *Ga.*, 59, and therefore we would not interfere to grant a new trial on this ground, even if these laws or acts were improperly admitted. The party complaining must show that he was hurt by the ruling in order to secure a new trial on any given ground therefor. But these acts were the acts of the congress of a *de facto* government recognized by all of the courts of Georgia,

published by the authority of that government while in dominion of the territory of this state, and will be recognized by her courts now whenever necessary to throw light upon any litigation therein. The government being overthrown, there is no record of them whereby they could be established by better proof; therefore Mr. Akin's testimony as to the genuineness of the printed pamphlets is as good as could be had, and in any view we can take the court admitted them properly so far as the record discloses what transpired, and in the anomalous condition of things which exists, arising from the war between the states and its consequences.

2. In so far as the legality of the bonds is assailed because issued in aid of the suffering families of the living and dead Confederate soldiery we need only say that the question is not open with us. It was settled in a case involving this class of Bartow county bonds which is reported in 54 *Ga.*, 53. cited above, and their illegality as being in aid of the Confederacy was there held unsound and their binding force on the county, so far as this point is concerned, was upheld.

3. So that the single question remains, does the act of the United States congress in 1861 prevent the plaintiff's recovery? That act is as follows: "Whenever the president in pursuance of the provisions of this title, has called forth the militia to suppress combinations against the laws of the United States and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the president, and when the insurgents claim to act under the authority of any state or states, or in the part or parts thereof in which such combination exists, and such insurrection is not suppressed by such state or states, or whenever the inhabitants of any state or part thereof are at any time found by the president to be in insurrection against the United States, the president may, by proclamation, declare that the inhabitants of such state, or any section thereof, where such insurrection exists,

are in a state of insurrection against the United States, and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue, and all goods and chattels, wares and merchandise, coming from such state or section into other parts of the United States, or proceeding from other parts of the United States to such state or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such state or section, be forfeited to the United States." Rev. Statutes U. S., §5301.

The plaintiff seems to have been resident in Georgia and moved north in 1862, leaving Georgia state money, being Central and Georgia Railroad bank bills, with an agent for investment here; and this agent invested these bills in the bonds of the county of Bartow sued on now. We can see nothing illegal or contravening the paragraph of the revised statutes of the United States in the purchase of these bonds by this plaintiff. The whole reason and spirit and policy of the act of congress of 1861, re-enacted and codified as cited, was to prevent northern goods from coming south so as to add to the material resources of the Confederacy, and to prohibit southern produce from going north to pay for these goods; but it cannot be construed to apply to a case where a northern man, resident here, returned home, and leaving local funds here, which would have been wholly useless and would have perished north, directed their investment in something, and his agent put them in these charitable bonds. The county ought to pay the bonds.

Judgment affirmed.

Rhodes *et al.*, executors, *vs.* Neal.

A contract to pay one for the use of his influence in securing the consent of a prosecutor to dismiss certain prosecutions for felonies is contrary to public policy; and a declaration which seeks to recover for services so rendered is demurrable.

Contracts. Actions. Before Judge Clark. City Court of Atlanta. December Term, 1879.

This cause was an action of *assumpsit*, begun in the city court of Atlanta, by the plaintiffs, as executors of Foster Blodgett, against John Neal, Jr., for the recovery of $750.00 for services rendered to the defendant by plaintiffs' testator during the months of August, September and October, 1877, in securing the consent of the authorities of the Nashville, Chattanooga and St. Louis Railway Company, to the dismissal of certain criminal prosecutions pending in the circuit court of Hamilton county, Tennessee, against Wesley W. Neal.

The declaration was afterwards amended, and it was alleged that on the 29th of September, 1877, W. W. Neal, a brother of defendant, was under indictment in the circuit court of Hamilton county, Tennessee, for the offenses of larceny and fraudulent breach of trust, committed by the said W. W. Neal, while agent of the Nashville, Chattanooga and St. Louis Railway Company, and in imminent danger of conviction for said crimes. On the day aforesaid the said W. W. Neal, having given bond for his appearance to answer said indictments, the defendant, John Neal, Jr., had deposited with the sureties upon the said appearance bond, to secure them from loss, the sum of $2,000 00, and having appointed Foster Blodgett his attorney in fact in this behalf, agreed with the said Foster Blodgett that if the said Blodgett would use his influence with the authorities of the said railway company to secure the dismissal of the said prosecutions against the said W. W. Neal, so much of

the $2,000.00 as should be left after paying attorney's fees and costs, should be the property of said Blodgett, in the event the prosecutions were dismissed. It was further alleged that Blodgett, in pursuance of this agreement, prevailed upon the authorities of the railway company to consent to the dismissal of said prosecutions, and they were dismissed, and of the $2,000.00 so deposited there remained $750.00 after paying attorneys' fees and costs, which sum of $750.00 the defendant, on November 12th, 1877, fraudulently took possession of and converted to his own use, and for which sum of $750.00 judgment was prayed.

To the declaration as amended, the defendant demurred upon the ground that the cause of action therein set out was a contract tending to obstruct the course of public justice in the state of Tennessee, and being such a contract, was contrary to public policy, illegal and void.

The court sustained the demurrer, and dismissed the case, and that judgment of the court is the error assigned.

CONLEY & SHUMATE, for plaintiffs in error.

A. B. CULBERSON; E. N. BROYLES, for defendant.

CRAWFORD, Justice.

The plaintiffs in error sued the defendant in error to recover $750.00 which they alleged was due to their testator for services rendered in using his influence with the authorities of the Nashville and Chattanooga Railroad Company, to dismiss certain criminal prosecutions pending against Wesley Neal, who was under indictment for larceny and fraudulent breach of trust, and in imminent danger of conviction for said crimes. It was further alleged that the prosecutions were dismissed and that the said sum of $750.00 remained of $2,000.00 which had been deposited as security for the appearance of the said Wesley, and which was to belong to plaintiffs' testator, after the payment of the attorneys' fees and costs, but which the said John Neal,

Jr., fraudulently took possession of and converted to his own use.

This case was dismissed on demurrer in the court below, and that ruling is the error complained of here. The cause of action as set out in this declaration evidently shows a contract tending to obstruct the course of public justice, and being such a contract, was contrary to public policy, and therefore illegal and void. It is alleged that the party was under indictment and in imminent danger of being convicted for larceny and a fraudulent breach of trust, and being in that condition, the testator was to use his influence with the prosecutors to have the same dismissed, and in which he was successful.

If that is not a contract for the purpose of obstructing the due course of public justice in its effort to punish crime, one could scarcely be found. It is sufficient to defeat such a contract if there be a *bona fide* charge against one for felony. It is a high requirement of public policy that felonies shall be punished, and the law frowns upon any attempt to suppress investigation. 39 *Ga.*, 89; 3 *Kelly*, 176.

"Public morals, public justice and the well established principles of all judicial tribunals alike, forbid the interposition of courts of justice to lend their aid to the enforcement of such contracts." 4 Peters, 184.

Judgment affirmed.

Prater *vs.* Cox *et al.*

1. Actual notice to an agent of any matter connected with his agency is also actual notice to his principal, and is not merely constructive notice to the latter.
2. Section 3583 of the Code, which provides that "when any person has *bona fide* and for a valuable consideration purchased" realty, and has been in possession four years, the same shall be discharged from the lien of any judgment against his vendor, does not protect one who purchases with notice that the property is subject to the lien of a judgment at the time of the purchase.

Crawford, Justice, concurred.

[illegible], Justice, dissented.

Title. Fraud. Prescription. Statute of limitations. Principal and agent. Notice. Before Judge McCutchen. Whitfield Superior Court. October Term, 1879.

Reported in the decision.

Shumate & Williamson, for plaintiff in error.

Johnson & McCamy, for defendants.

Warner, Chief Justice.

This was an action of ejectment brought by the plaintiff against the defendants to recover the possession of a tract of land therein described. On the trial of the case the jury, under the charge of the court, found a verdict in favor of the defendants. A motion was made for a new trial on various grounds, one of which was, that the verdict was contrary to the charge of the court and therefore contrary to law, which was overruled and the plaintiff excepted.

It appears from the evidence in the record, that Prater, the plaintiff's lessor, purchased the land in dispute at sheriff's sale under an execution in his own favor against Hiram Cox, Varnell, and Kincannon, which issued on a judgment dated 17th December, 1868. The defendant, J. P. Cox, purchased the land in dispute from Varnell, one of the defendants in *fi. fa.*, through his father Hiram Cox, another defendant in *fi. fa.*, who acted as his agent in making the purchase of the land in April, 1873, went into the possession thereof, and claimed to have been in possession of the land for four years as a *bona fide* purchaser for a valuable consideration, as provided by the 3583rd section of the Code, prior to the levy of Prater's *fi. fa.* thereon. The court charged the jury to the effect that if they found from the evidence that Hiram Cox purchased the land as agent for his son J. P. Cox, and he had notice of the existence of the judgment at the time of the purchase, that would be notice to his principal J. P. Cox. On the hear-

ing of the motion for a new trial, the court admitted that the finding of the jury was contrary to its charge as hereinbefore stated, but upon reflection had come to the conclusion that its charge was erroneous; that notice to the agent was only *constructive* notice to his principal, whereas the law required that he should have had *actual* notice of the existence of the judgment, and refused the new trial for that reason, and the question is whether the charge was right or erroneous.

The 2200th section of the Code declares that notice to the agent of any matter connected with his agency is notice to the principal. This we understand to mean *actual* notice; that is to say, if the agent had actual notice the principal had actual notice. See 55 *Ga.*, 438. There can be no doubt from the evidence in the record that Hiram Cox, who purchased the land as agent for his son, J. P. Cox, had notice of the judgment lien upon it at the time of the purchase.

But it is said that notice to the agent of J. P. Cox was not sufficient to affect his conscience with moral fraud, as heretofore ruled by this court in relation to a prescriptive title to land, under the provisions of the 2683rd section of the Code. That section requires that the adverse possession of land, in order to give a good prescriptive title, must be under written evidence of title for seven years. But if such written title be forged or fraudulent, and notice thereof be brought home to the claimant before or at the time of the commencement of his possession, no prescription can be based thereon. It is under this section of the Code that this court has held that notice of the forged or fraudulent written title must be such as to affect the conscience of the claimant. Under the 3583d section all the purchaser has to show is that he is a *bona fide* purchaser of the land for a valuable consideration and has been in possession of it for four years, then he will hold it discharged from the lien of any judgment against the person from whom he purchased. The statute does not require that the purchaser

shall be in possession of the land for four years under *written evidence of title* as in case of a prescriptive title for seven years. When the purchaser has notice of the lien of a judgment at the time of his purchase, the presumption is that he purchases the land subject to that lien and assumes the risk. There is not necessarily any fraud in his purchase; all that can be said is that the statute will not run in his favor when he purchased with notice of the judgment, and why should it? Perhaps he paid that much less for the land, but whether he did or not that was his own lookout. In order to be protected under the provisions of §3583 of the Code the purchaser must purchase the land without notice of the judgment at the time of his purchase, have paid a valuable consideration for it, and been in possession thereof for four years. 56 *Ga.*, 617. In the view we have taken of this case from the evidence disclosed in the record, the charge of the court to the jury was right, and it erred in overruling the plaintiff's motion for a new trial.

Let the judgment of the court below be reversed.

CRAWFORD, Justice, concurring.

The question dividing the chief justice and the senior associate justice in this case is, as to the legal effect which the notice of an unsatisfied judgment has upon the purchaser of property under section 3583 of the Code. One holds that the notice of the judgment lien prevents him from being such a *bona fide* purchaser as to protect him against the judgment after four years possession; the other, that he may have notice and still purchase *bona fide* and claim the protection of his title under a possession of four years.

Innocent purchasers of property for a valuable consideration are always a favored class of suitors, and their rights are protected both in courts of law and courts of equity. They are protected even where their vendors' title was obtained by fraud, and so too if they buy without notice of

an equity. Relief against wrong and fraud though granted as between original parties and their privies, none is granted as against *bona fide* purchasers.

Can there be a case found where a man with notice buys property subject to a judgment who ever expected or intended that it should be sold to pay that judgment? It is well known to him that it is liable to seizure and sale, unless his vendor pay off the *fi. fa.*, or that there is other and sufficient property to pay it, or that the creditor will not proceed against it until the bar of the statute attaches. Suppose his vendor deceive him, or that he was mistaken as to the amount of property subject, and that the creditor seeks to enforce his lien on the transferred property, would it be a just reply to say that the purchase was *bona fide* and for a valuable consideration and therefore not liable? Or, although he knew that it was liable, and that the amount of property in the defendant's hands would be that much less with which to pay off the *fi. fa.*, still it was not bought in bad faith to the judgment creditor, as it was bought fairly and honestly from the judgment debtor. The lessening of a debtor's assets liable to execution by buying it, with notice of the lien, is not such an act of good faith as should protect the purchaser of those assets against the execution, even though four years elapsed before the levy. For these reasons I concur in the judgment of the court.

JACKSON, Justice, dissenting.

For the reasons given by the majority of this court in *Sanders vs. McAffee et al.*, 42 *Ga.*, 250, and also in my own dissenting views in *Phillips vs. Dobbins*, 56 *Ga.*, 617, I dissent from the judgment of reversal and hold that one who pays full value for land may be a *bona fide* purchaser thereof, so as to free the land he so pays full value for from the lien of a judgment against his grantor after four years possession thereof, though he, by his agent or otherwise, had full knowledge of the judgment. The

bona fides with possession for four years. The mere knowledge of the judgment cannot be *conclusive* of bad faith. That circumstance may be rebutted by many things which would show perfect good faith, but I leave the argument where, in *Phillips vs. Dobbins*, I rested it.

JONES *et al. vs.* SMITH, governor.

Justices Jackson and Crawford being disqualified on account of relationship to parties interested, Judge Pottle, of the Northern Circuit, and Judge Lawson, of the Ocmulgee, were designated by the governor to preside in their places.

1. Where J. and his securities entered into a bond with the governor, conditioned for the faithful performance of the duties of his office as treasurer of the state, during the continuance of his office—that term being four years; and parol evidence was offered at the trial, going to show that the bond was accepted by the governor as a temporary bond, to be void when a new bond, with new securities, was executed, and when it appeared that the bond was absolute and unconditional on its face:

Held, that the court did right in repelling that parol testimony, there being no pretense that that testimony showed mistake or fraud on the part of the obligee.

2. An executive warrant, issued by the governor to the treasurer as a voucher for redeemed bonds of the state, is open to inquiry by the courts, as to the good faith of the treasurer in procuring such warrant, when it is alleged in the pleadings that the same was procured by the fraud of the treasurer. Especially is this so when the *state* sets up fraud upon its agent, the governor. by the treasurer.
3. An order of the presiding judge in appointing an auditor to investigate accounts of the treasurer in this case, was a proper order.
4. Where an auditor is appointed to investigate accounts, he does not exceed his powers in passing upon the legality of vouchers.
5. Where exceptions are filed to an auditor's report, it is the duty of the presiding judge to submit the exceptions of fact to the jury *seriatim*, according to section 4203 of the Revised Code; but if in the opinion of the judge, several of these exceptions contain the same subject matter, he may consolidate them into one exception, in order to simplify the issues to the jury. The condensation in this case was not error, especially as it seems that no objection was made at the time; and the jury, in one of their special verdicts, did consider them separately.

6. When a case has been submitted to a jury, and after argument to them has commenced, it is not error for the presiding judge to allow counsel to re open the case for the introduction of testimony, when the attorney states in his place, that he thought that that testimony was already before the jury, and if not, it was left out by inadvertence.
7. Where a jury, by the consent of parties, is allowed to disperse after making their verdict, and returns into court, it was not error in the court to allow an alteration made, which alteration but expressed the legal meaning of the finding. Especially was it not error in the presiding judge in this case, where it appears that the alteration was beneficial to the plaintiffs in error.
8. There were no errors of the court in its rulings on the auditor's report, and no material errors of which the defendants can complain, in the charge to the jury, as excepted to.
9. Where a case has been fairly submitted to a jury on the facts, and though the evidence was conflicting, this court will not disturb the verdict when the presiding judge was satisfied therewith. In this case the parties had the benefit of having the facts passed upon both by an auditor and the jury. It would require a very strong case to disturb that finding. The verdict of the jury in this case might have been either way, but it is not the province of this court to decide on which side was the preponderance.

Bond. Contracts. Evidence. Governor. Constitutional law. Auditor. Practice in the Superior Court. New trial. Before Judge Hillyer. Fulton Superior Court. October Term, 1879.

The facts material to the questions passed upon by the court are stated in the opinion.

P. L. Mynatt; B. H. Hill; John L. Hopkins; Hoke Smith; J. L. Brown, for plaintiffs in error, cited on effect of executive warrants obtained by Jones, 56 *Ga.*, 674; 59 *Ib.*, 364; 1 Miss., 442; 7 *Ga.*, 673; 8 *Ib.*,361; 17 *Ib.*, 29; 20 *Ib.*, 795; 12 Pet., 524; 14 *Ib.*, 497; 17 How, 225, 284; 6 *Ib.*, 92. If executive warrant may be set aside for fraud, facts must be alleged, 44 *Ga.*, 38; 58 *Ib.*, 144. On alteration of verdict, Code, §3492; 55 *Ga.*, 667.

R. N. Ely, attorney-general; McCay & Trippe, for defendant, cited on effect of [illegible] rants 56 *Ga.*, 674.

State not bound by laches of agents, 20 *Ib.*, 470; 2 *Ib.*, 150; 49 Mo., 243; 9 Wheat., 720; 11 *Ib.*, 184; Brandt on Suretyship and G., §474; 2 Hill, 175; 8 Paige, 541. On power of auditor and effect of report, 59 *Ga.*, 50; 56 *Ib.*, 264; 57 *Ib.*, 142; *Cook vs. Houston County*, February term, 1879. Parol evidence inadmissible to show that bond was not the regular official bond which it purported to be, 8 *Ga.*, 534; 13 *Ib.*, 192; 43 *Ib.*, 423; 57 *Ib.*, 319; 55 *Ib.*, 403; 53 *Ib.*, 18, 218, 575; 54 *Ib.*, 290, 586; 52 *Ib.*, 131, 448; 4 *Ib.*, 106; 30 *Ib.*, 271; 44 *Ib.*, 662; 59 *Ib.*, 851, 562; 52 *Ib.*, 149; 54 *Ib.*, 289; 56 *Ib.*, 31; 9 *Ib.*, 585; 1 *Ib.*, 583; 5 Wend., 187; 1 John. Ch., 425; 8 Cow., 543; 11 Iredell, 145; 1 *Ib.*, 303; 27 Grat., 614; 5 Ala., 65; 50 Maine, 36, 347; 1 Pet., 46; 3 How., 578; 11 *Ib.*, 162; 4 Wall., 185; 9 *Ib.*, 83.

Pottle, Judge.

This case was a suit on a bond of John Jones, made and executed on the 13th day of January, 1873, with John T. Grant and C. A. Nutting as securities, payable to James M. Smith, governor, conditioned for the faithful discharge of the duties of his office as treasurer of the state, to which office, as the bond recites, he had been elected on the 11th day of January, 1873, for four years from and after said day of election.

The declaration alleged that the treasurer had broken his obligation in many particulars. As some of these allegations have been disposed of upon the trial below, and are not here for review, it is only necessary to refer to those which are in the record for our examination.

First, it is charged that when Jones took possession of the treasury, on the 13th day of January, 1873, there were therein certain bonds of said state which had matured prior to that date, and had been redeemed, taken up and deposited in said treasury for safe keeping, as required by law—then followed a description of said bonds—which said Jones

subsequently falsely and fraudulantly pretended that he had paid off, with the interest on them, namely: twenty-one thousand and five hundred dollars principal, and one thousand and eighty dollars interest thereon, and that he presented them to the governor as vouchers for said payment, and had them covered by executive warrant, dated——day of———1874, and took credit for them in his accounts with said state.

Second, that John Jones falsely and fraudulently procured an executive warrant for another series of bonds, amounting to the sum of twenty-seven thousand five hundred dollars, which had been redeemed, and deposited in the treasury for safe keeping, and that he obtained a credit also for that amount fraudulently in his accounts with the treasury.

Third, that on the 30th day of November, 1874, he falsely and fraudulently represented to the governor, that he had paid off, with the money of the state, forty-three thousand two hundred and sixty dollars of gold coupons and fourteen hundred dollars of currency coupons, matured on the outstanding bonds of the state, and by that fraudulent means, had procured from the governor an executive warrant for said sums, and afterwards got credit for them.

These three items constitute the only issues here, as to the liability of Jones.

When the case was called for trial in the superior court, the securities, John T. Grant and C. A. Nutting, presented pleas with three counts. Those pleas are, substantially, that Jones was elected treasurer on the 11th day of January, 1873—that the governor was anxious that he should take charge of the treasury at once—that Jones was not prepared to give his official bond at once, because of the absence of his sureties. To meet that emergency, it was agreed that Jones should execute a temporary bond with sureties, to be held by the governor until he should make and deliver a permanent official bond, and then to become void and of no force—that, in pursuance of that agreement between the

governor and Jones, the bond sued on was made. It was made by Jones and the securities to be held by the governor until Jones should afterwards make and deliver a permanent bond, then to be void—that the bond sued on was delivered to the governor, in pursuance of that agreement, and accepted by him—that, afterwards, in pursuance of said agreement, and in satisfaction of the old bond, and in lieu thereof, and in obedience to law, on the 25th of January, 1873, Jones made his permanent official bond, signed by A. R. Jones, John A. Jones, Seaborn Jones, Batt Jones, J. M. Russell, J. D. Waddell and H. L. Benning, as sureties, which bond was tendered to and accepted by the governor on the 25th of November, 1873—that said last bond was placed of file in the executive office, and that suit is now pending on said bond against the securities. The pleas also insist that no breach of said bond sued on occurred, and if any official misconduct on the part of Jones took place, it was after the making of the second bond.

The presiding judge, by an order which appears in the record, referred the matters of account of said Jones to an auditor. The following is a copy of that order:

"Upon consideration it is ordered that James M. Pace, of the county of Newton, be and he is hereby appointed as auditor to investigate the accounts between the state and said John Jones, principal, during the time covered by said bond; that said auditor may *subpœna* witnesses, administer oaths, and hear testimony upon any disputed facts, always giving notice of his sittings to the defendants in said case or their solicitors; that all interrogatories and depositions in said case may be returned to the clerk and opened and handed to the auditor; that he report the result of his auditing of said accounts to this court by or during its next term, and either party to said cause shall have fifteen days after notice of filing said report to except thereto. July 1st, 1876."

The auditor made his report, to which many exceptions were filed. The exceptions of law were disposed of by the court, and those of fact submitted to the jury under the charge of the court. The jury found for the plaintiff the three items of liability charged in the declaration, aggregating $92,193.49.

A motion for a new trial was made on the grounds stated in the record, which motion the presiding judge overruled, and the principal, Jones, and his securities, Grant and Nutting, each excepted.

1. The assignments of error which relate to the rulings of the court as affecting the rights of the securities, Grant and Nutting, will be considered first in order. The record shows that all of the pleas of the securities were demurred to by their counsel, and that the demurrer was sustained as to one of them, but as it does not appear that this ruling was excepted to, this court will only consider that question made in the pleas, as it was raised on the introduction of testimony in support of the pleas.

In support of their pleas the securities offered themselves as witnesses, proposing to prove that Jones, the treasurer, applied to them to go on a temporary bond to be held by the governor for the performance of his duties until a permanent bond could be executed by John Jones, his relatives and friends, and that they went with that understanding to the executive office and signed and delivered this bond, and when they so signed and delivered it they so stated to the governor that it was for the temporary purpose, and was to become void when the permanent bond should be made, delivered and approved, and it was so accepted by the governor.

This testimony, when offered, was objected to by the plaintiff and the court sustained the objection.

The question is, was parol evidence admissible to show such an agreement made cotemporaneously with the bond as to the liability of the securities?

Parol evidence is inadmissible to add to, take from, or vary a written contract. Code, §2757.

There is no ambiguity in the lannage of the bond. It was absolute and unconditional on its face. It conformed precisely to the statute. It obligated the principal to discharge faithfully his duties during the term of his office, and that term specified in the bond was four

years. The proof offered went to show that the duties were to be performed only until a new bond could be made with new sureties, and when that was done, this bond was to be void. It did not propose to show fraud in any one in the demanding or acceptance of the bond. It was argued, and numerous cases were cited, to show that parol evidence was admissible to show the non-delivery of a contract; and that when a writing purporting to be signed, sealed, and delivered, was only delivered upon a condition, a condition, for example, that others were to become co-sureties, parol evidence is admissible to show the condition. The character of such proof goes to the extent, and no farther, of showing that there was not a complete execution of the instrument. It would have been admissible in this case to have shown that the bond was not delivered; but the proof offered goes beyond this; it admits the delivery of the bond, and seeks to engraft upon it a stipulation wholly inconsistent with it. The obligors say in the bond that it is to last for four years; that during *that time* Jones is to faithfully perform the duties of his office. They now propose to show by parol that that was not the undertaking; that the undertaking was that when a new bond was made, this should be void; that their liability was for a short time, and not for four years. There was no pretense that the parol stipulation was left out by mistake, but the only reliance was that the securities trusted to the parol promise as they did in the case of *Mansfield vs. Barber*, 59 *Ga.*, 351. In that case the security to a promissory note offered to prove a parol cotemperaneous agreement, that he was to remain surety for a short time. There being no allegation that it was left out of the writing by mistake on his part, or by the fraud of the other party, or that the parties intended to have inscribed the omitted matter, the evidence was rejected. In this case the parties did what they intended to do; they made the bond, and relied upon the parol agreement that its terms and duration should be different from the clearly expressed stipulations in the writing.

We therefore agree that there was no error in excluding the testimony. The courts have been strict in enforcing so wise a rule of law in its relation to all writings. We are not disposed to relax it, especially in a case like this, where the highest public interests demand that obligations to the state, when reduced to writing, should not be open to verbal explanations.

2. The next question which we are called on to consider is that raised by exceptions to the auditor's report. Those exceptions being that the auditor could not find against Jones $21.500, and other amounts of like character, it appearing by said report that those bonds are covered by executive warrants, and said warrants being conclusive as to the validity of all the vouchers upon which it is based, it is not in the power of the auditor, or of the courts, to overhaul the vouchers and determine the propriety of issuing said warrants, or to charge back to the treasurer any amount received by him upon said warrants.

This exception brings up the question of the right of one department of the government to revise the discretionary action of the other, to state it in the language of the counsel of the plaintiff in error.

We are at a loss to see how this action of the auditor, and the ruling of the court upon it, impinges upon the fundamental law, that the three departments of the government are to be kept distinct in their jurisdictions and functions. The gravamen of this whole case is, that one of the servants of the people has money in his possession which rightly belongs to them—that a large amount of its redeemed bonds and coupons had been put into the treasury for safe keeping after having been paid with their money—that *that* servant, in fraud of their rights, took these bonds and coupons to the governor, and fraudulently represented to him that he had paid them with his money.

If the facts alleged, and as found by the auditor, are true, the treasurer has in his possession vouchers which are false and fraudulent. The state itself, who is the real party, is

seeking to recover back these sums of money obtained upon false vouchers. Why cannot that be done? It is true that the issuance of the warrants is an executive act, but the governor himself, as the agent of the people, is seeking to reclaim lost money obtained by a fraud upon *him*, upon what principle of law is the state concluded from inquiring into the *bona fides* of this transaction? The state cannot do a more solemn act than to issue a grant, or the governor to pardon, and yet if a grant has been obtained by fraud it may be inquired into and declared void by the courts. A pardon, which annuls the judgments and sentences of courts, may itself be set aside for fraud. A commission to hold an office is a solemn act of the government, but the courts may inquire into the validity of elections and declare the commission void. So that we agree that the auditor and the court had a right to inquire into any alleged frauds going to show that the warrants obtained from the governor by the treasurer were obtained by fraudulent representations.

3, 4. When the order appointing an auditor was passed, it was a rightful exercise of power by the chancellor. The accounts were complicated, and it was a matter which could only be investigated by skilled persons.

5. It is complained that the presiding judge did not submit to the jury *seriatim* the exceptions of fact made and set forth in the record. It is undoubtedly the duty of the judge to do so, as is required by section 4203 of the Revised Code; but, after carefully inspecting the record and comparing the exceptions, we are of the opinion that the condensation of several of them into one was a simplification of the issues to the jury. When the order was passed condensing them it does not appear that any objections were made to it, and while we do not decide that the failure to do so at the time concludes them from urging the objection here, yet as no objection was made, and it appears to have been a proper exercise of discretion, and one beneficial to the defendants, we are unwilling to sustain this ground of error.

6. After the evidence had been closed, and one of the counsel for the plaintiff was addressing the jury, he proposed to put in evidence the contents of a box of coupons, which he stated in his place had been omitted by inadvertance, and that he supposed had been offered and admitted. The court did right to allow the case to be re-opened; such a practice has long existed in the courts, and justice required it to be done upon the showing made in this case.

7. After the jury had dispersed by the consent of the parties and returned into court, an alteration of the verdict was suggested and allowed to be made by the court. We are clear that this alteration but expressed more clearly the meaning of the jury, and one which was of benefit to the defendants.

8. We find no errors in the rulings of the court on the exceptions to the auditor's report, and no material errors in the charge to the jury.

9. The last ground in the motion for new trial is that the verdict of the jury was contrary to the evidence. As before said, the verdict was only for the plaintiff the amount of the redeemed bonds of twenty-one thousand five hundred dollars—then of twenty-seven thousand five hundred dollars, and the gold coupons, amounting to about forty-four thousand dollars. It was conceded in the argument that the item of twenty-seven thousand five hundred dollars was not a proper charge by the treasurer against the state; but he claims that the jury did not make proper allowances to him in diminution of that item of indebtedness.

Upon the merits of the case we express no opinion. The jury had before them the testimony of Alton Angier and his father, and also the testimony of the officers of the Fourth National Bank of New York as to the shipment, payment and deposit of those bonds and coupons in the state treasury, with the testimony of Jones and others. They chose to believe that the bonds had been paid and returned to the state treasury, and that *these* bonds had been

charged up wrongfully by the treasurer against the state. In this they are supported by the auditor. With the correctness of the verdict we have nothing to do. It might be supported either way. Where a case has been fairly submitted to a jury, it will require a strong case to authorize this court to disturb the verdict upon the facts alone.

Judgment affirmed.

Willis *vs.* Meadors, executor.

1. The mere recital in a deed that the land conveyed had been set apart as a homestead, is not ground for its rejection as evidence of title. The sale, though private, may have been for some one of the purposes enumerated in the constitution of 1868 as authorizing a judicial sale thereof.
2. Complaint for land cannot be maintained where the proof shows title out of the plaintiff.
3. The abstract of title which, under the statutory form, takes the place of demises, may be amended as readily and as often as under the common law form a new demise might have been laid. But it is not competent to amend such abstract by adding a new party plaintiff, or by setting up a perfect equity in plaintiff's own grantee.
4. Upon a motion for new trial, the whole record is before the court, and if from that it appears that the plaintiff had no right to recover, independently of any errors committed on the trial, the verdict against him should not be vacated.

Homestead. Deeds. Evidence. Complaint for land. Ejectment. Amendment. New trial. Before Judge Speer. Newton Superior Court. September Term, 1879.

The abstract of title attached to the declaration in this case was as follows:

"Mortgage from Harry Camp to Adams, Hopkins & Co., dated 10th July, 1848, and registered 7th October, 1848, covering the land sued for.

"Mortgage *fi. fa.* in favor of Lambeth Hopkins and Francis T. Willis, survivors, etc., of Adams, Hopkins &

Co., *vs.* Harry Camp. Judgment of foreclosure 31st March, 1854, *fi. fa.* issued 11th April, 1854, levied 20th June, 1854, by Lewis Zachry, depnty sheriff, on the land sued for, sold first Tuesday in August, 1854, to Francis T Willis."

The defendant, Skinner, who died pending the suit, held under a bond for titles from Thomas Camp. Thomas Camp held under a deed from Harry Camp and his wife The deed and the bond recited that the property covered thereby had been set apart as a homestead to Harry Camp as the head of a family. Upon this ground they were objected to when offered in evidence. The objection was overruled.

The evidence showed clearly that the title to the property sued for was not in the plaintiff at the time of the commencement of the suit, if it ever had been before; that whatever interest he had ever had therein was transferred by him before suit; that whilst he had no knowledge of the suit having been commenced in his name, and had not authorized it, yet upon being informed thereof he did not object as he understood it was proceeding for the benefit of the party to whom he had transferred whatever title he had.

The jury found for the defendant. The plaintiff moved for a new trial because of the admission of the bond for title and deed as above stated, and upon numerous other grounds not deemed material here.

The point as to the absence of title in the plaintiff seems not to have been made upon the trial and it was insisted that it could not be considered as a ground for refusing a new trial.

The motion was overruled and the plaintiff excepted.

For the remaining facts, see the opinion.

Clark & Pace, for plaintiff in error.

J. J. Floyd, for defendant.

CRAWFORD, Justice.

In August, 1854, the lands involved in this litigation were sold under a mortgage *fi. fa.* in favor of *Adams, Hopkins & Co., vs. Harry Camp*, and bought by Willis, the plaintiff in error and a member of the firm, at $800.00; which sum was credited on the *fi. fa.*, and an entry thereof made by the sheriff on his docket. No further action was taken, or had either by the sheriff, the defendant in *fi. fa.*, or the purchaser. The defendant in *fi. fa.* continued in the uninterrupted possession of the land from the sale in August, 1854, to November 28th, 1870, and then sold it to Thomas Camp, who sold it to John Skinner, December 17th next thereafter.

On the 24th day of February, 1874, this suit was brought in the statutory form to recover the land from Skinner by Willis, the plaintiff in error. The defendant pleaded the general issue and the statute of limitations, and the issues thus made were found by the jury in favor of the defendant, whereupon the plaintiff moved for a new trial, which was refused and he excepted.

The legal questions which arise on this motion and which must control the case are:

1. Whether a deed which in its recitals shows that the land conveyed had been set apart as a homestead, should be rejected as evidence conveying title? There are cases in which such a deed should be rejected, as for instance, one showing on its face that the sale of the homestead was made upon a consideration other than those specifically enumerated in the constitution. But the mere recital that the land conveyed had been so set apart, would not *ipso facto* authorize its rejection. It is provided in that organic law which has been invoked against this construction, that a homestead may be sold at a judicial sale to enforce a judgment, decree or execution against it for purchase money, labor done or material furnished therefor, money borrowed and expended in their improvement, or the removal of incumbrances thereon.

If therefore a claim resting upon any of these constitutional exceptions may be enforced *by law*, why may not the parties themselves provide for the discharge of such liabilities without waiting to be forced by a judgment or decree to comply therewith? Whatever the law will *compel* a man to do, that he may and should do *without compulsion*. The ruling which we make in this case is not in conflict with that made in *Roberts et ux. vs. Trammel*, 55 *Ga.*, 383, for there, upon the very face of the deed itself, it was recited that the consideration was not only without constitutional warrant, but utterly subversive of all the rights intended to be secured thereby. The mere recital therefore of the fact that the land had been set apart as a homestead would not, *per se*, authorize the court to repel it as evidence.

2–3. Can the action of complaint for land be maintained where the proof shows the title out of the plaintiff? and if not, may an amendment thereto be made by adding the name of the true owner?

We think that it is hardly needful to say that a plaintiff in ejectment must recover upon the strength of his own title, as it has been so long and so well settled by all the authorities upon the subject. Under the act of 1847, when adopted as to the form of the suit, the plaintiff comes into court asserting title in himself, and if his abstract of title is supported by proof that he has it from *any of his grantors* it will be sufficient, but if it is shown that he has parted with his title his standing in court is gone.

Where the common law form of ejectment is adopted, the plaintiff, John Doe, may lay as many demises as he pleases, and if he show title under any one of them he can recover; but where title is shown out of all his lessors he too must fail. He may use the names of any of his lessors without their consent to maintain his action and by bringing his title into them he can recover, and he may add, by way of amendment, new demises whenever it is necessary to maintain his suit.

The statutory form substitutes the abstract of title and

dispenses with demises, and the plaintiff may amend his abstract as easily and as often as under the common law form a new demise might be laid, and thus invoke the title of any of his grantors to sustain his own. But to allow an abstract to be amended by adding the title or setting up a perfect equity in *plaintiff's own grantee* would be violative of both law and precedent.

4. It was insisted on the argument before us, that upon the trial of this case in the court below, that there was no objection made by the defendant to the want of title in the plaintiff as a ground for a verdict in his favor, and that the same was not considered until the hearing of the motion for the new trial when the judge refused the same, because under the law and the evidence he could not recover, as he had shown that he had no title to the premises sued for at the time the action was brought.

The ground of error complained of is, that this objection was not made at the proper time, and because it was ruled upon when there was no opportunity to amend.

This would be so if the whole record were not before the judge on the motion for a new trial, but as it is before him, if it should appear thereby that under the law and the evidence the plaintiff had no right to recover, independently of any errors committed on the trial, it would be his duty to refuse it. Nor could the plaintiff have amended this suit by adding a new party at any stage of the cause, because it would have been a new plaintiff and a new cause of action. In the case of *Neal vs. Robertson*, 18 *Ga.*, 399, it was held that "an amendment to an action for land brought under and by virtue of the act of 1847, which amendment proposes to insert other plaintiffs, viz: the heirs of the grantee, is not admissible." The same is reaffirmed in 20 *Ga.*, 659, 29 *Ib.*, 320 and in the 52d *Ib.*, 539.

The judgment of the court for these reasons must be affirmed.

Simmons *vs.* Camp.

1. The decision of the supreme court in this case at the August term, 1878, is reviewed and affirmed.
2. Where one who is liable on the face of an instrument as a surety, seeks to limit his liability as against a co-security who has paid off the *fi. fa.* founded thereon and is seeking contribution, by reason of an understanding or agreement that he should only be liable as last indorser, it must appear that such limitation was known to the co-security and agreed to or acquiesced in by him.
3. The verdict is supported by the evidence.

Principal and surety. Negotiable instruments. Contracts. New trial. Before Judge Erwin. Gwinnett Superior Court September Term, 1879.

The report in the decision, taken in connection with that when the case was here before (*Camp vs. Simmons*, 62d *Ga.*, 73,) contains all the material facts. It is only necessary to add that the court refused to charge the following request of defendant's counsel, among others: * * "If they (the jury) are satisfied from the evidence that one of the indorsers refused to be bound only as last indorser, and there being no evidence that any other agreement was made, or any other understanding entertained by any of them prior to the judgment in favor of Malthie, the legal presumption of intention referred to by the supreme court is removed, and the intention of the parties as found from the evidence should be enforced."

Winn & Simmons, for plaintiff in error.

Clark & Pace; N. L. Hutchins, for defendant.

Warner, Chief Justice.

This case came on for trial in the court below upon an issue formed on an affidavit of illegality to an execution levied on the defendant's property. On the trial of that

issue the jury found a verdict in favor of the plaintiff. The defendant made a motion for a new trial on the several grounds therein set forth, which was overruled and the defendant excepted. It appears from the record that on the 22d of January, 1862, Steadman, as the agent of the Gwinnett Manufacturing Company, executed the following draft: "At sight pay to the order of William Maltbie two thousand five hundred dollars, for cash, at seven per cent," which was addressed to N. P. Hotchkiss, treasurer, and accepted by him on the 22d January, 1862. This paper was indorsed on the back thereof by N. P. Hotchkiss, Enoch Steadman, Merritt Camp, and James P. Simmons, in the order in which their names are here stated, but was not indorsed by Maltbie nor negotiated by him, he having loaned the money to the company and required personal security therefor. Suit was instituted on said draft by the executors of Maltbie against the Gwinnett Manufacturing Company as principal, Hotchkiss, Steadman, Camp and Simmons, as indorsers. At the March term of the court, 1869, the defendants (except Hotchkiss, who had gone into bankruptcy) confessed judgment to the plaintiffs for the sum of $2,500.00, and judgment was entered thereon against the Gwinnett Manufacturing Company as principal, and Steadman, Camp and Simmons, in the order named, as indorsers, and execution issued thereon against the defendants in the order as specified in the judgment. Camp paid off the *fi. fa.*, principal and interest, after it had been levied on his land, and proved the same in bankruptcy against the estate of Steadman for the full amount thereof, but the register only allowed one-third of the amount $1,092.67. Camp then levied the *fi. fa.* on the property of Simmons to compel him to pay his *pro rata* share of the execution as his co-security, the Gwinnett Manufacturing Company being insolvent.

This is the second time this case has been before this court. When it was here at a former term and decided, but two of the judges presided, and at the request of the

plaintiff in error he was allowed on the present argument, as a matter of favor but not as a matter of right, to review the decision made in this same case at the former term, which decision was, that Simmons, by his indorsement of the paper as set forth in the record, was liable thereon as surety, and was also liable to his co-surety to contribute his *pro rata* share towards the payment of the debt under the statutory laws of this state. After a careful review of the former decision of the court in this case in the light of the reviewing argument, this court is unanimously of the opinion that the former decision of the court was a correct and sound exposition of the law as applicable to the facts of the case, and do now reaffirm it.

2. The only remaining question in the case is, whether there was any special agreement between Simmons and Camp, his co-surety, at the time Simmons signed the paper, that he was only to be bound as the last indorser so as to take it out of the general rule as to his legal liability as surety, and did the court properly submit that question to the jury in its charge? The court charged in relation to this point in the case, "that the jury, after considering all the facts and circumstances in evidence, will determine for themselves whether it is shown that, at the time of the signing or writing their names, there was an understanding and agreement known to Camp and assented to or acquiesced in by him by silence or expressly, that Simmons should be liable only as last indorser." In view of the evidence in the record there was no error in the charge of the court, nor in refusing to charge as requested.

3. It is the unanimous judgment of this court, after a most laborious examination of this case, that the verdict was right under the evidence and the law applicable thereto, and could not well have been otherwise, inasmuch as the defendant was bound according to the legal effect of his signature upon the paper as to the other parties thereto (in the absence of any special contract or agreement with them to the contrary at the time of signing it) whatever may

have been his own private understanding of his own liability when he put his name on the paper. The private understanding of the defendant as to his liability when he signed the paper, cannot override, alter, or change the law as to the rights of the other parties to it without their agreement and consent, and especially as to a co-surety.

Let the judgment of the court below be affirmed.

MILES & CO. *et al. vs.* PEABODY, administrator.

1. Where questions of advancements to heirs at law of a deceased, and the amount due to each, and the claims of the creditors of the estate and one of the heirs, by attachment and otherwise, and their priorities, all had to be determined before an administrator could move safely in disposing of the estate, a bill by him against the heirs and creditors for direction and distribution was not without equity.
2. A claim by one not a lawyer or counsel for an administratrix, for clerical assistance to her in making out her returns, is not to be allowed out of the estate of the deceased. The law contemplates that such duties as ordinarily devolve on the administratrix herself will be performed by her; if she needs assistance, she should pay for it out of her perquisites. Especially is such claim not to be allowed when made by one as heir at law of the person rendering such assistance, and not as his administrator.
3. While generally a life tenant should provide means during her life for her own burial, and the remainder would not be technically chargeable with the expenses thereof, yet where a husband left by will a life estate to his wife, with remainder over, and the reasonable construction of the legacy, from its liberal provisions for her, would indicate that the husband intended that she should live comfortably and be buried decently, expenses necessary therefor will be allowed out of the estate as superior to the claims of remainder-men or their creditors.
4. Costs due the ordinary in the administration of the estate are a proper charge thereon, to be paid before distribution among the legatees, or before the claims of their creditors can take the property.
5. Where one of the children of a decedent furnished a wagon to the administratrix, who was his mother, for the use of the estate, and it was so used, an heir who assented to such an arrangement, would be estopped from objecting to the payment of the debt so contracted, and his creditors seeking to subject his distributive share of the

estate would only be subrogated to his rights, and would likewise be estopped.

6. One creditor of an heir of a decedent took out letters of administration and sought to secure payment of the indebtedness, which was in the form of a judgment from the state of Alabama. Other creditors levied attachments, by garnishments, upon the undistributed share of the common debtor in the hands of the administrator. He filed a bill for direction, etc.:

Held, that there was no error in ordering the claims to be paid *pro rata*, there not being enough to pay all. Interference with the regular course of administration will not be encouraged, if allowed at all, by giving preference to creditors who attach the share of a distributee in the hands of the administator before the administration has been completed.

Equity. Administrators and executors. Estates. Wills. Husband and wife. Contracts. Before Judge CRAWFORD. Muscogee Superior Court. May Term, 1879.

John R. Dawson died testate in 1859. His will provided, among other things, that certain described property should be kept together, except so far as was necessary to divide it for the purposes named; that his wife and children should be amply and liberally supported out of the proceeds and profits thereof, and the children educated; that as each child should become of age or marry, the executor should give him or her such portion of the estate as he might deem proper, approximating the distributive share of such child, but reserving a final settlement until the youngest child should become of age or marry; that in making such advancements the executor should reserve a proper and liberal support for the wife during her natural life, and, should she re-marry, she should have a child's part.

The brother of testator was appointed his executor. Testator left a widow, Jane A. Dawson, and five children. The executor resigned, and the widow was appointed administratrix with the will annexed. Two of the children died, one leaving minor heirs, the other childless. Various advancements were made to the children, and at the opening of this litigation nothing seems to have been

due to any of them except two, Mrs. Gray and John F. Dawson. The administratrix died, and McGough was appointed administrator *de bonis non*. The land of the deceased having been sold, and the money being ready for final distribution, the administrator filed this bill for direction, etc. The heirs, certain creditors of the estate, and creditors of John F. Dawson were made parties.

Those claiming as creditors of the estate, to be paid before distribution, were as follows:

(1.) Mary Johnson, as heir at law of her deceased father, claimed that $50.00 should be paid to her, which was due to her father for services rendered the administratrix in making out her returns.

(2.) B. F. Coleman claimed $30.00 for walling up a vault in which the widow of testator was buried, she having employed him to do such work before her death.

(3.) The ordinary claimed $30.00 for costs due him in connection with the administration of the estate.

(4.) Henry R. Dawson, one of testator's children, to whom advancements had been made covering about all of his share, claimed that the administratrix had agreed with him that if he would let her have a wagon and pair of mules for the use of estate he should share in the final distribution equally with the others, they agreeing thereto; that the wagon and mules had been turned over to her, and used for the benefit of the estate.

[On the trial the evidence failed to show an agreement by the other distributees to have Henry R. share with them, but did show knowledge by them of the use of the wagon and mules furnished by him to the estate, and acquiescence therein. Also, that in allowing advancements etc. returned by the administratrix, the ordinary had held the value of the property to be a valid claim, for which Henry R. should receive credit in the final settlement. Their value was proved on this trial to be $350.00].

(5). Thornton & Grimes had a claim for attorneys' fees, which was not contested.

When the question of payment of these claims should be determined, no further contest was made in regard to the share of Mrs. Gray. For the share of John F. Dawson, three of his creditors were contesting, each claiming priority of lien on the fund:

1. McGough & Co., of which firm the administrator *de bonis non* was a member, claimed by virtue of a judgment rendered in Alabama on a promissory note.

2, 3. Miles & Co. and Fraser & Co. claimed by virtue of attachments against John F. Dawson (he being a non-resident) which had been levied by garnishments served on the administrator.

The court rejected the claim of Mary Johnson, and allowed the claims of Coleman, the ordinary, Henry R. Dawson and Thornton & Grimes. The distributive share of John F. Dawson not then being sufficient to pay off the other claims, the court ordered it to be distributed to them *pro rata*. Miles & Co. and Mary Johnson, excepted.

J. T. Norman; J. M. Russell; Thomas & Coleman, for plaintiffs in error.

Peabody & Brannon; J. F. Pou; Thornton & Grimes, for defendant.

Jackson, Justice.

McGough, as administrator *de bonis non* with the will annexed on the estate of John R. Dawson, brought a bill for direction and distribution against the heirs and creditors of the estate of decedent, and the creditors of one of the heirs, John F. Dawson, who had some of them served process of attachment by garnishing the administrator, John F. Dawson being a non-resident of the state of Georgia. The entire case, fact and law, was submitted to the chancellor without a jury by consent, he made a full decree thereon, and to that decree Mary Johnson, as one of the creditors of the estate, and Miles & Co., as attaching credi-

tors of John F. Dawson, excepted, and their exceptions bring the case before us. McGough died pending the case here, and Peabody was made a party as administrator *de bonis non cum testamento annexo* in his stead.

1. Some objection was made to the equity of the bill, but a mere statement of the facts will show that the equity of it abounds. Questions of advancements among the heirs at law of the deceased and the amount due to each, and claims of creditors of the estate proper and their validity, had to be adjusted, and then claims of the attaching creditors and other creditors of one of the heirs and their priorities, had to be ascertained and adjudicated before the administrator could move safely in disposing of the estate.

So that, to use the figure of my late able associate, Judge Bleckley, the cause revolved around two centres—the one, John R. Dawson, deceased, whose heirs and creditors were contesting for the spoils which were heaped in that greater centre, and attracted them; and the other, John F. Dawson, an insolvent heir, about whose smaller pile his creditors hovered, drawn thither by a like attractive force. To divide either pile so as not to involve the administrator in danger and loss, the interposition of chancery might well be invoked, and to distribute both according to law made the task more difficult, and necessitated the aid of equity, on its general jurisdiction of all matters of trusts, as well as that which arises from a state of things which would multiply suits and waste both heaps in expenses and costs. The case therefore actually abounds in equity, and was rightfully held in court and adjudicated so as to settle the conflicting interests.

First let us see how the estate was divided among the creditors, and after they were paid, among the heirs, and next how the share of John F. Dawson was divided among his creditors.

2. The claim of Mary Johnson, who petitioned for the allowance of a debt due to her father from the estate of deceased, was rejected, and she excepted thereto. She

comes in as the heir at law of her father, who rendered service to the widow in making out returns for her as former administratrix, but the father of Miss Johnson was not of counsel for the administratrix, nor was he a lawyer; and if Miss Johnson had been before the court as administratrix on her father's estate, we hardly think she could have recovered for the mere administrative and clerical duty of making out returns. The administratrix should have paid these charges out of her perquisites or per centum of commissions, given her for this among other purposes. We do not think that section 2546 of our Code, which allowed the administratrix to employ labor or service for the benefit of the estate, was intended to apply to any duty which devolved ordinarily upon the administratrix herself. It is codified from the act of 1865–6, and has reference mainly to laborers on farms, and the like service—certainly not to that labor or service which the law devolved on the administrator himself. Besides, Mary Johnson had no standing in court, and a decree for her would not have barred a suit for the same matter if administration were taken out on her father's estate; nor is it claimed that this claim was ever assigned to her to prosecute under section 2536 of our Code by any regular administrator.

3. The court allowed a charge of thirty dollars for a vault in which to inter the remains of Mrs. Dawson, the life tenant of the property, the proceeds of which, sold after her death, were being distributed, and to this ruling Miles & Co. excepted. Whilst it is true that the life estate of Mrs. Dawson terminated the moment that the breath left her body, and then John F. Dawson, one of the children and heirs of her husband, had the right to enter in remainder; yet, as that husband by will had provided for her liberally, intending her to live as his widow should, and to pass to the death-bed decently, as the relict of a man of property, and as this money was spent or labor expended to give her decent interment, we cannot think that the will of the testator was violated when her burial expenses were

paid out of the proceeds of that property which until her death she had enjoyed. Whilst as a general rule the life tenant should unquestionably provide while living out of the rents, issues and profits for burial, we do not think that the rule should embrace a case where the entire distribution turns on the will of the testator, and that will should be construed, if possible, so as to carry into effect his intentions, and it is no strain to say that his intentions were not only that his widow should live comfortably, but be buried decently. It certainly would affront all ideas of civilization, to say nothing of Christianity, to allow heirs at law, who become entitled to the remainder when the mother dies, to debar her from decent burial, if she did not chance to lay up enough from her income from the life tenancy to insure it; and we do not believe that creditors of such heirs in such cases should be permitted to occupy any ground on which their debtor could not fairly and uprightly stand. Inherently, in such a case, burial of the body of the life tenant adheres to, and is part of, the legacy for life given by husband to wife.

4. The ordinary was entitled to his fees and they were properly awarded to him.

5. Payment to Henry R. Dawson was properly awarded for a wagon and team furnished the estate during the administration of the mother, and to which the heirs at law assented. John F. Dawson having assented thereto, he cannot now complain that this amount was allowed to his brother for a wagon and team actually worn out in the service of the common estate, and thus increasing its income and enhancing its value. The creditors of John F. Dawson must stand in his shoes and take that only which he could legally claim, unless there had been some charge of fraud or collusion between him and his brother, of which there is no pretense. As he is estopped from objecting to that debt which was incurred by his mother when administratrix *de bonis non* by his acquiescence, his creditors are also estopped in so far as they seek to collect their claim out of his undistributed share of his father's estate.

6. The only heirs entitled to a share, after paying creditors, are Mrs. Gray and John F. Dawson, the insolvent heir, whose inheritance is in controversy among his creditors; Mrs. Gray's share was awarded to her, about which there is no controversy; leaving the share of John F. Dawson to be disposed of. Three creditors contended for payment out of it; there was not enough to pay all, and the chancellor directed that each be paid *pro rata*; and to this decree Miles & Co. excepted.

There is no controversy that all are honest and *bona fide* creditors of John F. Dawson. McGough & Co., of which firm the late administrator was a member, claimed a debt on a note sued to judgment in Alabama, and the bill prayed that the administrator be allowed to retain enough to pay that debt; Frazer & Co. and Miles & Co. claimed by virtue of attachments levied by summons of garnishment on the administrator, McGough; and the questions to be decided by the chancellor were, who had priority, if anybody? and how should the fund be distributed? The chancellor ignored the Alabama judgment, as entitled to priority, properly perhaps, because it was not a judgment in this state, and had no lien here; it was conclusive evidence of debt, and that is as much as can well be claimed for it. However that may be, McGough & Co. do not except.

The chancellor ignored, also, the claim of Miles & Co., on their attachment, because it had not been prosecuted to judgment; the administrator had arrested it by this bill; and in equity it had no preference over McGough & Co., because that firm could not well garnishee one of themselves as administrator of the estate. The fact is that the administrator, or the firm of which he was a member, were as vigilant as Miles & Co.—more so, indeed, as one of them administered to secure their debt, before Miles & Co. served the garnishment upon the administrator, and thereby attached the fund. Shall one creditor, who holds the property of a common debtor, turn it over to pay another creditor of equal merit even, at his own loss? Will equity make him do so? We can hardly think so.

But it may be said that there was another attachment levied by Miles & Co. on the land, the proceeds of which are for distribution, or on the interest of John F. Dawson therein, and that was reduced to judgment and has priority. It is enough to reply that such attachment is not set up in the pleadings—neither in the bill nor the answer of Miles & Co. Even if it had been, its lien was not lost by the administrator's sale, if, indeed, it had any; because that sale only divests the lien of judgments not levied, and attachments would perhaps stand on the same footing if levied, and afterwards regularly reduced to judgment, 58 *Ga.*, 451. But apart from all this, the regular administration of an estate will not be interfered with, or interference therewith will not be encouraged, if allowed at all, by giving preference to attachments of the undistributed shares of the heirs at law—resting in *quasi* remainders, after all debts are paid. Even the process of garnishment is allowed to issue only with caution and on terms, Code, §§3555, 3556, and within twelve months from administration, not at all. 28 *Ga.*, 366.

Looking at the case in all its bearings, we cannot see how Miles & Co. have been hurt by the decree which divided the share of John F. Dawson *pro rata* among his creditors; and taking the decree altogether, we think that it accords with the equities of the case as made by the record.

Judgment affirmed.

Williams, administratrix, *vs.* Jeter.

1-2. The verdict was unsupported by the testimony.

3. Whilst as a general rule it is a correct principle that if one is employed for a stated term, and he does not comply with his contract, then, within a reasonable time after knowledge of the fact the employer must discharge him, or give him notice of his failure to comply, yet where, on account of the nature of the business or other circumstances, the employer was not present and it is probable knowledge of the non-compliance was not promptly had, it would be proper for the court to present that view to the jury, and its effect upon the respective rights and liabilities of the parties in connection with the rule as above stated.

New trial. Contract. Master and servant. Charge of Court. Before Judge Hood. Baker Superior Court. November Term, 1879.

Reported in the opinion.

D. A. Vason; Strozier & Smith, for plaintiff in error.

No appearance for defendant.

Crawford, Justice.

The defendant in error brought suit against *Henry C. and Mary D. Williams* as the administrator and administratrix of Reuben Williams, deceased, to recover $493.97, which he alleged was the balance due him of $1000.00 for his services in the 1873 as an overseer and superintendent of two plantations belonging to the said estate. Under the evidence and the charge of the court the jury gave him a verdict for the sum claimed. The plaintiff in error, her co-administrator having died, sought a new trial on account of the errors claimed to have been committed by the court and the jury, which was refused and she excepted. They were:

1. Because the jury found contrary to evidence and without evidence.

2. Because they found contrary to the charge of the court in this, "that they must be satisfied what the contract was, and that it was fully performed on the part of the plaintiff."

3. Because the court erred in the following charge: "As a general rule if a man employs another a year, or any other time and he does not comply with his contract, then, within a reasonable time after such knowledge, he must discharge him, or give him notice that he is not complying with his contract, and you are to consider whether they did this or not."

1. This plaintiff came into court claiming a verdict un-

der a contract set out in his complaint, and to entitle him to recover he must come also with sufficient proof to establish his demand. The testimony as shown by the record is, that he was by his contract to furnish the hands and superintend the two plantations for the year 1873 belonging to the estate. It was necessary therefore for him to show that he had complied, first by getting the requisite number of hands, and second, that he superintended the places according to his agreement. The testimony does not show that he did either, on the contrary it appears that a sufficient number of hands to cultivate the places were not furnished, and that his management was unskillful and damaging to the owners. We think therefore that the jury found contrary to the evidence and without evidence.

2. The second ground of the motion for a new trial is disposed of by the ruling on the first.

3. As there is to be a new trial in this case and the complaint of error alleged in this ground will be again before the court, we rule upon it. This charge of the judge was intended no doubt to cover cases where the employer and the employé are, or ought to be, in such communication as to put the former in possession of the information that the latter is not complying with his contract. This is not a parallel case to that of a clerk, or one who is in daily contact or under the observation of his employer. The duties of the plaintiff were to be performed upon the plantations of an estate, and whilst the representatives of that estate are bound to give attention to its interests and are charged with notice as to how it is managed, yet the evidence in this case discloses the fact that the administrator was in poor health and died during the year or shortly thereafter, and there is none as to the proximity, or the opportunity on the part of the administratrix to have been informed of the facts, or that it was not under the direct management of the administrator. We think that the charge assumes the presence and knowledge of the defendants that the plaintiff was in default; when really the circumstances of this particular

case might take it out of the general rule, and perhaps did, for there was evidence indicating such a state of things, and the defendant was clearly entitled to have had that view of her rights presented to the jury in connection with that obligation which the charge put upon her.

The judgment must therefore be reversed.

Walsh *et al.* vs. Colquitt, governor.

1. Where suit was brought on a bond in the county of the residence of the principal, against him and two securities residing in other counties, to which all parties appeared and pleaded, and the principal having died, his death was suggested, and an order taken allowing the case to proceed as to the securities, a plea to the jurisdiction filed by them was properly overruled.
2. The bond of a public printer was conditioned for his faithful performance of "all and singular the duties prescribed by the laws of Georgia appertaining to said office of state printer for and during the term for which he has been elected." At the time of its execution the law regulating his compensation was as follows: "If said printer shall legally and faithfully perform his duties, he shall be compensated as follows: He shall be paid twenty-five per cent on the actual cost of the material and labor employed in the public printing; provided that before being paid he shall make out an account on oath of the actual cost of the material and labor employed, stating that said account is correct and just, and that the prices paid are not above the customary rates for similar work and material when employed in the service of private parties to do a like amount of printing." After the execution of the bond the legislature, by resolution, authorized the treasurer to advance to the state printer $5,000 00 in part payment for the public printing of the session then pending:

Held, that this was such a novation of the contract as discharged the sureties if done without their consent.

3 Alston, the public printer, was insolvent, he had misappropriated $5,000.00 of the public funds advanced to him, and had become liable for liquidated damages amounting to $3,000.00, in addition. The governor, as agent of the state, received $198,028 58 from a claim of the state against the United States. He did not deposit all of it in the state treasury; but, out of the sum so collected, paid to the use of Alston $15,000 as a fee in connection with said claim

The indebtedness of Alston to the state was not reserved out of this amount:

Held, that such action increased the liability of the sureties on Alston's bond, and thereby discharged them. If the governor had paid the money received by him into the state treasury, and Alston had presented his claim and it had been found due, the state, as a creditor, would have been bound to have retained enough out of what was due him to satisfy his liability, for the protection of its own interest as well as that of the securities—he being insolvent. It can make no difference, so far as this principle is concerned, that the governor as the agent of the state, paid the money directly to the use of Alston instead of first paying it into the treasury.

Principal and surety. Bonds. Officers. Contracts. Novation. Jurisdiction. Practice in the Superior Court. Before Judge HILLYER. DeKalb Superior Court. September Term, 1879.

To the report contained in the decision it is only necessary to add that the following were among the grounds of the motion for new trial made by Walsh *et al.*:

(1). Because the court sustained plaintiff's demurrer to defendants' plea to the jurisdiction.

(2). Because the court refused to charge the following request of defendants' counsel: "Where plaintiff seeks to show that the surety has consented to a change of contract, it must be *clearly* shown; for liabilities of sureties cannot be extended by implication."

On this subject the court charged as follows: "It is not necessary for the state to show in the proof that the sureties, in so many words, either oral or written, expressed that consent, but it is necessary that facts or circumstances should be in proof sufficient to authorize the jury to their clear satisfaction to infer that, in their own minds, the sureties consented to it."

(3). Because the court charged as follows, and refused to give requests to the contrary: "As to the plea setting up an alleged release of the sureties by governor Colquitt, governor of the state, in paying to Alston $15,000.00, or other large sum in money in 1877, the court instructs you

as follows: The court is of the opinion that if the state, by legislative authority, under the circumstances as claimed, paid Alston $15,000.00, or other like sum more than the alleged liability, it may have operated to release the sureties; but the court instructs you, if the facts were that the state of Georgia had a claim against the United States government for $100,000.00, or $200,000.00, or other like sum, and if a draft issued from the United States treasury for that sum, payable to the order of Alfred H. Colquitt, governor, and if that draft came to the hands of the governor and he realized the money on it, and the funds being in his hands, before paying it into the treasury, he paid Alston $15,000.00, or other like fee due by the state to Alston, it cannot be said that said sum was so in the treasury of the state, or such payment was so made by the state that it will operate to relieve the sureties, and the court instructs you that payment under such circumstances by the governor, before the funds went into the treasury of the state, would not relieve the sureties; the court is of the opinion that no money is in the hands of the state until it has passed into the hands of the comptroller-general and has been deposited in the office of the treasurer."

Plaintiff made a counter-motion for a new trial, and excepted upon its being overruled. But as the decision upon defendants' motion controls the case, it is unnecessary to set out that of plaintiff.

Barnes & Cumming; J. L. Brown; Mynatt & Howell, for Walsh *et al.*

R. N. Ely, attorney-general; Z. D. Harrison, *contra.*

Warner, Chief Justice.

This was an action brought by the plaintiff against the defendants on a bond executed by them in the sum of $10,000.00, signed by Alston, as principal, and by Walsh and Adair, as securities, conditioned for the faithful per-

formance by Alston of the duties of public printer of the state. The alleged breach of the bond is that Alston had received $5,000.00 under a resolution of the general assembly, and had failed to account for the same, and had appropriated it to his own use, etc., and that Alston was further liable in the sum of $3,000.00 as liquidated damages. The securities pleaded that the plaintiff, after the default of said Alston, had paid him $15,000.00 without deducting said debt, with full knowledge of his insolvency, whereby the said securities became released, and further, that by reason of the advance of the said $5,000.00 before the same was due to said Alston under his contract for work done by him as public printer, the risk of the defendants as his securities was increased, and they were thereby exposed to greater liability to loss. Alston having died pending the suit, an order was taken suggesting his death and that the cause proceed against the other two defendants; thereupon they pleaded to the jurisdiction of the court on the ground that neither of them resided in the county of DeKalb, in which the suit was instituted. The plea was overruled. The jury, under the charge of the court, found a verdict for the plaintiff for $2,500.00, principal, and $641.66, for interest. A motion was made for a new trial on numerous grounds, which was overruled, and the defendants excepted.

1. There was no error in overruling the plea to the jurisdiction of the court.

2. It appears from the record that Alston was elected public printer in January, 1875, and his bond was executed January 30th, 1875, and he was to enter on the discharge of his duties the first day of the next session of the general assembly.

On the 19th of February, 1876, the general assembly passed a resolution authorizing the treasurer to advance to the public printer, the sum of $5,000.00 in part payment of the public printing for the present session. The condition of the bond is "that if the said Alston shall well and faithfully do and perform all and singular the duties pre-

scribed by the laws of Georgia appertaining to said office of state printer for and during the term for which he has been elected, then this bond or obligation to be void," etc. The laws of Georgia prescribing the duties of public printer are to be found in the following sections of the Code, to-wit: 1022, 1023, 1026, 1027, 1028, 1029, 1031, 1033 and 1034, as to the time and manner in which he was to be paid for his services, that is to say, he shall be paid twenty-five per cent. on the actual cost of the material and labor employed in the public printing, provided that before being paid therefor, he shall make out an account on oath, of the actual cost of the material and labor employed, stating that said account is correct and just, and that the prices paid are not above the customary rates for similar work and material when employed in the service of private parties to do a like amount of printing. Thus stood the law at the time the bond was executed by the defendants on the 30th of January, 1875, as to the time and manner of the payment of the public printer for his services as such, and the question is, whether the resolution of 1876, authorizing the treasurer to pay him $5,000.00, in advance of the performance of any work done by him as public printer, was such a change of the nature of the contract as amounted to a novation without the consent of the sureties and discharged them under the provisions of the 2153d section of the Code? In our judgment it was such a change of the contract as would discharge the sureties if done *without their consent*. The securities might have been willing to stand for their principal when he was to perform his duties and be paid therefor, as prescribed by law, that is to say, when he had done the work, but not willing to stand for him and be responsible for $5,000.00 advanced to him before he had done any work as public printer, to be used by their principal as he might think proper. The advance of $5,000.00 to Alston, their principal, before he had done any work for the state as public printer, was an inducement to him not to do it, and thereby calculated to injure his sureties. The con-

sent of the sureties to the advance of the $5,000.00 may be proved either by direct evidence, or by indirect or circumstantial evidence tending to prove that fact.

3. It appears from the evidence in the record that Alston, the principal in the bond, was *insolvent*, and it further appears from the evidence of Treasurer Renfroe, that in May, 1877, Governor Colquitt presented to him a check drawn in favor of the United States treasurer in Washington on the United States treasurer in New York, dated 28th of April, 1877, for one hundred and ninety-eight thousand and twenty-eight dollars and fifty eight cents, payable at sight to the order of Alfred H. Colquitt, governor of Georgia, and stated to him (the treasurer) that $152,278.24 was to be paid into the treasury of the state, and that the balance he would reserve to pay attorneys' fees for which the check was liable. The $152,278.24 was deposited in the treasury, but does not know what became of the balance only from hearsay. Governor Colquitt testified that in 1876 the Atlanta *Herald*, in which Alston was interested, was sold out for debt, and that Alston was much pressed for money, that in May, 1877, he, as the governor of the state, paid for *the use* of Alston about $15,000.00 for a fee due to him as one of the attorneys for the state in the case of The State of Georgia *vs.* The United States.

The 2154th section of the Code declares that "any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk, or exposes him to greater liability, will discharge him." In the case before us, the state was the creditor of Alston, who was *insolvent*, and the defendants were his sureties for his indebtedness to the state. The whole amount of the money due on the check hereinbefore described was the property of the state, the governor being the duly authorized agent of the state to receive the same for the purpose of paying it into the treasury, where the whole of it appropriately belonged under the laws of the state. The governor recognized the fact that the money belonged to the state, and that he was only the agent for the state in its collection, by

paying into the state treasury the sum of $152,278.24 of the amount received by him. If the governor had paid the full amount of the money received by him into the treasury of the state, as the law contemplates he should have done, and Alston had presented his claim against the state and the same was justly due him, the state would have paid him, less the amount that he was due the state; the state, as a creditor of Alston, would have been bound to have retained enough out of what was due him for the protection of the state's interest, as well as for the protection of his sureties, he being *insolvent*. The principle is not changed by the fact that the governor, who was the agent of the state, withheld a part of the money from the treasury and paid it to Alston without deducting Alston's indebtedness to the state; the money in the governor's hands was the money of the state all the same, and if the governor, as the authorized agent of the state, had an amount of its money in his hands due to Alston by the state of a greater amount than Alston's indebtedness to the state, and paid the same over to Alston without deducting therefrom what Alston owed the state, that would have been such an act on the part of the creditor by its authorized agent, the governor, as would injure the sureties of Alston by increasing their risk, and exposing them to greater liability, Alston, their principal, being *insolvent*. In our judgment, the charge of the court in relation to this point in the case, as set forth in the record, was error. There are but two main controlling questions in this case, although there are fifty assignments of error. First, were the defendants, as sureties, discharged by the change and novation of the contract, without their *consent*, under the provisions of the 2153rd section of the Code? Second, were the sureties discharged under the provisions of the 2154th section of the Code? As we grant a new trial in this case on the defendants' motion therefor, we express no opinion as to the grounds contained in the plaintiff's motion for a new trial, both cases having been argued together here.

Let the judgment of the court below be reversed.

Zellers *vs.* Beckman.

1. Courts of equity have exclusive jurisdiction of suits for the recovery of exempted property which had been voluntarily sold prior to the act of 1876, or of any interest therein.
2. The husband is the head of the family, and is the proper person to bring suit for such property. A suit brought by the wife for that purpose is demurrable, no good reason appearing why the husband did not sue.

Homestead. Equity. Jurisdiction. Parties. Husband and wife. Before Judge Speer. Campbell Superior Court. August Term, 1879.

Reported in the decision.

T. W. Latham; J. H. Longino, L. S. Roan, for plaintiff in error.

H. M. Reid, for defendant.

Jackson, Justice.

1. This suit was brought for the recovery of a mule which had been exempted by plaintiff's husband and set apart for the use of his family under section 2040 *et seq.* of our Code, and which had been sold by the husband to the defendant. The suit was dismissed on the ground that under the act of 1876—Sup. to Code, §§359 to 367—the courts of common law had no jurisdiction, but courts of equity alone could grant relief, and error is assigned on this judgment. Section 359 reads as follows: "Courts of equity *alone* shall have jurisdiction of suits for the recovery of property which has been set apart under the homestead and exemption laws of this state, and which was sold previous to February 15th, 1876, or for the recovery of any interest therein; and it shall be lawful for any party to prove that the purchase money of such property, or any part thereof, has been invested in other property, or has

been applied to the benefit of the family for which said property has been set apart as aforesaid."

This property was an exemption; it is sought to recover it as such from the vendee to whom it was sold, and therefore the broad words of the statute of 1876, commonly known as "the McDaniel act" from the able lawyer who drafted it, cover this case, even if the legal title to the entire property were in the wife. But she really has only a usufruct interest in a part thereof, and a small part, for the family of minor children is very large. It would seem therefore that the words "or for the recovery of any interest therein," were put in the act of 1876 on purpose to cover her case. Equity therefore *alone*, under the express words of that act, could relieve her. and the court was right to dismiss the action at law.

2. Moreover, the husband is the head of this family, the exemption was made to him as its head, the legal title is in him, and in trover he must sue. It is true that we held that the wife might interpose a claim for the family to stop the sale by execution of a homestead, 61 *Ga.*, 501, but in that case her husband had declined to take out or apply for the homestead, and the wife had thus been necessitated to do so. Besides, a claim case has been always considered a sort of equitable proceeding, and in that case this court did not mean to authorize suit by her predicated only on her own legal title. It is true trover against a wrong-doer may be founded on possession, but her possession here was her husband's, they living together.

On the first point, we do not mean to say that the head of the family would be forced into equity for trespass on the homestead or exemption, or against a mere wrong doer without some sort of sale from the head of the family; but in a case like this, where the mule was *sold* prior to the act of 1876, that act is applicable and the remedy is by bill in equity, especially as covered by the second point where the only interest of the wife is the usufruct of the property, or a part only thereof.

Judgment affirmed.

French, Richards & Co. *vs.* Kemp, sheriff.

Where, upon the traverse of a sheriff's answer on a rule against him for the failure to make the money on an execution, it appeared that he had failed to obey instructions to levy for six months, when the defendant died, and he was then enjoined until the right of the widow to dower and year's support was determined, and that the plaintiffs were injured by the delay, a *prima facie* case for movant was made out.

Sheriff. Levy and sale. Before Judge Wright. Dougherty Superior Court. October Term, 1879.

Reported in the opinion.

J. Armstrong, by brief, for plaintiffs in error.

No appearance for defendant.

Crawford, Justice.

The plaintiffs in error moved a rule against the sheriff for his failure to collect a *fi. fa.* placed in his hands against one W. L. Davis. The sheriff filed his answer, which was traversed by the movants, and after their testimony was submitted, the respondent's counsel moved, as he termed it, a non-suit, on the ground that no special damage had been shown by the non-action of the sheriff, which said motion was sustained, and the following order taken as the judgment of the court: "It is ordered that a non-suit be awarded, and the rule discharged for want of allegation and proof of damages." To which said judgment and order the movants excepted, and assign the same as error.

The rule was drawn in the usual form, setting forth the *fi. fa.;* that it was placed in the hands of the sheriff; that he had neglected to make the money thereon, though he had had ample time to do so, and that for this failure he show cause why he should not be attached as for a contempt.

The proof offered to support the rule, and to have it

made absolute, was that the judgment was obtained at the April term, 1873, of Dougherty superior court; that it was placed in the hands of the sheriff on the 5th day of May thereafter, with instructions by plaintiffs' attorney to levy; that the defendant had sufficient property to pay it; that no levy was made until the 8th of October; that on the 26th of November, the defendant having died, a bill of injunction had been granted to restrain the sale of the property under the right of the widow to dower and a year's support; that the movants had been injured by this neglect and delay.

To all of which respondent offered nothing in rebuttal, but submitted the motion to discharge the rule under the proof. The naked question therefore presented by this record, is whether the court pronounced a proper judgment in the case made.

Sheriffs are liable to an action on the case, or an attachment for contempt, at the option of the party, whenever he has injured such party by a failure to levy on the property of the defendant. Code, §3949. The official neglect in not obeying the general mandate of the court, and the special instructions of the plaintiffs' attorney, made a *prima facie* case, and he should have been held to answer thereto by proof.

The delay of six months, the death of the defendant, the springing up of new rights to the widow, and the probable loss of the debt, were quite sufficient to have maintained the rule, and cast the *onus* on the respondent. 7 *Ga.*, 445; 11 *Ib.*, 297; 26 *Ib.*, 437.

There is no conflict with these principles in the case of *Conart vs. Dunbar & Co*, 56 *Ga.*, 417, wherein it is asserted that the measure of the sheriff's liability is the injury sustained by the plaintiff; he may show any fact that will relieve him of this liability, such as that the defendant had no property, that that which was in his possession belonged to another, or that it was exempt.

In the case of *Hunter vs. Phillips*, 56 *Ga.*, 634, it

was held that the sheriff was bound by official duty, to execute with diligence the final process of the court, and when directed by the plaintiffs' attorney to levy upon defendant's property he must do so, unless there is some legal difficulty in his way, and if it appear that the plaintiff has been injured by the delay, then the sheriff is liable.

Judgment reversed.

Morrison *vs.* The State of Georgia.

1. When a *certiorari* to the decision of a county judge in a criminal case is sought, it must affirmatively appear that the petition, duly sanctioned, was filed in the clerk's office within ten days from the trial, otherwise the *certiorari* will be dismissed.
2. The act of 1868 provided, in the sixth section thereof, "that no writ of *certiorari* shall be granted unless the accused shall first have filed his affidavit setting forth that he is informed and believes that he has not had a fair trial, and that he has been wrongly and illegally convicted." The act of 1872 provided 'that no application for *certiorari*, however, in a criminal case shall be entertained unless the party applying will make the affidavit set down in section 6 of the act of 1868, as follows: "That no writ," etc., in the same language as that above quoted, except that the words "is informed and believes that he" were omitted, leaving the affidavit without such qualifying clause:

Held, that the act of 1872 is the latest expression of the legislative will, and since its passage an affidavit on information and belief is not sufficient.

Certiorari. Criminal law. Laws. Before Judge Lawson. Morgan Superior Court. September Term, 1879.

Reported in the decision.

J. A. Billups; Calvin George; McHenry & McHenry, for plaintiff in error.

Robert Whitfield, solicitor-general; H. W. Baldwin, county solicitor; Jackson & Lumpkin; F. C. Foster, for the state.

WARNER, Chief Justice.

This case came before the court below on a *certiorari* to the county court of Morgan county, in a criminal case. When the case was called in the superior court for a hearing, a motion was made to dismiss it on the grounds therein stated, which motion the court sustained, and passed a general judgment dismissing the *certiorari*. Whereupon the plaintiff in *certiorari* excepted.

1. It appears from the record that the trial was had on the 5th of April, 1879—the *certiorari* was sanctioned on the 12th of April, 1879. The writ of *certiorari* was issued by the clerk on the 26th of April, 1879, but it does not appear at what time the petition for *certiorari*, with the judge's sanction thereon, was filed in the clerk's office, which the law requires should be done in ten days after the trial, that being the commencement of the suit, and that fact should be affirmatively shown by the record. Code, §301; 60 *Ga.*, 632; *Fuller vs. Arnold*, decided at the present term, not yet reported.

2. The plaintiff in his affidavit to obtain the *certiorari*, stated that he was advised and believed "that he has not had a fair trial, and that he had been wrongfully and illegally convicted." Whereas, the 302nd section of the Code requires an affidavit setting forth "that he has not had a fair trial, and that he has been wrongly and illegally convicted." But it is said this section of the Code has been improperly codified and is not the law; that the true law is to be found in the 6th section of the act of 1868, and that the affidavit made by the plaintiff is in accordance therewith. It is true that the act of 1872 declares that no application for *certiorari*, however, in a criminal case shall be entertained unless the party applying will make the affidavit set down in section 6 of the act of 1868, as follows: "That no writ of *certiorari* shall be granted, unless the accused shall first have filed his affidavit, setting forth that he has not had a fair trial, and that he has been wrongly and ille-

gally convicted," which has been inserted in the Code, and the question is whether the act of 1868 contains the true law as to the affidavit required, or the act of 1872? The act of 1872 does not declare that the affidavit shall contain the same words as in the act of 1868, but on the contrary, it shall contain the words as follows, which are to be found in the enacting clause of that statute, and are different from those found in the act of 1868. In our judgment, the act of 1872 being the latest expression of the legislative will as to what the affidavit to obtain a *certiorari* in a criminal case should contain, is the true law applicable thereto. There was no error in dismissing the plaintiff's *certiorari*.

Let the judgment of the court below be affirmed.

Bones *vs.* Printup Bros. & Co.

1. In a claim case, if the claimant contends that he had possession of the property at the date of the levy, and that point is in issue, the plaintiff in *fi. fa.* is entitled to open and conclude.
2. Construing the entire charge together, the court committed no error which would necessitate a new trial.
3. The verdict is not contrary to evidence.

Claim. Practice in the Superior Court. Charge of Court. Verdict. Before Judge Underwood. Floyd Superior Court. September Adjourned Term, 1879.

Printup Brothers & Co. sued out an attachment against James W. Bones, a member of the firm of J. & S. Bones & Co , on the ground that he was about to remove without the limits of the county. The attachment was levied on certain property, which was claimed by Mrs. Maria Bones. On the trial the evidence for plaintiffs tended to support the ground of attachment, and to show that defendant in *fi. fa.* pointed out the property. The evidence for claimant tended to show the following facts: Mrs. Bones is a widow. Her husband died in 184[illegible], leaving three children,

viz: James W., John Samuel and Thomas McGran Bones. Thomas M. Bones died in 1876 intestate, unmarried and without issue. His mother and two brothers, James W. and John S., survived him, and were his only heirs. He wanted his mother to have his property, and to carry out this expressed desire, a deed was executed by James and John as follows:

"Whereas, Thomas M. Bones died intestate, unmarried and without issue, but desired that his mother, Maria Bones, should possess and enjoy his property, we, James W. Bones and John S. Bones, his brothers, in consideration of the premises and the sum of one dollar, the receipt of which is hereby acknowledged, do assign, transfer and deliver unto our mother, the said Maria Bones, all our right, title and interest in the property of every kind, debts, credits and effects, belonging to the said Thomas M. Bones at the time of his death, including his share, in common with us, of the residue of the estate of our deceased uncle, John Bones."

Among the property so conveyed was a large indebtedness by Bones, Brown & Co. Some time afterwards James W. Bones made the following conveyance to Mrs. Maria Bones:

"GEORGIA—Floyd County.

"Whereas Bones, Brown & Co., of Augusta, Ga., of which firm I am a member, is indebted to Mrs. Maria Bones in the sum of about sixteen thousand dollars, as will fully appear from the books of said firm, and whereas said firm has failed and made an assignment of its property, whereby some of its creditors are secured, and the said Maria Bones left unsecured and unpaid. Know all men by these presents that I, James W. Bones, of said county and state, in payment of twelve hundred dollars of the foregoing sum to said Maria Bones, so due as aforesaid, have granted, bargained, sold and conveyed, and do by these presents grant, bargain, sell and convey to said Maria Bones, her heirs and assigns, the following property, to-wit." (describing property claimed.)

Claimant also introduced evidence to contradict the ground of attachment.

Plaintiffs, in rebuttal, insisted, and it was admitted by claimant's counsel, that J. S. Bones and Bones, Brown & Co. were insolvent at the time plaintiffs' notes in suit were dishonored, and were so in February, 1878.

The jury found the property subject. Claimant moved for a new trial on the following, among other grounds:

(1). After the conclusion of the evidence, claimant's counsel submitted to the court the question as to who was entitled to the concluding argument, and claimed that right. The court inquired of J. Branham, claimant's attorney, who he claimed to be in possession at the time of the levy. He replied, the claimant. Whereupon the court held that the plaintiff's counsel was entitled to the concluding argument.

(2). Because the court charged as follows:

(*a*). "The plaintiffs also contend that the contract was secret and unknown. You are to judge from the evidence how it was, whether it was an open fair sale or a secret sale you will find that according to the evidence. If the evidence shows that it was a sale entirely in the circle of the parties in the contract the law calls that a secret transaction."

(*b*). "The plaintiffs contend that the property ought to be subject for another reason; that the sale is void because at the time Mr. Bones was insolvent, and that it was made for the benefit of a creditor of his and that a benefit was reserved for him, and that it was a mere pretended sale—you are to judge of that. If it was made at the time he was insolvent, and for the benefit of a creditor of his or of the firm of which he was a member, and a benefit was reserved for himself or a person for him, then it would be void."

(*c*). "The plaintiffs allege that the consideration was no consideration; that the debt and account upon which it was paid was transferred in March, 1878, to Maria Bones. That is the plaintiffs' allegation. The claimant says the transfer was made in 1876, when Bones was solvent, and that it was a *bona fide* transaction, and therefore there was a valuable consideration. You are to find what the proof shows in relation to that."

(*d*). "If it (the proof) shows that the deed was made not for a valuable consideration, when Bones was insolvent, it would be null and void."

(*e*). "An assignment made by an insolvent debtor of all his property for the benefit of a part of his creditors is not allowed by the laws of this state."

(3). Because the verdict was contrary to law and evidence.

The motion was overruled, and claimant excepted. For the other facts see the decision.

J. Branham; C. D. Forsyth, for plaintiff in error.

Darnet & Fouche; D. S. Printup, for defendants.

Jackson, Justice.

Printup Brothers & Co. levied an attachment on a lot of furniture as the property of J. W. Bones, copartner of J. S. Bones & Co., it was claimed by Mrs. Maria Bones, the mother of defendant in execution, was found subject, the claimant moved for a new trial, it was refused, and she excepted.

There are three views in which the claimant insists that a new trial should be awarded her: First, because the court gave the plaintiffs the right to conclude the argument; secondly, because of errors in the charge, and thirdly, because the verdict is against the law and the evidence.

1. The claimant's counsel was asked by the court, at the close of the testimony, whether he claimed that the claimant was in possession at the date of the levy, in reply to a demand he made for the conclusion? to which he replied that he did claim that she was in possession; thereupon the court gave the plaintiffs the right to open and conclude. Under the facts the court did not err. The plaintiffs took the burden in the outset of the case and carried it all through the trial. They carried the *onus* of showing possession and title in the defendant in attachment, and after having done so, it was too late for claimant, even if the possession in defendant in execution had not been contested, to insist on the right to conclude. But he did contest the possession.

He replied that it was in the claimant, and it would seem clear that putting thus the same *onus* of showing title in the defendant on the plaintiff in the argument which he had permitted him to carry in the introduction of testimony, he deprived himself of all right to conclude the argument.

2. Construing the portions of the charge excepted to in the light of the entire charge, we see no error which could hurt the claimant. The only exception which struck us as forcible is that which makes the judge say that "an assignment made by an insolvent debtor of all his property for the benefit of part of his creditors is not allowed by the laws of this state;" but in referring to the entire charge, which is sent up in the record, we find that the judge adds these words, "but a party in debt may *sell* a part of his property to pay one of his creditors." So that the exception is to part of a sentence, and we append above the balance, and so completing the sentence, as we understand it, it is the law. The judge did not mean that an insolvent could not *sell all bona fide* to pay one creditor, for in a few sentences following he adds: "He can make a sale of his property to a creditor; he can divest himself of every article he owns, and no other creditor has a cause of complaint if it was for a valuable consideration and in good faith." This is the substance of 1952nd and 1953rd sections of the Code, and the court did not err in reading them and so construing them; and the jury, we think, must have understood him. In this case there was no question of *assignment* for the benefit of a part of the creditors; but it was a question of *sale* to one creditor, and was that *sale bona fide* and for value? We think that the testimony authorized the charge in respect to the dispute about the date of the transaction between mother and son and mother and sons, and other charges criticized for like reasons; and considering the charge as a whole, and reading each sentence in the light of the context, we see no material error therein. What are badges of fraud, and how they may be explained, is fully and fairly set out in the charge.

3. The question was one of intent—fraud or no fraud—a question peculiarly the province of the jury to decide; and as that tribunal has decided it, and the judge who tried it has approved the finding, we do not feel authorized to set aside the verdict. There is evidence to sustain the verdict, and therefore it is not contrary to law.

The judgment is therefore affirmed.

Ross *et al.*, administrators, *vs.* Stokes, administrator.

1. Where lands, the subject matter of contest, are rented out pending the litigation under the order of court, the rents are but the mesne profits incident to the delay and should pass with the *corpus* in the adjudicated disposition thereof.
2. The costs seem to have been equitably taxed, but whether so or not, this court cannot interfere as it is provided that the chancellor shall determine upon whom the costs shall fall.

Equity. Rents. Costs. Before Judge Crisp. Lee Superior Court. November Adjourned Term, 1878.

The report of this case in 59 *Ga.*, 862, with the following opinion, is sufficient to a clear understanding of the questions decided.

Lanier & Anderson, by brief, for plaintiffs in error.

Hawkins & Hawkins; Fred. H. West, for defendant.

Crawford, Justice.

When this cause came before the chancellor for the final decree to be made therein, the plaintiffs in error insisted that the net proceeds of the rents of the land, which had been the subject matter of litigation for the years 1877 and 1878, and also the sum of $190.79, which had been reserved out of the sale of the land as commissions, should be paid over to them, the last mentioned sum to be paid from the rents of the years 1875 and 1876.

They further insisted that the estate of Ross be discharged from any part payment of the costs of this litigation, there being ample funds in the hands of the administrator Stokes, from the said rents of 1875 and 1876, to pay the same. The court refused so to decree, and on the contrary decreed that the auditor's report in the case, with the supplemental decree as directed by the supreme court, and the judgment of that court, be made the final decree, and that the estate of the said Ross be charged with its *pro rata* share of the costs and auditor's fees, to which ruling and decision of the court the said administrators excepted.

1. It became necessary during the pendency of the litigation in this case to rent out the land, and the first error complained of in this record, is the refusal of the court to allow the rents paid over to the plaintiffs in error. The decree directed the land sold, and also directed the disposition of the fund arising therefrom, and the delay in executing the decree did not change the rights of the parties, nor affect the order of the distribution of the money. The rents were but the mesne profits incident to the necessity for the delay—and we think went properly with the *corpus* in the adjudicated disposition thereof.

2. The plaintiffs in error complain that the costs between the parties are not equitably adjusted, and that the decree is totally defective as to the costs. This is not made to appear to us, for it seems that the *net amount* received by Ross after deducting commissions, etc., was $3525.08, and the *net amount* retained by Stokes, including the rents during the litigation, was $2418.00, aggregating $5943.08. The costs were to Ross $255.04, to Stokes $174.95, making the total $430.95. But if this be not right, it is not such an error as we can correct, for it is provided that the chancellor shall determine upon whom the costs shall fall. Code, §4210.

No error being made to appear to us the judgment of the court must be affirmed.

Way *et al. vs.* Myers.

Where a contract of rent provided that if the tenant be in any way ousted from the possession of certain rooms, the tenancy and rent should cease, the fact that the landlord entered and used, or allowed others to enter and use temporarily, on one or more occasions, the room during the absence of the tenant, does not constitute such an ouster as to relieve the latter from the payment of rent.

Landlord and tenant. Ouster. Before Judge Fleming. Chatham Superior Court. May Term, 1879.

To the report contained in the decision it is only necessary to add the following: Way, the tenant, claimed that he had been ousted, because during his absence intrusions had been made upon him; that his rooms had been entered and used on several occasions by the landlord's family or guests, and without his knowledge and consent. There seems to be no doubt that intrusions and temporary use were made, but whether the landlord knew of them or assented to them the evidence was conflicting.

A. P & S. B. Adams, for plaintiffs in error.

George A. Mercer, for defendant.

Warner, Chief Justice.

This was an action brought by the plaintiff on a written contract for the rent of certain described rooms in a tenement house in the city of Savannah. The defendants pleaded the general issue. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of $300.00, with interest from the 1st of November, 1877. A motion for a new trial was made on various grounds, which was overruled, and the defendants excepted.

It appears from the evidence in the record that the lease contract sued on contained the following clause: "It is

further agreed that if the said Charlton H. Way, be in any way ousted from the possession of said rooms, that then and from thenceforth the tenancy of said rooms and the rent therefor shall cease, the said Charlton H. Way paying proportionately therefor up to the time of such cessation."

The court charged the jury amongst other things, as follows: "I charge you that an ouster is a continuous act of exclusion; the party must take possession and with intention to hold it against the tenant. A temporary taking possession is a mere trespass or intrusion, and will not terminate the tenancy or give the tenant the right to abandon the premises." The evidence as to the temporary occupation of the rented rooms by the landlord's consent or knowledge, was conflicting; but, assuming all of the evidence of the defendants contained in the record to be true, it was not sufficient to constitute an ouster of the defendants' possession of the rented rooms to discharge them from the payment of the rent due therefor, according to the terms of the special rent contract. 2 Bouvier's Law Dictionary, 266; Taylor's Landlord and Tenant, section 389. Whether the charge of the court complained of was right or wrong, the verdict was right, under the evidence and the law applicable thereto, and should not be disturbed.

Let the judgment of the court below be affirmed.

Williamson *vs.* McLeod.

1 An assignment of dower is not a nullity because only four instead of five commissioners were appointed, if it be otherwise legal. It may be held bad upon objection made at the proper time, but after the return has been made the judgment of the court, objection on that ground comes too late Notice given by the wife to the administrator of her husband's estate of her application for dower gives notice also to creditors of the decedent.

2. A charge not warranted by the evidence should not be given. Where an assignment of dower was recorded in the book of deeds, and the plat having been omitted by accident, it was subsequently

inserted by order of court, a charge which assumed that this was an illegal record was error. It was constructive notice to the world, and actual notice to creditors of the decedent who were represented by the administrator.

Dower. Title. Judgments. Notice. Administrators and executors. Charge of Court. Record. Practice in the Superior Court. Before Judge Johnson. Johnson Superior Court. September Term, 1879.

M. C. Williamson died in 1863 or 1864, seized and possessed of a tract of land in Johnson county. His widow, who is the plaintiff in error, had dower set apart to her in this tract of land; the return of the commissioners was made the judgment of the court at the March term, 1867, of Johnson superior court. Neil McLeod, the defendant in error, had obtained a judgment against the administrators of M. C. Williamson, and an execution issued thereon was levied upon this tract of land, including the dower. It was sold, and McLeod became the purchaser at sheriff's sale. The sheriff put out Mrs. Williamson's tenant, and put McLeod in possession of the entire tract of land. Mrs. Williamson brought ejectment against McLeod to recover her dower land.

On the trial the main point in the controversy was the validity of the judgment of the court setting apart dower to Mrs. Williamson. The record showed that in the application for the appointment of commissioners to set apart dower, four persons were named as commissoners; that the writ was directed to four commissioners, and that three of them acted in setting apart dower and making their return, which was made the judgment of the court. The return of the commissioners assigning dower, was recorded by the clerk in the book of deeds, instead of being recorded by him on the minutes of the superior court, the judgment alone being on the minutes.

At the time of making the record he failed to record with the proceedings a copy of the plat of the dower land,

but, under an order of court, entered the same at a subsequent time.

Under the charge of the court the jury returned a verdict finding for the defendant. Plaintiff moved for a new trial on the following, among other grounds:

1st. Because said verdict was contrary to law and evidence.

2nd. Because the court erred in charging the jury as follows: "That the judgment of the superior court assigning dower to the plaintiff in and to the land in dispute was void and of no effect, because the writ of dower originally issued to the commissioners appointed but four, and was directed to but four commissioners, instead of appointing and being directed to five commissioners."

3d. Because the court erred in charging the jury "that the judgment making the return of the commissioners the judgment of the court was invalidated by the fact that the return of the commissioners was not incorporated with or set out in the order of the court making said return the judgment of the court, it being conceded that the plat as spread upon the minutes in the order making said return the judgment of the court, as it appears on said minutes, was an interpolation made without any authority, and designed to perfect said judgment."

The motion was overruled, and plaintiff excepted.

R. W. Carswell, for plaintiff in error.

John M. Stubbs, for defendant.

Jackson, Justice.

Mrs. Williamson brought ejectment for a certain piece of land which had been set apart as her dower, against McLeod, who had purchased the entire tract at sheriff's sale, it being sold as the property of her husband, and her title to the portion sued for turned on the validity of her dower interest previously set apart and assigned her by the superior court.

The presiding judge held that the assignment was void as to the purchaser, McLeod; the jury rendered a verdict for the defendant, the plaintiff excepted, and the question is whether the widow's assignment of dower was void?

1. Section 4041 of the Code enacts that five commissioners shall be appointed, a majority of whom may act, and in the case at bar but four were appointed, and the superior court held the whole assignment null and void on this account.

The section does not declare that dower assigned in any other way shall be void, or that unless five are appointed commissioners, the entire action of the court shall be a nullity. On the contrary, the section enacts that a majority of the five may act, and that their action will be as good as if all five acted. Sub-section six of the fourth section of the Code declares that "A *substantial* compliance with any requisition of the Code, or laws amendatory thereof, *especially on the part of public officers*, shall be deemed and held sufficient, and no proceeding shall be declared void for want of such compliance, unless expressly so provided by the enactment." There is no provision expressed in this enactment declaring the act of this public officer in the assignment of this dower by the appointment of four, and not five commissioners, void, and therefore it cannot be lawfully, we think, so declared by the courts.

Besides, it was admitted on the hearing before us, that McLeod was a creditor of the deceased husband of this widow. If so, he should have objected to the appointment of four commissioners at the time when the return was made the judgment of the court. After it was made that judgment, he was precluded from objecting. He had notice through the administrator. Formerly, notice had to be given to all persons interested in decedent's estate; but a subsequent statute made notice to the administrator suffice as to all heirs and creditors. Had the return been objected to before it was made the judgment of the court, doubtless it would have been held illegal, because the number called for by the statute had not been named as commissioners;

but to pronounce a judgment absolutely void after its rendition, is quite a different matter. Indeed, section 4048, which declares that "when the return of the commissioners is made the final judgment of the court, it shall be conclusive between all parties interested," would seem sufficient to settle the point, and to the same effect is the judgment in 41 *Ga.*, 42.

2. The court seems to have misapprehended the facts in the second charge, of which complaint is made. The assignment of dower was recorded in the place where other title papers appear, and the plat made by the surveyor having been by some inadvertence omitted from the record, was added thereto *by order of court regularly taken*, as the record of the case brought here under the clerk's certificate attests.

So that the title of this widow to her dower, always a favorite right in the eyes of the law, and held superior to the most sacred liens of creditors, was not only *lis pendens*, but finally made the judgment of the court, and recorded where all titles to real estate are looked for, and to all intents and purposes was thus constructive notice to the world, and was actual notice to this defendant, if a creditor of the deceased and interested thereby in the estate, and represented by the administrator.

The court below having charged contrary to the opinion we entertain of the law on these two controlling questions, which necessitated a verdict against the plaintiff, we must award to her a new trial.

Judgment reversed.

Foster *et al. vs.* Stapler *et al.*

The verdict for the plaintiffs in this case was contrary to law and evidence, because the plaintiffs failed to show that the legal estate in the premises was in them at the date of the demise laid in the declaration, and, on the contrary, the evidence affirmatively established title out of two of them.

Ejectment. New trial. Before Judge Pate. Dodge Superior Court. November Term, 1878.

This case was tried before Judge Grice, but the motion for new trial was overruled by Judge Pate. It is sufficiently reported in the opinion.

Lanier & Anderson, for plaintiffs in error.

L. A. Hall; D. M. Roberts; J. F. DeLacy, for defendants.

Crawford, Justice.

This suit was brought by Thomas J. Stapler *et al.*, as heirs at law of Thomas Stapler, deceased, to recover a lot of land in the possession of Foster & Armstrong, and who claimed to be the owners thereof. On the trial a verdict was rendered for the plaintiffs, and the defendants being refused a new trial, they seek to reverse that judgment as error.

The grounds of the motion for a new trial relied upon before this court are—

1. Because the verdict is contrary to the evidence, and to the principles of justice and equity.

2. Because the verdict is contrary to law.

These grounds may be considered and disposed of together. The plaintiffs set up and rely upon a demise of Thomas Stapler to them in the year 1867. An examination of the testimony as found in the record, shows the fact to be that in that year the said Thomas was in life, and that it was in the year 1869 that he died. So that the

plaintiffs could not have been at that time the heirs of Thomas Stapler, nor could they make a "lease" when they did not own, neither could there be an *eviction* of a lessee in the absence of a lessor.

"In all cases where the title of the real plaintiff in the action of ejectment is controverted under the general issue, or other plea which puts in issue the title of the plaintiff, he must prove that he had the *legal estate* in the premises claimed at the time of the demise laid in the declaration." Tyler on Ejectment, 482; 12 *Ga.*, 166.

Even if this objection could be overcome, the proof shows that Thomas J. Stapler and Lydia A. Stapler, two of the heirs of Thomas Stapler, deceased, have sold and conveyed one-half interest in this land to Philip S. Holt, who has whatsoever of title was in them, and of course to that extent the verdict was contrary to evidence and without evidence to support it. It further appears from the record that Richard F. Stapler, one of the plaintiffs, sues as the guardian of Andrew H. Stapler, a minor, and no proof was offered to show his appointment as such, the recovery, therefore, of any interest claimed for a ward in the absence of such indispensable testimony was contrary to law. 2. *Kelly*, 120; 41 *Ga.*, 607.

Judgment reversed.

Persoll *vs.* Scott, administrator.

Where a father advanced to his son a "wool carder" of the value of one thousand dollars, and afterwards took possession of it and used it, he thereby became the debtor of his son, and the statute of limitations would run as well against such claim as against any other debt. If the claim for the use of the property was barred before the death of the father, it would not be a proper deduction from the advancement in the settlement of his estate.

Estates. Administrators and executors. Statute of limitations. Before Judge Speer. Rockdale Superior Court. August Term, 1879.

Reported in the decision.

J. N. Glenn, for plaintiffs in error.

A. B. Simms, for defendant.

Warner, Chief Justice.

This case came before the court below on an exception filed to an auditor's report in the case of Persoll *vs.* Scott, administrator, *et al.* The court sustained the exception taken to the auditor's report, and the complainant excepted.

It appears from the report of the auditor that the deceased intestate, who died in 1874, advanced to his son, the complainant, in the year 1861, a "wool carder" of the value, at that time, of $1,000.00; that in the spring of 1862, the complainant went into the army, and during his absence his father took possession of the carder and moved it into his own mill-house and used it there until July, 1864, when it was burnt up by the Federal soldiers. The auditor charged the intestate or his estate with the sum of $300.00, for the use of the carder, and deducted that amount from the $1,000.00, and thereby reducing the complainant's advancement to $700.00.

As against this claim of the complainant upon his father's estate for the use of the carder, the administrator pleaded the statute of limitations. The gift and delivery of the wool carder by the intestate to the complainant as an advancement, in 1861, vested the title thereto in him, to be accounted for at its value at the time of the advancement, as a part of his distributive share of the intestate's estate after his death. If after making the advancement of the wool carder to the complainant, the intestate in his lifetime took possession of it and used it, and such use was worth $300.00, then the intestate in his lifetime became indebted to the complainant that amount in the same manner as any other person would have been who had used the complainant's wool carder, and the complainant could have sued the intestate in his lifetime on the account therefor, provided

he had done so before the same was barred by the statute of limitations. The intestate died in 1874, and the complainant's claim was barred in the lifetime of the intestate, not only by the four years statute, but by the act of 1869. As the intestate could have pleaded the statute of limitations in bar of the complainant's claim for the use of his wool carder, in his lifetime, so may his administrator do so after his death. But it was said on the argument that this was an equitable proceeding, and that the statute of limitations should not be applied to it. The answer is that equity follows the law, and cannot override and control the positive enactments of statutes. Code, §3084. There was no error in sustaining the exception to the anditor's report.

Let the judgment of the court below be affirmed.

Buice *vs.* The Lowman Gold and Silver Mining Company.

1. Is a motion for new trial the proper mode of correcting error in the dismissal of the levy in a claim case? *Quaere.*
2. If a judgment is in excess of the amount declared for, it is an irregularity, but is not a ground to dismiss the levy thereunder.
3. If a defendant in attachment replevies property levied on, or if he acknowledges service of the notice of the pendency of the attachment suit provided by law, a general judgment may be rendered against him.

(*a*). An acknowledgment of service signed by one as attorney for defendant is *prima facie* warranted until the contrary appears.

4. Where service has been had so as to warrant a general judgment in an attachment suit, it need not follow the attachment.

(*a*). After such service and appearance thereunder, or after replevy, the action may proceed to a general judgment, although the attachment may fall by reason of irregularities.

Practice in the Superior Court. Judgment. Attachment. Service. Before Judge Erwin. Hall Superior Court. September Term, 1879.

On August 21st, 1878, Buice sued out an attachment against the Lowman Silver Mining Company, a

foreign corporation, for $192.50, returnable to Hall superior court.

On the same day this attachment was levied on the tract of land now in dispute.

On August 22d, it was levied on certain personal property.

On August 23d, the defendant gave a replevy bond, with A J. Comer as security, the bond being signed by the defendant, by J. J. Hayden, superintendent.

On September 12th a notice of the pendency of the attachment and proceedings thereon was acknowledged on behalf of the defendant by S. C. Dunlap, as defendant's attorney.

At the September term, 1878, of court plaintiff filed his declaration on said attachment. This declaration was for the sum of one hundred and ninety-two dollars and fifty cents. The bill of particulars appeared to be for two hundred dollars and fifty cents.

There was an amendment to the declaration increasing the amount claimed to $200.50 and changing the items in the bill, dated March 1st, 1879. On this amendment there was an acknowledgment of service dated March 1st, 1879, by S. C. Dunlap, defendant's attorney. When presented to the court the body of the amendment appeared canceled, but the acknowledgment of service of the amendment was intact and the bill of particulars was for $200.50. No order appeared either allowing the amendment or directing it to be stricken.

At the March term, 1879, the jury found a verdict in favor of the plaintiff for $200.50, and a general judgment for that sum was signed up against the defendant and security by order of the court. Upon this judgment the plaintiff's *fi. fa.* was issued April 2d, 1879, and levied on the tract of land in dispute.

The Lowman Gold and Silver Mining Company claimed it. On the trial, the court dismissed the levy. Plaintiff moved for a new trial, which was refused, and he excepted.

MARLER & PERRY, for plaintiff in error.

JASPER N. DORSEY; SAMUEL C. DUNLAP, for defendant.

JACKSON, Justice.

The sheriff levied a *fi. fa.* in favor of the plaintiff in error against the Lowman Silver Mining Company, on a tract of land in Hall county as the property of defendant in *fi. fa.* The land was claimed by the Lowman Gold and Silver Mining Company, and when the issue was joined and the parties went to trial, the court dismissed the plaintiff's levy, and that is the error complained of, made in the shape of a motion for a new trial.

1. Whilst we cannot exactly see why a motion for a new trial was made, as there was no verdict rendered to be set aside, yet the point is made that the levy should not have been dismissed, and that is a question for review here.

2. Ought the levy to have been dismissed on the grounds appearing of record?

Those grounds are, first, that the judgment is for eight dollars too much, more than declared for. Secondly, that it is a general judgment to which the party was not entitled, the judgment being based upon an attachment, and thirdly, because the affidavit in attachment is only for $192.50, the bond is double that sum, and in such cases at least the excess of the verdict and judgment over the sum attached for is fatal.

If the judgment be general, the excess is a mere irregularity. 8 *Ga.*, 114; 14 *Ib.*, 589; 33 *Ib.*, 161; 33 *Ib.*, 596; 46 *Ib.*, 454.

3. The defendant replevied at least the personalty levied by attachment and gave bond for condemnation money, and by attorney at law acknowledged service. These or either of these acts gave the attaching creditor the right to a general judgment. Code, §§3309, 3319, 3328. The attorney at law had the power to acknowledge service, at least

until the contrary appeared. Code, §3337; 36 *Ga.*, 108; 39 *Ib.*, 394.

The judgment therefore is general and was legally made so. If general, the claimant could not attack it collaterally for the irregularity of being eight dollars over the amount declared on. 20 *Ga.*, 94; 47 *Ib.*, 205; *Tharp vs. Tumlin*, *Pollard vs. King*, last term, not yet reported. So that it was wrong to dismiss the levy because the judgment was too large—where the court below put the ruling.

4. Nor should it have been dismissed on either of the other grounds. Claimant's counsel contended that the attachment feature should appear in the judgment, even if general, in order to have the *fi. fa.* follow it and to designate the property attached to be first levied, under sections 3328 and 3329 of the Code; but we think not. The attachment may fall, and yet the action proceed if notice has been given, or even property replevied, perhaps—Code, §3309; 44 *Ga.*, 454. And those sections cited, 3328–9, authorize a general judgment without any addition thereto, or modification thereof, so that after notice and appearance, though affidavit and bond were so irregular that attachment fell, the suit by the declaration survived.

On the whole, it is clear that the judgment is not void, but valid, the *fi. fa.* followed it and should have carried the case to the jury for trial on the facts. The judgment is reversed because the levy was dismissed.

Judgment reversed.

KIETH *vs.* CATCHINGS.

1. In 1873 the Freedman's Saving & Trust Company had authority under their amended charter to loan money secured by title to real estate. A deed made for such purpose conveyed title, and therefore a subsequent purchaser under execution against the grantor simply acquired the right remaining in such grantor, to-wit: to redeem by payment of the debt.
2. Evidence to show fraud in the making or procurement of the deeds constituting the chain of title from the F. S. & T. Co. to the defendant, was inadmissible unless notice thereof was shown to the latter.
3. A quit-claim deed from the original grantor to the purchasers from the F. S. & T. Co., executed long after he had parted with his title, and an obligation back to him going to show that he had an interest in the land, were inadmissible as based upon no consideration and as totally irrelevant.
4. A legal title and actual ownership in such grantor after he had conveyed by deed to the F. S. & T. Co. cannot be shown by parol evidence.
5. The transfer by the grantor of the bond to reconvey from the F. S. & T. Co. to another, no matter with what object, could not affect the title of the party holding under the deed until the terms of the bond were complied with.
6. The legal effect of the deed and bond to reconvey was for the court, and parol proof tending to show that they constituted a mortgage was properly excluded, the instruments being unambiguous, and no charge of fraud, accident or mistake being made.
7. A ground for new trial certified by the presiding judge not to be true, cannot be considered.
8. After the grantor parted with the title, no subsequent act of his with other parties, whether fraudulent or not, could affect such title, and therefore all evidence to show such fraud was properly excluded.
9. It was not error for the court, after the question of law upon which the case must turn had been fully argued and the evidence closed, to announce to counsel that the principles involved had been settled in his mind, and then to read in the presence of the jury what he should charge. If counsel had new authorities to read, or additional reasons to submit, it would be the duty of the court to hear him.
10. The instructions of the court, and the refusals to charge, were in accordance with the principles herein announced.
11. The verdict was in obedience to law, in conformity with the evidence, in harmony with the equity, and in strict accord with justice,

13. The principles of law governing a case, separately considered, are not changed, nor their power lessened, by massing the objections thereto together, and in their totality presenting them to the court.

Corporations. Banks. Title. Mortgage. Debtor and creditor. Evidence. Contracts. New trial. Practice in the Supreme Court. Practice in the Superior Court. Before Judge HILLYER. Fulton Superior Court. October Term, 1878.

Reported in the opinion.

HOPKINS & GLENN; REINHARDT & HOOKS; S. WEIL, for plaintiff in error.

MARSHALL J. CLARKE, for defendant.

CRAWFORD, Justice.

The plaintiff seeks to recover a lot of land in the city of Atlanta under the statutory form provided for such cases, and in support of his suit he submits in evidence to the jury deeds from James Atkins to R. S. Eggleston, dated December 9th, 1870, from Perkerson, the sheriff of Fulton county, to J. R. Wallace, dated March 4th, 1874, reciting that the land was sold under a *fi. fa.* in favor of J. R. Wallace, as the property of Eggleston, and then a deed from Wallace to himself. By Chamberlin, a witness, he showed that Catchings, the defendant, held under and through Eggleston, and was in possession when suit began. By Fowler and Bass, that when Wallace's judgment was obtained Fowler had authority from Eggleston to sell the lot, and there rested his cause.

The defendant supported his title by deed from Eggleston to the Freedman's Savings and Trust Company, dated January 27th, 1873, a bond being given to reconvey to Eggleston upon the payment of the sum of $500.00 and interest, also a deed from three commissioners of the Freed-

man's Savings and Trust Company to Chamberlin, Boynton & Co., dated April 24th, 1877, accompanied by certified transcripts from the treasury department of the United States showing title vested in them, and a deed from H. S. Johnson, a partner of the house of Chamberlin, Boynton & Co., to his partners as individuals, dated May 5th, 1877, and then a deed from the said Chamberlin and Boynton to Catchings, the defendant.

Upon the testimony and the law as given in charge, the jury returned a verdict for the defendant, and the plaintiff moved a new trial for errors which he claimed to have been committed.

1. The first assignment of error is that the court should have ruled out the deed from Eggleston to the Freedman's Savings and Trust Company; their bond to reconvey title to Eggleston upon the payment of the $500.00; the deed to Chamberlin, Boynton & Co.; also the certified copy of the manuscripts showing the authority of the commissioners to make the deed and transfer the note of Eggleston.

The objection to this testimony nowhere appears to have been stated to the court below at the time when it was offered, nor in the motion for a new trial, but upon the argument before us it is insisted that it was illegal because the Freedman's Savings and Trust Company had no power under their charter to hold real estate, or accept it as security for loans, and therefore that the deed executed by Eggleston to the Freedman's Savings and Trust Company was void.

This company was chartered in 1865 with power "to receive on deposit such sums of money as may be from time to time offered therefor by, or on behalf of, persons heretofore held in slavery, or their descendants, investing the same in stocks, bonds, treasury notes, or other securities of the United States."

In the year 1870 their charter was amended "by adding thereto at the end thereof the following words:" "And to the extent of one-half in bonds or notes secured by mortgage on real estate in double the value of the loan."

This loan of $500.00 was made to Eggleston, and as a security for its payment the deed was executed and a bond given to reconvey upon the payment of the debt, the contract having been made and the deed executed in 1873, nearly three years after the amendment of their charter. If just such a contract had been made between two of the citizens of this state, we apprehend that there would be no division of opinion as to the exact legal rights of the parties.

Corporations created by other states, and even by foreign nations, are recognized both by our laws and our courts, and no reason occurs to us why the same rights do not attach to this that would to any other.

Since 1871 certainly, and perhaps before, whenever any person conveyed real estate by deed, to secure the payment of a debt, and received a bond for titles back, conditioned that upon the payment of the debt the land should be reconveyed, such conveyance passed the title of such property for that purpose to the grantee, the estate remaining in the grantor being purely equitable, and consisting of his right to redeem the legal title on the payment of the money. It is an equitable mortgage in fact and effect, and until the grantor puts himself in position to claim the benefit of his equity of redemption, he cannot defeat the rights arising to others under his contract.

A purchaser of his interest at sheriff's sale stands in no better relation to it than he did; he too must pay the money before he can claim the land. This has been ruled in the 54 *Ga.*, 45; 55 *Ib.*, 650, 412, 691; 57 *Ib.*, 601. And in the 59 *Ga.*, 507, it was held, Justice Bleckley pronouncing the opinion, that this was the law prior to the act of 1871. It would seem, therefore, that no question could be better settled.

2. That the court erred in not allowing the introduction of evidence going to show fraud in the procurement and making of the deeds by the Freedman's Savings and Trust Company, or their agents or attorneys, or any one holding under them, without first bringing it home to defendant,

especially when the plaintiff held under a sheriff's deed, and the judgment was upon a debt existing before the sale of the land to the Freedman's Savings and Trust Company by Eggleston.

The record shows that no evidence was offered to show fraud in the procurement or making of the deed, and that the opportunity to establish fraud in the defendant, or those under whom she claimed, if notice thereof were brought home to her knowledge, was extended to the plaintiff. This being the fact, we think that the second ground was properly overruled.

3. Because the court ruled out a quit claim deed from Eggleston to Chamberlin, Boynton & Co., and an obligation back to Eggleston, going to show that he had an interest in the land, there being a consideration expressed, and an agreement with Eggleston touching the same.

The testimony shows that this deed was made long after Eggleston had parted with his title; that there was no consideration paid for it, whilst the obligation was nothing but an agreement to look to the land alone for the payment of the debt.

Under the view which we have taken of the original transaction, and the relative rights of the parties, the introduction of this deed could not have changed in any degree the effect thereof, and it was properly excluded.

4. Because the court would not permit the plaintiff to show by parol evidence that Eggleston was the *actual* owner of the land at the time that the judgment was obtained and the sale made.

A legal title and ownership to land cannot be shown in that way.

5. Because the court refused to allow testimony to show that the bond for titles to Eggleston was fraudulently transferred to Allen, to defeat the judgment under which the land was sold.

The transfer of this bond to Allen or any one else, could not affect the title of the party holding the deed, until the

terms of the bond were complied with, and the rights of the owners of the land secured, hence there was no error in this ruling of the court.

6. Because the court erred in not allowing plaintiff to show by parol proof, that the deed from Eggleston was nothing but a mortgage to secure the $500.00, and was so understood.

All the title papers were in proof, had been offered and received, they were without ambiguities, and without the charge of fraud, accident or mistake, hence their legal force, intent and effect were questions for the court alone, and parol proof was inadmissible. Questions of construction are for the court, ambiguities, fraud, etc., are for the jury.

7. This ground not being verified by the court, but on the contrary certified to be erroneous, cannot be considered.

8. That the court held that the plaintiff could introduce no testimony to prove fraud that took place after the sale of the land to the F. S. & T. Co., unless a tender of payment was made.

When the deed was given by Eggleston to the F. S. & T. Co., no act of his thereafter with other parties could affect the rights of the company, or change the title, or render an original legal transaction fraudulent, which was not so at the time, and the ruling of the court was therefore right as to the admissibility of such testimony.

9. The error complained of in this ground is, that after the testimony had closed, the court announced to counsel that the questions of law involved in this case had been settled in his mind, and then read in the presence of the jury what he should charge.

Where the questions of law arising under the evidence in a cause, and upon which the verdict must inevitably turn, have been presented, fully argued and ruled upon during the progress of the trial, we can see no objection to the court's stating to the counsel how and in what manner he will instruct the jury thereon, thus saving needless argument and unnecessary delay. Of course if the counsel were to notify

the judge that he had new authorities to read, or additional reasons to submit, it would be the duty of the court to hear him, and doubtless this would always be done.

10. Because the court refused to give in charge to the jury certain written requests asked for by plaintiff's counsel. We think that the first of these was substantially given, that the second and third were properly refused under the law and the proofs, whilst the fourth was rendered unnecessary by plaintiff's amending his description of the lot to correspond with the deeds.

11. Because the court erred in charging the jury—that if Eggleston, before the judgment was obtained against him, had *bona fide* given a deed to the Freedman's Savings & Trust Company to secure the payment of a loan of $500.00, neither Eggleston himself nor Kieth, who claims under him, can recover without first paying the debt, or tendering the money. This was a proper charge, as we have endeavored to show under the first assignment of error.

12. Because the verdict was contrary to law, the evidence, the equity and justice of the case. In our judgment the verdict was in obedience to law, in conformity with the evidence, in harmony with the equity, and in strict accord with its justice.

13. This ground is disposed of by the ruling in the 5th, and need not be repeated here.

14. The substance of this ground is, that the court erred in rejecting parol proof going to show that the land actually belonged to Eggleston when it was sold under the *fi. fa.*, and that the deed was only treated as a mortgage by the Freedman's Savings & Trust Company, that Wallace was put in possession, and that the transfer of the bond was a fraud, that Eggleston was insolvent, that he was not a negro but a white man, that the company was not authorized to make the contract, and that suit was brought on the promissory note.

This broad exception it seems, was intended to include the whole line of the plaintiff's right to recover the land in

dispute, arising both under the law and the evidence, that which had been rejected and that which had been admitted. The opinion of this court is that the principles of law governing a case separately considered are not changed, nor their power lessened, by massing the objections thereto together, and in their totality presenting them to the court.

Having disposed of all the exceptions, it would not be travelling out of the record to say, that the rights of the plaintiff in this suit are clear and indisputable, and his remedies now are ample for their enforcement, but he has not availed himself thereof by this proceeding.

Let the judgment stand affirmed.

Scott *vs.* McDaniel.

1. **Where the certificate of the judge of the county court is that "petitioner has paid the costs in the above case, as follows," naming items, the *certiorari* will not be dismissed because the certificate did not show that all costs had been paid.**
2. **When the error complained of turns upon a ruling based on the inspection by the court of a set of interrogatories used upon the trial, the *certiorari* will not be dismissed because the original interrogatories and answers were attached to the petition.**
3. **Commissioners are officers of court for the purpose of taking testimony, and the presumption is that they performed their duty by having the answers written by a competent person. Nor is this presumption rebutted, so as to require the rejection of the interrogatories, by a mere inspection of them, without more, although the handwriting in the body of the answers, the signatures of the commissioners and that of the witness, may each appear to be different. We know of no law to prevent the employment by commissioners of some disinterested person to do the clerical work of transcribing the answers**

Certiorari. Interrogatories. Evidence. Presumption. Practice in the Superior Court. Before Judge Speer. Rockdale Superior Court. August Adjourned Term, 1879.

To the report contained in the decision it is only necessary to add that defendant in *certiorari* moved to dismiss

the case because the certificate of the county judge did not show that all costs had been paid; because the original interrogatories and answers sued out in the county court for Scott were attached to the petition for *certiorari*; and because a new trial had been granted in said cause before. The motion was overruled. The certificate of the county judge is that petitioner "has paid the costs in the above case, as follows:" (naming items for trial, issuing commissions and *subpœnas*).

WARNER, Chief Justice.

This case comes before this court on a bill of exceptions to the judgment of the court below in overruling the defendant's motion to dismiss the plaintiff's *certiorari* on the grounds therein stated, and in sustaining the same on the ground set forth in the judgment of the court as contained in the record.

1, 2. There was no error in overruling the defendant's motion to dismiss the *certiorari*.

3. It appears from the record and bill of exceptions, that on the trial of the case in the county court, a set of interrogatories for a witness by the name of Scott was offered to be read in evidence by the plaintiff (which interrogatories had been taken out by the defendant) when the defendant objected to the reading of the same on the ground that the answers were not written by either of the commissioners nor by the witness with their consent. The county court overruled the objection, and the defendant sued out a *certiorari*, and on the hearing thereof in the superior court the court sustained the *certiorari* upon that ground and ordered a new trial, the court deciding the question as appears in its judgment "by inspection of the answers." The answers of the witness appear to have been taken before the commissioners, signed by the witness, and attested by them in due form as required by law. Witnesses may write out their own answers in the presence of the commission-

ers and by their consent, but in no other way shall they (the witnesses) prepare the same. Code, §3887. The commissioners were the officers of the court for the purpose of having the interrogatories properly executed, and the legal presumption is that they performed their duty in that respect, especially in this case when they were selected by the party who now objects to their action as to the manner in which the interrogatories were executed, and the important practical question is, whether that legal presumption can be rebutted by the mere inspection of the answers of the witness, his signature thereto, and the signature of the commissioners, without any other evidence. The court below held that the county court erred in allowing the answers to be read, because from its inspection of the answers the same were not written either by the commissioners, nor by the witness. We are not aware of any law which prohibits the commissioners from employing a disinterested person as a clerk to write the answers of a witness examined before them, and to authorize justice courts, county courts, or any other court, to assume, by *mere inspection*, without other evidence, that the commissioners had violated their duty and the provisions of the 3883d and 3884th sections of the Code, would be in our judgment to establish a dangerous practice; therefore the sustaining of the *certiorari* on the ground as set forth in the record was error. This not being a motion for new trial, our judgment is confined to the errors alleged in the bill of exceptions.

Let the judgment of the court below be reversed.

Wright, comptroller-general, *et al. vs.* The Southwestern Railroad Company.

1. Where any ministerial officer of the state is attempting to collect money out of a person, natural or artificial, under the forms of law, but without any valid constitutional law to authorize the process he uses and calls an execution for taxes, it is the duty of the courts, on a proper case made, to arrest the proceeding in some of the modes known to the law, and afford relief to the party complaining.
2. Equity has jurisdiction to interfere in behalf of the railroad company on the following grounds: first, because exactions are pressed upon it, in the form of annual taxes, inconsistent with and violative of its chartered rights, and destructive of its franchise; secondly, because the exactions might be repeated if these are successful, and suits and costs be multiplied; thirdly, because it was misled by the action of the comptroller and a legal fraud perpetrated upon it; fourthly, because of mistake caused by the defendant's conduct: and fifthly, because the numerous questions made as to different parts of the road, and the liability of each portion or branch, most of them dependent for adjudication on separate charters and amendments, and other questions in respect to other items of property in and out of this state, and in what degree or how connected with this road, and whether liable or not to be taxed, make the case complicated to a degree that a court of equity can better unravel it than a court of law.
3. Tax executions having been issued against the railroad and levied upon property in Bibb county, by the sheriff thereof, and the principal office of the road being in that county, the superior court thereof had jurisdiction of a bill to enjoin the collection of the *fi. fas.* That another railroad, the principal office of which was elsewhere, had leased that road and agreed to pay its taxes, would not alter the case.
4. Under the facts of the case, it is apparent that to collect the tax upon the entire property of the railroad, without regard to the limitations of its charter, would be unconstitutional, and the chancellor was right to enjoin further proceedings until the final hearing of the case.

(*a*). The status of the various parts of the road as to taxation defined.

5. Whilst the words in limiting the taxing power of the state are very broad in the original charter of 1845, the limitation covering the said railway and its appurtenances and all property therewith connected, yet, under the rules for the construction of such grants, they will not be construed to embrace real estate other than that the continuous use of which is necessary for the road—that is, that lying each side of its track, and that covered by its depots, yards and shops and other places necessary to the full exercise of its franchise.

(*a*). Stock in the company's own road held by itself, or in other roads in this state, whose charters limit or exempt taxation thereon, and whose income is taxed, is not liable; and stock held by the company in railroads without the limits of this state is not taxable here.

(*b*). Bonds, notes, or other mere evidences of debt, unless they form part of the income of the road, are subject to the ordinary rates of taxation. So, also, water-craft belonging to the company in 1876 and 1877.

6. The company has acted in good faith, has offered to do equity, was misled by the officer of the state, and has not lost its rights by its own laches; therefore this is not a case to warrant the enforcement of penalties for default.

7. As the company owes the state tax on part of its property, not covered by the limitations in its charter, it would seem equitable that it should pay interest at least from the time the tax was claimed by the officers of the state.

Injunction. Tax. Constitutional law. Railroads. Laws. Stock. Before Judge SIMMONS. Bibb County. At Chambers. December 22nd, 1879.

Reported in the decision.

R. N. ELY, attorney-general; R. TOOMBS, for plaintiffs in error.

A. R. LAWTON; LYON & GRESHAM, for defendant.

JACKSON, Justice.

The Southwestern Railroad Company brought their bill in equity against Wright, the comptroller-general of the state, and Cherry, the sheriff of Bibb county, to restrain them from the collection of certain *fi. fas.* for taxes, purporting to be legally due the state for the years 1876 and 1877, but alleged in the bill to be unconstitutional and wholly illegal and void. The chancellor granted the injunction, and the defendants excepted.

The executions are each for some twenty odd thousand dollars, and for penalties for failure to return and pay taxes, each in three times the amount of the tax alleged to be due, the exact amount being for the year 1876 $26,642.29-100

and for penalty $79,926,30-100, and for the year 1877 $28,-203,29-100, and for penalty $84,609,87-100.

They were issued by the comptroller-general on the 3d of December, 1877, on assessments made by him of the value of all the property of the company, based upon returns of the company for the years, and made in the years, 1874 and 1875. The tax is on the entire road-bed, bridges, iron, locomotives—everything belonging to the railroad company as contained in the returns and valuations made in 1874 and 1875, and for three times that sum for penalty; in the aggregate, over two hundred thousand dollars. The tax is at the same rate per cent. *ad valorem* as the property of all the people of the state is taxed, without regard to any limitation thereon in the charter of the company, and the executions are levied on the depot and other railroad property of the company in the city of Macon and county of Bibb. To these tax executions the company filed affidavits of illegality under the act of 1874, renewed in 1875, and in 1876, which provided that on certain conditions precedent being complied with, these affidavits of illegality might be taken, returned to the superior court of Fulton county, and appealed by bill of exceptions to this court. This was attempted to be done, but no full and complete returns having been made as contemplated by the act of 1874 as one of the conditions precedent, this court dismissed the illegalities. See pamphlet report, February 9th, 1879, p. 74.

In the opinion or syllabus thereof so ordering the affidavits of illegality to be dismissed, the court intimates that owing to the apparent intricacies and complications of the case of this company, its more appropriate and complete remedy would be in equity. So we have now before us this bill in equity seeking to restrain the sheriff of Bibb county and the comptroller-general from further prosecuting the executions and levies alleged to be wholly unconstitutional and void.

It is substantially alleged in the bill that complainant

failed to make the full returns required by the act of 1874, in order to have the affidavits of illegality tried, because it was misled by the action and conduct of the comptroller-general himself—that tax executions, like these for 1876 and 1877 now being pressed against the company, were issued for 1874 and 1875, and the questions of their validity were tested before the superior court of Fulton county under the act of 1874, full returns having been then made pursuant to that act; that the case was taken thence to this court, and hence to the supreme court of the United States, where it was adjudicated that the execution for 1874, just like these, was illegal and void, in that it impaired the obligation of the contract made between the state and the company in respect to taxation and set out in the company's charter—the state having therein obligated herself not to impose on the company a higher tax than one-half of one per cent. on its net income; that the comptroller-general, after this judgment of the supreme court of the United States, was of the same opinion with the complainant, that the liability of the company for taxes beyond the limit fixed in its charter was settled, and so believing sent to complainant a schedule of returns to be made by it, embracing only its gross and net income, so as to have the company taxed according to its charter; that it made its returns for 1876 and 1877 in accordance with the schedule so sent it and the instructions thus given it by the comptroller-general, and paid all the taxes required by that officer and by the law for said years 1876 and 1877, for which it has the said officer's official receipt; that things moved on smoothly in this way, complainant not dreaming that it was liable for more taxes, until the 3rd of December, 1877, when said executions for these large sums, and penalties for not making the full returns, were, to its amazement, issued by the comptroller general and levied upon its property in Macon without notice or warning; that the comptroller-general had prior to that time, ever since the act requiring full returns to be made by it and other companies,

sent to complainant a schedule of those returns, and after this decision of the supreme court of the United States, changed that full schedule, and sent out to complainant that which it filled up and returned; that this misled complainant, and the subsequent issue of the executions taxing all its property, in connection with the conduct of the comptroller before recited, operated as a great hardship and fraud upon the complainant; that these executions would not have been issued by the comptroller-general, who absolutely refused to do so, but for the following executive order from the governor of the state:

"STATE OF GEORGIA, EXECUTIVE DEPARTMENT,
"ATLANTA, GA., December 3d, 1877.

"*Ordered*, that the comptroller-general issue execution for unpaid taxes due the state against such railroad companies as may be designated by Robert Toombs, attorney for the state, and the attorney-general.

(Signed) "ALFRED H. COLQUITT, *Governor*.

"By the Governor:

"J. W. WARREN, *Sec. Ex. Dep't.*"

That thereupon, under the instructions of said attorneys, and in obedience to said order, they were issued, and are therefore not the act of the comptroller-general, but the act of the said counsel of the state; that all legal taxes have been paid; that the property levied on, to-wit: the offices and depot and other property in Macon, is exempt from the tax, being appurtenances to the road absolutely necessary to use the franchise granted it for the public benefit and its own chartered contract with the state, and if these taxes are enforced in the manner and to the extent threatened, its entire franchise will be destroyed and rendered worthless. Therefore the prayer is that the sheriff and the comptroller-general be restrained from further pressing the *fi. fas.* and levies made on the company's property, they being for no constitutional, legal and valid tax, but for exactions violative both of the constitution of the United States and of the state of Georgia, and illegal and void.

To this bill, thus briefly epitomized, the comptroller gen-

eral Wright, Goldsmith who issued the executions being no longer in office, replied by answer that the superior court of Bibb county as a court of chancery and the judge thereof as chancellor, had no jurisdiction of said suit, and that the same should be dismissed—that the common law remedy provided by statute, the act of 1874, was complete and failed by reason of complainant's laches—that neither complainant nor the comptroller-general, nor the sheriff had any interest in the case. Complainant had none, because the Central Railroad & Banking Company had leased its road and bargained to pay its taxes—the sheriff had none, because he was a mere executive officer, levying according to official duty, and the comptroller-general had none, being also a mere officer of the state, and that the entire thing, stripped of disguise, was an attempt to evade the prohibition against judicial interference with the collection of state taxes—the state being the real party in interest, and especially is the Bibb county superior court without jurisdiction, because no substantial relief is prayed for against any defendant resident therein—that the United States supreme court did not conclude the right of the state to tax this company for much of its property, because such property was not the railroad-track, nor iron, nor any other thing "appurtenant to the road or connected therewith," in the sense of these words as used in the charter, and that the legal taxes should be paid at any rate before the company could be heard to set up any defense to that which it alleged was illegal, and that, to say the least, much of the property was liable and the tax levied thereon was legal and constitutional, and had not been paid or offered to be paid.

1. These are substantially the issues made in this important litigation, and we have endeavored to give to them that consideration which they merit, and apply the law as we understand it to all the issues made by the pleadings. First, had the chancellor sitting for Bibb county and exercising equity powers therein, jurisdiction to grant the injunction prayed for?

The Code, section 3668, declares that "no replevin shall lie nor any judicial interference be had in any levy or distress for taxes under the provisions of this Code, but the party injured shall be left to his proper remedy in any court of law having jurisdiction thereof." This section is codified from the tax act of 1804, Cobb's Dig., page 1051, where these words are found: "And no replevin shall lie, or any judicial interference be had in any levy or distress for taxes under this law, but the party injured be left to his own proper remedy in any court of law."

The plain meaning of these words, as used in the act of 1804, is that the courts shall not interfere with the collection of taxes imposed by that law. The words are "under this law;" if not imposed "under that law," then the inference is that there may be interference by the judiciary. In other words, if that law authorize any tax, its collection by levy and distress shall not be hindered; but if that law does not authorize the tax, then it may be hindered by the courts. And so it has been ruled by this court.

In *Vanover vs. The Inferior Court et al.*, 27 *Ga.*, 355, Judge LUMPKIN, after laying down the general rule that the 21st section of the act of 1804, above quoted, does not apply to municipal corporations and counties in their levy of taxes, uses this language: "But apart from this plain and palpable view of the case, the prohibition applies only to taxes properly laid under the act of 1804, and acts amendatory thereof. But suppose, as in this case, the inferior court assumes jurisdiction to levy a tax without authority of law to do so, or the ministerial officers of the state undertake to collect a tax on property, not only not taxable, but expressly exempt from taxation, would not the courts arrest such an attempt, that not being a tax authorized by the act of 1804, or any subsequent statute amendatory thereof? Most clearly. We hope the profession and the public will apprehend this distinction, and that there will be less doubt and confusion upon this subject."

It will thus be seen that if the tax were laid upon property

not taxable, and especially if it be exempt from taxation, the courts would "most clearly," to use Chief Justice LUMPKIN's words, "arrest" such an attempt.

The same construction precisely has been given to section 3668 of the Code above cited, which indeed is but the 21st section of the act of 1804, applied to taxes laid in the Code and amendments thereof. In the case of *Barlow et al. vs. The Ordinary of Sumter County*, 47 *Ga.*, 643, Chief Justice WARNER uses this language: "Section 3618 (now 3668) of the Code declares that no replevin shall lie, nor any judicial interference be had in any levy or distress for taxes under the provisions of this Code, but the money sought to be collected in this case is not for any tax legally imposed under any provision of this Code, or any other Code, which in law would bind the people of Sumter county to pay it, and the defendants, as securities of the tax collector, to refund it."

So that it seems clear, from these adjudications, that the construction put upon the act of 1804, and the Code on the subject of judicial interference, is that if the tax be imposed upon property not exempt, or on property upon which a tax might constitutionally and legally be laid, and if it were authorized by the constitution and laws of the state, and thus became a valid law and a tax due the state, then there could be no judicial interference; but if the act under which the ministerial officer of the state was proceeding were unconstitutional, by reason of the property being exempted by contract from taxation or otherwise, then the judiciary should interpose and arrest the collection.

So in *White vs. The State*, 51 *Ga.*, 254, Judge McCay expresses great doubt of the constitutionality of the immunity from judicial interference on the part of the state, and the court refuses to extend it.

Again, in *City of Athens vs. Lony et al.*, 54 *Ga.*, 33, the same judge uses this language: "The general rule that it is not competent for the judicial department of the government to interfere with the legislative department in the ex-

ercise of the taxing power, except in cases where it is attempted to violate the *prohibitions* of the constitution, is undeniable." Thus it seems in his judgment that the courts should arrest an unconstitutional exaction, though authorized by the legislature, if that body violated the constitution.

So also in *Decker et al. vs. McGowan*, 59 *Ga.*, 806, Judge BLECKLEY says: "It is certain that as a general rule judicial interference with the collection of state taxes, is forbidden (citing authorities). Perhaps there is not, save in instances expressly provided for by the statute, a single real exception to the rule, properly understood, the so-called exceptions being only apparent. Nothing is a tax but what has the nature of a tax, and is imposed by some law. For an officer to exact money under the name of a tax, when there is no law to warrant the exaction, is not an attempt to collect taxes, but an attempt to collect something else; and the rule which excludes interference in the collection of taxes does not apply." And he goes on and applies this test: "Conceding all the elements of fact to be as the officer decides them to be, or as favorable to him as possible, would his action be legal or illegal? If legal, no interference; if illegal, interference to the extent necessary for the citizen's protection."

Still on the same line of distinction, drawn by Chief Justice LUMPKIN in 27 *Ga.*, and the cases of *The Georgia Mutual Loan Association et al. vs. McGowan et al.*, and *Burke et al. vs. Speer*, in 59 *Ga.*, pages 811 and 353, follow in the same direction.

And so also does 60 *Ga.*, 505, the case of *Miller vs. Wilson*, where it is held that "in the absence of explicit language clearly expressing the will of the legislature to tax the bonds of the state, the general assembly will not be presumed to have passed upon so grave a question of public policy from the use of general words, especially when like words have been employed in former acts, and the executive department has never construed them to embrace

state bonds; therefore the tax act of 1877 empowering and authorizing 'the governor, with the assistance of the comptroller-general, to assess and levy a tax upon the taxable property of the state,' cannot be legally construed to authorize a tax upon the bonds of the state." In the same case it is said that "no point has been made upon the question of judicial interference with the collection of taxes under section 3668 of the Code; and inasmuch as the case involves no question of fact at all, but is one of pure law, this court will not itself, of its own mere motion, decline to exercise jurisdiction. Indeed it might well be doubted whether under the constitution, either of 1868 or 1877, it could decline to pass upon a question of pure law."

By reference to those constitutions it will be seen that our fundamental law declares: "Legislative acts in violation of this constitution, or the constitution of the United States, are void, and the judiciary shall so declare them." Cons. 1877, art. 1, sec. iv. par. ii; Cons. 1868, art. 1, sec. xxxii.

It is difficult to see how the judiciary is to declare an act unconstitutionally imposing a tax on the citizen void, if the citizen has no right to appeal to the courts, and the courts no power to interfere. Courts can only act on cases brought before them, and if they cannot be brought before them in some way, these words of the constitution are mere mockery.

It seems to us, therefore, clear, that where any ministerial officer of the state is attempting to collect money out of a citizen, or a person natural or artificial, under the forms of law, but without any valid constitutional law to authorize the process he uses and calls an execution for taxes, it is the duty of the courts, on a proper case made, to arrest the proceeding in some of the modes known to the law, and afford relief to the party complaining.

And the general assembly in 1874, when it began a system of more thorough investigation into the taxes paid by railroad companies, and when itself seemed doubtful of the

extent of its powers under the contract made with these companies in their charters, recognized that simple justice required some mode of testing before the courts the constitutional and legal rights of these corporations, and provided a remedy. That remedy furnished a court and the means of reaching it, wherein law and fact could be examined, and full justice be done. Therefore it cannot be said that our state has been so unjust as to empower her ministerial officers to extort money from any person entitled to her protection, without giving that person a remedy, if the officer were proceeding against the fundamental law of the state.

This company used this remedy, and tested the main question made in the record, by affidavit of illegality to a similar tax levied on its property in 1874; and it was prevented or misled by the acts of the comptroller-general in transmitting to it a different schedule or form of returns, after it had gained the case made before, from using the same remedy to test this proceeding for 1876 and 1877. It cannot be fairly said in a court of equity that it was the laches of the company that it did not comply. It certainly was not negligence unmixed with fault in the comptroller. It was misled by his official act. If it made a mistake, the mistake was caused by the change of the form of its return sent it by the comptroller-general, and surely equity will relieve against a mistake so superinduced. It is remediless now under the mode provided by the act of 1874. It has no remedy at law as the case now stands. It cannot make now the return required to have been made in 1876 and 1877, because the time has passed; and if it has any remedy it is in equity.

Besides, this court at the very time and in the very act of dismissing the case at law, because it had not complied with the conditions required by the statute, which alone gave the superior court of Fulton jurisdiction, announced that it had a remedy in equity, and from the nature of the case it was more complete than at law. The complainant

might well add to its charge of being misled by the comptroller-general, the charge of being misled by this court, if we should hold that equity could not give it any relief.

2. We hold that it had the right to relief in equity. First, because exactions are pressed upon it, in the form of annual taxes, inconsistent with and violative of its chartered rights, and destructive of its franchise; secondly, because the exactions might be repeated if these are successful, and suits and costs be multiplied; thirdly, because it was misled by the action of the comptroller, and a legal fraud perpetrated upon it; fourthly, because of mistake caused by the defendant's conduct; and fifthly, because the numerous questions made as to different parts of the road and the liability of each portion or branch, most of them dependent for adjudication on separate charters and amendments, and other questions in respect to other items of property in and out of this state, and in what degree or how connected with this road, and whether liable or not to be taxed, make the case complicated to a degree that a court of equity can better unravel it than a court of law. And more than all, because the process of injunction seems necessary to arrest what appears to be an unconstitutional exaction. Burroughs on Tax., 363, note and cases cited; 92 U. S., 575.

3. If equity has jurisdiction, in what county shall the bill be filed? The levy is made on property in Bibb; the wrong, if it be a wrong, is about to be perpetrated in Bibb; the sheriff of that county is the agent used to perpetrate that wrong; the executions are issued against the company whose chief place of business and principal office is in Bibb; the effort is made to collect the alleged taxes from this complainant and not from the Central Railroad & Banking Company; and though that company be bound by contract with the complainant to pay those taxes, still that does not release the complainant, the Southwestern Railroad Company, from its higher obligation to the state to pay those taxes, if legal; nor does it exempt the property levied on from being subject to taxes by the state if legally imposed;

the state cannot herself be sued, and the only two ministerial officers she has, who are illegally attempting this wrong in her name, are the sheriff of Bibb and the comptroller-general of Fulton, and against these officers alone can any relief at all be had; and the bill must needs be brought either in Fulton or in Bibb, and the levy being made on property in Bibb, and the sheriff residing there, the court of chancery there is the better entitled to the jurisdiction.

4. It thus being shown that equity has jurisdiction, and that the chancery court of Bibb county is the court which has the better right to exercise it, we are brought to the consideration of the merits of the case.

Was the chancellor right to grant the injunction?

The tax is imposed on the entire property of the company, without regard to the restriction on taxation specified in its charter, and in the teeth of the principle decided by the supreme court of the United States, whose judgment was made the judgment of this court, and transmitted to the superior court of Fulton county for further proceedings. The principle thereby ruled covers certainly the much larger part of the property of this road as exempt from taxation, except as limited in the charter, and which has been paid for both years 1876 and 1877. Yet these heavy taxes, with these heavier penalties, are sought to be forced in the name of the state out of this company illegally and unconstitutionally by these two officers, contrary too to the spirit of the legislation of this state as shown in its desire to have the questions fairly tested by the highest courts of the country, and contrary to its own constitution and to that of the United States, and the executions are levied upon the very forehead—the marrow—of the property which is exempted by that judgment.

If equity has jurisdiction and an injunction can ever be granted in a case of this sort, where under color of tax process illegal exactions are made upon a corporate body, surely that case is before us here. Therefore we think that the chancellor did not err in applying it to these executions,

and in staying the entire proceeding until an investigation can be had fairly and fully on the final hearing, and a decree be made settling the rights and obligations of the complainants—those items of property on which it is, and those on which it is not, liable to be taxed *ad valorem*.

It admits its liability to pay nothing more than it has paid. Hence, it cannot tender any sum as due; but it offers to pay whatever may be found to be due according to law. This, we think, is a substantial compliance with the rule in equity which requires suitors in her forum to do equity, and therefore to pay what is owing before the complainant is entitled to relief in regard to what is not due.

We think too that on the hearing complete relief should be afforded, and the whole matter be investigated to ascertain precisely what property of the company should be taxed and what should not be taxed—or in other words, what has paid its tax and what has not—or what is covered by the charter and what not. And in order to facilitate the trial, or a settlement if desired before trial, we will indicate our opinion in regard to these matters now.

(*a.*) We think that the portion of the new Southwestern Railroad, known as the former Muscogee Railroad, from Columbus to Butler, is not liable to be taxed beyond the limitation fixed in its charter, it being covered by the supreme court decision.—92 U. S., 665. That the road from Fort Valley to Butler is not liable further than fixed in the charter, because the words authorizing the extension to Butler, or Wolf Pen as then called, exonerate the extension from further taxation—those words being: "That all the rights, privileges and powers whatsoever, heretofore granted to the Southwestern Railroad Company, shall extend over the rail road hereby authorized to be built." This confers on the extension every right and privilege which the Southwestern Company had, and among the most valuable of these rights and privileges is the right and privilege to be exempt from taxation beyond "one-half of one per cent. on its net annual income."

That the road from Fort Valley to Perry is not in this litigation and cannot be brought in, because the tax execution is not issued against the Southwestern Company, and that company has not, and could not, enjoin that process against another company, to-wit: the Fort Valley and Hawkinsville Company.

That the main line of road as authorized to be built extends from Macon to Fort Gaines, and is exempt from taxation except as limited in its charter, the entire line through. We construe the franchise to build the road "to some point intermediate between Albany and Fort Gaines, or to any point or points upon the Flint and Chattahoochee rivers below Albany and Fort Gaines, to be agreed upon by the company, from which point the said company may build branch railroads to Albany and Fort Gaines," contained in the original charter of 1845, in connection with the amendment of 1850, which provides "that if said company do not build the main trunk of said road to or below Fort Gaines within two years," etc., and so construing them, we think that the company was authorized to build the main trunk to Fort Gaines, and has done so, and that the line is exempt from further tax.

We think that the words used in the said amended act by which we understand the road from Cuthbert, or a point near Cuthbert, to Eufaula, was built, to-wit, "under the rules and restrictions as they are now authorized to construct said Southwestern Railroad," are not sufficient to limit the taxing power on that road—from Cuthbert to Eufaula, and that it is liable to such tax as is imposed on other property in the state *ad valorem*, of course deducting what has been already paid by the company for its proportion of the income tax.

We think that the branch from Albany to Arlington is liable to the *ad valorem* tax, with the like *pro rata* deduction for its proportion of what income tax has been paid in its behalf, because it is made expressly liable for "such additional tax as the legislature may hereafter impose." And

when a tax *ad valorem* was imposed on all the property of railroad companies not limited as to taxation in their charters, the additional imposition was laid on this branch, and the company is liable therefor, deducting of course what has been paid as its part of the net income tax of the company.

We think that by the express language used in the amendatory act of December 19th, 1859, by which the railroad known as the Georgia & Florida Railroad was consolidated with the Southwestern, it being completed from Albany to Americus, to-wit, "that the said railroad from Americus to Albany shall be considered part and parcel of the road of the Southwestern Railroad Company, and be liable to pay to the state the same tax that the rest of the Southwestern Railroad Company is liable to pay, and such additional tax as the legislature may hereafter impose," that portion of the road is liable to pay the *ad valorem* tax less its proportion of the income tax already paid; but if it has already by agreement paid an *ad valorem* tax at a certain valuation then it is not liable to be taxed further for the years embraced in the agreement; and we think that the law officer of the state, the attorney-general, could and did bind the state by the agreement made pending this litigation.

In the statement that the line through from Macon to Fort Gaines is not liable to be taxed, except as prescribed and limited in the charter of 1845, of course we do not include the short track from Americus to Smithville, as that was part of the Georgia and Florida road, and is covered by the reservation of the state's right to tax when the Southwestern was allowed to absorb and consolidate that road with itself.

5. Whilst the words limiting the taxing power of the state are very broad in the original charter of 1845, the limitation covering the said railway and its appurtenances, and all property therewith connected, yet, under the rules for the construction of such grants, they will not be con-

strued to embrace real estate other than that whose continuous use is necessary for the road; that is, that lying each side of its track, and that covered by its depots, yards and shops, and other places necessary to the full exercise of its franchise. 40 *Ga.*, 646, 651, 655; 34 Ver., 484; 72 Ill., 452; 52 Miss., 127. Therefore, lands off the road, and bought originally to procure cross-ties from the timber thereon, are liable to the *ad valorem* tax.

(*a.*) Stock in the company's own road, held by itself, or in other roads in this state, whose charters limit or exempt taxation thereon, and whose income is taxed, is not liable; and stock held by the company in railroads without the limits of this state is not taxable here. Stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part at least, and taxable by the state in which the road is located.

(*b*). But bonds, notes, and all other mere evidences of debt, follow the *situs* of the creditor, no matter where the debtor lives. Code, §798; 50 *Ga.*, 392. So, any such evidence of debts due this corporation, whether held on natural persons or corporations, in or out of this state, are taxable. If, however, merely income, and taxed and paid as such, they ought not to be taxed again; if invested, they should be taxed *ad valorem*. So, any water-craft belonging to this company in 1876 and 1877 is also taxable.

6. We do not think that equity will allow penalties to be exacted in this case. The company seems to have acted with a desire to pay all the taxes it believed to be due, and tried to ascertain what was due in the manner pointed out by the act of 1874, and failed to make itself heard by the conduct of the comptroller-general in not sending it a schedule of full returns, but only of its income. It had the right to test the legality of the tax by the act of 1874, and the questions it has made are not such as appear to have been captiously made; but the matters of difference between itself and the state ought to have been legally and judicially settled and fixed, so that both parties might nn

derstand their rights. Whilst corporations should be held to a strict compliance with law, and to the payment of taxes due by law, yet all their legal rights should be upheld just as fully and cheerfully by the state as the rights of any citizen within its limits. And inasmuch as by its legislation in 1874 and the following years, the state unquestionably indicated its wish that a fair trial on law and facts should be accorded to these corporations in respect to taxes levied by the comptroller-general against them, both as to law and fact; and as this corporation was misled by the officer of the state, so as thereby to lose its mode of testing these questions at law, we think that equity should secure to it a fair trial now both as to law and fact; as to fact, in ascertaining the property it has subject to tax, and the value thereof in 1876 and 1877, and as to law, in drawing the line between what is exempt or limited by charter and what is not.

The value of the branches which we hold liable will be ascertained in proportion to the business done upon them in connection with the main line. Some will be more others less valuable. We do not think that the proportion of number of miles alone of a branch to the entire line of the road is a fair test. Some branches are very valuable, some almost worthless on some roads. The value of these branches can be ascertained by the business done upon them in proportion to the general business of the road, and the real value of each at last is dependent on the business it does, and not alone on the length of its line. But where it is made part of the main line, and the new stock issued to build the branch is incorporated into the general stock, perhaps it is right that it should be valued in the proportion of its length to the length of the entire road.

7. Where the complainant enters into the court of equity, the universal rule is that it must do equity. And inasmuch as it owes the state taxes, in our judgment, on part of its property not covered by the limitation in its charter, it would seem perhaps equitable that it should pay interest,

from the time the tax was claimed by the officers of the state, at least; but as this would depend on facts which may shed further light in regard to whose fault caused the delay in its payment, we do not now positively decide this question. And indeed all the points decided may require revision when the case is fully tried and all the facts are brought out. The views given above are merely indications of what we now think, from our understanding of this record as it now appears.

Considering, however, that the judgment of the supreme court of the United States is confined to the question really made there, that is, what effect the consolidation of the Southwestern and Muscogee Railroads had on the limitation on the taxing power in the two charters, we are clear that the principle ruled by that court only covers those two roads and property belonging to each appurtenant thereto, and cannot be extended to branches which were constructed with different rights and privileges as to taxation, and to property not appurtenant.

But this company has been forced into a court of equity, and is entitled to relief therein. The judgment granting the writ of injunction until the hearing is therefore affirmed, and it is ordered that on the hearing the case be tried on its merits, and that such issues be made as shall bring out the whole truth on the facts, and the law as indicated above be applied to those facts, subject to be modified by the chancellor as facts other than those in this record may require.

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3. Meaning, award itself is best evidence of. *Ibid.*
4. Testimony of arbitrator as to what was intended, and his construction of award, inadmissible. *Ibid*
5. Pending cause referred to arbitration without order of court, award returned and exceptions filed thereto, on trial of issue, award may be introduced without being proved. *Hardin, ex r.* vs. *Almand*, 582.
6. Pending cause may be referred without order of court. *Ibid.*
7. Exception which alleges mere error in giving weight to certain parts of testimony and failing to give proper weight to certain other parts, demurrable. *Ibid.*
8. Exceptions do not bring up whole case *de novo* New evidence inadmissible for mere purpose of strengthening case made before arbitrators. *Ibid.*
9. Exception that award is contrary to evidence, if sufficient to be considered at all, is for jury. *Ibid.*
10. Mistake to authorize setting aside of award must be shown, insufficient to infer mistake because award was against weight of evidence. *Ibid.*

ARREST. See *Criminal Law*, 4.

ATTACHMENT.

1. Foreign corporation allowed by special act to contract with municipal corporation on Georgia line and to extend road into that city, and made liable to suit in proper courts of this state, not change its character as a foreign corporation so as to prevent attachment. Remedy provided was merely cumulative. *South Car. R. R.* vs. *Peoples' Saving Institution, etc.*, 18.
2. Pendency of bill to foreclose mortgage on railroad and for appointment of receiver, in United States circuit court of South Carolina, not affect operation of attachment laws of this state, though some of the plaintiffs in attachment were parties defendants before any levy was made, and the others were made so afterwards, it not being a general creditors' bill. *Ibid.*

3. Foreign railroad, fact that attachment has been levied upon that part which extends into this state and its appurtenant property does not, without more, render levy illegal. *Ibid.*

4. Foreign corporation, attachments levied on property of in this state, and afterwards a receiver appointed for corporation in its own state, before he can plead to or defend attachment suits he must apply to court where pending and be made a party. *Ibid.*

5. Receiver, petition by to court to order property levied on, turned over to him, not proper mode of disposing of attachments. *Ibid.*

6. Purchase money, affidavit must so describe property as to certify to the officer what he is authorized to seize and sell. *Waxelbaum & Bro. vs. Paschal & Heidingsfelder*, 275.

7. Partner, attachment sued out against on firm debt under §3276 of Code, declaration need not be against both partners. *Cannon vs. Dunlap*, 680.

8. Replevy of property, or acknowledgment of service of notice of pendency of attachment suit, authorizes general judgment against defendant. *Buice vs. Lowman G. & S. M. C. Co.*, 769.

9. General judgment warranted by service, it need not follow attachment. *Ibid.*

10. Action may proceed to general judgment after service and appearance, etc., though attachment may fall by reason of irregularities. *Ibid.*

ATTORNEY AND CLIENT. See *Executions*, 3 ; *Lien*, 4.

AUDITOR.

1. Appointment of, proper in this case. *Jones et al. vs. Smith, gov.*, 711.

2. Appointed to investigate accounts, auditor does not exceed power in passing upon legality of vouchers. *Ibid.*

3. Exceptions filed to auditor's report, judge should submit exceptions of fact *seriatim* to jury, but where they contain same subject matter he may consolidate. *Ibid.*

BANKRUPT.

1. Plea that defendants had been adjudicated bankrupts, and prayer that suit be stayed to await action of district court on question of discharge, proceedings in state court should be suspended. *Cohen & Kaplan vs. Duncan & Johnston*, 341.

2. Note, though payable to assignee or bearer, and though sued in

representative capacity, yet courts of state have jurisdiction thereof. *Collier, assignee, vs. Barnes*, 484.

3. Especially where plaintiff was proceeding under order of United States court passed under act of congress of June 22d, 1874, and had so alleged in amendment. *Ibid.*

BANKS.

1. Demands secured by collaterals held by bank against customer, part of which had been liquidated by note, and evidence tending to show an accounting and an accord and settlement, in which the collaterals were divided between them, the amount falling to the bank credited on the gross sum of its demands, a new note taken for the balance, and old notes canceled and entered paid on discount book: *Held*, that transaction on face would operate as payment except as to balance for which new note was taken, and if bank alleged contrary, burden would be on it to prove it. *Rice vs. Geo. Nat. Bank*, 173.

2. Charge in terms or by reasonable implication throwing burden of proof on customer, necessitates new trial. *Ibid.*

3. Burden of proof, even if on debtor, charge which submits whether "circumstances as demonstrated to them by the evidence are of such a nature as to raise the implication—the necessary implication—that it was taken in payment," puts case too strongly, and demands more than the law would require to overcome such burden of proof. *Ibid.*

BOND. See *Municipal Corporations*, 6.

BOND FOR TITLE. See *Deeds*, 14; *Vendor and Purchaser*, 4.

BONDS. See *Contracts*, 14.

CANALS. See *Common Carriers*, 1.

CERTIFICATE. See *Evidence*, 6.

CERTIORARI.

1. Claimant of private way applied for removal of obstructions under §738 of Code, and accepted a conditional order, question as to whether he has complied with condition or not is one of fact; and upon further petition alleging compliance, and praying for warrant to sheriff, sole question is whether he has complied or not, and commissioners should adjudge according to evidence and refuse or grant warrant without more. On *certiorari* this is sole matter for review, if commissioners have confined themselves to question. If they have

gone further and ordered way closed, this is an excess of authority, and the *certiorari*, as to that part of the order, should be sustained. *Allen et al. vs. Meyerhardt*, 337.

2. Direction as to locating road or putting up gates is not within scope of proceeding. *Ibid*

3. Reversal of judgment of county court on *certiorari*, case remanded for new trial if questions of fact are involved. *Shannon vs. Daniel*, 448; *Star Glass Co. vs. Longley & Robinson*, 576.

4. Return to writ accepts statement of counsel in petition, and certifies same as fair representation of what transpired as far as justice claims to remember it, defective, but *certiorari* should not be dismissed. Remedy is by exceptions. *Star Glass Co. vs. Longley & Robinson*, 576.

5. Exceptions filed when case was called at first term out of its order, not too late. *Ibid.*

6. Instructions as to law should be given where case is remanded. *Ibid.*

7. Certificate of magistrate that costs have been paid and security given, unnecessary to attach to petition for *certiorari* before sanction of judge can be obtained. *Fuller vs. Arnold et ux.*, 599.

8. Clerk cannot issue *certiorari* unless there was filed within three months from decision, petition sanctioned by judge, and certificate as to costs, etc., or pauper affidavit in lieu thereof. Where certificate was not signed within three months, *certiorari* should have been dismissed. *Ibid.*

9. County judge, *certiorari* to decision of in criminal case sought, must appear that petition, duly sanctioned, was filed in clerk's office within ten days from trial. *Morrison vs. State*, 751.

10. Affidavit on information and belief, since act of 1872, insufficient. *Ibid.*

11. Certificate of judge of county court is that petitioner has paid costs in case, as follows. naming items; *certiorari* not dismissed because it failed to show that all costs had been paid. *Scott vs. McDaniel*, 780.

12. Error turns upon ruling based on inspection by court of set of interrogatories used on trial, *certiorari* not dismissed because originals were attached to petition. *Ibid.*

CHARGE OF COURT.

1. Facts on which defence is based not submitted to jury by charge, but excluded impliedly from their consideration, error. *Lynch vs. Goldsmith*, 42.

2. Impeachment of witness, material evidence confined to by

charge, when it should have been considered generally by jury, error. *Flanegan vs. State*, 52.

3. Diverts mind of jury from true issue, charge which does, error. *Thompson vs Douglas*, 57.

4. Involuntary manslaughter, that case might be not insisted on in argument, or contended for before court, and such grade is not apparent from evidence, court need not charge further than to read sections of Code which bear upon it, unless specially requested to do so. *Brassell vs. State*, 318.

5. Statement of prisoner, no request to charge in respect to made, and no injury done defendant by omission, not require new trial. *Ibid.*

6. Voluntary conveyance attacked solely on ground that donor was insolvent, making no charge as to fraudulent intent, such intent, apart from insolvency, is not in question, and instructions to jury which do not look to insolvency as necessary fact, inappropriate. *Cleveland et al. vs. Chambliss, guardian*, 352.

7. Epithets used by court calculated to affect evidence, objectionable. *Ibid.*

8. Homicide sequel to pre arranged scheme on part of both combatants, court may, as starting point for further instructions, charge as to legal consequences of such a combat resulting in death, though evidence shows that after arriving one ceased to intend, and the other ceased to expect, a meeting at the appointed place, and though no meeting there occurred. *Cox vs. State*, 374.

9. Views, different, evidence susceptible of, it is proper to submit law applicable to each state of facts to jury. *Ibid.*

10. Construed as a whole, charge must be. *Ibid.*

11. Widest and most favorable view of evidence presenting no defense, court may so instruct jury. *Williams vs. McMichael*, 445.

12. Question not warranted by testimony, to charge on error. *Atlanta & W. P't Railroad vs. Johnson*, 447; *Hardin, ex'r, vs. Almand*, 582; *Williamson vs. McLeod*, 761.

13. Assault and battery of nurse on child, request to charge that absence of motive is circumstance that jury may consider as favorable to defendant in determining her guilt or innocence, properly refused. *Moore vs. State*, 449.

14. Argumentative or partial, charge of court was not. *Hill vs. State*, 453.

15. Weight of evidence exclusively for jury; should not be controlled by charge. *Ford vs. Kennedy*, 537.

16. Case fully covered by general charge, failure to instruct jury on

particular branch, not error in absence of request. *Hardin, ex'r, vs. Almand*, 582.

17. Justice may or may not give law in charge to jury, at his option. *Adams et al. vs. Clark*, 648.
18. Burden of proof, in charging as to, court should state what testimony would shift the *onus*, rather than when it would be changed. *Clark vs. Cassidy, adm'r*, 662.
19. Pleas setting up various defenses, omission to instruct jury to return upon which rendered, requires new trial. *Ibid.*
20. Law fully argued and evidence closed, not error for court to announce to counsel that principles involved had been settled in his mind, and then to read in presence of jury what he should charge. *Kieth vs. Catchings*, 773.

CITY COURTS. See *Constitutional Law*, 6.

CLAIM.

1. Validity of judgment between creditor and debtor, finding of property subject, followed by affirmance in supreme court, concludes claimant as to. *Henderson vs. Hill*, 293.
2. Decree against realty held in trust, trustee being party to bill, beneficiaries cannot interpose claim. *Zimmerman et al. vs. Tucker*, 432.
3. Equitable pleadings cannot be based on claim where claimant was not properly in court. *Ibid.*
4. Issue is whether or not property is subject; immaterial whether there is other property subject or not. *Alston vs. Wilson*, 482.
5. Levy upon mill, etc., under execution based on foreclosure of saw-mill lien and claim filed, case returned to county of residence of defendant in *fi. fa. Akin vs. Peck & Allen*, 643.
6. Possession of property at date of levy, claimant contends that he had, plaintiff in *fi. fa.* entitled to open and conclude. *Bones vs. Printup Bros. & Co.*, 753.
7. Dismissal of levy, is motion for new trial proper mode of correcting error in? *Quære. Buice vs. Lowman G. & S. M. Co.*, 769.

COLLATERAL SECURITY. See *Contracts*, 4.

COMITY. See *Administrators and Executors*, 4, 5.

COMPTROLLER-GENERAL. See *Tax*, 1.

COMMON CARRIER.

1. Canal company not liable, in absence of special contract, for exercise of any diligence in guarding or protecting timber

which lies in basin for more than fifteen days, according to usage or regulation, after transportation is completed. *Watts & Bro. vs. Sav. & Og. Can. Co.*, 88.

2. Delivery to common carrier of goods consigned to defendants is delivery to defendants. *Star Glass Co. vs. Longley & Robinson*. 576.

COMPROMISE AND SETTLEMENT. See *Practice in Superior Court*, 8.

CONFEDERATE STATES.

1. *De facto* government, Confederate congress was legislative department of, and acts published by authority of that government, while in dominion of the territory of this state, will be recognized by its courts. *Commissioners of Bartow Co. vs. Newell*, 699.
2. Government being overthrown, and being no records by which to establish such acts, parol testimony of witness that he was member of Confederate congress, that acts were genuine, etc., sufficient to admit printed copy. *Ibid.*
3. Bonds issued by county in 1863 for support of indigent families of Confederate soldiers, were not in aid of rebellion. *Ibid.*
4. Citizen of another state, resident in Georgia, moved north in 1862, leaving money, consisting of bills of local banks, with agent for investment, and latter purchased county bonds, transaction not illegal within meaning of act of congress of 1861, which prohibited commercial intercourse, etc. *Ibid.*

CONSOLIDATION OF ACTIONS. See *Practice in Superior Court*, 4

CONSPIRACY. See *Trespass*, 1.

CONSTABLE. See *Sheriff*, 1.

CONSTITUTIONAL LAW.

1. Municipality has no authority, under constitution of 1877, to incur debt of $3,000.00 in order to exchange old fire-engine for steam, until there has been an election held according to a law prescribing the manner thereof. *Hudson et al. vs. Mayor, etc., of Marietta*, 286.
2. Jury being judges of law and fact in criminal cases, constitution of 1877 does not alter law in regard to. *Hill vs. State*, 454
3. County tax, prior to constitution of 1877, when 100 per cent. of 142½ per cent. on state tax was recommended by grand jury, and items amounting to 55 per cent. or more needed no recom-

mendation, whole would stand. *Spann et al. vs. Board of Commissioners*, 498.

4. Under latter instrument, county cannot levy tax for "incidental expenses," nor to buy safe, without assent of two-thirds of voters. An assessment for "expenses of jail" is equivalent to a levy "to maintain and support prisoners," and is constitutional. *Ibid.*

5. Jury system under constitutions of 1868 and 1877 respectively. *Hamlin et al. vs. Fletcher, ex'r*, 549.

6. Provision in constitution of 1877 that in county where there is city court, the judge thereof and of superior court "may preside in the courts of each other in cases where the judge of either is disqualified to preside," does not give right to judge of city court to exercise chancery powers in vacation, no order being taken in term time for the determination of the case in vacation. *Northwestern M. L. Ins. Co. vs. Wilcoxon, adm'r*, 556.

7. Ministerial officer of state attempting to collect money under forms of law, but without any valid constitutional law to authorize the process he uses and calls an execution for taxes, it is duty of courts to arrest the proceeding. *Wright, comp. gen'l, et al. vs. Southwestern Railroad*, 783.

CONTINUANCE.

1. Murder, on trial one month and half after rencounter in which prisoner was painfully wounded, whether excited state of public mind, and defendant's physical condition, etc.. would admit of fair trial, in discretion of court. *Cox vs. State*, 374.

CONTRACTS.

1. Fertilizer bought "entirely upon its analytical standard, they (the sellers) in no case to be held responsible for the practical results," evidence of chemist that it did not come up to standard admissible, though analysis was imperfect, and condition of sample as to preservation unknown to chemist, etc. *DeLoach vs. Hardee's Son & Co.*, 94.

2. Practical result, whilst inadmissible to hold plaintiffs responsible, standing alone, yet may be admitted to throw light upon the issue whether or not the fertilizer delivered came up to analytical standard. *I bid.*

3. New York, contract made and to be performed in, enforced by courts of this state according to legal status it would occupy there; but law of that state must be put in evidence before it can be applied here. *Champion vs. Wilson & Co.*, 184.

4. Collateral, certificates of stock deposited as, having indorse-

ment imparting power to transfer, and tranfer is actually made some time thereafter, and new certificates issued to the parties, same not wrongful if it was such as the power authorized. *Ibid.*

5. Ambiguous, if terms of power are, or if indorsement be blank, true meaning ascertained by assistance of all surrounding circumstances. *Ibid.*

6. Custom, to be binding as part of contract, must be so generally practiced by those engaged in the business that exceptions only serve to establish habit of trade. *Ibid.*

7. Promise to pay for colt on first of November, title to remain in vendor until paid for, but vendees to pay if colt died, *prima facie* promise to pay at that date even though colt die before payment, and while title was in vendor. *Boyer vs. Auburn et al.*, 271.

8. Warranty, administrator cannot bind estate by. *Colbert vs. Moore, adm'r*, 502.

9. Son obtained guano on credit by fraudulent representation that he was purchasing for himself and father jointly, and on discovery of fraud agent of vendor demanded return of guano, and was referred to father, who agreed to take it if specified reduction was made, which was assented to; he thereby became liable as original contractor. *Ellis vs. U. S. Fert. & Chem. Co.*, 571.

10. Representations of son when making purchase constitute part of contract and may be proven. *Ibid.*

11. One must suffer by reason of fraudulent conduct of third, he who places it in power of latter to perpetrate fraud must lose. *Ibid.*

12. Guano note which contains clause "guano sold and guaranteed under analysis of Dr. Means, inspector, which analysis has been submitted to me," does not exclude defense that fertilizer is not reasonably suited to purposes for which sold. *Wilcox, Gibbs & Co. vs. Owens*, 601.

13. Construed against party who drew it, contract of doubtful meaning will be. *Ibid.*

14. Bonds issued by county in 1862 for support of indigent families of Confederate soldiers, not in aid of rebellion. *Commissioners of Bartow Co. vs. Newell*, 699.

15. Prosecution for felonies, contract to pay one for services in procuring consent of prosecutor to dismissal, contrary to public policy. *Rhodes et al., ex'rs, vs. Neal*, 704.

16. Employment for stated term and party fails to comply with contract, employer must discharge him within reasonable time, or give him notice of failure to comply: yet where em-

ployer was not present, and it is probable knowledge of the non-compliance was not promptly had, proper for court to present that view, and its effect upon respective rights and liabilities of parties in connection with rule as above stated. *Williams, adm'r, vs. Jeter*, 737.

CORPORATIONS.

1. Foreign railroad allowed by special act to contract with municipal corporation on Georgia line and to extend its road into that city, and made liable to suit in proper courts of this state, not change its character as foreign corporation so as to prevent an attachment against it. *South Car. R. R. vs. Peoples' Sav. Ins.*, 18.
2. President of corporation cannot maintain possessory warrant in his own name to recover possession of corporate property of which he has had no prior possession either as an officer or an individual. *McEvoy vs. Hussey, pres't, etc.*, 314.
3. Affidavit to obtain possessory warrant must negative consent of corporation (not consent of officer) to disappearance of property, and allege that corporation does in good faith claim, etc. *Ibid.*
4. Freedman's Sav. & Trust Co. had authority in 1873, under amended charter, to loan money secured by title to real estate. *Keith vs. Catchings*, 773.

COSTS. See *Administrators and Executors*, 24; *Illegality*, 2; *Equity*, 13.

COUNTY COURT.

1. Jurisdiction of county court of Houston county at its monthly sessions is for all claims up to $100.00, and declaration for that sum maintained though damages beyond that amount be proven and found. *Giles, ord., for use, vs. Spinks et al.*, 205.
2. Appeal from county court of Rockdale must be entered within four days from decision irrespective of time of adjournment. *Black vs. Peters*, 628.
3. *Certiorari* to decision of county judge in criminal case sought, it must appear that petition, duly sanctioned, was filed in clerk's office within ten days from trial. *Morrison vs. State*, 751.

COUNTY MATTERS.

1. Time covered by contractor's bond for keeping bridge in repair expired, and county undertakes duty, it will be liable for damages resulting from failure. *Davis et al., com'rs, vs. Horne*, 69.
2. Suits for and against county, under constitution of 1877, must be in name thereof. *Bennett et ux. vs. Walker et al., com'rs*, 326.

3. Deed from ordinary, made officially, acceptance of is recognition by purchaser of title in county at date thereof, and whilst in possession under such deed he holds under county. *Ibid.*

4. Deed of ordinary does not pass title out of county, he having no power to make it, but only to authorize it to be made by some one or more persons as a commission; if free from fraud, it may serve as color of title. *Ibid.*

5. Constitution of 1877, prior to, where 100 per cent. of county tax of 142½ per cent. on state tax was recommended by grand jury, and items amounting to 55 per cent. or more, needed no recommendation, whole would stand. *Spann et al. vs. Board of Com'rs*, 498.

6. Under latter instrument, county cannot levy tax for "incidental expenses," nor to buy safe, without assent of two-thirds of voters. An assessment for "expenses of jail" is equivalent to a levy "to maintain and support prisoners," and is constitutional. *Ibid.*

7. Ordinary has jurisdiction to cite county treasurer to appear for settlement of accounts under §337, par. 1, and §563 of Code, and upon failure to pay to issue execution. *Smith, county treasurer, vs. Outlaw, sh'ff*, 677.

COVENANT. See *Deeds*, 8, 10.

CRIMINAL LAW.

1. *Res gestæ*, homicide committed in dark in midst of crowd, and question whether wound in back from which death may have resulted was made by prisoner, declaration by bystander immediately after rencounter, that he cut accused in back with knife, when he had no such cut but deceased had, admissible as part of. *Flanegan vs. State*, 52.

2. Charge of court confining such evidence to impeachment of bystander error. *Ibid.*

3. Description of money, though unnecessary, must be proved as charged. *Watson vs. State*, 61.

4. Police officer may make arrest without warrant for crime committed in presence, or if offender is endeavoring to escape, etc., but there must be an offense committed by party accused. *O'Connor vs. State*, 125.

5. Arrest without warrant of person guilty of no offense, and in preventing escape officer killed prisoner, facts at least warrant verdict of involuntary manslaughter in commission of unlawful act. *Ibid.*

6. Statement of prisoner and evidence conflict, former must yield to latter. *Ibid.*

7. Larceny of horse, though after committing in adjoining state, thief brings stolen property into this state, and here carries it from place to place, he does not commit offense in this state. *Lee vs. State*, 203.

8. Juror to retire in charge of bailiff, with leave of court, to attend call of nature, not illegal separation in trial of capital felony. *Neal et al. vs. State*, 272.

9. Involuntary manslaughter, that case might be not insisted on in argument, or contended for before court, and such grade is not apparent from evidence, court need not charge further than to read sections of Code which bear upon it, unless specially requested to do so. *Brassell vs. State*, 318.

10. Statement, no request to charge in respect to made, and no injury done defendant by omission, not require new trial. *Ibid.*

11. Indictment not demurrable for any matters *dehors* pleadings and record. *Jackson vs. State*, 344.

12. Examine fresh witness on general case, too late to after state has rebutted prisoner's evidence and closed, unless some good excuse is rendered. *Ibid.*

13. *Alibi*, charge as to in conformity to 59 *Ga.*, 142. *Ibid.*

14. Accomplice, charge in respect to evidence of in conformity to Ros. Cr. Ev., 456 *et seq.*, and to 52 *Ga.*, 106, 398.

15. Threats, as to, see 49 *Ga.*, 12, and 58 *Ibid*, 224.

16. Punishment, not error against prisoner to instruct jury in terms of act of December, 1878, on relative powers of court and jury over. *Ibid.*

17. Riot, evidence sufficient to sustain conviction. *Bolden et al. vs. State*, 361.

18. *Res gestæ*, where there is mutual agreement to arm and fight and parties separate and arm with pistols, and they meet within an hour and fight with pistols, all pertinent acts and declarations of either in the interval belong thereto. Doctrine of *res gestæ* fully discussed. *Cox vs. State*, 374.

19. Homicide sequel to pre-arranged scheme on part of both combatants, court may, as starting point for further instructions, charge as to legal consequence of such a combat resulting in death, though evidence shows that after arming one of parties ceased to intend, and the other ceased to expect a meeting at the appointed place, and though no meeting occurred there. *Ibid.*

20. Statement of prisoner and evidence, comparative weight of. *Ibid.* *Hill vs. State*, 453.

21. Assault with intent to rape, on conviction, sentence to twenty years not excessive. *Dykes vs. State*, 437.

23 Sentence passed not deprive defendant of right to move for new trial. *Smith vs. State*, 439.

23. Sentence ought not to be modified by any arrangement looking to abandonment of right to move for new trial, and if so modified, defendant not estopped. *Ibid.*

24. Appeal for leniency, etc., not forfeit right to move for new trial. *Ibid.*

25. City court of Atlanta, in passing sentence for assault and battery in the city, should not consider any serious difference defendant was then engaged in with many citizens of Stone Mountain. *Ibid.*

26. Sentence suspended and several continuances thereof to allow time for motion for new trial. On day to which cause was last continued, recognizance was forfeited. Defendant subsequently appeared, was sentenced, and moved to set aside forfeiture because motion for new trial was pending, and defendant had been several times ready to respond to judgment on said motion, but was sick in bed on day bond was forfeited: *Held*, that appearance and sentence would be complete reply to *sci. fa.* on bond, and time for making question as to liability for costs is when some motion is made to charge him therewith. *Johnson vs. State*, 442.

27. Taking and carrying away with intent to steal; that hog was heard to squeal, that defendant ran off from him, that hog was dead, having been knocked in the head, sufficient to show. *Cross vs. State*, 443.

28. *Allega a* and *probata* sufficiently agree in this case. *Ibid.*

29 Grand juror's name on minutes as properly drawn, sufficient reply to exception to indictment that his name was not in jury-box. *Ibid.*

30. Alteration of order for $1.00 to one for $3.00, jury justified in finding under facts of case, though witness, using microscope, testified that he could discern no trace of alteration. *Mitchell vs. State*, 448.

31. Alteration made by prisoner, jury authorized to infer. *Ibid.*

32. Assault and battery by nurse on child, circumstantial evidence sufficient to sustain conviction. *Moore vs. State*, 449.

33. Request to charge that absence of motive is circumstance that jury may consider as favorable to defendant in determining her guilt or innocence, properly refused, especially where instructions as to the presumption of innocence and weight of circumstantial evidence necessary to convict, were given *Ibid.*

34. Descriptive terms in indictment more specific than necessary, yet must be proved as charged. *Crenshaw vs. State*, 449.

35. Shooting at another, notwithstanding that defendant pointed pistol and fired, it must be shown that it was loaded with ball or shot; no such presumption follows. *Jones vs. State*, 450.

36. Idea of prevention or defense against impending or progressing wrong must enter into all cases of justifiable homicide. To deliberately kill in revenge for a past injury, however heinous, after reason has had time to resume its sway, cannot be justifiable. *Hill vs. State*, 454.

37. Homicide of adulterer with wife of defendant, murder and manslaughter distinguished. *Ibid.*

38. Constitution of 1877 does not alter law in regard to jury being judges of law and fact in criminal cases. *Ibid.*

39. Deliberate homicide in revenge for adultery with wife, defendant not protected by fact that he labored under delusion as to her character for virtue. If now a lunatic, can be removed to asylum on proceedings had therefor. *Ibid.*

40. Acquittal for stealing cow; on second indictment changing description only, but relating to same animal, plea of *autre fois acquit* should be sustained. *Buhler vs. State*, 504.

41. Arson can seldom be established by positive testimony; it is necessarily dependent upon confessions and corroborating circumstances. The force to be given to corroboration must be left to upright jury. *Smith vs. State*, 605.

42. Legal character of offense not affected by out-house being in city, town or village. It affects punishment only. Hence court properly refused to exclude testimony because indictment failed to allege that out-house was not in city, town or village. *Ibid.*

43. Principal in second degree, conviction of contrary to law where there is no evidence of guilt of principal in first. *Jones vs. State*, 697.

CUSTOM. See *Contracts* 6; *Evidence*, 4.

DAMAGES. See *Railroads*, 5, 9; *Vendor and Purchaser*, 4.

DEEDS.

1. Actual possession of part of tract will constructively extend to limits described in recorded deed. *Weitman, adm'r, et al. vs. Thiot et al.*, 11.

2. Admissible without proof of execution or of proper record, deeds thirty years old, apparently genuine, and coming from proper custody, are. *Ibid.*

3. Usury, deed tainted with void as title, and if good as equitable mortgage, it is only so far as to secure principal. *Denham vs. Kirkpatrick*, 71.

4. Usury law in force, deed executed whilst there was none, could not be tainted. *Tummons vs. Hamilton*, 137.

5. Possession of part of one lot embraced in same deed with others, not extended by construction unless deed be on record, so as to work a title by prescription. *Tutt vs. Roberts*, 156.

6 Acceptance of deed from ordinary made by him officially, is recognition of title in county at date thereof, and whilst purchaser is in possession thereunder he holds under county. *Bennett et ux. vs. Walker et al, com'rs*, 326.

7. Ordinary, deed of, does not pass title out of county, he having no legal power to make it, but only to authorize it to be made by some one or more other persons as a commission; if free from fraud may serve as color of title. *Ibid.*

8. Grantor, in consideration of $25.00 and of building of railroad, conveyed to company right of way, adding in deed provision that depot was to be located on strip for benefit of grantor, grantee, by accepting deed, entered into covenant to comply with terms, and this covenant ran with land and became obligatory upon second company which became purchaser. *Ga. So. Railroad vs. Reeves*, 492.

9. Bill to set aside deed made under tax sale, amount of taxes admitted to be due must be tendered. *Picquet vs. City Council of Augusta et al.*, 516.

10 General warranty of title includes in itself covenants of right to sell, of quiet enjoyment, and of freedom from incumbrances. *Burk vs Burk*, 632.

11. Instruments reciting that to secure debt certain property is conveyed at stipulated price, and concluding with *habendum*, *tenendum* and warranty clauses, are not mere mortgages, but under act of 1871 carry title, with right to have reconveyance on payment of debt. *Carter et al. vs. Gunn*, 651.

12. Recital that land conveyed had been set apart as homestead, no ground for rejecting deed as evidence of title. Sale, though private, may have been for some one of purposes enumerated in constitution of 1868 as authorizing judicial sale. *Willis vs. Meadors, ex'r*, 721.

13 Secure debt, title conveyed to, subsequent purchaser under execution against grantor simply acquired right to redeem. *Kieth vs. Catchings*, 773.

14. Transfer by grantor of bond to reconvey to another, could not affect title of party holding under deed, until terms of bond were complied with. *Ibid.*

DELIVERY. See *Sales*, 1.

DIVORCE. See *Husband and Wife*, 5-7.

DOWER.

1. Florida law makes widow entitled to dower in personalty as well as realty. *Mitchell vs. Word, guardian, et al.*, 208.

2. Widow in possession of dwelling-house needs no injunction to restrain creditor from selling under execution, or to restrain sheriff, before sale, from turning her out. Notice at sale of rights will fully protect her. *Jackson & Co. et al. vs. Rainey*, 311; *Spence et al. vs. Cox*, 543.

3. Possession entered under parol contract of purchase, but no part of purchase money paid to holder of legal title, one is not seized as against latter and those claiming under him, and on death, even after having tendered purchase money, widow is not dowable. *Latham vs. McLain*, 320.

4. Assignment of dower not a nullity because only four instead of five commissioners were appointed, if it be otherwise legal; may be bad on objection made at proper time, but after return has been made judgment of court, objection too late. *Williamson vs. McLeod*, 761. See *Dean, ex'r, vs. Cent. Cot. P. Co.*, 670.

5. Notice by wife to administrator of husband's estate of application for dower, is notice to creditors of decedent. *Ibid.*

6. Assignment recorded in book of deeds, but plat having been omitted by accident, it was subsequently inserted by order of court, charge which assumed this to be illegal record error. It was constructive notice to the world, and actual notice to creditors of decedent who were represented by administrator. *Ibid.*

EJECTMENT.

1. Grantee of executor who shows order from court of ordinary to sell real estate of testator need not introduce will in evidence. *Coggins vs. Griswold*, 323.

2. County, suits by or against under constitution of 1877, must be in the name thereof. If commissioners sue for land officially in their own names, no recovery can be had if they have had no actual possession, and if the title is not in them but in the county. *Bennett et ux. vs. Walker et al. com'rs*, 326.

3. Corporate magistracy of county and of city constituted of same persons or board, and sue in former character upon prescriptive title in county, cannot recover upon proof of title in city. *Ibid.*

4. Purchaser from intestate who went into actual possession, and paid purchase money to administrator by consent of heir, will acquire perfect equity against such heir, and may recover thereon in ejectment. *DuBose, adm'r, vs. Ball*, 350.

5. Title shown out of plaintiff by proof, complaint for land cannot be maintained. *Willis vs. Meadors, ex'r*, 721.

6. Abstract of title which takes place of demises, may be amended as readily and as often as under common law form a new demise might have been laid; but new party cannot be added, or perfect equity set up in plaintiff's own grantee. *Ibid.*

EQUITY.

1. Sale under tax *fi. fa.*, person seeking to set aside by bill must show that he has some title to or interes in the property. *Piquet vs. City Council of Augusta et al.*, 254.

2. Creditor of insolvent estate under injunction not to sue executor, has good excuse for not obtaining judgment on debt before proceeding in equity to set aside voluntary conveyance, if during pendency of bill, decree is obtained fixing amount, same may be brought in by amendment. *Cleveland et al. vs. Chamblis, guardian*, 353.

3. Marshal assets, bill to by executor, and one defendant files answer in nature of cross bill against certain co-defendants, voluntary donees of property under testator, another co-defendant, not made party thereto, may file independent bill to accomplish same object, and will not be bound by result of litigation on cross-bill. *Ibid.*

4. Agreement to convey to sister on payment of purchase money advanced by brother taking title as security, bill to enforce is not proceeding to change deed to brother from fee simple to conditional title. Evidence of such contract admissible without infringing rule that it is not competent to engraft express trust upon written deed by parol proof. *Scott vs. Taylor*, 506.

5. Deed made under tax sale, bill to set aside, amount of taxes admitted to be due must be tendered. Insufficient to allow city to retain sufficient amount out of proceeds of sale. *Picquet vs. City Council of Augusta et al.*, 516.

6. Judgment sustaining demurrer to bill affirmed, complainant cannot amend unless he makes case for equitable relief beyond reasonable doubt; nor even then, if there has been apparently needless delay, or if complainant has had his day in court thereon. *Ibid.*

7. Poverty and old age, distressing as they are, cannot create equity. *Wright et al. vs. James*, 533

8. Chancery powers, judge of city court no authority to exercise in vacation under provision of constitution of 1877 authorizing him and judge of superior court to preside for each other in certain cases. *Northwestern M. L. Ins. Co. vs Wilcoxon, adm'r* 556.

9. Will provided for payment of debts, of specific legacies, and that balance should go to son for life, with remainder to children, and if none, then to other relatives. Also, that son should not control property until he became of age, and that executor should see to religious and secular education. Son became of age in 1854, and died in 1860, leaving a child born in 1855. On *ex parte* proceeding in equity, filed in 1843, less than thirty days before term, court of county where executor lived rendered decree, founded on verdict of jury, allowing him to sell certain realty in order to pay a debt and to make distribution required by will: *Held*, that though proceeding was irregular, court was not without jurisdiction, and decree not being void; it cannot be collaterally attached. The executory devisee was not then born, and executor represented her interest as far as it could have a representative. *Dean, ex'r, vs. Cent. Col. P. Co.*, 670. See *Williamson vs. McLeod*, 761.

10. Advancements, priority of claims, etc., to be determined before administrator could safely dispose of estate, bill for direction and distribution not without equity. *Miles & Co et al. vs. Peabody, adm'r*, 729.

11. Exempted property, courts of equity have exclusive jurisdiction of suits to recover, where voluntarily sold prior to act of 1876. *Zellers vs. Beekman*, 747.

12. Rent of lands pending litigation, under order of court, passes with *corpus* in adjudicated disposition thereof. *Ross et al., adm'rs, vs. Stokes, adm'r*, 758.

13. Costs seem to have been equitably taxed, but whether so or not, this is matter for chancellor. *Ibid.*

ESTATES.

1. Devise to nephew and niece for life, with right and privilege to them to sell if they deemed proper, and at their death property or proceeds to be divided between named children of such devisees, they being husband and wife, under law of England they took an entirety and not a severalty. *Parrott et al. vs. Edmondson*, 332.

2. Georgia statute abolishing joint tenancy, etc., if it be not applicable to the above law of the mother country, then interest of wife is clear, for latter law is still of force, and power of sale being coupled with an interest, wife, as survivor, could sell. *Ibid.*

3. If English law was repealed by statute above referred to, still the wife's equity in the property would give her such interest therein to be coupled with the power as to authorize her, as survivor, to sell. *Ibid.*

ESTOPPEL.

1. Party consenting to settlement estopped from setting up title against. *DuBose, adm'r, vs. Ball*, 350.
2. Sentence ought not to be modified by any arrangement looking to abandonment of right to move for new trial, and if so modified, defendant not estopped. *Smith vs. State*, 439.
3. Husband and wife enter possession of land in 1858, and former, in 1870, gave note to plaintiff's intestate and took bond for title from him, and held thereunder until death, husband during life and widow after death, in absence of any written title, estopped from setting up adverse title by possession, even though for twenty years. *McMath vs. Teel, adm'r*, 595.
4. Wagon furnished by child of decedent to administratrix, who was his mother, for use of estate, and it was so used, heir who assented to arrangement estopped from objecting to payment of debt so contracted, and creditors seeking to subject his distributive share would only be subrogated to his rights. *Miles & Co. et al. vs. Peabody, adm'r*, 729.

EVIDENCE.

1. Deeds thirty years old, apparently genuine, and coming from proper custody, admissible without proof of execution or of proper record. *Weitman, adm'r, et al. vs. Thiot et al.*, 11.
2. Returns, several made to ordinary at same time and sworn to in one affidavit, and one introduced by plantiffs, defendant may introduce the rest of the series, and the whole may be considered by the jury as one entire document. *Munroe et al. vs. Phillips, adm'x*, 32.
3. *Res gestæ*, homicide committed in dark in midst of crowd, and question whether wound in back from which death may have resulted was made by prisoner, declaration by bystander immediately after rencounter that he cut accused in back with knife, when he had no such cut but deceased had, admissible as part of. *Flanegan vs. State*, 52.
4. Question as to fact of agency for proprietor of hotel of one who purchased as caterer, no error in excluding evidence as to custom of proprietors of hotels in the city in buying through caterers. *Thompson vs. Douglass*, 57.
5. Parol evidence inadmissible to show transcript of record from another court to be incomplete. *Elliott vs. Deason*, 63.
6. Certificate which states that "the following and annexed writing is a true, correct and complete copy of the original on file and remaining of record in my office," is not sufficient. *Ibid.*
7. Fertilizer bought "entirely upon its analytical standard, they

(the sellers) in no case to be held responsible for the practical results," evidence of chemist that it did not come up to the standard admissible, though analysis was imperfect, and condition of sample as to preservation unknown to chemist etc. *DeLoach vs. Lardee's Son & Co.*, 94.

8. Practical result, whilst inadmissible to hold plaintiffs responsible, standing alone, yet may be admitted to throw light upon the issue whether or not the fertilizer delivered came up to analytical standard. *Ibid.*

9. Plaintiff interrogated by defendant touching admissions made at certain time, and did not set up that what he said was with a view to compromise, but gave his version of the conversation, defendant should be allowed to give his version by himself or the witnesses present. *Scales vs. Shackleford*, 170.

10 Power, terms of ambiguous, or indorsement blank, meaning ascertained by assistance of surrounding circumstances. *Champion vs. Wilson & Co.*, 184.

11. Books of account are secondary evidence, and only admitted when. *Bracken & Ellsworth vs. Dillon & Sons*, 243.

12. Books will not establish items for cash, nor accounts of third persons transferred to defendants; nor are they admissible at all to show the authority to make such transfer. *Ibid.*

13. Title by virtue of duration of possession sole issue, rejection of testimony that improvements were of but little value, not such error as will require new trial. *Shiels vs. Roberts*, 370.

14. Privity of estate shown between defendant and long line of grantors to lot 17 and buildings thereon obtruding some feet over lot 18, continuity of possession for more than twenty years between him and his grantors, may be proven by parol. *Ibid.*

15. Indistinctness of hearing of witness not exclude testimony; it affects only force thereof. *Cox vs. State*, 374.

16. Stenographic notes of testimony taken down at coroner's inquest, and afterwards transcribed, may, upon proof that writing is correct minute of evidence, be read to show contradictions. *Ibid.*

17. Objection based upon one ground in court below, not entertained upon another in this court. *Ibid.*

18. Conversation, part admitted, rest may be brought out by opposite party on cross-examination. *Ibid.*

19. Doubtful or objectionable matter already before jury, and no motion to withdraw, repetition by another witness, though objected to, treated as not sufficiently material to require new trial. *Ibid.*

20. *Res gestæ*, mutual agreement to arm and fight, and parties separate and arm with pistols, and they meet within an hour and fight with pistols, all pertinent acts and declarations of either in the interval belong thereto. Doctrine of *res gestæ* fully discussed. *Ibid.*

21. Statement of prisoner and evidence, comparative weight. *Ibid. Hill vs. State*, 453.

22. Notice to produce is appropriate means of obtaining original paper; if no such notice is given, secondary evidence of letter excluded even though other party resides beyond limits of state, and has answered interrogatories propounded by his own counsel requesting the production of all letters touching cause of action, sending forward others than the one desired by his opponent, testifying that they were all. *McAdam vs. Weikel & Smith Spice Co.*, 441.

23. Contractor who had engaged for year to work streets according to plans, etc., discharged before year expired, on suit against city for damages, evidence admissible to show that he worked streets in proper manner. *Mayor, etc., of Americus vs. Alexander*, 447.

24. Agreement to convey to sister on payment of purchase money which had been advanced by brother taking title as security, on trial of bill to enforce, competent to prove contract and repayment of money without infringing rule that express trust cannot be engrafted upon written deed by parol proof. *Scott vs. Taylor*, 506.

25. Partnership or no partnership the issue, sayings of one who admitted himself to be such, inadmissible to prove that another was also. *Ford vs. Kennedy*, 537.

26. Admission of one who denies being a partner admissible to prove him such. *Ibid.*

27. Admission of evidence which, if error at all, was so slight as to be harmless, not ground for new trial. *Ibid.*

28. Weight to be given to evidence should be determined by jury, and should not be controlled by charge. *Ibid.*

29. Sayings of one party in absence of other, tending to establish his version of contract, and which form no part of *res gestæ*, inadmissible in his own behalf. *Williams vs. English*, 546.

30. Award itself is best evidence of its meaning. *Mulligan vs. Perry, adm'r*, 567.

31. Arbitrator, testimony of as to what was intended, and his construction thereof, inadmissible. *Ibid.*

32. Father and son lived together, latter cultivating portion of former's [illegible]ling to entire farm, and son went with

father's wagons to purchase guano, admissible to show that in making purchase he stated that guano was for use of both of them. Effect which it would have on father would depend on proof of agency. *Ellis vs. U. S. Fert. and Chem Co*, 571.

33. Bond for title produced under notice to defendant, and on death his widow was made party in his stead, and stood as heir claiming benefit under paper, it was properly admitted without proof of execution, but subject to be excluded if it subsequently appeared that she had legal claim to land independently of bond. *McMath vs. Teel, adm'r*, 595.

34. Letter inadmissible to bind third person in absence of proof of authority to write, etc. *Ibid.*

35. Records and judicial proceedings of courts of other state, since May, 1790, admitted upon proper attestation and certificate. *McAllister vs. Singer Man. Co.*, 622.

36. Parol evidence inadmissible to show that certain decree was rendered when collaterally in question in court of rendition; much more so in another tribunal. *Clark vs. Cassidy, adm'r*, 662.

37. Discharged employé, suit by, statements made after time when notice of discharge was alleged to have been given, and before it was to take effect, admissible to show preference by him of other service. *Howard vs Chamberlin, Boynton & Co.*, 684.

38. Amount made by discharged employé in other service admissible, and where he sold fruit trees on which he was to receive commission on collection therefor, books received from plaintiff containing notes taken, and also books compiled from these by last employer and plaintiff, containing schedule of makers and amounts, with marks of payment where made, admissible. *Ibid.*

39. Inadmissible to show that plaintiff left more lucrative position to obtain year's employment with defendants. *Ibid.*

40. Confederate government being overthrown, and being no records by which to establish acts of congress, parol testimony of witness that he was a member of that body, that acts were genuine, etc., sufficient to admit printed copy. *Commissioners of Bartow Co. vs. Newell*, 699.

41. Absolute bond as treasurer of state delivered, cannot be shown by parol that it was accepted by governor as temporary bond, to be void when a new one, with new securities, was executed. *Jones et al. vs. Smith, gov.*, 711.

42. Reopen testimony, court may in its discretion. *Ibid.*

43. Fraud in making or procurement of deeds constituting chain of title to defendant, inadmissible unless notice thereof was shown to latter. *Kieth vs. Catchings*, 773.

44. Quit-claim deed from original grantor to purchasers from his vendee, executed long after he had parted with title, and obligation back to him going to show that he had interest in land, inadmissible as based upon no consideration and irrelevant. *Ibid.*

45. Legal title and actual ownership in such grantor, after he had conveyed by deed, cannot be shown by parol. *Ibid.*

46. Legal effect of deed and bond to reconvey was for court, and parol proof to show that they constituted mortgage was properly excluded, the instruments being unambiguous, and no charge of fraud, accident or mistake being made. *Ibid.*

47. Grantor having parted with title, no subsequent act of his with other parties, whether fraudulent or not, could affect such title, and therefore, all evidence to show such fraud was properly excluded. *Ibid*

EXECUTIONS.

1. Comptroller-general not authorized by law to transfer tax *fi. fas.* issued by him against wild lands on payment of amount due thereon. *Johnson vs. Christie, sh'ff, et al.*, 117.

2. Advance by third person to obtain transfer of execution, with intention to keep it open until reimbursed, transaction is not a payment but a purchase, and though person making transfer had authority to collect, yet if he had no power to sell absolutely as against plaintiff, and latter has never ratified, there was no satisfaction and his title remains unimpaired. *So. Star L. R. Co vs. Duvall*, 262

3. Attorney is empowered to transfer execution subject to ratification by client, but whoever deals with the attorney or his transferee takes risk of client's refusal to ratify. *Ibid.*

4 Levy appearing on sufficient personalty to satisfy, presumption that *fi. fa* was satisfied. *Oliver vs. State*, 480.

EXECUTIVE WARRANT. See *Governor*, 1.

EXEMPLIFICATION. See *Evidence*, 5, 6.

FERTILIZERS. See *Contracts*, 1, 2, 12, 13.

FOREIGN CORPORATION See *Corporations*, 1

FRAUD. See *Contracts*, 11; *Prescription*, 4.

FRAUDS, STATUTE OF. See *Partnership*, 5.

FRAUDULENT CONVEYANCE.

1. Creditor of insolvent estate under injunction not to sue executor, has good excuse for not obtaining judgment on debt before proceeding in equity to set aside voluntary conveyance; if during pendency of bill, decree is obtained fixing amount, same may be brought in by amendment. *Cleveland et al. vs. Chambliss, guardian*, 353.

2. Voluntary conveyance attacked solely on ground that donor was insolvent, making no charge as to fraudulent intent, such intent, apart from insolvency, is not in question, and instructions to jurywhich do not look to insolvency as necessary fact, inappropriate. *Ibid.*

3. Reservation of two years' use and possession of land sold few weeks before judgment by insolvent debtor, destroys validity of conveyance as against such judgment. *Mitchell vs. Stetson*, 442.

FREE PERSONS OF COLOR See *Guardian and Ward*, 1, 2.

GARNISHMENT.

1. Traverse of answer denying indebtedness, with subsequent amendment setting out facts whereby other indebtedness was substantially shown, though on complicated state of facts, should not be stricken on demurrer. *Bates & Co. vs. Forsyth, adm'r*, 232.

2. Variance between condition of bond and that required by statute, fatal in this case. *Maddox vs. Heard et al.*, 448.

3. Answer summons from justice court, garnishee must within ten days. Duty is imposed by law, whether summons so specifies or not. *Hearn vs. Adamson*, 608.

4. Monthly wages of painter liable to garnishment for medical services, depends upon date thereof. If while act of February 24th, 1875, was of force, liable, otherwise not. *Moore vs. McClown*, 617.

GIFT.

1. Intention to give, acceptance by donee, and delivery of article given, or some act accepted by law in lieu thereof, necessary to constitute valid gift. Delivery of non-negotiable instrument, without more, insufficient. *Hill, adm'r, for use, vs. Sheibley*, 529.

GOVERNOR.

1. Executive warrant on treasurer as voucher for redeemed bonds of state, open to inquiry by courts, as to good faith of treas-

urer in procuring such warrant, when it is alleged that it was procured by fraud. *Jones et al. vs. Smith, gov*, 711.

GUARDIAN AND WARD.

1. Free persons of color, guardian of appointed prior to abolition of slavery, in 1868 no ordinary had power to dismiss and appoint successor. *Monroe et al. vs. Phillips, adm'r*, 32.
2. Slavery, during existence of there was no law or public policy against the ownership of personal property by free persons of color, and no law for any slave to have a guardian. The appointment of a white man as guardian for certain negroes, and his acting in such capacity, involved their freedom as a foregone conclusion. If they were *de facto* free in "slavery times," and he made returns to the ordinary in 1868 reaching back to 1854, in which he debited and credited them as his wards, it need not further appear whether they were free *de jure* or not, in order to hold him to account. *Ibid.*
3. Confederate bonds, burden of proving that fund was converted into in a legal way, on guardian or representative. *Ibid.*
4. Returns, one of several made at the same time and sworn to in the same affidavit, having been introduced by the plaintiffs, the defendant may introduce the rest of the series, and the whole may be considered by the jury as one entire document. *Ibid.*
5. Minor, bill served on and step-father answered as *prochein ami*, she would be bound by decree in absence of fraud. *Cuyler et al. vs. Wayne, adm'r*, 78.
6. Bond should always be required on appointment of guardian, but grant of letters without not void as against *bona fide* purchaser under guardian without notice of want of bond. *Ibid.*
7. Natural guardian of daughter over fourteen, not obligatory upon courts to supersede mother as, and appoint person selected by daughter. *Beard vs. Dean*, 258.
8. Ordinary exercises limited jurisdiction in issuing commission for examination of person alleged to be imbecile. Proceedings must show on face such facts, especially touching notice, as will authorize judgment appointing guardian. *Morton, guardian, vs. Sims*, 298.
9. Nearest adult relatives themselves the petitioners ten days' notice should be given to three of the next nearest, and if there be none within the state except petitioners, then notice should be given to the alleged imbecile himself, or else a guardian *ad litem* be designated to receive the notice. *Ibid*
10. Levy under *fi. fa.* for balance of purchase money, and claim by defendant as guardian of minor; plea to effect that he had

used money of ward in paying part of purchase money for land which had been bought by him individually, which fact was known to plaintiff, who is insolvent, and that ward is equitably entitled to have land, or that it be sold and ward repaid, etc , praying that sale be enjoined until proper decree can be rendered, demurrable, especially as there was no offer to pay balance due. *Shealy, guardian, vs. Toole*, 519.

11. Action on note payable to plaintiff for use of childr.n against father, plea setting up that defendant is natural guardian, that plaintiff is insolvent, and if permitted to collect will appropriate to his own use, and praying that upon defendant's giving bond for the faithful management of the fund the note should be decreed satisfied, should not be stricken on demurrer. *Smith vs. Danielly*, 554.

12. Husband of ward, who was also guardian, transferred execution in favor of ward to his creditors, and they collected money thereon, remedies of wife were two-fold: first, those of ward to call guardian to account ; second, of wife, to recover from creditor who knowingly receives, in payment of debt, money belonging to debtor's wife. *Story & Bro. vs. Walker*, 614.

HABEAS CORPUS.

1. Prisoner under *mesne* process for recovery of personal property, legality of imprisonment not depend on truth of plaintiff's affidavit, but upon due verification of material facts alleged therein, together with the substance of the declaration, the jurisdiction of the court, and the sheriff's return. *State ex rel. Lynch vs. Bridges, jailer, et al.*, 146.

2. Wife of prisoner suing out *habeas corpus* entitled to writ of error upon final decision. *Ibid*

HOMESTEAD.

1 Specific exemption of Code, act of 1874 making liable for purchase money, not affect exemption set apart before act was passed. *Hawks vs. Hawks, ex'x*, 239.

2. Exemption treated as valid, unrecorded mortgage for purchase money will take in preference to one duly recorded, to secure debt not within any of exceptions of constitution. *Walker vs. Johnson et al.*, 363.

3. Realty, homestead in under §2040 *et seq.* of Code, must be laid off and plat returned and recorded in order to vest title in head of family free from debts, unless quantity owned is not more than that exempted. *Pritchard vs. Ward*, 446.

4. Indigent sister and children, though mainly dependent on ap-

plicant for support, do not constitute family for whose benefit he can take homestead. *Dendy vs. Gamble & Copeland*, 528.

5. Debtor, in August 1856, arrested under *ca. sa.*, filed his schedule, etc., and discharged under act for relief of honest debtors, leaving him in possession of fifty acres of land, which he held until death of wife and arrival at age of children, no longer under the operation of exemption law of 1822 and amendments. *Wright et al. vs. James*, 533.
6. Subsequent marriage not re-establish exemption. *Ibid.*
7. Recital in deed that land conveyed had been set apart as homestead, not ground for rejection as evidence of title. Sale, though private, may have been for some one of purposes enumerated in constitution of 1868 as authorizing judicial sale. *Willis vs. Meadors, ex'r*, 721.
8. Equity has exclusive jurisdiction of suits for recovery of exempted property voluntarily sold prior to act of 1876. *Zellers vs. Beckman*, 747.
9. Husband is head of family and is proper person to bring suit. *Ibid.*

HUSBAND AND WIFE.

1. *Habeas corpus*, wife of prisoner suing out, entitled to writ of error on final decision. *Lynch vs. Bridges, jailer, et al.*, 146.
2. Possession entered in 1858 by husband and wife, and former, in 1870, gave note to plaintiff's intestate and took bond for title from him, and held thereunder until death, husband during life and widow after death, in absence of any written title, estopped from setting up adverse title by possession, even though for twenty years. *McMath vs. Teel, adm'r*, 595.
3. Guardian, who was also husband of ward, transferred execution in favor of ward to his creditors, and they collected money thereon, remedies of wife were two-fold: first, those of ward to call guardian to account; second, of wife, to recover from creditor who knowingly receives, in payment of debt, money belonging to debtor's wife. *Story & Bro. vs. Walker*, 614.
4. Competent to show, if action belongs to latter class, that money was received in payment of debt of wife, that husband was insolvent, and credit was refused him, etc. *Ibid.*
5. Decree authorizing divorce, none entered, though two verdicts rendered, parties incompetent to contract marriage. *Clark vs. Cassidy, adm'r*, 662.
6. Act of 1868, whether constitutional or not, can have no application on account of absence of decree. *Ibid.*
7. Marriage valid without license or banns, when. *Ibid.*

IMBECILE. See *Guardian and Ward*, 8, 9.

ILLEGALITY.

1. Service, jurisdiction in court of amount and person, as well as judgment against defendant, although by default, or not founded on sufficient evidence, conclusive as against illegality based on causes anterior thereto. *Greene vs. Oliphant & Hannah*, 565.
2. Ordinary on settlement with county treasurer, taxed no costs against him as far as record discloses, fact that judgment, and execution based thereon, do not contain itemized bill, no ground of illegality. *Smith, county treasurer, vs. Outlaw, sheriff*, 677.

INDICTMENT. See *Criminal Law*, 11, 29, 34, 42.

INDORSEMENT. See *Surety and Indorser*.

INJUNCTION AND RECEIVER.

1. Pendency of bill to foreclose mortgage on railroad and for appointment of receiver, in U. S. circuit court of South Carolina, not affect operation of attachment laws of this state, though some of plaintiffs in attachment were parties defendant before levy made, and others were made so afterwards, it not being a general creditors' bill. *South Car. R. R. vs. Peoples' Sav. Ins.*, 18.
2. Attachments levied on property of foreign corporation in this state, and receiver afterwards appointed in its own state, before he can defend he must apply to courts where pending and be made a party. *Ibid.*
3. Petition that property levied on be turned over to receiver, not proper mode of disposing of attachments. *Ibid.*
4. Trustees of camp-meeting ground, contest between two sets of, and no allegation being made that either has interfered with beneficiaries in enjoyment of religious worship, equity will not interfere by injunction, but will leave parties to a *quo warranto*. *Harris et al. vs. Pounds et al.*, 121.
5. Tax-payers may intervene by injunction and prohibit municipality from incurring illegal debt. *Hudson et al. vs. Mayor, etc., of Marietta*, 286.
6. Dower though not assigned, widow in possession of dwelling-house needs no injunction to restrain creditor from selling under execution, or to restrain sheriff, before sale, from turning her out. Notice at sale of rights will fully protect her. *Jackson & Co. et al. vs. Rainey*, 311; *Spence et al. vs. Cox*, 543.

7. Nuisance, obstruction of any part of twenty-foot alley dedicated to use of grantees of lots adjoining by common grantor, by erection of two privies thereon projecting in alley, is, and equity will enjoin; damage could not be estimated in money. *DeGive vs. Seltzer*, 423.

8. Affidavits used on hearing of application for injunction constitute no part of record; must be incorporated in bill of exceptions and identified by judge. *Morgan vs. Twitty et al.*, 426.

9. Discretion of chancellor in granting or refusing injunction not controlled unless some well recognized principle of law or equity be violated. *Holleman vs. Holleman*, 437; *Jenkins vs. Harris, ex'r*, 440; *Pitts vs. Flournoy & Epping et al*, 681.

10. Vendor's lien, bill asserting, and seeking to enjoin administrator from selling and paying other creditors, but failing to charge such creditors with notice of lien, or that they occupied such relation prior to sale of land to intestate, injunction properly refused. *Head et al. vs. Aycock, adm'r, et al.*, 441.

11. Levy under *fi. fa.* for balance of purchase money, not enjoined at instance of defendant as guardian of ward, setting up that payment made was with funds of ward, which was known to plaintiff, who is insolvent, that ward is equitably entitled to land, or to have it sold and money refunded, especially where there is no tender of balance due. *Shealy, guardian, vs. Toole*, 519

12. Adjacent property owner not entitled to injunction because sewer which is about to be inserted may be too small for volume of water, thus flooding lot, causing sickness, etc. Matter is in discretion of municipal authorities. *Mayor, etc., of Americus vs. Eldridge*, 524.

13. Judge of city court no authority to grant injunction in vacation under provision of constitution of 1877 authorizing him and judge of superior court to preside for each other in certain cases. *Northwestern M. L. Ins. Co. vs. Wilcoxon, adm'r*, 556.

14. Rent of lands pending litigation, under order of court, pass with corpus in the adjudicated disposition thereof. *Ross et al., adm'rs, vs. Stokes, adm'r*, 758.

15. Ministerial officer attempting to collect money under forms of law, but without any valid constitutional law to authorize the process he uses and calls an execution for taxes, it is the duty of the courts to arrest the proceeding. *Wright, comp. gen., et al. vs. Southwestern Railroad*, 783.

16. Equity has jurisdiction to interfere in behalf of railroad company on following grounds: First, because exactions are pressed upon it in form of annual taxes, violative of its chartered rights and destructive of its franchise; secondly, exac-

tions might be repeated and suits and costs multiplied; thirdly, it was misled by action of comptroller and legal fraud perpetrated on it; fourthly, mistake caused by defendant's conduct; and, fifthly, the numerous questions made as to different parts of the road, and the liability of each branch, most of them dependent upon separate charters and amendments, etc., make case complicated to a degree that court of equity can better unravel it than court of law. *Ibid.*

17. Tax executions having been issued and levied upon property in Bibb county, by sheriff thereof, and the principal office of road being in that county, superior court thereof had jurisdiction of bill to enjoin. *Ibid.*

INSANITY. See *Criminal Law*, 39.

INTEREST AND USURY.

1. Deed tainted with usury void as title, and if good as equitable mortgage, it is only so far as to secure principal. *Denham vs. Kirkpatrick*, 71.
2. Holder of such deed, by notice given at sale of amount of debt to him, including therein the usury, causes property not to bring full value, he becoming the purchaser, is liable to grantor for difference. *Ibid.*
3. Deed executed whilst there was no usury law in force, could not be tainted. *Tummons vs. Hamilton*, 137.
4. Loan made in 1873 at usurious rate, on two notes payable following October and November. At maturity usury laws had been repealed. The first was paid, and the second renewed by draft, without purging. To suit on draft begun in 1877, usury paid on note which was discharged not matter of defense. *Williams vs. Grif. Bank. Co.*, 178.
5. Contract made for more than 10 per cent., under act of December 11th, 1871, it was valid for that much. *Ibid.*
6. Limitations, usury paid from 1873 to 1875 cannot be pleaded as against suit commenced in 1879. *Finney vs. Brumby, trustee*, 510.
7. Appeal from justice court, interest on liquidated amount sued for cannot be remitted so as to avoid. *Howard vs. Chamberlin, Boynton & Co*, 684.
8. Tax due on part of property not covered by limitations in charter, equitable that company should pay interest at least from time tax was claimed by officers of state. *Wright, comp. gen'l, et al. vs. Southwestern Railroad*, 783.

INTERROGATORIES.

1. Party making himself witness held to answer strictly and

minutely every question, or testimony rejected. *Howard vs. Chamberlin, Boynton & Co.*, 684.

2. Error turns upon ruling based on inspection by court of set of interrogatories used on trial, *certiorari* not dismissed because originals were attached to petition. *Scott vs. McDaniel*, 780.
3. Commissioners are officers of court for purpose of taking testimony, and presumption is that they performed duty by having answers written by competent person. *Ibid.*
4. Presumption not rebutted by mere inspection of them, without more, although handwriting in body of answers, the signatures of commissioners and that of the witness, may each appear to be different. *Ibid.*

JOINT-TENANCY. See *Estates*, 1–3.

JUDGMENT.

1. Arrest judgment, refusal to cannot be made ground of motion for new trial. May be excepted to in bill of exceptions which brings up whole case, but not in that which brings up only motion for new trial. *Watson vs. State*, 61.
2. Subject, property found in claim case, followed by affirmance in supreme court, claimant concluded as to validity of original judgment between creditor and debtor. *Henderson vs. Hill*, 292.
3. Decree against realty held in trust, trustee being party to bill, beneficiaries cannot interpose claim. *Zimmerman et al. vs. Tucker*, 432.
4. Distribution of money, final judgment for passed, and during same term some of parties to proceeding petition for rule *nisi* requiring others to show cause why judgment should not be set aside because of mistake, etc., rule should not be granted where there is no verification of facts alleged, no mistake appearing on face of former adjudication. *Dugan et al. vs. McGlaun et al.*, 446.
5. Motion made March 31st, 1879, to set aside decree rendered in 1871, was barred by act of February 15th, 1876. *Plumb, trustee, vs. Tucker*, 497; *In re Bradley*, 535.
6. Administrator's sale discharges lien of judgments, exception where levy has been made before sale, not include constructive levy by reason of filing of bill to subject land. *Rhett, trustee, vs. Ga. Land and Col. Co.*, 521.
7. Service, jurisdiction in court of amount and person, as well as judgment against defendant, although by default, or not founded on sufficient evidence, conclusive as against affidavit of illegality based on causes anterior thereto. *Greene vs. Oliphant & Hannah*, 565.

8. Motion to dismiss *certiorari* made and overruled, but no order entered on minutes, and at subsequent term same ground was again urged on new motion to dismiss, no error in allowing order to be entered *nunc pro tunc*, and holding that ground to be *res adjudicata*. *Fuller vs. Arnold et ux.*, 599.

9 Foreign judgment, plea to suit on which appertains wholly to matters occurring anterior thereto, stricken. *McAllister vs. Singer Man. Co.*, 623.

10. *Nunc pro tunc* order, on motion to enter question of fact involved as to passage of original order, court should decide without jury. *Lewis et al. vs. Armstrong, adm'r*, 645.

11. Purchase with four years' possession, under §3583 of Code, does not protect one who buys with notice that property is then subject to judgment. *Prater vs. Cox et al.*, 706.

12. Excess of amount declared for, judgment covering is irregularity, but constitutes no ground to dismiss levy. *Buice vs. Lowman G. & S. M Co.*, 769.

JURISDICTION.

1. Ordinary exercises limited jurisdiction in issuing commission for examination of person alleged to be imbecile. Proceedings must show on face such facts, especially touching notice, as will authorize judgment appointing guardian. *Morton guardian, vs. Sims*, 298.

2. Court of county of sheriff has jurisdiction to rule him, though mortgage *fi. fa.*, on which it was claimed money had been illegally paid, was returnable to subsequent term of another county. *Hollis et al. vs. Saulsbury, Respess & Co.*, 444

3. Waive absence of jurisdiction of person, defendant cannot so as to affect rights of third persons. *Rhett, trustee, vs Ga. L. & Col. Co.*, 521.

4. Act of court after jurisdiction has terminated, without legal effect. *Greene vs. Oliphant & Hannah*, 565.

5. Levy under foreclosure of saw-mill lien on mill etc., and claim filed, case returned to county of residence of defendant in *fi. fa. Akin vs. Peck & Allen*, 643.

6. Will provided for payment of debts, of specific legacies, and that balance should go to son for life with remainder to children, and if none, then to other relatives. Also, that son should not control property until he became of age, and that executor should see to religious and secular education. Son became of age in 1854, and died in 1860, leaving child born in 1855. On *ex parte* proceeding in equity, filed in 1843, less than thirty days before term, court of county where executor lived, rendered decree, founded on verdict of jury, allowing him to

sell certain realty to pay debt, and to make distribution required by will: *Held*, that though proceeding was irregular, court was not without jurisdiction, and decree, not being void, cannot be collaterally attacked. *Dean, ex'r, vs. Cent Cot P. Co.*, 670.

7. County of residence of principal, action against him and two securities residing in different counties, and principal died. plea to jurisdiction by sureties properly overruled. *Walsh et al. vs. Colquitt, gov.*, 740.

8. Tax executions issued and levied in Bibb county, and principal office of railroad company being in that county, superior court thereof had jurisdiction of bill to enjoin. *Wright, comp. gen., et al. vs. Southwestern Railroad*, 783.

JURY.

1. Casual conversation by juror with person not on jury, and procurement by bailiff of newspapers for him, not necessitate new trial, it appearing that nothing was said or done which had any bearing on case. *Flanegan vs. State*, 52.

2. Capital felony, for juror to retire with leave of court in charge of bailiff, on trial of, not illegal separation. *Neal et al., vs State*, 272.

3. Commissioners acting and recognized by court as such, are officers *de facto* if not *de jure*, and that no order of appointment appears on minutes will not, in trial for felony, be cause of challenge to array. *Cox vs. State*, 374.

4. Alphabetical order, that sheriff selected tales jurors from list in, no ground of challenge. *Ibid.*

5. Statutory questions answered so as to make juror *prima facie* competent, and he being then put upon presiding judge for further trial, judge may decline to allow any other questions to be propounded, and confine investigation to evidence *ali unde*. *Ibid.*

6. Grand juror's name on minutes as properly drawn, sufficient reply to exception to indictment that his name was not in jury-box. *Cross vs. State*, 443.

7. Remark by juror before impaneled indicating bias, explained, and if simply for purpose of avoiding jury duty, fact that he was taken on jury which convicted, not necessitate new trial. *Hill vs. State*, 453.

8. Conversation by juror with wife apart from others, no ground of new trial, where it appears it had no reference to case, and was with consent of defendant's counsel. *Ibid.*

9 Objections *propter defectum* to late after verdict. *Ibid*

10 Polled, language used by juror on being, shows that he assented to verdict. *Ibid.*

11. Verdict, juror cannot impeach by affidavit. *Ibid.*

12. Constitution of 1877 does not alter law in reference to jury being judges of law and fact in criminal cases. *Ibid.*

13. Constitutions of 1868 and 1877, effect of provisions relating to jury system. *Hamlin et al. vs. Fletcher, executor*, 549.

14. Court has no power to indicate who shall be placed upon panel as jurors to complete it. How talesmen should be selected. *Ibid.*

JUSTICE COURTS. See *Appeal*, 4; *Charge of Court*, 17; *Garnishment*, 3.

LANDLORD AND TENANT.

1. Evicted, tenant cannot treat himself as, and attorn to another, without defending possession or giving his landlord notice that it was attacked. *Williams vs. McMichael*, 445.

2. Lien on crop for rent, superior to agreement between tenant and one who cultivated the premises with him on shares, that latter should have all the cotton raised thereon. *Alston vs. Wilson*, 482.

3. Contract provided that if tenant be ousted from possession of rooms, tenancy and rent should cease; that landlord entered and used, on one or more occasions, room during absence of tenant, not constitute such ouster as to relieve latter from payment of rent. *Way et al. vs. Myers*, 760.

LEVY AND SALE.

1. Holder of deed tainted with usury gives notice at sale of same as an equitable mortgage to cover amount of debt including usury, through which he is enabled to purchase land at less than its value by the amount of the usury, liable to the grantor for difference. *Denham vs. Kirkpatrick*, 71.

2. Municipal corporation, property in use of for public, or held for future use, not subject to levy and sale. *Curry vs. Mayor, etc., of Savannah*, 290.

3. Mortgage *fi. fa.*, corn sold thereunder and knocked off to defendant in *fi. fa.* Agreement then made between defendant and sheriff that if former would pay off amount due on *fi. fa.* he might have corn, otherwise agent of plaintiffs, who was next highest bidder, should take it. Defendant paid off mortgage *fi. fa.* and took property: *Held*, that lien of judgments not in sheriff's hands was not divested by this proceeding, and money was properly paid to mortgage *fi. fa.* *Hollis et al. vs. Saulsbury, Respess & Co.*, 444.

4. Court of county of sheriff had jurisdiction to rule him, though

mortgage *fi. fa.* was returnable to subsequent term of another county. *Ibid.*

5 Presumption that *fi. fa.* was satisfied where levy on sufficient personalty appears, and no disposition thereof. *Oliver vs. State*, 480.

6 Description sufficient where levy was upon "one house and one-half of lot No. 12 in the town of Wrightsville, adjoining T. W. Kent and Streets." *Smith, county treasurer, vs. Outlaw, sheriff*, 677

7. Rule against sheriff for failure to make money, it appeared that he had failed to obey instructions for six months, when defendant died, and he was then enjoined until right of widow to dower and year's support was determined, and that plaintiffs were injured by delay, makes *prima facie* case. *French, Richards & Co. vs Kemp, sheriff*, 749

8. Dismissal of levy, is motion for new trial proper mode for correcting error in? *Quære. Buice vs. Lowman G. & S. M. Co*, 769.

9. Judgment in excess of amount declared for is an irregularity, but is no ground of dismissal of levy. *Ibid*

LICENSE. See *Municipal Corporation*, 1-6, 15.

LIEN.

1. Affidavit to foreclose laborer's lien on products of labor, in this case, shows completion of contract, that wheat was raised under contract, and valid excuse for not making demand for payment *Lindsay vs. Lowe*, 438.

2. Vendor's lien, bill asserting, and seeking to enjoin administrator from selling and paying other creditors, but failing to charge such creditors with notice of lien, or that they occupied such relation prior to sale of land to intestate, injunction properly refused. *Head et al. vs. Aycock adm'r, et al*, 441.

3. Lien of landlord on crop for rent superior to agreement between tenant and one who cultivated premises with him on shares, that latter should have all cotton raised thereon. *Alston vs. Wilson*, 482.

4. Bill to cancel deed and to recover land conveyed by it, jury found for complainant 400 acres of land by his refunding to defendant $987.50; such refunding was condition precedent to absolute recovery, and until it took place no lien in favor of complainant's attorneys could attach. *Usry vs Usry et al.*, 579

5 Saw-mill lien, levy on mill, etc., under foreclosure of and claim filed, case returned to county of residence of defendant in *fi. fa.* *Akin vs. Peck & Allen*, 643.

LIFE ESTATE. See *Administrators and Executors*, 23; *Parties*, 5.

LIMITATIONS, STATUTE OF.

1. Suspended, statute having been from 1864 to 1868, and the time intervening between the two administrations not to be counted until the expiration of five years, and nine months and fifteen days to be added before bar prescribed by act of 1869 would attach, the bond and mortgage were not barred by that act in 1872, when the letters *de bonis non* were issued. *Weitman, adm'r, et al. vs. Thiot et al.*, 11.
2. Administration *de bonis non* having been granted in 1872 to one of several trustees for purpose of securing payment of bond and mortgage, they were not barred whilst he was sole administrator, and when he administered assets and applied them to debt without unreasonable delay. *Ibid.*
3. Infancy in reply to limitation act of 1869, effect of. *Munroe et al. vs. Phillips, adm'x*, 32.
4. Motion made March 31st, 1879, to set aside decree rendered in 1871, was, on its face, barred by act of February 15th, 1876. *Plumb, trustee, vs. Tucker*, 497; *In re Bradley*, 535.
5. Usury paid from 1873 to 1875 cannot be pleaded to suit commenced in 1879. *Finney vs. Brumby, trustee*, 510.
6. Items relied on to take whole account from under bar must both be pleaded and proved. *Ford vs. Kennedy*, 537.
7. Entry of payment on note by principal not prevent bar from attaching in favor of security. *McBride, adm'r, vs. Hunter*, 655.
8. Administrator of one who signed note only as surety, cannot relieve it from bar of statute so far as primary creditors may be affected thereby. *Ibid.*
9. Purchase with four years' possession, under §3583 of Code, does not protect one who buys with notice that property is then subject to judgment. *Prater vs. Cox et al.*, 706.
10. Advancement by father to son of wool-carder of value of $1000.00, which former subsequently again took possession of and used, father became debtor to son, and statute would run as well against such claim as against any other debt. *Persell vs. Scott, adm'r*, 767.

LIS PENDENS. See *Notice*, 1.

MAIL. See *Practice in Superior Courts*, 6.

MARRIAGE. See *Husband and Wife*, 4–6.

MASTER AND SERVANT. See *Contracts*, 16; *Evidence*, 37–39.

MINOR. See *Parties*, 4; *Railroads*, 2, 3.

MINUTES. See *Practice in Superior Courts*, 8, 11

MORTGAGE.

1. Note payable to certain person or ——, mortgage subsequently given to secure which describes it as payable to payee or bearer, on rule to foreclose, treated as explaining intention of parties in respect to blank, and note being indorsed to assignee of mortgage or to her trustee, held negotiable. *Elliott vs. Deason*, 63.
2. Married woman, mortgage assigned to, and note which it was given to secure is assigned to naked trustee for her use, title to both is in her, and she may foreclose in her own name. *Ibid.*
3. Written assignment purporting to be made for value received, and for love and affection, bearing date before maturity of debt, some evidence of valuable consideration, enough to warrant court to touch upon that subject in charging. *Ibid.*
4. Land incumbered by mortgage sold by mortgagor at full value, bond for title given and note taken for price, and third person, with notice of facts, purchases note before due at value, less amount of mortgage, and afterwards buys land at mortgage sale, he cannot collect balance of note after deducting what land brought. *Noys vs. Ray*, 283.
5. Unrecorded mortgage for purchase money on homestead will take in preference to one duly recorded, to secure debt not within any of exceptions of constitution. *Walker vs. Johnson et al.*, 363.
6. Instruments reciting that to secure debt certain property is conveyed at stipulated price, and concluding with *habendum*, *tenendum* and warranty clauses, are not mere mortgages, but under act of 1871 carry title, with right to have reconveyance on payment of debt. *Carter et al. vs. Gunn*, 651.
7. Legal effect of deed and bond to reconvey was for court, and parol proof tending to show that they constituted a mortgage was properly excluded, the instruments being unambiguous, and no charge of fraud, accident or mistake being made. *Kieth vs. Catchings*, 773.

MUNICIPAL CORPORATIONS.

1. Macon may collect license tax from any firm retailing fresh meat in city, whether from stalls, stores, or by peddling same on street. Exception exempting farmers selling their own produce, does not make the tax invalid as to others. *Davis & Co. vs. Mayor, etc, of Macon*, 128.

2. Wagons used in the business may also be taxed. Validity not impaired by exempting wagons used in delivering milk from dairies on country farms. *Ibid.*

3. Property tax paid, no obstacle to collection of business tax measured in part or in whole by the employment of vehicles already taxed *ad valorem* as property. *Ibid.*

4. Butcher whose residence, shop and pen are all out of the city limits, but who habitually hauls inside a part of his fresh meat and delivers to regular customers at their doors, making no charge for the delivery, is nevertheless within the ordinance both as to license tax and specific tax on wagon. *Ibid.*

5. Stone Mountain, though having authority to grant or withhold license to retail, and to establish police regulations generally, cannot, after granting a license, pass and enforce ordinance requiring all retailers to close doors and forbear to sell whilst, and at all times when, "any denomination of Christian people" is holding divine service anywhere in the town, the ordinance being silent as to any and all other worshippers. *Gilham & Brown vs. Wells et al.*, 192.

6. Stipulation in bond of retailer to abide by all ordinances which may be passed, does not bind him to subsequent ordinance which authorities had no power to pass. *Ibid.*

7. Itinerant traders, merchants who ship from St. Louis to Atlanta, to agent, who sells by going about city to engage goods, and then delivering from cars, having no store or warehouse, are, and liable for taxes imposed upon that business. *Burr & Co. vs. City of Atlanta*, 225.

8. Appeal in *forma pauperis*, corporation may enter through its chief executive officer. *Mayor, etc., of Savannah vs. Brown*, 229.

9. Mayor can only try and dismiss policeman in judicial capacity as mayor, and appeal to mayor and aldermen in council will lie from his decision. *Ibid.*

10. Marietta has no authority, under constitution of 1877, to incur debt of $3,000.00 in order to exchange old fire engine for steamer, until there has been an election held according to a law prescribing manner thereof. *Hudson et al. vs. Mayor, etc., of Marietta*, 286.

11. Tax-payers are interested to see that their city does not incur such debts except lawfully, and may intervene by injunction. *Ibid.*

12. Levy and sale, property of municipality held for public use, not subject to. *Curry vs. Mayor, etc., of Savannah*, 290.

13. Contractor engaged for year to work streets of city according to plans, etc., on suit against city for damages for wrongful

discharge, evidence admissible to show that he worked streets in proper manner. *Mayor, etc., of Americus vs. Alexander*, 447.

14. Power to open streets, construct sidewalks, levy taxes, etc., necessarily implies right to insert sewer in sidewalk to carry off surface water instead of open ditch. *Mayor, etc., of Americus vs. Eldridge*, 524.

15. License taken out as livery stable-keeper, authorizes hiring out two-horse wagon by day for purpose of hauling lumber without obtaining license to run dray. *Mayor, etc., of Griffin vs. Powell*, 625.

NEGOTIABLE INSTRUMENTS.

1. Certificate of deposit "subject to order, on the following terms: interest at 7 per cent. on call, or 10 per cent. by the year," signed by the cashier of a bank, and indorsed in blank by the payee, is in effect a negotiable promissory note, payable generally on demand, and due immediately, and no demand, notice or protest is necessary to charge the indorser. *Lynch vs. Goldsmith*, 42.

2. Note payable to certain person or ——, mortgage subsequently given to secure describes note as payable to payee or bearer, treated, on rule to foreclose, as explaining intention of parties in respect to blank, and note being indorsed to assignee of mortgage or her trustee, held negotiable. *Elliott vs. Deason*, 63.

3. Set-off between maker and payee arising subsequently to transfer of note and out of transactions wholly disconnected therewith, negotiable paper transferred *bona fide*, whether before or after maturity, and whether for a valuable or a good consideration, not subject to. *Ibid.*

4. Delivery to friend acting in her behalf effective where negotiable paper is assigned to married woman, or to a naked trustee for her use, both being absent. *Ibid.*

5. Partnership property, note given for payable to order of one partner individually, cannot be indorsed by another member of firm in name of payee so as to pass legal title, with incidents of negotiable paper transferred before due, without more authority than that which results by operation of law from the partnership relation. *McCauley et al. vs. Gordon*, 221.

6. Alteration of such note by inserting therein words "or bearer," is material alteration. *Ibid.*

7. Note payable to assignee in bankruptcy or bearer, and though sued in representative capacity, yet courts of state have jurisdiction thereof. Any person in possession could have maintained such suit. *Collier, assignee, vs. Barnes*, 488.

8. Receipt from payee of negotiable paper in full of note, not protect maker from payment when sued by *bona fide* holder thereof before due. *Wilcox, Gibbs & Co. vs. Aultman*, 544.

9. Transfer by delivery, without indorsement, of notes payable to order, transferees charged with notice in transferrers. *Planters' Bank vs. Prater et al.*, 609.

10. Transfer by delivery, without indorsement, of notes payable to order, does not carry with it title to land conveyed to payees to secure payment thereof. *Ibid.*

NEW TRIAL.

1. Evidence conflicting on real issue, and court charged erroneously on controlling points, new trial should be granted. *Weitman, adm'r, et al. vs. Thiot et al.*, 11; *Champion vs. Wilson & Co.*, 184.

2. Newly discovered evidence tending to impeach witness, and in the main cumulative, not ground of. *Flanegan vs. State*, 52.

3. Arrest judgment, refusal to cannot be made ground of motion for new trial. *Watson vs. State*, 61.

4. Immaterial error no ground of new trial. *Elliott vs. Deason*, 63; *Ford vs. Kennedy*, 537; *Rosser vs. Cheney et al.*, 564; *Commissioners of Bartow Co. vs. Newell*, 699; *Willis vs. Meadors, ex'r*, 721.

5. Judge who granted rule *nisi* related to one of the parties, not valid objection to hearing by non-resident judge who tried case, and to whom motion was submitted by consent. *Thomas, trustee, et al. vs. Jones & Norris*, 139.

6. Judge hearing motion may correct grounds of motion and brief of evidence. *Ibid.*

7. Adjournment to specified time at which no cases were to be tried except by consent, not prevent filing of motion for new trial. *Ibid.*

8. Certificate of judge verifies brief of evidence, not agreement of counsel; hence judge may correct. *Tritt vs. Roberts*, 156.

9. Evidence objected to contained in answers to interrogatories, portion must be designated in some way so as to leave no uncertainty in respect to the subject matter and range of the objection. *Cox vs Weems*, 165.

10 Verdict warranted by evidence. *Neal et al. vs. State*, 272; *Stokes vs. Tift*, 312; *Cox vs. State*, 374; *Geo. & Ala. S. Co. vs. McCartney & Ayers et al.*, *Couch vs. State*, *Austin vs. State*, *Griffeth vs. State*, *Dykes vs. State*, 438; *Mayor, etc., of Americus vs. Alexander*, 447; *Hill vs. State*, 453; *Clark, trustee, vs. Bryce*, 486; *Hardin, ex'r, vs. Almand*, 582; *Adams et al. vs. Clark*, 648; *Jones et al. vs. Smith, gov.*, 711; *Simmons vs. Camp*, 726; *Bones vs. Printup Bros. & Co.*, 753; *Kieth vs. Catchings*, 773.

11. Decision by judge without jury in vacation, under consent reference in term, there is no provision of law for granting new trial in. *Moreland vs. Stephens, sh'ff, et al*, 289; *Lester vs. Johnson et al.*, 295.

12. First grant of new trial not reversed unless it be made to appear that law and fact require verdict notwithstanding judgment of presiding judge to contrary. *Sparks vs. Noyes, City of Atlanta vs. Champe et al., Elliott, ex'r, et al. vs. Sav. & Og. Can. Co., Scofield Rol. M. Co. et al. vs. State*, 437; *Woodward & Co. vs. Gourdins, Young & Frost*, 490; *Hill, adm'r, vs. Sheibley*, 529.

13. Motion for new trial, defendant entitled of right to make at any time during term at which he was tried. *Smith vs. State*, 439.

14. Right not forfeited by fact that sentence has been passed on him. *Ibid.*

15. Counsel, new may be employed to make motion if defendant so desires. *Ibid.*

16. Sentence ought not to be modified by any arrangement looking to abandonment of right to move for new trial, and if so modified, defendant not estopped. *Ibid.*

17. Appeal for leniency not forfeit right to move for new trial. *Ibid.*

18. Judge certifies that he declined to pass upon merits of motion in case tried before another judge, because brief was not approved by said judge at the time agreed on by counsel, and no rule *nisi* was granted by him, supreme court is compelled to affirm judgment. *Tyson vs. Myrick et al.*, 443.

19. Newly discovered evidence merely cumulative, not ground for new trial. *Hill vs. State*, 453.

20. Reversal ordered unless small amount be written off from verdict. *McAllister vs. Singer Man. Co.*, 622.

21. Record, entire, before court on hearing of motion, and if it appears that plaintiff had no right to recover, independently of any errors committed on trial, verdict should not be vacated. *Willis vs. Meadors, ex'r*, 721.

22. Verdict unsupported by law or testimony. *Williams, adm'x, vs. Jeter*, 737; *Foster et al. vs. Stapler et al.*, 766.

23. Dismissal of levy, is motion for new trial proper mode of correcting error in? *Quære. Buice vs. Lowman G. & S. M. Co*, 769.

NOTICE.

1. *Lis pendens*, notice by cannot affect purchaser's title more than if a decree had already been rendered in favor of complainant. If decree would not have bound property, certainly

notice of pendency of bill would not. *Rhett, trustee, vs. Geo. L. & Col. Co.*, 521.

2. Transfer by delivery, without indorsement, of notes payable to order, transferees charged with notice in transferrers. *Planters' Bank vs. Prater et al.*, 609.
3. Agent, actual notice to of any matter connected with agency is actual notice to principal, and not merely constructive. *Prater vs. Cox et al.*, 706.
4. Application for dower, notice by widow to administrator of husband's estate is notice to creditors of decedent. *Williamson vs. McLeod*, 761.
5. Assignment of dower recorded in book of deeds but plat omitted by accident, subsequently inserted by order of court, constructive notice to the world, and actual notice to creditors of decedent who were represented by administrator. *Ibid.*

NOVATION. See *Surety and Indorser*, 10.

NUISANCE. See *Injunction and Receiver*, 10.

OFFICERS DE FACTO. See *Jury*, 3.

ORDINARY. See *County Matters*, 7; *Guardian and Ward*, 8, 9.

PARENT AND CHILD.

1. Minor, bill served on and step-father answered as her *prochein ami*, she would be bound by decree in absence of fraud. *Cuyler et al. vs. Wayne, adm'r*, 78.
2. Minor damaged in person may sue for any permanent injury reaching beyond majority, whilst father may recover for any damage by loss of service of child, as also for expense incurred. *Central Railroad vs. Brinson*, 475.
3. Action on note payable to plaintiff for use of children against father, plea setting up that defendant is natural guardian, that plaintiff is insolvent, and if permitted to collect will appropriate to his own use, and praying that upon defendant's giving bond for the faithful management of the fund the note should be decreed satisfied, not stricken on demurrer. *Smith vs. Danielly*, 554.

PARTIES.

1. Attachments levied on property of foreign corporation in this state, and afterwards receiver appointed for corporation in its own state, before he can defend he must apply to courts where pending and be made a party. *South Carolina Railroad vs. People's Sav. Ins.*, 18.

2. Accounting between partners, to authorize, both must be present as partners. *Elliott vs. Deason*, 63.
3. Partition, parties to proceeding for who were served, afterwards on bill filed by one who was not served, to set aside sale as to him, answered that they were content to stand by it, etc., cannot subsequently attack sale because of want of service of all parties. *Cuyler et al. vs. Wayne, adm'r*, 78.
4. Minor, bill served on and step-father answered as her *prochein ami*, she would be bound by decree in absence of any fraud. *Ibid.*
5. Verdict proper against trust estate, but usee for life and her trustee alone being parties defendant, judgment should have been against life estate only. *Thomas, trustee, et al. vs. Jones & Norris*, 139.
6. Counties, suits by or against, under provisions of constitution of 1877, must be in name thereof. *Bennett et ux. vs. Walker et al., com'rs*, 326.
7. Corporate magistracy of county and of city constituted of same persons or board, and sue in former character upon prescriptive title in county, they cannot recover upon proof of title in city. *Ibid.*
8. Marshal assets, bill to by executor, and one defendant files answer in nature of cross-bill against certain co-defendants, voluntary donees of property under testator, another co-defendant, not made party thereto, may file independent bill to accomplish same object, and will not be bound by result of litigation on cross-bill. *Cleveland et al. vs. Chambliss, guardian*, 353.
9. Decree against realty held in trust, trustee being party to bill, beneficiaries cannot interpose claim. *Zimmerman et al. vs. Tucker*, 432.
10. Sheriff necessary party to bill of exceptions to judgment distributing fund on money rule. *Brown vs. Wylie & Co.*, 435.
11. Amendment, new party cannot be introduced by. *Shealy, guardian, vs. Toole*, 519.
12. Paper produced under notice, admissible without proof of execution as against party producing it, and those succeeding to his status in case. *McMath vs. Teel, adm'r*, 595.

PARTITION. See *Parties*, 3.

PARTNERSHIP.

1. Advances by partner to carry on business are generally on credit of firm, and not on separate credit of copartner. Reimbursement involves settlement of partnership accounts, and both partners must be present as parties. *Elliott vs. Deason*, 63.

2. Individual, defendant sued as, recovery cannot be had against him as partner. *Champion vs. Wilson & Co.*, 184.

3. Note payable to order of one partner individually, given for firm property, cannot be indorsed by another one of the partners in the name of the payee so as to pass title, with incidents of negotiable paper transferred before due, without more authority than that which results by operation of law from the partnership relation. *McCauley et al. vs Gordon*, 221.

4. Incoming partner, to bind with debts of former firm, to which defendants succeeded, plaintiff must show some agreement on his part. *Bracken & Ellsworth vs. Dillon & Sons*, 243.

5. Writing, should agreement be in as promise to pay debt of third person? *Quære. Ibid.*

6. Survivor, proceeding against, plaintiff incompetent witness touching transactions between himself and deceased. *Ford vs. Kennedy*, 537.

7. Partnership or no partnership the issue, sayings of one who admitted himself to be partner, inadmissible to prove that another was such. *Ibid.*

8. Admission of one who denies being partner admissible to prove him such. *Ibid.*

9. Attachment sued out against partner on firm debt under §3276 of Code. declaration need not be against both partners, but only against him who is thus subject to summary process. *Connon vs. Dunlap*, 680.

PAYMENT. See *Banks*, 1, 3; *Negotiable Instruments*, 8.

PEDDLERS. See *Municipal Corporations*, 7.

PENALTY. See *Tax*, 15.

PLEADINGS.

1. Declaration not so defective as that verdict thereon would be necessarily illegal. Defects amendable and would be cured by verdict. *Rice vs. Geo. Nat. Bank*, 173

2. Over-payments may be recovered in suit on an account, but must be specified and pleaded as a set-off, with like particularity. *Bracken & Ellsworth vs. Dillon & Sons*, 243.

3. Facts constituting valid defense must be set forth in plea; legal conclusions insufficient. *Finney vs. Brumby trustee*, 510.

4. Foreign judgment, plea to suit on which appertains wholly to matters occurring anterior thereto, and which shows great negligence in failing to set up defense to original action, properly dismissed on demurrer. *McAllister vs. Singer Man. Co.*, 622.

5. Plea, more than one filed, and verdict fails to disclose upon which it was based, jury remanded to room to fix fact if counsel so request or pleas are contradictory. *Clark vs. Cassidy, adm'r*, 662.

POLICEMAN. See *Criminal Law*, 4, 5.

POSSESSION. See *Prescription*, 1, 2, 6-8.

POSSESSORY WARRANT.

1. President of corporation cannot maintain warrant in his own name to recover possession of corporate property of which he has had no prior possession either as an officer or an individual. *McEvoy vs. Hussey, president, etc.*, 314.
2. Corporation, not officer representing it, complaining party, affidavit made to obtain warrant must negative consent of corporation (not consent of officer) to disappearance of property, and allege that corporation does in good faith claim, etc. *Ibid.*

POWER. See *Contracts*, 4, 5; *Estates*, 2, 3.

PRACTICE IN SUPERIOR COURTS.

1. Damages, action for transferred from county to superior court because plaintiff's title to land was involved, goes in its entirety to that tribunal, and will be fully and finally disposed of therein. *Denham vs. Kirkpatrick*, 71.
2. Verdict, right for court to have put in proper form before discharge of jury, substance not being changed. *Ibid.*
3. Open case for new evidence, court is always at liberty to before argument closed, and unless abused, discretion not interfered with. *Bracken & Ellsworth vs. Dillon & Sons*, 243.
4. Consolidate three actions, to require superior court to, defendant must make it appear either that he has no defense, or that defense is same to each, and must aver what the defense is. *Gerding, sur. part., vs. Anderson, Starr & Co.*, 304; *Coward vs. Chamberlin, Boynton & Co.*, 684.
5. Examine fresh witness on general case, too late after state has rebutted prisoner's evidence and closed, unless some good excuse is rendered. *Jackson vs. State*, 344.
6. Reinstate case, discretion refusing to not controlled. Parties transmitting papers by mail take risk of same being received in time. *Man. Fire Ins. Co. vs. Tumlin*, 451.
7. Judges of superior courts may preside for each other although neither one be disqualified to sit in the case tried. *Harrison & Co. vs. Hall S. & L. Co.*, 558.
8. Act provided that no suit should be settled without consent and

written order of judge entered on minutes. Order was taken in open court sanctioning the compromise agreed on; it was signed by counsel for state and entered on minutes, which were approved and signed by judge on same day: *Held*, that the minutes furnish the strongest presumptive evidence of the consent and written order of the court. *Gaskill vs. State*, 562.

9. Bill filed by defendant to enjoin ejectment, court cannot, over objection of either party, order common law and equity case tried together. *Rosser vs. Cheney et al.*, 564.
10. Issue of fact as to passage of order involved in motion to enter *nunc pro tunc*, court should decide without jury. *Lewis et al. vs. Armstrong, adm'r*, 645.
11. Minutes, proceedings of courts of record to be ascertained from. *Clark vs. Cassidy, adm'r*, 662.
12. Plea, more than one filed, and verdict fails to disclose upon which it was based, jury should be remanded to room, if counsel so request or pleas are contradictory. *Ibid.*
13. Judge of superior court having approved brief of evidence and signed bill of exceptions, has exhausted power in respect to testimony, and cannot, by certificate subsequently made, alter brief as approved. *Jones vs. State*, 697.
14. Reopen testimony after argument commenced, court may permit. *Jones et al. vs. Smith, gov.*, 711.
15. Law upon which case must turn fully argued and evidence closed, not error to announce to counsel that principles involved had been settled in his mind, and then to read in presence of jury what he should charge. *Kieth vs. Catchings*, 773.
16. Principles of law governing case, separately considered, are not changed, nor their power lessened, by massing objections thereto together, and in their totality presenting them to the court. *Ibid.*

PRACTICE IN SUPREME COURT.

1. Arrest judgment, refusal to may be excepted to in bill of exceptions which brings up whole case, but not in one which brings up only motion for new trial. *Watson vs. State*, 61.
2. *Habeas corpus* sued out by wife of prisoner, she is entitled to writ of error upon final decision. *State ex rel. Lynch vs. Bridges, jailer, et al.*, 146.
3. Acknowledgment of service by counsel signing as attorneys for "respondents," will be construed as evidence of service on all the respondents. *Ibid.*
4. Certificate of presiding judge verifies brief of evidence, not the agreement of counsel; hence judge may correct. *Tritt vs. Roberts*, 156.

5. Evidence objected to contained in answers to interrogatories, portion must be designated in some way so as to leave no uncertainty in respect to the subject matter and range of the objection. *Cox vs. Weems*, 165.

6. Motion for new trial is part of pleadings and has no place in bill of exceptions; record controls in reference thereto. *Ibid.*

7. Judgment on demurrer, none in record, court will assume that no such judgment was rendered. *Rice vs. Geo. Nat. Bank*, 178.

8. Counsel for defendant conceding error on material point, calling for no decision thereon, this court will reverse judgment with appropriate directions. *Williams vs. Griffin Banking Co.*, 178.

9. Counsel and judge differ as to what was stated or omitted in charging jury, recollection of latter must govern. *Neal et al., vs. State*, 272.

10. Extend time for bringing cases to this court beyond thirty days from adjournment of the superior court, act of 1875 does not in any case. *Forsyth vs. Preer, Illges & Co.*, 281.

11. Decision of judge refusing new trial only error assigned, if refusal proper for any reason, judgment sustained. *Moreland vs. Stephens, sheriff, et al.*, 280.

12. Judgment excepted to right, immaterial upon what ground superior court rested same. *Lester vs. Johnson et al.*, 295.

13. Notice of motion for new trial, question of sufficiency of not raised in court below, not reviewed here. *Cleveland et al. vs. Chambliss, guardian*, 352.

14. Judgment not reviewed as against defendant not served with bill of exceptions. *Walker vs. Johnson et al.*, 363.

15. Approval of brief of evidence, none, and no reference thereto in bill of exceptions, writ of error dismissed. *Smith vs. Bryan*, 366.

16. Pending in court below, case appears to be from record, writ of error dismissed. *Mitchell vs. Tomlin*, 368.

17. Diminution of record, suggestion must be on oath. *Ibid.*

18. Affidavits used on hearing for injunction constitute no part of record; should be incorporated in bill of exceptions and identified by signature of judge. *Morgan vs. Twitty et al.*, 426.

19. Affidavits, if it were possible to identify them as being in record, in this case record was not certified until after bill of exceptions. *Ibid.*

20. Judgment in record not dated, but providing for stay of execution to November 15th, 1878, and bill of exceptions, certified January 17th, 1879, stating that it was tendered within thirty days from decision, clerk of superior court ordered, under act

of 1877, to certify date of decision as it appeared from minutes. *Dismuke vs. Trammell*, 428.

21. Bill of exceptions and record differ as to matters which form part of record, latter controls. *Ibid.*
22. Delay by presiding judge in certifying, no statement as to, date of certificate taken as date of tender. *Ibid.*
23 Suggestion of diminution must set out missing record so that opposing counsel may agree thereto. *Brown, vs. Lathrop & Co.*, 430.
24. Final judgment, none in record, writ of error dismissed. *Ibid.*
25. Argument postponed until after circuit to which case belonged was concluded, no further postponement to complete record under act of 1877 allowed. *Ibid.*
26. Sheriff necessary party to bill of exceptions to judgment distributing fund on money rule. *Brown vs. Wylie & Co.*, 435.
27. Assignment of errors must be made in bill of exceptions or writ of error dismissed. *Sewell vs. Conkle*, 436.
28. Plaintiff in error must show error, and to that end must have brief of evidence and motion duly verified. *Tison vs. Myrick et al.*, 443
29. Voluntary non-suit, can be no writ of error to, even though taken without prejudice and with leave to except. *Jones, assignee, vs. Mobile & Girard Railroad, Powell vs. Boutell*, 446; *McBride, adm'r, vs. Hunter*, 655.
30. Acknowledgment of service after ten days from certificate of judge, writ of error dismissed. *Marietta Paper Man. Co. vs. Faw*, 450.
31. Brief neither revised nor approved by the judge who presided at trial, or the one who passed on motion for new trial, and no legal reason being given for failure, court cannot hear case except as to such assignments of error as do not depend on evidence. *Harrison & Co. vs. Hall. S & L. Co.*, 558.
32. Verdict for plaintiff too small, not good ground of exception by defendant. *Ellis vs. U. S. Fert. & Chem. Co.*, 571.
33. Judgment in favor of party cannot be ground of exception by him. *Hardin, ex'r, vs. Almand*, 582.
34. Evidence conflicting as to original passage of order, discretion of court in refusing to allow its entry *nunc pro tunc* not controlled. *Lewis et al. vs. Armstrong, adm'r*, 645.
35. Original papers used by consent on motion for new trial, if case be brought up, identified copies must be attached to or included in brief of evidence; approval of brief generally, where what purports to be copies of written evidence are scattered through record, not save case. *Pounds vs. Hanson*, 668.
36. Exceptions *pendente lite* must be tendered, filed, ordered to be recorded and recorded at term when rulings complained of were made. *Howard vs. Chamberlin, Boynton & Co.*, 684.

37. Judge of superior court having approved brief of evidence and signed bill of exceptions, has exhausted powers in respect to testimony, and cannot, by certificate subsequently made, alter brief as approved. *Jones vs. State*, 697.

38. Ground of new trial certified not to be true, cannot be considered. *Kieth vs. Catchings*, 773.

PRESCRIPTION.

1. Actual possession of part of tract will constructively extend to limit described in a deed recorded, or of the boundaries of which adverse party had knowledge. *Weitman, adm'r, et al. vs. Thiot et al.*, 11.

2 Possession of part of one lot embraced in same deed with others, not extended by construction unless deed be on record, so as to work a title by prescription. *Tritt vs. Roberts*, 156.

3. Deed of ordinary does not pass title out of county, he having no power to make it, but only to authorize it to be made by some one or more persons as a commission; if free from fraud it may serve as color of title to base prescription. *Bennett et ux. vs. Walker et al., com'rs*, 326.

4. Fraud may be inferred from false recital in instrument as to mode of sale, together with inadequate consideration, etc. *Ibid.*

5. Title by duration of possession sole issue, rejection of testimony that improvements were of little value, not such error as will require new trial. *Shiels vs. Roberts*, 370.

6. Privity of estate between defendant and a long line of grantors to lot 17 and buildings thereon obtruding over on lot 18, continuity of possession for more than seven years shown by parol. *Ibid.*

7. Actual possession of such strip of 18 for twenty years by said building extending thereon, without written title thereto, is good prescriptive title against all the world, except the state. and persons not *sui juris*, unless possession originated in fraud. Honest mistake of true line is not fraud. *Ibid.*

8. Husband and wife enter possession of land in 1858, and former, in 1870, gave note to plaintiff's intestate and took bond for title from him, and held thereunder until death, husband during life and widow after death, in absence of any written title, estopped from setting up adverse title by possession even though for twenty years. *McMath vs. Teel, adm'r*, 595.

9. Executor, prescriptive title good against, also good against executory *devisee* born thereafter. Her interest was represented as far as it could be by such executor. *Dean, ex'r, vs. Cent. Cot. P. Co.*, 670.

PRINCIPAL AND AGENT.

1. Question as to the fact of agency for proprietor of hotel of one who purchased as caterer, no error in excluding evidence as to custom of proprietors of hotels in the city in buying through caterers. *Thompson vs. Douglass*, 57.
2. Competent witness, agent is to show agency not disclosed at time of transaction in controversy, although principal dead, and effect may be to make estate liable instead of agent individually. *Lowrys vs. Candler*, 236.
3. Actual notice to agent of any matter connected with agency is actual notice to principal, and not merely constructive. *Prater vs. Cox et al.*, 706.

PRINCIPAL AND SECURITY. See *Surety and Indorser.*

RAILROADS.

1. Amendment to plaintiff's declaration, nor evidence in support thereof, does not take case out of previous ruling. *Central Railroad vs. Kenney*, 100.
2. Presumption of negligence against defendant by reason of mere fact of injury, and where plaintiff was a child of only ten years of age, and peculiar facts of case make it not altogether certain that presumption is rebutted, non-suit not awarded. *Vickers, by next friend, vs. Atlanta & W. P. Railroad*, 306.
3. Minor of immature understanding not amenable to so high a standard of diligence as adult. *Ibid.*
4. Lease by which lessee makes itself responsible for acts done on leased road, yet neither loses identity, and any tort committed upon line of the one or the other, should be so alleged and proved. *Central Railroad vs. Brinson*, 475. *See Wright, comp. gen., et al. vs. Southwestern Railroad*, 783.
5. Presumptions, and apportionment of damages. *Ibid.*
6. Diligence used by employés, evidence as to conflicting, and presumption of negligence being against company, and presiding judge satisfied with verdict, this court not interfere. *Georgia Railroad vs. Cox*, 619.
7. Widow, suit by for homicide of husband who was engineer, two things necessary to recovery: First, absence of negligence on his part, and second, negligence on part of company. Deceased shown without fault, presumption of negligence on part of road arises. *Central Railroad vs. Roach*, 635.
8. Engineer having jumped from post and been killed, error to charge that fact that he jumped is proof that he thought jumping safest course. Necessity for jumping, ability to jump, etc., were all questions for the jury. *Ibid.*

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SCIRE FACIAS. See *Criminal Law*, 25.

SERVICE.

1. Acknowledgment of service by counsel signing as attorneys for "respondents," will be construed as evidence of service on all the respondents. *Lynch vs. Bridges, jailer, et al.*, 146.
2. Acknowledgment of service of bill of exceptions after ten days from certificate of judge, writ of error dismissed. *Marietta P. Man. Co. vs. Faw*, 450.
3. Acknowledgment of service signed by one as attorney for defendant is *prima facie* warranted until contrary appears. *Buice vs. Lowman G. & S. M. Co*, 769.

SET-OFF AND RECOUPMENT.

1. Negotiable paper transferred *bona fide*, whether before or after maturity, and whether for a valuable or a good consideration, not subject to set-off between maker and payee arising subsequently to transfer, and out of transactions wholly disconnected therewith. *Elliott vs. Deason*, 63.
2. Plea of set-off should state demand as distinctly as though sued on, and when to suit on negotiable instrument not in hands of payee, it must appear that paper was received under dishonor, that set-off was in some way connected with contract sued on, that there was mutuality of obligation, etc. *Kinard vs. Sanford*, 630.
3. Right to recoup must be exercised by party who would be authorized to maintain suit for damages under contract, or some sufficient reason be alleged to take it out of legal rule. *Ibid.*

SHERIFF.

1. Answer to rule shows money in hand collected on execution, and fails to disclose any legal reason for not paying it over, rule should be made absolute. Notice to constable, not accompanied by any judgment, *fi. fa.*, or other lien, no justification for withholding same. *Smith vs. Wade, constable, et al.*, 116.
2. Judgment distributing fund on money rule, sheriff necessary party to bill of exceptions to. *Brown vs. Wylie & Co.*, 435.
3. Court of county of sheriff had jurisdiction to rule him, though mortgage *fi. fa.*, on which it was claimed money had been illegally paid, was returnable to subsequent term of another county. *Hollis et al. vs. Saulsbury, Respess & Co.*, 444.
4. Rule against sheriff for failure to make money, it appeared that he had failed to levy for six months, when defendant died,

and he was then enjoined until right of widow to dower and year's support was determined, and that plaintiffs were injured by delay, makes *prima facie* case. *French, Richards & Co. vs. Kemp, sheriff*, 749.

SLAVERY. See *Guardian and Ward*, 1, 2.

STATUTE OF FRAUDS. See *Partnership*, 5.

STATUTE OF LIMITATIONS. See *Limitations, Statute of.*

SUBROGATION See *Estoppel*, 4.

SURETY AND INDORSER.

1. Certificate of deposit, "subject to order, on the following terms: interest at seven per cent. on call, or ten per cent. by the year," signed by the cashier of bank and indorsed in blank by payee, is in effect a negotiable promissory note, payable generally on demand, and due immediately, and no demand, notice, or protest is necessary to charge the indorser. *Lynch vs. Goldsmith*, 42.
2. Blank indorsement imports, *prima facie*, an undertaking to pay, and burden of rebutting presumption is on indorser. *Ibid.*
3. Negotiating instrument, indorser, at time of, construes indorsement as transfer of title unattended with liability on his part, and the other party knows he so construes it, and does not object, that construction, in the absence of an express agreement to the contrary, will control as between these two parties. *Ibid.*
4. Note signed as security upon condition that another should also sign, and principal delivers paper to payee without such additional name, and without notifying him of condition, surety signing not discharged. *Clark, trustee, vs. Bryce*, 486.
5. Indulgence to principal for valuable consideration, without consent of surety, discharges latter. Ratification of delivery without additional name, or of indulgence, surety still bound. *Ibid.*
6. Entry of payment on note by principal does not prevent bar of statute from attaching in favor of surety. *McBride, adm'r, vs. Hunter*, 655.
7. Administrator of one who signed note only as surety cannot relieve it from bar of statute so far as primary creditors may be affected thereby. Especially is this the case where note was barred before death of security. *Ibid.*
8. Liable on face of instrument as surety, party seeking to limit

liability as against co-security who is seeking contribution, by reason of understanding that he should only be liable as last indorser, must appear that such limitation was known to co-security and agreed to by him. *Simmons vs. Camp*, 726.

9. County of residence of principal, action against him and two securities residing in different counties, and former dies, plea to jurisdiction by latter properly overruled. *Walsh et al. vs. Colquitt, gov.*, 740.
10. Novation of contract without consent of sureties, discharges. *Ibid.*
11. Payment of money by obligee in bond to insolvent obligor, whilst indebted to him, discharges surety; especially where such fund was collected by obligee for obligor, but could not legally be paid to him without some legislative action. *Ibid.*

TAX.

1. Comptroller-general not authorized by law to transfer tax *fi. fas.* issued by him against wild lands on payment of amount due thereon. *Johnson vs. Christie, sheriff, et al.*, 117.
2. Macon may collect license tax from every firm retailing fresh meat in the city, whether from stalls, stores, or by peddling same on street. Exception exempting farmers selling their own produce, does not make the tax invalid as to others. *Davis & Co. vs. Mayor, etc., of Macon*, 128.
3. Wagons used in the business may also be taxed. Validity not impaired by exempting wagons used in delivering milk from dairies on county farms. *Ibid.*
4. Property tax paid, no obstacle to collection of business tax measured in part or in whole by the employment of vehicles already taxed *ad valorem* as property. *Ibid.*
5. Retailer in meat produced in Georgia, and never in city until carried in wagon to door of customer's house, not prevent tax on business. *Ibid.*
6. Butcher whose residence, shop and pen are all out of city limits, but who habitually hauls inside a part of his fresh meat, and delivers to regular customers at their doors, making no charge for the delivery, is nevertheless within the ordinance both as to license tax and specific tax on wagon. *Ibid.*
7. Itinerant traders, merchants who ship from St. Louis to Atlanta, to agent, who sells by going about the city to engage goods, and then delivering from cars, having no store or warehouse, are, and liable for taxes imposed upon that business. *Burr & Co. vs. City of Atlanta*, 225.
8. Constitution of 1877, prior to, where 100 per cent. of county tax of 142½ per cent. on state tax was recommended by grand jury,

and items amounting to 55 per cent. or more, needed no recommendation, whole would stand. *Spann et al. vs. Board of Com'rs*, 498.

9. Under latter instrument, county cannot levy tax for "incidental expenses," nor to buy safe, without assent of two-thirds of voters. An assessment for "expenses of jail" is equivalent to a levy "to maintain and support prisoners," and is constitutional. *Ibid.*

10. Ministerial officer of state attempting to collect money under forms of law, but without any valid constitutional law to authorize the process he uses and calls execution for taxes, duty of courts to arrest proceeding. *Wright, comp. gen'l, et al. vs. Southwestern Railroad*, 783.

11. Executions having been issued against railroad and levied upon property in Bibb county, and the principal office of road being in that county, superior court thereof had jurisdiction of bill to enjoin collection. *Ibid.*

12. Limitations upon taxing power not construed to embrace real estate other than that the continuous use of which is necessary for the road. *Ibid.*

13. Stock in the company's own road held by itself, or in other roads in this state, whose charters limit or exempt taxation thereon, and whose income is taxed, not liable; and stock held by company in railroads without limits of state not taxable here. *Ibid.*

14. Bonds, notes, or other evidences of debt, unless they form part of income of road, are subject to ordinary rates of taxation. So also water-craft belonging to company in 1876 and 1877. *Ibid.*

15. Good faith, company having acted in and offered to do equity, and being misled by officers of state, has not lost its rights by its own laches; therefore this is not case to warrant enforcement of penalties for default. *Ibid.*

16. Interest should be paid on tax due on property not covered by limitations of charter, from time such tax was claimed by officers of state. *Ibid.*

TRANSCRIPT OF RECORD. See *Evidence*, 5, 6.

TRESPASS.

1. Conspiracy to do unlawful act of violence on body of another, law not protect each from consequence of others not strictly observing bargain. *McEwen vs. Springfield et al.*, 159.

2. Calhoun purchased mill-property, dam to which is alleged to have caused damage. No request was made for him to lower

same. He leased to Chase, who repaired dam, and land was flooded. On suit against both, verdict in favor of Calhoun was right. *Felker vs. Calhoun, ex'r*, 514.

TENDER. See *Vendor and Purchaser*, 5.

TOLL-BRIDGE. See *Roads and Bridges*, 2.

TRUST.

1. Free persons of color, after status of became changed both civilly and politically, a guardian of that class was placed in new relations, and his holding of the property of his wards was thenceforth more in the nature of a general trust. *Munroe et al. vs. Phillips, adm'x*, 32.
2. Delivery to friend acting in her behalf effective where negotiable paper is assigned to married woman, or to naked trustee for her use, both being absent. *Elliott vs. Deason*, 63.
3. Mortgage assigned to married woman, and note to naked trustee for her use, title to both is in her and she may foreclose mortgage in her own name. *Ibid.*
4. Camp-meeting ground, contest between two sets of trustees of, and no allegation being made that either has interfered with beneficiaries in enjoyment of religious worship, equity will not interfere by injunction, but will leave parties to a *quo warranto*. *Harris et al. vs. Pounds et al.*, 121.
5. Devise to son except lot reserved for daughter to live on, and should she cease to occupy the same, "either from death or removal or otherwise," then to son. Will then be bequeathed to son, in trust for the use of the daughter during her life, "besides the lease in the land above mentioned," certain personalty: *Held*, that the trust attached upon the lease as well as upon the personalty. *Cox vs. Weems*, 165.
6. Intention to furnish daughter personally with home, she took separate estate unaffected by marital rights of husband. *Ibid.*
7. Competent for trustee, he being alone interested in remainder, to waive condition of her occupancy. *Ibid.*
8. Decree against realty held in trust, trustee being party to bill, beneficiaries cannot interpose claim. *Zimmerman et al. vs. Tucker*, 432.
9. Absolute conveyance from trustee with bond to reconvey on settlement of his individual notes payable to order of grantees, who took with notice, and notes transferred to bank by delivery, without indorsement. Such delivery did not convey title to land to bank. It could only be subrogated to rights of grantees, and is affected by notice to them. *Planters' Bank vs. Prater et al.*, 609.

10. Wrongful conveyance by trustee of land in which he had invested funds of estate, for purpose of securing individual debt, to one who took with notice, *cestui que trusts* could follow funds. *Ibid.*

USURY. See *Interest and usury.*

VACATION. See *New Trial*, 11.

VENDOR AND PURCHASER.

1. Promise to pay for colt on November 1st, vendor to retain title until paid for, and yet vendees liable to pay if colt should die, is *prima facie* promise to pay for colt at that date, even if it die before payment and while title is in vendee. *Boyer vs. Ausburn et al.*, 271.
2. Note recites that it was given for land sold and conveyed, without specifying quantity, terms of conveyance must appear to make case in behalf of defendant for apportionment on account of alleged fraudulent deficiency in quantity. *Sims, ex'r, vs. Henderson*, 278.
3. Land incumbered by mortgage sold by mortgagor at full value, bond for title given and note taken for price, and third person, with notice of facts, purchases note before due at value, less amount of mortgage, and afterwards buys land at mortgage sale, he cannot collect balance of note after deducting what land brought. *Noyes vs. Ray*, 283.
4. Breach of bond for title, where purchaser buys up outstanding title, measure of damages is actual cost. *Hull vs. Harris*, 309
5. Title to realty does not pass by purchase without actual conveyance, so long as agreed purchase money is not paid. Tender is not payment. *Latham vs. McLain*, 320.
6. Lien of vendor, bill asserting, and seeking to enjoin administrator from selling and paying other creditors, but failing to charge such creditors with notice of lien, or that they occupied such relation prior to sale of land to intestate, injunction properly refused. *Head et al. vs. Aycock, adm'r, et al.*, 441.

VENUE. See *Sheriff*, 3; *Jurisdiction*, 5, 7, 8.

VERDICT.

1. Proper form, right for court to have put in before discharge o jury, substance not being changed. *Denham vs. Kirkpatrick*, 71
2. Recovery limited to amount declared for; therefore verdict for more is illegal, but surplus may be written off. *Giles ord., for use, vs. Spinks et al.*, 205.
3. Certain, verdict is which can be made so. *Ibia.*

4. Reasonable construction given to verdict. *Mitchell vs. Word, guardian, et al.*, 208.

5. Polled, language used by juror on being, shows that he assented to verdict. *Hill vs. State*, 453.

6. Impeach verdict, juror cannot by affidavit. *Ibid.*

7. Parol sale of land by defendant to complainant set up by bill, which answer denied, alleging that complainant was wrongfully in possession of defendant's land, and asking writ of possession, verdict for defendant directing that writ issue, covers all questions made. *Williams vs. English*, 546.

8. Jury, by consent, allowed to disperse after making verdict, on return into court, not error to allow alteration made, which simply expressed legal meaning of finding. *Jones et al. vs. Smith, gov.*, 711.

VOLUNTARY CONVEYANCE. See *Fraudulent Conveyance*, 1, 2.

WAIVER. See *Jurisdiction*, 3.

WARRANTY. See *Administrators and Executors*, 14; *Deeds*, 10.

WILLS.

1. Memorandum found amongst testator's papers, though improperly admitted to record, yet is such a document as may be used, like other surrounding circumstances, to aid in the construction of ambiguous clauses, and being exhibited to the bill in connection with the will and codicils, may be considered on demurrer thereto. *Cumming et al. vs. Trustees of Reid Mem. Church*, 105.

2. Intention gathered from the whole will and all the codicils bearing upon the bequest of $8,000.00, and read with light of memorandum, was to give said sum absolutely to the trustees to be expended by them as they might see fit, not only in erecting the church edifice, but in preserving the same in perpetual memory of the wife of testator and of himself. *Ibid.*

3. Ambiguity none, will is for construction of court. *Cox vs. Weems*, 165.

4. Trust attached upon lease as well as upon personalty. *Ibid.*

5. Intention to furnish Mrs. C. personally with a home, she took separate estate therein unaffected by marital rights of husband. *Ibid.*

6. Construction of language of will, involving no principle. *McKinney, adm'r, vs. Wells & Avera*, 450.

7. Attestation must be at time and place where testator can see that he is not imposed upon, and can have cognizance of the persons and the act. *Hamlin et al. vs. Fletcher, executor*, 549.

WITNESS.

1. Homicide of husband, suit by widow for damages because of, defendants competent in their own behalf. *McEwen vs. Springfield et al.*, 159.
2. Impeached by contradictory statements, witness sustained by proof of good character. Charge should not state that such evidence should not be treated as re-establishing disproved facts; this is question for jury. *Ibid.*
3. Agent competent to show agency not disclosed at time of transaction in controversy, though principal be dead and effect may be to make his estate liable instead of agent individually. *Lowrys vs. Candler, ex'r*, 236.
4. *Falsus in uno falsus in omnibus*, and impeachment and support of witnesses generally, touched upon. *Jackson vs. State*, 344.
5. Surviving partner, suit proceeding against, plaintiff incompetent to testify concerning transactions between himself and deceased. *Ford vs. Kennedy*, 587.
6. Belief of witness as to fact not within his knowledge inadmissible. *Ibid.*
7. General understanding of witness, not based on facts, inadmissible. *Ibid.*
8. Other party to cause of action being dead, defendant is incompetent. *McMath vs. Teel, adm'r*, 595.
9. Party making himself witness held to answer strictly and minutely every question, or evidence rejected. *Howard vs. Chamberlin, Boynton & Co.*, 684.