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ARGUED AND DETERMINED
IN THE
Supreme Court of the State of Georgia,
AT ATLANTA,
MARCH TERM, 1860.

Present—JOSEPH H. LUMPKIN,
LINTON STEPHENS, } JUDGES.
RICHARD F. LYON,

NICHOLS *vs.* McABEE.

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2. When so reduced, it is within the statute which allows a plaintiff in Justices' Courts (under certain circumstances) to prove his account by his own oath.

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Nichols vs. McAbee.

one hundred and thirty-four dollars and fifty cents, upon which plaintiff admitted or acknowledged a payment of about one hundred dollars, and the suit was brought to recover only this balance of thirty-four dollars and fifty cents.

The defendant pleaded the general issue and set-off. At the trial in the Justices' Court, plaintiff proved, by his own oath, that he had rendered nine months and sixteen days work, at the rate of one hundred and seventy dollars per annum, and that Nichols owed him a balance of thirty-four dollars and fifty cents; in other words, that Nichols had paid him one hundred dollars. Defendant (Nichols) offered, in support of his pleas, his book of accounts, showing an indebtedness to him, by plaintiff, of twenty-one dollars: the book was proven by defendant's own oath.

The answer of the Justices state, but not clearly, that defendant, at the first trial before the Justices' Court, proved, by the depositions of one Foster, a former settlement of all accounts, to date, between the parties.

The jury (the case was on the appeal in the Justices' Court) found for the plaintiff thirty-four dollars and fifty cents. Whereupon, defendant excepted and sued out *certiorari*, on the grounds: 1st, Because the Justices erred in allowing plaintiff to prove his account by his own oath, the same being, originally, for one hundred and thirty-four dollars and fifty cents. 2d, Because the Justices erred in taking jurisdiction of the case, involving an amount over fifty dollars.

Upon hearing the *certiorari*, the presiding Judge dismissed the same, and affirmed the judgment of the Justices' Court. To which decision counsel for defendant (Nichols) excepted.

McCUTCCHIN, for the plaintiff in error.

HACKETT, *contra*.

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

1. None of the Court felt any difficulty, in this case, in affirming the ruling that a demand, whose amount places it beyond the jurisdiction of a Justices' Court, may be brought within the jurisdiction, by payments reducing it.

2. But whether an account, so reduced, is within the stat-

Whitworth vs. The State of Georgia.

ute allowing the plaintiff (under certain circumstances) to prove his demand by his own oath, was a more difficult question. I thought, and still think, that the case is not within that statute, upon a sound and safe construction of it; but my colleagues informed me that a different construction had prevailed in the Courts for a great number of years, and, with entire uniformity, to the extent of their knowledge on the subject. I was not prepared to dispute it, and therefore acquiesced in what seemed to be established by authority.

Judgment affirmed.

WHITWORTH *vs.* THE STATE OF GEORGIA.

Where the Court refuses a continuance in a capital case, on account of the absence of testimony material for the prisoner's defense, a new trial will be granted.

Murder, in Chattooga Superior Court. Tried before Judge CROOK, at the March Term, 1859.

This was an indictment charging the defendant in the Court below, with the murder of E. M. Hall.

When the case was called for trial, the defendant moved the Court to continue the same, and for that purpose submitted a showing, in writing, sworn to and subscribed before the Clerk in open Court, stating that he was "not ready for the trial of said case; that Lucinda Gaddis, who had been subpoenaed, and lived in the county of Cass, was a material witness for him; that he had been informed and believed that she was unable to attend said term of said Court, on account of her sickness; that he expected to be able to prove by the witness, that on the 31st day of March, 1857, she went to the residence of E. M. Hall and found him lying in the dwelling house dead, and Mary Hall, his widow, and one Mr. Holloway, were standing in the dark, or came together from some unknown place in the dark, and stopped behind the kitchen, and that the witness overheard them talking about renting the land, and buying and selling whisky, say-

ing, "What shall we do with the land? Shall we, or had we better rent the land?" Also saying, "we can buy whisky at so much by the gallon, and sell at such and such profit," and talking of "living and doing business together"; and that they, Holloway and Mrs. Hall, were both very near drunk; that Mrs. Hall then went down to the grocery, Askew Brock and Holloway with her; that witness then went down to the grocery to bring Mrs. Hall to the house, and when she got to the grocery she saw Mrs. Hall lying on the floor drunk; that Brock and witness carried Mrs. Hall to the house and put her to bed, where she (Mrs. Hall) remained until 10 o'clock in the day; that Mr. Robert A. Brock is also absent, by whom the defendant expected to prove certain facts set forth in a former showing for a continuance; that the defendant expected to have the benefit of the testimony of Dr. G. B. T. Maddox, by whom he expected to prove that, if the blow was struck at the grocery it would have bled before they got to the house, some 150 yards from the grocery; that the showing was not made for delay, but for the purpose of obtaining justice; that Dr. Maddox, as defendant understood, was sick and unable to come into Court; that there was no other evidence to satisfactorily establish the facts detailed in the showing."

The motion was overruled, and the continuance refused.

EVIDENCE FOR THE STATE.

Mary Hall testified that: On the 30th of March, 1857, in the county of Chattooga, and about 3 o'clock, the deceased, Holloway, Brock and Butler, were all at the grocery of the deceased, and remained there until about dark, when deceased called to witness to bring a light to the grocery; that she went down to the grocery and found deceased fastened up in the grocery; that deceased opened the door and requested witness to come in with the light, that he might look for a gun; that Brock came in, and after looking, said there was no gun there; deceased found no gun; deceased and witness then went out of the grocery, and started toward the house, which was some 75 yards distant; when they had gone about ten steps on the way, deceased stopped, saying there was a pound weight about there, and when in the act of looking for the weight, some person, at that time unknown to

Whitworth vs. The State of Georgia.

witness, but which turned out to be the prisoner, stepped up and struck deceased on the right side of the head with a gun, and when witness said something to the person striking, he replied, "If you say anything I will knock you down." Witness and Brock carried deceased to the house, and he never spoke after the blow was given; witness threw down the light (which was a pine torch) when the blow was struck. After the deceased was taken to the house, the prisoner and Holloway came to the house, and the prisoner brought the gun into the house, and, in a little while after, dropped it down on the floor, and left. The gun exhibited was Holloway's gun, (as he said) and it was the gun used on the occasion. Prisoner did not return to the house that night; witness saw Holloway frequently that night—he and Brock, and Butler stayed all night. Dr. Watts being sent for, came to see the deceased in about one hour after the blow was given. When the deceased was first carried to the house after the blow was given, witness set him down in a chair until a matrass was fixed, and then laid him on the matrass; put some soot and water on his head before he was laid on the matrass; he bled a great deal, and was moved several times because he bled so much; he was also moved by Dr. Watts in fixing the wounds. Witness never saw prisoner until the night of the difficulty; had seen Brock and Holloway before; they moved into the neighborhood about Christmas; had not seen either of them since the night of the difficulty; deceased was engaged in the business of retailing liquors; heard the deceased say that he had credited Holloway and Brock as long as he was going to, and intended to tell them so when he saw them; witness got the grocery key out of the pocket of deceased, before he died, and gave it to Brock and Holloway to go and get liquor to give to the deceased; witness went to the grocery next morning, in company with Mrs. Watts, to get some coffee; witness drank some liquor that night because she was sick, but did not drink much, and knew all that occurred after day-light. When prisoner was brought back next morning after the difficulty, he said, in the presence of Esquires McClung and Knowles, that he had done the murder; witness did not say, next morning, to the persons at the house that they could leave, nor that she would order the Coroner off if he came; nor did she say on that morning that Mr. Hall was dead

Whitworth vs. The State of Georgia.

and gone to hell, and that she was glad of it; never told Mrs. McClung about eight days before deceased's death, that he and witness would not live long together, nor that somebody would kill him, or drive him off; nor that he should leave witness. Mr. Bryant was the brother of witness' first husband—lived in call of the house; and in the lifetime of witness' first husband, she usually called on Mr. Bryant for any wanted assistance, but after her marriage with deceased, she did not call on Bryant, as he and deceased had had a falling out; did not go to the grocery on the night of the difficulty and set out liquor, saying, "this is the widow Hall's grocery;" witness was in bed next morning, but did not recollect about going to bed; witness was not cognizant of what transpired a portion of the time after deceased's death; when prisoner admitted striking deceased, he gave no excuse for the act, but said he could not deny it with a clear conscience.

Dr. Maddox testified that, he saw Mr. Hall, after his death, about two or three o'clock; had a wound on the right side of his head, which caused his death; both tables of the cranium were fractured; one fracture was about four, and the other about six inches long; he saw him on the 31st of March, 1857, in Chattooga county; the wound on deceased's head ranged from the right ear over the top of the head, and might have been made with one or with two licks, and from its appearance witness thinks it must have been given from the side of the deceased on the right; if the wound did not bleed at once, the motion in carrying deceased to the house would have started it to bleeding; the room where deceased lay was very bloody, but witness, upon looking, saw no blood between the grocery and the dwelling; if the wound had been made with a sharp instrument, the blood would have appeared much sooner than if given with the barrel of a gun.

John D. Knowles testified that, he was one of the magistrates who committed the prisoner on the 31st of March, 1857, in Chattooga county; prisoner, on that occasion, admitted that he struck deceased a lick; his words were, "if you must have it, I struck him a lick;" he seemed excited and uneasy, and did not appear to know what he was doing; said he wanted a certain man to have his gun, and wanted to know how long it would be before they would hang him; witness, with four or five others, reached the house of Hall

Whitworth vs. The State of Georgia.

about sun-up on the morning after the difficulty; found Mrs. Hall in bed, and drunk, and she did not get up while witness stayed; she said there was no use for a Coroner, nor for those who were there; there was blood all over the floor; saw blood on the facing of the grocery door, as though rubbed off from one's clothes; saw one little spot of blood about eight steps from the grocery door, but saw no more between the grocery and the house; has known Mrs. Hall for 17 or 18 years, and had the means of knowing her general character, which is not very good, and from his knowledge of her general character could not believe her on her oath; never heard anything against her truthfulness until after this difficulty.

Wesley Temples testified that, on the morning after the difficulty he was at the place deceased was said to have been killed, which was about ten steps from the grocery; saw a small spot of blood there, also the mainspring of a gun-lock, which was then and there picked up; saw some blood on the gate-post about the latch of the gate, and about the height that one would be carried, if carried through the gate; saw no other blood between the dwelling and the grocery, except that already mentioned.

Daniel Collins testified the same as Temples, and also that he saw some blood which seemed to have been rubbed on the facing of the door of the house about four inches from the floor, and also some blood on the facing of the grocery door, which appeared to have been put on with hands, about as high up as one would put the hand in opening the door; prisoner was brought back by Clopton Henly and others, and was identified by Mrs. Hall.

E. M. Fant testified that, he was present on the morning after the difficulty, and heard the prisoner admit that he gave deceased the blow; the prisoner did not look like he knew what he was doing, and wanted to know if they were going to hang him that evening.

Jeremiah Murphy testified that, the prisoner passed his house a short time before those in search for him; he was going in a direction from the house of deceased on the morning after the difficulty, and inquiring the way to Alabama; witness heard him say, when he was brought back, "you had as well hang me now as any other time;" he appeared to be in great distress; saw the spot of blood near the grocery; saw blood on the facing of the grocery door, and on the gate-

Whitworth vs. The State of Georgia.

post. Has known Mrs. Hall since 1850, and from his knowledge of her general character would believe her on her oath.

Larkin Davis testified that, he was present when prisoner was examined before the magistrates, and when asked as to his guilt, he replied, "I reckon I must say it was me that struck the blow;" and after he was spoken to again, he said, "I don't want to die with a lie in my mouth."

David W. Strange testified that, he lived in the neighborhood and knew Mrs. Hall's general character, and would believe her on her oath.

Alfred Cook testified that, at the examination of prisoner, when questioned as to his guilt, he replied, "Yes, I struck the lick, and it is too plain to deny;" and when some one remarked, "poor fellow," he then said he was drunk, and did not know whether he did it or not; witness saw the blood near the grocery, and saw a pound weight picked up near the blood spot; had lived in the neighborhood about four years, and about one and a half miles from deceased; knew Holloway who had been about there two or three months; on the day of prisoner's examination Holloway was present, and under arrest, but was discharged after prisoner was taken off; prisoner did not live in the neighborhood, and witness never saw him until that day; he was inquiring the way to Alabama; Mrs. Hall has had a bad name, both before and since the difficulty.

EVIDENCE FOR THE DEFENDANT.

John D. Knowles testified that, he saw two pound weights lying on the ground, the day after the difficulty, about twenty or twenty-five yards from the grocery, rather angling from the grocery toward the house.

A. B. Maloney testified that, he was at the house of deceased on the morning after the difficulty, and saw blood on the grocery door, which seemed to have been smeared; Mrs. Hall was sitting at the head of her husband's corpse; she was in liquor, and said for those persons who were there to leave; that they had got Hall; he was dead, and she reckoned was in hell; had known Mrs. Hall's general character for several years, and would not believe her on oath.

Mrs. McClung testified that, she was at deceased's house about eight days before the killing; that then and there Mrs.

Whitworth vs. The State of Georgia.

Hall told witness that she was not going to live with Mr. Hall long; that he was quarrelsome, and she would get shut of him, or that somebody would kill him; that the place where deceased lived, was her (Mrs. Hall's) place, and she would not leave there; had seen Mrs. Hall drunk twice; had known Mrs. Hall ten or eleven years; was acquainted with her general character and would not believe her on oath.

Jonas McClung testified that, he was at the house of deceased on the morning after the difficulty, and found deceased dead, and his wife lying on the bed in the same room about as drunk as people ever get to be; saw blood a few steps from the grocery, and some on the door of the grocery; was acquainted with Mrs. Hall's general character, and would feel at liberty to doubt her oath; on the night of the difficulty, witness was burning a coal kiln; prisoner came there drunk, said he was lost and wanted to go to Holloway's; also inquired the way to Alabama, and set at witness to go with him to Holloway's.

Thomas Gaddis testified that, he lives about one and a half miles from deceased's house; that he and his wife, and Askew Brock, who came after witness and his wife, went to the house of the deceased, arriving about one hour and a half before day on the morning after the difficulty; found Holloway and Butler there; Mrs. Hall was intoxicated, and with Brock and Holloway, went down to the grocery; soon after witness went down also, and found Mrs. Hall leaning on a barrel; went back to the house and after a little while returned to the grocery and found Mrs. Hall lying on the floor, and Holloway on her; as soon as day come, Holloway and Brock took Mrs. Hall to the house, and witness went home; witness took Butler, Brock, Holloway and Mrs. Hall, all to be drunk; when prisoner was brought back, Mrs. Hall pointed him out as the man who killed her husband, to which prisoner made no reply.

Allen Bryant testified that, he lived about a quarter and half-quarter of a mile from deceased, and had known Mrs. Hall sixteen years; her first husband was brother of witness; heard of the difficulty about 8 o'clock next morning; before that time witness was usually called on for any wanted assistance by Mrs. Hall; knew the general character of Mrs. Hall, and would hardly believe her on oath; witness was not friendly with deceased for a month before the diffi-

culty; heard prisoner admit on his examination before the magistrates, that he struck the lick; saw a gun said to be the one used.

Richard Echols testified that, he knew Mrs. Hall's general character, and would not believe her on oath.

Elisha Henley testified that, he had been acquainted for about five years with Mrs. Hall's general character, and would believe her in cases where she had no prejudice, but in other cases he would not believe her on oath.

EVIDENCE FOR THE STATE IN REBUTTAL.

George Latimer testified that, he was acquainted with the general character of Mrs. Hall; had heard that she drank too much, and kept company with other men than her husband, but from his own knowledge of her, thought he would believe her on oath.

Samuel Davidson testified that, he was acquainted with the general character of Mrs. Hall, having lived within one and a half miles from her fourteen years, and although he had heard reports against her virtue, still he would believe her on oath.

The jury returned a verdict of guilty.

Defendant made a motion for a new trial in the Court below, on the following grounds:

1. Because the jury found contrary to law.
2. Because the jury found contrary to evidence.
3. Because the jury found contrary to law and evidence.
4. Because the jury found a verdict strongly and decidedly against the weight of the evidence.
5. Because the verdict is strongly and decidedly against the law and evidence.
6. Because the Court erred in refusing the defendant a continuance on the motion and showing made by him, and hereinbefore mentioned.
8. Because one of the jurors who tried the case, was not a fair and impartial juror, but had formed and expressed an opinion against the defendant before the trial of said case, which fact was unknown to prisoner or his counsel until after the trial.

The hearing of the motion for a new trial was postponed, and moved, by agreement of counsel and order of the Judge,

Whitworth vs. The State of Georgia.

from time to time, until it was finally heard at Gordon Superior Court, on the 4th of April, 1859, and upon the hearing the motion, was overruled, and the new trial refused by Judge Crook; and his decision and judgment in the premises are alleged as erroneous.

F. C. SHROPSHIRE, for the plaintiff in error.

J. A. W. JOHNSON, Solicitor General, *contra*.

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

My judgment is, that a new trial should be granted in this case, on the ground, that the Court erred in refusing the motion made by the prisoner for a continuance.

Upon a dispassionate examination of the evidence in this record, can it be denied but that there is a mystery enveloping this tragedy? How, where, when, and by whom, was Hall killed? There is more or less uncertainty attending each head of this inquiry.

In candor, I confess that I think it possible, if not probable, the fatal blow was inflicted by the prisoner, and between the dwelling-house and grocery; and yet, my mind is not free from doubt, as to these material facts.

It is frankly admitted by the prosecuting officer, that no reliance can be placed upon the uncorroborated testimony of Mrs. Hall, the wife of the deceased. Such depravity has rarely been witnessed, as was exhibited on this melancholy occasion by this miserable woman. Whitworth's conviction must rest alone upon his own confessions. And under other circumstances, perhaps, they would be deemed sufficient and satisfactory, notwithstanding it is conceded he had no controversy or cause of quarrel with the deceased. If he struck at all, it must have been to avenge the offended pride of his kinsmen, Holloway and Brock, whose credit had been stopped at the grocery, or to accomplish some more unholy purpose, by removing Hall out of their way. They instigated the blow. It was inflicted with Holloway's gun. Is it impossible, in the condition the prisoner was in that night, for him to have been made to believe that he, and not Holloway or Brock, was the slayer?

This, at least, is the theory of the prisoner's defense, and

a deep impression has been made upon the public mind as to its probability, if not its truthfulness. Hence the mammoth petition from the neighborhood where the trial was had for his pardon, including, it is said, eight of the jurors who tried the case, the other four having left the country. Hence the almost unanimous vote of the Senate and the large majority vote of the House for the bill, introduced by Mr. Echols (who was the Sheriff of Chattooga at the time) that arrested Whitworth. The veto of the Governor, if I remember right, (I have not the message before me), was put upon technical grounds, and not upon the merits; and mainly because this writ of error was pending before this Court.

A clear legal right, then, having been withheld from the prisoner, and evidence thereby kept back from the jury, which was germane to the prisoner's line of defense, I am unwilling that his blood should be upon my hands. If, with all the testimony before the jury, they see fit to convict the defendant, it is their province and privilege to do so. But why should I desire to thrust myself into the jury-box, and usurp their functions? I have neither the wish nor, in my humble opinion, the right to do so. It is for them, and not for me, to say what weight the absent proof shall have, in determining the guilt or innocence of the accused.

Judge Story, in commenting upon the clause in the Constitution of the United States—and which is but a re-enactment of the British Statute of Edward III., which requires, in cases of treason, the confession to be made *in open Court*, to justify a conviction—speaks of this provision as founded upon the great policy of protecting men from “unguarded confessions, to their utter ruin.” “It has been well remarked,” he says, “that confessions are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor or menaces, seldom remembered accurately, or reported with due precision.” *Story's Com. on the Con.*, 3d vol., 671.

Read the testimony of John D. Knowles and E. M. Fant, as to the state of the prisoner's mind when these confessions were made, and no one will wonder at the subsequent excitement which has resulted from this trial and conviction.

Cash and others *vs.* Williams.

CASH AND OTHERS *vs.* WILLIAMS.

Unless the Judge of the Superior Court manifestly abuses his discretion, in refusing to dissolve an injunction, this Court will not interfere, especially where it is apparent that no particular injury will accrue to the defendant by the delay, and where it is desirable that there should be first a final hearing upon the merits.

In Equity, in Cass Superior Court. Decision, on motion to dissolve injunction, by Judge WALKER, at Chambers, 29th February, 1860.

This was a bill by B. F. Williams against Jesse Cash and others, to enjoin a judgment recovered in an action of ejectment by Cash against Williams, and also to set aside said judgment, and to quiet complainant in the possession of the land sued for and recovered in said action of ejectment, and to compel defendant to execute a deed of conveyance for said land to the wife of complainant.

The bill alleges that complainant married the daughter of defendant Cash, and that in pursuance of an agreement between them, complainant entered into possession of said land about the year 1845, and made clearings and improvements thereon, and built a comfortable dwelling-house, and has been in the peaceful possession of the same since the time of his entry aforesaid. That defendant promised and agreed, in consideration that complainant would thus enter upon and improve said land, to execute a deed for the same to complainant's wife, as a part, or an advancement to her, of defendant's estate. The bill alleges that in violation of this agreement, defendant instituted his action of ejectment against complainant for said land, and has recovered judgment therein, and threatens to eject complainant from said premises.

The defendants answered the bill, Jesse Cash denying the statements of the bill as to the contract or agreement therein set up, but admitting, substantially, its other allegations and charges.

Upon the coming in of the answers, defendant moved to dissolve the injunction which had been granted, upon the grounds, that there was no equity in the bill, and that if any,

Cash and others vs. Williams.

it had all been fully sworn off by the answers. After argument, the Judge refused the motion to dissolve the injunction. To which refusal defendants excepted.

WM. T. WOFFORD, for plaintiff in error.

MILNER & PARROTT, *contra*.

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

Was the Circuit Court right in refusing to dissolve the injunction in this case? or rather was it guilty of such a flagrant abuse of its discretion, as should constrain this Court to reverse its judgment?

Perhaps, had his Honor have dissolved the injunction, we might not have felt bound to overrule him. Having seen fit to refuse the motion, we are not inclined to interfere.

In a case like this, it is difficult for this Court to give the reasons which control their decision, without prejudicing the case on the final trial. Suppose we were to put it upon the ground, that notwithstanding the answer swore off the equity of the bill, still we would retain the injunction, because the answer was incredible. This would damage it as evidence, and injure the respondent's case generally. We must be guarded in justice to both parties, as well as from a becoming respect for the province of the jury, whose peculiar privilege it is to pass upon the merits of the case.

Mr. Cash professes to have instituted this suit, not so much for the purpose of ejecting his son-in-law and daughter from the land in dispute, as to establish his title to the premises. A little longer delay then will not be detrimental to him.

In answer to the position assumed in the argument, that equity will not enforce a voluntary agreement, we would suggest: That if the complainant establishes, by satisfactory proof, the case made in the bill, the question as to the power of a Court of Chancery to enforce a gift or gratuity, will not arise. There is a valuable consideration set forth for the agreement, which the complainant is seeking to compel Mr. Cash to execute.

Judgment affirmed.

Mitchell vs. Western & Atlantic Railroad.

DANIEL R. MITCHELL vs. WESTERN & ATLANTIC RAILROAD.

1. A railroad company is liable only for such damages as result from its mismanagement, neglect, or the want of due care and attention. And it is necessary for the plaintiff to show some act that will cast the burden of proof on such railroad company. The fact that a negro is run over and injured, while being transported by the road as a passenger, is not sufficient for that purpose.
2. The liability of a railroad for injuries to slaves in their transportation, is to be measured by the law applicable to passengers, rather than by that applicable to the carriage of common goods.
3. Less care and caution is necessary by the employees of a railroad, when stopping for wood and water only, than when stopping to take on or put off passengers.
4. It is no error in the Court to refuse to charge a principle of law, however sound, unless such principle has some application to the case on trial.
5. The fact that the superintendent of the road is on the train, and in the same car where the negro injured was seated, is not even a circumstance to charge the road for injuries received by the negro at that time.
6. If the train stop at a wood and water station, and start again in an unusual short time, or with unusual speed, or without blowing the signal whistle at all, or sufficiently long before starting to put persons on their guard, and an injury happens at the time to a slave passenger, any one of these facts will be sufficient evidence of neglect or mismanagement, to charge the road for all damages received at the time by such negro.

Case, in Cass Superior Court, and motion for New Trial. Heard and decided by Judge CROOK, October Term, 1859.

This was an action on the case, brought by Daniel R. Mitchell against the Western & Atlantic Railroad, to recover damages for injuries received by plaintiff's slave on board the cars of defendant.

From the evidence it appeared that plaintiff, with his wife and children, and about ten of his negroes, took passage on the Western & Atlantic Railroad at Atlanta, for Kingston. The negroes were paid for as *passengers*, and went on the second-class passenger-cars; that somewhere between Atlanta and Kingston, the train stopped a very short time at a

Mitchell vs. Western & Atlantic Railroad.

wood and water station, and, upon starting, one of plaintiff's negroes (a boy about ten or twelve years old) was run over by the train and badly hurt. The train was immediately stopped, and the boy taken in and carried on to a station above and left. It did not appear from the evidence in what way he came to be run over; whether he had got out and was about getting back into the car, when it started and ran over him, or whether he was standing out on the platform or steps, and was thrown off upon the cars starting off. The testimony was somewhat conflicting, too, as to the signal given by blowing the whistle when the train moved off; some of the witnesses testifying that the train moved off before the signal was given; others, that it moved off simultaneously with the blowing of the whistle, and the conductor of the train, and probably another, testifying that it moved off after, but immediately after, the signal was given. The jury, under the charge of the Court, found for the defendant; whereupon, counsel for the plaintiff moved for a new trial, upon the following grounds, to-wit:

1st. Because the verdict of the jury is contrary to the weight of evidence.

2d. Because the Court charged the jury, that to entitle the plaintiff to recover, some negligence on the part of the defendant must be shown by proof, and that the mere fact of the injury having been done to the negro by his having been run over on the track, is not, of itself, *prima facie* evidence of negligence of defendant; and to authorize a recovery, there must be some other proof of negligence.

3d. Because the Court charged the jury, that the liability of defendant in the case must be determined rather by the laws applicable to the carriers of passengers, than by those applicable to carriers of goods, and that defendant must have been guilty of negligence, or he is not liable.

4th. Because the Court charged the jury, that if the place where the cars stopped, and the negro was injured, (Barrow's Station,) was a wood and water station, and not a place for passengers to get on or off the cars, then there was no necessity for the cars to stop longer than was necessary to get a sufficiency of wood and water; and especially, so, as far as this negro was concerned, as he had started to go to Kingston, and had no business to get off at the station; and that to make the defendant liable, it must be shown that he was

Mitchell *vs.* Western & Atlantic Railroad.

[guilty of more negligence than it would have taken to make him liable, had the accident happened at a passenger depot, and not at a wood station.

5th. Because the Court refused to charge the jury as requested by plaintiff, that to neglect to exercise authority to prevent a thing, is, in legal contemplation, to permit it; and if the negro boy was placed under the care and control of the officers of the railroad, it was their duty, and they had the power and authority to place him in such a condition as to prevent an accident, to his injury accruing; and if they failed to do so, the railroad is liable, and the plaintiff entitled to recover. They may not only use coercion even to chains, if necessary for the protection of property from peril, but it is their duty to do so. Humanity to the slave, as well as a proper regard for the interest of the owner, alike, demand that the rules of law regulating such transactions should not be relaxed. The imprudence of slaves demand it. They are incapable of self-preservation, either in danger or disease, and especially one of the age and size of the boy William, sued for in this action, and this duty and office devolves upon those who, for the time being, have the custody and control of the slave, and if they fail fully to perform it, then it becomes the high and solemn duty of Courts to enforce it by the only means in their power—a direct appeal to the pocket of the delinquent party.

6th. Because the Court refused to charge the jury, as requested by plaintiff's counsel, that if the negro boy William was placed in the possession of, and under the control of the proper officers of the railroad, and James F. Cooper, superintendent of said railroad, was in the car with said negro boy and permitted him to go out of the car, by which he was injured, the railroad is liable for all the injury done to the boy and the loss the plaintiff sustained by it.

7th. Because the Court refused to charge the jury, as requested by plaintiff's counsel, that if the cars stopped at a wood and water station, and started without blowing the whistle or giving the usual signal, having stopped a much shorter time than is usual at such places; or if the cars started simultaneously with the blowing of the whistle or giving the usual signal—starting with unusual speed—and the negro boy was injured by it, then the road would be liable for all the injury done to the negro, and the jury ought to find for the plaintiff.

Mitchell vs. Western & Atlantic Railroad.

After argument, the presiding Judge overruled the motion for a new trial, and counsel for plaintiff excepted, and assigns as error said refusal.

AKIN, for plaintiff in error.

WOFFORD, *contra*.

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

The first ground of motion for new trial, that "the verdict of the jury was contrary to the weight of the evidence," was not argued or relied on, and is not, therefore, considered by this Court.

1. We cannot see that there is any error in the charge of the Court as stated in the second ground for new trial. The defendant, in cases of this sort, is only liable for such injuries as result from its mismanagement, neglect, or the want of due care and attention. The only question is, upon whom rests the burden of proof? And we can see no reason, why it should not, in this case, as well as in all others of like character, be on him who holds the affirmative—the plaintiff. In different cases, different and various circumstances have been held sufficient to change the *onus*: such as the upsetting of the coach, running off the track, etc. The fact here relied on is, that the negro was a passenger, and was run over. This, in our opinion, is not sufficient, for the reason, that to have been run over as the negro was, he was, necessarily, not in the place where he ought to have been; that is, inside of the car.

2. The defendant undertook to transport the plaintiff's negro from Atlanta to Kingston as a passenger. In the transit, the negro was injured. The responsibility of the defendant for such injury to the plaintiff "must be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods," for the reason, as given by the books, that the slave has volition and feelings, which cannot be entirely disregarded or overlooked in conveying him from place to place. He can not be stored away like a common package. The carrier has not, and cannot have, the same absolute control over him that he has over inanimate matter. In the nature of things, and

in his character, he resembles a passenger, and not a package of goods. He is, in fact, a passenger, paid for as a passenger, and so treated and held, not only by defendant, but by plaintiff.

The doctrine of common-carriers, as to goods, does not apply to the carriage of slaves, and the carrier is not liable for the loss of, or injury to, slaves, unless the injury has been caused by the negligence or unskillfulness of himself or his agents.

3. From the statement of the charge of the Court, in fourth ground, the meaning of the Court below is not very clear; but taking the whole charge together, we think the Court meant simply to instruct the jury: that if the train stopped for wood and water only, less care or caution on its part was necessary, than if it had stopped for the purpose of taking on or putting off passengers; and if we are right in our understanding of that charge, there was no error in the instruction.

4. There was no error in the refusal of the Court to give the charge requested by counsel for plaintiff, as stated in fifth ground of motion, for the reason, that the principles stated in that request, although sound legal propositions, when applied to the hirer of a slave, or to one who has the absolute control of the slave for the time, whose duty it is, not only to exercise proper care in the "*supervision*" of the slave, but also "to coerce him even to chains, if necessary for the protection of the property from peril." Yet, they have no relevancy, whatever, to this issue; for the defendants in the carriage of slaves, has no supervision or control of them. The slave has volition, the right of locomotion, and the defendant has no right to restrain him in the exercise thereof, by the use of chains or other violent means, unless there has been an express stipulation between the parties to do so, and this is not claimed to be the fact.

5. Neither was there error in the refusal of the Court to give the charge requested in sixth ground; because, although the Superintendent, Cooper, was in the same car with the negro boy injured, yet, there is not a particle of evidence that Cooper saw the boy go out of the car, or permitted him to do so; and while we put the decision, on this point, on this ground, we are not to be understood as holding or intimating that our decision would be different, if it was in proof

Prince and Stafford *vs.* The State of Georgia.

that he did see the boy go out and permitted him to do so, or rather did nothing to prevent him. What I mean is, that that is a question we do not decide, because not properly before us; and it will be time enough to declare the rule when the facts make the question. If owners desire the prohibition of a railroad to restrain the locomotion and volition of a slave in his transportation, it is easy to stipulate for such unusual service, and then there will be no doubt as to the right and power to supervise and control his actions, while under their care and control.

6. Some evidence was offered to the jury, on the trial in the Court below, that when the train stopped at Barrow's Station for wood and water, it started again in an unusually short time, with unusual rapidity; also, that this start was made without first blowing the whistle, or, if at all, not sufficiently long, before starting, to give warning thereof to persons in an exposed situation. If these facts be true, or either of them—of which the jury are to judge—this is such evidence of neglect or mismanagement, on the part of defendant, as charges it with all loss or injury sustained by the plaintiff, in consequence of the cars running over the negro boy at that time, unless the defendant can affirmatively show that the injury to the boy did not result from this mismanagement or neglect, but from some other cause, and for which the defendant was wholly without blame or fault. Hence, the Court below committed error in the refusal to give the request to charge as stated in the seventh ground of new trial, with such qualification as is here stated.

Judgment reversed.

PRINCE AND STAFFORD *vs.* THE STATE OF
GEORGIA.

A riot cannot be committed without as many as two persons acting in execution of a common intent.

Indictment for Riot, in Whitfield Superior Court. Tried before Judge CROOK, at November Term, 1859.

Prince and Stafford vs. The State of Georgia.

The plaintiffs in error were indicted for a riot. At the trial, their counsel moved to quash the indictment, on the ground that there was no averment or allegation therein that defendants committed any act in a violent and tumultuous manner, and because it is alleged that they fought, or had a fight only, which does not, in law, amount to a riot.

The Court refused the motion, and defendants excepted.

The testimony being closed, counsel for defendants requested the Court to charge:

1st. That if the defendants are guilty of an assault and battery, or if Stafford acted in self-defence, and was justifiable in what he did, then they cannot be found guilty of a riot.

2d. That a riot is a disturbance of the public peace by the assembling together of two or more persons, with an intent mutually to assist each other, and, 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.

3d. That to find the defendants guilty, the jury must believe that they assembled with an intent, mutually to assist each other in the commission of an unlawful act, or some other act in a violent and tumultuous manner.

4th. That if the defendants assembled to fight with each other, and so fought, then the jury should find them not guilty, under this indictment for a riot.

All of which requests the Court refused to charge, but charged that, in order to convict the defendants of riot, the jury must be satisfied that they, either with or without a common cause of quarrel, did an unlawful act of violence, or did any other act in a violent and tumultuous manner; that this could be done by fighting each other back; but if one is not guilty, neither can be convicted. They must convict both or acquit both. The Court further defined, in the language of the Penal Code, the offence of riot.

To which charge and refusal to charge, counsel for prisoners excepted.

The jury found the defendants guilty; whereupon, counsel for defendants moved for a new trial, on the grounds of error in the rulings, charge and refusal to charge, aforesaid; and further, because the verdict was contrary to law and evidence, and the charge of the Court.

The presiding Judge overruled the motion for a new trial, and defendants excepted.

JESSE A. GLENN, for the plaintiffs in error.

Solicitor General JOHNSON, *contra*.

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

We think that the facts in this case do not constitute a riot. A riot, according to the definition in our Code, is where "any 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." There must be as many as two persons, and they must do the same act. To be sure, it is not necessary that they should do the same act, in the sense that, what each one does, must be identical with what is done by each of the others. If so, a riot is an impossibility; for it is impossible that the action of each shall not have a certain individuality which will distinguish it from the action of all the rest. In tearing down a house, for instance, one rioter breaks down a door, and another breaks down a window, and a third merely hands a crow-bar to one of his associates. Here each one's act is different from the acts of the others, and the act of one of them has in it nothing of violence. But there is an obvious legal sense in which they all *do the same act*. The *common intent* which covers all the individual parts in the action, cements those parts into one whole, of which each actor is a responsible proprietor. The parts performed by himself is his by perpetration, and the parts performed by the others *in execution of the common intent*, are his by adoption. The principle is, that each one adopts the performances of all the rest and adds them to his own, and thus *does* the whole, in the sense of the definition, so long as they are acting in execution of a common intent, but *no longer*. Hence, there cannot be a riot except where the acts of as many as two persons are cemented into one and the same act, by virtue of being done in the execution of a common intent. While, therefore, there may undoubtedly be a riot without a common cause of quarrel, or without any quarrel at all, there cannot be a riot without a common intent on the part of as many as two persons who do something in execution of that common intent. Now, the case before us is the simple one of two

Cobb vs. Edmondson.

men fighting each other—Prince with an intent to hurt Stafford, and Stafford with an intent to hurt Prince—with intents which, so far from being the same, were precisely the opposites of each other. Prince, in making the attack, was guilty of a *battery*, and Stafford, in returning it with a rock, may have exceeded a lawful measure of force, and so have been guilty of a *battery* also; but certainly they were not acting in execution of a common intent, and so were not guilty of a *riot*. For myself, I think it would be a great straining of the statute to hold that even a pitched battle—a fight in pursuance of an agreement to fight—would constitute a *riot*. But that question is not in this case; for though there is proof of an agreement to fight, the proof is, that the fight which actually took place, was not in execution of that agreement. The agreement was, that they should go out of the incorporation and fight; but while they were going out for the purpose, Prince precipitated the fight by giving the “damned lie” and striking a blow. Stafford was overtaken by a fight not in the bargain. It may be that a riot was brewing; but if so, Prince spoiled the riot by an assault and battery. This view covers all the grounds of error.

Judgment reversed.

COBB vs. EDMONDSON.

1. Suit being brought in the name of a trustee who is removed, his successor may be substituted upon motion, and the cause proceed.
2. A husband is not a competent witness to testify in respect to the separate estate of his wife, who is a direct beneficiary of the action, although not a party to the record.

Assumpsit, in Whitfield Superior Court. Tried before Judge CROOK, at October Term, 1859.

This was an action originally brought by Peyton L. Wade, trustee of Mrs. Sarah A. Powell, against Jacob L. Cobb, on

an account for flour sold and delivered to defendant, amounting to \$79 00.

Upon the trial, plaintiff introduced, as a witness to prove the sale and delivery of the flour, Jacob S. P. Powell, the husband of Sarah A. Powell, *cestui que trust*. Defendant objected to the witness on the ground of incompetency, he being the husband aforesaid. (It appeared that the flour was the product of the separate estate of Mrs. Powell, of which Wade was trustee.) The Court overruled the objection, and allowed the witness to be sworn. To which ruling defendant excepted.

Plaintiff having closed, defendant moved for a non-suit, upon the ground that, since the commencement of the action, Wade, the trustee, had been removed and Edmondson appointed in his stead, but not made a party plaintiff; and that the action could not be carried on, or maintained in the name of the removed trustee, Wade. Whereupon, plaintiff's counsel moved to amend the declaration by striking out the name of Wade, and inserting the name of Edmondson, as plaintiff.

The Court refused the motion for non-suit, and allowed plaintiff to amend his declaration as proposed, and counsel for defendant excepted.

The jury found for the plaintiff, and counsel for defendant moved for a new trial, upon the ground of error in the rulings and decisions aforesaid, which motion for new trial the Court refused, and counsel excepted and assigns said refusal as error.

M. CUTCHEON, for plaintiff in error.

JESSE A. GLENN, *contra*.

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

It was no error in the Court to substitute, upon motion, the name of the new trustee, in the place of the former trustee—Peyton L. Wade—any more than it would be one *prochiam ami*, or guardian *ad litem*, in lieu of another, which is the every-day practice. The Act of 1859 expressly authorizes it. It was the law before.

As to the second error assigned, we are clear that Mr.

McGinnis vs. Chamberlain, Miller & Co.

Powell, the husband, was not a competent witness to testify, in respect to the separate estate of his wife, although she was not the party to the record, but yet the direct beneficiary of the suit; and all the authorities concur upon this point. (1 *Greenleaf. Ev.*, sec. 341. 1 *Burr*, 424; 4 *F. Rep.*, 668; 5 *Beav.*, 443; 6 *Bin.*, 483; 2 *Stark on Co.*, Part 1, 550, 551.) He is excluded, not so much on the score of interest and the temptation to commit perjury, but upon a great ground of public policy—the preservation of domestic peace and conjugal confidence.

For admitting the evidence of Mr. Powell, the husband, the judgment of the Circuit Court must be reversed.

MCGINNIS vs. CHAMBERLAIN, MILLER & CO.

1. N. McD. applied to S. McG., to become his security on a note to C. M. & Co., not naming any amount; McG. replied by letter, authorizing McD. to sign his name to such note as security. Suit afterwards being brought on this note, McG. plead *non est factum*. On the trial of that issue, it was proper for the Court to let the note be read to the jury on proof of a conversation between McD. and McG., in which McG. distinctly admitted writing the letter giving the authority to McD. to sign his name, etc., and, on the further admission by McG., that McD. was, by the permission and consent of McG., in the constant habit of signing McG.'s name as security for him whenever he chose to do so.
2. The jury having returned a verdict against McG. on this proof, such verdict was not so decidedly against the weight of evidence as to require the Court to grant a new trial.

Complaint, in Gordon Superior Court. Tried before Judge CROOK, at October Term, 1859.

This was an action by Chamberlain, Miller & Co., of Charleston, South Carolina, against Newton McDill, principal, and Stephen McGinnis, security, on a promissory note

McGinnis vs. Chamberlain, Miller & Co.

for \$1,168 00, payable eight months after date, and dated Charleston, South Carolina, June 11th, 1856.

McGinnis defended the action, and pleaded the general issue, that he never signed said note, which plea he verified by his oath.

Plaintiffs read in evidence, the deposition of Charles H. Smith, who testified that he had the note sued on in his possession, and first had a conversation with McGinnis about the winter of 1857-'58. Told him the note would soon be due; he asked, "What note?" Witness told him the note he had signed with McDill to plaintiffs, for \$1,168 00. McGinnis said he never signed any such note. The next day, witness went with McGinnis to McDill's house, and witness asked McDill how came McGinnis' name to that note. McDill said he signed it for McGinnis. McGinnis said, "Newton, how came you to do so?" McDill replied, "Why, Stephen, you wrote me to do it." McGinnis replied, "No, I never." McDill said, "Why, Stephen, I've got your letter now, and you know you wrote me to sign your name to that note." McGinnis said, "I know, Newton, you wrote me that you could get further time on the Charleston debt, if I would sign with you, but you never named such an amount as that. I thought it was some debt of two or three hundred dollars, and I wrote you to sign my name." McDill said, "Well, Stephen, I did not write you any amount at all, and you know I've been signing your name, for several years, as my security whenever I needed security, and you know you authorized me to do it, and you never objected before." McGinnis said, "Well, Newton, that's so, but things are *squally* now, and I am going to swear off every one I can. I don't intend to pay this note—I am going to take care of myself."

Plaintiffs then offered in evidence, the note sued on, to the introduction of which defendant objected. The Court overruled the objection, and admitted the note, to which ruling defendant excepted.

The case was submitted upon the foregoing testimony, and the charge of the Court, and the jury found for the plaintiffs the amount of the note; whereupon, counsel for McGinnis moved for a new trial, upon the grounds, that the verdict was contrary to law and the evidence and the charge of the Court, and because the Court erred in admitting the note in evidence under the facts and proof.

McGinnis vs. Chamberlain, Miller & Co.

The presiding Judge refused the motion for a new trial, and counsel for McGinnis excepted.

DABNEY, for plaintiff in error.

COOPER, *contra*.

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

1. Whether Newton McDill was authorized to sign the name of plaintiff in error to the note sued on, as security for the said McDill, so as to charge the plaintiff in error with payment, was a question for the consideration of the jury solely. That was the issue that they were to try. The evidence of Charles H. Smith, read to them on the part of defendant, in support of that proposition, was sufficient to let the note go to the jury to be considered by them in connection with that evidence. The Court below, therefore, properly overruled the objection to its admissibility.

2. Was the verdict strongly and decidedly against the weight of evidence? We think not. In the conversation that occurred between McDill and plaintiff in error, in the presence of the witness—the note in controversy being before the parties—McDill said to plaintiff in error: "Why, Stephen, I've got your letter now, and you know you wrote me to sign your name to *that note*"—the one in suit—to which McGinnis replied, "I know, Newton, you wrote me that you could get further time on the Charleston debt if I would sign with you, but you never named such an amount as that. I thought it was some debt of two or three hundred dollars, and *I wrote you to sign my name.*" Here was a plain, open, and unqualified admission that McDill, the principal, had made application to him to sign his name to this identical debt, for the purpose of getting further time on it, and that he had authorized McDill to sign his name thereto. How much stronger evidence could have been given of McDill's authority to make the signature? It is true, that McGinnis said, in giving that authority, that he thought the debt was a much smaller one, but he did not pretend that he made any such limitation, or qualification, in his written authority to sign his name to that note. And if he honestly

Ware vs. Craven.

thought at the time, that the debt was a much smaller one such thought cannot save him from the effect of an open and unqualified authority to McDill to make the signature for him. But the testimony does not end here. McDill replies to McGinnis: "Well, Stephen, I did not write you any amount at all, and you know I've been signing your name for several years as my security, whenever I needed security, and you know you authorized me to do it, and you never objected before." McGinnis said, in reply to this whole statement, from beginning to end, "*Well, Newton, that's so,*" etc.

One of the tests for determining whether a signature to a paper of this kind is authorized or not, is this: Would the party actually signing the name of the third person, in an indictment, be guilty of forgery? Try this case by that test, and would it be possible to legally convict McDill of forgery in signing the name of McGinnis to that note, as his security on the same? No one would, for a moment, hesitate in saying that he could not be—and why? Because McGinnis authorized him to do so. Yet it is either McGinnis' act, and must be so treated, or McDill is guilty of forgery. In any point of view that we look at this case, the verdict of the jury is not strongly and decidedly against the weight of evidence, but it is well supported by the evidence, any other verdict would have been against the evidence.

WARE vs. CRAVEN.

1. The verdict is supported by the evidence.
2. In order to obtain a *certiorari* from a Justices' Court, the points stated in the petition need not be verified by affidavit.

Certiorari, in Gordon Superior Court. Decision by Judge CROOK, at October Term, 1859.

R. W. Craven brought suit in a Justices' Court, against E. P. Ware, guardian of Miss Eliza Applebey, a minor, on an account for work done and services rendered as a dentist, for Miss Applebey. At the first trial in the Justices' Court,

Ware vs. Craven.

plaintiff recovered judgment for the amount of his account. The defendant appealed, and upon the trial on appeal, the same testimony offered on the first trial was again submitted, to-wit: The affidavit of plaintiff, in support of his account, and the counter-affidavit of defendant, as provided by law, in cases where the plaintiff in suits in Justices' Courts resides out of the county in which the suit is brought: the plaintiff here residing in the county of Cass, and the defendant in the county of Gordon. Plaintiff further offered and read in evidence the depositions of Mr. and Mrs. Chum, who proved that Miss Applebey was boarding at their house at the time the work was done; that she was suffering very much with her teeth, and at her request, plaintiff was sent for, and executed the work for her, which is charged in the account sued on; that Miss Applebey said at the time, that it was her mother's wish that her teeth should be plugged; she did not complain of her teeth afterwards, and are of opinion that she was benefitted by having her teeth plugged.

Upon this proof, the jury found for the defendant. Whereupon, plaintiff applied for, and sued out, a *certiorari* to have said verdict reviewed and set aside, upon the ground that the same was contrary to the evidence.

At the trial before Judge Crook, counsel for Ware moved to dismiss the *certiorari*, upon the ground that plaintiff had not made affidavit of the truth of the facts set forth in his petition for *certiorari*, as required by law. The Court overruled the motion, holding that the affidavit made was sufficient. To which ruling counsel for Ware excepted.

The Court further held, that the verdict was contrary to the evidence, and ordered the same to be set aside, and that a new trial be had. To which decision counsel for Ware excepted.

G. J. FAIN, for plaintiff in error.

PHILLIPS, *contra*.

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

1. We do not agree with the presiding Judge, that this verdict in favor of the defendant in the Justices' Court is against the evidence. The only evidence which the plaintiff

Ware vs. Craven.

there had to carry it the other way, was his own affidavit, and the testimony of Mr. and Mrs. Chum. As to his own affidavit, it was met by a counter-affidavit by the defendant, and no reason is shown in the case why the jury should not have believed the defendant rather than the plaintiff. As to the testimony of Mr. and Mrs. Chum, it covers only one point among several, which were necessary for the plaintiff to establish, in order to recover. They state that he did the work, and that it relieved the young lady's toothache. This is the whole proof. Now, aside from his own affidavit, which the jury considered to be overcome by the counter-affidavit of the defendant, the plaintiff had no proof as to how much the work was worth, and none to show that the work was suitable to the young lady's estate and condition in life—the suit being against her guardian. It was said that any girl, with or without an estate, has a right to get relieved of a toothache and make her guardian pay for it. If this doctrine is conceded in favor of gallantry, (and it can hardly be conceded on any other score,) still, some care must be taken not to make the guardian pay for anything but relieving the toothache. Now, it is very possible that the toothache, in this young lady's case, could have been relieved as the toothache of her grandmother had, no doubt, often been relieved, by a plug of cotton, with a little laudanum on it, instead of fine plugs of gold. We think the jury were authorized to find the verdict which they found.

2. We do not think that there was any necessity to verify, by affidavit, the statement of facts in the petition for *certiorari*, in order to obtain the writ; and we concur with the Judge, in his refusal to dismiss the *certiorari* for the lack of such an affidavit.

Judgment reversed.

Maddox vs. Boswell.

MADDOX vs. BOSWELL.

A physician who was practicing at the date of the Act of 1847, which revived the Act of 1825, to regulate the licensing of physicians in this State, etc., is a qualified physician, and may collect his account for medical services.

Complaint, in Catoosa Superior Court. Tried before Judge CROOK, at November Term, 1859.

This was an action by Doctor George B. T. Maddox, against William M. Boswell, on an account for board and medical services, rendered by plaintiff for defendant.

The defendant pleaded the general issue, and that plaintiff was not a practicing physician, entitled, by law, to charge and recover for the services rendered, never having obtained a license to practice, as required by statute, in such case made and provided.

At the conclusion of the testimony, plaintiff's counsel requested the Court to charge the jury: That if the plaintiff was a practicing physician at and before the passage of the Act of 1847, and up to that time, (the time of trial,) and has proved his account, then he is entitled to recover. Which charge the Court refused to give, but charged: "That the Act of 1847 revived the Act of 1825, and excepts from its operation the graduates of Botanic Medical Colleges, and the licentiates of a legally established board of physicians; and although plaintiff was practicing medicine before the Act of 1847, he could not recover, unless he came within the exception of that Act," etc.

The jury found for the plaintiff \$71 00, being the amount of items in the account, other than for medical services. Whereupon, counsel for plaintiff moved for a new trial, on the ground that the verdict was contrary to law and the evidence, and that the Court erred in its charge, and refusal to charge, as above stated.

The Court overruled the motion for a new trial, and plaintiff excepted.

CARUTHERS; DODSON, for plaintiff in error.

SUTTON; J. A. GLENN, *contra*.

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

The only question in this case is, whether the plaintiff, as an unlicensed practicing physician, has a right to sue for, and recover that part of the account declared on, which is made up of professional services rendered defendant, on proof of the same—he (the plaintiff) having been a practicing physician at the date of the Act of 1847, reviving the Act of 1825, to regulate the licensing physicians in this State?

This identical question was made and decided affirmatively by this Court in *Newsom vs. Lindsey, adm'r*, 21 Ga., 365.

We see nothing in the present case to induce a change of the construction of those Acts given by the Court in that case. For my own part, I would not consent to a change of that construction, were I convinced that it was an erroneous interpretation of the law, for the reason, that I believe it is the true policy of this Court, as well as the spirit in which it was organized by the people of Georgia, that a principal once decided, that is not in conflict with a statute of the State, should stand as law, and be conclusive in all subsequent adjudications and judicatories in this State, until repealed or changed by the Legislature of Georgia.

And as the charge of the Court below to the jury on this question, and his refusal to charge as requested by counsel for plaintiff, was directly in conflict with that decision, the judgment must be reversed on that ground. The Court should have charged the jury as requested.

Counsel for defendant insisted, that to entitle the plaintiff to the benefit of the exception, it was necessary for him to show, by proof, that although a practicing physician, he fell within some one of the different schools or classes of practitioners expressly named by some one of the several statutes on this subject. The statute makes no such distinction. To recover for his services, he must show that he was a "practicing physician" at the passage or revival of the Act of 1825. If he does that, no matter what school or class he belongs to, he is within the exception, and entitled to recover.

Judgment reversed.

NEAL vs. WM. N. & WRIGHT BOOKOUT.

1. The preliminary issue authorized by the Act of 1855-'6, to traverse the truth of the affidavit in relation to the ground upon which the attachment issued, must be tendered at the return Term of the attachment.
2. Where the issue traversing the truth of the ground upon which the attachment was issued, was tendered at the trial Term of the attachment, and disallowed by the Court, an appeal upon the merits does not carry up this preliminary question.

Attachment, in Gordon Superior Court. Tried before Judge CROOK, at October Term, 1859.

Thomas Neal sued out an attachment against the defendants, the Bookouts, on the ground that they abscond. The debt sued for was a promissory note for \$295 00, and the attachment issued the 18th May, 1857, returnable to the July Term, 1857, of the Inferior Court of Gordon county. At that term of the Court nothing was done, except the filing of the declaration, as provided by law. At the January Term, 1858, the defendants appeared and traversed the ground upon which the attachment had issued, to-wit: that they "*abscond*." At the same term of the Court, and without trying the issue presented by the traverse, the defendants confessed judgment to the plaintiff for the amount of the note sued for, reserving the right of appeal. Upon the trial on the appeal, the jury found "against the issuing of the attachment." This verdict was rendered at the October Term, 1859, of Gordon Superior Court. Whereupon, plaintiff moved for a new trial, upon the following grounds, viz:

1st. Because the Court erred in allowing the traverse of the ground on which the attachment issued—said traverse not having been filed at the term to which the attachment was returnable. (The traverse was allowed by the defendants swearing, that, being absent from home at the time of suing out the attachment, and at the return term of the same, they had no knowledge of the existence of the attachment, and that was the reason why the traverse was not filed at the return term thereof.)

2d. Because the Court erred in charging the jury, that if, from the evidence, they believed that the defendants, Book-

outs, were just gone from home at the time of suing out the attachment, to sell some property, and left their land, families and other property in the county of Gordon, having a residence in the county of Gordon all the time, that they might find the issue in favor of the defendants.

3d. Because the Court erred in charging the jury, that if, during the absence of the defendants out of the county or State, the plaintiff could have had legal service perfected by leaving a copy of a declaration and process at the most notorious place of abode of the defendants, and that their land, families and other property remained in Gordon county, that then they would be authorized to find the issue in favor of the defendants.

4th. Because the Court erred in charging the jury, that if, from the evidence, they believed that defendants did not leave Gordon county with a view of avoiding the service of ordinary process upon them or secreting themselves, but only left for the purpose of selling their stock, and not changing their residence, they would be authorized to find the issue in favor of the defendants.

5th. Because the Court erred in ordering the attachment dismissed upon the finding of the jury, notice having been served upon the defendants after their return, but not within ten days of said judgment.

6th. Because the finding of the jury in said case is strongly and decidedly against the weight of the evidence.

The Court overruled the motion for a new trial, on all the grounds therein taken, and counsel for plaintiff excepted.

MILNER and PHILLIPS, for plaintiff in error.

FAIN, *contra*.

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

The thirty-first section of the Attachment Act of 1855-'6 declares, that it shall be lawful for the defendant in attachment to traverse the truth of the affidavit, in relation to the grounds upon which the attachment has issued, "*at the return term of the attachment*;" and the issue thus formed is to be tried at the first term, unless good cause be shown for

Neal vs. Bookout.

a continuance, and either party being dissatisfied with the verdict, is entitled to appeal. (*Pamphlet*, p. 33.)

Can the traverse thus authorized be allowed at any other than the return term of the attachment? We think not. Nor does this construction of the statute work any serious detriment to the defendant. He may still come in and defend the case upon the merits.

But in this case, there is, we apprehend, a fatal objection to the proceeding. The attachment was returnable to the July Term, 1857, of the Inferior Court. At the trial term, in January thereafter, the traverse was tendered and disallowed by the Court; and thereupon, the defendant confessed judgment to the plaintiff *for his debt*, reserving the right of appeal, which was duly entered. But this appeal did not, of course, take up the traverse. It remained where it was left in the Court below, no *certiorari* being sued out to reverse the judgment of the Inferior Court, in refusing to allow the traverse to be filed at the appearance term of the attachment, and no attempt being made to carry it up by appeal. For, we repeat, the defendant did not confess for the debt; and further, that *he absconded*, with liberty of appeal, but for the debt only.

How does this issue come up, then, and be treated as upon the appeal? The whole proceeding was *coram non judice* and void.

This being so, it is useless to consider the charge of the Court. The case must be reinstated, and a trial had upon *the merits*—upon the appeal. It is too late to take up and try the preliminary question, as to whether or not there was ground for the attachment.

Judgment affirmed.

JONES vs. THE WILLS VALLEY RAILROAD CO.

1. *The State vs. Dean*, 9 Ga. Rep., 400, and *Armstrong vs. The Oglethorpe Bridge & Turnpike Co.*, 18 Ga. Rep., 609, reaffirmed.
2. It would seem, that where the land of a citizen is taken to build a railroad against his will, he should be paid its value, *in coin*, according to quality, form and location. But if the owner sets up a claim for apprehended evils and inconveniences, the incidental benefits which he receives from the location of the road upon his property, should be allowed, by way of reduction of the damages so claimed.

Assessment of Damages, in Dade Superior Court. Tried before Judge CROOK, at June Term, 1859.

This was a proceeding to assess damages sustained by James H. Jones for, and on account of, the right of way for the construction of a railroad through his land.

Upon the trial on the appeal, counsel for Jones (the railroad being the appellant) moved to dismiss the appeal, upon the ground that the same was not taken within the time prescribed by law. The statute providing "That the award of a majority of the appraisers, in writing, shall operate as a judgment for the amount against the company, and shall be enforced by an execution from the Inferior Court, with the right of appeal to either party, to be tried by a special jury as other appeals, at the next term of the Superior Court thereafter." That the award, in this case, was made in writing, and signed by the appraisers on the 15th day of November, 1858, and the appeal was not entered until the 14th day of December, thereafter, which being more than four days from the date of the award, rendered said appeal illegal. The Court refused to dismiss, and plaintiff, by his counsel, excepted.

Plaintiff then proved by the chief engineer of the company, the location of the road through his land, and the appropriation therefor of two acres of his land; that there would be an embankment through plaintiff's field, varying from two to nine feet high.

Zachariah O'Neal sworn, testified, that he thought the land damaged \$800 00.

Mr. Dearberry testified, that he thought the land was damaged \$800 00 or \$1,000 00.

Jones *vs.* The Wills Valley Railroad Company.

B. F. Pace thought the land damaged \$1,200 00.

Hugh L. W. Allison thought it damaged \$400 00 or \$500 00, and also, that the land was worth as much after as before the road was built.

Plaintiff here closed, and defendant introduced no evidence.

After argument, counsel for the road requested the Court to charge the jury :

1st. That the fact of the defendant being a corporation, should have no influence on their minds in making up their verdict, but that they should decide and find on the same principles as if the case was one between man and man.

2. That the question to be determined was, how much damage the plaintiff had sustained by the appropriation of his land for the purposes of the road? And in the determination of this question, the jury must deduct from the amount of damages the enhanced value of the remainder of the land, caused by the construction of the road.

3d. That if the plaintiff's land is worth as much with the road upon it as it would be without it, he is not entitled to recover any damages.

4th. That all the defendant is required to do is, to make *ju s* compensation for the land appropriated, and is not bound to do so in money, but may do so by enhancing the value of the remainder of the land.

5th. That if the jury think, from the evidence, that plaintiff is not, in fact, injured, they must find for the defendant. That the great question is, has the plaintiff been damaged, and if so, how much?

6th. That if, from the testimony, the jury believe that plaintiff's land, without the contemplated road, was worth, for instance, \$2,500 00 and after the appropriation of a certain amount for the right-of-way, the remainder, by reason of the road, is worth as much as the whole without the road, say \$2,500 00 then plaintiff is not entitled to recover anything.

7th. That the burden is on the plaintiff to show that he is damaged; and although he may not be as much benefited as his neighbor through whose land the road may not pass, this is no reason why he should have damages from the defendant.

8th. That the *fee simple* to the land, which defendant acquires by virtue of their decision, is no more than the right of way for the construction of the road.

Jones vs. The Wills Valley Railroad Company.

9th. That the award made by the arbitrators in the case is to have no influence with them in making up their verdict.

10th. That the jury are to consider the question of the value of the land as if the plaintiff wished to sell, and defendant wished to buy. That the road is not to be considered a wrongdoer, but as a fair purchaser in the market.

All of which the presiding Judge charged as requested, and to all of which counsel for plaintiff excepted.

The jury found for the plaintiff three hundred dollars.

And counsel for plaintiff, therefore, tender their bill of exceptions, assigning as error the rulings and charge aforesaid.

ROBERT H. TATUM, for plaintiff in error.

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

As to the appeal, not having been entered in time, the first point made in the bill of exceptions, that point is settled against the plaintiff in error, in *Armstrong against the Oglethorpe Bridge & Turnpike Company*, (18 Ga. Rep., 609;) and *The State vs. Dean*, (9 Ga. Rep., 400.)

The main question to which our attention has been called by the learned counsel is, what shall be the rule in estimating the damages to be assessed against the Wills Valley Railroad Company for seizing and appropriating the land of the citizen for the construction of their road? He insists that the rule prescribed by the Supreme Court of Tennessee, in the case of *Woodfolk against The Nashville & Chattanooga Railroad Company*, (*American Law Register*, July number, 1853,) and sustained by several adjudications in Kentucky, (5 Dana, 28; 7 ib., 81, and 9 ib., 114. But see contra, 3 Moss. Rep., 489; 4 Cush., 471,) is the true criterion of compensation; and that is the fair cash value of the land taken for public use, if the owner were willing to sell, and the company desired to buy that particular quantity, in that place and in that form, would be the measure of remuneration; and that this must be paid *in money*.

For myself, I confess I am strongly inclined to maintain this. But the Tennessee Court further held, and, I think, correctly, too, that if the owner of the land seeks to recover incidental damages beyond the actual value of the land taken, the road has a right to set off a counter-claim for the in-

Jones vs. The Wills Valley Railroad Company.

creased value of the land, by reason of the location of the road on the plaintiff's property.

All our railroad charters contain this principle; and by irresistible implication, it is embraced in the charter of the Wills Valley Road; for it provides expressly that the land-owner is not, by the assessment of damages, to be brought in debt to the road—a result which is only possible, by setting off the benefits against the injuries.

The verdict in this case was clearly contrary to the evidence; but as no motion was made for a new trial, the case cannot be sent back, on that account. But there is a ground upon which a rehearing can be awarded: The witnesses, in testifying to the increased value of the land do not *state*, whatever they may have *intended*, that it was owing to the location of the road. We know that there is not an acre of ground in the State, nor a foot of land in any of our cities, towns or villages that has not steadily appreciated in value for the last ten years. To have warranted the instructions of the Court of the jury, it should have appeared, affirmatively, that the enhancement in price was attributable to the road, or at least, to what extent the road had contributed to produce this result.

We think that the ends of justice would be best subserved by sending this case back, with the opinion of this Court, by way of directions, that the jury first ascertain the value of the property appropriated by the road, add to this the damages which would result from its construction; the latter to be set off by the benefits conferred. If the latter equal the former, the verdict to be for the actual value only of the property used; if less, the difference to be added to the price. and that, too, although the road should never be built. For it is the duty of the defendant in error to complete it, and put it, and keep it in operation; and the fault will be at the door of the company, if it be left unfinished.

The subject is one of difficulty and delicacy. It would seem that where the private property of a citizen is taken against his wish and will for a railroad, he should be paid its value in coin. If the owner, however, sets up a claim for apprehended evils and inconveniences, it may not, perhaps, be going too far to allow, by way of reduction for the damages so charged, all the incidental benefits which he receives from the location of the road upon his premises. This ap-

McGinnis vs. The Justices, etc., of Gordon County.

proximates, as near as possible, the meteing out of equity to all concerned. To lay down a rule or draw a line, with mathematical precision, is impossible.

McGINNIS vs. THE JUSTICES OF THE INFERIOR COURT OF GORDON COUNTY.

1. An injunction will not be dissolved on the coming in of the answer, unless the answer fully swears off or denies all the equities of the bill, especially when the injunction is necessary to protect the complainant from an invasion or trespass upon his property.
2. Where a general demurrer has been heard and adjudicated, the Court will not, on a motion subsequently made to dissolve the injunction on the coming in of the answer, consider any objection to the bill that was properly involved in the demurrer.

In Equity, in Gordon Superior Court. Decision by Judge CROOK, at Chambers, January, 1860.

This was a bill filed by Stephen McGinnis, against the Justices of the Inferior Court of Gordon county, to enjoin them from pulling down and removing the toll gates erected by complainant across the public highway, at his bridge, over the Oostanaula river, and to enjoin and restrain the collection of an execution issued against complainant by the Commissioners of Roads, under the order and authority of said Justices, to enforce the payment of a fine imposed upon complainant for the erection of said toll-gate; said fine being imposed upon the pretence that said gates are unlawful obstruction of a public highway. The bill alleges that the premises upon which said bridge and toll-gates are erected, is the property of complainant, and that he purchased the same with said bridge and toll gates, as appurtenant and belonging thereto, and established and recognized by the Superior Court of said county, as a toll bridge, with the right and authority of complainant to exact and receive toll, according to a rate established by said Court.

McGinnis vs. The Justices, etc., of Gordon County.

To this bill defendants demurred, and, upon argument, the Court overruled the demurrer, and ordered defendants to answer.

Upon the coming in of the answer, defendants moved to dissolve the injunction. After argument, the Court granted the motion, and dismissed the bill, upon the ground that there was no such case of irreparable injury, by the trespasses complained of and threatened, as entitled complainant to the interposition of a Court of Equity, and that said injunction had been improvidently granted.

To which decision counsel for complainant excepted and assigns the same as error.

SHEPPARD, JOHNSON & PHILLIP, for the plaintiff in error.

DABNEY & FAIN, *contra*.

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

The complainant filed this bill returnable to the October Term, 1858, of Gordon Superior Court. At that term the defendants to the same appeared and put in a general demurrer for the want of equity, and after argument had, the Court overruled the same at that term. From this judgment no appeal or exception was taken by defendants, but they then put in their answer, and at the April Term, 1859, moved to dissolve the injunction on the ground that the equity of the bill was fully denied by the answer. Upon this motion, the Court "dissolved the injunction and dismissed the bill, on the ground that there was no sufficient allegation of irreparable mischief, to restrain the trespass, and that the injunction was improvidently granted."

This judgment we are called on to review, and it is insisted by counsel for defendants, that, although the Court below may have improperly dismissed the bill, and dissolved the injunction on the wrong ground, or for a wrong reason; yet, as the true question before the Court, was a motion to dissolve the injunction on account of the denial of the equity of the bill by the answer, so, that is, or ought to be, the true question before this Court; and if we should be

satisfied that the answer fully denies all the equities of the bill, then this Court ought, at least, to affirm that part of the judgment which dissolves the injunction. Agreeing as we do with the counsel for defendant in this respect, we shall consider the judgment under review in that aspect. Then, does the answer fully deny all the equities of the bill?

The equities of the bill are, that the Inferior Court of Gordon county, being the owners of that part of lot No. 191, in the 14th district and 3d section of said county, on which was situated the bridge across Oostananla river, built by Washington Lawson, having purchased the same at sheriff's sale as the property of said Lawson under executions against him, did on thirty-first day of October, 1855, sell the same to one Newton McDill for the sum of \$1,500, which has been fully paid to the Inferior Court of Gordon county, the whole of which has been received and appropriated to the use and benefit of the county of Gordon; that to induce McDill to make that purchase, the then said Inferior Court represented to him that the tolls from the bridge would yield him the net sum of \$100 per month; that the said Court would establish the road-crossing on and at that bridge as a public highway, and they as a Court would by its order vest in him the right to charge toll on all persons crossing, at a tariff of tolls to be fixed by the Court; that McDill did purchase on these representations and inducements; that the Inferior Court in compliance with their agreement, and in execution of this contract, did on the same day of the sale pass an order of that Court changing the road leading to Lawson's ferry, so as to cross on that bridge, and authorizing McDill to establish the rates of toll on said bridge, said order being subsequently amended so as to read "and the same is made a public highway from the time of Newton McDill's" purchase from the Inferior Court; and in this amended order the rates of toll were fixed and prescribed by that Court for all crossing on the bridge with this single qualification, that persons hauling grain or desirous of trading in Calhoun would be charged but half price. That three of the members of the Court on the day of sale gave to McDill their bond to execute titles to him or his assigns on the payment of the purchase-money, for the faithful performance of which they not only bound themselves individually, but also their "successors in office as Justices of the Inferior Court

McGinnis vs. The Justices, etc., of Gordon County.

of Gordon county," and in that bond to make titles to the land sold was not only particularly specified, but also "together with the bridge which stands thereon;" that subsequently, on the 26th day of January, 1857, the Inferior Court transferred their bid at sheriff's sale of the premises to McDill, and directed the sheriff of Gordon county to make titles to him, and that the sheriff did so. That complainant subsequently purchased the premises, including the bridge, and that he now in all respects occupies the place in the contract that McDill held, and is possessed by virtue thereof with all the rights and equities that McDill had. That now, notwithstanding the clear rights of complainant under the aforesaid statement of facts, the present Inferior Court, in the face of the solemn contract and obligations of their predecessors, and of their express grants, all of which appear on the minutes of the Court, and are exhibited to the bill, they are using their offices as Justices of the Inferior Court to disturb complainant in the full and free use of his premises, and the exercise and enjoyment of his rights under said contract, and grants from the Inferior Court, by causing his toll-gates to be torn down as obstructions in the highway, and to coerce him by fines, threats, lawsuits and penalties under color of their office, and without authority of law, and against right, to permit the citizens of Gordon county to pass over his said bridge free of toll.

The defendants, in reply, after admitting that they know nothing of the representations made to McDill, or of the inducement held out by their predecessors to McDill to buy the premises, deny that their predecessors sold the premises to him as the Inferior Court of Gordon county for \$1,500 00, or any other sum, or that they as a Court bid off the premises; but if they did buy or sell the premises to McDill, they did so as individuals, and not as a Court as they, defendants, are unable to find on the minutes of the Court any order authorizing such purchase or sale, and this is the whole extent of their denial. Do they deny that their predecessors in the purchase of the lands at sheriff sale, and in its subsequent sale to McDill acted in their representative character for the benefit of the Court of which they were members, and of the county which they represented, or that they in doing so made the representation, and held out the inducements to McDill as charged in the bill? Do they deny that the Court and the

McGinnis vs. The Justices, etc., of Gordon County.

county got the full benefit of the entire operation; that they got the purchase money? These facts are not denied by the answer, yet, they constitute the very gravamen of the bill. Besides an examination of the bond given by three of the members of the Court, to-wit: Fain, Swaggerty and King, on the 31st of October, 1855, as well as the order of that Court on the same day, the subsequently amended order, and transfer of the bid of the Inferior Court to McDill, must satisfy any impartial inquirer in the absence of other proof that the allegations of the bill are true. The land on one side of the river was bid off by Stephen T. Mays, a member of the Court, who does not join in the bond; that on the other side was bid off by Swaggerty. Now, if they bought as individuals, and not as a Court, why did not Mays join in the bond, and why did Fain and King, who were not purchasers give their bond? Again, if it was an individual transaction, why did these persons in addition to personal obligation, also stipulate for their successors in office as Justices of the Inferior Court? Then, again, why did these orders of the Court follow so simultaneously with the contract and sale, if not in execution of the contract as charged, and as a part of the same? To all these inquiries, and they are fairly presented by the bill and exhibits, the answer makes no response, nor offers any explanation whatever.

It appears from the answer, that when Lawson projected the building of this bridge, the Inferior Court for the purpose of securing a free passage for the citizens of Gordon county across the bridge, at first subscribed and paid to Lawson \$500 00, in consideration of which sum, Lawson agreed that the citizens of Gordon might pass over the bridge; that subsequently as the bridge advanced, Lawson, from his embarrassments, was about to fail with the bridge, and the Court to prevent such failure, borrowed from G. P. King \$3,000 00 on the note of the county, and paid it over to him to aid in the building of bridge, which sum was to be refunded to the Court when collected from subscriptions, and that the Court again contributed \$500 00 more to aid him in repairing a damage done to the bridge by freshet, making in all about \$4,000 00 that the county of Gordon, through its Inferior Court, had invested in this bridge, while in the hands of Lawson, to enable him to complete it so as to secure to the citizens the free use of the bridge. Right here the defendants plant them-

McGinnis vs. The Justices, etc., of Gordon County.

selves on the proposition, that under this contract with Lawson, and in consequence of these different investments and contributions to secure this object, the citizens of Gordon county acquired a vested right to pass over the bridge free of toll for all time to come into the hands of whomsoever it might come, that could not be divested by the sheriff's sale of the same under an execution against Lawson of a lien of junior date to this contract, and this is a sound proposition, but it does not meet the facts of this case. The complainant's right to relief does not depend on a denial or abridgment of the principle involved in that proposition. The citizens of the county acquired this right under a contract of the Inferior Court, as their representative, with Lawson. So long as the bridge remained in the hands of Lawson, and all others holding under him with notice, this vested right attached to it, but when the land, and of course the bridge resting on it, was sold, and the Inferior Court became the purchaser, the two interests—that is, the bridge itself, and the right of the citizens to pass over it free of toll—united and became one undivided interest belonging entirely to the county; the one interest as much as the other, and the Inferior Court had the same right to part with one as the other, and the whole as much as a part. And the bill in effect charges this to be the case. It was through the contract of the Inferior Court that the citizens acquired the right, and it was by the contract of the Inferior Court with McDill, that this right was parted with by the citizens and not by the sheriff's sale.

The sheriff's deed to Newton McDill recites the fact, that this property was bid off on the first Tuesday in September, 1855, at the sum of \$2,355 00; that is, that the creditors of Lawson realized from that sale only that amount for all that property. I take it from this, that the Inferior Court bid off the property at that price. Now, if this is the fact, there is one view of the case that surely neither the present Inferior Court, or the citizens of Gordon County, have taken of this transaction, or that sense of justice and right, which ought to animate and control the action of all tribunals as well as of individuals, would have impelled a more charitable feeling and conduct towards the complainant and his right in this property.

That sum, \$2,335 00, was the bid of the Inferior Court;

McGinnis vs. The Justices, etc., of Gordon County.

that is what they paid for the property, but McDill paid them \$6,500 00, being \$4,165 00 more than it cost at sheriff's sale, and this large sum of money has been actually received by the county from McDill. What could have induced him to pay the Inferior Court so much more for the premises than they paid for it? The bill says that it was paid on the faith of the promises and agreement of the Inferior Court, that the bridge should be a general toll bridge, etc., and this is not denied by the answer. Now, the Inferior Court had contributed \$4,000 00, as has already been shown towards the building of the bridge for the purpose of securing to the citizens a free transit over the same, when \$500 00 was considered by them and Lawson in the first place as sufficient for that purpose. When Lawson became insolvent, and the property was seized for his debts it must have become apparent to the Court that the \$3,000 00 borrowed of Mr. King would certainly be lost to the county, and possibly the right of the citizens to the use thereof free of toll if the land and bridge on it should be bid off by, and pass into the hands of, a stranger. Is it not fair to suppose from all the facts of the case, that the members of the Court to prevent so great a loss to the county, as such a result would have been, stepped in at that sale and became the purchasers of the whole property for the use of the county? When they had done so the county had invested \$6,335 00 in the property. Now, is it not more than likely that the Justices of the Inferior Court at this point came to the conclusion that they were paying too much for the intended benefit, the mere right of the citizen to cross on the bridge free of toll? It had cost them more, much more than they contemplated; more probably than their constituency would approve, and governed by the desire to promote the best interest of the county determined to sell the whole property with no other reservation than such is made in the order appended as an exhibit to the bill, and from the sale refund to the county all that had been contributed for that purpose. Whether these motives actuated the Court in that sale or not, it is clear that they, in fact, did then part with the land and bridge to McDill, and whether from design or inadvertence they failed to reserve the right of the citizens to pass the bridge free of toll; that is, if the facts stated in the bill, and not denied by the answer are true; and it is equally clear that the county from

McGinnis vs. The Justices, etc., of Gordon County.

the sale so made by the Inferior Court to McDill, was reimbursed all that was paid or advanced by the Court to Lawson to enable him to build the bridge, and secure this benefit, for the \$6,500 00, paid by McDill to the Inferior Court covers all the outlay which is set up by the answer. Then if it be true that the county has received back all that she paid out for this vested right of which so much is said, and it has been fairly sold and paid for by McDill, and secured by a solemn grant from the Inferior Court, which vests in complainant by his purchase, it would be grossly unjust and inequitable to deprive him of the same or to interfere in any way with his full, free and perfect enjoyment thereof.

Defendants admit that they have instructed road commissioners to remove the toll gates and keep open the same for the free passage of the citizens of the county; the infliction of the fine; the passage of the order, etc., and plead as a justification or excuse, the recommendation of the grand jury of the county. The unauthorized action of any body of men, however respectable, can never excuse an independent judicial tribunal for an invasion of the rights of an individual unheard.

It is said by the defendants in their answer, by way of an avoidance of the equities of the bill, that the sheriff's sale was illegal; that no title passed; that the land was not legally sold; that the bridge was not sold; that the bid of the Inferior Court was not legally transferred, etc. Then it is of the greater importance that the bill should be retained to settle and quiet the title to the premises, and if it be true that no title did pass to McDill, the county of Gordon surely, under the circumstances, would refund the purchase money. If the facts in this bill are true, it does not lie in the mouths of these defendants to cast a cloud on the complainant's title.

For these reasons, and as the answer does not fully and completely deny the equity of the bill; the judgment of the Court dissolving the injunction and dismissing the bill was erroneous, and must be reversed. The injunction, as well as the bill, must be retained to a hearing on their merits.

It was argued with great force by counsel for defendants, that the judgment of the Court below ought to be affirmed, because they argue there was no equity in the bill; that complainant's remedy at common law in trespass was adequate and complete; that this bill could not be maintained

Chastain & Luck vs. Robinson *et al.*

against defendants as an Inferior Court. To all this the reply of the Court is, that these questions were involved in the demurrer, and were by the judgment of the Court below thereon fully adjudicated, and they are now between these parties no longer open questions. My own opinion is, that there is equity in the bill, and that injunction is the proper remedy; but as the judgment of the Court is not put on that ground it is not necessary to give the reason.

Judgment reversed.

CHASTAIN & LUCK vs. ROBINSON *et al.*

1. What was said and done by the Justice of the Peace, at a Justices' Court, when a levy of property was advertised for sale, under executions, is inadmissible on the trial of a claim for other property levied on by the same *fi. fas.*, for the purpose of accounting for a proper disposition of such previous levy, or for any other purpose.
2. The declarations or statements of one who is no party to the record, and who in no other way appears to be a party in interest, is not competent evidence to affect the rights or interests of the plaintiffs, or parties before the Court.
3. The Court should always, upon request, charge the jury specially as to any fact relied on by either party, that is true and material, so as the jury may be advised by the Court of its legal effect and application to the issue they are trying.

Claim, in Chattooga Superior Court. Tried before Judge CROOK, at September Term, 1859.

This was a claim interposed by F. W. Cheeney to a lot of land levied on as the property of A. G. Robinson, by virtue of two *fi. fas.* issued from a Justices' Court in Hall county, in favor of Chastain & Luck, for the use of C. & J. Peeples, against said Robinson.

Upon the trial, claimant, amongst other evidence, introduced one Wesley Shropshire, who testified, that he was in

Chastain & Luck vs. Robinson et al.

Milledgeville on the 14th December, 1855, as Senator from Chattooga county, and that James Cantrell was there as Senator from Lumpkin county; that Cantrell spoke to him about some *fi. fas.* against A. G. Robinson, and that there was a lot of land in Chattooga county which was subject to said *fi. fas.*; witness knew that Dr. Cheeney claimed said land, and he wrote and informed him of the fact, and Cheeney answered witness to see if the *fi. fas.* were all right, and to settle them; witness went to Cantrell and told him that if the *fi. fas.* were all right, Dr. Cheeney had requested him to pay them; Cantrell said that Col. Crook had the *fi. fas.*, and that they were sent off, according to the best of witness' recollection; Cantrell told him the executions were pending for his benefit, and belonged to him; Cantrell, when asked for the *fi. fas.*, did not let witness see them; asked again for them, but did not see them, which induced witness to suspect that all was not right. The entries on the *fi. fa.* of 1850 and 1855 are, in the opinion of witness, in the hand-writing of Cantrell; sat near him in the Senate Chamber, and saw him write often; they are in the same hand, written, in witness' opinion, with the same ink and pen, and at the same time, by James Cantrell.

To this testimony plaintiffs in *fi. fa.* objected. The Court overruled the objection and admitted it to go to the jury, and counsel for plaintiffs excepted.

To understand the above testimony of Shropshire, it may be proper to state, that there were two entries on the *fi. fas.*—one made 15th February, 1850, and one made 14th December, 1855—signed, or purporting to be signed, by Wm. Taylor, L. C., and reciting that there was no property belonging to defendant whereon to levy the said *fi. fas.*

The testimony being closed, counsel for plaintiffs requested the Court to charge the jury:

1st. That if the entry of December 14th, 1855, was not necessary to keep the *fi. fa.* from becoming dormant, that is a circumstance to show that the entry was not fraudulently made. If all the other entries were properly made, they could disregard the entry of 1855; the other entries being right, the *fi. fa.* would not be dormant.

2d. That if Taylor, the constable, was in Milledgeville and requested Cantrell to make the entries of December 14th, 1855, and if they should believe that the same was made in

Chastain & Luck vs. Robinson *et al.*

Milledgeville, then it was legal, if made at the request of the constable and in his presence.

Which charge the Court refused to give, but charged: That the plaintiffs in *fi. fa.* must show title in the defendant in *fi. fa.*, or possession after the rendition of the judgment. If this is shown, then the *onus* is cast on the claimant to show that the land was not subject. If they believe that the entries on the *fi. fas.* were made by the Justice of the Peace fraudulently, for the purpose of keeping the *fi. fas.* from becoming dormant, and without authority from the constable, then they should find for the claimants; or if the jury believe that the entries of 1850 and 1855, were made at the same time and by the same person, without authority from the constable, and not in his presence, that they might find for the claimant; that the entries made by Cantrell, to be valid, must have been made in the presence, and by authority, of the constable. But if they should believe, from the evidence, that the entries were made by Cantrell, the Justice of the Peace, in the presence of, and by the request of, the constable, and at the times they purport to be made, then they were as good as if made by the constable himself; that fraud could not be presumed, but must be shown either by positive proof or circumstances.

To which charge and refusal to charge, counsel for plaintiff excepted.

The jury found for the claimant; whereupon, counsel for plaintiffs in *fi. fa.* moved for a new trial, on the following grounds:

1st. Because the verdict is contrary to law and evidence.

2d. Because the verdict is contrary to the charge of the Court.

The Court refused the motion for a new trial, and counsel for plaintiffs except, and assign as error—

1st. That the Court erred in rejecting the testimony of William Taylor and Osborn J. Taylor, as to the reason of, and the facts and circumstances relative to, dismissing the levy of the *fi. fas.* on a bay mare, made in 1849.

2d. That the Court erred in admitting in evidence the sayings of James Cantrell, as above stated.

3d. That the Court erred in its charge and refusal to charge, as above stated.

Chastain & Luck vs. Robinson *et al.*

4th. That the Court erred in refusing the motion for a new trial.

JESSE A. GLENN, for plaintiffs in error.

A. R. WRIGHT, represented by T. L. COOPER, *contra*.

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

1. For what purpose the evidence of the constable, William Taylor, and that of the Justice of the Peace, Osborn J. Taylor, in relation to the proceedings of the Justices' Court of Lumpkin county, on a question that "sprung up" in that Court, in relation to the legality of the levy on the bay mare, was offered, we are unable to see. The evidence was inadmissible for any purpose that we can imagine. If it was offered to explain a levy on the *fi. fas.*, it was inadmissible for any such purpose, as a disposition of a levy made in that way was illegal, and amounted to none at all. But on looking carefully to the *fi. fas.* themselves, or the copies thereof attached to the record, we see no levy but such as is sufficiently accounted for or disposed of, to enable the plaintiffs in *fi. fas.* to proceed with their collection against any other property of defendant that may be subject to them.

The main defense relied on by claimant to defeat the lien of the executions on the lot of land levied and claimed, so far as we can judge from the record and position of counsel taken in the argument, is, that the entry on the executions of "No property" of the dates of 15th February, 1850, and 14th December, 1855, were not the entries of the constable, whose name is signed thereto, nor made at the time they bear date, but were made by one James Cantrell, who was claimed to be the owner of them, after the *fi. fas.* had become dormant, etc., and that the entries were therefore fraudulent and void, and the executions, in fact, dormant. If these facts are true, the conclusion must be: to prove the facts, claimant offers the testimony of Wesley W. Shropshire, who testifies, that the entries of those dates are in the hand-writing of James Cantrell, and this fact is also proved by the constable himself, who says that Cantrell did make the entries for him and at his request, and, he thinks, at the dates thereof. Shropshire testifies, further, that he was in Milledge-

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Chastain & Luck vs. Robinson *et al.*

ville on the 14th December, 1855, and that Cantrell was there as a Senator in the Legislature from the county of Lumpkin. We do not understand the witness to say that Cantrell was himself in Milledgeville on that day, and made the entry then.

If Cantrell had an interest in these executions—if they were proceeding for his benefit, then it was to his interest to have these entries made and dated back; that is, if they had become dormant for the want of such entries; and the circumstances connected with the interview, as testified to by Mr. Shropshire, might have created a very strong presumption against the *bona fides* of these entries, that would very justly have operated materially on the minds of the jury in passing on this question. On the contrary, if Cantrell had no interest in the *fi. fas.*, there was no motive to him to fabricate a false and fraudulent entry on the same, in order to give vitality to them, which they did not otherwise have. It was, therefore, important to show that Cantrell had an interest in these executions. For that purpose, claimant proposed to prove by the witness, Shropshire, a conversation between witness and Cantrell, in relation to the execution that occurred in Milledgeville, in the winter of 1855, and what Cantrell then said to the witness about his ownership of, and interest in, the executions; who had them, and for what purpose, etc. Counsel for plaintiffs in execution objected to this evidence and the Court overruled the objection, and the witness was allowed to testify to the conversation, to what Cantrell said, etc.

2. In this the Court committed error. The executions were proceeding in the name of Chastain and Luck, for the use of C. and W. J. Peeples. They were the parties in interest before the Court to be affected by the judgment of the Court; and there was nothing before the Court except the statements of Cantrell, showing that the executions did not belong exclusively to the plaintiffs therein. They were not present when Cantrell made the statements complained of nor did they in any other manner assent thereto. Cantrell's admissions, declarations or statements could not affect the rights of these plaintiffs. They could only affect himself, and until it was shown to the Court, by other evidence, that the *fi. fas.*, did not belong to the plaintiffs, but to Cantrell, the evidence ought to have been excluded.

Chastain & Luck vs. Robinson *et al.*

3. At the date of 14th December, 1855, and during that entire winter, these executions were not dormant, even if no entry had, in fact, been made since that of 20th June, 1849, which is not questioned. That fact was an important one to be considered by the jury, with all others, as to the *bona fides* of the two contested entries. For if, at the conversation with Shropshire, the *fi. fas.* were not then dormant in the absence of the two entries of 1850 and 1855, and they could not have been if the entry of 20th June, 1849, is a genuine one. There was no particular necessity, at that time, to antedate or fabricate a return or entry of no property on the *fi. fas.* Hence, the Court ought to have charged the jury on the request of counsel, that they might consider this as circumstance showing the *bona fides* of the entries.

Judgment reversed.

Leonard *vs.* Peeples.

LEONARD *vs.* PEEPLES.

1. In order to prove statute or customary law, it is not competent for a witness to testify simply, that such is the one or the other. There is higher evidence to substantiate both.
2. Because property is not as valuable as the purchaser supposed, is no reason in the absence of fraud or warranty, for withholding any portion of the price agreed to be paid.
3. Where one misrepresents a fact, knowing it to be false, or asserts a thing to be so, not knowing whether it be true or not, and it proves to be false, he is, in both of these cases, guilty of a moral as well as a legal fraud. But where one honestly believes the truth of what he affirms, although it turns out he was mistaken, can he be guilty of a legal fraud (being free from moral turpitude) so as to subject him to liability for the mistake, unless the representations are of a character to amount to a warranty? *Quere.*

Debt, in Murray Superior Court. Tried before Judge CROOK, July, 1859.

This was an action of debt by Alexander J. Leonard against John H. Peeples, on a promissory note, of which the following is a copy, viz :

"\$424 87. One day after date we, or either of us, promise to pay John A. J. Leonard, or bearer, the sum of four hundred and twenty-four dollars and eighty-seven cents, for value received of him October 1st, 1853.

(Signed)

JOHN H. PEEPLES,
JOHN W. BAKER,
H. A. JOHNSON."

Defendant pleaded the general issue; and further, that said note was procured by fraud and misrepresentation, in this, that said note was given in part for an interest in a claim in a gold mine in the State of California, sold by plaintiff to defendant and his associates, Baker and Johnson; and that plaintiff represented to defendant and his associates, that if they would purchase said interest they could clear three thousand dollars, and defendant relying on said statement, not knowing anything of the mine himself, bought said interest for \$1,200 00, seven hundred and seventy-five dol-

Leonard *vs.* Peeples.

lars and thirteen cents of which was paid in cash, and the note sued on, given for the balance; and defendant avers that said representation was false, that said mine was worth nothing, and that the consideration of said note totally failed, etc.

The testimony being closed, the Court charged the jury as follows:

1. Whatever representations were made by plaintiff at the time of the sale, or pending the negotiation, he is bound by, and that they amount in law to a warranty that the thing sold is as represented.

2. That if plaintiff represented the mind sold to be a good one, (he being a miner, and having an opportunity of knowing,) and Peeples had not seen and examined it, and these representations were the inducement to purchase, then it is immaterial whether the representations were fraudulently made, or by mistake. The plaintiff must suffer the consequences resulting therefrom.

3. That the testimony of one witness who testifies positively to a fact, outweighs the testimony of many witnesses who testify that they have no knowledge of it.

4. If you shall believe, from the evidence, that the mine was of some value, and that it was equal in value to the amount paid, *in cash*, by defendant, and of no more value, then the plaintiff is not entitled to recover this note—the balance of the purchase money.

Plaintiff's counsel requested the Court to charge, that if defendant inquired of Freeman (the treasurer of the mine) as to its value, and that if he exhibited his day-books showing their mining operations, and which was true, then the parties negotiated upon equal terms.

This charge the Court refused to give, holding that this testimony was introduced for the purpose of showing that defendant did not act upon the representations alone, and for no other purpose.

Plaintiff's counsel further requested the Court to charge that the sale of a gold mine is peculiar, and that representations concerning them are mere matters of opinion, and did not amount to a warranty, that they were as represented.

This charge the Court declined to give, but charged, that if plaintiff was a miner, and acquainted with the business of mining, and had worked the mine sold, then he is bound by any false representations made by him to defendant, as to its

Leonard vs. Peeples.

value, and clearly so, when they are made to one who has neither seen nor examined the mine and buys upon such representations.

The Court further charged, that the doctrine of *caveat emptor* does not apply, and that it was not necessary to defendant's support of his plea, or defense, that he should tender back the property purchased.

The jury found for the defendant, whereupon plaintiff moved for a new trial, on the grounds—

1. That the Court erred in allowing defendant to prove by witnesses, that it was the custom and law in the mining districts of California, when a mine claim was purchased, and proved or turned out to be unprofitable or worthless, for the vendor to give up the note given for the purchase money.

2. Because the Court erred in its charge to the jury, and its refusal to charge as above stated.

3. Because the verdict was contrary to law and the evidence.

The Court refused the motion for a new trial, and plaintiff excepted.

J. A. W. JOHNSON, for plaintiff in error.

WALKER, represented by DABNEY, *contra*.

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

Leonard sold to Peeples and two others, an occupant claim, which he held in the gold diggings of California, for \$1,000. The purchaser paid, say \$575 00 cash, and gave the note sued on for the balance. This action is brought to collect this note, and the defense set up is two-fold—fraud in the contract and failure of consideration.

There was much testimony read on the trial, and amongst the rest, the Court allowed the defendant to prove that according to the law and custom of that country, that whenever a note was given for a gold mine and it proved unproductive, or did not turn out according to expectation, it was given up, and this is the first error complained of.

California was a State when this transaction took place in the fall of 1853, and no evidence is adduced of any such law at that time, and no such custom was established as to author-

Leonard vs. Peebles.

ize the Court below to recognize and act upon it. No proof was offered that Leonard had notice of any such custom, or of the existence of any such custom which was public and uniform and peaceable, so as to infer that this contract was made in reference to it. If there be such a custom, it is so unreasonable, that it was probably enforced by the bowie knife.

All the other exceptions grow out of the charges and refusals to charge on the part of the Court. As we shall send this case back, we forbear to express any opinion as to the preponderance of the proof.

And before examining each specification in the motion for a new trial, I would remark, generally, that the Court seems to have labored under this misapprehension, that anything said at the time of the trade, whether it amounted to a positive representation or a mere expression of opinion, was a warranty for the breach, of which the plaintiff was responsible. Indeed, this is the very language of the first charge which is assigned as error.

"Because the Court charged the jury that whatever representations were made by the plaintiff, pending the negotiation and at the time of the sale, to the defendant, were binding on the plaintiff, and amounted in law to a warranty that the mine sold, was of the character it was represented."

All the evidence on the part of plaintiff, was to the effect that if the mine proved as productive as it had been, the upper end of it would reimburse the purchasers, and the lower end would be net profit. Surely the opinion thus expressed, does not amount that these results would follow.

Another error complained of is this: The Court charged the jury that if they should believe from the testimony, that the mine sold was of some value, and that it was equal in value to the amount that the plaintiff had received at the time of the purchase, and no more, that then the plaintiff was not entitled to recover the balance.

This is putting the issue upon value, alone, irrespective of fraud or warranty. This cannot be the law of the case, or the rule of the plaintiff's rights.

We do not think the Court was bound to charge, as law, the first request made by counsel for plaintiff, namely, that, "if the defendant inquired of the witness Freeman," (the treasurer of the company) "as to the value of the mine,

Leonard vs. Peeples.

and the said witness showed him a book of their mining, which was true and correctly kept; that defendant was upon equal terms with the plaintiff."

It will be borne in mind, that the parties were fifty miles distant from the mine when the sale was made. The plaintiff had been working it for some time. The defendant had never seen it. Of course, then, a bare inspection of the book kept by the company, would not itself put the defendant upon an equality with the plaintiff.

We cannot sustain the instruction which the Court gave the jury, that "the testimony of Freeman, the witness, was admitted for the purpose of showing that the defendant in making the purchase, did not act solely upon the plaintiff's representations, and that only for that purchase could they consider it."

Mr. Freeman was present at the trade, and his evidence is full, as to all that transpired at the time; and his testimony, if credible, establishes that all the plaintiff said was by way of opinion only; and he substantiates the truthfulness of Leonard's representations. His evidence, therefore, was material on many accounts.

We do not think the plaintiff was entitled to the second charge which he asked, that "the sale of gold mines was peculiar, and that representations concerning them are matters of opinion only, and do not amount to a warranty, that they are as represented.

This, we apprehend, depends entirely upon the nature of the representations. They may be so positive as to amount to a warranty, and if so, they stand upon the same footing as representations concerning any other species of property.

The second and last charge are very similar. The second is to this effect: That "if the plaintiff represented the mine sold to be a good one, (he being a miner and having an opportunity of knowing,) and Peeples had not seen and examined it, and these representations were the inducement to purchase, then it is wholly immaterial whether the representations were fraudulently made, or by mistake. The plaintiff must suffer the consequences resulting therefrom."

And the last charge was, that "if the plaintiff was a miner, and had a practical knowledge of the business, and had operated in the mine sold, he was bound by any false representation made by him to Peeples as to the value of the

Leonard vs. Peeples.

mine, especially as Peeples had not seen nor examined the mine, and bought only upon the faith of such representations."

Much has been written upon the principle of law involved in these charges. This ought to be the doctrine of the Courts upon this subject: When one misrepresents a fact, knowing it to be false, or asserts a thing to be so, not knowing whether it be true or not, and it turns out to be false, he is, in both of these cases, guilty of a moral, as well as a legal fraud. But where one honestly believes the truth of what he affirms, he is clearly not guilty of moral turpitude, and I should be slow to convict him of a legal fraud, so as to subject him to a liability for the mistake, unless the representations were of a character to amount to a warranty. (See *Thorn vs. Bigland*, 8 *Exch. Rep.*, 731; *Wilde vs. Gibson*, 1 *H. L. Cases*, 605, 603; *Taylor vs. Ashton*, 11 *M. & W.*, 407, 415.)

If the defendant's witnesses in this case have sworn the truth, the mine did not pay expenses. And yet, after Johnson and Baker had been six weeks at work in the mine, they bought out Mr. Peeples' interest at the price he paid Leonard, and continued to work the mine until they had dug out every foot of it. It will be for another jury, who will be more competent to the task than we are, to reconcile this and other portions of the testimony.

GANN vs. THE STATE OF GEORGIA.

1. Whenever the homicide is the result of that sudden and violent heat of passion, which is supposed to be irresistible, and without any malice or deliberation, the killing is voluntary manslaughter, and not murder.
2. If, upon a sudden quarrel, the parties fight upon the spot, or presently agree and fetch their weapons and fight, and one of them is killed, such killing is but voluntary manslaughter, no matter who strikes the first blow.

Murder, in Cobb Superior Court. Tried before Judge RICE, at September Term, 1859.

This was an indictment against Jephtha Gann, charging him with the murder of William Collins.

It was shown by the proof, that: On the 23d day of April, 1859, in the county of Cobb, the deceased, the prisoner, John Oshields, Joseph White, Alexander Cupp, Nancy Scoggins, and Fanny Scoggins, were all on their way home from Marietta; that, as they went along, deceased and Nancy Scoggins fell out; that deceased commenced blackguarding Nancy Scoggins with vulgar language, which was the first beginning of any difficulty; that the blackguarding of Nancy Scoggins, by the deceased, made the prisoner mad; prisoner was in company with Nancy Scoggins; that prisoner cursed deceased, and wanted to fight him; that when the prisoner said he would whip deceased, if he did not mind, deceased replied that that was as good a time, he reckoned, as he would ever get; that the altercation then ceased, and the parties made friends, and drank together at Gault's grocery, the prisoner buying the liquor; that the prisoner and his immediate company, consisting of Nancy Scoggins, Fanny Scoggins, and Alexander Cupp, left the grocery first, and started on home; that after they had gone on some little distance, the deceased, Oshields, and White, also left the grocery, and went on towards home, along the same road; that after going along, and getting near to Mr. Hunton's, the deceased and Oshields began to sing a song about the Fillmore boys; that the words of the song seemed to be harmless, but the manner of singing the song, or something else, offended Nancy Scoggins, who had a child named Fillmore; that the

Gann vs. The State of Georgia.

deceased and Oshields were told by prisoner that if they wanted to sing, either to stay behind or go on before; that deceased, Oshields, and White then passed by prisoner and the Scogginses, and again commenced singing the song; that prisoner again cursed them, saying that any man who would sing such a song as that before decent women was of no account, and that he was the best man that ever made a track on Marietta hill, and could whip any Collins or Oshields of the name; that deceased replied, "No you can't—you can't whip Scott Oshields," to which prisoner rejoined, "Yes I can; I can whip him the best day he ever saw;" that Oshields and deceased were told not to sing any more or say anything else to prisoner, as he was drunk and did not know what he was doing; that in going about seventy-five yards, White and Oshields got before the deceased about thirty steps; that when about that distance ahead, they rather stopped, and heard three licks back behind them; that they turned and went back and found deceased retreating from prisoner whilst prisoner was advancing on deceased; prisoner had something in his hand that looked bright; that it was dark, and the prisoner was drunk, and the deceased was sober; that when White and Oshields got back to the place of rencounter, deceased said that prisoner had cut him badly, to which prisoner replied, "Yes, and I am sorry for it;" that White caught hold of deceased by one arm and Oshields took him by the other, asking him if he was sick, and when asked the second time, replied that he was, and began to sink down; White and Oshields then let him down in the lock of the fence, and he died in a short time; White and Oshields heard the blood spouting, or bubbling, from his wound; that when deceased was caught by White and Oshields, he had an open knife in his right hand, which one of the witnesses took from his hand and put it into the witness' pocket; that prisoner had a double-barrel shot gun, which Nancy Scoggins was carrying at the time; prisoner also had a pistol, but the evidence did not show that he was carrying the gun or pistol with any reference to deceased, or that he drew or attempted to use either of them against deceased, except that one of the witnesses testified that after deceased had been let down in the lock of the fence, prisoner said to deceased, not to crowd him, or rush on him, for he had his repeater drawn; deceased was stabbed on the shoulder, under the collar bone, with a

Gann vs. The State of Georgia.

knife, and the wound caused his death ; that prisoner had the knife shown in Court on the night of the difficulty—it is called a Spanish dirk, but is not above the size of a pocket knife, and shuts up, and is carried in the pocket. On the night of the homicide the prisoner was arrested at a house in or near the Camp Ground, and when arrested, was in bed with Nancy Scoggins, who is an unmarried woman, and Alexander Cupp, all three being asleep in the same bed ; that blood was seen on the under-dress of Nancy Scoggins, who said it got on her dress as she stooped down to see if deceased was dead ; that prisoner was, when arrested, searched for weapons and none were found on him ; the coat-sleeve and the arm of prisoner was cut with a knife, and there was also a cut on the left breast of his coat ; that from the place where White and Oshields heard the three licks down to the place where they took hold of deceased when they went back, there was blood along on the ground ; that there was but one wound of any importance on deceased ; that during the altercation between prisoner and deceased, about whipping Scott Oshields, prisoner said, "O, God damn you, Dorse, here I come;" there was a pistol, and the knife aforesaid, found next day at the place of rencounter, both of which were shown to belong to prisoner ; the knife which was taken from deceased, was shown in Court, and identified as his.

The jury found the defendant guilty.

Defendant, by his counsel, moved the Court for a new trial in said case, on the grounds :

1. Because the finding of the jury was contrary to the evidence in said case.
2. Because the finding of the jury was contrary to law.
3. Because the jury found a verdict in said case which was decidedly and strongly against the weight of the evidence in said case.
4. Because after the Court, in compliance with the request of defendant's counsel, had charged the jury that, "whilst voluntary drunkenness is no excuse for crime, yet the drunkenness of the defendant, at the time of the killing, may be considered on the question whether the defendant was excited by passion, or actuated by malice in committing the homicide." Qualified said charge by adding thereto the following, to-wit : "In case it is proven that any such provocation was given, as the Court has already mentioned, that is a pro-

Gann vs. The State of Georgia.

vocation not by words, threats, menaces, or contemptuous gestures alone, whether said or sung, but an actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing." In connection with this, the presiding Judge further certifies, that he charged the jury that, "in all cases of voluntary manslaughter, there must be some actual assault upon the person killing by the person killed, or an attempt by the person killed to commit a serious personal injury on the person killing."

5. Because after the Court, at the request of the defendant's counsel, had charged the jury as follows: "If you believe from the evidence, that, at the time Gann killed the deceased, the deceased had a knife drawn, and was cutting at Gann, or attempting to cut or stab him, and that Gann killed deceased to save his own life, or killed deceased under the influence of a reasonable fear that deceased would kill him, or inflict upon him serious bodily harm, or was trying to kill him at the time, then the defendant Gann is not guilty of murder, and you ought not to find him guilty of murder." Qualified said charge by adding thereto the following, to-wit: "But if the prisoner first advanced on, and assaulted the deceased with a knife, or other deadly weapon, then the deceased might defend himself, and if, in defending himself, he cut the clothes, or even the person of the prisoner, that would not justify the prisoner for killing deceased, unless the prisoner had, after he assaulted deceased, really, and in good faith, endeavored to decline any further struggle before he struck the mortal blow, and that, at the time he struck the mortal blow, the danger to himself was so urgent and pressing, that in order to save his own life, he killed deceased," as such addition and qualification were illegal and unwarranted, and unsupported by the evidence.

6. Because the Court erred in admitting in evidence, over the objections of prisoner's counsel, where and with whom Nancy Scoggins slept, and where and with whom the prisoner slept, on the night of the alleged murder, and after it had occurred, as such evidence was illegal, irrelevant, and calculated to prejudice the jury against the defendant for vices, immoralities, and indecent conduct, having no connection with his guilt or innocence of the alleged murder.

The motion was overruled, and the new trial refused, and defendant excepted, and assigns the same as error.

IRWIN and LESTER, for plaintiff in error.

WM. PHILLIPS, Solicitor General, *contra*.

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

The Court having charged the jury that, "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing by the person killed, or an attempt by the person killed, to commit a serious personal injury on the person killing," and then, after giving a charge as requested by counsel for prisoner, qualified such charge thus: "In case it is proven that any such provocation was given as the Court has already mentioned, that is, a provocation, not by words, threats, menaces, or contemptuous gestures, whether said or sung, but an actual assault upon the person killing, or an attempt by the person killed, to commit a serious personal injury on the person killing." This charge, when considered with reference to the facts of this case, is erroneous.

The Court was evidently impressed with the idea that the only thing which, under our statute, could reduce a homicide from murder to voluntary manslaughter, was an actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, and such is the letter of the statute on this subject, but there is more in the statute besides that. The statute says in another place, that "the killing must be the result of that sudden, violent impulse of passion, supposed to be irresistible, and that is the general principle distinguishing voluntary manslaughter from murder rather than that enunciated by the Court. Whenever the killing results from such passion alone, and not from any mixture of malice or deliberation, then the killing is not murder, but is voluntary manslaughter, no matter how that passion may be aroused, for if there is no malice either expressed or implied, or criminal neglect, there can be no murder. The clause of the statute given by the Court to the jury to control them in passing on the facts of this case applies to that class of cases, and was so intended by the Legislature, where the only excuse for the killing was the provocation given by deceased to accused. Not to those cases, however, when the provocation given is of such a char-

Gann vs. The State of Georgia.

acter that it so excites the slayer with such great and sudden heat of passion, that he cannot resist its influence, and when the killing is caused by such passion, and not solely on account of the provocation given. Any other construction of this statute would leave a large number of cases of homicide unprovided for, which are neither murder, involuntarily manslaughter, or justifiable.

2. From all that we can see of the facts of this killing, as disclosed by the evidence, these parties, that is, the deceased and the accused, went into the fight mutually, upon equal terms, each having and using a knife upon a sudden heat of passion, caused by the provocation given by deceased, and their almost immediate collision, and that the killing was the result of this mutual fight and sudden heat of passion rather than of the provocation. Now, if this was the fact, the killing was voluntary manslaughter and not murder, and so the Court ought to have charged the jury. Instead of this, the charge as given, taken altogether, excludes such a principle from the consideration of the jury.

We find the principle thus broadly laid down: "If A and B fall suddenly out, and they presently agree to fight in the field, and run and fetch their weapons, and go into the field and fight, and A kills B, this is not murder, but homicide," (manslaughter.) 1 *Hale*, P. C., 453. "If, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons and go into the field and fight, and one of them falleth, it will be but manslaughter." 1 *Hawkins*, 31, sec. 22, 29. 4 *Blk. Com.*, 191. "Upon words of reproach, or any sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side, and death ensues under such circumstances, the offense of the party killing will amount only to manslaughter." 1 *Russ. on Crim.*, 585, refers to *Fost.*, 285.

"If two draw their swords upon a sudden quarrel, and one kills the other, it is only manslaughter." 1 *Russ. on Crim.*, 586, refers to *Rex vs. Walters*, 12 *St. W.*, 113, and in such case it is immaterial who strikes the first blow.

Could a principle be clearer or better settled? And it in no wise conflicts with our statute, but is in full accordance with its very letter and spirit. "Manslaughter," says the statute, "is the unlawful killing, etc., without malice, without deliberation, which may be voluntary UPON SUDDEN HEAT OF

Gann vs. The State of Georgia.

PASSION, or involuntarily," etc., and again, "the killing must be the result of that *sudden, violent impulse of passion*," etc.

Apply this principle to the facts of this case. Deceased and his friends were traveling faster than accused and his crowd—for he was behind—had overtaken and passed them some twenty or thirty steps, when he renewed the singing that was so offensive to the prisoner. Prisoner cursed deceased, and said "he could whip any Oshields or *Collins* of the name." Deceased denied this; he was willing for the fight, and had been from the first of the difficulty, and instead of going on with his companions, as he had been previously, he stops in the road and waits for accused to come up with him, and then the fight commences, each having and using his knife—blows and wounds are given and received, and no one knows who is the aggressor. The result is, that the prisoner in the fight kills Collins, the deceased, by a stab with his knife. Now, it is manifest that he did not kill Collins solely on account of the provocation, because at that time, the distance between them was some twenty or thirty steps, and prisoner had a repeater and double-barrel gun, and used neither to revenge the affront, which it is likely he would have done, had it been his purpose to kill deceased for the provocation. Had he done so in that way, his crime would have been murder. The provocation would have been no excuse. But he does no such thing; on the contrary, when he, in his anger, comes up, and in collision with deceased, who was awaiting him for that purpose, in the dark, they engage with each other in a mutual fight, on equal terms. Now, it is clear that such killing, if we have the facts aright, under the rule stated, is not murder, but manslaughter, and so the Court ought to have charged the jury, and so should have been their finding; and as the Court did not so charge, nor the jury so find, we reverse the judgment of the Court below, and send the case back for a new trial.

There is nothing else in the rulings of the Court that is necessary for us to pass upon.

Judgment reversed.

Murdock *vs.* Mitchell.

MURDOCK *vs.* MITCHELL.

1. A Court of Equity will enjoin an administrator from recovering a tract of land when the intestate has been dead more than seven years, and the heir at law was of age at the death of intestate, and when there are no debts against the estate, and the defendant has been in adverse possession for seven years before commencement of suit or grant of administration.

Equity, in Cobb Superior Court. Tried before Judge CABANISS, at September Term, 1859.

This was a bill filed by Jane L. Mitchell, in Cobb Superior Court alleging that she was regularly appointed administrator of Samuel Mitchell, deceased, who was her late husband; that about the 13th of September, 1837, William G. Robinson purchased from Thomas Patterson, lot of land number one hundred and twenty-one, in the 20th district of the 2d section of Cobb county, and went into the possession and occupancy of the same, claiming it adversely; that Robinson afterwards conveyed the land to Michael O'Brien; that the land was afterwards sold at sheriff's sale as the property of O'Brien, and Samuel Michell, complainant's intestate, became the purchaser; that Phillip Clayton and Elizabeth Clayton went upon the land, and occupied as tenants of Mitchell; that the land was held by complainant, and those under whom she claimed, by regular bargain and sale, and deeds of conveyance from the year 1837 until in August, 1849, continuously and adversely; that Thomas J. Murdock, as the administrator of one Elizabeth Brown, deceased, commenced an action of ejectment against Elizabeth and Phillip Clayton, for the recovery of said land and mesne profits; that Murdock's letters of administration were obtained in July, 1849; that his intestate, Elizabeth Brown, died in the fall of 1835, leaving no debts to pay, and leaving but one child and heir at law; that said administration of said Elizabeth Brown's estate, was unnecessary, either to pay debts against her estate, or to make distribution thereof; that there was nothing, and had been nothing to hinder or prevent the heir at law of Elizabeth Brown from asserting her right to said land, and that as she had failed so to do, the complainant had a perfect title to the land by the statute of limita-

tions and adverse possession. The bill prayed for discovery and a perpetual injunction of the action of ejectment.

The answer of the defendant admits substantially the facts and allegations set forth in the bill.

It was admitted and agreed by counsel on both sides, in the Court below, that the following facts were true, to-wit :

Elizabeth Brown, the drawer and grantee of the land in controversy, and intestate of the defendant, died in the fall of 1835, leaving one daughter, Mary, who was the wife of Lewis Lodge; that Lewis Lodge died in the life time of Elizabeth Brown, leaving his wife Mary and two children, one of whom died long since, and the other is still living; that Mary again married a man by the name of Cross, by whom she had five children; that Mary's marriage with Cross occurred in Elizabeth Brown's lifetime; that Mary died after the death of Elizabeth Brown, leaving her husband Cross, and five children, all of whom, except one, were minors at the commencement of the action of ejectment for the land in dispute; that neither of the husbands, or the heirs of Mary, ever reduced the land to possession, or took administration on her estate, or upon that of Elizabeth Brown; that Murdock obtained administration on Elizabeth Brown's estate on the 2d of July, 1849, and commenced the action of ejectment the 23d of July, 1849; that the deed in complainants chain of title is not the deed of the grantee, but is either a forgery or made by some other Elizabeth Brown. It was also agreed that as the result of the trial depended entirely upon a legal question, that that question should be argued before the Court, and as the Court might decide, so the verdict of the jury should be rendered.

The Court, upon hearing argument, decided that, "upon the death of Elizabeth Brown without any debts to be paid, and leaving but one heir at law, namely: Mary Cross, her daughter, the title to her land passed to her heir at law, and vested in her, and she could maintain an action of ejectment for the recovery of the land in dispute. The real estate of Elizabeth Brown could vest in her administrator only for two purposes: to pay her debts, and to make distribution among her heirs at law; but there being no debts to be paid, and but one heir at law, there was no necessity for the administrator to recover and sell the land for either purpose, and consequently, the administrator of Elizabeth Brown could not le-

Murdock vs. Mitchell.

gally dispose of the land so as to divest the title of the heir at law; but upon the death of Elizabeth Brown, with no debts to be paid, and leaving but one heir at law, the title to her land, vested in her heir at law, Mary Cross, and the husband of Mary Cross, by virtue of his marital rights, was entitled to all the choses in action of his wife upon reducing them into possession; and as his wife, Mary Cross, died before he reduced the land in controversy into possession, he was entitled to administration on her estate without being liable to distribution, and as such administrator was entitled to recover the land, unless superior outstanding title should be shown, and when so recovered, it would be his property, and not subject to distribution. It not appearing that the recovery of the land, by the administrator of Elizabeth Brown, was intended to enure to the benefit of the husband of Mary Cross, and his administration of the land being unnecessary to pay the debts of Elizabeth Brown, or to make distribution among her heirs at law, his suit for the land was such a one as, according to the decisions of the Supreme Court, ought to be perpetually enjoined.

The jury rendered a verdict and decree, in accordance with the decision of the presiding Judge, which decision was excepted to by defendant, and alleged here to be erroneous.

IRWIN and LESTER, for plaintiff in error.

A. J. HANSELL, *contra*.

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

Upon the death of Elizabeth Brown, the drawer and grantee of the lot in controversy, the title was cast upon Mary Cross, the only child of the intestate, and her husband, James Cross, as the only heir at law of said intestate, subject only to the payment of debts of intestate; and as there were no debts, the whole title vested absolutely in them without the necessity of administration. Adverse possession to this title commenced in 1827, during the life of Mary. She and her husband could have maintained ejectment for its recovery against the tenant. *Carruthers vs. Baily*, 3 Kelly, 108; see also *Wellborn vs. Weaver*, 17 Ga., 270 Upon the death of Mary, the daughter and wife, subsequently in 1840, whatever

Murdock vs. Mitchell.

title, equity, or interest, she might have had in the land during the coverture, by reason of her husband not having reduced the same into his *actual* possession—see *Chappell vs. Causay*, 11 Ga., 28—vested absolutely in her husband, James Cross. *Bryan vs. Rooks*, 25 Ga., 624. Here, then, was the legal title to this land from 1840 to 1849, in James Cross, with an adverse possession under a claim of right, supported by a paper title, running all the time not only against his title, but all the world. What prevented him from bringing his action of ejectment for the recovery of the possession during all this time? If it be replied, that he could only sue as administrator on the estate of his wife, we answer, *that* is not so certain. What is the necessity of an administration under the circumstances? No distribution is to be made, no account to be taken or rendered; then, why administer? He is the heir at law. Again, nearly twenty years have elapsed since the death of his wife—what evidence have we, that no administration has been had on her estate? But allow that an administration was necessary, and that none has been had, we ask why Cross, the heir at law, did not administer and assert his right before the statutory bar attached? What obstacle was there to an administration? None whatever; and his failure to administer, even if that was necessary, in time, is as fatal to his right to recover as the failure to bring his action within the statutory period. Shall he be permitted to slumber over his rights, until the claims of third persons have ripened into a paramount title?—until the rights of innocent and *bona fide* purchasers have attached, and then do, indirectly, through this otherwise unnecessary administration, what he could not do himself directly? We apprehend not. This question has been frequently before this Court, and as often decided by it, that a Court of Equity under the circumstances, would, by injunction, protect the occupant from such action. In *Jonekin vs. Holland*, 7 Ga., 591, one Studstill, who was the owner of the lot in dispute at his death, died intestate in 1820, leaving all of his children and heirs at law, of age. Subsequently, Jonekin held the lot adversely more than seven years. Holland took out letters of administration on the estate of Studstill in 1846, and brought ejectment against Jonekin for the recovery of the lot. Jonekin filed his bill setting up these facts, and prayed a perpetual injunction. Judge Lumpkin, who pronounced the opinion,

Murdock vs. Mitchell.

says: "I am happy to find that my brethren are quite clear, that equity will interpose to protect the occupant under the facts set forth in this bill. It would be a palpable fraud on the law, to permit the heirs to do that indirectly, under color of an administration, which they have lost their right to do directly." In *Woolfolk vs. Beatty*, 18 Ga., 523, which was a bill filed for the same purpose, the Court say, "In 1852, forty-two years after the adverse possession began, James Beatty administers upon the estate of Andrew McNeely, with no debts to pay, and commences his suit at law to recover the property for the purpose of distribution. And this injunction is prayed for to restrain the action. We are fully satisfied, under the facts and circumstances of this case, that the injunction should have been granted." In support of that decision, this Court refers to *Wagner vs. Baird*, 1 Howard 234, in which the Supreme Court of the United States lays down the principle thus broadly: "Long acquiescence and laches, by parties out of possession, are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment. The party guilty of such laches, cannot screen his title from the just imputation of staleness, merely by the allegation of an imaginary impediment or technical disability." "What," says this Court in applying the principle to the facts in *Woolfolk vs. Beatty*, "is the pretence, upon which the great hardship and gross injustice in recovering this property from these bona fide purchasers, sought to be justified? That no administration has been taken out upon the estate of old Andrew McNeely. Why, did not the heirs force one forty years previously? Is not this, in the language of the authority, an imaginary impediment, a mere technical disability? There was no greater obstacle then than now. If a disability existed, it was voluntary and self-imposed." So we say, again, in this case. The decree of perpetual injunction must be affirmed.

FIELDS *vs.* RALSTON AND MARTIN.

Where lands are levied on by execution, and claims interposed and withdrawn by successive claimants to whom the property is conveyed, a Court of Equity will interfere and restrain the claimant from withdrawing his claim, and the holder of the title from transferring the same, until the question as to its liability to the lien can be adjudicated.

Equity, in Lumpkin Superior Court. Decision on demurrer by Judge RICE, at July Term, 1859.

This was a bill in equity, filed by John D. Fields, against Lewis Ralston and William Martin. The bill alleges that complainant is the owner and transferee of several *ft. fas.* obtained in a Justices' Court of Lumpkin county, against one Samuel King. These executions were issued in the years 1835 and 1836.

That in 1839, complainant ordered the levies then made under said executions to be dismissed, believing that they could not be sustained, and had said *ft. fas.* releived upon lots of land Nos. 1,080 and 1,055, in the 12th district and 1st section of Lumpkin county. That at the time said last levy was made, the defendant in *ft. fas.* had the title to said lots of land. That the executions with the levies on said lots, were turned over by the constable to the sheriff, and by him advertised for sale, and one Tully Choice interposed a claim to said lands, which was returned to the Superior Court of said county, first March Term, 1840, and was continued until 1843, when it was withdrawn, and no record thereof can be found. After Choice's claim was withdrawn said lots of land were again advertised for sale, when Choice again interposed his claim to lot 1,055, and one Charles V. Chamberlain interposed a claim to No. 1,080, which claims were returned to March Term, 1844, of Lumpkin Superior Court, and were continued from time to time, and transferred to the appeal, until March Term, 1850, when they were withdrawn, and complainant ordered said lands to be readvertised for sale, when Lewis Ralston interposed his claim to both lots, and which are now pending. That complainant has been prosecuting his rights up to the time of filing this bill; that the pretended claims to these lands have been, and are now

Fields vs. Ralston and Martin.

constantly being transferred, and have finally been transferred to William Martin, and thus the litigation continued and protracted to the great injury of complainant, and by the fraudulent combination of Ralston and Martin to prevent him from collecting his just debts. The bill prayed that said Martin be enjoined, etc.

To this bill defendant demurs for want of equity. The Court sustained the demurrer and dismissed complainant's bill, and counsel for complainant excepts and assigns said decision as error.

IRWIN and LESTER, for plaintiff in error.

WM. MARTIN, represented by EZZARD, *contra*.

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

It would seem that this was a case where a Court of Equity ought to interpose. Otherwise, we see no end to the litigation involved. By enjoining Lewis Ralston from withdrawing his claim, and William Martin from selling or conveying the two lots of land levied on, he being the last purchaser, until the rights of the parties can be heard and adjudicated under this bill, there will be a final adjustment of the matter in dispute; and we shall direct that leave be granted to the complainant to amend his bill so as to effectuate this object.

SPRAYBERRY vs. MERK.

As to a suit for divorce, the wife is *sui juris*, and may charge the husband without his consent with the real value of all such services of other persons as may be necessary to her in the conduct of the suit.

Assumpsit, in Lumpkin Superior Court. Tried before Judge RICE, at January Term, 1860.

This was an action of assumpsit brought by Henry J. Sprayberry, Esq., against George W. Merk, for services rendered as an attorney and solicitor for Ann W. Merk, the wife of the defendant, in instituting and conducting a libel for divorce on behalf of said Ann W. Merk against her husband, the defendant, and in filing a bill in equity for *ne exeat*, relating to the divorce cause. The wife, at the time she employed plaintiff was living separate and apart from her husband, and the cases were dismissed before judgment, on account of the settlement of the difficulty between the parties, and the return of Mrs. Merk to her husband. Plaintiff proved that his services were worth one hundred dollars, and that the causes were dismissed without want of skill, or failure, or neglect, on his part to prosecute them.

At the close of the testimony, the Court, on motion, ordered a non-suit, holding that, under the circumstances of the case, the action could not be maintained against her husband, to which decision plaintiff excepted.

MARTIN, by EZZARD, for plaintiff in error.

No counsel appeared for the defendant in error.

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

The non-suit was granted in this case upon the ground, that a man cannot be chargeable for the services of a lawyer in bringing a suit against himself without his consent. This is, undoubtedly, true as a general principle, but we think that a suit by the wife for a divorce, must be excepted from its operation from the necessity of the case. As to this one matter of a suit for a divorce, the wife is *sui juris*, having a

Sprayberry vs. Merk.

clear right to institute and conduct that kind of a suit independently of her husband's consent. But this right is practically denied to her if she can command no means of paying the agents who are necessary to the conduct of the suit. Therefore, it is that, *quoad hoc*, she may charge the common funds of herself and husband in his hands. But as this power on her part, is founded on the necessity of the case, so its extent does not exceed the demands of the necessity ; and, therefore, she can charge the common funds (or her husband, which is the same thing in effect) only with the real value of such services as she may procure, and not with the price which she may fix on them by her contract. Upon these views is founded the constant practice of the Courts in granting *alimony* to the wife during the pending of her suit for a divorce, and in embracing her counsel fees in the allowance. It is worthy of remark, that her counsel fees are allowed as a part of her necessary *maintenance*, and are allowed before it is ascertained whether she has valid ground for a divorce or not. They are allowed as the necessary means of testing that question, a question which every wife has a right to test whenever she pleases. *Pro hac vice*, she is, *sub modo*, a *feme sole*.

As to the settlement which took place in this case between the husband and wife, after she had got the services of her counsel, it is scarcely necessary to remark, that the counsel, after having acquired a right to compensation for his services by rendering them at the request of the wife, could not be settled out of that right by arrangement to which he was no party.

Judgment reversed.

PAYNE vs. MCKINNEY AND WHITLOW.

1. A deed made since 1839, and attested by a Justice of the Peace, is not admissible in evidence, upon the fact of its having been recorded without other proof.
2. The possession of the vendee under a bond for titles, is not the possession of the vendor, (especially when the former repudiates the title of the latter,) so as to perfect the statutory title of the vendor, by reason of the adverse holding of the vendor and vendee.

Ejectment, in Fannin Superior Court. Tried before Judge RICE, at the May Term, 1859.

This action was brought by John Doe, *ex dem*, Mordecai McKinney and Miles W. Whitlow vs. Richard Roe, casual ejector, and Nathaniel S. Payne, tenant in possession. Porter Fleming was subsequently made co-defendant.

On the trial, plaintiff read in evidence the grant from the State of Georgia to Mordecai McKinney for the lot of land in controversy; proved the possession of Payne at the time suit was commenced, and that the land lay in the county of Fannin. He also proved that Whitlow, as the agent of McKinney, sold the land to John Patterson, taking his note for the purchase money, and executing a bond for titles to John Patterson and Enoch Patterson, jointly; that John Patterson took possession of the land in 1840, asserting title and claiming it as his own; that after he had kept possession of the land for several years, an action was brought in the Superior Court of Gilmer county, in which the land then lay, in favor of John Doe *ex dem*, Mordecai McKinney vs. Richard Roe, casual ejector, and Enoch Patterson, tenant in possession, in which action a judgment was rendered in favor of the plaintiff on the 19th of September, 1848; that after the termination of said suit, Enoch Patterson held the land as tenant of Whitlow for about two years, and then left it, giving Whitlow written notice that he was his tenant no longer, and would not hold under him; that Enoch Patterson re-entered upon the land, setting up title in himself, and then sold it to Payne, who went into the possession of the land, and remained on it until this suit was commenced in July, 1854; that Enoch Patterson paid John Patterson in full for the land,

Payne vs. McKinney and Whitlow.

but John Patterson never paid Whitlow. Plaintiffs also offered in evidence, a power of attorney, made by McKinney to Whitlow for a valuable consideration, and irrevocable, dated the 6th of April, 1839, empowering Whitlow to sell and convey the land in dispute. The power of attorney was attested by a Justice of the Peace, and recorded the 12th of August, 1847. Defendants objected to the introduction of this power of attorney, on the ground that its execution was not proven, and that the attestation thereof by a Justice of the Peace, and its registration did not make it admissible in evidence without proof of its execution. The objection was overruled by the Court and the power of attorney admitted.

The defendants then introduced the following testimony, to-wit: The grant to McKinney aforesaid; a deed from John T. Bailey, Sheriff of Gilmer county, to John Lamar, dated the 8th of August, 1836, recorded 5th of November, 1836, and made pursuant to a sale of the land in dispute, as the property of McKinney, under a *feri facias* issued from a Justice's Court of Wilkes county, in favor of a man by the name of Dooley, for the use of Peter Lamar against said McKinney, and after showing the loss of the *fi. fa.*, proved its contents, and that it had all the entries on it necessary to authorize a valid sale. Also, a deed from John Lamar to Porter Fleming for the land in dispute, dated 9th of January, 1855; also, a deed from B. B. Moore and LaFayette Lamar, to Porter Fleming, for the land in dispute.

The jury returned a verdict for the plaintiffs. Defendants moved for a new trial on the following grounds, to-wit:

1. Because the verdict was contrary to the evidence in the cause.

2. Because the verdict was greatly against the weight of the evidence.

3. Because the Court erred in admitting as evidence, an exemplification of the record of a suit in Gilmer Superior Court, against Enoch Patterson, for the land in dispute.

4. Because the Court erred in admitting as evidence the power of attorney from McKinney to Whitlow, without proof of its execution.

5. Because the Court erred in charging the jury "that if Enoch Patterson entered under a joint bond to himself and John Patterson, with a transfer from John to Enoch, such transfer from John to Enoch for full payment, would make

Enoch's possession adverse to John Patterson, but not adverse to McKinney."

6. Because the Court erred in charging the jury that if land be sold by the sheriff, and the defendant afterwards takes possession, claiming the land as his own, the right of the purchaser is barred in seven years.

There were several other grounds taken in the motion which it is not necessary to set out.

The motion was overruled by the Court, and the judgment is assigned as error.

WALKER; MARTIN, by IRWIN and LESTER, for plaintiff in error.

BROWN and EZZARD, for defendant in error.

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

Was the power of attorney made by McKinney to Whitlow, and witnessed only by a Justice of the Peace, admissible in evidence upon the fact merely of its having been recorded without other or further proof of its execution?

Conceding that it operated as a conveyance, and that one witness was sufficient to constitute it a good deed, still there is no law which entitles it to registration upon the attestation of a single witness, although he be a magistrate. The Act of 1839, applies only to deeds made prior to that time.

The main question in this case is this: Can the vendor of lands avail himself of the possession of his vendee, especially when he repudiates the title of his vendor to perfect a statutory title by adverse possession?

It is true, the books treat the vendor and vendee under a bond for titles, as occupying the *quasi* relation of landlord and tenant. But not, we apprehend, for the purposes contended for in this case. The tenant stipulates to hold the premises for his landlord proper, and to return it at the expiration of the lease: not so the vendee—and while he holds the land in subordination to the title of the vendor, still he holds it as an absolute purchaser, and never contemplates a surrender, and each party is remitted to his respective rights resulting from the executory contract.

Adams and Carroll vs. Keeler et al.

ADAMS AND CARROLL vs. KEELER et al.

Executions issued from a Justices' Court against Ward Keeler and John M. Jordan, jointly, on which appeared the following entry, "Received payment in full on the within *fi. fa.*, by John M. Jordan, security. January 8, 1839. E. L. Harris, J. P."

Held, that such entry did not give the control of the executions to Jordan as surety against Keeler, the co-defendant, but the same operates as a satisfaction as against each of the defendants, and that a subsequent levy and sale of the property of Keeler, under said executions, was illegal and void.

Ejectment, in Gilmer Superior Court. Tried before Judge RICE, at December adjourned Term, 1859.

This was an action of ejectment by Doe, *ex dem*, Thomas H. Turner and Ward Keeler, against Roe, casual ejector, and Adams and Daniel Carroll, tenants in possession, for the recovery of lot of land No. 33, in the 7th district and 2d section of Gilmer county.

Plaintiff read in evidence a grant of the lot from the State to Thomas H. Turner, dated 20th December, 1837, and a deed from Turner, conveying the lot to Keeler. The possession by defendants was admitted.

Defendants claimed under a sale and conveyance by the Sheriff of Gilmer county, under three Justice executions from Crawford county, against Keeler and John M. Jordan, in favor of one Matthew H. Myrik. The executions were all dated first of January, 1839, and upon each was the following endorsement:

"GEORGIA, CRAWFORD COUNTY—

Received payment in full on the within *fi. fa.*, by John M. Jordan, security. January 8, 1839.

(Signed)

E. L. HARRIS, J. P."

The lot of land was levied upon by virtue of said Justice *fi. fas.* December 15, 1849, and sold by the sheriff to one B. A. Freeman, to whom titles were executed by said sheriff.

Defendants offered said *fi. fas.* and deed in evidence. To the introduction of which plaintiff objected, on the ground that it appeared by the endorsements on said *fi. fas.*, that

Adams and Carroll vs. Keeler et al.

they had been fully paid off and satisfied, and that there was no authority for said sale and conveyance by the sheriff.

The Court sustained the objection, and excluded the evidence and defendants excepted. The jury found for the plaintiff, whereupon defendant tenders his bill of exceptions assigning said decision as error.

D. A. WALKER, by IRWIN and LESTER, for plaintiffs in error.

WM. MARTIN, by EZZARD, *contra*.

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

The executions having been issued against the defendants, Ward Keeler and John M. Jordan, jointly, a payment by one was a satisfaction. If Jordan was, in fact, but a surety for Keeler on these debts, which were the foundation of the executions, he ought, after this payment to have made such fact "satisfactorily appear to the Court from whence the executions issued," when that Court would judicially have given to him the control. *Cobb's Dig.*, 595. Not having done so, he had no right to control the executions against his co-defendant. Hence the subsequent levy and sale of the lot in controversy under these executions, as the property of Keeler, was illegal and void, and conveyed no title to the purchaser at such sale.

It is insisted by counsel for plaintiff in error, that the entry made by the Justice of the Peace, the same who issued the executions "of payment from Jordan, security," is a substantial compliance with the Act before referred to, sufficiently so, at least, to give Jordan control of the executions against Keeler. We do not think so. These entries were made by the Justice of the Peace as receipts for the money paid to him for the plaintiff in execution, and as a collecting officer—not as a Court. It does not appear to have been done in Term time, or upon proof that Jordan was but surety; all of which is fatal to the position of counsel.

Judgment affirmed.

Findley vs. Lawless.

FINDLEY vs. LAWLESS.

In an application for dower, since the Act of 21st February, 1850, no person but the administrator of deceased, can be made a party to the proceeding for the purpose to contest the right of the widow to have dower assigned her.

Dower, in Dawson Superior Court. Decision by Judge RICE, at February Term, 1860.

Nancy Pinion, widow of Stokes Pinion, deceased, made application to the Superior Court of Dawson county, for the appointment of commissioners to lay off and assign to her dower in lands, of which she alleged her late husband died, seized and possessed. Due and legal notice of this application was given to Calvin J. Lawless, the administrator of said deceased, and objection made, commissioners were appointed as provided by law, who made their return to the next term of said Court, assigning dower in said land to the said Nancy. At this term of the Court, Samuel R. Findley appeared and filed his objections to said return, and to its being made the judgment of the Court upon the grounds:

1st. That said Nancy Pinion had never been married to said Stokes Pinion, deceased.

2d. That said land had been legally sold by said administrator and bought by said Findley.

The presiding Judge held and decided that, this being a proceeding between the widow and the administrator, to which Findley was not a party, he had no right to be heard in this form, and ordered the return of the commissioners to be made the judgment of the Court, to which decision counsel for Findley excepted.

WM. MARTIN, represented by EZZARD, for plaintiff in error.

IRWIN & LESTER, *contra*.

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

The only question in this case is this: Whether, upon the application of a widow for dower, she having given notice of

Findley vs. Lawless.

such intention to the administrator of her deceased husband, a third person, on his own motion, can come into Court, cause himself to be made a party to the proceeding, and resist her right to have dower assigned to her? The Court below decided that he could not, and we concur in that opinion.

By the Act of 7th of December, 1824, *Cobb's Dig.*, 228, any person interested in the lands upon which the widow claimed dower, could traverse and deny the right of the applicant. When an issue was formed and tried by a special jury, under the provisions of that Act, the widow was required to give notice of her intended application to all persons interested in the land. This made them proper parties to that proceeding, and entitled them to be heard; and the judgment of the Court making the assignment, concluded all parties affected with notice. The Act of 21st February, 1856, *Cobb*, 231, very materially changed the law in relation to the assignment of dower. By that Act, it is only necessary for the applicant to give notice to the representative of the estate of the deceased person in whose land the dower is claimed, instead of to all parties interested, as heretofore. No provision is made for bringing in third persons, and adjudicating their rights in respect to the land, nor does that seem to have been contemplated. The intention of the Legislature evidently was, to provide a more simple and summary remedy, for the assignment of dower to the widow, than that previously afforded by law. And if the Court allowed her application to be thwarted and delayed by litigation with adverse claimants, or others, the object of the law would be defeated. The right of such third persons cannot be affected by the judgment to which they are no parties, unless they claim as heirs at law, or from the administrator, and in that case, they must litigate through the administrator and through him only.

Judgment affirmed.

Glover vs. Townsend, Crane & Co.

GLOVER vs. TOWNSEND, CRANE & CO.

1. A proposition to which the Judge expresses his assent during the argument to the jury, and in their hearing, conveys the Judge's opinion to the Jury as effectually as a formal charge could do, and may equally serve as a foundation for the assignment of error.
2. A representation that a person may be safely credited, can not give a right of action, without some indication in the representation, or its circumstances, of the extent to which the credit may go.

Deceit, in Cobb Superior Court. Tried before Judge HAMMOND, at March Term, 1859.

This was an action on the case brought by Townsend, Crane & Co., against John H. Glover, to recover damages for deceitful representations, respecting the solvency of one Samuel Lawrence, whereby they were induced to sell goods to Lawrence, and, on account of his insolvency, they lost their debt.

Samuel Corrie, in behalf of the plaintiffs, testified, that, he was clerk and salesman for Townsend, Arnold & Co., wholesale drygoods merchants, in the city of Charleston, South Carolina; that the plaintiffs are the successors of Townsend, Arnold & Co., in the same business, and that witness continued with plaintiffs as clerk and salesman; that in April, 1851, Samuel Lawrence, then a merchant of Marietta, visited Charleston to buy goods for his business, and applied to the house of the plaintiffs to purchase a bill of dry goods; that plaintiffs doubting the solvency of Lawrence, were not willing to sell him the goods on credit until the defendant, John H. Glover, who was in Charleston at the time, affirmed to the witness, then clerk and agent of plaintiffs, that "Lawrence was good for his purchases; that he was all right, and that witness must sell to him on fair terms, do a good part by, and treat him right." That, upon the faith of this and similar representations and affirmations, repeated several times on different occasions by Glover, witness sold goods to Lawrence on a credit, amounting in value to the sum of \$1,261 91, for which the note of Lawrence was taken, due at six months. That Glover was particular to inform witness as to the solvency of Lawrence, and urged him to sell the goods to Lawrence, which witness did entirely and altogether

Glover vs. Townsend, Crane & Co.

upon the faith of and his confidence in the representations of Glover, that Lawrence was solvent, and good for his purchases, and all right, and that the goods would not have been sold and delivered, but for the representations. As clerk of Townsend, Arnold & Co., witness had sold Lawrence a small bill of goods on a credit, amounting to some two hundred and eighty dollars, taking his note therefor, due at six months, which was paid in April, 1851. Plaintiffs also proved that Lawrence was sued on the note first aforesaid in the United States District Court, and confessed a judgment which is still unpaid; that Lawrence removed from South Carolina to Marietta, Georgia, in the fall of 1848. At that time he was largely insolvent, having no property, except an old decrepit negro woman, only retained on account of her past services as a family servant, and who has since died; that when he came to Marietta he bought a stock of goods from John H. Glover, and agreed to pay him therefor, the sum of ten thousand dollars, and gave him a lien in the nature of a mortgage on the goods, books of accounts, etc., to secure the payment of the purchase price; that Lawrence continued in the mercantile business during the years 1848, 1849, 1850, and until the fall of 1851. That whilst engaged in said business, he purchased two lots in Marietta, on which he built houses worth seven or eight thousand dollars, which were paid for out of the proceeds of his mercantile business. That Lawrence never had any property in Georgia, except said stock in merchandize and the negro woman aforesaid of no value; and, at the time this case was tried, he had no property that his creditors could touch. There was some conflict between Corrie, witness for plaintiff, and Lawrence, witness for defendant, as to whether Lawrence bought the goods in person, or through an agent by the name of Moyer. There was also, some proof as to the disparity in size and appearance of Lawrence and Moyer. It was also proven that in the fall of 1851, Lawrence closed up his mercantile business in Marietta, and that Glover got all he had, including houses and lots, remnants of goods, notes, books of accounts, etc., and that he was still short with Glover some \$3,000 00.

The jury returned a verdict in favor of the plaintiffs for \$1,919 17.

Glover, *vs.* Townsend, Crane & Co.

Counsel for Glover then moved for a new trial on the grounds:

1. Because the Judge, who tried the case, erred in this, to-wit: When the concluding counsel for the plaintiffs opened his argument by stating to the Court and jury, that "if Glover represented Lawrence as good for his debts, and solvent, then the plaintiffs are entitled to recover, if it is proven that Lawrence was insolvent, and that Glover knew it at the time of the sale, and plaintiffs acted upon the faith of the representations." His Honor replied, in the presence and hearing of the jury, in a decisive manner, that "plaintiffs' counsel need not discuss that question, that the Court recognized that to be the law."

2. Because the finding of the jury was contrary to law and contrary to the evidence.

The Court overruled the motion and refused the new trial, and this decision is alleged to be erroneous.

IRWIN and HANSELL, for plaintiff in error.

LESTER, for defendant in error.

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

1. There was some controversy in this case, as to whether or not a proposition, to which the Judge expressed his assent during the argument to the jury, and in their hearing, ought to be regarded as a charge on which error may be assigned. We think it ought to be so regarded, for the remark put the jury in possession of the Judge's opinion as effectually as a formal charge could have done.

2. The substance of the remark, or charge, was that there was nothing wanting to complete Glover's liability if he had made the false representation, knowing it to be false, and the credit had been given to Lawrence on the faith of it. This omits another element necessary to the right of action, and that is some indication, either in the representation, or in the surrounding circumstances, of the *extent* to which the credit may safely go. If the representation, as illustrated by the circumstances, does not point with reasonable certainty to the amount of the expected credit, it ought not to serve as a foundation for any credit at all. A reasonable man would

Jones et al., vs. Keer & Hope.

not act on it. The person who knowingly makes a false representation is responsible for the legitimate appropriate consequences of his falsehood, but not for the consequences which another's folly or imprudence may tack to it. This same principle was distinctly held by this Court in the case of *Hopkins, Allen & Co. vs. Cooper and Gilliland*, 28 *Ga. Rep.*, 392.

Judgment reversed.

JONES *et al.* vs. KEER & HOPE.

1. If a party act as the agent of another, and not as an attorney at law, his testimony is not objectionable; and if he be made a co-defendant to a bill with his principal, and die, the evidence given in by him on a former trial at law, between the same parties, and concerning the same subject matter, may be testified to.
2. If a plaintiff in a *fi. fa.* take a new note for his judgment debt, with security, undertaking to deliver the original execution to the securities for their indemnity, and fail to do it, and who, in consequence thereof, lose the money, they are entitled to their discharge.

In Equity, in Gilmer Superior Court. Tried before Judge RICE, at December Term, 1859.

This was a bill filed by Samuel Jones and William Cox, administrators of Jonathan Cox, deceased, against Kerr & Hope, to enjoin an action at law, and for discovery.

The bill alleges, substantially, that Jones and Jonathan Cox were induced to become the sureties of one A. J. Williams on a promissory note payable to Kerr & Hope, which note was given in lieu, or payment of a *fi. fa.* held by Kerr & Hope against said Williams, and was signed by said Jones and Cox, as his securities, under the agreement and upon the condition that said *fi. fa.* should be assigned by said Kerr & Hope, to them. That this matter was negotiated, and arrangement made, with one Beverly A. Freeman, Esq., the attorney of Kerr & Hope. The bill further states, that

Jones et al., vs. Keer & Hope.

Kerr & Hope have failed and refused to assign said *fi. fa.* agreeably to their contract, and are prosecuting their action at law against complainants and Williams on said note; that on the trial of the action at law, on the appeal, complainants offered said Freeman as a witness to prove the terms and circumstances upon and under which said note was signed, and defendants objected to this testimony upon the ground that Freeman was their attorney at the time, and acquired his knowledge of the facts proposed to be proved by him while he was their attorney, and which objection the Court sustained, and refused his testimony, and the case was continued. The bill further alleges that complainants cannot establish their defense at law, without a discovery from defendants, and call for the letters that they received from Freeman relating to this matter, and they pray that in the meantime the action at law be enjoined.

The cause was heard upon the bill, answer and proofs.

Upon the trial complainants proposed to prove what Freeman testified to upon the trial of the common law action. (It was admitted that Freeman had died since.) Counsel for defendants objected, and the Court sustained the objection and repelled the testimony, and complainants excepted.

The Court, amongst other things, charged the jury that if the note was given to secure the debt due by Williams to Kerr and Hope, on the *fi. fa.*, and Jones and Cox were his securities, then William's debt was the consideration of the note, and the securities had no interest in the consideration thereof; and if there was an agreement that the *fi. fas.* should be handed over or transferred to Jones and Cox, that agreement was no part of the consideration of the note, and their failure to transfer the *fi. fa.* will not authorize the jury to find for the complainants. To which charge counsel for complainants excepted.

The jury found and decreed for the defendants, whereupon counsel for complainants tender their bill of exceptions, assigning as error the foregoing ruling and charge.

WM. MARTIN, represented by EZZARD, for plaintiffs in error.

No counsel appeared for defendants in error.

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

Freeman acted in this transaction as the agent, not as the attorney at law, of Kerr & Hope. His testimony, therefore, given on the common law trial, was legal, and would have been admissible, had it been objected to; as it was not his answer to the bill, if in life, as a co-defendant could not be excluded, and could be used against his principal. Being dead, his original answers are to be received as the sworn statements of a competent witness—perhaps more than this, of one of the parties to the contract with the complainants.

As to the charge of the Court, that the indebtedness of Williams was the consideration for the new note, and not the undertaking of the agent of the payee, to cause the *fi. fa.* to be transferred to the securities to the new note, we understand the law to be this: If the creditor neglects to perform or performs defectively any of the conditions, either express or implied, which are incumbent upon him, or any of the terms which collectively form the consideration of the security's contract, or of the contract to which the security acceded, the surety is discharged, or rather his liability never attached. *Theobald on Principal and Surety*, 103. *Burge on Suretyship*, 115.

But for the promise to deliver the execution against Williams, to the sureties to indemnify them against loss, the presumption is, they would not have consented to be bound. If the creditor failed to do this, are they not discharged?

Chastian *vs.* Smith *et al.*

CHASTAIN *vs.* SMITH *et al.*

1. Where one person agrees, as agent, to buy land for another as his principal, and does buy it, but takes the title in his own name, this title in his hands stands affected with a resulting trust for the benefit of the principal by operation of law, and the case is not within the Statute of Frauds, resulting trusts being expressly excepted from the operation of the statute.
2. Equity will decree the whole performance of an agreement which is within the Statute of Frauds, whenever there has been such a part performance as that the whole performance is necessary to prevent a fraud; and the whole performance is necessary to prevent a fraud in a case where the parties have proceeded so far on the faith of the agreement, that they can not be restored to their *statu quo* nor adequately compensated in damages, by avoiding the agreement and leaving them to their action for damages.

In Equity, in Fannin Superior Court. Tried before Judge RICE, at October Term, 1859.

This was a bill by Elijah W. Chastain, against Jacob Smith, Henry Smith and George Smith, to compel the specific execution of an agreement relating to the sale and division of a lot of land, situated in the county of Fannin.

The bill alleges, in substance, that complainant and defendants entered into a parol agreement to purchase of one Lovingood, a certain lot of land adjoining complainant, and that whichever party should actually buy the land from Lovingood, the same should afterwards be divided so as to give to complainant a certain part adjoining him, designated by certain lines and courses, etc.; and that for the portion thus received by complainant, he was to pay the sum of \$75 00.

The bill alleges that the Smiths negotiated the sale with Lovingood, and agreed to give him four hundred dollars for the lot, and that they made valuable improvements on it, but Lovingood refused to carry out the agreement, and they filed their bill against him to enjoin his action of ejectment and to compel him to execute titles agreeably to their agreement. That they succeeded in their bill, and obtained a decree requiring and compelling Lovingood to make titles upon the payment by the Smiths of *five* hundred dollars. Complainant alleges that, being admitted to practice as an attorney at law, soon after this litigation commenced, he rendered val-

Chastain vs. Smith *et al.*

nable services to the Smiths as an attorney and solicitor in said equity cause, and for which he made no charge, being personally interested in and benefited by said decree as a part owner of the land thus recovered, and his services being by agreement a part of his contribution towards the cause; that his services were worth seventy-five dollars. That defendants, although they have received titles under said decree from Lovingood for said land, refuse to comply with the terms of said agreement, and to make to complainant titles for his portion of said land, and absolutely deny his right to any part thereof. Complainant offers to pay his proportion of the purchase money, and prays that defendants be compelled to execute titles to him for that portion of the lot which by said agreement he was to have.

The case was heard upon bill and answers, and proofs.

The Court charged the jury, among other things, that such part performance of this agreement as would entitle complainant to its specific execution, must be possession of the premises, payment of the purchase money, and the making of valuable improvements. To which charge complainant excepted.

There were other rulings and charges in the case to which complainant excepted, but as the judgment of the Court below is reversed upon the ground of error in the above stated charge, it is unnecessary to insert others upon which no opinion was pronounced.

The jury found for the defendants, and complainant tenders his bill of exceptions, etc.

WM. PHILLIPS, for D. A. WALKER, for plaintiff in error.

WM. MARTIN, by EZZARD, *contra*.

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

The only question presented in this case, is: whether or not the Statute of Frauds is in the way of the specific performance prayed by Mr. Chastain.

1. In the first place, this case was never within the Statute of Frauds. The substance of the agreement, so far as that particular part of the land to which Mr. Chastain seeks a title is concerned, is that the Smiths would, *as his agent, buy it for him*. They did, in fact, buy it, but took a title to themselves. This title in their hands, was immediately af-

Chastain vs. Smith et al.

X effected with a resulting trust for his benefit by operation at law. Now, a trust raised, or resulting by operation of law, is expressly excepted from the operation of the statute, and this case, therefore, was not within the statute from the beginning.

2. In the second place, even if the agreement had, at first, been within the statute, we think it was error in the Judge to instruct the jury that the only part performance which could take it out of the statute, was possession of the land delivered to Chastain and the purchase money paid by him, and improvements made on it by him; all done in pursuance, and upon the faith of the agreement. Now, the case made by Mr. Chastain was, that in pursuance and upon the faith of the agreement, he had contributed his professional services, worth seventy-five dollars, towards the acquisition of the title which the Smiths got, and that they were *insolvent*, having nothing out of which to compensate him for those services, except only this very land which they were claiming to hold exempt from sale under execution, by virtue of the statute which allows a defendant in execution to hold a certain quantity of land exempt from sale. That is to say, the case is, that they having already received the benefit of his services, and being both unable and unwilling to pay him for them in money, now ask to be protected from their contract to turn over to him the fruit of those services, upon the ground that the contract was not in writing. This would be to convert the statute, which was intended to prevent fraud, into an instrument of fraud. Whenever there has been such a part performance as that the whole performance becomes necessary to prevent a fraud, equity will decree the whole performance; and whenever the parties can not be restored to their *statu quo*, nor adequately compensated in damages by avoiding the contract and turning them over to their action for damages, it would be a fraud to refuse to execute the contract, and equity will order it executed. Such would be the result of a refusal in this case. Mr. Chastain's action for damages would be fruitless, because the Smiths are insolvent; and the only possible mode of preventing them from making a fraudulent appropriation of his services without paying him for them, is by compelling them to execute the agreement on the faith of which the services were rendered.

Judgment reversed.

8

MASON AND FIELD, JR., vs. FORCE, BROTHERS
& CO., et al.

1. As the Act of incorporation of the Dahlonega Tanning and Leather Company contains a personal liability clause as to stockholders therein, that liability continues, notwithstanding a transfer of the stock, unless the stockholder so transferring, shall discharge himself from liability, by a compliance with the provisions of 2d section of the Act of 29th December, 1838.
2. When a judgment is properly rendered against that incorporation, and execution legally issued, the same may be levied upon and collected out of the private property of any of the stockholders therein. No service of process upon, or notice of the suit to, the stockholders being required by that Act are necessary.

Illegality, in Lumpkin Superior Court. Tried before Judge RICE, at January Term, 1860.

Force, Brothers & Company, and others, creditors of the Dahlonega Tanning and Leather Manufacturing Company, brought suits and obtained judgments in Lumpkin Superior Court, against said incorporation. From these judgments, *fi. fas.* were issued and levied upon the private property of Zelotes H. Mason and David H. Mason as *stockholders* in said Company. The Masons filed affidavits of illegality to the *fi. fas.*, alleging that they were not stockholders in the Dahlonega Tanning and Leather Manufacturing Company at the time said suits were commenced, and the judgments were rendered from which the *fi. fas.* issued, and that they never had any notice of the suits, and had never been served with process therein. Issues were joined on these affidavits.

It was shown by the proof, that the suits were regularly brought, and prosecuted to judgment, and that the President, or head officer of the corporation, was served with process; that the Masons belonged to the original corporators, their names being mentioned in the charter; that they continued to own stock as late as 1843; the charter of incorporation was read in evidence, and the 2d section declares that "the private property of the stockholders shall be bound for the payment of the debts of the Company," and the 3d section declares that, "any *fieri facias* issued against the incorporation may be levied and collected upon, and out of the private

Mason and Field *vs.* Force, Brothers, & Co., *et al.*

property of any stockholder, or stockholders, in said incorporation;" it was also shown that David H. Mason transferred his stock in the Company one year and eight days before any of the suits were instituted; and that Zelotes H. Mason also transferred his stock seven months and eighteen days before the commencement of any of the suits; neither of the Masons gave notice of the transfer of stock in any newspaper.

The presiding Judge charged the jury that: "As the Act incorporating the Dahlonega Tanning and Leather Manufacturing Company provided that 'any *fi. fa.* issued against the corporation, might be levied and collected upon and out of the private property of any stockholder, or stockholders, in the incorporation' if the plaintiffs have shown a regular judgment against the corporation and a *fi. fa.* issued therefrom, and have also shown that Mason was a stockholder in that corporation, his private property is subject to levy and sale under the execution, notwithstanding he may have transferred his stock in the Company before the commencement of the suit, and *before the creation of the debt*, unless he gave notice once a month for six months of such transfer, and immediately after such transfer, in two newspapers in or nearest to the place where the principal office of the Company was kept at the time."

To this charge the Masons, by their counsel, excepted, and allege the same to be erroneous.

The jury found the issue in favor of the plaintiffs.

GEORGE N. LESTER, for plaintiffs in error.

MARTIN, by EZZARD, *contra*.

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

1. Were the plaintiffs in error stockholders in the Dahlonega Tanning and Leather Manufacturing Company, are liable as such for the debts of the Company? This question was made in a case between the same parties in 22 *Ga.*, 86, in which this Court held, that they were not only stockholders originally—for this fact appears in the charter—but that they were liable as such for the debts, unless they could allege and prove that they had been discharged from such liability

according to the provisions of the second section of the Act of 29th December, 1838, *Cobb*, 112, that is, by a transfer of their stock and a publication thereof in two newspapers in or nearest the place where the corporation kept its principal office, once a month for six months, immediately after such transfer. The plaintiffs did offer proof of the transfer of their stock in the company, but they did not show or attempt to do so, that they had published notice of such transfer in terms of that Act. And as the 2d section of the Act of incorporation of this company makes "the private property of the stockholders bound for the payment of the debts of the company," the question is settled that the plaintiffs, as stockholders, are liable for the debts of the company.

3. Where the plaintiffs entitled to personal services or notice of suits against the company before judgment, in order to render their individual property liable for seizures under executions against it? To determine this question, reference need only to be had to the Act of incorporation. By the 3d section of that Act it is enacted, "That any *feri facias* issued against said incorporation, may be levied and collected, and out of the private property of any of the stockholders in said incorporation." Therefore, no such notice of the suit, or service of the process upon the stockholder, is required or was necessary by that Act. It is only necessary that execution should legally issue against the incorporation, that is, that the incorporation itself, not its members, should be legally served, a judgment properly rendered against it. A *feri facias* issued from such judgment might be levied and collected out of the private property of the stockholder. The Legislature clearly intended that a service on the incorporation should be good as against the stockholder, that a judgment and execution good as against the incorporation, should be such against the individual members thereof. Such is the enactment. The stockholders cannot complain. They accepted the charter, enjoyed its privileges, and they must now stand by all its terms and bear all its burdens. But what is the necessity of such service or notice? What plea or defense could the stockholders, as such, have made to the suits, had they been served, that the incorporation did not make or ought to have made? They are liable for the debts. These are debts, so declared to be by the judgment of the Court, and nothing more was necessary than to provide a means for

Adair *et al.*, vs. Adair.

their enforcement. This was done by *fieri facias*. The same way precisely, and no other, that is provided by law for the enforcement of all other debts against other persons.

These are the only questions made in the record, and as there is no error, the judgment of the Court below must stand affirmed.

ADAIR *et al.* vs. ADAIR.

1. When a will is prepared by one who takes a large benefit under it, it cannot be set up without strong proof that the testator understood its provisions and assented to them.
2. When a legal charge is requested upon the main point in a case, but is unintentionally omitted by the Judge, and not suggested by counsel, when called on at the end of the general charge to suggest omitted points, a new trial ought to be granted.

Caveat to will in Paulding Superior Court. Tried before Judge HAMMOND, March, 1859.

This was a caveat filed by John B. Adair and others, heirs at law, to a paper propounded as the last will and testament of Bozeman Adair, deceased.

The grounds of caveat, were in substance as follows:

1. That deceased was not of sound and disposing mind and memory at the time he executed said alleged last will and testament.
2. That said will was procured, and deceased induced to execute the same, by the undue and unlawful influence of James L. Adair and Mitchell S. Adair, principal legatees in said will, and sons of deceased; said influence exercised at a time when deceased was extremely weak and imbecile from old age and sickness.
3. That deceased was induced to sign said paper by the false and fraudulent representation made to him by said James L. and Mitchell S. Adair, in relation to the conduct of

Adair *et al.*, vs. Adair.

the other children of deceased, and the advancements made to said children, and the value of the estate of the deceased.

The case came on for trial in the Superior Court, the appeal from the judgment of the Ordinary, rejecting the paper propounded as the last will and testament of Bozeman Adair deceased.

On the trial, it was proven that at the time the alleged will was executed, deceased was very weak and feeble, and about eighty-six years of age; he spoke very low. The will was read once to him, and he was asked, if it was right, he replied, "*That is the way.*" The paper was then presented, the "rest" upon which the old man leaned, was removed, and a table put in its place; deceased then wrote his name, with the help of one of the witnesses, who guided his hand.

Solomon L. Strickland, the draftsman, and one of the witnesses to the will, proved substantially that James L. Adair called on him to write a will for his father, the deceased, and told him how to write it, saying that "he knew how the old man wanted it written." Witness wrote the will, and went with James L. Adair and Mitchell S. Adair and the other two witnesses to testator's house. Witness spoke to the old man and said, "Grandsire, do you know me?" Testator replied, "No, who are you?" witness said, "Strickland." Witness then told him that he had a paper to read to him, and did read the will to him in a slow and distinct tone. After witness had read the will, he asked the old man if it suited him, he said, "that's the way I want it." He was sitting before the fire and his head was leaning on a fixture made of two upright pieces and a piece of cloth; it might be called a rack. He was very weak and feeble, and the rack was removed and a table put in its place; witness put the pen in his hand, and guided his hand while he signed the will; witness then subscribed as a witness with Lane and Cole.

Upon cross-examination, he testified that he wrote the will in his office, because his writing fixtures were convenient there, and he could write it better there than at testator's house.

• Witness never had any correspondence with testator on the subject of his will before James L. Adair called on him, as above state, to write the will; he wrote the will as directed by James L. Adair. To the question, whether he thought testator was, at the time, of sound and disposing mind and memory, witness said, "That is a tight question."

Adair *et al.*, vs. Adair.

Much other testimony was introduced both by propounder and caveators, but the foregoing is sufficient to understand fully the exception taken to the rulings of the Court, and to its refusal to charge as requested, and the opinion of this Court upon the errors assigned.

The jury found in favor of the will, and counsel for caveators moved for a new trial upon the following grounds:

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

2. Because the jury found contrary to the charge of the Court.

3. Because the Court erred in failing to charge the jury as requested by counsel for caveators, "that the presumption is strong against a party preparing a will, who takes a benefit under it, and although it will not be declared void on that account, strong evidence of intention in such a case will be required."

4. Because the verdict of the jury does not find the issue submitted to them, in favor of, or against either party. (The verdict was in the following form, "We the jury agree that this is Bozeman Adair's will.")

5. Because the Court refused to allow the jury to be polled upon the motion of counsel for caveator.

The Court refused the motion for a new trial, and caveator excepted and assign said refusal as error.

CHISOLM & WADDELL; MILLER & PARROTT, for plaintiffs in error.

IRWIN & LESTER, *contra*.

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

There is one ground on which we think a new trial ought to have been granted in this case: the failure of the judge to charge as requested, that where, as in this case, the will is prepared by one who takes a large benefit under it, the will cannot be set up without strong proof that the testator understood its provisions and assented to them. That this charge as asked is sound law, and that it was applicable to the case are propositions not disputed in the argument. The real controversy touching this point, was as to the proper con-

struction of the bill of exceptions. The bill of exceptions states that the charge was asked and was not given. A note to it adds that the Court recognized it as law, and after concluding his general charge, inquired of counsel whether there were any other points on which they desired a charge, and that they replied there were none. This note does not vary the original statement that the charge was asked and was not given. It does say that the Court *recognized* it as law, but it does *not* say that he *charged* it as law. The Court's recognition of law becomes a guide for the jury when expressed to them, and not before. Then the charge was not given. Was it waived? The exact truth of the case is, that it was not waived, but *forgotten* by the judge and by the counsel. If the Judge had thought of it, he would have given it, for he recognized it as law. If counsel had thought of it, they would have suggested it, when requested to suggest any other points not covered by the general charge, for their case turned on it. Our conclusion is, that the case was submitted to the jury without any instruction upon the main point in it, by an unintentional omission of the Judge; the omission committed by him, and not corrected by the counsel, because they happened to slip into a like momentary trick of the memory. The case was not tried on its merits. The failure, if the fault of anybody, was as much the fault of the Judge as of the counsel; and we think he ought to have granted a new trial on account of it. There is no need to express any opinion upon the other grounds of error, for they involve no general principle, and cannot recur upon the new hearing. As to the point upon the weight of evidence, we will remark, that in our judgment, the evidence was such as not to authorize the Court to set aside a verdict which might have been found either way, if the case had been legally and fully submitted to the jury.

Judgment reversed.

Benson vs. Griffin.

BENSON vs. GRIFFIN.

A representation by the seller of a horse, that a sore on the horse's eye was caused by a mule bite, is not so overcome by mere opinions to the contrary, founded on the appearance of the sore, as to require a jury to find that the representation was false.

Certiorari, in Carroll Superior Court. Decision by Judge HAMMOND, at the October Term, 1859.

Griffin, as bearer, brought suit against Benson, in a Justice Court, on a promissory note for forty dollars. The note was given by Benson for a horse, which he had purchased. Defendant pleaded the general issue and failure of consideration, in that the horse bought, and for which the note was given, was unsound.

The jury, in the Justice Court, found for the plaintiff the full amount of the note, and defendant sued out *certiorari* to review and correct said finding, on the ground that it was against the evidence.

The Court, after argument, dismissed the *certiorari*, and counsel for Benson excepted and assign said decision as error.

BURKE & BLACK, for plaintiff in error.

GLENN & COOPER, representing the MERRELLS, *contra*.

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

There was no warranty in the sale of this horse, but on the contrary, an express refusal to give one. The defense to the note must then rest solely upon the misrepresentation of the seller. His statement was that the sore on the horse's eye was produced by a mule bite. The only evidence tending to invalidate this statement, was the *opinion* of a horse doctor, and the opinions of some other non-professional people. These opinions were founded on nothing but the appearance of the sore, which had got to be an old and bad one before it was examined by the witnesses. The jury by their verdict have said that these opinions resting on such a

Connell vs. Culpepper & Boon.

foundation, were not sufficient to establish the falsehood of the representation; and we cannot say that they were constrained by the evidence to take a different view.

Judgment affirmed.

CONNELL vs. CULPEPPER & BOON.

In an issue of fraud where the Court and jury who tried the case, have passed upon it, and this Court is satisfied with the result, a new trial will not be awarded.

Claim, in Carroll Superior Court. Tried before Judge HAMMOND, at the October Term, 1859.

This was a claim cause between George T. Connell, the assignee of an execution in favor of Alexander Price and Culpepper and Boon, claimants of the store-house or grocery, levied on under and by virtue of said *fi. fa.*, as the property of Charles Rodahan. The execution was against Charles Rodahan, John Rodahan, and Terrence Connell, principals, and Joseph A. Thrasher, security on the appeal. The execution issued from the Superior Court of Henry county, and was for \$535 00, besides interest and cost, and bore date 12th January, 1857. It was levied upon the property in controversy by the Sheriff of Carroll county, 27th January, 1859.

Plaintiff, the assignee of the execution, first tendered it in evidence, and proved by the depositions of L. T. Doyal, Esq., the assignment of said *fi. fa.*, that he gave his note for the full amount with A. W. Turner and Willis Goodwyn, securities. Don't know whether the note has been paid or not, it has been sued to judgment. At the time of the transfer defendants were considered insolvent—don't know whether defendants placed any means in Connell's hands to pay the debt. Turner and Goodwyn are perfectly solvent.

Plaintiff then proved that Charles Rodahan was in possession of the house levied on, in July, 1856, and closed.

Connell vs. Culpepper & Boon.

Claimants introduced and read in evidence a deed of conveyance from Charles Rodahan for the property levied on; dated 6th January, 1857, and recorded on the same day. Claimant also, amongst other things, tendered in evidence, an order from the Superior Court of Carroll county, dated 27th November, 1857, directing the treasurer of said county to pay George T. Connell fifteen hundred and fifty dollars, the 1st February, 1858, and two thousand dollars on 1st February, 1859, for work done up to that time on the Court House of said county by John Rodahan. Counsel for plaintiff objected to this evidence as irrelevant; the objection was overruled, and the order received in evidence.

Claimants then tendered in evidence the tax books for the years 1857 and 1858, from which it appeared that the taxable property of plaintiff for the year 1857, amounted to \$5,040 00, and for 1858, it was \$17,825 00; and that the taxable property of Charles Rodahan amounted in 1857 to \$5,618 00, and that in 1858, he was a defaulter. To which evidence counsel for plaintiff objected, on the ground of its irrelevancy. The Court overruled the objection, and admitted the tax books in evidence. After the introduction of other testimony not material to be set out, claimant rested.

Plaintiff then read the depositions of Hardy Duke, and a written agreement, as follows:

GEORGIA, CARROLL COUNTY: Know all men by these presents, that I, John Rodahan, of the county of Henry, and State aforesaid, have this day transferred to George T. Connell, of the county of Carroll, a claim or account on the county of Carroll, a balance due to the said Rodahan amounting to five thousand and fifty dollars, the money arising from said account to be paid to the following debts:

One thousand dollars to James Gray of the county of Carroll, and nine hundred and sixty-three dollars to John M. Stewart, of the county of Carroll, and the sum of three hundred and thirty-one dollars to McKay and Amspow for plastering Court House, and one hundred and sixty dollars to Joseph Sykes, for work on Court House, and also ninety-five dollars to Jacob Morton for work on Court House, also, four hundred dollars to E. M. Beck, of the county of Spaulding, and the further sum of five hundred dollars to Cary M. Wood, of the county of Newton, and three hundred and

Connell vs. Culpepper & Boon.

eighty-four dollars to A. J. Boggess, of the county of Carroll, and the further sum of two hundred dollars to Thomas Wells, of the county of Carroll, also, fifty dollars to Wm. Johnson, of the county of Carroll, also, fifty dollars to Charles Hilton, of the county of Carroll, also, the further sum of one hundred dollars to John T. Mador, of the county of Carroll, and the further sum of two hundred and fifty dollars to A. Nonderville, of Carroll, and also, three hundred dollars for the completion of said, and the sum of fifty-six dollars for interest that has accrued on the Cary Wood, and Erasmus Beck notes.

The money arising from this claim to be paid to these specified debts, and to no others. I, George Connell, of the county of Carroll, bind myself, my heirs and assigns unto the said John Rodahan, and his heirs and assigns, that the five thousand and fifty dollars shall be applied to the specified claim, set down in this receipt.

November 25th, 1859.

GEORGE T. CONNELL.

Test: H. H. DUKE.

The article of agreement to remain in the hands of Hardy H. Duke until called for by said John Rodahan, or his assigns or executors.

Duke proved that he signed said agreement as a witness, and Connell signed it, and it was delivered to him by the parties, and that the balance of the \$5,050 00, not required for the payment of the debts specified, was to be applied to John Stroud's claim for interest.

Plaintiff then proved the payment by him of various debts against the Rodahans; and the case was submitted to the jury upon the charge of the Court, who returned a verdict in favor of the claimants, and counsel for plaintiff moved for a new trial upon the following grounds:

1. Because the Court erred in charging the jury, that the first point for their consideration was, whether the property levied on belonged to defendants in *fi. fa.*, and if they so believed in the absence of qualifying circumstances, they should find the property subject to the *fi. fa.* But claimants have introduced evidence for the purpose of showing that Connell, the assignee of the *fi. fa.*, had not acted in good faith with the money which he controlled for the defendants, and that

Connell vs. Culpepper & Boon.

he had consequently discharged from the lien of his *fi. fa.* property in the hands of third persons. The instrument offered and read in evidence was an assignment; and if they believed that creditors were preferred by it, then it was void under the Act of 1818. And if Connell held said property under a void assignment, and has paid out and discharged younger *fi. fas.*, he has thereby discharged the lien of this older *fi. fa.*, which he owns on property in the hands of *bona fide* purchasers for a valuable consideration without notice, and that a defendant remaining in possession of his property after sale was a badge of fraud, and unexplained, became conclusive.

2. Because the Court erred in charging the jury, as requested by plaintiff's counsel, that if they believed from the evidence, that John and Charles Rodahan were partners in building the Court House in Carrollton, and that they, or either of them, made a *bona fide* assignment of \$5,050 00 owing them for said building, for the payment of certain creditors free from any trust or benefit to themselves, then said assignment is good, but added, "but if creditors were preferred by the assignment, then it was not good, but void."

3. Because the Court erred in qualifying the charge requested by plaintiff's counsel, that if plaintiff received the funds under the assignment to pay certain creditors; and did, in pursuance of said agreement, pay said creditors, his judgment lien was not thereby extinguished as to other property of the Rodahans, and if claimants bought property subject to this execution, they were in no better situation than Charles Rodahan would be, and their remedy is on their warranty against Rodahan, which charge the Court gave, but added, that was so if the assignment was made in good faith, and creditors were not preferred; but if creditors were preferred, then it was void; and if Connell had funds in hand under the assignment, and paid them out to younger *fi. fas.*, that the lien of his *fi. fa.* was extinguished as to property in the hands of third persons.

4. Because the Court erred in admitting the testimony of Goodwyn Driver, plaintiff's counsel objecting thereto on the ground of irrelevancy.

5. Because the Court erred in admitting the testimony of Driver as to John Radahan having a large roll of money.

6. Because the Court erred in permitting claimants to

Connell vs. Culpepper & Boon.

prove an assignment by the record of the Inferior Court of said county—plaintiff objecting thereto, on the ground of irrelevancy.

7. Because the Court erred in admitting in evidence the tax books.

8. Because the Court erred in admitting the testimony of W. J. Head and J. M. Redwine in relation to the Haralson county bonds.

9. Because the Court erred in rejecting the answers of Allen W. Turner.

10. Because said Court was illegally held, there being no law authorizing said Court to be held on the 2nd Monday in October, 1859.

11. Because the Court erred in not permitting the plaintiff to prove by John W. Benson, that he could not have paid more for the property, levied on by the sheriff under the Driver *fi. fa.*, than the amount of said *fi. fas.*, and that he did not communicate to any one the agreement between Connell, Driver, and himself.

12. Because the Court erred in charging the jury, that if they believed that Connell paid the funds received from said assignment to younger *fi. fas.* and not to older ones, that his judgment lien was thereby extinguished—there being no evidence upon which to predicate such charge.

13. Because the verdict was contrary to law, the evidence, and charge of the Court.

The Court overruled the motion for a new trial, and counsel for plaintiff excepted, and assigns said refusal as error.

BURKE and BLACK, for plaintiff in error.

THOMAS CHANDLER, and BUCHANAN and WRIGHT, *contra*.

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

Had the jury found for Connell in this case, we should have felt constrained to have awarded a new trial. A clearer case of combination and confederacy than that established by the proof, between Connell and the Rodahans—Charles and John, we have seldom seen.

The proceedings under the Driver executions, alone, if there was nothing else, would constitute an effectual bar to

Worthan vs. Brewster.

prevent G. T. Connell from subjecting the property bought by Culpepper and Boon, to the payment of his *fi. fa.* We cheerfully and cordially affirm the judgment of the Circuit Judge.

WORTHAN vs. BREWSTER.

1. Whenever the holder of a promissory note, signed by a principal and surety, extends the time of payment to the principal, without the concurrence of the surety, for the purpose of avoiding a defense to the note which is claimed by the principal, the surety is discharged from all liability on the note.
2. A new trial will not be granted on the ground that the verdict is contrary to evidence whenever there is sufficient evidence to support the verdict.
3. Upon an issue whether the surety had been discharged from liability on a promissory note by the *act* of the holder, the jury returned the following verdict: "We the jury, find for the plaintiff sixty dollars with interest and costs of suit—releasing the security": *Held*, that the verdict was not void for uncertainty or irregularity.

Debt, in Coweta Superior Court. Tried before Judge HAMMOND, at September Term, 1859.

This was an action by Worthan against Hugh Brewster, security on a promissory note, of which the following is a copy, viz:

"\$60 00. Two weeks after date we, or either of us promise to pay McRunnells, or bearer, sixty dollars for value received. December 23, 1853.

(Signed,)

WM. ^{his} ~~X~~ BESHEARS.
mark.

HUGH BREWSTER.

Test: W. B. WILKINSON."

Plaintiff read in evidence the note and closed.

Defendant swore Fayette Smith, who testified in substance, that in 1853, or 1854, he was in company with Beshears and another person, coming to Newnan, when they were met by two men riding; that one of them was McRunnells, or he answered to that name, who said he was going to see Beshears to collect some money. Beshears said that the mule he sold him was unsound, and tendered him back. McRunnells said he sold the mule as sound, and refused to take him back. Beshears said he had given him a note with Brewster as security, and had stored his cotton with him to save him against loss. McRunnells told Beshears to keep the mule and he would wait with him till the next Christmas. In the opinion of witness, the mule was unsound.

Plaintiff in reply, read the answers of Elijah Nelson to interrogatories, who deposed that he was along with McRunnells when he sold the mule to Beshears for sixty dollars, and took his note, with Brewster as security. That as they returned home, some two or four weeks afterwards, about two miles from Newnan, they met Beshears with some other persons unknown to witness. Beshears said he liked his mule first rate, and that he had been offered eighty dollars for him, but would not take it, and told McRunnells that he wanted him to wait till he sold his cotton and he would pay him.

The jury found for the defendant, and plaintiff's counsel moved for a new trial on the following grounds:

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

2. Because the Court erred in charging the jury, that if McRunnells, to avoid a suit in consequence of the unsoundness of the mule, agreed to grant indulgence to the principal in the note, and extend the time of payment without the knowledge or consent of the security, then the security was discharged.

The Court refused to grant a new trial, and plaintiff excepts and assigns said refusal as error.

BUCHANAN and WRIGHT, for plaintiff in error.

M. KENDRICK, *contra*.

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

1. Was the charge of the Court right? It is a well settled principle, that if the creditor, by agreement with the principal, without the concurrence of the surety, varies the terms of the contract, as by enlarging the time, etc., or if he does *any act* by which the risk of the surety is increased, then the surety is discharged. *Curan vs. Colbert*, 3 *Kelly*, 248; *Brown vs. Riggins*, *ib.* 412; *Bethune vs. Dozier*, 10th *Ga.*, 235; *Taylor vs. Johnson*, 17 to 521. The proof submitted by the defendant, was that the note sued on was given for a mule; that in consequence of the unsoundness of the mule, Beshears, the principal, refused to pay the note, and tendered back the mule to McRunnells, the vendor of the mule and payee of the note. McRunnells admitted that he sold the mule as a sound one, and told Beshears if he would keep the mule that he would wait with him until the next Christmas for the money agreed to be paid, to which Beshears agreed. The note was then due, and suit was not brought on it until some two years and a half thereafter. The Court charged the jury that if these facts were true, the defendant was not liable—and we think the charge was right. For here was a new contract upon sufficient consideration by which the time of payment was extended from the first of the year 1854 to the latter part of that year, and to which the surety was no party, and by reason of which new agreement the risk of the surety was greatly increased. Had no such agreement been made, it is not only possible, but very probable that the mule would have been returned and the trade rescinded, or the money would have been paid. At all events, the surety had a right to have the contract stand and be enforced as he made it; but as it was changed without his concurrence he was discharged.

2. Was the verdict contrary to the evidence? It is not denied but that there was sufficient evidence, although conflicting, of the agreement between McRunnells and Beshears, to which reference has already been made, to support the verdict in that respect; but it is claimed that there was no evidence, but that the plaintiff was an innocent and *bona fide* purchaser of the note without notice. On this point the evidence is not so satisfactory. One of the witnesses says that

he and Beshears, on going towards Newnan, he thinks in April of 1853 or 1854, met McRunnells and another, when McRunnells said he was going to see Beshears to collect some money; Beshears said the mule McRunnells had sold him was unsound, and tendered the mule back, etc. Now, although the note was not exhibited, it is not reasonable to suppose that McRunnells would call on Beshears for payment of the note without the note, or before it was due. Another witness, one Nelson, introduced by the plaintiff to rebut the testimony of defendant, testifies that he was present when the mule was sold and the note given, and that subsequently, as he and McRunnells returned home, they met Beshears and others about two miles from Newnan, when Beshears, after expressing his satisfaction with the trade, told McRunnells that he wanted him to wait for his money until the next fall, and when he sold his cotton he would pay the note with interest. This was from two to four weeks after the note was given, and was evidently the same interview of which the other witness testified. While the evidence is not very clear, still we think the jury was justifiable in inferring from all the facts, that McRunnells was at that time the holder of the note, and that it was then due and payable. If he was not the holder at this time, it was easy to have established the fact by Nelson, who seems to have been his companion all the time; but the plaintiff did not rely on the fact that he was an innocent holder of the note, he trusted to overcome the defense by the testimony of Nelson, and in this he failed.

3. Counsel for plaintiff in error insists that the verdict of the jury, which is in the following words: "We, the jury, find for the plaintiff sixty dollars with interest and cost, releasing the security," is illegal and void for uncertainty and irregularity. We do not think so. The question in issue was whether the surety had been discharged from liability on this note on the agreement between McRunnells and Beshears, and in the opinion of this Court the verdict of the jury is so explicit in this respect, that it is impossible to mistake their meaning, and whatever else is in the verdict is mere surplusage and amounts to nothing.

Judgment affirmed.

May vs. Dorsett.

MAY vs. DORSETT.

1. A new trial will be granted when the verdict is contrary to the evidence.
2. When the defendant pleads and proves a negotiable promissory note of the plaintiff's as a set-off, the legal presumption is, that the defendant was the legal owner of such note at the commencement of the suit; and to avoid such set-off, it is necessary for the plaintiff to show affirmatively that he was not, in fact, the legal holder at that time. It is not sufficient to show that the defendant had previously transferred such note to third persons.
3. One who is a bank-officer, engaged in banking, and a judge of counterfeit money, is competent to give his opinion as to the spuriousness of a bank bill, especially when he gives the facts on which such opinion is founded.

Assumpsit, in Campbell Superior Court. Tried before Judge HAMMOND, at September Term, 1859.

This was an action of assumpsit, brought by Dorsett against May, to recover the sum of one hundred dollars, alleged to be due and owing by defendant to plaintiff, by reason of a counterfeit bank bill paid by defendant to plaintiff, for value, and received by him as a genuine bill, at and for the amount of one hundred dollars, but which bill was counterfeit, and wholly worthless and of no value.

Defendant pleaded the general issue and a set-off to the amount of \$218 94, due by plaintiff to defendant on several promissory notes.

Upon the trial, plaintiff proved by W. E. Smith, that in the year 1855 he was agent for plaintiff; took certain notes of plaintiff's and shaved them off to defendant, receiving from him \$300 00; after he got the money, defendant remarked that he believed it was all Georgia Railroad money; witness then turned the ends of the bills, and on an inspection of about half of each bill, replied that they were all on the Georgia Railroad Bank; he thought they were all on that Bank, but could not be positive; there were two one hundred dollar bills, the balance in small bills; after he received the money, he went immediately to Dorsett, without putting it in his pocket, and let him have it; Dorsett wanted it for Mr. Foster, and he let him have it as soon as witness carried it to

him; don't recollect whether Thomas J. Foster, Jr. was present or not.

Thomas J. Foster testified, that he saw Smith let Andrew Foster have some \$300 00; that there were two one hundred dollar bills and some small bills; one of the hundred dollar bills was on the Georgia Railroad Bank, and the other on the same Bank; that the bill sued on was one; thought it was one, but did not know; it was a bill for the same amount, with one corner torn off like the one in Court, and the same Bank; did not notice the money very particularly; was accidentally present.

Alfred Austell testified, that he was a bank officer; that Andrew Foster sent some money, some years ago, by him to Charleston to pay a debt he owed there; amongst the bills sent, was a one hundred dollar bill that was counterfeit; could not say whether the bill in Court was the one or not; in his opinion the bill in Court was a counterfeit.

To the testimony of this witness, as to the spuriousness of the bill, defendant objected, on the ground that there was higher evidence of that fact.

The Court overruled the objection, and defendant excepted.

Plaintiff then read the bill in evidence, and closed.

Defendant then, in support of his plea of set-off, read in evidence ten promissory notes on plaintiff and one James Lasseter, all dated and due in 1855, payable to W. E. Smith, except one, which was payable to defendant, amounting to \$119 44; and that the notes payable to Smith were transferred to defendant before this suit was commenced.

The jury, under this evidence, found for the plaintiff one hundred dollars with interest. Whereupon, defendant moved for a new trial on the grounds:

1st. Because the verdict was contrary to law and the evidence.

2d. Because the Court erred in admitting the testimony of Austell.

3d. Because the jury found contrary to the charge of the Court, and to the defendant's set-off.

The Court overruled the motion for a new trial, and defendant excepted, and assigned said refusal as error.

TIDWELL and WOOTEN, for the plaintiff in error.

FITCH, *contra*.

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

1. The defendant in the Court below, James E. May, having plead and put in proof the notes of the plaintiff, James R. Dorsett, was entitled to have the same allowed by the jury as a set-off, and as the jury failed so to find, their verdict was contrary to evidence, and the Court erred in refusing to grant a new trial on this ground.

2. It is true, that there was proof that the defendant had, after trading for these notes on the plaintiff, transferred them to third persons, but this does not establish the fact, or even raise a presumption, that he was not the legal holder at the commencement of the suit, for both facts may be true, and probably were. The notes were negotiable, and the defendant having properly pleaded them as a set-off, the legal presumption was, that he was the holder at the commencement of the suit. The *onus* was on the plaintiff to show affirmatively that the defendant was not so in fact, and so the Court substantially charged the jury. The verdict was contrary to this charge, and the defendant was entitled to a new trial on this ground.

3. A new trial was moved for on another ground, that is, that the Court erred in admitting the testimony of the witness Austell, as to the spuriousness of the bank bill, which was the foundation of the plaintiff's action. This ground was not pressed in the argument before us. Nor do we see any good objection to the evidence. The witness was a bank officer, engaged in the banking business, and considered himself a good judge of counterfeit money. The witness not only gave his opinion, but the facts upon which this opinion was based. The objection to the evidence was on the ground that "there was higher and better evidence." What that higher and better evidence of the fact was, does not appear.

Whether there was sufficient evidence before the jury, that the defendant May did, in fact, pass and pay the bill in controversy to the plaintiff, to authorize them to so find, was much discussed before us. And although we do not put our decision on that ground, it is, nevertheless, due to the parties, and to the Court below, for us to state frankly, that in

May vs. Dorsett.

our opinion, it is not. The evidence of W. E. Smith, who received the money from the defendant for the plaintiff, and amongst which this bill must have been, if it was ever passed and paid by the defendant to the plaintiff, says, at the time, in 1855, when he received the three hundred dollars from the defendant for plaintiff, the defendant remarked that he believed it was all Georgia Railroad money. This called the attention of the witness immediately to the fact, of what kind of money was paid him, having the money then in his hand, and he turned down the ends of the bills, exposing about one-half of each bill, and looked through them, and he, the witness, remarked they were all on the Georgia Railroad Bank. He thought they were all on that bank. The bill in controversy purported to be a bill on the bank of Cheraw, S. C., for \$100. Here was positive and direct evidence that the defendant passed no such bill to the plaintiff at that time; yet, it must have been at that time or not at all. It is not possible to see how the witness could be mistaken. To overcome the force and effect of this evidence, and also to establish a right to recover, the plaintiff introduces but one other witness, one Thomas J. Foster, who testifies, that he was present, not when defendant delivered the bills to Smith for the plaintiff, and when this particular examination was had as to the kind of money, but when Smith delivered the money to the plaintiff; that there were two \$100 bills, one on the Georgia Railroad Bank, and the other on the same bank with the one sued on. He did not know, but thought the bill sued on was one of the bills; it was a bill for the same amount, with one corner torn off, and on the same bank; could not say that the bill sued on was the same, but that resembled it very much in appearance, and he thought it to be the same bill; witness was not doing business for plaintiff nor Mr. Foster; was accidentally present; *did not notice the money very particularly*. This evidence is pretty clear, and if true, the bill in controversy must have been one of the bills that the witness, Smith, paid over to the plaintiff. But how is it possible for a witness who happened to be present when a sum of money was passed from the hands of one man to another, to remember, describe, and absolutely identify, the specific bills, after the lapse of four years and a half—for this is the time that intervened between the periods of passing the bill and the giving

May vs. Dorsett.

in of his testimony—it is impossible to conceive! Add to this the fact that the witness had nothing whatever to do with the matter; had no connection with either of the parties; did not particularly examine the bills; his attention was not called to it in any way, either as to the character or kind of bills, so as to fix the particular bill or its characteristics in his mind; and the statement becomes, to say the least of it, a most extraordinary one. What a marked contrast there is between the testimony of this witness and that of Mr. Austell. This gentleman was accustomed to deal in money; he carried a \$100 bill from plaintiff to Charleston to pay a debt for him; the bill was condemned as counterfeit; his attention was thus called particularly to that bill; he examined it, knew it to be counterfeit, yet he could not identify the bill in Court as the one that passed through his hands, though the witness Foster could, from an accidental glance of it as it passed through the hands of others, in a bundle of other bills, after a lapse of four years and a half! It would be useless to follow the investigation further, for, as I have already stated, this view of the evidence is not conclusive, in our own minds. Our impressions are against the sufficiency of the evidence and for the reasons I have stated. The question is an open one for the parties to press further or not, as they may consider most advisable. The new trial is ordered because the verdict was contrary to law and against the evidence, in the exclusion of the set-off pleaded and proven by defendant.

Judgment reversed.

BIGELOW vs. YOUNG.

1. Parol proof of the contents of a written contract, cannot go to the jury without satisfactory preliminary proof to the Court, that the writing was executed and is lost.
2. When the question between parties is, what was the state of accounts between them at a particular time? it is error to admit evidence against objection, touching an item which was at that time barred by the Statute of Limitations.
3. It is within the discretionary power of the Court to allow a witness to be sworn, after the evidence on both sides has been announced closed, and the argument has been commenced; and a liberal practice in this respect is most favorable to the ends of justice.
4. But the practice of recalling a witness to *restate* a point in his testimony, after counsel have disputed about it in the argument in his hearing, while also under the control of a sound discretion in the Court, is one which ought to be allowed with great caution, and not at all where there is reasonable ground to suspect the *fairness* of the witness.
5. Trover is an action for damages done to the right of possession, and amount of the damages depending therefore upon the extent of the right, it is competent for the defendant to reduce the damages by showing the quantity of the plaintiff's interest.
6. Where two parties make a written contract of pawning, one advancing money and the other pledging a negro, to be reclaimed *at any time by payment of what the pledger may owe the pledgee*, the negro can be redeemed only by the payment of all that may be due at the *time of the redemption*.

Trover, in Polk Superior Court. Tried before Judge HAMMOND, at October Term, 1859.

This was an action of trover, brought by Rebecca Young against Benj. F. Bigelow, for the recovery of a negro man slave named Sam.

The parties having announced themselves ready, counsel for plaintiff called on counsel for defendant to respond to a notice to produce certain papers at the trial. Defendant, in response, produced these papers; one a receipt from the plaintiff and one Scott Young to defendant for \$246 37, dated 17th January, 1852. The second, a paper, of which the following is a copy:

Bigelow vs. Young.

"BENTON COUNTY, Jan. 17th, 1852.

Received of Rebecca Young, as executrix of the estate of Griffin Young, deceased, and Scott Young, a negro boy, by the name of Sam, about ten years old, to be held as my property, for value received—which boy may be redeemed of me by Rebecca Young at any time, by her paying the amount which may be due me; the use of the negro to pay for the interest of indebtedness to me.

(Signed,)

BENJ. F. BIGELOW.

REBECCA ^{her} ~~X~~ YOUNG.

JOHN S. YOUNG.

Test: LOTT WHITLOCK."

And the third, the following receipt :

\$524 73.

Received of Benj. F. Bigelow five hundred and twenty-four 73-100 dollars. March 25th, 1857.

(Signed,)

REBECCA ^{her} ~~X~~ YOUNG.

JOHN S. YOUNG.

Test: W. M. DAVIS.

Plaintiff proposed to prove the contents of a receipt, or contract in writing, not produced, and described in an affidavit made by Henry F. Vernon, as a foundation for the notice given. Counsel for defendant objected to this testimony on the ground, that the execution of the paper must be first proved, before proof of its contents could be made. The objection was overruled by the Court and the evidence admitted, and defendant excepted.

At the conclusion of plaintiff's evidence, counsel for defendant moved for a non-suit on the ground, that there was no evidence of conversion, and because the money alleged to have been tendered (the \$247 37 mentioned in the last receipt above set out) was not deposited in the Clerk's office.

The Court refused to grant the motion for non-suit, and defendant excepted.

Defendant then offered in evidence an exemplification of the last will and testament of Griffin Young, deceased, plaintiff's testator, the object of which was to show that plaintiff

had only a life-estate in the negro sued for. The Court, upon objection, excluded this evidence, on the ground, that it was incompetent for defendant to prove such fact. To which ruling counsel for defendant excepted.

Defendant then proposed to prove by the depositions of a witness, taken by commission, that the boy Sam, the negro sued for, was received by plaintiff as a legatee, in and under the will of said Griffin Young; and that, by said will, she was entitled to only a life-estate in said negro, which testimony, upon objection, was also repelled by the Court, and counsel for defendant excepted.

After the testimony was closed, and after plaintiff's counsel had finished his opening argument, he moved to prove by the witness, John S. Young, an indebtedness on the part of defendant to plaintiff. Defendant objected, on the ground that it was too late, at that stage of the cause, to let in the proof, and that the witness was interested, and further, that the debt proposed to be proven was barred by the statute of limitations. The objection was overruled, and the testimony was received, and defendant excepted.

Counsel for plaintiff, while making his concluding argument to the jury, proposed to recall the witness John S. Young, to state what he had testified to when on the stand, counsel stating in the hearing of the witness what he understood the witness had proved or testified to. Counsel for defendant objected. The objection was overruled, and the witness allowed to state what he had sworn on his first examination, and defendant excepted.

The Court, among other things, charged the jury, that if defendant held the negro as a pledge or mortgage from plaintiff, to secure the payment of a debt, that then defendant had no right to retain the possession of the said boy, to secure the payment of subsequent advances made by him to plaintiff, or subsequent demands or indebtedness, unless it was so stipulated and expressed in the written mortgage or contract. That the doctrine of *tacking* did not exist at law, unless by the contract of the parties—to which charge defendant excepted.

The jury found for the plaintiff two thousand dollars, which might be discharged by the delivery of the negro within ten days, and three hundred dollars for hire.

The defendant moved for a new trial upon the ground of

Bigelow *vs.* Young.

error in all the rulings and charges above stated and excepted to, and upon the further ground, that the verdict was contrary to law and the evidence and the charge of the Court.

The presiding Judge refused to grant a new trial, and counsel for defendant excepted, and assigns said refusal as error.

VERDERY, HARVEY, BUCHANAN and WRIGHT, for plaintiff in error.

CHISOLM and WADDELL, represented by SHROPSHIRE, *contra*.

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

1. We think the Court erred in allowing *parol* evidence of the contents of the writing, about which Vernon and Hall testified, to go to the jury. If we make the assumption on which Mrs. Young's whole case rests, that this paper is a different one from those produced in Court by Bigelow under notice, then there was not the slightest proof that the paper ever was executed. On the other hand, if the paper was not a different one, then it was not lost, but was in Court, and ought to have been allowed to speak for itself, to the exclusion of all *parol* evidence touching its contents. On either hypothesis, the *parol* proof of the contents was improperly admitted; for before that proof was allowed to go to the jury, there ought to have been satisfactory preliminary proof to the Court that the paper had been executed and was lost. In point of fact, we think that the preliminary proof, so far from showing that the paper had been lost, shows that it was in Court. The written contract, about which Vernon and Hall testified, was no doubt, the very same which Bigelow produced, consisting of the two contemporaneous papers, bearing date the 17th January, 1852. The execution of these two papers was proven by the subscribing witness to them, so clearly, that it was not even contested by Mrs. Young. Now, it is a curious, if not incredible thing, that the parties should have executed a different and *inconsistent* writing, to be an exponent of the same contract. The very satisfactory conclusion to which our minds are

brought by the whole preliminary proof is, that the parties did no such inconsistent things, and the written contract about which Vernon and Hall testified, was the same which Bigelow produced in Court. The variance between the contents of the two papers of the 17th January, 1852, and the contents about which the witnesses testified, is a variance which does not so much prove the existence of a different paper, as it illustrates the importance of the general rule, that the writing must speak for itself.

2. We think there was error in admitting the evidence touching the negro hire, for the evidence showed that more than four years had elapsed after the negro hire was due, and before the tender was made for the redemption of the pledged negro, and so that item in Mrs. Young's account was barred by the Statute of Limitations.

3. We do not think there was error in allowing the witness to be sworn after the evidence had been announced as closed on both sides, and there had been some progress made in the argument. The ends of justice are much better promoted by liberality than stringency in matters of practice, and we see no reason for pronouncing that the Judge abused his discretionary powers in this case.

4. Another assignment of error is made upon the Judge's having allowed a witness to be recalled and to *restate* a point in his testimony about which counsel differed in their recollection. This is a dangerous practice, and, we think, should be allowed, if at all, with much caution. For myself, I have no hesitation in saying, that it ought never to be allowed with a witness whose fairness lies under any ground of suspicion. An unfair witness will be sure to make his second statement more favorable than his first one was, to that side he leans towards, after the dispute in his presence has shown him how he can mend it. With these remarks on the general rule in such cases, we pass from the point without deciding whether there was error in regard to it in this case or not, for such a decision could settle no principle, and the same question cannot recur on the next trial in the same light in which it is now presented.

5. We think there was error in rejecting the evidence to show that Mr. Young had only a life-estate in the negro. Trover is an action for *damages* done to the right of possession, and the amount of the damage obviously depends upon

Bigelow vs. Young.

the *extent* of the right. It needs no argument to prove that one suffers less damage in losing only a life-estate than in losing the fee simple. We think, therefore, the evidence ought to have been admitted in reduction of damages. But it was said in the argument, that the negro was pledged by Mrs. Young, as executrix of Griffin Young, deceased, to whose estate the negro belonged, and that she had the right, therefore, to recover the full value of the negro, without regard to the limited nature of her personal interest in him, in order that she might account to the remainder-men for their interest in him. The answer to this is, that she had no right to pledge the negro, and that the very act of pledging at all constituted an *assent to the legacy*, and from that time the life-estate was hers, and the remainder was complete in the remainder-men. She, therefore, was entitled to recover only her own interest in the negro, while the remainder-men had to look after their own.

6. We think the charge given in this case was erroneous. Whatever may have been the written contract of the parties, they certainly had the power to vary it by subsequent agreement, written or verbal. The charge was given in reference to evidence which we hold to have been improperly admitted and which will not be received on the next trial. We shall, therefore, only say that we think the proper charge in the case would be founded solely upon the contract as evidenced by the papers which Bigelow produced, and that under these Mrs. Young is entitled to have the negro returned to her, when she pays Bigelow all that she may owe him at the time when the redemption takes place, but not till then.

7. These principles, applied to the evidence in this case, lead necessarily to the conclusion that the non-suit ought to have been awarded as asked. The evidence shows that Mrs. Young owed Bigelow more than seven hundred dollars when she demanded the negro, and that she tendered him only \$246 37. She had no right to reclaim the negro without tendering all she owed.

Judgment reversed.

Slayton vs. Russell.

SLAYTON vs. RUSSELL.

1. Possession acquired under a writ of possession, that has been superseded or suspended by an order of the Court from which it issued, is wrongful, and the person from whom such possession has been thus acquired, can have the same restored by possessory warrant.

Certiorari, in Fayette Superior Court. Decision by Judge BULL, September Term, 1859.

This was a *certiorari*, sued out by Usebius Slayton against William J. Russell, to correct a judgment rendered by two Justices of the Peace in a proceeding by possessory warrant before them, instituted by Russell against Slayton, for the restoration to Russell's possession of thirty-five or forty barrels of corn.

On the trial of the possessory warrant before the Justices, Russell proved that he planted the corn on lot No. 120, in the 7th district of said county, and cultivated it to maturity, and said corn was standing in the field in December, 1858, when Slayton entered and gathered and took possession of said corn. Russell further proved that he had been in possession of the land from about 1854 or 1855, up to the time of said entry by Slayton.

Slayton proved that he was put into possession of said premises by the deputy sheriff of said county, on the 17th day of September, 1858, under and by virtue of a writ of *habere facias possessionem*, issued from the Superior Court of said county in an ejectment cause, at the suit of Slayton against Russell, in which he had recovered said premises by the verdict of the jury and judgment of that Court. That Russell did not reside or live on the land, but cultivated a field on the lot.

Russell, in reply, offered in evidence a rule *nisi* issued from said Superior Court, at September Term, 1858, calling on Slayton to shew cause why the judgment in said ejectment should not be set aside. Slayton objected to the introduction of this evidence, on the ground that said rule did not appear upon the motion docket of said Superior Court, and that its introduction involved the question, whether the sheriff had violated the order contained in said rule, and which question could not be determined by the Justices.

Slayton vs. Russell.

The objection was overruled, and the rule *nisi* admitted and read in evidence. Russell then proved that said rule was made out in the forenoon of the 17th September, 1858, and served on Slayton's counsel about 6 o'clock, P. M., of the same day. Said rule contained an order restraining the sheriff and all others from executing the writ of *habere facias possessionem* until the further order of the Court.

It further appeared on the trial, that the deputy sheriff put Slayton into possession of the premises about dark on the 17th September; that he had no notice of the rule *nisi*. Russell further offered in evidence an affidavit of illegality to said writ, to the reading of which Slayton objected, on the ground, that the facts therein stated involved the validity of the judgments both of the Superior and Supreme Courts, and said Justices had no jurisdiction of this question. The objection was overruled, and the affidavit allowed to be read in evidence. Russell further proved that said affidavit was handed to one of the deputy sheriffs, who had the writ of possession in his hands, on the evening of the 16th September, and that he offered to said deputy, at the time, a mule or any other property that he would take to levy on; that no levy was made, and the writ was withdrawn from the hands of the deputy by the agent of Slayton.

Upon this evidence the Justices determined that the right of possession was in Russell, and gave judgment accordingly. To all of which rulings, decisions and judgment Slayton excepted, and alleged the same to be error, and sued out *certiorari* to correct and recover the same.

On the hearing before the presiding Judge of the Superior Court, he ordered the *certiorari* to be dismissed, and that the judgment of the Justices be executed—to which the counsel for Slayton excepted.

HUIE and CONNER, for plaintiff in error.

TIDWELL and WOOTEN, *contra*.

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

The right of the plaintiff in error to the possession of the corn in controversy depended entirely on the vitality of the writ of *habere facias possessionem*, under which the deputy

Low vs. Argrove and wife *et al.*

sheriff, William A. Crumby, acted in putting him in possession thereof. That writ had been superseded and suspended by an order of the Superior Court of Fayette county before the deputy sheriff had placed the plaintiff in error in the possession. The writ was, therefore, inoperative, and the possession acquired under it wrongful and tortious, whether the plaintiff in error had notice of the order or not. But there is abundant evidence in the record, that if Slayton himself did not have notice of the order, his agent and attorney did, and by which he is bound. The tenant, Russell, who made the corn, and who had thus been deprived of his property, had the right to rescue the possession of which he had been illegally ousted. The judgments of the Courts below, in so holding, must be affirmed.

LOW vs. ARGROVE AND WIFE *et al.*

1. When a promissory note, without any consideration expressed in it, is changed by the holder by stating a certain tract of land as the consideration, the alteration is a material one, and vitiates the whole note.
2. The fact of the execution of a note has nothing peculiar about it to save it from the operation of the general rule in Equity, that the answer, when responsive to the bill, can be overcome only by two witnesses, or one witness aided by corroborating circumstances.

In Equity, in Meriwether Superior Court. Tried before Judge BULL, at August Term, 1859.

This was a bill in equity by John Low against Allen Argrove and Mary Argrove, his wife, and Joel Hood and Mary A. Hood, his wife. The bill, in substance, alleges that complainant, about the 1st December, 1853, purchased of Mary Burton a certain tract of land in the 10th district of Meriwether county, for the sum of \$1,200 00; that immediately after said purchase, and before titles for said land had been executed by Mary Burton to complainant, he at the request and solicitation of said Mrs. Argrove and Mrs. Hood, both

Low vs. Argrove and wife et al.

*femme covert*s, sold said land to Mrs. Argrove, for the sum of \$1,500 00; that Mrs. Hood, who had a large separate estate, joined with Mrs. Argrove in a note to complainant for the said purchase money, which note is as follows :

"On or by the 25th December, 1855, we, or either of us, promise to pay John Low, or bearer, the sum of fifteen hundred dollars, with interest from the 25th December, 1854, without defalcation, *for tract of land in 10th district.*

(Signed)

MRS. MARY ^{her} X ARGROVE,
mark.

MRS. MARY ^{her} X HOOD."
mark.

Witness : JOEL HOOD.

That Mrs. Burton, at complainant's direction and request, therefore executed titles for said land to Mrs. Argrove. The bill alleges that the parties now refuse to pay said note. That the land has been sold to one Matthews, to defeat complainant in the recovery of his demand, and that Argrove and wife have no property unencumbered, or at least, not enough to satisfy complainant's claim; that Mrs. Hood has a large separate estate under an ante-nuptial settlement which she manages and controls, and which she holds free from the debts, contracts or control of her husband. The bill prays that said land be sold, and that the proceeds of the sale be applied to complainant's note, aforesaid, to the exclusion of all other liens, or that said note be paid out of any property belonging to said Argrove and wife, or said Hood and wife.

The defendants answered the bill, amongst other things denying that said land was purchased by Mrs. Argrove from complainant, or that she, or any, or either of them, had anything to do with him, in the purchase of the land; that it was bought from Mrs. Burton, and the money paid to her; that the note mentioned in the bill, signed by Mrs. Argrove and Mrs. Hood, was given for borrowed money; that they never signed the note set out in the bill, and made an exhibit thereto; that the note they signed had not the words, "*for tract of land in 10th district,*" but these words have been added by complainant since they signed said note.

Low vs. Argrove and wife *et al.*

The case was heard upon the bill and answers and the proofs. Complainant introduced in evidence the note set out and described in the bill; the marriage contract between Hood and wife, and proved that Mrs. Hood was in the habit of carrying on and transacting business as a *feme sole*; also proved the insolvency of Argrove and wife.

The material, probably controlling, question made in the Court below was, whether the note set out in the bill as the foundation of complainant's action was made by defendants, Mrs. Argrove and Mrs. Hood; and, if so, whether the words, "*for tract of land in 10th district*" were in the note when signed, or were afterwards added by the complainant; and if the latter, what was the effect of such addition or alteration?

Upon this point the Court charged the jury, that these words, if put in the note after its execution and delivery, amounted to a material alteration, although the note may have been given for the land, and that such alteration vitiated the note, and that it could not be collected in law or equity.

The Court further charged the jury, that Mrs. Argrove and Mrs. Hood, having in their answers denied making such a note, it was incumbent on complainant, in order to entitle him to a recovery, to contradict and overcome said answers, by at least one witness and corroborating circumstances.

To which charge complainant excepts.

The jury found for the defendants. Whereupon, counsel for complainant tenders his bill of exceptions, assigning as error the aforesaid charge.

GEO. A. HALL, for plaintiff in error.

ADAMS and KNIGHT, *contra*.

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

1. Where a promissory note does not state that it is given for any consideration, not even for value received, is an addition to it, stating truly that it is given for a certain tract of land, a material alteration? The addition is a material alteration just as certainly as the note is a material paper. Waiving the question as to the validity of the note, without

Low vs. Argrove and wife et al.

the statement of any consideration, its effect was changed by stating that its consideration was a tract of *land*. The fact is a material fact, for it gives the vendor a lien on the land for the payment of the debt, and the statement of the fact in the note is a material statement, for it furnishes *evidence* of a material fact. Now, the whole force and effect of the note itself is only as *evidence*. It is not the debt, but only the appointed evidence of the debt. If the holder of the note, without the consent of the maker, adds anything which is material to the evidence thus appointed, he makes evidence for himself just as effectually as if he were to forge the whole note. Whether the forged addition states the truth is just as important as whether a forged note states the truth. If one man should forge a due-bill on another, acknowledging a debt of a hundred dollars, he would not be saved from the crime of forgery, nor save the paper from total condemnation in a Court of justice, by showing that the money really was due according to the statement in the forged paper. So, the truth of any statement added to the note cannot save the addition from being material, nor save the whole paper from the fate of a forged paper. When the holder of a paper tampers with it by putting a material addition to it, he vitiates the whole paper. We do not say that he cancels the debt which is evidenced by the note, but we do say that he must recover it on other evidence than that which was appointed by the parties, but which has been put in disrepute by his own act. The *note* is cancelled. We do not think there was any error in the charge on this point.

2. Nor do we think that there was any error in the charge, that on the point of the execution of this note, the answer of the makers could not be overcome except by two witnesses, or one witness aided by corroborating circumstances. Such is certainly the general rule in equity, in relation to the effect of an answer which is responsive, and we see nothing to vary the rule in this case. The answer on the point is directly responsive to the bill.

Judgments affirmed.

Glass & Blalock vs. Cook.

GLASS & BLALOCK vs. COOK.

Where the charge of the Court is calculated to prevent the jury from giving to any portion of the testimony proper consideration, and the party may thereby have been injured, a new trial will be granted.

Debt, in Fayette Superior Court. Tried before Judge BULL, at September Term, 1859.

This was an action of debt, brought by William N. Cook, executor of Hubard Cook, deceased, against William Glass, and Jesse L. Blalock, upon a promissory note for seven hundred and twenty-five dollars, payable to plaintiff, executor aforesaid, and dated 3d Nov., 1857, and due twelve months after date.

The defendants pleaded that said note was given for a negro boy about 10 years old, bought by them at the sale of the negroes belonging to the estate of Hubard Cook, deceased, made by plaintiff as his executor, and that plaintiff warranted said negro to be sound, when, in fact, said negro was unsound, and of no value, and died shortly after said purchase; that said plaintiff made said warranty, knowing at the time that the negro was unsound, and that his representations as to the boy's soundness and condition were false and untrue.

Amongst other testimony, defendant offered and read in evidence the bill of sale executed to them by plaintiff, which was as follows, viz:

GEORGIA, FAYETTE COUNTY:

Received of J. L. Blalock and William Glass, seven hundred and twenty-five dollars, in full payment for a negro boy by the name of Lawrence, about 9 years old, of dark complexion, which negro I warrant to be sound in body and mind. Nov. 3d, 1857.

(Signed,)

[L. S.]

DAVID D. MINN,

L. S. W. MINN, Clerk S. C.

WM. N. COOK, Executor
of Hubard Cook, deceased.

Both parties having submitted their testimony, the presiding Judge charged the jury, who returned a verdict for the

Glass & Blalock vs. Cook.

plaintiff, for the full amount of the note and cost ; whereupon, counsel for defendants moved for a new trial upon the following grounds :

1st, 2d and 3d. Because the verdict was contrary to law and the evidence, and against the weight of evidence.

4th. Because the Court erred in charging the jury, that the bill of sale was executed by plaintiff *as executor*, and did not bind him personally, and, in the opinion of the Court, the executor did not intend thereby to bind himself personally.

5th. Because the Court erred in charging the jury, that although the executor stated publicly at the time of the sale, that the negro was sound and healthy, and "*the best negro of the flock*," yet he was not liable unless it was proven that the negro was unsound at the time of sale, and that the executor knew it.

6th. Because the Court erred in ruling out that part of the answer of James Oliver, in which he deposed that he heard plaintiff say, during the sale, that if the property was not good, we are—alluding, as witness supposed, to the title and soundness of the negroes.

7th. Because of newly discovered evidence: the defendant, Blalock, swearing that since the trial, he had discovered that he could prove by several witnesses, (naming them) that plaintiff knew at the time and before the sale of said negro, that he was sickly and valueless, and that he had no knowledge of said evidence at the time of the trial, etc.

The presiding Judge overruled the motion for a new trial, holding, after consideration, that there was no error in the rulings and charge of the Court ; that there was sufficient evidence to support the verdict, and that the newly discovered evidence was merely cumulative.

To which refusal counsel for defendants excepted, and assign said refusal as error.

J. M. and W. L. CALHOUN, for the plaintiffs in error.

TIDWELL and WOOTEN, *contra*.

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

We concur with the Court, that the bill of sale made by Cook, the executor, creates no personal liability upon him,

Speer vs. Atlanta and West Point Railroad.

and that the only ground of defense to the note given for the boy Lawrence is the fraudulent representation as to his soundness. The proof was conclusive as to the diseased condition of the negro, at the time of the sale and previously, and the discrepancies were pretty strong to bring home a knowledge of the fact to Cook; and hence, we think the presiding Judge used too strong language in charging the jury: "That although the executor (Cook,) stated at the sale publicly, that the negro was sound and healthy, and the best negro of the flock, yet he was not liable, unless it was *positively* proven that the negro was unsound at the time of the sale, and the executor knew it."

Now, the unsoundness of the negro, and the knowledge of the executor, may be established by circumstances as well as by direct and positive proof. Both these points were pretty satisfactorily made out—the latter mainly on circumstantial evidence; and yet, the jury, under the instructions of the Court, might have disregarded the testimony entirely, not being *positive*. And for this cause, we feel constrained to award a new trial, and, I will add, not reluctantly, upon the facts in the record.

It is unnecessary to make any remarks upon the newly discovered evidence, as that can be procured for the next trial.

SPEER vs. ATLANTA AND WEST POINT RAILROAD.

Suits brought against a Railroad Company for a breach of contract, prior to 1859, had to be instituted in the county where the office for transaction of the business of the corporation was kept.

Case, in Troup Superior Court. Decision by Judge CANNISS, at May Term, 1859.

This was an action by William A. Speer against the Atlanta and West Point Railroad Company, to recover dam-

Speer *vs.* Atlanta and West Point Railroad.

ages for breach of contract; said damages alleged to have been sustained by reason of the failure and refusal of defendant to perform a certain agreement made with plaintiff relative to certain privileges and favors to be granted and allowed him, in consideration of his conveyance to defendant of the right of way for said road through plaintiff's land.

Defendant pleaded to the jurisdiction of the Court, on the ground that its principal office or place of business was not in the county of Troup, but in the county of Fulton, and was liable to be sued and impleaded in Fulton county, and not elsewhere. And further, that the President and chief officer of the Atlanta and West Point Railroad Company did not, nor does not, reside in the county of Troup, but in the county of Richmond.

Plaintiff demurred to said plea, which demurrer was overruled by the Court and the plea sustained, and the action dismissed—to which decision counsel for the plaintiff excepted.

SPEER & SPEER, for the plaintiff in error.

BLECKLEY, *contra*.

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

This is a suit brought by the plaintiff in error against the Atlanta and West Point Railroad Company for the breach of a contract. The action was instituted in Troup county, through which the Road runs. Atlanta, in Fulton county, is the place of business of the corporation. There was a plea filed to the jurisdiction of the Court, and a demurrer put in to the plea, which was overruled by the Court; that is, the Court held that Fulton county, and not Troup, was the proper place for bringing the suit.

The action is brought under the Act of 1856, and not the Act of 1854. It is by common law process as prescribed by the Act of 1856, and not by notice, as required by the Act of 1854. Now, the Act of 1856 does not extend to suits brought for violation of contracts, but only for certain injuries therein specified. Indeed, it is somewhat doubtful whether the Act of 1854 gives the right to sue upon con-

Milner *vs.* The State of Georgia.

tracts, notwithstanding the generality of its terms. If it does, the body of the Act is lucider than its title; for the title does not extend to such cases.

Perhaps under the head statutes of the last legislature, the case might be reversed in Troup county. This Act did not operate upon a decision already made.

MILNER *vs.* THE STATE OF GEORGIA.

1. A new trial will not be granted when the verdict is not contrary to law, contrary to the evidence, or strongly and decidedly against the weight of the evidence.
2. On the trial of one for an assault with the intent to murder, it is no error in the Court to refuse to charge the jury that if they believed from the evidence that the prosecution was unfounded, that they should not only find the defendant not guilty, but that they should return the prosecution unfounded or malicious.
3. Neither is it error in refusing such request for the Court, in response thereto, to remark, "that there was no evidence to warrant the charge," when such is the fact.
4. A new trial will not be granted on the ground of newly disclosed evidence when there is no affidavit from prisoner or his counsel that such evidence was unknown to them during the trial, especially when the witness by whom this newly discovered evidence is expected to be proven was sworn and examined on the trial in the defense, and who remembers the additional facts by having his recollection subsequently refreshed.

Indictment for Assault with intent to Murder, in Fayette Superior Court. Tried before the Hon. D. F. HAMMOND, Judge, at September Term, 1859.

John H. Miller, the plaintiff in error, was indicted for an assault with intent to murder, and convicted. He moved for a new trial on the grounds—1st. That the verdict was contrary to law and the evidence. 2d. That the Court refused

Milner vs. The State of Georgia.

to charge the jury as requested by counsel for defendant, that if they believed from the evidence that the prosecution was unfounded, they should not only acquit the defendant, but should return the prosecution unfounded and malicious—the Court refusing so to charge, and saying that there was no evidence to warrant such charge, thereby expressing an opinion on the facts of the case. 3d. That since the trial defendant had discovered new and material evidence not known to him before.

The Court refused the motion for a new trial, and counsel for defendant excepted, and assigned as error said refusal.

BLALOCK & JONES, TIDWELL & WOOTEN, for plaintiff in error.

Solicitor General T. L. COOPER, *contra*.

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

1. The three first grounds of the motion for new trial, to-wit: that the verdict was contrary to law; contrary to the evidence, and strongly and decidedly against the weight of the evidence, may all be considered together, as they all depend upon the single question, whether there is sufficient evidence to support the finding of the jury? We think there was, and shall dispose of the whole by a very slight reference to the testimony itself. Beavers, the prosecutor, went into a grocery in Fayetteville, on the night of the 29th day of March, 1859, and after remaining a short time he went out, leaving the prisoner inside of the grocery, standing at the counter. As prosecutor walked away from the grocery he heard some one walking and following him; a four pound iron weight, a weapon likely to produce death, was thrown at him with great force, passing beneath the rim of his hat close to the side of his face. On turning round he saw the prisoner run back into the grocery. The prisoner at that time was in custody under a peace warrant issued by the prosecutor as a magistrate, upon the application of the wife of prisoner, who had come to the house of prosecutor and remained there a while. Prisoner had bad feelings towards prosecutor; had clenched and shook his fist that day, saying, he would like to

get one crack at prosecutor; had threatened, previously, that if prosecutor ever crossed his path he would put a ball through him. Other testimony of a negative and conflicting character was offered, but was immaterial and incompetent. Under these circumstances it is not at all extraordinary that the jury should find the prisoner guilty.

2. The fourth ground of the motion is, that the Court erred in refusing to charge the jury as requested by counsel for prisoner, and in saying as he did so, "that there was no evidence to warrant the charge." Counsel did not rely greatly on the refusal to charge, for the good reason that the giving or refusing such charge could not go in aid of any defense of the prisoner; the finding of a malicious prosecution affects the prosecutor, and not the prisoner; all the prisoner is interested in, so far as the trial is concerned, is a verdict of acquittal. Hence, the refusal of the Court to give such charge would never be a good ground for sending the case back.

3. The ground on which counsel mainly rests their argument on this point is, the remark that the Court made in refusing the request. What the Court stated was a proper response to the request. It was the truth. There was no evidence that the prosecution was unfounded or malicious; but on the contrary, evidence enough to sustain a verdict of guilty as we have held; counsel seem to think that the remark of the Court was an expression of opinion on the facts, which was calculated to exercise a controlling influence on the minds of the jury; that it was in effect saying, that there was at least a probable cause made out by the testimony. If counsel did in fact think so, the request ought not to have been made so as to draw this fire from the Court. But the remark of the Court had no such meaning. It meant simply, that from all the facts before the Court, there was not sufficient evidence of a want of foundation for the prosecution, or of malice in the prosecutor, to justify the jury in taxing the prosecutor with the costs of the prosecution.

4. The fifth ground for a new trial is, that of newly discovered evidence, which is contained in the affidavit of the witness, one William S. Brown, appended to and forming part of the record. There is no affidavit from the prisoner or his counsel that this evidence was unknown to them at the trial; besides this, the witness, by whom this newly discovered evi-

Burch vs. Ward.

dence is to be made, was a witness examined on the trial for the defense. The new and additional facts recited in the affidavit, which the witness says he remembers since his recollection has been refreshed, and "that he was in the grocery with the prisoner at the time and on the night testified to by prosecutor, and when the prosecutor came in, that the prosecutor took a drink, was half drunk, and that the prisoner remained talking with him some half hour after prosecutor went out." We know of no rule which would authorise a new trial to be ordered on the ground of such *newly discovered evidence* under these circumstances.

Judgment affirmed.

BURCH vs. WARD.

1. This case decides no legal principle, but only the bearing of facts in the particular case.

Certiorari, in Fayette Superior Court. Decision by Judge HAMMOND, at September Term, 1859.

Morton N. Burch sued out a *certiorari* to correct the verdict and judgment rendered in a Justices' Court in certain suits wherein he was plaintiff and Miles Ward was defendant. The suits were brought on dormant judgments, alleged to have been formerly obtained by Burch against Ward in said Justices' Court.

The following proceedings were had on the trial in the Justices' Court on the appeal: Plaintiff offered in evidence the original summons, and called for the docket upon which the judgments were entered, which could not be found or produced; plaintiff then proved by one Brassell, that he, Brassell, had once acted as a Justice of the Peace in that same district; that he was the successor of John McLain, the Justice before whom the judgments sued on were obtained. Witness

had the old docket in his possession, and examined it in reference to these cases, and there were four or five judgments entered thereon, signed by McLain, J. P.; that in 1856 McLain sent to him for said docket, which he sent to him and had never seen it since.

Joseph McLain proved that he got said docket from Brasell, his successor in office, and that he let Oliver Pearson have it, and had never seen it since, and did not know where it was.

Mrs. Pearson, the widow of Oliver Pearson, testified that she had never seen said docket, either before or since her husband's death; she was familiar with his books and papers; was executrix and John Whitaker executor of her late husband; Whitaker had taken off some of the papers, but never a docket; had never made a search for said docket, but had never seen it, and believed that if it was in the house she would have seen it; there was a drawer in the house that she had never examined particularly.

Plaintiff then proved by N. Miller that he, witness, was one of the appraisers of Pearson's estate—examined his books and papers, but saw no docket, except the one Pearson had used while he was a Justice.

Plaintiff having laid this foundation, offered in evidence one of the executions. Defendant objected, on the ground that there was no evidence that there ever had been a judgment. The objection was overruled and the execution admitted. Here plaintiff closed.

Defendant tendered in evidence two notes, one for \$40 00 and the other for \$28 00, signed by Jesse Ward as principal, and Miles Ward as security, payable to Oliver McLain, and dated in 1835. Plaintiff objected to the introduction of said notes. Defendant stated that his object was to show that Jesse Ward had an interest in the suits now being tried, and that they had all been settled by Miles Ward, he having paid off said two notes on which he was security for Jesse. Plaintiff admitted that Jesse Ward had an interest in the suits. Plaintiff further objected to the introduction of said notes, on the ground that they bore date prior to the rendition of the judgments sued on. The objections were overruled and the notes admitted and read to the jury. Defendant then proved by one James Ward, that in 1838, Jesse Ward told him to tell Miles Ward, that if he would pay off the two notes, that

Burch vs. Ward.

it should be a full payment of all demands said Jesse held against said Miles. Did not know what demands Jesse held against Miles in 1838; did not know whether Jesse at that time had any interest in the cases now in Court; did not know whether the debt now sued on existed then or not. On being asked upon re-examination what debts Jesse Ward held against Miles in 1838, he answered: "Of course it was the Burch papers, and that it was these Burch papers that were to be settled."

Defendant further proved that Mr. Grice, the attorney for plaintiff, was employed by Andrew McBride and Jesse Ward, and that he, defendant, had been able for the last 15 years to pay all his debts.

Upon this testimony, the jury found for the defendant, and plaintiff excepted, first, because the Justice Court erred in admitting in evidence said notes. Second, because the verdict was contrary to law and evidence, and applied for a *certiorari*, to recover and correct said finding and judgment.

The Judge of the Superior Court, the Hon. D. F. HAMMOND, upon hearing the case, ordered the *certiorari* to be dismissed. To which decision counsel for plaintiff excepts.

S. C. GRICE, and TIDWELL & WOOTEN for plaintiffs in error.

J. L. BLALOCK, *contra*.

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

A view which shows the materiality of the notes introduced in evidence by the defendant, and which removes all the difficulties stated by the plaintiff, and reconciles the testimony of the witness, Ward, with the other facts in the case, is this: Jesse Ward being jointly interested with Burch in a debt which Burch held against Miles Ward, and which was un-reduced to judgment, agreed with Miles that the debt should be considered as paid whenever Miles should take up these notes wherein Jesse was principal and Miles security. There was delay in taking up the notes, and the Burch debt remaining unpaid, went to judgment. After judgment Miles took up the notes, and thereby paid the judgment un-

Jackson & Brothers vs. Mowry.

der the agreement which had begun before judgment and continued after it. This view is consistent with all the evidence in the case, and we think the verdict in conformity with it ought not to be disturbed, and that the notes in support of it were properly admitted.

Judgment affirmed.

JACKSON & BROTHERS vs. MOWRY.

If A owns land that is in the occupancy of B, the law will imply a liability on the part of B to pay rent for the land; but no such presumption can arise where B expressly disclaims holding possession under A.

Action for Rent, etc., in Fulton Superior Court. Tried before Judge BULL, at October Term, 1859.

This was an action by S. and L. Mowry against Jackson & Brothers for the rent of a store house in the city of Atlanta, from 1st June, 1858, to 1st October, 1858. There was also a count for use and occupation.

Upon the trial, plaintiff proved that J. T. Doane executed to them a mortgage of the premises 7th August, 1855; that said mortgage was afterwards foreclosed and sold by the sheriff under and by virtue of the mortgage *fi. fa.*, on 1st Tuesday in June, 1858, when plaintiff became the purchasers. They then proved that defendants were in possession of the premises at the time of the sale by the sheriff, and had been in possession since 1st January, 1858, as tenants of John A. Doane, and that they remained in possession till 1st October, 1858, and that the rent was worth \$400 per annum. Plaintiff next proved that, after the sale to them, they gave notice in writing to defendants of their purchase, and that they would hold them liable for the rent; that *John A. Doane* took possession of the premises in *January*, 1856.

It further appeared that John A. Doane, at the sale by the sheriff, handed to him a claim to said premises, under

Jackson & Brothers vs. Mowry.

and by virtue of a lease from J. T. Doane, extending from 1st January, 1855, to 1st January, 1860, said lease dated 16th day of December, 1854, and gave notice to bystanders that he held said lease; that the premises were sold either subject to this claim or in defiance of it. The sheriff did not recollect which. That John A. Doane did not go into possession under said lease till about January, 1856, and that he subsequently sub-let a portion of the premises to Jackson & Brother, the defendants, from 1st January, 1858, to 1st October, 1858, for three hundred dollars. Defendants offered in evidence the lease from John A. Doane to them, dated 16th Dec., 1857, to the introduction of which plaintiffs objected, on the ground that there was no proof of its delivery, or that it was executed at the time it purports to bear date. The Court sustained the objection, and excluded the paper, and counsel for defendants excepted.

Defendants then proved that they went into possession of the premises in December, 1857, and remained in possession till 1st October, 1858, under John A. Doane; that John A. Doane built a kitchen and barn on the lot, and repaired the store after the fire in April, 1857; that J. T. Doane was solvent in December, 1854, and remained so till the last of 1855, when he failed; J. T. Doane occupied the store till the last of the year 1855, but removed his family off the lot in May, 1855; and proved that others also rented portions of the premises of *John A. Doane*, after 1855, and paid him for them, and again tendered their lease in evidence, which the Court again repelled, and defendants excepted.

Defendants then proved the handwriting of Thomas C. Jackson, one of the firm of Jackson & Brother, and that the signature to the lease was in his handwriting, and again offered it in evidence, which the Court again repelled on the ground that there was no proof it had ever been delivered, or that it was made at the time it purported to be, and counsel for defendants excepted.

Plaintiffs proved, that in 1855, J. T. Doane, in a conversation with their attorney, said that there were no liens or incumbrances on his property other than plaintiff's mortgage. Defendants objected to proof of the sayings of J. T. Doane. The Court overruled the objection and admitted the proof—he being in possession at the time—and defendants excepted.

Counsel for defendants requested the Court to charge the

Jackson & Brothers vs. Mowry.

jury, that if plaintiffs knew, at the time their mortgage was taken, of the lease from J. T. Doane to John A. Doane, then they were estopped from objecting to it, and they ought to find for defendants—which charge the Court refused, but charged that if the lease was *bona fide*, plaintiffs could not recover.

Counsel for defendants further requested the Court to charge, that if the jury were satisfied, from the evidence, that the sheriff sold the premises subject to said lease, and notice thereof was given, then plaintiffs could not recover. The Court refused so to charge, but charged, that the main issue was, whether the lease was fraudulent or not; and if it was, plaintiffs were entitled to recover, whether the property was sold subject to it or not; and counsel for defendants excepted.

Counsel for defendants further requested the Court to charge, that if the lease was prior to the mortgage, if John T. Doane was in possession on the 16th December, 1857, and then rented to defendants till 1st October, 1858, for \$300 00, who had no notice of any fraud, then they were not liable—which charge the Court declined or omitted to give, and defendants excepted.

Counsel for the defendants further requested the Court to charge, that an action for use and occupation could not be maintained, if defendants held adversely to plaintiffs, which charge the Court refused to give, but held and charged that that principal of law did not apply in this case, as defendants set up no claim of title, but only a claim under a contract of rent, and defendants excepted.

The Court further charged the jury, that the issue was not between plaintiffs and defendants, but between plaintiffs and John A. Doane, as to who were entitled to the rent, and if the lease was executed in secret, that was a badge of fraud, and if suits were pending against J. T. Doane, at the time, or he was insolvent, these were badges of fraud.

To which charge counsel for defendants excepted.

J. M. and W. L. CALHOUN, for the plaintiffs in error.

HAYGOOD, COOPER, *contra*.

Cooper vs. Mullins.

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

The action for use and occupation will not lie in this case.

It is argued, that in order to maintain this action, two things only are necessary to be proven, to-wit: Title in the plaintiff and possession by defendant. And while it is true that a contract to pay rent may be implied from these data, yet, if it shall affirmatively appear, as it does in this case, that the tenant disclaims holding under the plaintiffs, no such presumption can arise.

It would be absurd to imply that A agrees to pay B rent for the land he lives on, when A most stoutly denies it is B's land. And such, we understand, is the well-settled doctrine of the books upon this subject; and in conformity thereto have been the rulings of this Court.

COOPER vs. MULLINS.

1. The doctrine that servants of the same master cannot have redress against the master, for the consequences of each other's negligence in his service, being founded upon the policy of making each servant interested in the good conduct of the rest, cannot apply to a case where the respective situations of the servants allow no opportunity for the exertion of a mutual influence upon each other's carefulness.
2. Pecuniary injury is not the only one for which compensation ought to be allowed in damages.
3. A verdict will not be set aside as contrary to evidence, because it may conflict with the conclusions of a witness who drew his conclusions from the interchange of signs between himself and another person, and who testifies under a strong motive to support those conclusions.

Case, in Fulton Superior Court. Tried before Judge BULL at April Term, 1857.

This was an action brought by James Mullins against James F. Cooper, superintendent of the Western and Atlan-

tic Railroad, to recover damages for an injury, received by the plaintiff, and resulting from a collision of trains running on said road.

Plaintiff proved by the attending physicians the nature and extent of the injury he received; that his left arm was broken in several places; the elbow was seriously and materially injured; that the injury was received in September, 1855, and that he was confined, by reason of said wounds, till the last of December thereafter; his elbow joint was still (at the time of the trial) stiff, and incurable in that respect; Dr. Dearing's bill for attention was about twenty-five dollars.

Plaintiff further proved, that he was in the employment of the *Georgia Railroad*, at the time of the injury, as an engineer; that he was formerly a machinist, and that he was incapacitated, by reason of said injury, for a machinist, but not for an engineer, but that he could not, as an engineer, be able to *reverse* an engine so promptly as before.

The circumstances under which the plaintiff went upon the Western and Atlantic Railroad, upon the occasion of receiving the injury, were as follows:

The machinist of the Georgia Railroad shop, in the city of Atlanta, was applied to by an officer of the Western and Atlantic Railroad for an engine and engineer, to go up the Western and Atlantic Road, to bring down from Chattanooga a train of cars, as that road did not have sufficient motive power to bring down the cars, which belonged to the Georgia Road, as fast as they were needed below; said officer saying that he wanted an engine and engineer to make a trip up the road after them. In consequence of this application, Mullins was sent up the road with an engine, with instructions from the Georgia Railroad to bring down only empty cars belonging to the Georgia Railroad. Plaintiff was willing to go, and was selected because he knew the Western and Atlantic Road, having made similar trips before. There was a general agreement between the two Roads that such service was to be paid for, and for similar services before rendered, the Georgia Road had been paid by the Western and Atlantic Road. This trip was not a gratuity; Georgia Road expected to be paid for the trip; plaintiff, while making this trip, was subject alone to the orders of the officers and agent of the Western and Atlantic Road.

Cooper vs. Mullins.

Plaintiff further proved by the witness, Bruner, that, in making the trip under the circumstances above stated, on his return down with the cars, when about forty miles from where the accident occurred, he got behind with his train on account of his engine *foaming*, there seemed to be several trains coming down at the same time,) and was, therefore, not suited to run in front. The witness, who was engineer of the front train, displayed a flag, which indicated that another train was following—a signal well known to railroad men. Plaintiff's train had the right to the track, even if he had been three hours behind the schedule time, the flag having preceded him; he was only about twenty-five minutes out of time when witness left him. There was no rule of the road which required regular trains which might be out of time, to stop; the rule required other trains to wait for them and to keep the track clear. Plaintiff's train consisted of Georgia Railroad cars and a caboose belonging to the Western and Atlantic Road, and he was accompanied on the trip by a conductor of the Western and Atlantic Road, whose business it was to regulate the running of the train.

Plaintiff having closed, defendant read the depositions of Henry G. Cole, taken by commission, who deposed: That he had control of the engine and train at the Etowah embankment, in September, 1855; the engine and train were used for hauling earth into the embankment at the Etowah river; deponent and Kendrick were the contractors for said work; it was their daily practice to send the earth train after water to the station, about three miles and a half from the works; usually sent it after the express train; on the day of the collision, two express trains passed at schedule time, and we waited one hour and a half for the third, and finding our water was giving out, the engine was sent to the station for water; about fifteen minutes after it started, witness saw the train, of which Mullins was engineer, approaching; witness immediately took position at a conspicuous place near the track, and several times made the usual sign for stopping trains, called to the engineer and pointed to the pit, to show him that the earth train engine was not there, as he passed, witness called aloud and told him that the way engine was on the track; plaintiff made a sign with his hand which witness understood to mean that he would run the earth en-

gine to Alatoona siding. The sign made for stopping plaintiff was the usual sign for stopping trains. Plaintiff disregarded the signal, and his engine and the earth engine came together about three miles from the embankment. Witness walked to the place when he heard the collision, thinks neither engine was thrown from the track. The earth engine belonged to the Western and Atlantic Railroad, but was controlled by the contractors for doing the work at the embankment; don't think the engineers would have been hurt if they had remained on the engines.

The testimony being closed, counsel for defendant requested the Court to charge the jury, that if plaintiff had hired himself to the Georgia Railroad, and that road had with his consent hired him to the defendant for the service in which he was employed at the time he received the injury, then plaintiff was the servant of defendant. That such contract need not be an *express* one; if in the usual course of dealing between them it had been customary for a compensation to be made for such services, then the law would imply a contract in the absence of proof of an express contract, and of any stipulation to the contrary. Which charge the Court gave with this qualification, to-wit: "But if the plaintiff was in the employment of the Georgia Railroad, and engaged in the business of that road for its benefit, and paid by that road for his services, the fact that he, during that trip, was subject to the orders of defendant, or its officers, and the fact that defendant paid the Georgia Railroad for said services, would not constitute plaintiff the servant of defendant in such sense as would bar his right to recover for injuries he received by the gross neglect and misconduct of the officers or employees of defendant, committed by them in the service of defendant.

To which charge counsel for defendant excepted.

The Court, amongst other things, further charged the jury, that to entitle plaintiff to recover, it was not necessary for him to prove any specific pecuniary damages, but that they could find such damages (if any) as under all the circumstances of the case, and the extent and nature of the injuries, they thought he was entitled to, but that they could not in this case give vindictive damages—counsel for defendant having requested him to charge that before plaintiff could recover, it was necessary for him to prove some pecuniary damages.

Cooper vs. Mullins.

To which charge and refusal to charge, counsel for defendant excepted.

The jury found for the plaintiff thirty-five hundred dollars. Whereupon counsel for defendant moved for a new trial on the grounds of error in the charges and refusals to charge as above stated, and because the verdict was contrary to law and the evidence, and the damages found thereby excessive.

The Court overruled the motion for a new trial, and counsel for defendant excepted and assigns said refusal as error.

GLENN & COOPER, and BLECKLEY, for plaintiff in error.

J. M. CALHOUN & WM. EZZARD, *contra*.

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

1. The general rule is, that whoever is injured by the negligence of a servant in his master's business, is entitled to redress from the master. The railroad, in this case, claims an exception against other servants of the same master. Such an exception has been recognized in some modern cases, but when confined within the reason on which it is founded, it can have no application to this case. That reason is one of public policy to secure to the public a more faithful service from employees on railroads, steamboats and other branches of business wherein the safety and property of the public are involved, by making it the interest of each one of such employees to look after and encourage the carefulness and fidelity of all the rest. This reason can have no application to employees whose situations allow them no connective influence over each other. The exception operates as a penalty, and to impose the penalty when there is no opportunity of exercising that supervising care which it is intended to enforce, is sheer cruelty. In the case of *Scudder vs. Woodbridge*, 1 *Ga. Rep.*, 195, this Court held that the exception did not extend to *slaves*, because slaves from their *status* were incapable of influencing their associate employees towards fidelity and care in the common business. Nor can it be extended to other employees who from *any cause* are not in a situation to exert such an influence on their fellows. It follows, therefore, that the cases to which this exception applies, are only those where the servant receiving the injury is en-

Cooper vs. Mullins.

gaged with the servant inflicting it, in a common business where he has an opportunity to exercise a preventive care over his negligence. // In this case the person whose negligence produced the injury was on one train of cars, and the person who was injured was on *another train*, and had not the slightest possible opportunity of preventing the other's carelessness. To hold the employees on different trains of cars responsible for the carefulness of each other seems to me about as reasonable as it would be to exact such a mutual responsibility between employees on different railroads, or in different quarters of the earth, because they might happen to be all servants of the same master. The reason of the exception is to make each employee a help to the carefulness of the rest, and where that object cannot be accomplished, the exception ought to cease, and the general rule of giving redress against the master to everybody who may be injured by the negligence of his servant in the performance of his business ought to prevail. But it is not even true that the two employees in this case were servants of the same master. The argument of the case mainly turned on this point, and therefore I will devote a few words to it, though notice of it is rendered unnecessary by the preceding view. One of the engineers was in the pay of the Western and Atlantic Railroad, and the other, Mullins, who was injured, was in the pay of the Georgia Railroad, and at the very time when he was hurt was doing a job for which the Georgia Railroad, and not himself, was to receive pay from the other road. The Georgia Road furnished to the other an engine and engineer, that is to say, a team and driver for a single occasion.

Whose servant was that driver? In the case of *Laugher vs. Pointer*, 5 *Barn & Cressw.*, 547, a stable-keeper had hired a team and driver to another person for a day, and the question was, whose servant was the driver? The Court of King's Bench were equally divided, but Judge Story, in a note to sec. 4536, of his work on agency, says that all the subsequent cases have followed the opinion of those who held that the driver was the servant of him who had furnished him, and in whose pay he was, and not of him who had him but for a single occasion, who had no part in selecting him, and who was under no obligation to pay him. The parallel between that case and this seems to be complete. For these reasons a majority of the Court think that the doctrine relating to

Cooper vs. Mullins.

servants of the same master is not applicable to this case, and that the charge asked on it might have been refused instead of being merely modified as it was by the Judge.

2. The errors assigned upon the refusal of the Judge to charge that some *pecuniary* damage must be proven, and upon the excessiveness of the damages found, may be considered together, for the same view covers both. Surely, there ought to be some compensation for the *suffering* endured. The pain from the wounds must have been great, and the dread of the approaching collision between the two engines, though brief, must have been terrible. Mental agony has been known to turn a head gray in a night, and gray hairs are often but the effervescence of some great mental anguish. Shall all compensation be denied to such suffering merely because there can be no adequate compensation? We think not.

3. The ground that the verdict was contrary to the evidence rests upon its conflict with the testimony of Cole, tending to show that the accident was caused partly by negligence of the plaintiff himself. The engine which was in the wrong place had been put there by Cole's order, and he therefore testified under a strong motive to lighten the blame in that quarter and fix it upon Mullins. He made certain *signs* to Mullins, and Mullins made signs back to him, and the only important part of his testimony consists of the conclusions which he drew from Mullins' signs, as to the information which Mullins had got from his signs. Is it wonderful that the jury did not place implicit reliance upon such conclusions of a witness so situated?

Judgment affirmed.

WILKINSON vs. JEFFERS & COTHRANS.

1. Where a negotiable note is transferred as collateral security after maturity, the legal title is vested in the holder, and a set-off against the payee is inadmissible as a defense to the action.

Complaint, in Coweta Superior Court. Tried before Judge HAMMOND, at September Term, 1859.

This was an action brought by Jeffers & Cothrans, as endorsees against Uriah B. Wilkinson, the maker, on a promissory note, of which the following is a copy :

"\$302 22-100. One day after date I promise to pay G. L. Anderson or order, three hundred and two (22-100) dollars, for value received. August 21st, 1857.

(Signed,)

"U. B. WILKINSON."

Endorsed: "G. L. ANDERSON, per J. H. Anderson, Attorney."

Defendant pleaded the general issue and payment, and further, "that the said G. L. Anderson, the payee of said promissory note, transferred said note to the plaintiffs long after said note had become due and payable, and that the said payee transferred said note to plaintiffs as collateral security only, who received it as such security, and not in the usual course of trade, and at the time plaintiffs received said note, the payee thereof was, and still is, indebted to defendant a large sum of money, to-wit: the sum of five hundred dollars, for one thousand bushels of wheat sold and delivered to said payee at his request by defendant, before said note became due, and after said note became due, and this the defendant is ready to verify," etc.

To which said last plea plaintiffs demurred, and after argument, the Court sustained the demurrer, and ordered the plea to be stricken. To which decision counsel for defendant excepted.

Y. J. LONG, M. KENDRICK and JOHN ERSKINE, for plaintiff in error.

SAMUEL FREEMAN, *contra*.

The Mayor and Council of Rome vs. Jenkins.

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

The only question in this case is, whether a negotiable note being transferred by the payee, as collateral security, after maturity, the maker can plead a set-off against the payee, to an action at the instance of the holder?

The point has been fully and satisfactorily discussed upon the cases. And while it is true that there is a conflict of authority both in England and in this country, the better opinion seems to be, that the defense is not admissible; and such has been the uniform tenor of the decisions in this State. *Story on Prom. Notes*, sec. 186-195 and note; *Chitty on Bills*, 74; 3 *Burrow*, 1663; 2 *Kelly*, 92; 3 *ib.*, 47; 4 *ib.*, 428; 18 *Ga. Rep.*, 650; 22 *Ga. Rep.*, 246; 27 *Ga. Rep.*, 20; *Wheaton's Sel. Vol.* 132; *Chitty on Bills*, 5-226; *Story on Prom. Notes*, 178; 5 *Cowen*, 231; *Creswell*, 558; 3 *Vermont*, 540; *Swift vs. Tyson*, 16 *Peters*, 1; 20 *Hon. C. 5 Rep.*, 243; 6 *Cush. Rep.*, 469; *Story on Bills*, 192; 8 *Metcalf*, 40; 3 *Cush. Rep.*, 162; 20 *Vermont*, 569.

The legal title to the note is vested by the transfer in the holder, and notwithstanding the paper be over due, no equity can be set up outside the contract itself.

THE MAYOR AND COUNCIL OF THE CITY OF ROME vs. JAMES P. PERKINS.

1. The owner of land is entitled to just compensation before it can be taken for public use; if he see fit to waive his right and sell for the value of the property thus seized and appropriated, he can do so.

Complainant in Floyd Superior Court. Tried before Judge HAMMOND, at the January Term, 1860.

This was an action by the defendant in error, who was plaintiff in the Court below, against the Mayor and Council of the City of Rome, to recover compensation for certain

The Mayor and Council of Rome *vs.* Jenkins.

lands belonging to plaintiff, which had been seized upon and appropriated by defendant for a public street in the city of Rome.

The defendant moved to dismiss the action upon the ground, that the same could not be maintained upon the allegations contained in plaintiff's declaration.

The Court overruled the motion and defendant excepted.

The testimony being closed, the jury found for the plaintiff \$285 00. Whereupon, defendant moved for a new trial on the grounds:

1st. Because the Court erred in not dismissing said action.

2d. Because the verdict was against the evidence.

3d. Because the verdict was against the law.

The Court refused the motion for a new trial, and defendant excepted, and assigns as error said refusal.

R. D. HARVEY, represented by LESTER, for the plaintiff in error.

WRIGHT and SHROPSHIRE, represented by BUCHANAN, *contra.*

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

The Mayor and Council of Rome having seized and appropriated a portion of the real estate of the defendant in the city to a public street, the action is brought to recover of the corporation the value of the property thus taken. The jury found two hundred and eighty-five dollars for the plaintiff, Perkins.

A motion was made and overruled before the case was submitted to the jury, to dismiss the action. No exceptions was taken at the time to the decision; but this is made one of the grounds for setting aside the verdict and arresting the judgment.

We think this objection, if good at all, came too late after verdict.

The landholder, instead of enjoining the corporation from taking his property before just compensation was made, or suing in trespass, brings his action to recover its value. If he is content to take this course, we do not see that the pub-

Kirksey vs. Kirksey.

lie can object. We shall require the plaintiff to execute and file the necessary release, to avoid all future misunderstanding.

The testimony was conflicting. The jury have found the land to belong to the plaintiff, and we cannot say that their verdict is strongly and decidedly against the weight of evidence.

KIRKSEY *vs.* KIRKSEY.

1. If a wife, by bill, sets up an ante-nuptial agreement by parol for the settlement of property, which is admitted by the husband, and the Statute of Frauds is not insisted upon, equity will decree a specific performance.

In Equity, in Clayton Superior Court. Decision on demurrer by Judge BULL, at November Term, 1859.

This was a bill filed by Mary Kirksey, (by her next friend) against Elisha H. Kirksey, her husband, Jesse L. Blalock and others, and its object was to set up an ante-nuptial verbal agreement between complainant and the said Elijah H. relative to the property owned by her prior to their marriage, and which she might subsequently acquire. The marriage occurred about June, 1857. The bill further seeks to set aside and have declared void a certain deed of gift executed by said Mary in favor of her children by a former marriage, of a negro girl and 100 acres of land ; this deed was executed just prior to her marriage with Kirksey, and which she executed when sick, upon the representation of her two sons, John F. and James H. Waldrop, that said paper was a will. The bill further seeks to set aside and annul a certain bill of sale executed by her husband, the said Elisha H., to Jesse L. Blalock, of the negro girl Suse, owned by complainant before her marriage with Kirksey, and which negro has been detained or taken into the possession of Blalock.

Defendants demurred to the bill for want of equity. The Court sustained the demurrer, on the ground that the ante-

Kirksey vs. Kirksey.

nuptial parol agreement sought to be set up and enforced is within the statute of frauds, and that marriage is not such a part performance as takes the case out of the statute, and dismissed the bill.

To which decision counsel for complainant excepts.

NORTON, GREEN & STEWART, for plaintiff in error.

HILL & CONNER, *contra*.

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

We are clear that this bill ought to be answered. If the husband confesses the ante-nuptial agreement and does not insist upon the statute of frauds in bar of its execution, there will be no obstacle in the way of decreeing its performance. And the case made by the bill and admitted by the demurrer of the other three defendants, sternly demands the interference of a Court of Equity.

True, the husband might voluntarily make a conveyance and invest the trustee of his wife with power to institute proceedings against the other parties to recover the property. But it is better in the end to settle the whole matter in the present proceeding.

Woodruff vs. McGehee.

WOODRUFF vs. McGEHEE.

1. When an agent makes a contract for his principal, but conceals the fact that he is an agent, contracting as if he were principal, the principal may at any time appear in his true character, and claim all the benefits of the contract from the other contracting party, so far as he can do so without injury to that other by the substitution of himself for his agent.

Action for Breach of Warranty and Non-suit, in Troup Superior Court. Decision by Judge BULL, at November Term, 1859.

This was an action brought by Michael Woodruff against John W. McGehee, to recover damages for the breach of a warranty of soundness of a horse sold by defendant to plaintiff. The declaration alleged that plaintiff purchased the horse, by his agent, William M. Lee, for the sum of two hundred dollars, and that defendant warranted said horse to be sound, whereas he was unsound and of no value.

Preliminary to the introduction of the paper or receipt containing the warranty, plaintiff read the answer of James N. Bethune to interrogatories, who deposed that "the purchase of the horse was made by Wm. M. Lee for Woodruff." Also, the answer of W. H. Griswold, as follows: "I do know of a horse purchased by Wm. M. Lee for plaintiff from defendant. Wm. M. Lee, as before said, purchased the horse for plaintiff at his request, Lee having engaged in the horse business, and being, as Woodruff thought, a judge of horses." Plaintiff further proved that the horse purchased by him as aforesaid was a sorrel horse. He then offered in evidence the following paper containing the warranty relied on, viz:

COLUMBUS, GA., April 1, 1857.

"Received of Wm. M. Lee, two hundred dollars for a sorrel horse, which I warrant sound on delivery.

(Signed)

JOHN W. McGEHEE."

To the introduction and reading of which in evidence counsel for defendant objected. After argument, the Court sustained the objection, and excluded the paper, and plaintiff excepted and assigns said ruling as error.

J. H. Goss, for plaintiff in error.

B. H. BIGHAM, *contra*.

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

The only reason assigned for the rejection of this warranty, is that it is made to the agent, the principal not being known in the transaction. But the authorities are express that the principal may claim all his rights, though not at first known, just as if he had been known, with the single limitation that the other party shall not lose any right which he would have against the agent if the agent were principal as he had first been supposed to be. *See Story on Agency, sec. 418.* The reason of the doctrine is, that it is but just that every man should have what really, though secretly, belongs to him, so far as he can obtain it *without injuring another* by appearing in his true character of owner. We think the action is maintainable in the name of the before unknown principal, and that the evidence ought to have been admitted. Judgment reversed.

STEPHENSON vs. CAMPBELL.

1. Process of garnishment must be issued by a magistrate who is qualified to issue an attachment, and such process issued by any other person is void and cannot be the foundation of a valid judgment.

Garnishment, in Meriwether Superior Court. Decision by Judge BULL, at August Term, 1859.

James L. Stephenson instituted his action of complaint respectively against James Renfroe and James W. Renfroe, returnable to the February Term, 1858, of Meriwether Superior Court, and on the same day before David Ellis, a Justice of the Inferior Court, he made affidavits that he apprehended

Stephenson vs. Campbell.

the loss of said debts, or some part thereof, unless summons of garnishment issued. He gave the bond and security required by law in such cases, and the same with the affidavits were filed in the Clerk's office, and the sheriff notified that Catlett Campbell was the person to be garnisheed. On the same day, to-wit: 1st Dec., 1857, the Clerk gave the certificate required by law, and handed the same, together with a copy of the affidavit, to the sheriff, who attached them to a summons of garnishment, for said Campbell to appear at the February Term, 1858, and answer upon oath what effects of defendants he had in hand, or had at the time of service; said summons was signed by John S. Blalock, sheriff of said county, and upon it was the following entry, "Served Catlett Campbell with a copy of the within personally, this 1st December, 1857." Said Campbell refused to answer at the February Term of said Court. At the August Term, 1858, judgments went against defendants, and Campbell still failing to answer, on the last day of said term the usual order was taken to enter judgment against him; the judgment not having been entered at that term, at the February Term, 1858, an order was taken to enter judgment *nunc pro tunc*. At the August Term, 1859, a motion was made to set aside said judgment upon the grounds that the affidavits did not allege that deponent had reason to apprehend the loss, etc., and because the summonses of garnishment were illegally issued, the same having been signed and issued by the sheriff instead of by the Justices of the Inferior Court. Plaintiff insisted that the affidavit was in compliance with the statute, and that it was too late, after judgment, for the garnishee to come in and plead any matter going to show that the proceedings were irregular or illegal.

The Court after argument granted the motion and set aside said judgment, on the ground that the summonses of garnishment should have been issued by the Justice; and the sheriff having no authority to issue the same, the garnishee was not bound to answer or notice it.

To which decision counsel for plaintiff excepts.

HINTON & BULL for plaintiff in error.

GEO. A. HALL, *contra*.

Myrick vs. Vineburgh.

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

We think this judgment against the garnishee was properly held to be void, for the reason that there had never been any legal process against the garnishee. There cannot be a valid judgment without process. The process in this case was issued and signed by the sheriff. The Act of 1856, see page 36 of the Acts of that year, provides that process of garnishment shall be issued by a *magistrate* who is capable of issuing an attachment, and makes *no other* provision for process of garnishment. The Act then concludes by *repealing* all other Acts and parts of Acts in relation to attachments and garnishments. Therefore, the provision in the Act of 1856, is the *only* provision for process of garnishment, and any process not in conformity with that provision, is without law, and is no process at all.

Judgment affirmed.

MYRICK vs. VINEBURGH.

1. The evil which our statutes against manumission were intended to prevent is not a reduction of the number of slaves, but an increase of the free negroes within the State—hence, an instrument providing for manumission outside of the State is not within the statutes.
2. The Supreme Court being a Court of review only, will not hear, in support of a plea, evidence which was not before the Court below.

Motion to set aside and revoke Probate of Will, and Caveat thereto, in Monroe Superior Court. Decision by Judge CABANISS, at February Term, 1859.

At the instance of Septimius Myrick, an heir at law of Nathaniel T. Myrick, deceased, a rule *nisi* issued from the Court of Ordinary of Monroe county, calling upon Isaac Vineburgh and Benj. F. Ward, the executors of the last will and testament of said Nathaniel T., to show cause why their letters testamentary should not be revoked, the probate of

Myrick vs. Vineburgh.

said will set aside, and said last will and testament declared void, upon the following grounds, viz :

1st. Because said will is illegal and void, being an attempt to manumit and set free certain slaves therein named, contrary to the statutes of the State of Georgia in such cases made and provided.

2d. Because so much of said will as attempts to give certain slaves, therein named, the property of deceased is illegal and void.

3d. Because the bequests to Isaac Vineburgh and Benj. F. Ward are void, being contrary to law.

At the December Term, 1858, of the said Court of Ordinary, the said executors appeared, and in answer to the said rule say—

1st. That said will was duly executed by said Nathaniel T. Myrick, deceased, in his lifetime, and does not contravene any law of this State in any of its provisions, and that the same is a good and valid disposition of the estate of deceased.

2d. And said executors further say, that they have heretofore, and before the granting of said rule *nisi*, at the instance of said Septimius Myrick, and all the other heirs at law, and next of kin of said Nathaniel T. Myrick, deceased, to-wit: At the December Term, 1856, of said Court of Ordinary, and at the August Term, 1857, of the Superior Court of said county, said cause being on the appeal from the Court of Ordinary in said Superior Court, duly proved said last will and testament in solemn form of law, and upon the evidence then and there submitted on said appeal, the jury empannelled to try said cause, found said paper propounded to be the last will and testament of said Nathaniel T. Myrick, which finding was afterwards, upon a bill of exceptions, affirmed by the Supreme Court of the State of Georgia, and in which all the grounds taken by movant in this rule, were taken and considered, and decided against the heirs at law. Of which proceedings, trials and judgments, the said Septimius had notice, and was a party to the same. And therefore said respondents plead said former proceedings and judgments in bar to this proceeding, and in bar of any further showing on their part, and ask the judgment of the Court whether they shall be required again to prove in solemn form said last will and testament of said Nathaniel T. Myrick, deceased.

Myrick vs. Vineburgh.

The Court, after argument, overruled each and all the grounds taken in said rule, and dismissed the same.

To which decision counsel for Septimius Myrick excepted, and assigned the same as error.

BLANFORD & CRAWFORD, for plaintiff in error.

PRICHARD, represented by TRIPPE & PEEPLES, *contra*.

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

1. This will directs certain negroes of the testator to be removed to some free State, *and there* manumitted; and that certain property shall be *there* bought for them. This does not violate the policy of our statutes against manumission, as that policy has been more than once expounded by this Court. The evil at which those statutes strike, is manumission *within this State*; the design was not to prevent the reduction of slaves, but to prevent an increase of free negroes in the State. If the testator takes care, first to get his negroes out of our way, he may do what he pleases with them after that. If the will gives the slave his freedom to be enjoyed but for one hour within the limits of Georgia, it is void; but if, with an honest intent to put him out of our way and keep him there, *it carries him over the State line as a slave*, it may make what it pleases of him afterwards. We think the Court was right in sustaining this will.

2. It may not be amiss to remark, that the defendants here who are the propounders of the will, cannot avail themselves of the former judgment, *now*, for the reason that they did not produce it in the Court below. They pleaded it in the Court below, but the bill of exceptions does not inform us that they produced it in evidence. That plea was a naked one, unsupported by evidence, and the evidence cannot now be heard in this Court. This Court is one of *review*.

Judgment affirmed.

King vs. Mitchell.

KING vs. MITCHELL.

1. A paper which merely acknowledges the reception by one person of a promissory note from another, is not a contract, and does not exclude foul evidence, showing the contract under which the note passed from the one to the other.

Assumpsit, in Floyd Superior Court. Tried before Judge HAMMOND, at January Term, 1860.

This was an action brought by Joshua King against Daniel R. Mitchell, Esq., an attorney-at-law, for recovery of damages for neglect of duty in failing to collect a note which plaintiff had put into his hands for collection.

On the trial of the case, the plaintiff introduced in evidence a receipt, of which the following is a copy, to-wit:

“ROME, January 8, 1857.

“Received of Joshua King, per A. J. Bearden, a note on John M. Phinizy, dated 12th of December, 1856, due thirty days after date, for four hundred dollars.

“D. R. MITCHELL.”

It also appeared from the testimony that the note mentioned in the receipt was sued on by Mitchell & Harris, (who were law-partners,) on the 9th of April, 1857, in Floyd Inferior Court, and that judgment was obtained on the note, at the November Term, 1857, of said Inferior Court; that a *fi. fa.* issued from the judgment, which was returned *nulla bona*, on the 6th of April, 1858; that all the *fi. fas.* against Phinizy, which were obtained at the August Term, 1857, of Floyd Superior Court, were paid off by a sale of Phinizy's property by the sheriff.

There was a good deal of other testimony introduced, the object of which was to show that, if the note for which the receipt was given had been sued on to the Superior, instead of the Inferior Court of Floyd county, the money due on the note could have been collected, and that the plaintiff had, therefore, lost his money by the negligence of the defendant, Mitchell.

Pending the trial, the plaintiff proposed to prove by A. J. Bearden, that the note was given to D. R. Mitchell, as an

King vs. Mitchell.

attorney at law, for collection; and that it was received by said Mitchell for that purpose. To the introduction of which evidence the said defendant objected, and the Court sustained the objection and repelled said evidence, to which decision plaintiff, by his counsel, excepted. Plaintiff then proposed to prove by A. J. Bearden, that he, as the agent of the plaintiff, when he gave said note to the defendant, instructed him to bring suit on said note, and in no case to let return day to the next Superior Court pass. The Court sustained the objection to, and ruled out said evidence, and the plaintiff, by his counsel, excepted.

When the testimony had closed:

The Court charged the jury, that the receipt offered in evidence by the plaintiff imposed no obligation on defendant to collect said note, or to bring suit on the same, and the plaintiff cannot, by parol evidence, vary or add to the terms of the receipt; and it is necessary in order to charge the defendant in this case, for the plaintiff to show that defendant received said note as an attorney at law, for the purpose of collecting it, and that he neglected to comply with his agreement. If the jury believed that the defendant did receive said note for collection, and by his negligence the debt was lost, then the defendant is responsible, and not otherwise. The measure of damages is the loss sustained by defendant's neglect, if the jury should believe that defendant has been guilty of neglect.

The jury returned a verdict for the defendant; and the plaintiff, during the regular term of said Court, moved for a new trial on the following grounds, to-wit:

1st. Because the verdict is contrary to law.

2d. Because the verdict is strongly and decidedly against the weight of evidence.

3d. Because the Court erred in refusing to permit the plaintiff to prove by A. J. Bearden, that the receipt offered in evidence was given by the defendant as an attorney at law for a note given for collection.

4th. Because the Court erred in refusing to permit plaintiff to prove by A. J. Bearden, that he, as the agent of Dr. King, instructed the defendant, when he gave him the note, to bring suit on said note at the first term of Floyd Superior Court, and in no case to let return day pass without suit.

King vs. Mitchell.

After argument had, the Court overruled the motion on all the grounds taken, and the plaintiff excepted, and says that the Court erred in not granting the new trial on all the grounds taken on said motion, and plaintiff further says that the Court erred in charging the jury, that the receipt offered in evidence created no legal obligation to collect said note or bring suit on the same.

SHROPSHIRE, PRINTUP and TERHUNE, for the plaintiff in error.

UNDERWOOD, *contra*.

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

The plaintiff introduced in evidence a paper signed by the defendant, acknowledging that the defendant had received from the plaintiff a promissory note on a third person, but silent as to the reason why, or the purpose for which, the possession of the note had been changed from the one to the other. The plaintiff then offered to prove by a witness that the defendant, who was an attorney at law, received the note for the purpose of collecting it for the plaintiff, and with instructions to sue on it immediately. On objection by the defendant, the Court rejected the testimony upon the ground, that parol evidence was not admissible to enlarge the terms of the receipt, he holding that the receipt itself imposed no obligation to collect the note. We think this is an erroneous view of the receipt. It is not a contract, for it does not express any undertaking on either side. It is merely an acknowledgment of a *fact*, that the property of the note was in the plaintiff. From that one fact, it follows, that he had a right to do what he pleased with it, and that the defendant, who took it, was bound to pursue his instructions concerning it, or if he were unwilling to do so, then to return it to him. The *legal effect* of the receipt itself was an undertaking by the defendant, to hold the note subject to plaintiff's order, so long as he should hold it at all. Of course, it was competent for the plaintiff to show what orders he had given.

Judgment reversed.

WILLIS *et al.*, vs. JENKINS.

1. The ordinary popular and legal sense of the word "children," embraces only the first generation of offspring; and for it to be extended further, there must either be something in the context showing that a larger signification is intended, or the person using it must know that there neither then is, nor can afterwards be, any person to whom the term can be applied in its appropriate sense.
2. A will cannot be reformed by making additions to it, because the whole will must be in writing *ab origine*.

Bill in Equity, in Pike Superior Court. Demurrer sustained by Judge CABANISS, at Chambers, 1st of February, 1860.

This was a bill brought by the children of Sarah Willis, deceased, against the executor of her father John Jenkins, deceased, for the recovery of a residuary legacy contained in the 6th item of the will, in these words: "All the rest of my estate, not herein specially disposed of, real as well as personal, I give to my beloved wife, Polly, during her life and the continuance of her widowhood, and after her death, the land I now live on, in the county of Pike, to go to my son, John R. Jenkins and his heirs forever, and the rest of my estate, real and personal, to be equally divided according to valuation, among such of my children (sons and daughters) as may, at the death of my wife, be in life." Mrs. Willis, the mother of complainants, and daughter of the testator, died before her father. The widow survived the testator. The complainants claimed on two grounds: 1st. That under the words as they stand, they were entitled to what would have been their mother's share, if she had been in life at the death of the testator's wife; and 2d. That the legal effect of the words, as they stand, had been mistaken by the testator, he having intended to give, and supposing that he had used such words as did give to the complainants what would have been their mother's share, if she had survived the widow. The prayer of the bill was accordingly in the alternative. That their construction of the words used might be decreed, or that failing, then that the will should be so reformed as to express the true intention of the testator. A general de-

Willis *et al.*, vs. Jenkins.

murrer to this bill was sustained by the Judge, and that decision is excepted to and assigned as error.

GREENE & STEWART, for plaintiff in error.

GIBSON & MOORE, *contra*.

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

1. We think that these complainants are clearly not entitled to anything under this will, as it stands. The clause under which they claim, is to *such children (sons and daughters)* of the testator as shall be *in life at the death of his widow*. The mother of these complainants, Mrs. Willis, was a child, of the testator, but she was *not* in life at the death of his widow. She therefore took nothing, and they cannot get anything through her. It is equally clear that they cannot take in their own right. For them to do so, they must be embraced in the description of "children—sons and daughters" of the testator; but they are not his children—sons and daughters, but only grand children—grand sons and grand daughters. There is no rule of law which can make the term "children" in this case cover grand children. The word child has neither a popular nor a legal technical signification which includes grand child. Both in popular and in legal parlance, it embraces only the first generation of offspring. It can acquire a more extensive meaning only from the context in which it occurs, or from its use in a case where the person using it must know that there neither then is, nor can afterwards be, any person within the first generation to whom it can be applied. 1. *Jarman on Wills*, 52. In this case the context indicates rather its strict sense than an enlarged one, for it gives "children" the additional description of "sons and daughters." The context, instead of changing the usual sense of the word, confirms it. Nor is there an absence of objects who fall within the usual meaning of the word. There were, when the will was written, and there have been every day since, a number of persons answering the description of "children," in the usual and correct sense of the term. There was not a single reason suggested why grand children should be embraced in this case, except the hardship of leaving them out. That is not a legal reason,

Willis *et al.*, vs. Jenkins.

and if it were, it is counterbalanced by the hardship of letting them in. The will is express that the division among these "children" (whoever they may be, whether "sons and daughters" only, or these, together with grand children,) shall be an *equal* one. Each one who takes at all, takes as much as any other one; that is to say, each grand child would take as much as any child would, if grand children are to take at all. To put grand children, as a class, on the same footing with children, would scarcely be less unnatural than the exclusion of grand children altogether. The words of this will are so specific and so appropriate that they cannot possibly be made to extend to grand children.

2. Can this will be reformed by striking out and inserting? We think not. There is no doubt that on a different issue, to-wit: the issue of *devisavit vel non*, and parts of the propounded paper to which the testator had not assented, ought to be rejected; but to allow the insertion of anything into it, upon *parol proof*, would be to set aside the law which requires the will—the whole will—to be in writing. I know that *contracts* which are within the Statute of Frauds are allowed to be reformed by inserting such things as may have been omitted from the writing, through fraud, mistake or accident; but contracts and wills are placed on very different footings by that statute. Wills must be wholly in writing *ab origine*; contracts need not be. In the case of contracts, the statute, carefully distinguishing between the whole, and less than the whole, accepts less as sufficient, for its requirement is in the alternative; the "agreement, or some *note* or *memorandum* thereof" must be in writing. The mere jottings of a memorandum will satisfy the statute and put it out of the way. It is true, the Courts have then to cope with the rule which excludes *parol* evidence when offered to vary or add to the writing; but this rule they hold to be inapplicable to a writing which has been prevented from being what the parties intended it to be, by fraud, mistake or accident. This *rule* is as little in the way of reforming a will as of reforming a contract. In either case, the rule offers no obstruction to the reformation of the writing so as to make it what it was intended to be, whenever the failure to have it so from the beginning has resulted from fraud, mistake or accident. So far as this rule is concerned, contracts and wills are equally effected by it. But the statute affects the

Camp vs. Matheson & O'Harra *et al.*

two very differently. Under the conjoint operation of the rule and the statute, the doctrine with respect to contracts is, that if the parties leave a written vestige, this may serve as a skeleton on which *parol* evidence can hang such lacking components of the perfect form as may have been withheld by fraud, mistake or accident. But not so with a will. The statute demands that the whole of it shall be in writing. This view is strongly presented by Mr. *Jarman*, in his treatise on *Wills*, 1 vol., page 349.

Judgment affirmed.

CAMP vs. MATHESON & O'HARRA *et al.*

1. When a bill is presented to the Judge, praying an injunction, and it appears upon its face that the complainant has ample redress at law; and especially if the statements are inconsistent and contradictory, it is the duty of the Judge to refuse his sanction.

In Equity, in Butts Superior Court. Decision by Judge CABANISS, at Chambers, 10th September, 1859.

This was a bill by Nathan F. Camp, against Matheson & O'Harra and others, creditors of complainants, for an injunction to restrain defendants from selling and disposing of certain goods, or a remnant of a stock of goods, bought by defendants, through their agent, from the complainant, and by him turned over and delivered to them in payment and satisfaction of their claims against him; and further, to enjoin them from dismissing their actions at law, pending for the recovery of those claims, and from transferring said claims.

Judge Cabaniss, to whom the bill was presented for his sanction, and for an order for the injunction prayed, refused the same, and passed the following order:

"In Chambers, Sept. 18th, 1859. The injunction prayed for in the within bill is refused, on the grounds that there is no equity in the bill to authorise an order and prevent the plaintiffs in the common law actions from dismissing their

Camp vs. Matheson & O'Harra *et al.*

suits if they see proper to do so ; nor to authorise an order for the arrest of defendants, and to stop the sale of the goods which have been turned over to the agent of defendants to pay their demands against complainant ; and further, it is refused because the 9th rule in equity has not been complied with."

To which refusal to grant the injunction prayed for, counsel for complainant excepted, and assigns as error said refusal.

The facts stated in the bill, and relied upon as constituting its equity and grounds for the injunction, are sufficiently recited and set out in the following opinion of the Court.

L. T. DOYAL, for plaintiff in error.

J. J. FLOYD, *contra*.

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

This is the second time this case has been before this Court, and whether we look to the bill alone, or to the bill and the agreement which is appended, we see nothing to require the interposition of a Court of Equity.

The case is simply this : In 1836, the complainant, who was a merchant, found himself in failing circumstances. He owed debts in New York and Charleston to a large amount ; and besides these, there were others which had already gone into judgment against him in Butts county. A Mr. Alamong presents himself as the agent of the city debts, amounting to \$5,095 25. Suits had already been brought up on a portion of these claims. He entered into a contract with Mr. Camp to take his stock of goods for the demands which he held. It was further stipulated that if the goods, or any part of them, should be seized and sold by the outstanding judgments, in that event the suits then pending at the instance of the city creditors were to proceed to judgment and be enforced against any other property belonging to the defendant to cover any loss resulting from the appropriation of the goods to the judgments then outstanding against the complainant. This was the contract.

In the bill presented to the Judge, and refused by him, it is alleged that these old *fi. fas.* have been satisfied out of other property belonging to Camp. Very well. This is just

Camp vs. Matheson & O'Harra et al.

what should have been done. He asks that the defendants may be enjoined from prosecuting their actions against him. He does not pretend that they are attempting or even threatening to do so. Suppose they did: he can show that they are paid off by the sale of his stock of goods. He further prays that they may be restrained from dismissing their suits; that is, that they may neither go forwards nor backwards, on nor off with their suits. For aught that appears or is insinuated, they are standing perfectly still. But why not dismiss these cases, provided they are discharged and the agreement annexed to the bill shows that they are paid? If retained under these circumstances, they would furnish no pretext for the Court in Butts county to take jurisdiction over these non-residents; and this is the object for which they are sought to be retained.

The complainant further prays, that the defendants may be prevented from transferring his paper to third persons. What if they did? He will be entitled to the same defense against this overdue, dishonored and discharged paper in the hands of third persons, with or without notice, as if sought to be enforced by the original payees. He prays the Court to stop them from selling the goods. Wherefore? Have they not bought and paid for them? But suppose they have not: how can it be ascertained how balances stand until the goods are sold? What profit will it be to any one to have them consumed by moth and rust?

He avers that a fraud was practised upon him by Alamong in this: that he represented that he had deposited cash to take up the outstanding judgments. But how is this statement reconcilable with the fact, that the complainant stipulated expressly that they were to be paid out of his property? And that if they were not, and the goods had to be taken for that purpose, Alamong was to carry his cases to judgment and collect them out of the defendant?

He claims an accounting, and that if the claims against him were bought at a depreciation, that he may be allowed the benefit of it. But how can this be, when the agreement shows that he made an absolute sale of his stock of goods to pay these claims?

We hold the Court did right to refuse the injunction.

Askew vs. Dupree.

ASKEW vs. DUPREE.

1. Notwithstanding the statute directs a license to issue in case of marriage, and inflicts a penalty upon any minister of the gospel or magistrate who performs the ceremony without such license; yet in the absence of any positive enactment declaring that all marriages not celebrated in the forms prescribed shall be void, a marriage deliberately and intentionally entered into—*per verbi de presenti*—that is, "I take you to be my wife," and, "I take you to be my husband"—by parties able to contract, is to all intents and purposes a valid marriage, notwithstanding the parties have failed to comply with the statutory provisions.

In Equity, in Pike Superior Court. Decision by Judge CABANISS, November Term, 1859.

James F. Dupree and his wife, Uriah E. Dupree, filed their bill in equity against Uriah Askew, for an account of the estate of Mrs. Dupree in defendant's hands, as her guardian, and also to recover the remainder of her distributive share of the estate of her deceased father, in the hands of defendant, as administrator. The bill alleged the marriage of complainants, and the right thereby of said James F., by virtue of said marriage to recover and receive the estate and amount belonging to and due his wife.

To this bill the defendant pleaded in abatement, that complainants were not man and wife, and they were misjoined as complainants. That they were never lawfully married; that the pretended marriage between them was solemnized by A. Buckner, as a Minister of the Gospel, but that said Buckner was not at the time of the solemnization of said pretended marriage, a Minister of the Gospel of any christian order or denomination, and was not clothed with any ministerial powers or functions, but had long before that time, to-wit: at the August Conference in the year 1855, of the Griffin Baptist Church, been deposed from the ministry of said church, and his credentials as such surrendered, cancelled and revoked, and said Buckner excommunicated from said church, by means whereof he became and was totally disqualified to perform marriage rites and ceremonies, and that said marriage was null and void.

To this plea complainants demurred. The Court sustained the demurrer, and held the plea insufficient in law.

Askew vs. Dupree.

To which decision counsel for defendant excepted, and assigned the same as an error.

It may be proper to add, that the marriage between complainants was solemnized 25th Dec., 1855, and that a marriage license had been taken out dated 24th Dec., 1855, and upon which was endorsed the following, viz :

"I certify that Mr. J. F. Dupree and Miss U. E. Askew were duly joined in matrimony by me, this 25th day of December, 1855.

(Signed,)

"A. BUCKNER, M. G."

GREEN & STEWART, for plaintiff in error.

PEEBLES & CABANISS, DOYAL & CAMPBELL, *contra*.

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

As an act of justice to the ability and research of Judge Cabaniss, I have determined to publish his opinion in this case without alteration or abridgement. It is entitled to be preserved in a permanent form, as a monument of the learning and industry of that most excellent man and magistrate.

Says the Judge :

"The bill is filed by James F. Dupree and his wife, Uriah E. Dupree, against Uriah Askew, to recover the amount due said Uriah E. Dupree from said Uriah Askew, as her guardian ; also, the remainder of her distributive share of the estate of her deceased father, now in the hands of the defendant as his administrator. The bill alleges the marriage of the complainants, and the consequent right of James F. Dupree, by virtue of their intermarriage, to recover and receive the amount due his wife.

"To this bill the defendant has filed a plea in abatement, and for cause of plea says that said bill of said complainants ought to be abated and dismissed, because he says that said complainants were not in terms of the law, in such cases made and provided, duly and legally married as set forth and alleged in said bill, and that the said James F. Dupree is not, and never has been legally the husband of the said Uriah E., and therefore is not entitled to have or maintain the said suit as co-complainant with the said Uriah E. for the re-

covery of any of the matters or things set forth in said bill. "And the defendant further says, that the pretended marriage between the said complainants, James F. Dupree and Uriah E. Askew, was pretended to have been solemnized by one A. Buckner, as a Minister of the Gospel, when he, the said Buckner, was not then and there a Minister of the Gospel of any christian order whatever, and was not in any way clothed with the power of ministerial ordination, but was long before that time, to-wit: at the August Conference in the year 1855, of the Griffin Baptist Church, required to render up to said church his credentials, as a Minister of the Gospel, which he then and there did, which said credentials were then and there cancelled, revoked and annulled, and the said A. Buckner then and there excommunicated from said church, by means whereof the said A. Buckner became, and was totally disqualified to perform marriage ceremonies. All of which matters and things the defendant doth aver to be true, and pleads the same in abatement of said bill, and demands the judgment of the Court, whether he ought to make any answer to said bill of complaint.

"To this plea the complainants have demurred, and the question for the determination of the Court is, admitting the facts set forth in the plea to be true, is the marriage of the complainants valid? Admitting that A. Buckner at the time he performed the marriage ceremony between James F. Dupree and Uriah E. Askew was deprived of his functions as a Minister of the Gospel, and was excommunicated from the church of which he had previously been a member, is the marriage of the parties valid and binding according to law? Do they legally bear and sustain to each other the relation of husband and wife? If yea, the complainant, James F. Dupree, has the right, by virtue of his intermarriage with Uriah E. Askew, to recover and receive whatever amount is due her from her guardian, and the administrator of her deceased father. If he has not been lawfully married to her, and is not her husband, he has no such right of recovery.

"The sole question, then, made by the plea and the demurrer thereto, is the validity of the marriage between the complainants.

"Another question which was discussed by counsel, both for complainants and defendants in the argument before the Court, viz: whether A. Buckner was a Minister of the Gospel

Askew vs. Dupree.

at the time he performed the marriage ceremony, is not legitimately made by the plea and demurrer.

"The plea alleges that he was deprived of his ministerial functions—was excommunicated from the church of which he had been a member; that he was required to surrender up his credentials as a Minister of the Gospel, which he did, and therefore they were cancelled, revoked and annulled. The demurrer admitting, these facts to be true, ends that question. According to facts admitted to be true, he was not then and there a Minister of the Gospel.

"His authority to act as a Minister of the Gospel was derived from the church of which he was a member at the time of his ordination, and when that authority was revoked and taken from him, he ceased to be a minister.

"Such are the facts alleged in the plea; their truth is admitted by the demurrer, and the conclusion follows as a matter of course.

"But the true question in this case, and one of no small magnitude and importance, is this: Is a marriage when the ceremony is performed by an unauthorized person, valid and binding in law?

"Let us, in the first place, ascertain the legal principles which are involved in this question. And the first, and the foundation of all the rest, is that marriage is a civil contract. It is so defined in all the elementary works, and in the two most generally approved and used in this country—Blackstone's and Kent's Commentaries; and it is so defined by Judges learned in the law in decisions pronounced by them.

"Sir William Scott who was not surpassed for learning and ability by any Judge who ever presided in any of the Courts in England, in one of his best considered and most elaborate opinions, *Dalrymple vs. Dalrymple*, 4 *Eng. Eccl. Rep.*, 485, has exhausted the learning on this subject. He says, 'Marriage, in its origin, is a contract of natural law'—'in civil society, it becomes a civil contract, regulated and prescribed by law, and endued with civil consequences.'

"Perhaps the most accurate definition of marriage is found in *Bishop on Marriage and Divorce*, sec. 29.

"The word marriage is used to signify either the act of entering into the marital condition, or the condition itself. In the latter and more frequent legal sense, it is a civil status, existing in one man and one woman, legally united for life

Askew vs. Dupree.

for those civil and social purposes, which are based in the distinction of sex. Its source is the law of nature whence it has flowed into the municipal laws of every civilized country, and into the general law of nations. And since it can exist only in pairs, and since no persons are compelled, but all who are capable are permitted to assume it, marriage may be said to proceed from a civil contract between one man and one woman of the needful physical and civil capacity.'

"Again, in sec. 31, he says: 'though marriage, in law writings is generally denominated a contract, yet it is said to be more than a contract, and to differ from all other contracts.'

"In accordance with this is Judge Story's view of marriage in his *Conflict of Laws*. In sec. 200, he says, 'Marriage is not treated as a mere contract between the parties, subject as to its continuance, dissolution and effects to their mere pleasure and intentions. But is treated as a civil institution, the most interesting and important in its nature of any in society.'

"Again, in a note to sec. 108, he says, 'I have throughout treated marriage as a contract in the common sense of the word, because this is the light in which it is ordinarily viewed by jurists, domestic as well as foreign. But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belongs to ordinary contracts.'

"That eminent jurist, whose opinion has already been quoted, in an elaborate judgment, rendered in the case of *Lindo vs. Belisano*, 4 *Eng. Eccl. Rep.*, 373, says, 'The opinions which have divided the world, or writers at least, on this subject, are generally two. It is held by some persons that marriage is a contract merely civil; by others, that it is a sacred, religious and spiritual contract, and only so to be considered. The jurisdiction of the Ecclesiastical Court was founded on ideas of this last described nature; but in a more correct view of this subject, I conceive that neither of these opinions is perfectly accurate. According to the juster notions of the nature of the marriage contract, it is not *merely* either a civil or religious contract; and at the present time, it is not to be considered as originally and simply one or the other. It is a contract according to the law of nature, antecedent to civil

Askew vs. Dupree.

institutions, and which may take place to all intents and purposes, wherever two persons of different sexes engage by mutual contract to live together.'

"Such is marriage and the marital relation. It is founded upon and grows out of a contract. In the next place, what is necessary to make a contract? As in all other contracts, the consent of the parties, for without that, there can be no contract; but when that is given, and mutually declared, the contract is made and the marriage relation supervenes, and no form of ceremony is prescribed by law to carry into effect the agreement of the parties.

"'It is not unworthy of remark,' says Sir William Scott, 'that amidst the manifold ritual provisions made by the Divine Law-giver of the Jews for various offenses, and transactions of life, there is no ceremony prescribed for the celebration of marriage.'

"And it is equally true that none is prescribed by the common law, or our statutes in relation to marriage.

"Marriage, then, in its inception, by the common law, is a civil contract founded on the consent of the parties.

"'Any mutual agreement between the parties to be husband and wife in *presenti*, especially where it is followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of either to contract matrimony?' *Rose vs. Clark*, 8 Paige, 574.

"Marriage being a contract, is of course consensual, for it is of the essence of all contracts to be constituted by the consent of both parties. *Consensus, non concubitas, faciat matrimonium*, the maxim of the Roman civil law, is, in truth, the maxim of all law upon the subject; for the *concubitas* may take place for the mere gratification of present appetite, without a view to any thing further; but a marriage must be something more; it must be an agreement of the parties, looking to the *consortium vita*; and agreement indeed of the parties capable of the *concubitas*, for though the *concubitas* itself will not constitute marriage, yet it is so far one of the essential duties for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract.

"Marriage being a civil contract, it is not necessary that it be solemnized by a person in holy orders, and in *facie ecclesie*. In the Roman Catholic Church, marriage is a sacrament; and

in countries where that religion prevails, and is established by law, marriages are required to be solemnized by a priest, and in the church; but it is not so here, for our statute enacts, that marriage licenses may issue, directed to any Judge, Justice of the Superior Court, or Justice of the Peace, as well as to Ministers of the Gospel.

"If the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba the futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesie*. There is no recognition of any ecclesiastical authority, in forming the connection; and it is considered entirely in the light of a civil contract. This is the doctrine of the Common Law, and also of the Court Law which governed marriages in England prior to the Marriage Act of 26 Geo., 2d.

"The Supreme Court of the United States, *Jewell vs. Jewell*, 1 *Howard's Rep.*, 219, were equally divided in respect to the proposition in the above paragraph, and gave no opinion. 2 *Kent. Com.*, 7 *Ed.*, top page 52, near 87, and note.

"The same question came before the House of Lords, in England, in 1844, in the case of the *Queen vs. Millis*, reported in 10 *Clark and Finnelly*, 534.

"The question was, whether the marriage of the defendant Millis, who was a member of the established church, to a woman in Ireland by a Presbyterian minister, according to the form which was usual with that denomination, was valid?

"[The question was referred by the lords to the Judges and Lord Ch. J. Tindal gave their unanimous opinion against the validity of the marriage, and held that, by the law of England, as it existed at the time of the Marriage Act, a contract of marriage *per verba de presenti*, was indissoluble between the parties themselves, and afforded to either of them, by application to the Spiritual Court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The civil contract and the religious ceremony were both necessary to a perfect marriage by the common law.

Askew vs. Dupree.

"The lords who gave judgment were equally divided: Brougham, Denman and Campbell being in favor of sustaining the first marriage; the Lord Chancellor, (Lyndhurst,) Cottenham and Abinger being of the opposite opinion.

"Chancellor Walworth considers the ancient common law doctrine to have been, that the marriage was invalid, unless celebrated *in facie ecclesie*; but adds: 'The law on this subject, however, was unquestionably changed at the Reformation, if not before.' *Rose vs. Clarke*, 8 *Paige*, 574.

"But the doctrine, that to give validity to a marriage, it is necessary that it be solemnized by a person in holy orders, has never obtained in any of the States of this Union.

"It is not necessary," says Judge Kent, (2 *Kent*, 53-87) 'that a clergyman should be present to give validity to the marriage, though it is doubtless a very becoming practice, and suitable to the solemnity of the occasion. The consent of the parties may be declared before a magistrate, or simply before witnesses, or subsequently confessed, or acknowledged, or the marriage may even be inferred from continual cohabitation and reputation as husband and wife, except in cases of civil actions for adultery, or in public prosecutions for bigamy or adultery, when actual proof of the marriage is required.

"*Bishop on Mar. and Div. sec. 167*: 'Assuming, then, that the contract *per verba de presenti*, or *per verba de futuro cum copula*, is at common law a complete marriage, we are next to seek for the rules of interpretation by which to determine whether, in a given case, a statute has altered the common law upon the subject.'

"Has our statute, in relation to marriages, changed the common law? and is a marriage celebrated by any person, other than those to whom the statute prescribes that marriage licenses shall be directed, valid and binding in law?

"Upon this point, 'the leading rule, and one of great importance, will be found to be, that the marriage at common law is always good, notwithstanding the statute, *unless the statute contains an express clause of nullity*.'

"This," says Bishop, 'like most other principles of law, that may now be deemed to be well settled, has struggled against some doubts, but it seems never to have been overruled, unless we except a decision in Massachusetts.'

"In support of the rule, he refers to decisions in Vermont,

Askew vs. Dupree.

New Hampshire, New Jersey, Pennsylvania, North Carolina and Kentucky; and such is the rule in England, since the repeal of 26 Geo., 2 Ch., commonly called Lord Hardwicke's Act.

"The same rule is recognized in *Reeve's Domestic Relations*, p. 196, and enforced in a note at page 199.

"There is scarcely any principle of law better supported by the authorities than that which declares that a marriage not solemnized according to the provisions of the statute, in the mere matter of form, is a valid marriage. It will be first noticed, that most of these statutes impose a penalty upon the person assuming to join others in matrimony, who is not legally authorized, and that in other respects the statutes are merely directory. Now, it is a principle both salutary and well-settled, that the official acts of a person not duly qualified are valid as to third persons and the public, when the neglect of the qualification is punished by a mere penalty, and where the acts themselves are not in their nature void, or are not expressly made void by statute." 7 Johns, 554.

"The statute of 26 Geo., 2, renders the marriage illegal and void, if not solemnized according to the regulations prescribed by the statute, but that statute is not, and never has been, of force in this State. Before its enactment, and since its repeal, the decisions in England were, and have been, in accordance with the doctrine already indicated; that the decisions in England before the passage of the Act of 26 Geo., 2 Ch. 33, held marriages to be valid, though they were not solemnized strictly according to the statutes, if there was no clause of nullity: *Rex vs. Brampton*; 70 East, 232; 1 Bl'k Com., 433.

"That such is now the rule in England, since the repeal of 26 Geo., 2, see *The King vs. the Inhabitants of Birmingham*, 8 Barn & Cres., 29; 15 Eng. Com. Law Rep., 24.

"This case arose in relation to the settlement of a pauper. The pauper, Luke Smith, was married to Elizabeth Bratt, in the year 1826, by license, he then being a minor under the age of twenty-one years, and having his father then living, who did not consent to his said marriage.

"It was objected that his marriage was void under the new Marriage Act, Stat. 4 Geo. 4 C. 76, for want of the father's consent.

Askew vs. Dupree.

"The statute points out the mode in which licenses are to be obtained, and the matters to be sworn to by the parties or one of them; and one of those matters, where either of the parties, not being a widower or widow, shall be under twenty-one years is, that the consent of the person or persons, whose consent to such marriage is required under the provisions of the Act, has been obtained thereto.

"The statute specifies who shall have power to consent—the father, if living, or the guardian, if there be one—and proceeds: 'and such consent is hereby required for the marriage of such party so under age, unless there be no person authorized to give such consent.'

"The Court of King's Bench, Lord Ch. J. Tenterden delivering the judgment, held the marriage to be valid, on the ground that 'the language of the statute is merely to require consent; it does not proceed to make the marriage void if solemnized without consent.'

"'One of the most frequent forms,' says *Bishop on Mar. and Div.*, sec. 171, 'in which this question arises is, where certain persons are forbidden to solemnize the marriage, or those who are authorized are forbidden to exercise the authority in any other method than the one prescribed, and the violators of the law are subject to punishment. The rule that a marriage in disregard of such penal prohibition is good, seems to be universally acknowledged.'

"Again, sec. 173: 'There is no particular form of words essential to the solemnization of marriage, unless made so by statute. It is sufficient if the proper person, as minister or Justice, be present, and cognizance of the mutual engagement of the parties to assume the marital relation. But if such person do not consent to act in his official capacity, and do not so act, though he be present, and witness their undertaking, it has no other effect than if witnessed by an unauthorized person. This defect would not, however, vitiate the marriage, unless the statute contained an express clause nullifying all marriages not celebrated by such official person.'

"The statute of New Jersey, in relation to marriages, declares, 'that every Justice of the Peace in that State,' every 'stated and ordained minister of the Gospel,' and every 'religious society according to its rules,' shall be empowered to solemnize marriage.

"Justice Ford, in commenting upon this statute in *Pearson vs. Hovey*, 6 *Halstead*, 20, said: 'Suppose this Act had gone to the whole extent of declaring that no other person or persons should solemnize marriages, except those mentioned in it, such persons would commit an offense against the Act by solemnizing marriages, for which they might be punished, but still, the marriage contract between the parties themselves would remain valid. During the Commonwealth of England, Parliament passed a law requiring all marriages to be solemnized by Justices of the Peace; yet, a marriage solemnized by a clergyman was holden by all their Courts to be valid, as between the parties, though the statute prohibited such priest from doing it; and for the act he was exposed to punishment. Our Act empowers an ordained Minister of the Gospel to solemnize marriages; but suppose a Minister of the Gospel should do it before he is ordained, can any person believe that the marriage itself would be invalid, and that either of the parties might go away at any time afterwards and contract a new alliance? Our statute prohibits Ministers of the Gospel from solemnizing the marriage of persons under age, without the consent of parents or guardians, under a very heavy penalty; but this does not render the marriage void; on the contrary, it remains sacred and inviolate, which is the very thing that aggravates the offense.'

"2 *Kent*, 91: Such 'is the doctrine judicially declared in New Hampshire, Pennsylvania, and Kentucky, and by statute in Alabama and Vermont; and the marriage is held valid as to the parties, though it be not solemnized in form according to the requisitions of their statute law.'

"This doctrine has been virtually recognized by the Supreme Court of this State, in the case of *Park et al., vs. Barron*, 20 *Ga.*, 702—Judge McDonald delivering the opinion.

"It is conceded that the precise point before the Court in that case, and adjudicated by it, is not identical with the question now under consideration, but the Judge who delivered the opinion of the Court recognized the general principle which has now been laid down.

"The facts of that case were these: James Barron intermarried, and was divorced from his first wife at her instance, he being the 'guilty party.' He afterwards married again, his first wife being still alive; by both he had children;

Askew vs. Dupree.

after his death, his children were entitled to a distributive share of the estate of A. Barron, a brother of James Barron, who died without issue after James Barron died. The contest was between the children of James Barron by his first wife, and those by his second. The issue of the first marriage claimed the whole distributive share which would have gone to their father, had he been living, contending that the second marriage was void, and the issue thereof bastards.

"James Barron having been the party whose improper or criminal conduct authorized the divorce, was prohibited from marrying by the Act of the General Assembly of 1806, during the life of the woman from whom he had been divorced. By marrying the second time, he subjected himself to the pains and penalties against bigamy; but the second marriage is not declared by that Act to be void, but is made indictable and punishable. The Court held the issue of the second marriage legitimate, and entitled to take, representing their father.

"It is only necessary to refer to so much of the published opinion, as goes to sustain the general principles of law under consideration.

"Barron, whose misconduct led to a divorce, was prohibited from marrying, under a penalty; but the marriage is not declared void by the Act which prohibits him from marrying.

"The first Marriage Act in England was 26 *George 2d*. That Act was never in force in this country. It expressly provides that it shall not extend to marriages solemnized beyond seas. There is a marked difference between that statute and our own as respects the solemnization of marriages. That Act not only inflicts a severe penalty on persons who solemnize marriages contrary to its provisions, but it also declares all marriages thus solemnized void. Our statutes inflict a penalty, but do not declare the marriage void.

"Barron's marriage is the marriage of a person prohibited from marrying under a penalty, the statute not declaring the marriage void. If it be not a good one, it should be classed according to the analogies of the English law with marriages that are voidable.

"Marriages within certain degrees of kindred are, in Eng-

land, prohibited by both the canon and statute law. They are, therefore, unlawful; and yet, they are not void, but voidable only. 1 *Ecc. Rep.*, 73. If not pronounced void in the life time of the parties, they are valid to all civil purposes. *Ib.*, 168. . If such marriages are prohibited by the statute law of England, why are not the parties who enter them in violation of the law, indictable for committing an act forbidden by a public law? The common law Courts, however, have never interfered, and have left such cases to the undisturbed jurisdiction of the Ecclesiastical Courts. If the Courts there abstain from taking cognizance of such cases, the Courts here may well say, that the public policy to which the Courts have referred by declaring the contracts void, which are prohibited by inflicting statutory penalties on those who enter into them, whether the contracts are declared void or not, does not require the enforcement of that principle so as to set aside the actual marriages, which the legislature has not pronounced void. A public policy which looks to the protection of the innocent and unoffending, to the peace of families, and the welfare of society, would seem to us to forbid the inference of a purpose on the part of the legislature, which they have not expressed, that the marriage of a party, against the prohibition of the Act of 1806, should be void.

"If this be the law applicable to a marriage prohibited by statute, but not made void by statute—*a fortiori*—does it apply to a marriage not solemnized by either of the persons authorized to join persons in matrimony, if it be not rendered void by the statute for the want of that formality.

"It is true, that this rule of construction is different from that ordinarily applied to contracts, but it is required by considerations of public policy.

"For obvious reasons connected with the welfare of society, the law is more tender of nuptial contracts than ordinary contracts which relate merely to property and the ordinary dealings among men.

"Marriage contracts are, by the common law, excepted from the rules which govern ordinary contracts. 20 *George*, 704.

"*Bis. on Mar. and Div.*, sec. 170: 'It was admitted by Dr. Sushington, that the rule of interpretation we are considering is not in accordance with the constructions which

Askew vs. Dupree.

some other Acts, relating to other subjects have received; but it must always be remembered,' he said, 'that marriage is essentially distinguished from every other species of contract, whether of legislative or judicial determination; that this distinction has been universally admitted; that not only is all legal presumption in favor of the validity and against the nullity of marriage, but it is so on this principle, that a legislative enactment to annul a marriage *de facto*, is a penal enactment, not only penal to the parties, but highly penal to the innocent offspring, and therefore to be construed according to the acknowledged rule most strictly.'

"This indicates the reason for the rule, and it is one which has been already adverted to. It is founded upon public policy.

"After the marriage relation is entered into, it is then considered in the light of a civil institution, in which the State itself has an interest, as well as the parties. And the interest of the State is that these contracts shall be permanent, and not revocable at the will and pleasure of the parties; to prevent promiscuous concubinage between the sexes; that parents may be held responsible for the support, maintenance and education of their offspring, and that the legitimacy of their offspring may be known and established beyond dispute, and the offspring of a marriage should never be bastardized, except in cases in which the law declares the marriage to be void *ab initio*.

"This being the rule, that a marriage at common law is always good, notwithstanding the statute, *unless the statute contains an express clause of nullity*, it only remains to inquire, whether our statute regulating marriages declares such a marriage as the one under consideration void for want of conformity to the statute?

"The 6th sec. of the 3d art. of the Constitution of Georgia provides that the Clerk of the Court of Ordinary may grant marriage licenses, and the Act of 1799, passed to carry that section of the Constitution into effect, enacts in the 3d section, that, 'the Clerks of the Courts of Ordinary in the several counties shall grant marriage licenses directed to any Judge, Justice of the Superior Court, Justice of the Peace or Minister of the Gospel, (and by a subsequent statute to any Jewish Minister, or other person authorised to perform the marriage ceremony between Jews,) to join

Askew vs. Dupree.

persons of lawful age, and authorised by Levitical degrees to be joined together in matrimony; and where such persons intending to marry shall have the banns of marriage published three times in some public place of worship, it shall be lawful for such Judge, Justice of the Superior Court, Justice of the Peace or Minister of the Gospel, being duly certified thereof, to marry the persons whose banns have been so published; and any person marrying any couple without such license, or publication of such banns, shall forfeit \$500 00, to be recovered for the use of the academy of the county, by action of debt, in any Court having cognizance thereof, in the name of the commissioners of such academy. *Cobb's Dig.*, 282.

"The 28th section of the Penal Code enacts, that, 'If any Minister of the Gospel, Judge, Justice of the Superior Court, or Justice of the Peace, shall join together in matrimony any man and woman without a license, or publication of banns, as provided by law, or where either of the parties within his own knowledge shall be an idiot or lunatic, or subject to any other disability which would render such contract or marriage improper and void, such Minister, Judge, Justice of the Superior Court, or Justice of the Peace, shall be guilty of a misdemeanor, and on conviction, shall be fined in a sum not less than \$100 00 nor more than \$500 00, which said fine, when collected, shall be paid over to the Justices of the Inferior Court of the county where the offense was committed, for the use of the Poor School Fund of said county.' *Cobb's Dig.*, 818.

"These are all the statutes which have been enacted by the legislature of this State for the regulation of marriages. In neither is a marriage declared void, if not solemnized by a Judge, Justice of the Superior Court, Justice of the Peace or Minister of the Gospel—the only penalty imposed is upon the officer or minister who may marry a couple without a license, or the publication of banns; no penalty is imposed upon an unauthorised person who may perform the marriage ceremony, but the penalty is for joining together in matrimony any man and woman without a license, or publication of banns, as provided by law. If Mr. Buckner was not a minister at the time he performed the ceremony, but had a license authorising James F. Dupree and Uriah E. Askew to be joined together in matrimony, he is not liable to the

Askew vs. Dupree.

penalty prescribed by the statute. The object and intention of the statute is to prevent clandestine marriages, and this object is affected by requiring the publication of banns or the issuing of marriage licenses; either gives publicity to the intended marriage; the publication of the banns does it effectually, and when a marriage license issues, any person interested has a right to know the fact from the Ordinary; for his official acts are not a matter of secrecy. But our statute does not say that a clandestine marriage shall be void; but it only imposes a penalty upon those who may celebrate marriages without the requisites which are necessary to give them publicity.

"If marriage be a civil contract, consummated by the consent of the parties, freely and voluntarily given, the bare fact of its being clandestine, and being entered into and solemnized without the usual requisites to give it publicity, does not *ipso facto* render it void, in the absence of any statutory provision to that effect.

"The advantage," says Chancellor J. Woodbury, in 2 *New Hamp.*, 277, 'of an open and notorious solemnization of the marriage contract is no doubt advantageous to the interest of society, and it was for the purpose of giving it a greater degree of notoriety, that these statutes were enacted; but even without these forms, for they are nothing more, where a contract which changes so thoroughly the relations of the parties to the community, is first executed by them with deliberation, and afterwards consummated by cohabitation, it should not be lightly endangered, and everything done disannulled.'

"So in Kentucky, where a statute prohibited the celebration of marriage without a license, the marriage was held to be valid, though no license was taken out. *Cannon vs. Alsbury*, 1 A. K. *Marshall*, 76.

"From the premises which have been laid down, the conclusion is inevitable.

"In every aspect in which the case before the Court can be considered in relation to our statutes regulating marriages, under long established rules of law, and enforcing a public policy which regards the welfare of society and the peace of families, the marriage of the complainants, James F. Dupree and Uriah E. Askew, must be held to be valid and binding."

I would merely add, that it would constitute an act of un-

Askew vs. Dupree.

pardonable pedantry to attempt any further review of the authorities upon this question. The law of the case has been exhausted by *Bishop on Marriage and Divorce* and other text writers, and in the adjudicated cases in England and this country.

See *Dalrymple vs. Dalrymple*, 4 *English Ecc. Report*, 485; *The Queen vs. Millis*, 10 *Clark & Finnelly*, 534; 6 *Halsted's N. J. Rep.*, 12; 2 *New H. Rep.*, 268; 4 *Johns*, 52; 1 *Hill N. Y. Report*, 270; 8 *Paige*, 574; 4 *Const.*, 230; 6 *Binn*, 405; *A. K. Marshall*, 368; 2 *Vermont*, 157; 12 *Ib.* 396; 20 *Ib.*, 382; 1 *Yerg.*, 177; 2 *Ib.*, 59; 6 *Alabama*, 765; 1 *Har. & McH.*, 152; 2 *Cal. Report*, 503; 1 *Louisiana*, 68; 4 *Ib.*, 347; 6 *Ib.*, 463.

I would remark that the case in 10 *Clark & Finnelly* occupies 374 pages of the volume!

The conclusions to be deduced from the whole matter are these: That marriage is founded in the law of nature, and is anterior to all human law; that in society it is a civil contract; that if the contract is *per verba de presenti*—that is, I take you to be my wife, and I take you to be my husband—though it be not consummated by cohabitation, or if it be made *per verba de futuro*, and be consummated, it amounts to a valid marriage, in the absence of all municipal regulations to the contrary; and that notwithstanding there be statutes directing a license to issue, as in this State, and inflicting a penalty on any minister or magistrate who shall unite the parties in wedlock, without such license, yet, in the absence of any positive enactment, declaring that all marriages not celebrated in the prescribed form, shall be void; a marriage deliberately and intentionally entered into by the parties, who are able to contract according to the rules of the common law, without conforming to the enactment, is still a valid marriage.

And this is the opinion of Chancellor Kent, 2 *Com.*, 90-91; *Judge Reeve, Dom. Rel.*, 2 *9d.*, 1857, note page 199; and *Prof. Greenleaf*, 2 *Ev.*, 513, and notes.

In Massachusetts it is provided by statute, that no persons but Justices of the Peace and Ministers of the Gospel shall solemnize marriages; and they only in certain specified cases. And in *Milford & Worcester*, 7 *Mass. Rep.*, 48, it was held, that the parties themselves were precluded from

Askew vs. Dupree.

solemnizing their own marriage, and that a marriage by mutual agreement, not according to the statute, was void.

But this opinion, evidently a departure from the general doctrine, and distasteful to the public sentiment, was overruled in the subsequent case of *Parben vs. Harvey*, 1 *Grey's Rep.*, 119.

For the policy of this law we are not responsible. It is for the legislature to change it, should it see fit to do so. In this State, no marriage, within our knowledge, has been declared a nullity because the statutory regulations were not complied with, and while the law inflicts penalties upon the celebrator, it has cautiously abstained from interfering with the marriage itself.

For myself, I approve the law as it is. True, it will be sometimes abused. What human institution is not? Rarely, however, will the parties forego the benefits resulting from a compliance with the statutes. It adds so much both to the respectability as well as the security of the contract.

I have never known of a self-solemnized marriage. But suppose such should occur: better, far, for the parties, especially the female, that the law should be as it is. Her honor is saved, and this is worth more than everything, even life itself. All other contracts may be rescinded, and the parties restored to their former condition; marriage cannot be undone.

Why does this law, in utter disregard of what seems to be the usual protection and restraint, thrown around the inexperience and imprudence of infancy, allow infants—the male at fourteen and the female at twelve—to enter into the binding contract of marriage? It is at this age the sexual passions are usually developed, and the law, with a wise forethought, looking beyond exceptional cases, and to the general interests of society, to guard against the manifold evils which would result from illicit intercourse, declares even infants capable of forming this relation.

The greatest amount of domestic discontent and discord I have ever known, was produced by a marriage celebrated under a license, regularly issued, and by an officiating magistrate duly authorised to perform the ceremony.

But, I repeat, let our rulers take action upon this most difficult and delicate subject, if, in their judgment, the good of the community demands it. It is a disgrace to the civilization of the age to condemn Courts for the real or imaginary defects of the law.

*Lucas et al., vs. Lucas.*LUCAS *et al.*, vs. LUCAS.

1. That relief will be granted from a mistake as to the legal effect of an instrument, is law, settled by adjudications of this Court and by statute.
2. The evidence shows such a mistake in the verdict in this case.
3. A motion to set aside a verdict and reinstate the case, is equivalent to a motion for a new trial, and is a proper remedy for a mistake in the verdict.
4. The nominated executor and propounder of a will is a legal party on behalf of the legatees, to conduct the litigation involved in a *caveat* to the will, from the beginning to a final adjudication.

Motion to set aside verdict, etc. Decision by Judge CABANISS, at the August Term, 1859, of Monroe Superior Court.

This motion was predicated upon an alleged misunderstanding and mistake as to the terms and effects of an agreement made by the parties and their attorneys, to settle and terminate the litigation and controversy which had been long pending, relative to the estate and wills, or papers propounded as wills, of the late Littleberry Lucas, deceased.

The agreement and consent sent up were as follows :

"JAMES M. PARSONS and WIFE, "ELZA HALSTEIN and WIFE, and "PEGGY LUCAS, propounders, <i>vs.</i> "CINCINNATUS M. LUCAS, caveator.	}	Caveat, in Monroe Superior Court. On Appeal.
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"CINCINNATUS M. LUCAS, propounder, <i>vs.</i> "JAMES M. PARSONS and WIFE, "ELZA HALSTEIN and WIFE, and "PEGGY LUCAS, caveators.	}	Caveat, in Monroe Superior Court. On Appeal.
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"It is hereby agreed by the parties to the above stated cases, that C. M. Lucas shall qualify as executor on that portion of the will of 1845, set up by the verdict of the jury, to-wit: a part of the 14th item of said will, and that his qualification shall only extend to the property, to-wit: the land and negroes specified in said part of said item of said will, and shall not include any increase of said negroes born since the execution of said will.

Lucas et al., vs. Lucas.

"It is further agreed that Mrs. Peggy Lucas, C. M. Lucas and James M. Parsons shall, or may qualify as administrators on the balance of the estate of Littleberry Lucas, to-wit: all of said estate not included in the foregoing and first item of this agreement, and that neither or all of them will charge for commissions or services as administrators and administratrix.

"It is further agreed that any advancement made by Littleberry Lucas in his life time to either or any of his children shall be estimated in the division of said estate, and that the negroes that have been received from said Littleberry Lucas by either or any of his children, shall and may be kept by those to whom they have been respectively loaned, but that the same, together with their increase, shall be appraised with the balance of said estate, and counted and estimated in the division of the same.

"It is further agreed that all of said estate, excepting what is specified in said first item of this agreement, including all the increase of said negroes in said item mentioned since the execution of said will, shall be equally divided between Mrs. Peggy Lucas, the wife, and the three children of said Littleberry, having reference always in said division to the third item of this agreement.

"It is further agreed that the costs of both of said cases, including witnesses' costs and all cost in the Court of Ordinary, the Superior Court and Supreme Court, which have been paid by either party, or remains to be paid, shall be paid out of said estate.

"It is further agreed that the respective parties litigant shall be reimbursed out of said estate the sum of five thousand dollars for counsel fees.

"It is further agreed that this agreement be entered on the minutes of the Court for the convenient reference of all parties interested."

[Signed by the attorneys for plaintiffs and defendant.]

Appended to the agreement is the 14th item of the will.

The following is the verdict taken and entered under the foregoing agreement, after stating the cases as first above stated, viz:

"We, the jury, find that the 14th item of the will of July, 1845, in favor of James T. Lucas, Love P. Lucas, and La-

Lucas et al., vs. Lucas.

Fayette W. Lucas, as far as the same is bequeathed to them, the land and negroes specified in said item, and the appointment of Cincinnatus M. Lucas as executor to execute the said portion of said item, is the true last will and testament of Littleberry Lucas, deceased, and we hereby set up the same, and set aside the balance of said will. We further find that said Littleberry Lucas died intestate as to the balance of his estate.

(Signed,)

“L. B. ALEXANDER, Foreman.”

The alleged mistake was in this. That the agreement and verdict as entered into and rendered as above, in setting up the 14th item of the will as to the land and negroes therein devised and bequeathed to the children of Cincinnatus Lucas, carried to, or vested in them the rents and profits of said land and negroes since the death of testator, whereas it was the intention of the attorneys representing Peggy Lucas, Parsons and Halstein to give the corpus; that is, the land and negroes, but not the rents and profits aforesaid, but that these should fall to the estate undisposed of, and be equally divided amongst the heirs-at-law.

Counsel for the plaintiffs in error in the Court below, in the progress of the case there, submitted this proposition as, or in evidence: “We propose to insert in the written agreement, or in the verdict, at the option of the other party, an item that the rent and hire of the lands and negroes shall be a part of the estate of L. Lucas, for division between his heirs, and that the motion to set aside be dismissed on that being done.”

The following testimony was submitted:

W. Poe said: On his arrival in Forsyth, we found the matter under consideration for a compromise; himself and Trippe were authorized by their clients to settle the case; Mr. Hill came in and joined us, and read some propositions. The first offer of negotiation was, the cavetor of the will, 1845, offered \$20,000 00 in money, and the other party demanded the land and negroes bequeathed in the 14th item; Parsons said he did not like to allow that, it was too much, but would yield if we thought it best; renewed the negotiation, and informed Mr. Hill that we would yield to his proposition and give land and negroes; the difficulty was as to

Lucas et al., vs. Lucas.

the manner of carrying out the agreement. It was first suggested to set up the will of 1855, and in framing the verdict, would provide for vesting the land and negroes in the children of C. M. Lucas ; Mr. Hill preferred another way ; that the 14th item of the will should be set up to the extent of land and negroes, and to declare an intestacy as to the balance of the property ; witness stated it was a matter of form, but he had some feeling on the subject, and was opposed to setting up the old will, as he had been fighting it so long, but yielded, as the will of 1855 was but a declaration of the Statute of Distribution of the State of Georgia. Agreed that the land and negroes should be vested in the children in that way ; the plan then was to frame the verdict to carry out the agreement, and Mr. Hill commenced writing it. Mr. Trippe not liking the way it was written, then took the paper and wrote the agreement now in Court, and Mr. Hill wrote the verdict ; witness got the will of 1845 and estimated the worth of the negroes and land from information, and said that caveators were giving more than he at first expected. Whilst doing this, Mr. Simmons asked what was to become of the crops which had been made on the land ? witness replied, they would go with the estate, and that was whilst Trippe and Hill were writing ; witness' view was, that nothing was to go into the verdict but the land and negroes, and the object was to carry out that view in the most compendious way. Whilst this was going on, Mr. Hill said he wanted the 14th item of the will set up, and had an object in it ; the verdict and papers were read, and in the Court-house the verdict was signed by the jury, and the agreement by the parties. Whilst the arrangement was being made, Mr. Trippe was interrupted by Dr. Burney, on business ; witness' purpose was, to give the corpus of the land and negroes, and nothing more ; did not express that purpose to Mr. Hill, except inferentially ; hire and rent were not mentioned at all, except by Mr. S., and don't know that Mr. Hill heard him ; Simmons was only counsel—not one of the referees ; no counsel for propounder was present except Mr. Hill ; the object of the agreement was to explain the verdict ; the verdict was to embody the whole agreement, excepting the increase of the negroes, after the death of the testator, was a matter of discussion.

R. P. Trippe said : That himself and Hill were together

in the morning trying to settle the cases ; proposed to give him \$20,000 ; he wanted the land and the negroes ; estimated the land and negroes at twenty-two thousand dollars ; was urged to accept that, as there was a small difference between the two propositions ; Mr. Hill stated there were special reasons why he wanted the land and negroes ; witness said that the difference of \$2,000 was but \$500 each for the parties ; it was a nominal sum ; proposed that the land and negroes should be estimated, and if Mr. L. was anxious for his children to have them, he could pay them the difference between that extent and the \$20,000 ; adjourned without coming to any agreement ; saw his client and he refused to accede to the agreement ; in the afternoon he and Mr. Poe took the responsibility to make a settlement, and would meet Mr. Hill ; told him they would give him the land and negroes. In the interview in the evening, witness first heard of the birth of negroes' children after the death of testator ; Mr. Hill said there were only few ; witness said he would not give another dollar ; the question then arose how it should be carried out ? Mr. Hill suggested that we would make an award, declaring an intestacy, and in the award give the children the land and negroes ; Mr. Poe suggested setting up the will of 1855, and by agreement, give them the land and negroes ; Mr. Hill preferred setting up that part of the 14th item giving them the land and negroes, and witness consented on the ground that it would be best to set up that item, as it would bind all parties and be a more formal execution of the agreement, and would more effectually bind the parties ; Mr. Poe said we were giving too much, and stated the estimated value of the property at the time ; Mr. Hill said two of the negroes were dead and two were worthless ; Mr. Poe's estimation was on 20 negroes, when Mr. Hill wanted the negroes born since the execution of the will ; witness replied that they would not give one dollar more than was mentioned in that item of the will, adding what was allowed as counsel fees to C. M. Lucas ; witness called attention to the amount which was yielded to him ; proposed to give the corpus of the land and negroes, and nothing more ; thought it was stated a number of times that we were to give nothing more ; if it had been claimed, would not have yielded it ; we intended to draw the agreement to carry out this purpose—that is, to convey nothing but the land and negroes, without the increase of the

Lucas et al., vs. Lucas.

negroes, rents and profits; that was the intention of witness and all parties, so far as witness knew; rents and profits were not mentioned by name, but that was the intention; the idea of rents, issue and profits did not occur formally; when the two little negroes were mentioned, witness said he would yield nothing more than the land and negroes mentioned in the will; were not authorized to give that much, but would take the responsibility of doing it; not exceeding five minutes after the agreement was signed, witness took Mr. Hill aside and asked him if the rents and profits would be claimed, and he said the point probably would not be raised, but that Mr. Hill said it was a construction of law; Mr. Hill had already raised the point; witness asked then that an agreement should be put down as they understood it, and that he should call on Mr. Lucas and let it be known what they were to do; went instantly to Mr. Poe and gave notice to the Clerk not to record the verdict; called the attention of the Court to it, and sent for Mr. Hill; witness had no authority to go any further than giving the corpus of the land and negroes; Mr. Hill claimed, as the basis of his negotiation, that the 14th item of the will should be set up; did not understand him to say that he would not come to any other agreement; his proposition was, to set up the 14th item; \$10,000 was to be paid out of the estate for counsel fees—\$5,000 on each side, and C. M. Lucas was to be executor of that part of the will set up, and an intestacy declared as to the balance of the estate; and the reason assigned by Mr. Hill was, that the testator intended the land for the boys; always understood it to be his will and so Mr. Hill claimed; the first proposition was, to set up the 14th item. In the afternoon Mr. Trippe came to Mr. Hill and said that he had got his client willing to do what he and Mr. Poe would say; went to Mr. Trippe's room; Mr. Hill suggested to get an order of Court appointing them arbitrators, and that their award be made the judgment of the Court; Mr. Poe wanted the will of 1855 set up; Mr. Trippe suggested a verdict, setting up that part of the will of 1855 giving the land and negroes to the boys, with an agreement explaining it; Mr. Hill said don't let us have any agreement but a verdict; the verdict was read first to Mr. Poe, and afterwards in the hearing of all; Mr. Trippe suggested an alteration, and made an interlineation. After coming into the Court-house, an interlineation was made by

Lucas et al., vs. Lucas.

Mr. Trippe; agreed upon the verdict; Mr. Trippe read it to the jury, and it was signed; during all the time of the negotiation, the rents, issues and profits were not mentioned by Mr. Trippe, or in his hearing; while writing the agreement, Mr. Hill was taunting witness about writing so long an agreement; the object was, to cover everything, and to give only the corpus.

T. J. Simmons corroborates the testimony of Messrs. Poe and Trippe, so far as the conversation in Trippe's office; intended to give the land and negroes, estimated at \$22,000 00 or \$23,000 00; did not know that anything more would be claimed, until it was mentioned after the verdict; nothing was said about rents and profits; witness mentioned the crops to Mr. Poe; Mr. Hill objected to the increase of the negroes being excluded, and said if Dr. Parsons claimed them, he would pay one-half; finally agreed to the little negroes, because it was a small amount; Mr. Trippe positively refused to yield anything but the land and negroes.

Defendant's evidence.

In relation to the settlement of the issues to the will of Littleberry Lucas, deceased, B. H. Hill said: During the argument of the case before the Supreme Court, His Honor Judge Lumpkin asked why the case could not be settled, as C. M. Lucas had offered to surrender the notes and money for division, and the accumulation of these formed the pretence for the necessity of making the new will, or something to this effect. As counsel for C. M. Lucas, I immediately replied, I was ready to make that settlement. A few weeks ago, I received intimation that the propounders of the will of 1855 were willing to pay the children of C. M. Lucas' legacies, under the will of 1845, the sum of \$20,000 00, and allow certain counsel fees and costs to be paid out of the coming fund, and divide the balance. I replied that I thought the case was one which ought to be settled, and that I was willing to settle on principle; and that while I thought the money and notes ought to be divided, I also thought the specific legacies in the will of 1845 to C. M. Lucas' children ought to be set up. When I arrived here in Forsyth, I learned the case was referred to me for settlement in behalf of Lucas, and to Col. Trippe, on the other side. On Monday morning

Lucas et al., vs. Lucas.

I called on Col. Trippe, and, in the first place, asked him if he had plenary power to settle the cases? He replied, he did not, but had restricted power, and that he could only settle on the terms above mentioned. I told Col. Trippe that I was authorized to settle, but I was unwilling to settle except on principles of right, as I conceived them, and that I thought the notes and money ought to be divided, and that as much should be applied out of the estate to pay the counsel fees of C. M. Lucas as the fees of the other side ought to have amounted to; that I thought the whole of the 14th item of the will of 1845 ought to be set up and distinctly stated, for the reasons then given; that whatever the children of C. M. Lucas received, must be received as a specific legacy, without being subject to appraisement under the will of 1845. (As to what was said on the question of advancement, need not be mentioned, as it is not involved.) Remarks were then made as to the value of the land and negroes, and by estimating the land at \$10,000 00 and the negroes at about \$700 per head, we thought the value would be \$22,000 00 or \$23,000 00, and the other items mentioned in the 14th item of said will would increase it a few thousand. Col. Trippe asked me if I thought the increase of the negroes passed under the will? I replied that I thought the increase, prior to the death of the testator, did not pass. Mr. Trippe had an interview with Mr. Parsons, who happened in, and on returning, said to me he was positively prohibited from doing more than he had proposed. I told him I thought he could inform his client of the nature of my position, and at least get their views on it. He said he did not see why they should seriously object to acceding to my proposition, as far as the land and negroes were concerned, but he did not think they could be brought to agree to the balance of the 14th item. I said I might give up \$1,000 00 for ditching, etc., but that I doubted whether I would yield any other point, but at all events, see his clients and see what they would do; I made my proposition, and now wanted to hear from his side. About 10 o'clock Col. Trippe called at my room and said he could do nothing with them men, or they would do nothing more, and I replied, very well, and Col. Trippe immediately left. I informed Mr. Lucas of the result, and he expressed himself satisfied, and the case could go on. After I came into Court-house, Col. Trippe came and took me out and said his clients had finally

agreed to do anything he and Mr. Poe should agree to. I asked him what he thought he and Mr. Poe would agree to? He said he thought they would give us the land and negroes under the 14th item, but as I was of opinion that the increase of the negroes did not legally pass under the will, I must agree to so express it. I told him I thought the increase before the death of the testator did not pass, but the increase after his death did pass, as the will took effect at his death, and I thought the will ought to have its legal effect. He said his client would not agree to it, and the increase of the negroes must be excepted. I told him to go and get Mr. Poe, and we would go to his office and see if he could draw up an agreement that would suit us. When we got to Col. Trippe's office, we discussed as to the best method of having the agreement effectively carried out. I suggested that we enter into an agreement stating the terms of the settlement, and then, by an order of the Court, having the whole matter referred to our discretionary arbitrament, and then we could make our agreement our award, and return it at once as the judgment of the Court. Col. Trippe suggested, that as to the portion of the will of 1845, which was to be set up, the better plan might be to take a verdict, and that the other application might be dismissed, and the other points about costs, lawyers' fees, increase of negroes, etc., could be embodied in an agreement. Col. Poe agreed with Col. Trippe, and I at once agreed to the plan; whereupon I commenced to draw an agreement, and drew the first item, which Col. Trippe said ought not to be in the agreement, as it would be covered by the verdict, and it was, but not to specify in writing that we agreed to a verdict, etc. I assented, and commenced to write the next item. He said that was also covered by the verdict. I then said I did not really see that it was necessary to have any written agreement, but let us write a verdict and settle all by the verdict. Col. Trippe preferred an agreement for explicitness on some points. He then commenced and drew the agreement, and I drew the verdict. I read the verdict, and Mr. Poe assented to it. Col. Trippe, after finishing the agreement, took the verdict and read it, and suggested the alteration appearing by the first interlineation, and which was at once assented to as not altering the meaning. Col. Trippe then read the agreement he had drawn, and I objected to the portion excluding from the effect of the will

Lucas et al., vs. Lucas.

the increase of the negroes born after the death of the testator, and said I surely could not think his client would insist on it. That he ought to leave them to pass by the usual construction of the will, and that if his client really, after understanding it, insisted on taking these infants, to write me the fact, and I would pay half their value myself. Col. Trippe said the infants would not be taken away, but that C. M. Lucas could pay for them in the division and let the boys have them. I then said it was a small matter any way, and though I thought it was wrong, I would let it go and agree to the agreement as it stood. But the verdict and agreement were then assented to, and, by agreement, it was to be entered on the minutes of the Court for reference, and I added that to the agreement of Col. Trippe's suggestion, and it was read and agreed to. We came on to the Court-house, and I showed the verdict agreed on to my associate counsel, Col. Hunter, suggested the additional words of the second interlineation, and set aside the balance of said will. Col. Hunter suggested that we add, "and we set aside the will of 1855." Col. Trippe said this was unnecessary, as an intestacy was declared, and it would not alter it to add those words, and he would object to it, and said we ought to be satisfied with it as it stood. I thought so too, and said to Col. Hunter, that I did not think the words suggested at all necessary. The Court was informed that we had agreed on a verdict, and asked for a jury. The first twelve were ordered down, and Col. Trippe read the verdict to the jury, and it was signed and handed to the Clerk. At no time during the negotiation was the question of hire and rent mentioned, either by Mr. Poe, or Col. Trippe, or myself. I will add, the verdict is precisely as it was agreed on; nothing is inserted which ought to be omitted, and nothing is omitted which was to be inserted; if the hire and rent are to go to the estate, and not the legatees, the place to insert it is the agreement, and not the verdict; there was certainly no intention to limit the effect of the verdict in the verdict itself, but that was to be set up in the 14th item as it now expresses it, etc.

Cross-examination of Mr. Hill by Movants.

Mr. T. said they would give the negroes mentioned in the 14th item; when they disagreed before dinner, the difference

Lucas *et al.*, vs. Lucas.

was \$1,000 00; in the morning estimated the negroes at about \$14,000 00; the land at \$8,000 00; told Mr. T. to see his client and see if he would give the land and negroes; nothing was said about corpus rents and profits; witness had no doubt the object of Mr. T., in making up the sum to pay the difference between \$20,000 00 and \$22,000 00, was to give a specific sum for the purpose of making the settlement; when talking about the infant negroes, Mr. Trippe said he would not give one dollar more than he had proposed; if a proposition had been made to exclude the profits of the land and negroes, witness would have objected, but can't say but he might have yielded; can't say but he might have thought of the rents and profits at some time during the negotiation; think they would not have included the rents and profits, if it had occurred. When that part of Mr. Hill's written testimony was read, in which he stated that Mr. Trippe said he thought they would give the negroes and land under the 14th item, he was asked by Mr. Trippe if he said, "under the 14th item," or, "the land and negroes mentioned in the 14th item." And Mr. Hill replied, "the expression was, the land and negroes mentioned in the 14th item."

After hearing said testimony, the Court refused to grant said motion, and overruled the same, on the ground that the Court have no right to correct the alleged mistake or to entertain jurisdiction of the question in the form of proceeding. To which counsel for movants excepted, and counsel for movants, on this the 16th day of November, 1859, (being within thirty days from the adjournment of said Term of said Court,) tender their bill of exceptions, and say the Court erred in refusing to grant said motion, and in overruling the same. And as the facts do not appear on record, the movants pray that this foregoing may be signed and certified as their bill of exceptions in our case, according to the provisions of the statute in such cases made and provided.

R. P. TRIPPE,
Movant's Att'y.

TRIPPE & POE, for plaintiffs in error.

B. H. HILL, *contra*.

Lucas *et al.*, vs. Lucas.

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

Littleberry Lucas died, leaving two wills—one executed in 1845, and the other in 1855. Cincinnatus Lucas, the defendant in error, being the nominated executor of the older will, propounded it for probate, and the plaintiffs in error propounded the other, each party entering a *caveat* against the probate proposed by the other party. When the two cases thus made stood for trial on the appeal, the parties, through certain of their counsel, Mr. Hill for the defendant in error, and Messrs. Trippe & Poe for the plaintiffs, entered into a negotiation for the settlement of the whole litigation. The negotiation resulted in the taking of an agreed verdict, accompanied by an explanatory paper, the verdict written by Mr. Hill, and the explanatory paper by Mr. Trippe. Within a few minutes after the verdict had been taken, the plaintiffs moved to set aside on the ground that, by their mistake of its legal effect, the verdict, with the explanatory paper, had been so framed as not to carry out the true settlement to which they had agreed. The defendant met this motion with four objections: First, that the ground on which it is founded is not good in law, if true in fact. Second, that it is not true in fact. Third, that the proper remedy is not a motion to set aside the verdict, but a bill to reform the agreement on which the verdict is founded. Fourth, that the minor children of Cincinnatus Lucas have an interest in the verdict, and are not legally represented before the Court. The presiding Judge sustained the third objection, and overruled the motion. We think all of the objections are bad, and that the motion ought to have been granted.

1. The principle of granting relief from a mistake as to the legal effect of an instrument, is established by repeated adjudications of this Court, and also by statute. An Act of 1858, (*see Acts of that year p. 74.*) in attempting to do several things, does accomplish this: it converts into statutes, from the time of its passage, all such decisions of this Court as had been made before its passage, with the concurrence of a full bench. Now, the case of *Wyche and wife vs. Greene*, in 11 *Ga. Rep.*, 159, and again in 16 *Ga. Rep.*, 49, had been decided by a unanimous full bench long before the passage of that Act; and the very point decided in it, is the principle in question. In that case, a man made a deed of

Lucas *et al.*, vs. Lucas.

gift to his married daughter and "her issue," *intending* to give her an estate for life with remainder to her children, and supposing that the words he had used would have that legal effect. The legal effect of the instrument was, of course, to vest the whole estate immediately in the husband of the woman; but the Court held that it ought to be so reformed as to carry out the true intention of giving to her for life, with remainder to her children. The principle is, that where there is a difference between the legal effect produced by the words, and the effect intended to be produced by them, the words, with their mistaken effect, shall yield, and the true intention shall prevail.

2. Did the parties mistake the legal effect of the verdict in this case? The verdict sets up as a *will*, a part of the 14th item of the will of 1845, giving certain land and negroes to the children of Cincinnatus Lucas, and then declares an intestacy as to the rest of the estate. This gives the land and negroes *as the will* gives them; that is, from the time of the testator's death, with the natural increase of the negroes from that time, and with eight thousand dollars of rent and hire which had accrued between that time and the time of the settlement. The explanatory paper excepts the natural increase of the negroes from this effect of the verdict, but is silent as to the rent and hire. The verdict, therefore, gives the Lucas children the land and negroes named in that part of the will which is set up, together with the rent and hire. Now, we think it is perfectly clear that the settlement which was *intended* to be carried out by this verdict, gives these children only the land and negroes as they stood at the time of the settlement, without any precedent rent or hire. The history of the negotiation, as given by all three of the negotiators, proves this beyond all doubt. Mr. Trippe opened the negotiation by offering Mr. Hill a round sum of twenty thousand dollars for the Lucas children. Mr. Hill rejected the offer, and made a proposition of his own, which was very much discussed and finally accepted by the other side. The question, What was that proposition? covers the whole dispute. It is important to remark, that it covered the whole estate of which this rent and hire were a known part—giving a certain specified part to the Lucas children, and all the rest of it, without specification, to the heirs at law. Under this proposition, there cannot be an absence

Lucas *et al.*, vs. Lucas.

of intention as to *any part* of the estate. Under it, the rent and hire were *intended* to go either to the Lucas children or to the heirs at law, and to the heirs at law for lack of specification, unless *intended* to be included in the specification of what goes to the children. It is a division of a whole consisting of many parts, by carrying certain parts over a line for one set of persons, and leaving the remainder for another set of persons. The intention is to divide the whole, and whatever is not intended to be carried over the line, is intended to be left. The only question, then, is, What was intended to be included in that part of Mr. Hill's proposition which was for the benefit of the Lucas children? He says the terms of his proposition were, that he would take the land and negroes *under* the 14th item of the will of 1845. Now, the legal effect of these terms, in which he says he communicated his proposition, is undoubtedly to carry the land and negroes *as the will* gives them; that is, from the time of the testator's death; but it is demonstrable from the discussion and treatment of this proposition by the negotiators, Mr. Hill included, that he himself did not *mean* so. They all discussed it, went into a valuation of it, and agreed to it, *as a proposition embracing only the land and negroes mentioned in the 14th item, as they stood at the time of the negotiation.* They valued the land and negroes at twenty-two thousand dollars, as they stood at the time, and they were valuing them *as embraced in the proposition.* They therefore treated and considered the proposition as embracing the land and negroes only as they stood at the time of the negotiation. This of itself is a conclusive view as to what both sides intended by the proposition. But again: When the valuation had been made, Mr. Hill urged the other side to accept his proposition, *because* it exceeded theirs by only *two thousand dollars*; that is to say, it embraced nothing but the land and negroes valued at twenty-two thousand dollars. The proposition, considered as embracing the *corpus* only of the land and negroes, did exceed the other by precisely two thousand dollars, and he, by telling them that it exceeded the other by no more than two thousand dollars, assured them that it embraced no more than the *corpus* of the land and negroes. If it had embraced the rent and hire, it would have exceeded the other proposition by, not two, but *ten* thousand dollars. The negotiators talked about it, estimated it, con-

sidered it, treated it, and *agreed* to it as embracing only the *corpus* of the land and negroes named in the 14th item of the will of 1845, and as *not* embracing either the preceding natural increase of the negroes or the preceding rent and hire. Mr. Hill says it never occurred to him to get rent and hire. Messrs. Trippe & Poe say that they conceded the *corpus*, and *no more*. There is no conflict, the evidence is all one way, and it shows irrefragibly that these negotiators arrived at an agreement to settle the whole estate by giving the Lucas children the *corpus* only of the lands and negroes. Did they afterwards depart from that agreement? It is true, they made a subsequent agreement as to the *mode* of carrying out the main one, but the subsequent agreement was only ancillary to the first, intended, not to vary it, but to *carry it out*. In the subsequent negotiation respecting the proper mode, Messrs. Trippe & Poe gave the strongest proof that they intended to sanction no departure from the agreement already made, and that they held the mode *subordinate* to the end. This verdict, as it now stands, was proposed as the best mode of carrying out the agreed settlement. After it had been discussed somewhat, they discovered that, in that form, it would carry the preceding natural increase of the negroes. Mr. Hill insisted that he should have the verdict in that form, with its *legal effect*, whatever that might be, but Messrs. Trippe & Poe promptly and peremptorily repudiated the idea of allowing any legal effect which should concede more than they had already agreed to. They said they would not concede a dollar more, and Mr. Hill yielded. They adhered, however, to the verdict, but prevented its legal operation on the preceding natural increase of the negroes, by a clause in the explanatory paper. This natural increase was small in value, and this incident in the negotiation shows at once how resolute Messrs. Trippe & Poe were, not to concede *any* more than they had already agreed to concede, and that they considered the natural increase of the negroes to be an enlarged demand on Mr. Hill's part. The departure which was about to be made from the agreement in respect to the natural increase of the negroes was seen and prevented. The departure which was made in respect to the rent and hire is discovered now, and ought to be corrected.

3. And this brings us to the remedy. There is no effort here to *reform* an agreement nor to *enforce* one. A bill in

Lucas *et al.*, vs. Lucas.

equity would be necessary for that purpose. The Court, in this case was simply asked to recall the aid which itself had lent to the consummation of a mistake. It was asked to set aside its own verdict, because it was not truly an *agreed verdict*, as the Court supposed it to be when it was signed. Suppose the mistake in this verdict had been discovered before it was signed, and Messrs. Trippe & Poe—as they undoubtedly would have done—had objected to its being signed, would the Court have ordered it to be signed as an agreed verdict, over the protest of one of the parties to it? Surely not; and for the reason that it would not have been an agreed verdict, and would have had nothing to support it. And for the same reason, the Court ought to have recalled its own act in having it signed as an agreed verdict, when it was discovered to have had nothing to support it but a *mistake*. Suppose the verdict had contained *words* which one of the parties did not know were in it, it would not have been an agreed verdict, and would have been set aside immediately upon the discovery that it was not so. So when it contained an *idea* which one of the parties did not know was in its words, it was not an agreed verdict, and ought to have been set aside. This motion to set aside and reinstate was, in effect, a motion for a new trial, and gave the Court the same power over the verdict. When a new trial is moved within time, as this was, it is a form of proceeding under which the Court may inquire into any cause which shows that the verdict was obtained by fraud or mistake, or is without foundation to support it. The whole argument on the remedy in this case is embraced in the statement that this motion only asks the Court to set aside its own mistaken verdict, and does not ask the reformation or enforcement of any contract.

4. The children of Cincinnatus Lucas are not heirs at law of Littleberry Lucas, and have no interest in this verdict, except as legatees under the will of 1845. Of that will, Mr. Cincinnatus Lucas, the defendant in error here, is the nominated executor and propounder, and the motion to set aside this verdict is but a part of the litigation involved in conducting the *caveat* to a final adjudication. We cannot doubt that the nominated executor and propounder of a will is the legal party, in behalf of the will and those who claim under it, to conduct the litigation of a *caveat* from the beginning to the end of the chapter. It was intimated that while

Mann vs. Waters.

he might litigate for the legatees, he could not bind them by his compromise. It is enough to say that our judgment in this case does not bind them by his compromise, but turns them loose from it. We think the verdict ought to have been set aside, on condition that the defendant might prevent it by entering on the minutes of the Court a renunciation of the rent and hire, which are carried by the terms of it as it now stands. We send the case back for it to take that course.

Judgment reversed.

MANN vs. WATERS.

1. On the trial of a possessory warrant, the Judge ought to adjudge the possession to the plaintiff, if the property has been *enticed* away from him by the defendant, or if the property having been in his recent peaceably and legally acquired possession, has gone out of it *without his consent*, and has gone into the possession of the defendant without legal authority.
2. The judgment on a former warrant between the same parties and covering the same property, is relevant to show that the plaintiff's former possession of which he has been deprived, was a "legally acquired one," when taken in connection with proof that the property had been delivered to him in pursuance of the judgment.
3. Any limit which may have been put by such former judgment upon the *time* during which the possession was to continue, is irrelevant on this issue.

Possessory Warrant. Tried in Monroe county, at Chambers, on the 3d March, 1860, by Judge CABANISS.

This was a possessory warrant brought by the defendant in error against the plaintiff, for the recovery of certain negroes. The plaintiff introduced in evidence the judgments on two former possessory warrants adjudging these same negroes to her possession, and proved that the negroes were delivered to her by the officer in pursuance of those judgments, one of the judgments covering a portion of the negroes and the other covering the rest. She also proved that the ne-

Mann vs. Waters.

groes had been in her possession for some time, up to the first Monday in January last, but had disappeared between that day and the next Wednesday. She showed by the sheriff who executed the present warrant, that he found the negroes in possession of the defendant. She then closed. Before the plaintiff had opened her case, the defendant moved for a continuance, in order to get testimony that the judgments aforesaid, while adjudging the possession to the plaintiff, limited it to the 25th December last. The Court refused the continuance, holding the testimony to be irrelevant, and the defendant excepted; and this is the first assignment of error. When the plaintiff tendered the judgments on the two former warrants with the proceedings antecedent thereto, the defendant objected to them, on the ground—first, that they were not properly proven; and second, that they were not relevant to the issue. The Court required the papers to be proven, and they were then proven by a witness who testified that he saw them all executed as they purported to have been; but overruled the objection on the ground of irrelevancy, and the defendant excepted; and this is the second assignment of error. When the plaintiff had closed, the defendant introduced a bill of sale made to him by the plaintiff on the 6th January, 1859, covering the negroes in dispute, and proved the acknowledgements of the plaintiff during that year, that the negroes were to stay with her only till Christmas. In rebuttal, the plaintiff proved that defendant had agreed to let her have the negroes back whenever she might replace the purchase money, and that before Christmas she, through her agent, had tendered purchase money back to defendant, but he had refused to return the negroes to her.

Upon this testimony, the Judge adjudged the possession of the negroes to the plaintiff, and the defendant excepted; and this is the third assignment of error.

GEORGE T. BARTLETT and ROBERT P. TRIPPE, for plaintiff in error.

C. PEEBLES, *contra*.

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

1. The evidence in this case is sufficient to support two conclusions, either one of which required the Judge to adjudge the possession of these negroes as he did, to Mrs. Waters. One is, that the negroes being in her possession, were *enticed* out of it by the defendant into his possession; and the other is, that the negroes having been in her recent and peaceably and legally acquired possession, had gone out of it *without her consent*, and had been taken possession of by Mr. Mann without any legal authority. Under the statute regulating possessory warrants, (*Cobb's Dig.*, 591,) there is no question as to title nor as to the right of possession; the sole question is as to the manner in which the possession has been obtained by the defendant. If it turns out to have been obtained, as in this case, in any of the several ways prohibited by the statute, it must be restored to the person from whom it has been taken in such improper manner. The parties must be placed in *statu quo ante*, etc.

2. The relevancy of the former judgments in connection with the proof that the negroes had been delivered by the officer in pursuance of the judgments, was to show that her possession had been "legally acquired."

3. The continuance was properly refused, because the evidence to be got by it was irrelevant for the reason already given.

Judgment affirmed.

Williams vs. Stewart.

WILLIAMS vs. STEWART.

1. The vendor's lien for the unpaid purchase money is good against the vendee, his heirs and devisees, executors and administrators, all volunteers and purchasers who had notice of the lien before paying the purchase money, and may be set up as a defense to a note given to the vendee by a purchaser of the land, where the same has been transferred as collateral security, provided the holder took it with full knowledge of all the outstanding equities between the parties.

Assumpsit in Butts Superior Court. Tried before Judge CABANISS, at September Term, 1859.

This was an action by Levin J. Stewart against Theophilus Williams, on a promissory note given by Williams to one Richard L. Harvey, and held by plaintiff, as bearer. The note was dated 2d October, 1851, payable 25th December, 1853, for \$150 00.

The defense was, that the note was given by defendant to Harvey in part payment of a lot or tract of land purchased by defendant of Harvey; that Harvey had before purchased said land from one Dismukes. Failing to pay the purchase money, Dismukes asserted the vendor's lien, and to relieve the land from said lien, defendant had paid to Dismukes the balance of the purchase money due by Harvey, and which was equal to the amount of the note sued on; and it appeared that Stewart, when he traded for the note, had full knowledge of the above facts; that Harvey was insolvent, and had moved from or left the State.

The Court, amongst other things, charged the jury, that if the defendant was aware of the incumbrance, the vendor's lien, when he purchased the land from Harvey, and gave his note in payment thereof, and took a warranty of title from Harvey, there was no fraud or deceit practiced upon him by Harvey, and he could not defeat a recovery on the note in this action by a plea of failure of consideration, but his remedy was against Harvey upon his warranty. If he had such notice, he took the land with a knowledge of the defect of the title, and must rely upon his warranty for indemnity.

The jury found for the defendant, notwithstanding the aforesaid charge of the Court. Plaintiff moved for a new

Williams vs. Stewart.

trial, on the ground that the verdict was contrary to evidence and law and the charge of the Court.

The presiding Judge granted the motion, set aside the verdict, and ordered a new trial, and defendant excepted.

D. N. MARTIN ; G. J. GREEN, for plaintiff in error.

DOYAL & CAMPBELL, *contra*.

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

The facts of this case are briefly these : Jesse Dismukes sold to Richard L. Harvey a tract of land, for which Harvey gave his note. Harvey sold the same land to Theophilus Williams, taking his note in payment. Williams' note was transferred to Levin J. Stewart by Harvey, who, as well as Williams, had knowledge of Dismukes' vendor's lien upon the land. Harvey made to Williams a warranty deed. This action is brought by Stewart to recover this note of Williams, who resists the payment upon the ground that the consideration had failed on account of the outstanding lien upon land which has been decreed to be paid.

Upon this state of facts, the Court charged the jury, that Williams must pay his note to Stewart and look to Harvey for indemnity upon the warranty in his deed. The jury found for the defendant, and the Court granted a new trial, because the verdict was contrary to the charge of the Court. And to this decision Williams excepts.

We cannot concur with the Court in the view which it took of the law of this case. Stewart is not an innocent holder of this note ; on the contrary, the proof is ample that he took it merely as collateral security for money which he had paid for Harvey, and with full knowledge of all the equities subsisting between all the parties. He occupied precisely the same position that Harvey would, had the suit been brought by him ; and in that event it would not be pretended that Williams would be compelled to pay the note to Harvey and be driven to a cross-action against Harvey, who has left the country insolvent. But he might defend the note on account of the failure of consideration occasioned by the outstanding encumbrance, to-wit : the vendor's lien.

Our conclusion, therefore, is that the verdict was in ac-

Pitt vs. Thrower.

cordance with the law and the evidence, and that the new trial ought not to have been granted.

Judgment reversed.

PITTS vs. THROWER.

1. A bill in equity is filed by B., as the trustee of S. P., a married woman for the recovery of certain negroes. On the trial, no evidence is offered showing the appointment of a trustee, or the existence of a separate estate in the married woman, neither is the husband made a party. A verdict being had for the complainant, on motion made for new trial on these grounds: *Held*, that these objections came too late after a verdict on the merits; by not insisting on them before verdict, defendant is to be held as waiving them.
2. When the Court grants a new trial on the ground that the verdict is contrary to evidence, against the weight of evidence, against law and the charge of the Court, this Court will reverse such judgment, granting the new trial whenever it appears from the record, that the verdict is not contrary to evidence, nor the weight of evidence, or against law, although it may be against the charge of the Court, the charge itself being wrong.

In Equity, in Spalding Superior Court. Tried before Judge CABANISS, November Term, 1859.

This was a bill in equity, brought by Sally Pitts, wife of Laban Pitts, by her trustee, and Alexander Kendrick and Bethena, his wife, against Thomas Thrower, for the recovery of an interest in certain negro slaves, etc., in the possession of said Thomas.

The bill alleges that complainants, Mrs. Pitts and Mrs. Kendrick, are the children of Margaret F. Thrower, late deceased, by her first husband, ——— Williams, and that defendant is the son of said Margaret by her last husband, Jeremiah Thrower; that in the year 1808, Joseph White, the brother of said Margaret F., executed a bill of sale, conveying a negro woman named Member, and her increase to said Margaret F. for life, remainder at her death to complainants and their sister Polly, (they being the three youngest children of said Margaret by her first husband, (and Thomas Thrower the defendant; that said Margaret F. sur-

Pitt vs. Thrower.

vived her husband Jeremiah and continued in the possession of said negro woman and her increase, till her death, in 1850, when the life-estate terminated, and the remaindermen became entitle to the possession of said negroes. The bill further states, that the defendant, since the death of said Margaret, has taken and held possession of all said negroes, claiming them absolutely in his own right, under a bequest thereof to him, in and by the last will and testament of said Margaret F., and he refused to have said negroes partitioned amongst said remaindermen, or to account for their hire, etc.

To this bill defendant pleaded in bar, the receipts executed to him by complainants for the legacies bequeathed to them in and by the last will and testament of said Margaret F., and having received said legacies, they have recognized her title in and to said negroes, and her right to dispose of the same, and that complainants are thereby concluded from setting up any claim or interest in conflict with said will.

The defendant also filed his answer to complainants' bill denying their right or title to said negroes, or any portion or share thereof, and alleges and insists that said negro girl, Member, at the time said bill of sale was executed, was the property of Jeremiah Thrower, the husband of said Margaret F., which negro he received from said Joseph White, in exchange for a negro given to his wife by her father, and that after said negro became the property of said Jeremiah, and the title had passed from Joseph White, he made said bill of sale, which, under such circumstances, conveyed no title to said Margaret and her children, but said negro and her children remained the property of said Jeremiah, the father of defendant, until his death.

Complainants met defendant's plea by alleging and charging, that the receipts given by them for their legacies, under the will of said Margaret F., were obtained from them by the fraud of defendant, and in ignorance of their rights.

The case was tried upon the bill, answer and proofs. After the charge of the Court, the jury returned a verdict for complainants; whereupon, counsel for defendant moved for a new trial on the following grounds:

1st. Because the Court erred in permitting the complainants to give in evidence the sayings of David White, the father of Margaret F. Thrower.

Pitt vs. Thrower.

2d. Because the Court erred in permitting complainants to give in evidence the sayings and declarations of Joseph White, made after he parted with the possession of the negroes.

3d. Because the Court erred in refusing to permit defendant to prove the sayings and declarations of Joseph White, made before the execution of the bill of sale under which complainants claim.

4th. Because the Court erred in permitting complainants to give in evidence the sayings of Margaret F. Thrower.

5th. Because the Court erred in receiving the testimony of Eli Benson, the trustee of Mrs. Pitts.

6th. Because Laban Pitts, the husband of Sally Pitts, was not made a party to said bill.

7th. Because complainants introduced no evidence to shew title in the trustee of Sally Pitts.

8th and 9th. Because the verdict of the jury was without any evidence to support it, and decidedly against the weight of evidence, against the law and the charge of the Court.

10th and 11th. Because one of the jury had formed and expressed an opinion before he heard the evidence, argument or charge of the Court, and which fact was unknown to the defendant at the time the jury was selected or stricken.

12th. Because one of the jurors who tried said cause, after the jury was charged with the case, and instructed not to speak to any one about it, did, in violation of said order converse with other persons than his fellow-jurors about the case, and expressed a strong and decided opinion against the defendant.

13. Because of the discovery of evidence since the trial material to the defense and not before known.

The presiding Judge, after argument, and a very able and elaborate review of the grounds of the motion for a new trial, ordered the verdict to be set aside and granted a new trial, on the ground: That there was no evidence showing any title for the property in dispute in the trustee of Mrs. Pitts, and in the absence of such proof, holding, that her husband ought to have been made a party complainant with her; and on the further ground, that the verdict was decidedly against the weight of evidence, and contrary to law and the charge of the Court.

To which ruling and order counsel for complainants except, and assign the same as error.

GREEN, MARTIN, GIBSON and MOORE, for the plaintiffs in error.

PEEPLES & CABANISS, FLOYD, ALFORD, *contra*.

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

Sally Pitts, by her trustee, Eli Benson, and Alexander Kendrick and his wife, Bethena, filed their bill in Spalding Superior Court against defendant for the two one-fourths of certain negroes in the possession of defendant, with hire, etc. On the trial of the cause in the Court below, much evidence was had on both sides, and resulted in a verdict for the complainants. The defendant moved for a new trial on thirteen different grounds. The Court sustained the motion, and granted a new trial on three grounds: the two first of which apply only to the recovery in favor of Sally Pitts—the third to the whole recovery.

1. That complainant introduces no evidence to show title in the trustee of Sally Pitts.

2. Because Laban Pitts, the husband of Sally Pitts, was not made a party to the cause.

3. That the decree of the jury is decidedly against the weight of the evidence, and contrary to law and the charge of the Court.

After defendant had answered the bill on the merits, and a verdict was rendered by the jury, it was too late to deny the character in which complainant sued.

If it was true, that there was no legally appointed trustee, or no separate estate in the wife, or if it was in any way necessary for the husband to be made a party, the defendant ought to have taken advantage of the same before the verdict. But by permitting the cause to proceed to verdict and final decree, he is to be considered as waiving such objections.

The verdict was on the merits of the title and could not be affected by such defects. The decree, notwithstanding, could have been so shaped as to provide for and remedy all these difficulties, if the necessity existed.

2. The facts of this case are, that Jeremiah Thrower, the father of defendant, was sometime about the year 1802, on

Pitt vs. Thrower.

a visit to his wife's father, David White, in the State of Louisiana; while there, David White gave to him, for his wife Margaret, mother of defendant, and complainants, a negro. But when Thrower started on his return to his family in Georgia, the negro kept out of his way, so that he came home, leaving her there. There is no evidence but that the gift was a *parol* one, and unaccompanied by delivery.

Sometime after Jeremiah's return, Joseph White, a brother of Mrs. Thrower, being about to visit the State of Louisiana, agreed with Margaret and Jeremiah, or with Margaret Thrower, to let them or her have two negroes, old and young Member, for the one David White had given Margaret in Louisiana; provided, old man David White would let him have that negro. What occurred between David and his son Joseph White, in respect to the negro, does not very clearly appear from the evidence. But very soon after his return to Georgia, Joseph White bought old Member back, and made and delivered to Margaret Thrower a bill of sale for young Member, conveying the negro to Margaret Thrower during her life, and at her death to be equally divided between her four youngest children—Polly, Sally and Bethena Williams, children by a former marriage, and Thomas Thrower, the defendant—stating when he made the bill of sale that David White directed him to make the bill of sale for this negro in this way. It does not appear that Jeremiah Thrower ever consented to this arrangement, but the evidence rather tends to satisfy me that he repudiated it entirely. The negroes in controversy are the natural descendants of the negro woman, young Member. Very soon after this transaction, Jeremiah Thrower left his family in Georgia and returned to Louisiana, and, subsequently, enlisted in the army as a soldier, and died some five or six years after he left his family, having never returned to them.

This bill of sale was dated in 1808, under it Margaret Thrower held possession of Member and her increase from that day, down to her death in 1851, not as the property of her husband, Jeremiah Thrower, not as her absolute property, but as property in which she had only a life-estate, and which at her death would go to her four children as named in the bill of sale from Joseph White, as was abundantly proved, not only by the repeated admissions and declarations of herself and the defendant, but by his acquiescence in that

title, from 1823, when he became of age, to the death of his mother, a period of near thirty years.

Under this state of facts, the jury returned a verdict for complainant, directing that the property should be divided into four equal parts, so that complainants should receive two one-fourths thereof.

The Court, on motion, set aside that verdict and ordered a new trial, on the ground that it was decidedly against the weight of the evidence, against law, and contrary to the charge of the Court.

Ought the Court below to have disturbed this verdict on these grounds?

In passing upon these grounds, his Honor Judge Cabaniss, evidently regarded the verdict as depending for its support, almost exclusively on the evidence of the witness, Joseph Williams, and so the case has been mainly argued before us.

It is claimed by counsel for defendant, that this witness was entitled to no credit, on account of certain inconsistencies and contradictions that, they insist, appear from his evidence. He was examined by commission as many as four different times, and three sets of the interrogatories and answers are before this Court. The witness at the time of testifying was sixty-five years old, and he testifies to facts that occurred when he was a boy of 12 or 13 years old, and under the circumstances it would be strange indeed, and almost unnatural, if, in some of the long and sifting examinations to which he has been subjected, when his different answers are compared together, with themselves and with what he had written in reply to a fishing letter of the defendant, to him on this subject, previously to the commencement of any litigation, there should not be found some little inaccuracies and apparent inconsistencies. It is conceded on all hands that if the testimony of this witness is entitled to full credit, that then the verdict ought to stand. Before considering this evidence, let us consider the motion independently of it, that is, as if the testimony of Williams was entirely out of the way, and if the verdict can be maintained without this evidence, then it ought not to be disturbed by the Courts, whether the witness was entitled to credit or not.

Independently, then, of this evidence, and looking alone to the balance of the evidence had on the trial, such as the answer of defendant, his letters and the evidence of the other

Pitt vs. Thrower.

witnesses, it is well established that Margaret Thrower held the exclusive possession of these negroes, under the bill of sale, before referred to, from the time her husband left her, between the years of 1808 and 1812, during the balance of her life, claiming only a life-estate in them, and asserting all the time whenever and wherever she is heard from, in respect thereto, that at her death the negroes belonged and were to go to, and be divided amongst her four youngest children, of whom complainants are two, and defendant a third. Such possession was not only inconsistent with a title in her husband's estate, or her son the defendant as his heir at law, but was hostile and adverse to such or any other outstanding title to the negroes. The defendant himself was not only apprized of the character of this adverse holding by his mother, and acquiesced in it, but he expressly admitted that such was her title to these negroes. This evidence was altogether sufficient to enable the complainants to recover in the absence of all other proof. The defendant attempts to overcome the force of this evidence by showing that although, all this is true, yet the negro woman, young Member, was at, and previously to the date of the bill of sale, the property of his father, Jeremiah Thrower, and not the property of Joseph White, to convey in this way. That the marital rights of the husband had attached by his possession, and that it was his property. Admit that he established this fact conclusively, was it not at last a question for the jury to determine, whether he should, after such a great lapse of time, be permitted to disturb a title so long conceded, and so fully acquiesced in by himself, with a full knowledge of all his rights and all the facts. But does the evidence established the defence? Has it been shown that Joseph White made the bill of sale without a right to do so? Has not the possession and claim of title as asserted by complainant, been continued and acquiesced in sufficiently long by defendant to justify the jury in their finding; the jury having disregarded the traditional accounts given by the witnesses of the beginning of the title, and ought the Court to disturb the verdict, on the ground that it was decidedly against the weight of the evidence? We think not.

What are the facts as to the beginning of the title? Up to the time that Joseph White left old and young Member in the possession of Jeremiah and Margaret Thrower, between

the year 1802 and 1808, on the understanding that they should have them for the negro in Louisiana, if David White would let him have her, there is not the slightest evidence

That the gift from David White to Mrs. Thrower had been completed by a delivery. It does not follow that because the witnesses said David White had given, that everything was done to constitute it a good gift. When a gift is proven by parol, everything must be proven necessary to constitute the gift a good one. Then at the time of this provisional arrangement with Joseph White, neither Jeremiah Thrower or his wife, had any title to the negro in Louisiana: on the contrary, the negro belonged to David White to do with as he pleased, to surrender or retain. If he chose to let Joseph White take the negro, or her value in money, on the terms that he should convey young Member to Mrs. Thrower and her four children, he had the right to do so, and Joseph White was bound thereby; he could not avoid it. In such case no interest ever did or could vest in Jeremiah Thrower. It was immaterial whether he accepted the bill of sale or not. Under this view, Member did not vest in Jeremiah Thrower when David White gave to Joseph White money in place of the negro, because that money was given to and received by him on terms. Thus stands this case, and what other verdict could the jury have rendered, that is, if the evidence of Joseph Williams is to be believed, and why should it not be? It is not in conflict with any other, nor is he contradicted or impeached, unless he does so himself. We think the rule by which the Court below tested the credibility of this witness was rather stringent. All the presumptions ought not to have been against his integrity. He was an old man, testifying to facts that occurred fifty years before. It was quite natural to suppose that his recollection would be imperfect; that that which on first examination would appear dim and uncertain, would become clear and more perfect, as his mind should be brought to bear more steadily on the circumstances of a far distant past. But notwithstanding the great time that had elapsed, the number and severity of his examinations, there is great consistency in the whole; true, there is some little inconsistency, and how could it be otherwise? That shows at least that the witness was not swearing to a well studied tale. Take his letter as written to defendant in reply to a fishing inquiry of defendant, written

Mann vs. Waters.

to him immediately after the death of his mother, to find out whether the witness knew anything, and how much; take that as the basis, and Thrower himself admits so much to be true in his letter to Wm. Williams, and how has he varied from it materially in any of all his depositions? We think that his evidence was not so conflicting or contradictory as to discredit itself, and we hold that the credit to be given a witness is one for the jury to judge of, and not the Court, and that their verdict should never be disturbed because the Court should differ with the jury on the degree of credit to be given a witness, unless, at least, the verdict should depend entirely on the evidence of that witness, and the case a very clear and decided one.

In every view the judgment of the Court granting a new trial was erroneous, and must be reversed. The verdict was not only not decidedly against the weight of evidence, but it was well supported thereby; neither was it against law; indeed, we do not see how the jury could have done otherwise. Certainly no other verdict ought to have been allowed to stand.

Judgment reversed.

MANN vs. WATERS.

1. Notwithstanding the Court refuses to postpone a case to procure testimony which would be unobjectionable, still if the evidence, if in, could not affect the result of the case, the judgment will not be disturbed.
2. Can a party under the Possessory Warrant Act of 1821, institute proceedings to regain the possession of property which he has voluntarily placed in the custody of another? Query.

Possessory Warrant for negroes. Heard before Judge CABANISS, at Forsyth, Monroe county, 3d March, 1860.

This was a possessory warrant issued by the Hon. E. G. CABANISS, Judge of the Superior Court of the Flint Circuit, at the instance of Sarah J. Waters against Americus V. Mann, to regain the possession of a negro woman Rose, and

her children, Wyatt, Emma and Elizabeth, alleged to have been taken by fraud, violence or seduction, and without lawful warrant or authority from her possession by said Mann.

The warrant issued 25th February, 1860.

At the trial, before Judge CABANISS, defendant moved for a continuance or postponement to such time as the Judge thought reasonable, on the ground of the absence of a witness who had been subpoenaed, but failed to attend, and by whom defendant expected to prove that the judgments in former possessory warrant cases between these same parties, in relation to these same negroes, and which were in favor of plaintiff, Mrs. Waters, only awarded the possession of said negroes to her till 25th December, 1859. The Judge refused to continue or postpone, holding that said testimony was immaterial. To which decision defendant excepted.

Plaintiff first tendered in evidence the warrants, bonds and proceedings of two former trials between the parties, had about October, 1859, one by plaintiff against defendant for the children, Wyatt, Emma and Elizabeth; the other by defendant against plaintiff, for the woman Rose. To their admission in evidence, defendant objected: 1st. Because they were not properly proven or authenticated. 2d. Because they were irrelevant. The Court overruled the last ground, but sustained the first, and required the execution of the papers to be proved, which was done, and they were then received. To which ruling defendant also excepted.

The parties then submitted their evidence, from which it appeared that Mrs. Waters had had possession of the negroes from the death of her husband in 1854; that on the sixth January, 1859, she sold said negroes to defendant for \$1,400 00, and executed a bill of sale for the same; that when the bill of sale was executed, defendant agreed that the negroes might remain with her till the next Christmas, and that she might have them if she paid him for them; that when she paid for the negroes she might have them. Afterwards, in October, 1859, upon defendant's being about to remove from Jasper county, where the parties resided, to Monroe county, these possessory warrants above referred to were taken out by the parties respectively, which resulted in judgments in favor of Mrs. Waters, and the negroes awarded and delivered to her. This was about the 1st November; about the last of December she tendered the money to defendant for the negroes,

Mann vs. Waters.

(\$1,400 00) who refused to take it, saying they were worth \$3,000 00. The negroes continued in Mrs. Waters' possession until the first week in January, 1860, when by some means that did not appear, they left, or were taken from her premises, in Jasper county, and were found in possession of the defendant, who resided in the county of Monroe. Therefore, she sued out this possessory warrant.

Judge CABANISS, after hearing the testimony, ordered and adjudged that the negroes be delivered to plaintiff, upon her giving the bond required by law in such cases.

To which order and judgment counsel for defendant excepted.

R. P. TRIPPE, for plaintiff in error.

PEEPLES & CABANISS, and LOFTON, *contra*.

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

This was a proceeding under the Possessory Warrant Act of 1821, (*Cobb* 590,) at the instance of Sarah J. Waters against Americus V. Mann, to get the possession of a family of negroes.

It appears that Mrs. Waters had been in the possession of these negroes, except for a short time, from the death of her husband in 1834, down to 1859. In January of this latter year, Mann bought the negroes at \$1,400 00, and took a bill of sale to them from Mrs. Waters, agreeing to let her retain possession for that year, with the privilege of redeeming them whenever she could pay for them. Some litigation sprung up between the parties relative to the possession of the slaves, when it was adjudged that Mrs. Waters was entitled to the possession of the property. She held the negroes till the first Monday in January thereafter, when they disappeared, and were found in the custody of Mann. No one knew how the change of possession took place. This proceeding is at the instance of Mrs. Waters, to repossess herself of the property; apprehending that the warrant, under which the litigation was had in the fall of 1859, would be used by Mrs. Waters, Mann moved to continue the case to some future day, in order to prove by Phillips, the sheriff, that the judgment rendered under the warrants only entitled Mrs. Waters to retain

Mann vs. Waters.

the slaves till the end of the year. The Court refused to postpone the case for that purpose, and this is the first error assigned.

Concede that the evidence could have been made, and would have been legal in the view we look upon the rights of these parties under the Act of 1821, the testimony would have been wholly immaterial. And I would remark, that Mr. Ballard and others abundantly established the fact, that the negroes were to be surrendered at the close of the year 1859. For the purposes of this decision, we assume that point to be satisfactorily proven.

The only effect of this proof is to raise the presumption that the present possession of Mr. Mann was by the consent of Mrs. Waters. But now comes in the evidence of Mr. Williams, that subsequently to all this, he, at the request of Mrs. Waters, and acting for her, called on Mr. Mann to tender him the purchase money and then redeem the negroes, which Mr. Mann refused to accept, alleging the negroes were worth three thousand dollars, thus rebutting effectually the inference that the negroes were voluntarily surrendered; and such, no doubt, was the view taken by Judge CABANISS in the case.

We see no objection as to the mode in which the fall warrants of 1859 were proven. Indeed, independent of these warrants, the testimony is entirely sufficient and uncontradicted, that Mrs. Waters was entitled to the peaceable possession of these negroes till the end of the year 1859.

We see no reason for disturbing the judgment of the Court, but must remit the party to such other remedy, if any, as he may see fit to institute.

Judgment affirmed.

Sharman vs. Jackson.

SHARMAN vs. JACKSON.

1. Elizabeth Tankersly, by a deed of gift, gave to her son, William F. Jackson, certain negroes, at the death of the said William F. to be equally divided among the heirs of the body of the said William F. Matilda, a daughter of the life-tenant, married one Sharman and died, leaving children and her husband surviving her in the life of her father. *Held*, 1st. That the words heirs of the body did not create an estate tail in the life-tenant. 2d. That the person who should answer that description at the death of William F. Jackson, took the estate as purchasers and not by descent; that their interest during the life-estate was contingent and not vested. 3d. That in the distribution, the children of Matilda take *per stirpes*, and not *per capita*.

Trover, in Upson Superior Court. Decision by Judge CABANISS, November, 1859.

This was an action of trover brought by Thomas S. Sharman, as administrator of Matilda C. Sharman, deceased, against Winfield S. Jackson, for the recovery of certain negroes contained in the following deed of gift, and upon which plaintiff alone relied in support of his title, viz:

"GEORGIA—MONROE COUNTY:

"Know all men by these presents, that I, Elizabeth Tankersly of said county, in consideration of natural love and affection, which I have for, and bear for my son, William F. Jackson, have this day given to him the following negroes: Patience, Charles, Bill and Winney, during his life, and at his death I give Patience to my grandchildren, Eliza Jane Jackson and Maria Louisa Jackson; and Charles, Bill and Winney, at the death of said William F., to be equally divided among the heirs of the body of said William F., reserving to myself the possession and use of said negroes during my life, without paying any hire therefor.

(Signed) "ELIZABETH TANKERSLY, L. S.

"Signed, sealed and acknowledged this 17th day of June, 1825.

"In the presence of W. JOHNSON, W. B. CLARK, J. P.

"Recorded 20th June, 1825."

After reading the deed, plaintiff proved that Matilda C. Sharman, deceased, was his wife, and that she departed this

Sharman vs. Jackson.

life in the year 1844, and that William F. Jackson died in 1855, and that said Matilda C. was his daughter, and that she was in life at the date of the foregoing deed. Upon this testimony plaintiff rested his case, and defendant moved for a non-suit on the ground that said deed vested no title in remainder in said Matilda C. Sharman, she not being in life at the time William F. Jackson died.

The Court granted the motion, and ordered a non-suit, and counsel for plaintiff excepts.

JAS. M. SMITH & P. W. ALEXANDER, for plaintiff in error.

GIBSON, GREEN & PEEPLES, *contra*.

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

Three points arise in the construction of this deed. 1st. Whether by its terms an estate tail is created. 2d. Is the remainder a vested or contingent one? 3d. Who will take under the limitation to the heirs of the body?

1. As to the first, we consider it well established, that although these words, "heirs of the body," do, *prima facie* import an estate tail, yet in the language of Lord Hardwick, *Hodgson vs. Russey*, 2 *Atk.*, 89, "the general run of cases makes this plain, that notwithstanding they sound like words of limitation, yet upon circumstances and the intention of the parties, they may be construed words of purchase, and descriptive of the person who is to take." See, also, *Archers' case*, 1 *Co.*, *Kemp vs. Daniel*, 8 *Ga.*, 385. The superadded words, "at his decease to be equally divided," exclude the idea of a perpetuity, and take from the words that technical signification that the law ordinarily attaches, and gives to them their natural sense; hence we hold that they were used here as words of purchase, and not of limitation, and that they do not create an estate tail.

2. The limitation over then being good, is the remainder contingent or vested? It was insisted on by counsel for plaintiff in error, who is also plaintiff in the Court below, that the words "heirs of the body," must be considered as synonymous with children, and hence that Matilda Sharman, who was a child of the tenant for life, in life at the date of the deed, took a vested remainder, and which on her death

Sharman vs. Jackson.

before the determination of the life-estate was transmissible to her legal representative. But do these words when construed to be words of purchase, necessarily mean children? We admit that they may be used as synonymous with children, but we know no rule of construction which says they must be so taken; and we apprehend that an examination of the cases will show that whenever they have been so interpreted, it has been in consequence of the supposed intention as collected from explanatory words contained in the deed or will before the Court. They have been construed to mean next of kin: 1 *Rich. Eq.*, 145, *per Dunkin, Ch.* They have been used in the various senses of children or the persons who should answer the description of heirs at the time of his death, or in the technical sense, as *nomen collectivum*, to signify the whole line of succession. *Harper Ch. in Rice's Eq.*, 37. We have seen that they are not here used in the last sense. There is nothing in the context to show an intention to use them in the sense of children, and there can be no good reason why they do not import in this case such persons as answer that description at the death of first taker, considered in their natural sense, and not technical sense, as the grantor evidently intended by their use, whether such persons should be children, grand-children, or great-grand-children.

No words of explanation are to be found in the instrument, and we consider that they create a contingent remainder to a class of persons who at the death of the tenant for life would answer the description of heirs of the body. Wherever the remainder is limited to a person not in *esse*, or not ascertained, then the remainder is contingent. *Fearne*, 217. As if a lease be made to one for life-remainder to the right heirs of *J. S. Boraston's Case*, 3 Co., 20 a. In *Else vs. Osborne*, 1 P. Wms, 38, after a settlement for life on the grantor, with remainder to trustee during his life, etc., there was a remainder to the heirs of his body. Lord Chancellor Cowper decided it to be plainly a contingent remainder, being limited to the heirs of the body of A., who can have no heir during his life, for *nemo est hæres viventis*. *Bailey vs. Morris*, 4 Ves., 798, was a case in which there was a limitation by deed after life-estate to husband and wife to the heir male of her body by him, to be begotten, and for want of such heir remainder over. A son was born of the marriage, who died during the life of the wife, and through whom the plaintiff

claimed. *Held*, that this was a contingent remainder in such person as should be heir male at the death of the wife; the Court saying, "This is the case of a deed, therefore, I am of opinion that the limitation subsequent to the estate for life of E. H. was a contingent remainder to such person as would be heir male of her body at her death, in fee, and as *nemo est hæres viventis*, and Thomas H. (the son,) died in the life of the mother, that remainder never took place." This reasoning and decision was afterwards adopted by Lord Cottenham, *Chancellor, in Chambers vs. Taylor*, 2 *Mylne and Cr.*, 376. That is almost a parallel case. The son having died in the life-time of the mother, the tenant for life, no estate ever vested in him, and here Matilda Sharman having died during the life of the tenant for life (her father,) no interest ever vested in her. The only interest which Matilda Sharman took by this deed was a bare possibility. Being presumptive heir at the time of its date, she had a mere hope of succession, which is not devisable, 3, *T. R.*, 93, and consequently not transmissible to her representatives.

Wherever the limitation is contingent by reason that the person or persons to whom it is directed cannot be ascertained, as in the case of a limitation to the right heirs of J. S. (then living,) no interest will vest in the heir during the life of J. S., nor will it be transmissible or descendible from any one dying before it becomes vested. *Fearne* 371, *Doe vs. Tomlinson*, 2 *M. & S.*, 170.

Indeed, these words, heirs of the body, in themselves, import a contingent remainder, for admitting that the person who will be heir is in being, still it is uncertain whether the person who would be heir should the ancestor die at a particular time, may not die before the ancestor, and hence the person who will eventually be heir, is one, who even if he is in being, cannot be ascertained until the death of the ancestor. And hence, it is a general rule that a remainder limited to the heir or heirs of a living person, is a contingent remainder. To this there are certain exceptions, as where there are explanatory expressions showing that they were used in some other sense, as sons, or children, as denoting the persons who at the time are the apparent heirs. Another exception is, when, by the celebrated rule in Shelly's case, the words are to be considered as words of limitation. 2 *Fearne*, 202. In this instrument, however, there are no explanatory words showing

Sharman vs. Jackson.

an intention that they are used as synonymous with children, or sons, or daughters, or that they are intended to designate any particular person, who at its date were the heirs presumptive of the tenant for life, and having already determined that by reason of the superadded words, the term heirs of the body are taken out of the application of the rule in Shelly's case, they must *ex vi termini*, constitute a contingent remainder by virtue of the maxim, *nemo est hæres viventis*.

By this construction we violate no intention of the donor, as collected from the instrument. The children of Jackson living at the date of the deed, and who were then his apparent heirs, were not the immediate objects of her bounty. This is manifest from the creation of a prior life-estate. She, no doubt, intended to give the benefit of this disposition first to her son for life, and then to those who, at his death, would stand towards him in the relation of his heirs. It would be a most forced construction to say that after the death of her son, the tenant for life, she intended the property to pass away from his family and go to strangers. But this would be the result were we to hold that the words heirs of the body, are here synonymous with children, and that they took vested remainders transmissible to their legal representatives. This presumption of intention has no bearing on the decision we give. Her intention is to be looked for in the deed itself, and there is nothing there inconsistent with the construction we put upon it. "At his death to be equally divided among the heirs of his body," we construe to mean a remainder to those who at that time would answer to the description of heirs of the body; that is, the lineal descendants upon whom the law would cast the descent of lands if the ancestor had died intestate. *Lemacks vs. Glover*, 1 *Rich. Eq.*, 141. And it is undoubtedly competent that an interest may be limited to such persons as shall at a particular time sustain a particular character. *Halloway vs. Halloway*, 5 *Ves.*, 401.

Where property is given to a class of persons, and not by name, it will take in all who shall answer the description at the time the gift shall take effect, and if there be but one, though it be expressed in the plural number, that one will take. *Swinton vs. Legare*, 2 *McCord's Ch. R.*, 445; *Myers vs. Myers*, 2 *ib.*, 257, 259.

It is clearly established by *De Visme vs. Mele*, 1 *Bro. Ch. Cas.*, 537, any many other cases, that when the testator gives

Sharman vs. Jackson.

any legacy or benefit to any person not as *persona designata*, but under a qualification and description at any particular time, the person answering the description at that time is to claim. *Godfrey vs. Davis*, 6 Ves., 43.

It follows, therefore, that as the husband or representative of Matilda Sharman at the death of Jackson, the life tenant does not answer the description of persons to whom the gift is made; that he cannot take, but that her children, who do answer to that description, and who are also within the intention of the donor, take instead. And so the judgment of non-suit was properly awarded by the Court below.

3. It having been ascertained who are to take under the description, it remains to be determined, how the distribution is to be made under the direction "to be equally divided." We hold that they are to take *per stirpes* and not *per capita*; and this opinion is founded on the intention of the donor, as gathered from the words of the instrument, construed in reference to, and in connection with, the Statute of Distribution of this State, by which the grantor evidently contemplated that the property should be distributed among these persons.

Elizabeth Tankersly in making this deed, never could have meant that one, of a half dozen grand-children, should take equally under the deed with one of the children of her son, the life tenant, who was in life at the making of the instrument, and directly within the scope of her immediate intended bounty. It is true, she says equally divided, but that is to be understood and construed as that equal division made by the distribution laws, that is, that all the heirs related to the first taker equally, or in the same degree should take equally, while those who were in the same line, but further removed, should take by representation, that is, all together standing in the place of the deceased parent, and taking but the share or proportion which is equal with the shares of the children. This is an equal division among the heirs of Wm. F. Jackson, and it is not the less so that one or more of the shares must again be sub-divided into as many parts as there are grand-children distributees.

Matilda Sharman was in life at the execution. She was in the eye of the donor at that time, as one who would take an equal share with the other children at the death of her father, should she at that time be in life; but she was not, and as her children, equally with herself, answer the descrip-

Sharman vs. Jackson.

tion, one degree farther removed, they fall in, filling up the gap caused by her death, and take only that distributive part of the estate which would have come to her had she lived, just as the law would have distributed the property to them had William F. Jackson absolutely possessed the property in his own right and died intestate. *Buskin's Appeal*, 3 *Penn. R.*, 304, was a case very much like this. The testator, after making certain bequests, directed thus: "Then my will is, that the remaining part of my goods, stocks, etc., shall be impartially appraised, and after such appraisement made, that the same *shall be equally divided between all the heirs.*" The Court held that, "by these expressions, the testator means his own heirs, which can only be ascertained by resorting to the Statute of Distribution, as has often been done in analogous cases; and taking this to be the rule, it descends to the children and grand-children *per stirpes*. This shows the persons who are to take, and the same rule must be applied to the quantum of the estate."

In England the rule would be different, but the reason of the rule cannot be the same here as there, on account of the difference in the law of descents. In *Lemack vs. Glover*, Reported in *Rich. Eq.*, 141, this question was well considered by Chancellor Harper. The testator in that case bequeathed the use of personal property to his sister Jane, and after her death bequeathed the same to the heirs of her body, to them and their heirs and assigns forever." The Court held, first, that the words, "heirs of the body," were words of purchase. Second, that all who answered the description of the heirs of the body at the death of Jane, were entitled; but the Court dividing equally as to whether such persons took *per capita* or *per stirpes*, there was no decision of that question, Chancellor Harper holding that they took *per stirpes*; Chancellor Johnson and Justices O'Neal, Evans, Wardlaw, concurring; while Chancellor Johnston, Dunkin and Justice's Richardson, Butler, and Frost, held to the contrary. We think the opinion in favor of the *per stirpes* distribution is the better one. The other is put on the ground that the rule was settled in the previous adjudication of *Campbell vs. Wiggins, Rice Eq.*, 10, and not upon reason or law, and with the candid confession that such rule, when applied to the circumstances of that case and considered in connection with the proportion in which the distribution is to be made, the Court

Sharman vs. Jackson.

is constrained to doubt whether the intention of the testator is not sacrificed, (perhaps necessarily sacrificed,) in deference to an established rule. The opinion of Chancellor Harper, on the other hand, from its strength, clearness and ability, and in accordance with the manifest intention of the testator in that case, and the donor in this, is entitled to great respect, and attention, at least in considering the question, if it does not, in fact, amount to a judicial precedent. He says, "I would not depart from the English cases when they apply, but I think our Statute of Descents and Distributions, making the distributees of personal estate identical with the heirs of land, (as in our own statutes,) makes a new case, and admits and requires a different construction. In England, the heir at law is in general a single individual, and the plural 'heirs of the body' serves to denote the succession. When these words, therefore, are held to denote a class or classes of persons, it may be said that there is nothing on which to found the notion of representation, or that the parties are to take otherwise than *per capita*. With us, certainly, it must be competent for a testator to give his own or mother's lineal descendants in such shares and proportions as they would have taken land by descent in case of intestacy. And when he describes them as heirs of the body, nothing can more plainly express their intention. They are to take as heirs in every respect that they can so take, only it is by purchase instead of descent. In England, when taken to mean a class of persons, these cannot in any respect take as heirs, or heirs of the body. Whether construed, children, issue, descendants, next of kin, etc., they must always be different persons from the heirs. It is said in cases of coparcenary or gavel-kind, that all the individuals who take, make up but one heir. But with us, the heir is made up of component parts in different proportions. In the present case, I think he consists of two individuals, each entitled to one-fifth of the estate, of six persons, each entitled to one-third of one-fifth, or one-fifteenth, and of two persons each entitled to one-tenth. So they would have taken any land of which their mother had died intestate. And this agrees with what the law supposes to be the rule of affection by which children are preferred to grandchildren, and nearer kindred to the more remote."

Williams vs. Fambro.

WILLIAMS vs. FAMBRÖ.

1. In an action to recover damages for the killing of a slave, the defendant may give evidence of the slave's character for turbulence and insubordination, for the purpose of aiding the probability of his theory of defense that the slave was killed in an act of insubordination, and also for the purpose of mitigating the damages; but the evidence must come from witness who knew the slave to have had such a disposition, or from admissions of the plaintiff, and not from general reputation, nor from proof of previous particular acts of insubordination on the part of the slave.
2. Such an action to recover damages for the killing of a slave, need not be preceded by a prosecution for the felony.

Trespass *vi et armis*, in Pike Superior Court. Tried before Judge CABANNIS, at October Term, 1859.

This was an action brought by Allen G. Fambro against Richard W. Williams, for the recovery of damage for killing a negro man slave, named Jim, *alias* Jim Sheet, the property of plaintiff. The declaration alleged that the negro was worth \$1,200 00, and that he came to his death by wounds inflicted upon him by defendant.

The defendant pleaded the general issue.

Upon the trial it appeared from the testimony, that at the time the negro was killed, 23d March, 1857, the defendant was overseeing for plaintiff; that the plantation upon which the negro was killed, was in the county of Crawford, and that plaintiff resided about thirty miles distant. None of the witnesses examined was present at the killing; the negro was found dead—stabbed in the left side; the wound having the appearance of having been inflicted with a long knife. The defendant lived on the plantation with his family, and had charge of the negroes as plaintiff's overseer; that he was absent when the witnesses who were examined first went to the plantation and found or saw the negro dead; that he left immediately after the killing.

When the case was called for trial and plaintiff announced ready, defendant moved for a continuance, on the ground of the absence of a witness who resided in the county, and had been duly subpoenaed, and by whom defendant expected to prove that the negro killed was of bad character, turbulent and unruly; plaintiff objected to the showing as insufficient;

the testimony of the absent witness, as stated by defendant, if procured, being immaterial and inadmissible. The Court held the showing insufficient, and refused the motion to continue, and defendant excepted.

The plaintiff having closed his testimony, the defendant offered to read the depositions of one Robert D. Walker, a witness examined by commission. The substance of the answers of this witness was, that he knew the boy, Jim; that his character in the neighborhood was, that he was hard to manage and control, and of a violent disposition. That in January, 1856, he commenced to oversee for plaintiff, who told witness that if Jim complained of being sick, to give him some medicine, and if he was not sick, to put him to work; witness went to the door of the house where Jim was, and told him if he was well enough, to take his tools and go to work. Jim replied, that when he was sick his master never allowed him to work, and he'd be damned if he would do it; witness struck him with his fist, and went to get his whip, when Jim followed him out into the yard and picked up an axe and went back into his house. Plaintiff then told witness not to go into the house until he, plaintiff, went in and brought the boy out; plaintiff said the negro was dangerous, and advised witness to go armed, so as to defend himself. About three weeks after this, witness undertook to whip him for playing cards; he swore he'd be damned if he should do it, and picked up a stick and struck at witness; witness then had him tied and whipped him; witness remained on plaintiff's plantation four months, and whipped Jim three times; he attempted to strike witness one time, and resisted twice; says he was afraid of him, and good cause to be in the night, but not in the day. Nat Lucas and Frank Bacon told witness that the character of the negro was bad, and they wanted him to keep Jim away from their plantations; they said he was a dangerous negro, and of bad habits; witness considered him dangerous.

Plaintiff's counsel objected to the reading of these depositions, upon the ground that the testimony was irrelevant and immaterial. Defendant's counsel stated that this testimony was offered for two purposes: 1st. To show the character and conduct of the negro. 2d. To mitigate the damages. The Court sustained the objections and ruled out the depositions, so far as they went to prove the general character of

Williams vs. Fambro.

the negro for violence, unless some act of violence was shown to defendant, or knowledge on his part of the negro's character for violence. To which ruling defendant excepted.

The testimony being closed, defendant's counsel requested the Court to charge the jury, that plaintiff could not maintain this action for damages, without first showing that he had prosecuted the defendant to conviction or acquittal on the criminal side of the Court. The Court refused so to charge, but charged that plaintiff had the right to maintain this action, and to recover therein, without prosecuting the defendant criminally to conviction or acquittal. To which charge and refusal to charge, counsel for defendant excepted.

The jury found for the plaintiff twelve hundred dollars. Whereupon defendant moved for a new trial, on the ground that the verdict was contrary to law and evidence, and because of error in the rulings, decisions, charges and refusal to charge above stated and excepted to. The Court overruled the motion, and defendant excepted.

PEEPLS & SMITH, for plaintiff in error.

GIBSON & FLOYD, *contra*.

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

1. We think the plaintiff in error was entitled to the continuance to get the benefit of Barron's testimony, and that he ought also to have had the benefit of Walker's testimony, which was offered but ruled out. We think the testimony of these two witnesses was material and admissible, so far as it related to their own general knowledge of the negro's disposition, or to Mr. Fambro's statements concerning his disposition, but not admissible so far as it related to previous particular acts of violence on the part of the negro, or to general reputation as to his disposition. To go into proof of particular acts of the negro, would be to open a collateral issue involving "all things that he ever did." Such proof coming collaterally, would come without the least notice to the opposite party, and therefore without opportunity to meet it by preparation. Proof by general reputation is obnoxious to the objection that it is hearsay. It is clearly within the general rule against hearsay, and we do not perceive that it is

within any of the exceptions. When *reputation* is in issue, as it may be in several classes of cases, it may be shown by general report, or rather the general report in that case is the very thing to be proven, and of course may be proven. But the thing to be proven in this case was, not the negro's reputation, but his character, his disposition or nature, and especially his aptness for strife and his proneness to insubordination—a fact which ought to be proven by witnesses who know it, or by the admissions of the opposite party. The fact, if proven from the proper sources, ought to have gone to the jury for two purposes, as tending to aid the theory of the defense that the negro was killed in an act of insubordination, and as tending to lessen the value of the negro, and so to mitigate the damages. To prove a proneness to insubordination, to be sure, does not prove an act of insubordination, but it does increase the probability of the story when there is, as there was in this case, other evidence suggestive of such an act. Such a story of rebellion, if told by a witness, or indicated by circumstances, ought to be more easily believed concerning a violent, turbulent negro, than concerning a meek, humble one. I think that any mind in search of truth in such a case, or finding itself in *doubt*, would want to know the character of the negro. The presiding Judge intimated that he would have allowed this evidence, if it had been shown that this character had been communicated to Williams before he killed the negro. His knowledge or ignorance has nothing to do with that bearing of the character which I have pointed out. The sole purpose for which character was admissible in *this case* on the question of justification, was from the negro's general readiness for rebellion, to render more probable the evidence which tended to show an act of rebellion at the time when he was killed; and this probability is evidently not affected in the slightest degree by Williams' previous knowledge. The light comes from the *fact* that the negro was one who was apt or likely to do such an act as the one imputed to him, and not from Williams' knowledge of the fact.

As to the bearing of the negro's character upon the question of damages, it is very obvious that a negro's bad character detracts from his value, and ought to lessen the damages for killing him. In this view the evidence need but be confined to his particular character for insubordination, but

Williams vs. Fambro.

ought to be allowed as to his bad character in general, for a bad character in any respect is one element affecting his value.

2. We agree with the presiding Judge, that a previous prosecution for the felony to a conviction or acquittal, was not necessary to the maintenance of this action. In the case of *Neal vs. Farmer*, 9 *Ga. Rep.*, 555, this Court held that this doctrine applied only to such felonies as were felonies at common law, and that *at common law* no killing of a slave was felony, and therefore that an action to recover damages for the killing of a *slave* need not be preceded by a prosecution for the felony. We were invited by the argument in this case to review and reverse that decision. Without considering its original propriety, the decision ought to be maintained *now*. It was made nine years ago, and attracted the universal attention of the profession at the time. The legislature with full knowledge of the decision for nine years, not having changed the law declared by it, may fairly be considered as acquiesced in it. The great body of the common law derives its authority from decisions of Courts and legislative acquiescence in them. We adhere to this one.

Judgment reversed.

Walker *et al.*, vs. Floyd.

WALKER *et al.*, vs. FLOYD.

1. It is no ground of continuance, of itself, that a full report of a decision of this Court in the case on trial has not been received by the party desiring its use.
2. To be entitled to a continuance on account of the absence of a practicing attorney from the Court, the party desiring such witness must show the same diligence to have the attorney in attendance, or to obtain his evidence, as for that of any other witness.
3. When money is in the hands of an officer of the Court on which counsel claim a lien for fees which is controverted by the client to whom the money belongs, a rule is a proper remedy to settle all questions between client and attorney in respect to the same.
4. To such rule the attorney need not attach a bill of particulars of the various services he has rendered, steps taken or things done in the different stages of the litigation in which the service was rendered, nor need he, on the trial, go into proof of the same; the services in a particular litigation must be in pleading, and proof, treated as a whole.
5. Such proceeding will not lie for services not yet rendered.

Rule, in Upson Superior Court. Tried before Judge CABANISS, at November Term, 1859.

In an equity case pending between James S. Walker and others, against Nathaniel F. Walker, an award was made against defendant under a rule of reference. He, in part payment of the amount awarded against him, paid to James M. Smith, Esq., one of plaintiff's solicitors, a considerable sum of money, between ten and fifteen thousand dollars. This was a rule by John J. Floyd, Esq., one of the solicitors of complainants in said cause, against Smith, to pay over to him out of said fund the sum of two thousand dollars for counsel fees due to him by complainants in said case, or show cause to the contrary, etc. This rule was predicated upon the ground or principle that movant, as solicitor aforesaid, had a lien, as counsel, for his fees on the funds in the hands of Smith, who was associate counsel in said cause, and an *an attorney of the Court*. The question as to the right to maintain this form of procedure, and how to be tried, were decided upon a bill of exceptions brought to the Supreme Court in this and other cases, at August Term, 1859. (*See 29 Ga. Rep.*, 185.) The case being remanded by the Supreme Court, came up

Walker et al., vs. Floyd.

again for trial, before Judge CABANISS, at November Term, 1859. J. S. Walker, N. F. Walker, jr., and F. Coleman, complainants in the equity cause, came in under the rule and defended, and were the real parties respondents.

The cause being called, counsel for respondents moved to continue the case, on the following grounds :

1st. In order to enable them to obtain and have the opinion of the Supreme Court pronounced in the cause at Atlanta, August Term, 1859.

2d. Because of the absence of H. Hill, Esq., a material witness for respondents ; that witness was a practicing attorney of this Court, residing in Macon, Georgia, and that they reasonably expected that he would be present at this term of the Court, and at this trial ; that he had not been subpœnaed, nor had any steps been taken to take his depositions.

It further appeared, that the remittiter from the Supreme Court, remanding the case for a new trial, had been received and entered on the Minutes of the Court below.

The Court refused the motion to continue, and respondents excepted.

Counsel for respondents further objected to proceeding to trial, on the ground that rule was not the remedy in a case like this ; that it could only hold up the fund in Court, but that movant must establish his demand by action at law.

The Court overruled the objection, holding that an attorney at law had a lien on money raised under a judgment obtained by him for his client, which he can enforce by rule ; and respondents excepted.

Counsel for respondents further objected to the rule, on the ground that the cause of action, or the particular services rendered, was not distinctly set forth and specified in the rule.

The Court overruled the objection, and respondents excepted.

Counsel for respondents, in the progress of the examination of the witnesses, objected to their testifying as to services rendered, unless such services were specifically set out in the pleadings, and further objected to the witnesses who were lawyers giving their opinions as to the value of the services rendered by plaintiff.

The Court overruled the objections, and respondents excepted.

Walker *et al.*, vs. Floyd.

The case being submitted to the jury upon the evidence, argument of counsel and charge of the Court, they returned a verdict for plaintiff for two thousand dollars.

Whereupon, counsel for respondents tender their bill of exceptions, assigning as error the rulings and decisions aforesaid.

N. M. HARRIS and B. H. BIGHAM, for plaintiffs in error.

GIBSON & PEEPLES, *contra*.

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

1. The Act of 22d of January, 1852, "to regulate the practice of the Supreme Courts and of the Superior Courts of this State," etc., provides, "That when any cause shall be sent back to the Superior Court by the Supreme Court, the same shall be in order for trial at the first Term of the Superior Court next after the decision of the said Supreme Court. And where either party may have exhausted their continuances on the appeal, the said Superior Court shall have full power and authority to grant one continuance to said party as the ends of justice may require." Under that statute, the plaintiffs in error were not entitled to a continuance of the cause on the first ground. The record does not show that they had exhausted their continuances. That statute evidently intended that the Court should continue only for a good and sufficient cause shown. That the mere fact that a full report of the decision of the Court in the former trial had not been received, should not, of itself, be a sufficient ground of continuance. But that when the continuances allowed by law, on proper showing made, had been exhausted, that then the Court might continue on a like showing one time more, if the ends of justice require it. These parties gave no reason why the decision of this Court was necessary to a full understanding and settlement of their rights before the Court, or in what way it could benefit them in that trial. Nor can we see how the want of that judgment has injured or even affected their rights.

2. To entitle one to a continuance on account of the absence of an attorney, who is a witness for him, it is necessary that he should show that he has used the same diligence to

Walker *et al.*, vs. Floyd.

procure his attendance or his testimony, if he resides out of the county, as any other witness, notwithstanding the attorney, at the time, may be a regular attendant upon, and practitioner in, the Court where the testimony is desired to be used; for the reason that, although the attorney is for certain purposes an officer of the Court, he is not so for all purposes. He is not obliged to attend the Court. He attends the Court voluntarily in the pursuit of his profession as the prosecutor of his client's rights before the Court. And as the plaintiff did not come up to this rule, the motion for continuance was properly overruled.

3. Counsel for plaintiffs in error demurred to the form of proceeding on three grounds:

1st. That a rule was not the proper remedy.

2d. That the rule did not plainly and distinctly set forth the cause of action, and did not contain a bill of particulars of the services rendered.

3d. That there was a branch of the litigation still pending. Whether a rule was the proper form of proceeding for settling the issue between these parties, was made and determined against plaintiffs in error in this same case, in the name of *Smith vs. Goode*, 29 Ga., 185, with the reasoning of which the plaintiffs must be satisfied.

4. The employment of counsel goes to the whole of the litigation, from the time of his employment to the end of the same, and he is expected, and it is his duty, to do every service in the progress of the cause that is necessary for the prosecution, protection, or defense of his clients' right—in all things to represent and insist upon his rights, and his compensation is to be measured by the amount involved, the benefits conferred, the services actually rendered that was necessary to be rendered, and the time the litigation was continued. But it is not the practice, and it would be bad policy, to fix a specific charge for each specific thing done by counsel in the progress of the cause. There would be no end to the charges, and no inducement to counsel to bring the litigation to an end. Without enlarging further upon this point, we hold, for these reasons, that it was not necessary to attach a bill of particulars to the rule to show cause why the money should not be paid. It is sufficient if the rule show on what account it is moved and in what litigation the service was rendered. In other words, all that is necessary is, that the

Smith et al., vs. Overby.

rule should contain sufficient to put the client on notice and to bar a future demand of the attorney for the same service, and this we think this rule does. And this, we think, disposes of all objection to the testimony of the witnesses sworn on the trial on the same ground.

5. The attorney could not move this rule against a fund in Court for services not yet rendered. But we do not understand that to have been the object or effect of this proceeding. It was a claim for fees for such services only as had already been rendered, and in a litigation which was ended.

Some other points appear in the bill of exceptions, but as they were not argued or relied on, and as we do not see any merit in any of them, we take it for granted that counsel for plaintiffs in error abandoned them and did not desire this Court to pass upon them. The main ground relied on was, that the attorney's claim for services could not be enforced as a lien against the fund in Court by rule, but must be ascertained and fixed by an action at law as all other claims; and this question was decided as before stated, and against the plaintiffs at Atlanta, August Term, 1859, of this Court.

Judgment affirmed.

SMITH *et al.*, vs. OVERBY.

1. Although a charge be literally correct, still, if the language was calculated to mislead the jury upon a material point, a new trial may be awarded.
2. The doctrine of damages discussed.

Case, in Newton Superior Court. Tried before Judge RICE, at September Term, 1859.

This was an action on the case brought, in the first place, by William H. Smith, against Benjamin H. Overby, a physician, to recover damages for the neglect and want of care,

VOL. XXX—17.

Smith *et al.*, vs. Overby.

skill and attention of defendant in delivering plaintiff's wife of a child, defendant being called in as an accoucheur, or man-midwife, on said occasion.

The defendant pleaded the general issue.

Plaintiff afterwards amended his declaration by making his wife, Harriet D. Smith, a co-plaintiff, and alleging that defendant injured the said Harriet D. by gross negligence, inattention and unskillful treatment in and about the delivering the said Harriet D. of a child, and by cutting and lacerating the child with a jack-knife, while in the womb, and before its birth, and other wrongs and injuries done to said Harriet D., etc., and causing her great mental and bodily suffering, and destroying her health and peace of mind, to the damage of the plaintiffs twenty-five thousand dollars.

The parties submitted their testimony; after which, and argument by counsel, the Court charged the jury, who returned a verdict for the defendant. Whereupon, counsel for plaintiffs moved for a new trial, upon the following grounds:

1st. Because the verdict was contrary to law and evidence.

2d. Because the verdict was contrary to the charge of the Court.

3d. Because the Court erred in charging the jury, that the damages must be confined to the actual injuries sustained by Mrs. Smith in her person.

4th. Because the Court erred in charging the jury, that in this case the plaintiffs are not entitled to recover what is called exemplary or vindictive damages.

5th. Because the Court erred in charging the jury, that plaintiffs are not entitled to recover damages by way of example or punishment.

6th. Because the Court erred in charging, that if the necessity existed, and no better instrument was at hand or could be procured in time, then, from the necessity of the case, defendant might use the knife, and that the physician is not responsible for any error in judgment on such occasion; such error arising from the peculiar circumstances of the case, and not from want of proper care or skill.

The presiding Judge refused the motion for a new trial, and annexes to his decision, overruling the motion, the following as a portion of his charge, necessary to a proper understanding of the grounds of the motion for a new trial, and of the reasons of the Court for refusing the said motion, viz:

Smith *et al.*, vs. Overby.

The Court, after a statement of the pleadings, charged the jury, among other things, as follows:

"This action is not brought for any injury sustained by the husband, but is brought by the wife, Mrs. Smith, for the injury which she alleges she sustained on the occasion of her accouchement. The husband, William H. Smith, is joined in the action, but the damages are to be given for the injury sustained by the wife, Mrs. Harriet D. Smith. To sustain the plaintiff's action, the plaintiffs must prove that Mrs. Harriet D. Smith sustained injuries as alleged in *their declaration*, and that those injuries were attributable to a want of a reasonable and proper degree of care and skill in the defendant's treatment on the occasion mentioned in the plaintiff's declaration. The profession of the physician is one of the learned professions; and in regard thereto, as in all professions, in the practice of which, learning and skill are required, the rule of law is, that every person who enters into a learned profession undertakes to bring to the exercise of his profession a reasonable degree of care and skill. He does not undertake to use the highest possible degree of skill; for there may be persons who, from having enjoyed a better education and greater advantages, are possessed of greater skill in their profession; but he undertakes that he will bring a fair, reasonable and competent degree of skill. The care and skill required of him ought to have reference to the nature of the business he is called on to perform. To embody these principles so as to make them more immediately applicable to the case before us, the Court charges you, that a physician called on to deliver a woman in labor, does not undertake that he will, at all events, safely deliver the woman of her child, without injury to the mother or child; but he undertakes that he will bring to the work a fair, reasonable and competent degree of care and skill in reference to the operation to be performed. Again: Of necessity, the physician acting as an accoucheur must judge from the circumstances attending the accouchement the necessary treatment of the case, and the operation, if any, necessary to be performed to accomplish a delivery. He is called in for the very purpose that by his skill he may judge what is necessary to be done, and by his skill to do it; and he is not responsible for an error in judgment on such occasion, if such error arises from the peculiar circumstances of the case, and not from want of

Smith *et al.*, vs. Overby.

proper care or competent skill on his part. As to the use of the knife, the Court charges you that if the necessity existed, and no better instrument was at hand, or could be procured in time, then, from that necessity, the defendant might use the knife."

The Court further charged the jury, among other things, as to damages: "That if Mrs. Smith sustained any injury from want of proper care or competent skill on the part of the defendant, then the plaintiffs are entitled to recover damages for the actual injury she sustained. You will take all the circumstances into consideration, and award damages to the plaintiffs for all the injuries Mrs. Smith actually sustained from any want of skill or of proper care on the part of the defendant. Any pain or suffering caused to Mrs. Smith by defendant's want of skill or care must be taken into consideration as injuries in awarding damages to the plaintiffs; and you will award such damages as will be a full compensation for all the injuries which Mrs. Smith sustained by reason of any want of skill or proper care on the part of the defendant.

"Plaintiffs are not entitled in this case to recover what are called exemplary or vindictive damages; that is, the plaintiffs are not entitled to recover damages of the defendant for the sake of example or as a punishment on defendant.

"The foregoing is so much of the charge of the Court as is necessary for a full understanding of the errors complained of. It is proper that the Court state, as a reason for giving the last one of the above charges, viz: The charge in relation to exemplary or vindictive damages, that the plaintiffs' counsel, in their argument before the jury, insisted on the right of plaintiffs to recover exemplary or vindictive damages by way of punishment of defendant.

"GEORGE D. RICE,
"Judge S. C."

To which decision, overruling the motion for a new trial, counsel for plaintiffs excepted.

CLARK & LAMAR, for plaintiffs in error.

J. J. FLOYD, *contra*.

Smith *et al.*, vs. Overby.

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

This is an action brought by the husband and wife against the defendant, as a physician, for an injury done to the wife in delivering her of a child. Upon the evidence, and under the charge of the Court, the jury found a general verdict for the defendant.

A new trial was moved for, mainly on the ground of the misdirection of the Court as to the law. The application was denied; and this is the judgment excepted to and sought to be reversed.

The declaration, as amended, claimed damages, not only for the bodily pain and injury inflicted upon the mother, but also for the mental sufferings occasioned, as it is alleged, by the unnecessary destruction of the life of the child; and the burden of complaint is, that owing to the manner in which the law was given to the jury, this last ground of grievance was withdrawn from their consideration. At any rate, that the jury were misled, or likely to have been so, by the charge; that the jury might have been satisfied that Dr. Overby did not bring competent skill to the treatment of the case, and yet they permitted him to escape because it was not shown that the wife had not sustained any bodily injury.

It is true, the Court did not restrict, in so many words, the finding of the jury to the bodily injury done to the wife, as is assumed in the motion for a new trial. On the contrary, the Judge directed them to all of the injuries complained of in the declaration; and yet, we can readily believe that the jury did not so understand the instructions given to them, and that their finding may have been the result of this misconception. The jury are directed that the plaintiffs are entitled to recover for all the injuries Mrs. Smith "*actually sustained*" from any want of skill or proper care on the part of Dr. Overby; and the same phraseology is repeated in the charge, and the mind of the jury is no where called to the anguish of maternal feeling produced by the destruction of the child; and for this reason, we think it will better subserve the ends of justice to have this case re-examined.

As to the degree of skill and care required of a physician, we find no fault in the charge. And we concur with the Court, that this is not a case, judging from the evidence in the record, for positive damages, even conceding that there

Smith et al., vs. Overby.

are cases where exemplary damages may be awarded. The defendant may have exhibited a want of skill, for which he is responsible. But we see nothing in the proof that should subject him to be punished as an example to others.

The first question to be settled by another jury is, does it appear, from the evidence, that Dr. Overby was so deficient in care or skill as to subject him for the consequences of his mistreatment? And if so, what should be the compensation to which the plaintiffs are entitled?

The proof is, that the case was one of difficulty, owing to the unnatural presentation of the child. But were the circumstances of such an extraordinary character as to excuse the physician for any fatal mistake which he may have committed? Dr. Overby gave two accounts of the obstacles which he had to encounter. One was, that he supposed there were yet two other children in the womb, one having been already born; and that the remaining two were united or "linked together," to use his own language, so as to prevent him from turning them. The other was, that the second child could not be turned owing to the sudden and violent contraction of the womb, after the expulsion of the other child.

The first hypothesis turned out to be unfounded. As to the second, neither the testimony of Dr. Stewart nor any other witness shed any very satisfactory light. True, Dr. Stewart swears that had the same circumstances existed, two hours before (when the amputation of the arm and probable death of the child took place) which surrounded the case when he arrived, it would have been easier to have effected a delivery than when he got there. He found no difficulty in effecting a delivery in ten or fifteen minutes. But then the system of the mother was greatly relaxed, even to syncope. She had fainted and was actually unconscious when the child was born. Upon the next trial, medical skill can make this point plain.

It occurred to me on the argument, that the conduct of the physician, which most needed explanation, was this: He seemed to have come to the conclusion that nothing but a partial dissection of the child could save the mother. Hence, he proceeded to amputate the protruded arm; and having administered an opiate, he desisted from doing anything more until the arrival of Dr. Stewart, two hours afterwards. Why take this decided course, thus causing, as it probably did, the

death of the child, and then stop short, without consummating his purpose?

Since delivering the opinion which I did in this case, and before leaving Court, I am inclined to think that, in my ignorance, I may have magnified this apparent error. By reference to the cases of difficult preternatural and complicated labor commented upon by Dr. Robert Lee, in his Treatise on Clinical Midwifery, a standard work kindly placed in my hands by an eminent accoucheur, I am inclined to think that the amputation of the arm, and the opiate administered, might, after the delay which intervened before the arrival of Dr. Stewart, have produced quite a change in the condition of Mrs. Smith, thereby enabling Dr. Stewart readily to deliver the child, which the forcible contraction of the womb, at the time of the amputation, have prevented; and that the practice pursued by Dr. Overby may likely be sustained by the highest medical authority.

Case No. 3, at page 122, in the First American from the Second London Edition of that Treatise; and Rambotham's book on Transverse Presentations, with the illustrations, have brought my mind to the conclusion, that while a physician of more skill and experience may have succeeded in saving the child, yet, that the evidence does not satisfactorily establish that want of proper care and skill, under all the circumstances of this case, which should make the defendant liable for any want or error of judgment he may have committed. In cases of doubtful practice, a certain amount of discretion must be exercised by the qualified medical man. A contrary doctrine would drive from the profession many worthy men, or render them timid, where confidence and boldness were demanded.

As to the law of damages, it is not necessary to decide between the conflicting opinions of those distinguished juriconsults, Professor Greenleaf and the late Mr. Sedgewick, the former holding that damages are compensatory only; and the latter, that the jury may give damages, not only to recompense the sufferer, but to punish the offender where the elements of fraud, malice, gross negligence or oppression mingle in the controversy; thus blending the interest of society with that of the aggrieved individual.

We apprehend that in most of the cases, when carefully examined, it will be found, that whether the injury be done

Smith et al., vs. Overby.

to person or estate, the measure of damages is, after all, the actual injury inflicted, neither more nor less.

An assault and battery is committed on the person by pulling plaintiff's nose or spitting in his face, the object being to degrade him. What, I ask, is the actual injury? The mere bodily sufferings? That is nothing. Man has a moral as well as a physical nature. Here the injury is to his feelings—his honor—his pride—his social position. Suffer these to go unprotected, unredressed, and life itself is no longer tolerable nor desirable. Hence, the jury in such case should render large damages, not as punishment, but to compensate the actual injury. They must put a price upon the manhood of a freeman, and mulct the defendant accordingly.

Let this illustration suffice. Analyze the cases, and the same solution applies to all. Courts and text-writers have not clearly comprehended this doctrine and the philosophy of it. Otherwise, there would be harmony instead of confusion and apparent contradiction upon this subject.

Apply the rule to the case before us: grant that Mrs. Smith felt that the fruit of her womb had been lost to her, and that all her maternal yearnings and fond affections had been doomed to cruel disappointment, and yet, that there was no want of sympathy and proper exertion on the part of Dr. Overby, and that the misfortune was attributable entirely to his want of requisite skill for the emergency, while she would still suffer, and be entitled to compensation for her grievances; yet, how much keener and more poignant would have been her grief, and to how much larger damages would she be entitled, if her sorrow and anguish were the result of unfeeling, though conscious empiricism!

GOODWYN vs. HIGHTOWER. HIGHTOWER vs.
GOODWYN.

1. The failure to file a brief of the evidence at the time when the motion for a new trial is made, is cured when the party seeking to take advantage of it has appeared and argued the motion, or has, by his own fault, caused the failure.
2. A creditor holding a debt against a principal and deceased surety, is under no *duty* to give notice of the existence of his debt to the administrator of the surety. He must give notice when he seeks to hold the administrator personally liable for a wrong application of the assets to other claims, but need not do so in order to hold the estate liable for the debt.
3. The surety is not discharged by any such indulgence of the principal as is not granted for a valuable consideration.

Assumpsit, and Motion for New Trial, in Pike Superior Court. Decision by Judge CABANISS, at Chambers, January, 1860.

The above two causes were argued together, and one opinion pronounced, covering and deciding the questions and points made in the bills of exceptions in both cases.

This was originally an action by Goodwyn against Martha J. Hightower, administratrix of Daniel Hightower, deceased, on a promissory note given by one Gaines H. Fryer, who was principal in the note, and Daniel Hightower, defendant's intestate, who was surety only. The suit was brought against both, but Fryer, not being served, it proceeded alone against Mrs. Hightower; and she dying pending the motion for a new trial, James M. Hightower, administrator *de bonis non*, etc., was made the party defendant.

The defense relied upon was, that plaintiff had given indulgence and extended the time of payment, in consideration of usury, and that he had failed and neglected to give to the administratrix notice of his demand within the twelve months as provided by law.

The testimony being closed, the presiding Judge charged the jury, in substance, that it was incumbent on the plaintiff to give to the administratrix notice of his demand within twelve months from the grant of administration; and if deceased was only surety on the note, and by this neglect to give

Goodwyn vs. Hightower.

the notice, defendant had been rendered unable to secure the debt from the principal, and the estate had suffered injury by such neglect, then defendant was discharged; but if the neglect to give the notice had not caused any injury, and defendant had not thereby been deprived of means of securing her intestate's estate against said debt, then said estate was not discharged. Mere forbearance to sue will not discharge a surety, but if a binding and valid contract is made by the holder with the principal, without the consent of the surety, to give further time for payment, that is a discharge of the surety.

To which charge plaintiff excepted.

The jury found for the defendant; whereupon, plaintiff moved for a new trial, upon the grounds: that the verdict was contrary to law and evidence, and the charge of the Court, and because the Court erred in the charge aforesaid.

Upon the argument of the motion for a new trial, counsel for defendant moved to amend and correct the brief of the testimony by the addition of a few words left out or omitted by the presiding Judge, who took down the testimony. Counsel for plaintiff objected to the amendment. The Court overruled the objection, and plaintiff excepted.

Upon the final hearing of the motion for new trial, at Chambers, 19th January, 1860, counsel for defendant moved to dismiss said motion, upon the grounds:

1st. Because no motion for new trial was made and filed in the Clerk's office at the trial term of said case.

2d. Because no brief of the oral evidence was filed in the Clerk's office at the trial term.

The Judge refused the motion to dismiss, and defendant's counsel excepts, and this is the error assigned in defendant's bill of exceptions.

The Court, after argument on the merits of the motion for new trial, refused the same, and plaintiff's counsel excepts, and this refusal is the error assigned in plaintiff's bill of exceptions.

G. J. GREEN, and O. C. GIBSON, for defendant.

J. S. PINCKARD, *contra*.

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

1. Nos. 14 and 16 being argued together, one decision covers both cases. No. 16, wherein Goodwyn is the plaintiff in error, is the main case, and Hightower, who is the defendant in error, brings up the other merely as a reason for sustaining the judgment in the first. No. 16 was a motion by Goodwyn for a new trial, and No. 14 was a motion by Hightower to dismiss that motion for certain causes. The Judge overruled both motions, refusing to *dismiss* the motion for a new trial, and refusing the new trial on the merits. The position which Hightower occupies in this Court is, first, that the Judge was right in overruling the motion for a new trial on the merits; and second, that if he was wrong in the merits, he ought to have dismissed the motion for the technical reasons, and so have arrived at the same result of disallowing the new trial. We think the Judge was right in refusing to dismiss the motion for a new trial. The reasons assigned for a dismissal were two, which resolve themselves into the single one, that no brief of the evidence was filed during the term when the motion for a new trial was made. The other ground, that no motion for a new trial was made during the term when the verdict was rendered, is only another form of stating the first ground; for the only showing made in support of it, is the same as that made in support of the other, to-wit: Not that no actual motion was made, but that no valid one was made in conformity with the requisitions of law, the failure consisting in the lack of a brief of evidence. The evidence on this point from Goodwyn's counsel is, that the motion was made during the trial term, and signed by himself, and that he then left the Court under an agreement with Hightower's counsel that *he* (Hightower's counsel) would make out the brief of evidence and file it in due time. Col. Gibson, who was Hightower's counsel, *declined to deny that statement*, saying that his memory would not authorize him to do so, and that he believed his brother to be incapable of making a false statement. If the statement was *true*, it was decisive against the motion to dismiss, for this Court has held repeatedly that the filing of a brief of evidence is waived by appearance and argument of the motion; and for the additional and still stronger reason, that in this case, the failure was the fault of the party who was seeking to take advantage of it, since a

Goodwyn vs Hightower.

performance of his agreement would have prevented the failure. That the statement was true, Col. Gibson declined to dispute, and he can scarcely expect the Courts to do for him what he refuses to do for himself. The Judge who heard the case was satisfied of the truth of the statement, and so are we. We think, therefore, he was right in overruling the motion to dismiss.

2. We think he ought to have granted the motion for a new trial, on two grounds: He charged the jury that it was the duty of the holder of the note to give notice of its existence to the administrator of the security within twelve months after the appointment of an administrator. Surely the holder of a note is not under any *duty* to give notice of his debt to the administrator of his debtor, whether that debtor be principal or surety. He is under a *necessity* to do so for one purpose, and for one only: When he seeks to hold the administrator *personally* liable for a failure to get his debt paid out of the assets of the estate according to its legal priority, it is a necessary preliminary step for him to show that he has given notice of his debt before there was a misapplication of the assets to other debts, or that he has given it within twelve months after the appointment of the administrator. It is not necessary for him to do this in order to hold the *estate* liable, but only to make the administrator liable personally for any misapplication of the estate's assets to other debts.

3. We think the Judge also erred in refusing this new trial, on the ground that the verdict was contrary to the evidence. There was a good deal of discussion on this branch of the case, as to what conduct on the part of the holder of a debt will discharge a surety; but there is not in this record the slightest proof of any conduct which could operate as a discharge under any of the rules which were invoked. The evidence shows that the holder indulged the debtors, but there is not the slightest evidence that the indulgence was given for a consideration, or under any legal hindrance to a suit. So far as the evidence discloses the facts, he neither did any act injurious to the surety, nor omitted any which duty required of him. It is well settled that no discharge results to the surety from such indulgence of the principal as is granted to mere entreaty, and not on account of a valuable consideration; for such indulgence being voluntary, is de-

Curry et al., vs. Curry et al.

terminable at the will of the creditor, and can be no legal obstruction to the collection of the debt. No indulgence was shown in this case, except just such as this. The case being once relieved from the idea that the creditor is under a *duty* to give notice of his debt to the administrator of his debtor, all further difficulty disappears. We affirm the judgment in No. 14, and reverse it in the main case.

Judgment reversed.

CURRY *et al.*, vs. CURRY *et al.*

1. Testator by the 2d item of his will says, "I give my servants, John a man, and Betsy, a woman of yellow complexion, to my executors hereinafter named, in trust to convey said negroes immediately after my death to some one of the non-slaveholding States of this Union, as the said executor may select, or to whomsoever said servants may elect for a master in this State before John T. Stephens:" *Held*, to be in conflict with the Act of 1818 against manumission and void.

Caveat to Will, in Monroe Superior Court. Tried before Judge CABANISS, August Term, 1859.

Peter M. Curry and others, heirs at law of Wiley Curry, deceased, filed their *caveat* to the probate of the second and fourth items of the last will and testament of said deceased, on the ground that said items were in violation of the statutes prohibiting the manumission of slaves, and were therefore void.

These two items are as follows:

"Item 2d. I give my servants, John, a man of yellow complexion, and Betsy, a woman of yellow complexion, to my executor, hereinafter named, in trust to carry said negroes, immediately after my death, to some one of the non-slaveholding States of this Union, as the said executor may select, or to whomsoever said servants may elect for a master in this State, before John T. Stephens.

"Item 4th. I desire my executor, out of any funds in his

Curry et al., vs. Curry et al.

hands, to pay John Goodman, my worthy and trusty friend, the sum of one thousand dollars, the interest on which is to be annually paid to my servants, John and Betsy, after their removal to a free State, by the said John Goodman, and at the death of said John and Betsy, said sum to be equally divided between their children. It is my will that five hundred dollars of said one thousand be considered in trust for said John, and five hundred for Betsy; if either die without children his share to go to the other—if both die without children, said sum to come back to my estate, and to be disposed of as the rest of my negroes are hereinafter disposed of. If said John Goodman refuses said trust, I desire my executor to make application to the presiding Judge of the Flint District for the appointment of some fit and proper person to said trust."

Upon the trial the *factum* or execution of the will was admitted, as also, that testator was of sound and disposing mind and memory.

Propounders then offered to prove that after the execution of the will, but before the death of the testator, the negroes, John and Betsy, informed said testator whom they would choose as their master, and testator expressed himself satisfied with their choice. Caveators objected to this evidence; the Court sustained the objection, and propounders excepted.

Caveators admitted that John and Betsy, the negroes named in the 2d item of the will, did a few days after testator's death, choose their masters, to-wit: John selected Willis Curry, Jr., as his master, and Betsy chose Mrs. Sarah Babcock as her mistress, and that the negroes were delivered to the said Willis Curry, Jr., and Sarah Babcock who paid nothing to the executors for them. They were not appraised as a part of testator's estate.

Propounders then offered in evidence the paper propounded as the will. Caveators objected to the second and fourth items being read to the jury, upon the ground that they were void and contrary to law. The Court sustained the objection and excluded said items, and propounders excepted.

The remainder of the will was read and submitted to the jury, who found the following verdict:

"We, the jury, find the paper propounded to be the last will and testament of Wiley Curry, deceased, except the second and fourth items of the same."

Curry *et al.*, vs. Curry *et al.*

Counsel for propounders moved for a new trial upon the following grounds :

1st. Because the Court erred in rejecting the evidence offered to prove the choice made by John and Betsy of their master, prior to testator's death, and his approbation thereof.

2d. Because the Court erred in holding that 2d and 4th items of the will of deceased, were void under the statutes prohibiting emancipation, and withholding them from the jury.

The Court overruled the motion for a new trial, and propounders excepted and assign said refusal as error.

JAS. S. PINKARD, for plaintiff in error.

PEEPLS & CABANISS, *contra.*

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

Is the second item in the will of testator void under the Acts of 1801 and 1818, prohibiting manumission of slaves in this State? And this is about the only question in this record for our consideration, as the other questions depend entirely on it.

Had the testator stopped with the gift to his executors of these slaves, in trust to convey them immediately after his death to some one of the non-slaveholding States of this Union, there is not a doubt but that the Court would have been bound by previous adjudications to have declared that this bequest was not in violation of those Acts, for whether such intended manumission is within the mischief intended to be remedied and prohibited by those Acts, it is quite clear, that the Courts from that day to this have steadily and uniformly declared in favor of the legality of such bequest.

It would be arrogant in me to say, that adjudications on this subject were wrong, even if it should be conceded that this was an open question.

But with the most profound respect for those eminent lawyers and high Courts, who made these adjudications, it is impossible not to feel that those decisions have left many grave questions not very satisfactorily answered, such as, is not such emancipation in conflict with the letter of those Acts? would not a deed, having for its purpose the same object in

Curry et al., vs. Curry et al.

view, to be enforced in the lifetime of the maker, be void? or rather, could it be enforced in the Courts of this State? and if so, by whom, and at whose instance? If the executor in a will having this provision should refuse to execute it, or the slaves should refuse to go, how could it be enforced? It will not do to say that it can be done upon the application of the slave, or on his behalf, for as a slave he has no civil right, and no legal capacity whatever. If the slave takes any interest whatever, under the will, it is that with which it intends to invest him with freedom. He takes all or nothing. It requires all that to enable him to assert his rights, and if the will confers that on the slave, it is void. Again, would not the great object of the law and its true policy, have been better promoted by a different ruling? It is too late at this day to inquire whether that interpretation is the true one or not, for those decisions of the Courts, right or wrong, have for me, at least, all the force of a positive enactment, and so the Court holds.

But this testator goes one step farther, after directing his executors to convey said slaves, immediately after his death, to some one of the non-slaveholding States of this Union, as the executor may select, he adds, "or to whomsoever said servant may elect for a master in this State before John T. Stephens."

Does this alternative direction of the testator afford a sufficient evidence on his part to violate the provisions of the laws of this State, prohibiting the manumission of slaves as will require this Court to pronounce this item void? We think that it does, and I now proceed to give the reasons for that conclusion. Whenever the intention of the testator is to give an estate in the negroes mentioned different from what the Act of 1818 admits, the bequest is void.

The Acts of the Legislature against manumission look to the prohibition of all manumission, and of all attempts to effect it either directly or indirectly. The intention of the Legislature was to prohibit qualified manumission—to prohibit owners from placing them in a situation where, according to law, they would be pronounced slaves, yet would be entitled to some of the rights and immunities of freemen: *Robinson & Wood vs. King*, 6 Ga., 547.

The negroes, John and Bestsy, are the entire object of the bounty of the testator, as expressed in the 2d item of his

Curry *et al.*, vs. Curry *et al.*

will. His first direction to his executor is, "to convey them to some of the non-slaveholding States," for what purpose is not expressed. It is only from construction that we conclude even as to this clause of that item, that he intended that the negroes should be free on reaching the State selected. We know that the negroes could not reside in one of the non-slaveholding States as slaves, hence we conclude that testator's intention was that they should be free. Had the clause gone no further, as I have said, this Court would have been compelled, under previous adjudications, to have given effect to the bequest. But it goes further, the executors are directed to "convey the negroes to whomsoever the said servants may select for a master in this State." For what purpose, to be slaves in fact, or in name only? How is the title to vest in such unnamed, unknown and indifferent personage? All this is left to conjecture, presumption and construction. We are told that inasmuch as testator used the words '*convey*' and '*master*,' he meant that such person as the slaves might elect for a master should take the negroes under the will absolutely and forever as slaves, in fact and not *pro forma*; that such person would take the negroes and their natural increase, as slaves, to himself and his heirs forever. And we must presume all this to have been the intention of testator, by the words employed, to sustain this item of his will. Taking this whole item together, (and we must do so to get the intention, for it has reference to but one subject, and but one object in view, and must all stand or fall together,) can we presume or conclude that such was the intention of the testator; that is, that the person elected by the negroes, for their master, should sustain to them only the ordinary relations that exist between master and slave, with the right and power to sell, barter, give, or use them in any and every way he thought proper as slaves? Such presumption or conclusion is not at all consistent with the intention of testator towards these negroes, as is manifested in every word of that item of his will. It would defeat the whole object of the bequest; that is, to confer a real or supposed benefit on the negroes manifested by giving them this extraordinary power. The intention of testator was that these negroes should be free, wherever they might be, either here or in a non-slaveholding State. They were the objects of his bounty—not the person they might elect for a master. What was the inducement to

Curry et al., vs. Curry et al.

him to give these negroes to the persons they might elect for a master? It was in the power given to the slaves, and possible for them in their choice, to elect persons in no wise related, or even acquainted with testator. The bequest gave, as it was intended, the widest possible range within the State to make their election, and no matter upon whom it fell, however unworthy or unknown to testator, the conveyance and title followed as a necessary conclusion. Such person could not have been the object of testator's bounty. It was for no benefit to such *elect* that this bequest was made, but it was for the benefit of the negroes wholly and solely, and the inducements or consideration moving the conveyance to the elect was such contract or agreement as the negroes might make with such persons that would but promote and subserve the great leading object of that bequest, by giving to the negroes John and Betsy, the largest possible freedom without actually being free.

The bequest was in fact, placing a charter of the liberty of these negroes in their hands to go throughout the State and trade and traffic on it until such person should be found who would give them the largest liberty for the least consideration; one in whom they could confide, who would hold them nominally as slaves, while for all practical purpose they would be free. There is no time fixed within which they must elect. In the interim, what is their condition, slaves or free? Neither the one or the other—*quasi slave—quasi free*. It cannot be doubted but that such a condition is obnoxious to the provisions of the Act of 19th Dec., 1818. Look at the intention of the Legislature expressed in the preamble to that Act: "*And whereas, divers persons of color, who are slaves by the laws of this State, having never been manumitted in conformity to the same, are nevertheless in the full exercise and enjoyment of all the rights and privileges of free persons of color, without being subject to the duties and obligations incident to such persons, thereby constituting a class of people equally dangerous to the free citizens of this State, and destructive of the comfort and happiness of the slave population thereof, which it is the duty of the Legislature by all just and lawful means to suppress.*" By this will these negroes are slaves, yet they are in the full exercise and enjoyment of all the rights and privileges of free persons of color, without the burdens. They have a higher and greater

right than the free negro, for the social right and legal capacity of election to be free is in their hands. I cannot imagine a condition of the negro more hurtful to a proper and necessary regulation of the slave population, or one more obnoxious to the provision of the Act. Should such a bequest be sanctioned by this Court as a legal disposition of these slaves, there would be no end to which the system would be carried. As emancipation is now prohibited by statute, whether to take effect in or out of the State, this plan would be instantly laid hold of and followed as a happy expedient by persons, who, from improper relations with these slaves, or from other causes, desire after their death that the condition of the slaves should be altered, until a large class of this sort of population will be established throughout the State, obnoxious to the laws, dangerous, mischievous and corrupting to the slaves. New legislation would be required to abolish the system, not to eradicate the evil, for that would be impossible. The effect would continue, like free negro-dom, a perpetual blight on the institution.

How much better is it to strike at the evil as we do here, while it is yet in the bud, and break it up, root and branch, before it has laid a basis for its own propagation.

Should we be mistaken in this view of the question, there are other reasons why this bequest is void.

This bequest, as I have already shown, is a gift to the slaves themselves, and is void for that reason; for, as slaves, they have not the capacity to take property, either by purchase or descent. In *Watters vs. Blocker*, 6 Porter 269, Collier, C. J., says, "If the bequest of freedom be considered as a legacy to the slaves, it cannot be maintained, for being themselves in servitude, they have not the capacity to take property by purchase or descent. As it regards their transmission from owner to owner, they are considered as personal property, and rather as things than persons. It is essential to every gift that there should be a donor, a donee, and a thing given; the donee must have capacity to take and to hold; when he has neither, the conveyance is absolutely void. If a devisee has not capacity to take when the estate ought to vest, the devise is void. A slave cannot hold property, and the holding for him is illegal, whether by trust or otherwise." If it be said that the slaves are not the donees of themselves, but their *elect* is, we answer that then the bequest

Curry et al., vs. Curry et al.

would be void for uncertainty, if not otherwise obnoxious to the emancipation laws of the State.

But again: As slaves they could not elect; they have no legal capacity to exercise such power, that is, the privilege and the right of a freeman, and the testator could not clothe them, as slaves, with any such power or capacity; and the attempt to do so makes the bequest void. The manumission laws of Alabama are very much like our Act of 1801—they do not go as far as that of 1818. There is nothing in the Acts of that State resembling the preamble I have herein extracted from the preamble of the Act of 1818. Notwithstanding, such a bequest would be void in Alabama. In *Carroll & Wife vs. Brumby*, 13 Ala., 102, the testator in the clause of the will before the Court says, "In relation to my kind and faithful servants, Jane, etc., it is my will that they be permitted to go Africa, their passage paid, and two years support allowed, etc. If however, my said servants prefer to remain subject to my said daughter as they are to me, they may be permitted to do so, but in no event shall they be sold or deprived of their privilege before or after the death of my daughter."

The Court held the bequest to be void, saying, "It is true that the testator did intend to give them the option of freedom or servitude, but they (the slaves) have not the legal capacity to choose: the slave has not capacity to accept."

Such a bequest as this would be void under the statutes of Virginia, although that State not only does not have such a stringent policy or spirit in regard to the manumission of slaves, either partial, absolute, or mixed, as is contained in our Act; but manumission by deed or will is expressly allowed, by positive enactment. In *Baily vs. Poindexter*, 14 Grat., 132, testator provided in his will that the slaves loaned to his wife for life should have their choice of being emancipated or sold publicly. The Court, in that case, held that the emancipation of the slaves was made by the will to depend on their election to be free. *And as slaves have no legal capacity to choose, the provision is void, and of no effect.* DANIEL, J., delivering the judgment of the Court, page 197, says: "When we assent to the general proposition, as I think we must do, that our slaves have no civil or social rights; that they have no legal capacity to make, discharge or assent to contracts; and that a slave cannot take anything

Curry et al., vs. Curry et al.

under a decree or will except his freedom, (allowed by the laws of that State—forbidden by ours), we are led necessarily to the conclusion that nothing short of the exhibition of a positive enactment, or of legal decisions having equal force, can demonstrate the capacity of a slave to exercise an election in respect to his manumissions. Any testamentary effort of a master to clothe his slave with such power is an effort to accomplish a legal impossibility. No man can create a new species of property unknown to the law. No man is allowed to introduce anomalies into the ranks under which the population of the State is ranged and classified by its constitution and laws. It is for the master to determine whether to continue to treat his slaves as property, as chattels, or in the mode prescribed by law, to manumit them, and thus place them in that class of persons to which the freed negroes of the State are assigned. But he cannot impart to his slaves, as such, for any period, the rights of freedmen. He cannot endow, with powers of such import as are claimed for the slaves; here, persons whose *status* or condition in legal definition and intentment exists in the denial to them of any social or civil capacity whatever." MONCURE, J., who dissented from the judgment of the Court in this case, admitted broadly that the slaves have no civil rights or legal capacity, but he put his dissent on the ground that the emancipation was the act of the master, and not of the slave; that *that* was the intention of the testator, and as it was a legal one, the Court should endeavor to effectuate his intentions.

In *Williamson vs. Coalter*, 14 *Grat.*, 394, testatrix, by her will, says: "I direct, in regard to the balance of my negroes, that they shall be manumitted on the first day of January, 1858." She then directs her executors to raise a fund out of her estate sufficient for the purpose, and use it in settling her said slaves in Liberia, or any other free State or country in which they may elect to live, and then says: "And I further direct that if any of my said servants shall prefer to remain in Virginia instead of accepting the foregoing provision, it is my desire that they shall be permitted, by my executors, to *select* among my relations their respective owners." In that case, the very one here, although the testatrix had the power to emancipate by will, and although she directed an unconditional manumission at a certain time, with only a condition subsequent allowing them to waive the

Curry *et al.*, vs. Curry *et al.*

provisions in their favor, the Court held, upon great argument and consideration, "That the freedom of the slaves is made dependent *on their election*, and they having *no legal capacity to elect*, the will is ineffectual to emancipate them." It may be contended that, although this clause of the second item of this will is void, yet, the direction to convey the negroes to a non-slaveholding State is not, and while the Court should declare the one to be void, it should give effect to the other.

To this, there are two replies: One is, that the clause void serves to demonstrate to the Court the intention of the testator in his entire scheme as to the *status* of these negroes, and that being to violate or elude the provisions of the manumission laws of this State, the whole scheme is void. The other one given by Allen, J., in *Williamson vs. Coalter*, 14 Gratt., 398: "No one has the right to say, or can say, what would have been the disposition of the testator if he had known he could not submit the alternative to the choice of slaves."

If, then, such testamentary disposition would be void under the existing laws of Alabama and Virginia, how much stronger and more forcible are the reasons for its being void under the stringent, precautionary enactments on this subject in the State of Georgia, especially when the law itself makes it the stern and imperative duty of all the Courts and Judges of the State in the strong language that glares in the face of every Judge who passes on these questions: "So to construe the several provisions thereof as to carry the same into full and complete operation, according to the true spirit, intent and meaning thereof as declared in the preamble to the same."

It could make no difference in the legal effect of the clause, that the testator knew before his death, and after the making of the will, that the slaves had made their election, unless the testator had acted upon that fact by making the bequest directly to such persons. Had he done so, the will would not have been before us. It is upon the will as it is, and as it was made, that we pass.

Of course the bequest of one thousand dollars in trust, for the use of these negroes, falls with the clause in their favor, and for the same reason, and for the additional one that this bequest was not to operate in their favor until after they reached a non-slaveholding State.

So the judgment stands affirmed.